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Case No COMP/M.7685 - PERRIGO / GSK DIVESTMENT BUSINESSES

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 21/08/2015

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EUROPEAN COMMISSION

Brussels, 21.08.2015
C(2015) 6002 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Sir/Madam,

Subject: **Case M.7685 - PERRIGO / GSK DIVESTMENT BUSINESSES**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

(1) On 22 July 2015, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004[3] by which the undertaking Perrigo Company Plc ("Perrigo", Ireland) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the assets constituting certain consumer healthcare businesses (the "GSK Divestment Businesses" or the "Target") of GlaxoSmithKline Consumer Healthcare Holdings Limited ("GSK", United Kingdom), by way of purchase of assets.[4]

(2) Perrigo is referred to as "the Notifying Party". Perrigo and the GSK Divestment Businesses are jointly referred to as "the Parties".

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1 OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

2 OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

3 OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

4 Publication in the Official Journal of the European Union No C249, 30.07.2015, p. 14.

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I. THE PARTIES

(3) **Perrigo** is active globally in the development, manufacture, and marketing of consumer healthcare (over-the-counter, or "OTC") and prescription pharmaceuticals, nutritional products, and active pharmaceutical ingredients (APIs). On 23 June 2015, Mylan N.V. ("Mylan", the Netherlands) notified its unsolicited takeover bid to acquire control over Perrigo. The Commission has approved under the Merger Regulation the Mylan / Perrigo transaction on 29 July 2015.[5]

(4) **The Target** comprises consumer healthcare businesses divested by GSK as part of commitments submitted by GSK in the context of case M.7276 *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business* ("GlaxoSmithKline / Novartis Consumer Health").[6] Within the EEA, the relevant businesses are:

a. GSK's *NiQuitin* nicotine reduction therapy ("NRT") business in the whole of the EEA;

b. GSK's *Coldrex* cold & flu business in the whole of the EEA and GSK's *Nasin* and *Nezeril* cold & flu business in Sweden;

c. GSK's *Panodil* pain management business (including both prescription and non-prescription products) in Sweden; and

d. Novartis' topical cold sores management business (including the *Fenivir*, *Pencivir*, *Vectavir*, and *Vectatone brands*) in the whole of the EEA.

II. THE OPERATION

(5) On 1 June 2015, [Acquiring entity], an indirectly controlled subsidiary of Perrigo, and GSK entered into transaction agreements, pursuant to which [Acquiring entity], and ultimately Perrigo, will acquire the Target, for a cash consideration of EUR 200 million.

III. EU DIMENSION

(6) The operation does not have a Union dimension within the meaning of Article 1 of the Merger Regulation. The Parties' combined worldwide turnover is below EUR 5 000 million (Perrigo: EUR 4 218 million, the Target: EUR 99 million) and the thresholds in Article 1(3) of the Merger Regulation are not met.[7]

(7) On 22 June 2015 the Notifying Party informed the Commission in a reasoned submission that the transaction was capable of being reviewed under the national merger control laws of three Member States (Portugal, Romania and the UK) and requested the Commission to examine the transaction. None of the Member States that were competent to review the transaction indicated its disagreement with the request for referral within the period laid down by the Merger Regulation.

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5 See case M.7645 – *Mylan / Perrigo*. The Commission's competitive assessment of Perrigo's acquisition of the GSK Divestment Businesses takes into account the ongoing Mylan / Perrigo bid.

6 See case M.7276 – *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business.*

7 The aggregate Union-wide turnover of the Target is below EUR 100 million (EUR [70-75] million).

(8) The transaction is therefore deemed to have a Union dimension pursuant to Article 4(5) of the Merger Regulation.

IV. COMPETITIVE ASSEMENT

(9) The consumer healthcare industry comprises pharmaceutical products which can be purchased without a prescription (over-the-counter, or "OTC") in pharmacies, as well as in other type of stores such as supermarkets in certain countries.

(10) The Parties' activities give rise to affected markets in the following areas: (i) nicotine reduction therapies ("NRT"); (ii) cold & flu treatments; (iii) topical cold sores management treatments. The Commission has recently analysed those markets in case GlaxoSmithKline / Novartis Consumer Health business.[8]

(11) In accordance with past Commission's practice in the consumer health sector,[9] the Commission applied a system of filters aimed at determining the group of markets where concerns are most likely to arise and on which it focused its analysis.[10]

IV.1. Nicotine Reduction Therapies (NRT)

IV.1.1. Relevant product market

(12) Smoking cessation products are aimed at reducing and ultimately eliminating the nicotine addiction that comes with smoking.

(13) The majority of smoking cessation aids consists of NRT products, which provide smokers with a slow release of nicotine in gradually smaller doses, thereby slowly reducing smokers' dependence on it. The three main formats of NRT products are (i) nicotine patches, (ii) nicotine gums and (iii) nicotine lozenges. Other formats include nicotine inhalators, sprays, orally dissolving strips and sublingual tablets. NRT products are mostly sold as branded products but, in some countries, are supplied to retailers to be sold under private labels.

(14) In GlaxoSmithKline / Novartis Consumer Health business,[11] the Commission found that NRT products and other smoking cessation products (for instance nicotine de-addiction therapies) did not belong to the same market. It left open whether or not all NRT formats belonged to the same market.

(15) The Notifying Party submits that all NRT formats (patches, gums, lozenges etc.) belong to the same product market, and that private label NRT products do not belong to the same relevant market as branded NRT products.

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8 See case M.7276 – *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business*.

9 See for instance case M.7276 – *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business.*

10 The filters identify the following groups: (i) Group 1 markets, where the Parties' combined market share exceeds 35% and the increment exceeds 1%, (ii) Group 2 markets: where the Parties' combined market share exceeds 35% but the increment is below 1% and (iii) Group 3 markets: where the Parties' combined market share is between 20% and 35%.

11 See case M.7276 – *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business.*

(16) The exact product market definition for NRT products can be left open in this case as the transaction does not give rise to serious doubts as to its compatibility with the internal market under any plausible market definition.

IV.1.2. Relevant geographic market

(17) The Commission has previously defined the geographic market for pharmaceutical products, including for NRT, as national in scope. The Notifying Party does not contest this.

IV.1.3. Competitive assessment

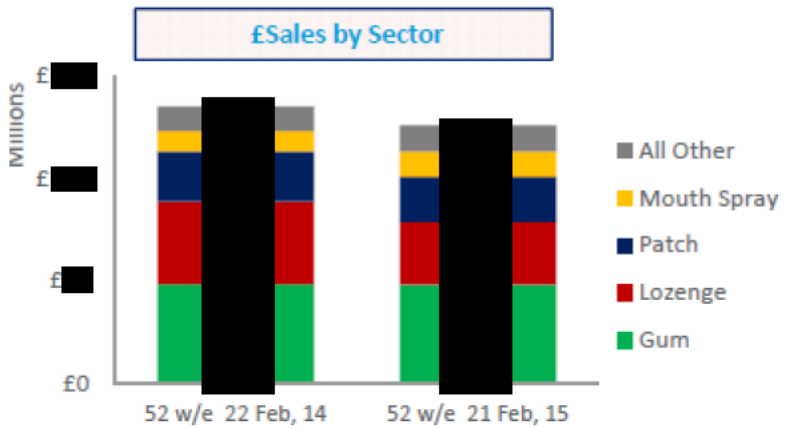
(18) The GSK NiQuitin branded products which are being purchased by Perrigo are sold throughout the EEA. In the UK, Perrigo has been selling NRT products under its own Galpharm brand since 2011, as well as supplying private label lozenges to retailers such as.[Retailer name] and [Retailer name], Perrigo will also, in 2015, start supplying NRT products to a Dutch retailer.

(19) The only affected markets arising from the transaction are in the UK[12], in particular in relation to NRT products in general, as well as to NRT lozenges.

(20) Sales of NRT products in the UK are predominantly branded sales. The main competitors of the Parties are Johnson & Johnson ("J&J") with its Nicorette brand and GSK with its Nicotinell brand. The Notifying Party submits that GSK and J&J (McNeil) are also suppliers to UK customers of certain private label NRT products.

(21) Gums are the most popular NRT format in the UK, followed by lozenges. In 2014, the Target experienced shortages in its NRT NiQuitin lozenges, resulting in a decrease of the total volume of the NRT lozenges market in the UK as illustrated in Figure 1 below.

Figure 1: Evolution of the NRT in the UK, Feb 2014-Feb 2015



Source: Internal document of Perrigo entitled "[...]"

(22) The Target's sales are expected to recover from this supply disruption, although only partly. Internal documents from Perrigo estimate that "*NiQuitin will regain [...]% of lost share between now and 2019*".[13]

12 In particular, no affected market arises in the Netherlands.

(23) Concerning plausible markets encompassing: a) **branded and private label NRT products (all formats) in the UK**; and b) **branded and private label NRT lozenges in the UK**, the Notifying Party submits that the transaction does not lead to affected markets due to the drop of *NiQuitin* sales.[14]

(24) Concerning **private label NRT products**, the Notifying Party submits that no overlap arises as the Target is not active in this market. Furthermore, in relation to the supply of private label products, the Notifying Party submits that there are no vertically affected markets arise as Perrigo does not contract manufacture NRT products for any third party pharmaceutical company in the EEA.

(25) In a market encompassing only branded NRT products, the transaction gives rise to a group 1 market for branded NRT lozenges with a limited increment, and a group 3 market for branded NRT products.

Table 1: Market share of the Parties' and competitors in NRT in the UK, 2014

	Branded NRT products	Branded NRT lozenges
Perrigo	< [0-5]%	< [0-5]%
Target *NiQuitin*	[20-30]%	[30-40]%
Combined	[20-30]%	[30-40]%
J&J *Nicorette*	[60-70]%	[20-30]%
GSK *Nicotinell*	[5-10]%	[30-40]%
Others	[0-5]%	

Source: Notifying Party's submission based on IMS data

(26) The increment brought about by the transaction is limited, and J&J and GSK remain as strong branded competitors in the NRT area in the UK with their Nicorette and Nicotinell brands. Brand recognition is key in the NRT area.[15] The Notifying Party submits that its Galpharm brand is a value brand. Internal documents of Perrigo [Assessment of Galpharm].[16]

(27) The customers contacted in the course of the market investigation did not raise any concerns as regards the transaction's potential impact on the NRT market in the UK.[17] A respondent for instance stated that it was "not concerned by the merger because there is sufficient competition in the smoking category, even on restricted licence".[18]

(28) In view of the above, the transaction does not raise serious doubts as to its compatibility with the internal market in relation to NRT products in the UK.

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13 Internal document of Perrigo entitled "*[...]*", dated March 2015.

14 IRI data for year ended 21 March 2015. IRI is an information and business services provider focusing on the consumer packaged goods, retail and healthcare industries. IRI data is based upon grocery and retail market.

15 See case M.7276 – *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business*.

16 Internal document of Perrigo entitled "*[...]*", dated June 2014.

17 See responses from customers dated 20 July, 21 July, and 4 August 2015.

18 Response of a customer submitted by email dated 20 July.

IV.2. Cold & flu treatments

IV.2.1. Relevant product market

(29) Cold and flu OTC products treat the variety of symptoms generated by the common cold and influenza, commonly referred to as flu. Cold and flu typically present multiple symptoms which can be treated by a number of different OTC products.

(30) Two broad categories of OTC products treating a cold and flu can be identified: (i) multi-symptoms products and (ii) single-symptoms products. Multi-symptoms products contain more than one active ingredient and treat multiple symptoms of the cold and flu. Single-symptoms products on the other hand contain a single active ingredient treating only a specific symptom.

(31) In GlaxoSmithKline / Novartis Consumer Health business,[19] the Commission has left open whether or not multi-symptoms products and single-symptoms products belong to the same market(s).

(32) The Notifying Party submits that single-symptom and multi-symptom products exert a competitive constraint upon one another.

(33) As the transaction does not raise serious doubts as to it compatibility with the internal market under any plausible market delineation, the precise scope of the market can be left open.

IV.2.2. Relevant geographic market

(34) The Commission has previously defined the geographic market for pharmaceutical products, including for the OTC products relevant in this case, as national in scope. The Notifying Party does not contest this.

IV.2.3. Competitive assessment

(35) In the EEA, Perrigo is active in the cold and flu segment with its Antigrippine and Aflubin products, each classified as Multi-Symptom Cold and Flu Treatments (R5A). Perrigo also sells small volumes of Throat Preparations (R2A) in Lithuania and Poland.

(36) The Target is active with the following cold and flu products:

a. *Coldrex*, a multi-symptom preparation,

b. *Coldrex Lary*, a throat preparation,

c. *Nezeril and Nasin*, topical nasal preparations (purchased only for Sweden).

(37) The transaction results in three group 3 markets.

(38) In Latvia, the combined market share would be of [20-30]% with a [5-10]% increment. Competitors include GSK ([20-30]%), Boiron ([10-20]%), KRKA ([10-20]%) and Marsans Pharma ([5-10]%).

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19 See case M.7276 – *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business.*

(39) In Lithuania, the combined market share would be of [20-30]% with a [0-5]% increment. Competitors include GSK ([20-30]%), US Pharmacia ([20-30]%), KRKA ([10-20]%) and Boiron ([5-10]%).

(40) In the Netherlands, the combined market share would be of [20-30]% with a [5-10]% increment. Competitors include Reckitt Benckiser ([20-30]%), Sanofi ([20-30]%), and Schwabe ([10-20]%).

(41) Given the limited combined market shares, the size of the increments, and the presence of various alternative suppliers including strong competitors, the transaction does not raise serious doubts as to its compatibility with the internal market in the cold and flu area.

IV.3. Topical cold sore management treatments

IV.3.1. Relevant product market

(42) Cold sores (herpes labialis, also commonly known as herpes of the lips or fever blisters) are groups of small blisters on the lips and around the mouth, typically caused by a viral strain of the herpes simplex virus. Products aimed at cold sore management include notably topical antiviral (creams and gels), patches, lip balms, herbal remedies, analgesics and light/heat therapy devices.

(43) In GlaxoSmithKline / Novartis Consumer Health business,[20] the Commission found that the relevant market was topical antivirals used for the treatment of herpes labialis. The Commission has assessed the present transaction on the basis of this market definition.

(44) At the upstream level of APIs, in a previous decision, the Commission considered the acyclovir API as a possible product market.[21]

IV.3.2. Relevant geographic market

(45) The Commission has previously defined the geographic market for pharmaceutical products, including for the OTC products relevant in this case, as national in scope. The Notifying Party does not contest this.

(46) In past decisions, the Commission has considered the API markets to be at least EEA-wide and possibly global in scope.[22] The exact scope of the relevant product and geographic market can be left open as the transaction does not give rise to serious doubts as to its compatibility with the internal market under any plausible market definition.

IV.3.3. Competitive assessment

(47) The Target is active across the EEA with sales of branded products based on the active ingredient penciclovir, under various brand names. Perrigo sells small quantities of cold sore treatments in Belgium, Italy, Netherlands, Portugal and the UK.

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20 See case M.7276 – *GlaxoSmithKline / Novartis vaccines business (excl. influenza) / Novartis Consumer Health business*.

21 See case M.7645 – *Mylan / Perrigo*.

22 See case M.5865 – *Teva / Ratiopharm*.

(48) The transaction would lead to one group 3 market: Italy, where the combined market share of the Parties would reach [20-30]% with a [5-10]% increment.[23] The market for topical cold sore management treatments is to a large extent genericized. Post-transaction, Perrigo is expected to face competition from the biggest remaining competitor, GSK ([30-40]%), followed by a large number of smaller competitors with individual market shares ranging between 1% and 10%.

(49) Furthermore, the Commission also assessed a possible vertical link given that Mylan, as a manufacturer of the API, acyclovir, has significant activities upstream from the market for topical herpes labialis antivirals. The Notifying Party submits that the Target's products use the active ingredient penciclovir. Furthermore, apart from Mylan, a large number of API providers exist for topical cold sore management APIs. Therefore, the transaction is unlikely to result in foreclosure effects.

(50) In view of the above, the transaction does not raise serious doubts as to its compatibility with the internal market in the area of topical cold sore management treatments.

V. CONCLUSION

(51) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(signed)
Miguel ARIAS CAÑETE
Member of the Commission

23 These figures take into account Mylan's sales.