Anticipated acquisition by Perrigo Company plc of Omega Pharma Invest NV

ME/6500-14

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 (the Act) given on 9 March 2015.

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

SUMMARY

1. Perrigo Company plc (**Perrigo**) agreed to acquire Omega Pharma Invest NV (**Omega**) on 6 November 2014 (the **Merger**). Perrigo and Omega are together referred to as the **Parties**.

2. The Competition and Markets Authority (**CMA**) considers that the Parties will cease to be distinct as a result of the Merger, the share of supply test is met, and that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

3. The Parties overlap at a horizontal level in the wholesale supply of own-label and branded OTC pharmaceutical products to retailers and pharmacies in relation to four product areas, specifically:

   (a) analgesics;

   (b) antacids;

   (c) hay fever and allergy relief products; and

   (d) sleeping aids.

4. There is also a vertical link between the Parties as Perrigo contract manufactures analgesics, hay fever and allergy relief products and sleeping aids for Omega. The CMA has not found a realistic prospect of a substantial

lessening of competition in relation to any of the vertical links resulting from the Merger.

5. In relation to the supply of OTC clinical sleeping aids, the CMA found that the Parties' combined share of supply was high and that, pre-Merger, there has been some competitive interaction between the Parties' branded and own-label products. However, the Parties are mainly active in two different segments as Omega is exclusively active in the supply of branded OTC clinical sleeping aids, while Perrigo has minimal sales in the branded segment and is principally active in the supply of own-label OTC clinical sleeping aids. Only a small number of third party respondents to the CMA's market testing considered that the Parties competed closely in the supply of OTC clinical sleeping aids pre-Merger.

6. In relation to branded OTC clinical sleeping aids products, the CMA found that, pre-Merger, there were limited competitive constraints on Omega's Nytol, which some customers considered to be either a 'must-stock' brand or a brand for which there was no clear alternative to switch to. Customers also generally indicated that Actavis' Sominex was a stronger competitor to Nytol than Perrigo's branded or own-label products.

7. In relation to the supply of own-label OTC clinical sleeping aids products, the CMA identified two alternative suppliers, Crescent and Alinter, and noted that [✂].

8. The CMA found that, to the extent that own-label products imposed some competitive constraint on branded products pre-Merger, these two other suppliers of own-label products will continue to exert some competitive constraint in this regard on the Parties post-Merger.

9. In the light of the above, the CMA has found that pre-Merger the Parties' products may have imposed limited competitive constraints on each other but that post-Merger sufficient constraints will remain from other suppliers in both the branded and own-label segments.

10. In relation to the wholesale supply of OTC analgesics, antacids and hay fever and allergy relief products, the CMA found that the Parties' combined shares of supply were not at a level that raised *prima facie* concerns, especially given that the Parties are mainly active in two different segments, ie Omega is active in branded only and Perrigo is primarily active in own-label products, with minimal sales of its branded products.

11. In addition, the CMA considers that a number of other strong brands are likely to be closer competitors to Omega's brands than Perrigo's branded or own-label products and will continue to constrain the merged entity post-Merger.

The CMA notes that Omega is not active in the supply of own-label products and third parties generally named a range of alternative suppliers of own-label products that would continue to constrain the merged entity post-Merger.

12. In the light of the above, the CMA does not believe that it is or may be the case that the Merger will result or may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom.

13. The Merger will therefore **not be referred** under section 33(1) of the Act.

ASSESSMENT

Parties

14. Perrigo manufactures and sells over-the-counter (**OTC**) and generic prescription pharmaceuticals, infant formula, nutritional products, animal health, dietary supplements and active pharmaceutical ingredients (**APIs**). Perrigo's focus is mainly on the supply of own-label products. In the financial year 2014, Perrigo's worldwide turnover was £2,467 million, of which £[✂] million was generated in the European Economic Area (**EEA**) and £[✂] million in the UK.

15. Omega supplies health and personal care products including branded OTC pharmaceuticals, as well as distributing third party OTC products and generic medicines. Omega has activities in almost 40 countries, but markets its products primarily in countries within the European Union (**EU**). Omega's focus is on the marketing and supply of its own brands, such as Solpadeine, Beconase, Nytol and Dermalex. In 2013, Omega's worldwide turnover was £1,030 million, of which £[✂] million was generated in the EEA and £[✂] million in the UK.

Transaction

16. Perrigo agreed to acquire Omega on 6 November 2014 for €3.6 billion, comprised of the purchase of Omega's equity for €2.48 billion and the assumption of €1.1 billion in debt.

Jurisdiction

17. The Merger will result in Perrigo and Omega ceasing to be distinct for the purposes of section 23 of the Act through the acquisition by Perrigo of 95.77% of Omega's outstanding share capital.

18. For the purposes of section 23(1) of the Act, the turnover test is not met, because Omega did not generate turnover of £70 million or above in 2013 in the UK.

19. For the purposes of section 23(2) of the Act, the CMA considers that the share of supply test is met. The Merger will result in an increment to a share of supply of 25% or more in relation to the supply of OTC clinical sleeping aids, including both branded and own-label products, in the UK. Omega's share of supply was estimated by the Parties to be approximately [60-70]% and Perrigo's share of supply was estimated by the Parties to be [10-20]% to [20-30]%. In both cases these shares of supply are based on retail sales data provided by IMS for the UK market in 2013.

20. The Parties provided a complete Merger Notice on 12 January 2015. The initial period for consideration of the Merger under section 34ZA of the Act began on 13 January 2015 and the end of the initial period is therefore 9 March 2015.

Frame of reference

21. The CMA considers that market definition provides a framework for assessing the competitive effects of the Merger. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the Merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.[1]

Product scope

22. The Parties overlap in the wholesale supply of OTC pharmaceutical products to retailers and pharmacies. Specifically, the Parties are both active in the supply of four OTC pharmaceutical products: (i) analgesics; (ii) antacids; (iii) hay fever and allergy relief products; and (iv) sleeping aids. There is also a vertical relationship between the Parties given that Perrigo contract manufactures certain branded OTC analgesics, hay fever and allergy relief and sleeping aids products for Omega.

23. The Parties also identified a potential overlap in relation to the supply of contract-manufactured OTC pharmaceutical products to UK pharmaceutical companies, given that Omega contract manufactures small quantities of certain OTC pharmaceutical products for other pharmaceutical companies at

[1] *Merger Assessment Guidelines*, paragraph 5.2.2.

its manufacturing facilities in Europe. Given that Perrigo does not contract manufacture any of the same products as Omega for pharmaceutical companies and the Parties' combined share of supply of contract manufacturing is negligible in the UK, this potential overlap is not considered further.[2]

ATC classification

24. In previous decisions, the CMA and the European Commission (**EC**) have noted that pharmaceuticals may be subdivided into therapeutic classes by reference to the 'Anatomical Therapeutic Chemical' (**ATC**) classification, developed by the European Pharmaceutical Marketing Research Association (**EphMRA**) and maintained by EphMRA and Intercontinental Medical Statistics (**IMS**) as a starting point to defining the relevant product frame of reference.[3]

25. The third level of the EphMRA ATC classification (**ATC3**), which specifies the therapeutic indication, has generally been used as a starting point for defining product scopes. The CMA and the EC have previously departed from the ATC3 level when market testing has indicated that another product scope was more appropriate, for example using the fourth level of the classification[4] or including (or excluding) medicines irrespective of their ATC classification.[5]

26. In this case, the CMA has identified the relevant ATC3 category for each of the four product overlap areas and has considered where relevant whether it is appropriate to depart from that classification.

OTC vs prescription products

27. 'OTC' refers to those pharmaceutical products that can be purchased by consumers without a prescription. These include pharmacy-only medicines, which can only be dispensed under the supervision of a qualified pharmacist,

---

[2] The Parties estimated their combined share of supply on this hypothetical frame of reference to be [0-10]% to [0-10]% in the UK and [0-10]% to [0-10]% in the EU.
[3] This classification is based on finished dose pharmaceutical products and their approved indications in the various countries. See, for example, Case ME/4136/09 *Anticipated joint venture between GlaxoSmithKline plc and Pfizer Inc. in relation to their respective HIV businesses*; Case ME/4703/10 *Completed acquisition by Reckitt Benckiser Inc. of certain assets of Combe Incorporated, namely specific Combe sore throat and skincare products*; Case ME/6331/13 *Completed Acquisition by Shire plc of Viropharma Inc.*; and Case ME/6465/14 *Completed acquisition by ProStrakan Group PLC of Archimedes Pharma Limited*. See also Case COMP/M.6613 – *Watson/Actavis* and Case COMP/M.5865 – *Teva/Ratiopharm*.
[4] The ATC4 level constitutes a further subdivision which may be based on therapeutic use or more frequently pharmacological criteria such as molecule class, formulation, or mode of action.
[5] This is consistent with the approach in Case COMP/M.5999 – *Sanofi-Aventis/Genzyme*, where the EC noted that it was appropriate to diverge from the ATC3 class where the circumstances of a case show that sufficiently strong competitive constraints faced by the undertakings involved are situated at another level and there are indications that the ATC3 class does not lead to a correct market definition. See also Case COMP/M.4049 – *Novartis/Chiron*.

as well as products that do not have to be dispensed by a pharmacist and are sold through a wider range of retail outlets.[6]

28. OTC medicines have typically been considered as a separate product market from prescription medicines.[7] This distinction is justified by reference to the differences between OTC and prescription medicines in terms of medical indications, side effects, legal framework, distribution and marketing, despite products across the categories at times containing the same APIs.[8] The CMA notes that the Parties are not active in the supply of prescription products in the overlap product markets.

29. The Parties agreed that OTC and prescription products formed separate markets in this case, although they considered there to be significant competition between prescription and OTC products in relation to hay fever and allergy relief products. Responses from third parties were mostly consistent with OTC and prescription products forming distinct product markets and there being limited substitution between the two.[9]

30. It has not been necessary for the CMA to conclude on this point in this case but, in the light of the above, the CMA has followed previous decisional practice and has limited its frame of reference to include OTC products only.

Own-label vs branded products

Parties' views

31. The Parties submitted that the overlap in relation to their activities is minimal and there is no overlap in the Parties' activities in the own-label segment, where Omega is not active.

32. The Parties submitted that the supply of branded and own-label products should be considered separately, given that, among other factors:

(a) there is a distinction between contract manufacturing (including the manufacture of third party, or unbranded, OTC products)[10] and the manufacture of branded OTC products, even where they are sold to the

---

[6] Case ME/1356/04 *Phoenix Healthcare Distribution Limited/East Anglian Pharmaceuticals Limited* (2004).
[7] Case COMP/M.5295 *Teva/Barr*.
[8] See Case ME/4703/10 *Completed acquisition by Reckitt Benckiser Inc. of certain assets of Combe Incorporated, namely specified Combe sore throat and skincare products*.
[9] A small number of third parties indicated that consumers may, in some specific circumstances, substitute between prescription products to OTC products but indicated that switching would generally be from prescription to OTC products (rather than *vice versa*).
[10] The Parties make a further distinction in the Merger Notice between contract manufacturing for, on the one hand, pharmaceutical companies and, on the other, own-label manufacturing and supply to mass market retailers and pharmacy chains.

same customer, which is in line with the EC's approach in the pharmaceutical sector;[11] and

(b) retailers and pharmacy chains exercise substantial control over their own-label brands independently of the supplier, such that it is not appropriate to consider Perrigo's share of supply of own-label products as taking place at the same level of the market as Omega's branded supply.

CMA's assessment

33. The CMA notes that the Parties overlap in the wholesale supply of OTC pharmaceutical products (including branded and own-label products). As part of its market testing, the CMA has spoken to national grocery retailers, national pharmacy chains and wholesalers in assessing the interaction between branded and own-label products.

34. At the retail level, the CMA found that:

(a) branded and own-label OTC pharmaceutical products are frequently based on the same API and, as such, may be seen as functionally equivalent by consumers;[12]

(b) most national grocery retailers and national pharmacy chains stock an OTC own-label product alongside OTC branded products,[13] although the relative proportion of sales attributable to the own-label products varies substantially by product and retailer;

(c) in relation to OTC clinical sleeping aids, some customers reported consumer switching between branded and own-label products, either as a result of a price rise or a lack of availability of one of the products; and

(d) while there is some demand-side substitutability between own-label and branded OTC products, there is also a degree of product differentiation and brand loyalty. As a result, the closeness of competition between the various OTC products, whether branded or own-label, varies considerably between different products.

35. At the wholesale level, evidence provided by the Parties indicated that some retailers and pharmacies consider own-label and branded products to be

---

[11] The Parties refer, for example, to Case COMP/M.4314 *J&J/Pfizer Consumer Healthcare*.
[12] For example, in relation to OTC clinical sleeping aids, one customer told the CMA that its in-store pharmacists recommend its own-label product to customers on the basis that it is less expensive and functionally equivalent to the branded product, Nytol.
[13] For example, in relation to OTC clinical sleeping aids, most national retailers and pharmacy chains that the CMA spoke to said that they stock both branded and own-label products, although some said that their consumers may have a preference for branded products.

substitutable to some extent. For example, retailers and pharmacies that have previously experienced interruptions to the supply of their own-label products [✂].[14] Another customer began stocking an alternative branded product supplied by Crescent Pharma (Crescent) after delisting its own-label product supplied by Perrigo.[15]

36. From a supply-side perspective, there may be some degree of substitutability between branded and own-label supplies. The CMA notes that Perrigo itself is currently active in the production and supply of both branded and own-label products in all product overlaps. The CMA considers that the ease of supply-side switching will likely vary by product market and it is more likely that suppliers active in both branded and own-label, or in the supply of branded products (where switching to own-label would in principle be straightforward, although potentially less profitable), could more easily switch between the two than suppliers that are only active in own-label (where switching to branded would be likely to involve considerable upfront investment, particularly in relation to marketing).[16]

Conclusion on own-label vs branded

37. On the basis of the evidence set out above, and given that the primary overlap between the Parties at the wholesale level is in the supply of OTC branded and own-label products to retailers and pharmacies, the CMA has adopted on a cautious basis a frame of reference that includes both. The degree of product differentiation, and the extent to which the Parties' products compete against each other at the wholesale level (and, to the extent it is relevant, at the retail level), is taken into account in the competitive assessment.

Sleeping aids

38. The Parties overlap in the wholesale supply of sleeping aids. Both Parties sell sedative antihistamine-based sleeping aids, which include the API diphenhydramine. The CMA refers in this decision to sleeping aids containing a sedative antihistamine, such as diphenhydramine or promethazine, as

[14] For example, [✂].
[15] The CMA also notes that, as can be expected, there is also a substantial price difference between branded and own-label products sold to retailers at the wholesale level. This indicates a degree of product differentiation, which is considered further in the CMA's competitive assessment.
[16] In any case, the CMA does not consider this point to be determinative on the frame of reference to be adopted in this case, and the constraint posed from other suppliers is considered where relevant in the competitive assessment.

'clinical' sleeping aids, for ease of reference. Omega also sells a herbal sleeping aid product.

39. The Parties submitted that the closest ATC3 classification, R06A, for systemic antihistamines, is not the appropriate frame of reference, as it includes both sedative and non-sedative antihistamines. The Parties submitted that the relevant frame of reference should include products falling within the ATC3 classification R06A, which are sold as sleeping aids, together with herbal sleeping aids.[17] The Parties submitted that herbal products exert a significant constraint on the sale of clinical products, which should in any case be taken into account in the CMA's competitive assessment.

40. In support of their submission that herbal sleeping aids should be included in the product frame of reference for OTC sleeping aids, the Parties refer to:

(a) a decision of the EC, *Johnson & Johnson/Pfizer*, where homeopathic substitutes were considered in the competitive assessment (in relation to cold and flu products and nicotine replacement products);[18]

(b) consumer research data, specifically Kantar Worldpanel data commissioned by the Parties, which the Parties submitted shows a degree of substitution between herbal and clinical sleeping aids; and

(c) internal documents, [✂],[19] which the Parties submitted show herbal sleeping aids to be a material constraint on clinical sleeping aids [✂].

41. The CMA assessed the Parties' submissions and considered a range of evidence in reaching its view on the appropriate frame of reference in relation to OTC sleeping aids; specifically, whether it should be limited to OTC clinical sleeping aids or expanded to include herbal sleeping aids.

Consumer research data

42. Kantar data commissioned by the Parties appears to show that a significant proportion of the consumers who were surveyed use both herbal and clinical sleeping aids. However, the CMA considers that this does not provide conclusive evidence of consumer switching from clinical to herbal sleeping aids in response to a small, but significant, non-transitory increase in the price (**SSNIP**) of clinical sleeping aids. The evidence could equally indicate that

[17] The CMA notes that the appropriate market definition for OTC sleeping aids has not previously been considered, although the market for prescription sleeping aids has previously been assessed.
[18] Specifically case COMP/M.4314 *Johnson & Johnson/Pfizer Consumer Healthcare*, paragraph 79 and paragraph 119.
[19] [✂].

products are used by consumers at different points in time (eg sequentially) or are complementary in nature.[20]

43. Without further information on the intended use or consumer perception of clinical compared to herbal sleeping aid products, the CMA does not consider that the data provided by the Parties is a reliable basis on which to assess how closely consumers consider clinical and herbal sleeping aid products to be substitutes.

Internal documents

44. [✂]. [✂]. The [✂] shows that many consumers report using both clinical and herbal sleeping aid products. However, [✂] did not address to what extent consumers view them as substitutable or would switch between them in the event of a SSNIP. [21]

Third party views

45. The CMA spoke to a number of third parties to understand the extent to which customers and consumers consider herbal and clinical products to be substitutable. Most did not support the Parties' views and considered that clinical and herbal products were seen as distinct by consumers.

46. For example, third parties told the CMA that consumers typically have a preference for using either a herbal or a clinical product, would be likely to use herbal sleeping aids initially and then move on to a clinical product if the herbal product did not work and would make a choice about buying a herbal or clinical product depending on the severity of their sleeping problem and personal preferences.

47. The CMA notes that, when one customer's own-label clinical sleeping aid product was out of stock, consumers purchased higher quantities of other clinical sleeping aids (Nytol and Sominex) and not herbal products. Similarly, when another customer's own-label clinical sleeping aid went out of stock on several occasions over the period 2012-2014, that customer did not observe any significant effect (ie increase) in the sales of its herbal products.

---

[20] The CMA also notes that Omega's educational materials present both clinical and herbal sleeping aids together, but state that a herbal product should be recommended to customers 'who prefer a traditional herbal product'.

[21] The type of product chosen by the consumer is also associated with the self-reported severity of the consumer's sleeping problem, [✂]. The study also defines a range of different consumer types by their attitudes to different types of sleep aid. [✂] The study does, however, define a range of consumer types and indicates those that might use both herbal and clinical products.

48. In addition, the CMA understands that consumers requiring a clinical sleeping aid will need to speak to a pharmacist, whereas those requiring a herbal sleeping aid can buy one directly off the shelf. One third party indicated that a customer going to a pharmacy for a sleeping aid, will already have made a choice that they are looking for a stronger product (ie a clinical rather than herbal sleeping aid). This additional step in the customer journey is likely to further differentiate these two products.

Conclusion on clinical vs herbal sleeping aids

49. In light of the above and on a cautious basis, the CMA has included in its frame of reference for OTC sleeping aids sedative antihistamines falling within the ATC3 classification R06A, but has excluded herbal sleeping aids.

Analgesics

50. The Parties overlap in the wholesale supply of OTC oral analgesics, which are products designed to enable consumers to self-manage the symptoms of mild to moderate acute, episodic or chronic pain. Analgesics include paracetamol, aspirin and ibuprofen and may be combined with other active ingredients such as caffeine or codeine.

51. The Parties submitted that the appropriate frame of reference should be products falling within the ATC3 code N02B (non-narcotic analgesics) and that the narrowest plausible market definition would be adult oral analgesics.

52. The CMA has not previously considered the market for the supply of analgesics. However, the EC has previously found that products in ATC3 class N02B (ie systemic medicines to treat mild to moderate pain) make up a separate product market, and are distinct from topical analgesic products (classified under ATC3 class M02A), narcotic analgesics (eg morphine – classified under N02A), anti-migraine drugs (N02C), and analgesics used in cold and flu remedies in combination with other active ingredients such as antihistamines or decongestants (R05A).[22] The EC has also considered a possible distinction between adult and paediatric analgesics, but ultimately left this question open.[23] The CMA notes that the Parties only overlap in the supply of analgesics to adults and children over 12 years old.[24]

---

[22] See Case COMP/M.5953 *Reckitt Benckiser/SSL*, Case COMP/M.4314 *Johnson & Johnson/Pfizer Consumer Healthcare*, Case COMP/M.4007 *Reckitt Benckiser/Boots Healthcare*; and Case COMP/M.3354 *Sanofi-Synthelabo/Aventis*.
[23] Case COMP/M.4314 *Johnson & Johnson/Pfizer Consumer Healthcare*, paragraphs 24 and 95; Case COMP/M.5953 *Reckitt Benckiser/SSL*, paragraphs 19 and 67.
[24] The CMA notes that the IMS data provided by the Parties also includes only sales of products to adults and children over 12 years old.

53. The Parties submitted that the presence of codeine in some of their products does not change the classification as products containing a codeine dosage of less than 20mg per unit are still classified as N02B. The Parties submitted that none of their products contain more than 20mg of codeine.

54. In light of the above, the CMA has adopted as its frame of reference for OTC analgesics those products falling within the ATC3 classification N02B (non-narcotic analgesics), sold in tablet form, to adults and children over 12 years old.

Allergy and hay fever relief

55. The Parties overlap in the wholesale supply of OTC products used for the relief of hay fever and allergies. Both Parties supply products in tablet form containing cetirizine dihydrochloride and Perrigo also supplies products in tablet form containing loratadine. Both cetirizine dihydrochloride and loratadine are antihistamines, which are designed to provide relief from symptoms of hay fever such as sneezing, runny noses, burning and itchy eyes and to counter symptoms of skin allergies such as rashes or itching. These products fall within ATC3 classification R06A (antihistamines for systemic use).

56. Omega also supplies two other hay fever and allergy relief brands, Prevalin and Beconase. The Parties submitted that these products are not substitutable for products containing antihistamines.[25] Beconase is a long-lasting corticosteroid nasal spray that takes 2-3 days to have its full effect and is used preventatively. It includes a different active ingredient, beclometasone diproprionate, and is classified under ATC3 R01A (nasal decongestants for topical use).[26] The Prevalin nasal spray product contains a mixture of inactive ingredients, which create a barrier on the nasal lining. Due to the nature of the product, it does not have an ATC classification. Perrigo does not supply products falling within the R01A classification. The Parties submitted that the relevant frame of reference should therefore be limited to the Parties' overlapping antihistamine-based products, namely those falling within ATC3 classes R06A (antihistamines for systemic use).

---

[25] The Parties also refer to Case COMP/M.1846 *Glaxo Wellcome/Smithkline Beecham*, which found that corticosteroids (such as Beconase), which treat hay fever and nose-related symptoms and relieve nasal congestion (R01A), are significantly different from systemic antihistamines (R06A).
[26] For completeness, the Parties note that a product manufactured by Perrigo, Galpharm Nasal Decongestant Spray, falls under the same ATC3 classification as Omega's Beconase – ie ATC3 R01A. However, given the different intended uses of these products, they fall under different ATC4 classes. On this basis the Parties submit that there is no overlap with these products. The Parties also submit that while the Perrigo product is used for the temporary relief of nasal congestion caused by hay fever, Omega's Beconase product treats rhinitis, which is an inflammation of the nasal mucus membrane, principally caused by allergies. Beconase cannot be used to treat nasal congestion.

57. The CMA notes that IMS retail data submitted by the Parties records sales in both categories under the same product classification (ie treatment of hay fever) and includes: (i) non-sedative antihistamines falling within ATC3 class R06A; (ii) nasal decongestants for topical use falling within ATC3 class R01A; and (iii) products without an ATC classification that contain no active ingredients but can be used to treat the symptoms of hay fever. This data captures sales of all the Parties' products sold specifically for hay fever and/or allergy relief.

58. The CMA notes that the Parties have a higher increment when products falling within ATC classification R01A that are manufactured by Omega are included. Therefore, on a cautious basis, the CMA has adopted as its frame of reference for OTC allergy and hay fever relief those products falling within ATC3 classification R06A and R01A that have a hay fever or allergy relief function.

Antacids

59. The Parties overlap in the wholesale supply of OTC antacids in both ATC3 categories. Perrigo and Omega supply a heartburn relief product in tablet form with ranitidine as an API. Ranitidine is a histamine H2-receptor antagonist that inhibits stomach acid production. Both Parties also supply alginate and antacid products.

60. The Parties submitted that the appropriate frame of reference for these products should include: (i) products falling under ATC3 class A02A (antacids and alginates) that have an antacid function (but excluding anti-flatulents and carminatives, which address different symptoms); and (ii) products falling under ATC3 class A02B (H2 antagonists and PPIs) that have an antacid function. The Parties submitted that antacids, alginates, H2 antagonists and PPIs, which are available on an OTC basis, are all used interchangeably by consumers to treat acid-related complaints of the upper gastrointestinal tract.

61. The Parties submitted that the narrowest plausible product market definition would appear to be antacids based on H2 antagonists (ATC4 classification A02B1). However, the Parties consider that this product market definition would not take account of the substitutability of different OTC antacid products from a demand-side perspective.[27]

---

[27] The EC has previously considered the question of whether or not H2 antagonists are substitutable for antacids. In Case No COMP/M.3544 - *Bayer Healthcare/Roche (OTC business)*, it noted that there was wide consensus among both customers and competitors covered by the market investigation that both products treat the same symptoms and that there were strong indications that there exists a relevant OTC product market comprising antacids (ATC4 category A2A1) and H2 antagonists (A2B1).

62. In light of the above, the CMA has adopted as its frame of reference for OTC antacids those products falling within ATC classes A02A and A02B, which have an antacid function (but excluding anti-flatulents and carminatives).[28]

Conclusion on product frame of reference

63. For the reasons set out above, the CMA has assessed the impact of the Merger on the following frames of reference:

(a) The wholesale supply to retailers and pharmacies of OTC branded and own-label clinical sleeping aids, namely products falling within ATC3 classification R06A (antihistamines for systemic use), which are sold as sleeping aids.

(b) The wholesale supply to retailers and pharmacies of OTC branded and own-label analgesics, namely products falling within ATC3 classification N02B (non-narcotic analgesics), sold in tablet form, to adults and children over 12 years.

(c) The wholesale supply to retailers and pharmacies of OTC branded and own-label hay fever and allergy relief products, namely products falling within ATC3 classification R01A (nasal decongestants for topical use) and R06A (antihistamines for systemic use) that have a hay fever or allergy relief function.

(d) the wholesale supply to retailers and pharmacies of OTC branded and own-label antacids, namely products falling within ATC3 classes A02A (antacids and alginates, but excluding anti-flatulents and carminatives) and A02B (H2 antagonists and PPIs) that have an antacid function.

Geographic scope

64. The Parties submitted that the relevant geographic frame of reference for each of the four product overlaps should be UK-wide. This approach is consistent with the decisional practice of the CMA and EC, which has recognised that the relevant geographic market for finished pharmaceutical products, including OTC products, is national in scope. This reflects differences among EEA member states in price-setting, regulatory regimes and channels of distribution.[29]

---

[28] The CMA notes that in a previous antitrust decision (Reckitt Benckiser – Abuse of a dominant position), the OFT defined a market for *prescription* antacids and alginates excluding H2 antagonists and PPIs.
[29] For example, Case ME/4703/10 *Reckitt Benckiser/Coombe* and Case COMP/M.2192 *SmithKline Beecham/Block Drug*.

65. The CMA did not receive any evidence to suggest that the market was any narrower than the UK in any of the four product overlaps. The CMA has therefore considered the impact of the Merger in each of the four product overlaps on a UK-wide basis.

Counterfactual

66. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). In anticipated mergers, the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. The CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or that there is a realistic prospect of a counterfactual that is more competitive than these conditions as between the merging parties.[30]

67. In this case, the Parties did not put forward any evidence to support an alternative counterfactual. Therefore, the CMA considers the prevailing conditions of competition to be the relevant counterfactual.

Competitive assessment

Horizontal unilateral effects

68. The CMA has examined, in each of the four product overlaps identified at paragraph 63 above, the possibility that the merged entity could unilaterally raise wholesale prices above the pre-Merger level or deteriorate its competitive offering to retailers and pharmacies, in relation to either its branded products, own-label products or both.

69. Where products are differentiated, for example by branding or quality, unilateral effects are more likely where the merger firms' products compete closely.[31] The CMA has therefore assessed the extent to which the Parties' products competed pre-Merger, taking into account the fact that they are active primarily in different segments, ie branded and own-label. The CMA has also assessed the extent to which products supplied by third parties will continue to competitively constrain the Parties post-Merger.

70. The Parties consider the relationship between them to be primarily vertical, rather than horizontal, in nature, given that Perrigo manufacturers under

---

[30] *Merger Assessment Guidelines*, paragraphs 4.3.5 onwards.
[31] *Merger Assessment Guidelines*, paragraph 5.4.6.

contract certain OTC products for Omega (on a white-label basis), retailers and pharmacies, and Omega sells branded products direct to retailers and pharmacies.

71. However, the CMA considers that the Parties both supply, at the wholesale level, overlapping OTC pharmaceutical products to retailers and pharmacies in the UK and, through them, to consumers. As such the CMA has principally assessed the Merger in relation to possible horizontal unilateral effects. Vertical issues are considered separately.

Share of supply data

72. In relation to the shares of supply set out for each frame of reference below, the CMA has relied upon retail level data as a proxy for the Parties' shares of supply at the wholesale level. The CMA recognises that these shares will not be precisely the same as at the wholesale level as retailers and pharmacy chains may apply different mark-ups to different brands. However, this is the best proxy available for branded sales. The CMA notes that in any event shares of supply are merely an indicative starting point for its competitive assessment.

73. The Parties provided share of supply data on the basis of IMS reports for 2013.[32] IMS records sales at the retail level of branded products (with the exception of some smaller brands and excluding some retail outlets) but does not differentiate own-label sales by different retailers or pharmacies. This therefore allowed the CMA to determine the overall size of the relevant retail market but did not provide the CMA with an estimate of the share of supply of Perrigo's own-label products.

74. The Parties provided an estimate of Perrigo's share of supply of own-label sales, by applying a multiplier to Perrigo's revenues derived from the relevant products at the wholesale level, to reflect retailers' and pharmacies' estimated mark-up. The original estimate provided by the Parties assumed that retailers and pharmacies made a [✂]% mark-up on sales of Perrigo own-label products, which the Parties' submitted was a conservatively high (ie 'worst case') estimate.

75. However, information provided by the Parties to the CMA indicated that this approach had significantly understated the actual mark-up applied by some retailers and pharmacies, which was often much higher (eg up to [✂]%), and

[32] In some cases the IMS retail categories do not correspond precisely to the frame of reference section above but the CMA does not consider that this affects its competitive assessment.

so had significantly understated the presence of Perrigo's products at the retail level.

76. The Parties provided revised estimates for Perrigo's share of supply for each frame of reference that applied a mark-up based on a product's actual retail unit price, divided by Perrigo's wholesale unit price, for all products within that frame of reference where the retail and wholesale price data could be matched. The Parties noted that in some cases this approach gave a figure significantly in excess of the total market size recorded by IMS, which could for example indicate the use of price or volume promotions by retailers or pharmacies.[33]

77. In each of the four product frames of reference, the CMA has therefore included an estimate range of Perrigo's share of supply of own-label products, which ranges from the original to the revised figures provided by the Parties.

OTC sleeping aids

78. The CMA has examined whether the Merger may give rise to a realistic prospect of a substantial lessening of competition in the supply of OTC sleeping aids to retailers and pharmacies. Specifically, the CMA has examined whether there is a realistic prospect that the merged entity could unilaterally raise wholesale prices of its branded or own-label OTC clinical sleeping aids (or both) above the pre-Merger level or deteriorate its competitive offering to retailers and pharmacies (including, for example, by ceasing to supply its own-label products to encourage diversion to its branded products).

79. Given the Parties' differing strengths in the supply of these products (where Perrigo is strong in the supply of own-label products and Omega in the supply of branded products), the CMA has examined the competitive interaction between these two types of product at the wholesale level.

Share of supply

80. The Parties' combined share of supply in the wholesale supply of OTC products falling within the ATC3 classification R06A (antihistamines for systemic use), which are sold as sleeping aids, is [70-80]% to [90-100]%, with an increment of [0-10%]% arising from Perrigo's sales of branded products

[33] In light of the known use by retailers and pharmacies of seasonal pricing or two-for-ones on particular products, including for hay fever and allergy relief products, the Parties submitted additional estimates assuming a degree of discounting by retailers and pharmacies to the listed retail price. These fall within the ranges set out in the following sections but do not in any event affect the CMA's competitive assessment.

and an increment of [10-20]% to [20-30]% arising from Perrigo's sales of own-label products.

81. The Parties initially estimated that Perrigo's share of supply of own-label OTC clinical sleeping aids was [30-40]%. However, the CMA's market testing exercise found that Perrigo is by far the largest supplier of own-label OTC clinical sleeping aids in the UK, with a share of supply in that segment of [90-100]%.

Closeness of competition

82. As set out at paragraph 69 above, unilateral effects are more likely to arise, in markets where products are differentiated, where the Parties' products compete closely. The CMA has therefore assessed the extent to which the Parties' branded and own-label products competed closely pre-merger.

- *Parties' views*

83. The Parties submitted that they are not close competitors in the supply of OTC clinical sleeping aid products. Perrigo principally operates upstream in the supply of own-label products and contract manufacturing (ie on behalf of Omega) and competes against other producers supplying to brand owners (including retailers). In contrast, Omega is a brand owner and competes against other brand owners (eg Actavis and retailer brands) in supplying to pharmacies and retailers. The Parties submitted that Perrigo and Omega are not therefore in direct competition with each other.

84. To the extent that Perrigo is active in branded products, the Parties stated that Perrigo's Galpharm brand is a 'tertiary brand' (ie one that is positioned as an alternative to a retailer's own-label product) that does not compete strongly with Omega's Nytol.

- *Third party views*

85. Most responses from third parties supported the view that the Parties' products were not close competitors. Two customers stated that the closest competitor to Omega's Nytol is Actavis' Sominex and one of these customers said it would be unlikely to delist Nytol in response to a 5% price rise. One customer described Nytol as a 'must-stock' product. Four customers indicated that there was no clear alternative to Nytol that they would switch to.

86. Only two customers saw the Parties' branded and own-label products as close competitors. One of these customers said that if Perrigo had increased the price of its own-label sleeping aid product, it would have approached

Omega to source a replacement product, although it was not clear whether that customer was seeking to source a branded or own-label product. The Parties told the CMA that Omega did not supply [✂] own-label products pre-Merger. That customer also said that, if the price of Omega's Nytol had risen (or the product had been unavailable) then it would have promoted Perrigo's own-label product.

87. Another customer suggested that if the price of Nytol increased there would be a partial diversion of customers to both Sominex and its own-label product (supplied by Perrigo), although the proportions diverted to one or other were unclear.

- *CMA's assessment*

88. The CMA notes that the Parties are mainly active in two different segments. Perrigo generates minimal sales of branded clinical sleeping aids and Omega is not active in the supply of own-label products.

89. However, the CMA's investigation found that there had been some competitive interaction between the Parties' branded and own-label products. Some customers that had previously experienced interruptions to own-label products supplied by Perrigo had bought larger quantities of Omega's Nytol brand.[34] A small number of customers also considered that, pre-Merger, the Parties competed in the supply of OTC clinical sleeping aids.

90. The CMA considers that the instances of switching in response to supply interruptions may reflect the limited alternatives inherent in sourcing own-label products in the short term, or the time required to switch to an alternative, rather than indicate close competition between these product segments (and so close competition between the Parties).

91. The CMA notes that, of the customers it spoke to that have offered an own-label product in the last three years, the vast majority have maintained that product line (despite in some cases experiencing extended supply disruptions). The CMA notes that a customer who had previously sourced an own-label product from Perrigo [✂], prior to delisting that product, [✂].

92. In this regard, the CMA notes that the price of Omega's branded product, Nytol, is approximately £[✂] at the wholesale level and that Perrigo's own-label products are on average substantially cheaper at approximately £[✂]. However, at the retail level, pricing levels can be considerably closer. For

[34] Specifically, when two customers experienced difficulties sourcing own-label product [✂], they approached Omega to increase supply of Nytol in the short term. When one customer experienced similar difficulties [✂], they approached Omega to source additional supplies of Nytol [✂].

example, the retail price of Nytol 50mg (20 pack) was submitted by the Parties to be £5.99 while an equivalent Boots own-label product was £5.49. This evidence indicates that retailers and pharmacies may have incentives to maintain their own-label range, where they achieve higher margins, rather than switch to branded products. This suggests that the constraint exerted by branded products on own-label products at the wholesale level may be limited.

93. In the light of the evidence set out above, the CMA considers that, pre-Merger, the Parties were not close competitors, although they may have imposed some limited constraints on each other. Specifically:

(a) in relation to the supply of own-label, where Omega is not active, the CMA found that, while some customers had purchased an Omega branded product when their own-label product was unavailable, the constraint that branded products exert on own-label products at the wholesale level appears to be limited; and

(b) in relation to branded products, while Omega's branded product Nytol faced limited constraints from competitors' products pre-Merger, responses from customers indicated that a stronger competitive constraint was likely to be Actavis' Sominex, rather than Perrigo's own-label or branded products.

Remaining competitive constraints on own-label post-Merger

94. The CMA assessed what competitive constraints would remain post-Merger in relation to the Parties' own-label products. The CMA identified two other suppliers of diphenhydramine-based clinical sleeping aids; Crescent Pharma Limited and the Alinter Group.[35]

95. Crescent is a supplier of generic own-label and branded pharmaceutical products. It holds a marketing authorisation (**MA**) for the supply of 25mg and 50mg diphenhydramine-based products and has previously supplied a product labelled 'diphenhydramine chloride' directly to national wholesalers and to one national grocery retailer.

96. Crescent told the CMA that, although it has held the relevant MA for around four years, it has only more recently obtained all of the necessary regulatory approvals to be able to supply retailer own-label clinical sleeping aids. Crescent told the CMA that it has been actively pursuing own-label business in the last 18 months and is currently in discussions with two national

[35] The Alinter Group includes Wallace Manufacturing Chemists Limited and Norma Chemicals Limited.

customers to supply them with own-label clinical sleeping aids. One of these customers confirmed that [✂].

97. Crescent also told the CMA that it did not face capacity constraints supplying own-label clinical sleeping aids as it is a relatively low volume product compared to (for instance) Paracetamol, which they produce in much larger volumes.

98. A second supplier, Alinter, holds an MA for the 25mg own-label sleeping aid product (through its subsidiary, Norma) and [✂] to two national customers and one regional customer. Alinter told the CMA that [✂].

99. Alinter told the CMA that it did not face capacity constraints and could also supply a 50mg sleeping aid if it gained the necessary MA. [✂].

- *Parties' views*

100. The Parties submitted that, since 2013, Perrigo had either lost, or was under threat of losing, [✂], to either Crescent Pharma or Alinter. The Parties provided examples of switching or threats by customers to switch from Perrigo to one of these suppliers.[36]

101. The Parties also submitted that attempts to increase prices in own-label (to divert consumers to Nytol) would be ineffective given the mark-ups typically applied by retailers to these products, which the Parties estimated to be, on average, around [✂]% on own-label sleeping aids. In light of this, the Parties submitted that a 5% price rise at the wholesale level would result in a price increase of less than 1% for the end consumer, which is unlikely to be sufficient to induce material switching to the Parties' Nytol product.[37]

102. The Parties submitted that they supply a variety of products to national pharmacy chains and grocery retailers and that, if they were to increase the price of their own-label products, [✂]. The Parties provided examples of extended negotiation periods over intended price increases. However, the CMA considers that the credibility of such a [✂] strategy depends on the alternatives available to customers and has received insufficient evidence to judge how likely it is that customers are able to [✂].

---

[36] For example, a national grocery retailer tendered its own-label supply [✂], whilst another customer [✂] and [✂]. A national customer [✂] whilst another customer [✂].

[37] The Parties also told the CMA that retailers would not have an incentive to induce switching to Nytol through pricing practices since they achieve a higher margin on their own-label product than on branded products. However, the CMA notes that it has not received sufficient evidence on wholesale and retail margins and the likely magnitude of diversion at retail level from own-label to branded products to assess these representations.

- *Third party views*

103. The CMA asked customers what they would do if Perrigo had, pre-Merger, increased the price of its own-label products by 5%, and which alternative suppliers of own-label sleeping aid products they would consider in response to such a price rise. In general, customers of Perrigo's own-label products said that there were limited alternative suppliers of own-label clinical sleeping aids and switching own-label supplier was difficult and time consuming. Customers identified two specific issues, namely the need to ensure that the supplier has an MA from the Medicines and Healthcare Products Regulatory Agency (**MHRA**) and that the supplier can consistently deliver the necessary volumes.

104. However, one customer has previously tendered its own-label business. Another customer confirmed that it was due to commence sales of [✂] products supplied by another supplier.

- *The CMA's assessment*

105. Given the evidence of a customer planning to switch to sourcing its own-label requirements from another supplier and, to a lesser extent, [✂], the CMA considers that, post-Merger, the Parties will continue to be competitively constrained by other suppliers of own-label sleeping aids.

Remaining competitive constraints on branded post-Merger

106. As set out at paragraph 85 above, the CMA found that Omega's branded product, Nytol, faced little competitive constraint pre-Merger. Four customers indicated that there was no clear alternative to Nytol that they would switch to. One customer described Nytol as a 'must-stock' product. One of these customers said that it would be unlikely to delist Nytol in response to a 5% price rise.

107. Customers also generally indicated that Actavis' Sominex was a stronger competitor to Nytol than Perrigo's branded or own-label products.

108. The CMA considers that, overall, these customer responses indicate that there are limited competitive constraints pre-Merger on Nytol but that Sominex will continue to exert some constraint on the Parties' branded products following the Merger.

Conclusion on unilateral effects in relation to OTC clinical sleeping aids

109. The CMA found that the Parties are mainly active in different segments, ie branded and own-label products. Despite this, a small number of customers considered that the Parties competed pre-Merger in the supply of OTC clinical sleeping aids. As set out at paragraphs 88 to 90 above, some evidence reviewed by the CMA indicated that there had been some competitive interaction between the Parties' branded and own-label products.

110. However, the CMA found that sufficient constraints will remain post-Merger from other suppliers in both the own-label and branded segments, specifically:

(a) as summarised at paragraphs 93 and 105 above, the constraint that Omega's branded product exerts on Perrigo's own-label product at the wholesale level appears to be limited and other suppliers of own-label products will continue to exert some competitive constraint post-Merger; and

(b) as summarised at paragraphs 93 and 108 above, there were limited competitive constraints pre-Merger on Omega's branded product, Nytol, but Actavis' Sominex was a stronger competitor than Perrigo's products and will continue to exert some competitive constraint post-Merger.

111. In light of the above, the CMA finds that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the wholesale supply of OTC branded and own-label sleeping aids to retailers and pharmacies in the UK.

OTC analgesics

Share of supply

112. The combined share of supply of the Parties in the wholesale supply of OTC (non-narcotic) analgesics (falling within ATC3 classification N02B) to retailers and pharmacies, for sale in tablet form to adults and children over 12 years, is [20-30] to [30-40]% with an increment of [0-10]% arising from Perrigo's sales of its branded products and an increment of [10-20]% to [20-30]% arising from Perrigo's sales of own-label products.

Parties' submissions

113. The Parties submitted that they are not close competitors, given that Perrigo's contract or own-label manufacturing and sourcing activities are different from

Omega's activities and therefore Perrigo's own-label products do not compete with Omega's brands.

114. The Parties submitted that post-Merger, the Parties will remain constrained by significant competing brands, including Reckitt Benckiser's Nurofen (with a [20-30]% share of supply). The Parties also submitted that customers would not, as a consequence of the Merger, lose an alternative (or potential) supplier of own-label products, given that Omega is not active in the supply of own-label products.

Third party views

115. Several customers said that the Parties were not close competitors in the supply of analgesics. For example, one customer told the CMA that GlaxoSmithKline (**GSK**) and *Johnson & Johnson* (**J&J**) are closer competitors to Omega, whereas suppliers such as Brunel and Aspar are closer competitors to Perrigo. Another national customer suggested that Omega's Hedex product and Perrigo's Galpharm branded product are not close substitutes.

116. One customer said that the Parties' branded and own-label products competed. Another customer said that the Parties are both key suppliers of Paracetamol and that they may have been able to switch from Omega's Hedex brand to a Perrigo alternative.

117. Customers identified a number of other alternative brands, including but not limited to Nurofen, Pfizer's Anadin and GSK's Panadol. The CMA received mixed evidence on the extent to which these would be substitutable for Omega branded products. For example, several customers described the Omega brand Solpadeine as a 'must-stock' product and said they would not delist it if prices rose by 5%. Conversely, some customers would consider switching to other branded products or to an own-label product.

118. In relation to the supply of own-label products, customers named a wide range of alternative suppliers that they currently used or could potentially use to supply own-label analgesic products.[38] Some customers told the CMA that switching own-label supplier would be difficult, incurring time and costs. However, some customers of Perrigo indicated that they would switch away in the event that it increased prices of its own-label or tertiary branded products by 5%.

[38] These were: Aspar; Boots Contract Manufacturing; Bells; Brackmills; Bristol Labs, Brunel; Cipla; Custom UK; EM Pharma; Kent Pharmaceuticals; and Wockhardt.

CMA's assessment

119. The CMA notes that the share of supply of the Parties in the wholesale supply of OTC non-narcotic analgesics at [30-40]% (at most) does not appear to suggest *prima facie* concerns, especially given that the Parties are mainly active in two different segments, ie branded and own-label products.

120. In relation to branded products, the CMA notes Perrigo's minimal sales (accounting for [0-10]% of the overall branded and own-label wholesale market) and the presence of a number of other strong brands that are likely to be closer and stronger competitors to Omega's brands than Perrigo's products and which will continue to constrain the merged entity post-Merger (eg from increasing the price of its branded products).

121. In relation to own-label products, the CMA notes that Omega is not active in this segment and third parties named a wide range of alternative suppliers of own-label products. These alternative suppliers are estimated to account for [40-50]% to [50-60]% of the supply of own-label wholesale products in this segment. The CMA considers that these suppliers of own-label products will continue to constrain the merged entity post-Merger (eg from increasing the price of its own-label products).

122. Overall, on the basis of the evidence set out above, the CMA therefore finds that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the wholesale supply of OTC branded and own-label analgesics to retailers and pharmacies in the UK.

OTC antacids

Share of supply

123. The combined share of supply of the Parties in the wholesale supply of OTC products falling within ATC3 classes A02A (antacids and alginates) and A02B (H2 antagonists and PPIs), which have an antacid function, is [10-20]% with an increment of [0-10]% arising from Perrigo's sales of branded products and an increment of [0-10]% arising from Perrigo's sales of own-label products.

Parties' submissions

124. The Parties submitted that they are not close competitors, given that Perrigo's contract or own-label manufacturing and sourcing activities are different from Omega's activities and therefore Perrigo's own-label products do not compete with Omega's brands. The Parties submitted they will remain constrained by

competing brands such as Reckitt Benckiser's Gaviscon (with [40-50]% of the market) and Bayer's Rennie (with [20-30]%).

Third party views

125. Customer views on closeness of competition were mixed, and similar to some of the views reported in paragraph 115 above with regard to analgesics. However, one customer said, with regard to antacids, that the Parties were close competitors as they both supply ranitidine-based products

126. Third parties identified a number of other alternative brands, including but not limited to Gaviscon and Rennie. Third parties also named a wide range of alternative suppliers of own-label products that they currently used or could potentially use to supply own-label antacid products.

127. Similar to the views reported in paragraph 118 above, with regard to analgesics, some customers indicated that switching own-label supplier may be difficult in this market. However, some customers said that they would switch in the event of a 5% price rise.

CMA's assessment

128. The CMA notes that the share of supply of the Parties in the wholesale supply of OTC antacids at [10-20]% (at most) does not appear to suggest *prima facie* concerns. The CMA considers that the Parties will continue to be constrained by suppliers of other brands and suppliers of own-label antacid products.

129. The CMA therefore finds that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the wholesale supply of OTC branded and own-label antacids to retailers and pharmacies in the UK.

OTC hay fever and allergy relief products

Shares of supply

130. The combined share of supply of the Parties in the wholesale supply of OTC products within ATC3 classification R01A (nasal decongestants for topical use) and R06A (antihistamines for systemic use), which have a hay fever or allergy relief function, is [20-30]% to [40-50]% with an increment of [0-10]% arising from Perrigo's sales of branded products and an increment of [10-20]% to [20-30]% arising from Perrigo's sales of own-label products.

Parties' submissions

131. The Parties submitted that they are not close competitors as Perrigo is primarily active in own-label supply and Omega is active in the supply of branded products. With regard to branded products, the Parties submit that they will remain constrained by competing brands, such as GSK's Piriteze (with a [10-20]% share of supply), GSK's Piriton (with a share of supply of [0-10]%) and J&J's Benadryl (with a share of supply of [10-20]%). As Omega is not active in the supply of own-label products, they submit that customers of own-label products would not lose an alternative supplier.

Third party views

132. Customer views on the closeness of competition between the Parties were mixed and similar to some of the views reported in paragraph 115 above with regard to analgesics. Some customers indicated that Omega products were 'must-stock' and that it would be difficult to delist them.

133. Customers identified a number of other alternative brands, including but not limited to Piriteze, Piriton, Benadryl and Bayer's Clarityn. One customer said it would consider switching to alternative brands sold by GSK or J&J if Omega raised its price by 5%. It said it would be able to give more shelf space to own-label or GSK branded products if Omega raised the price of the tablet products, but there was no alternative to its spray format products.[39] Customers responding to the CMA's questionnaire also listed several other competing suppliers of branded hay fever and allergy products, including products manufactured by Bayer and Novartis.

134. One customer said that, with regard to hay fever and allergy relief, the Parties were both key suppliers of products containing cetirizine.

135. In relation to the supply of own-label products, third parties named a wide range of alternative suppliers that they currently used or could potentially use to supply own-label hay fever and allergy relief products.[40] Similar to the views reported in paragraph 118 above, with regard to analgesics, some customers indicated that switching own-label supplier may be difficult in this market. However, some customers said that they would switch in the event of a 5% price rise. One customer stated that although it would look to switch supplier out-of-season, it would not be possible to switch in response to a price rise in-season.

---

[39] The CMA notes that Perrigo does not provide a spray format product in the branded or own-label segments.
[40] These were: Bells, Bristol Labs, Budget Pharma, EM Pharma, Teva and Wockhardt.

CMA's assessment

136. The CMA notes that the share of supply of the Parties in the wholesale supply of OTC hay fever and allergy products is [40-50]% (at most). However, it is relevant that the Parties are mainly active in two different segments, ie branded and own-label products respectively.

137. In relation to branded products, the CMA notes Perrigo's minimal sales (accounting for [0-10]% of the overall branded and own-label wholesale market) and the presence of a number of other strong brands that are likely to be closer and stronger competitors to Omega's brands than Perrigo's products and which will continue to constrain the merged entity post-Merger (eg from increasing the price of its branded products).

138. In relation to own-label products, the CMA notes that Omega is not active in this segment and third parties named a wide range of alternative suppliers of own-label products. Although the share of supply that these alternative suppliers account for is uncertain (estimated to be between [0-10]% and [60-70]% of own-label wholesale products in this segment) the CMA considers that these suppliers of own-label products will continue to constrain the merged entity post-Merger (eg from increasing the price of its own-label products).

139. Overall, on the basis of the evidence set out above, the CMA therefore finds that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the wholesale supply of OTC branded and own-label hay fever and allergy relief products in the UK.

Conclusion on unilateral effects

140. In light of the above, the CMA considers that there is no reasonable prospect of a substantial lessening of competition in relation to any of the horizontal overlaps arising from the Merger.

Barriers to entry

141. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no substantial lessening of competition. In assessing whether entry or expansion might

prevent a substantial lessening of competition, the CMA considers whether such entry or expansion would be timely, likely and sufficient.[41]

142. The Parties submitted that market entry in the OTC pharmaceuticals sector is typically by existing suppliers expanding into new product areas or by new suppliers relying on third parties to carry out part of the supply chain process. The Parties note that a prospective entrant can outsource its supply chain activities to third parties. For example, Omega outsources [✂] of its manufacturing activities to third parties.

143. The CMA notes that obtaining an MA from the MHRA can take approximately 12 months. Some third parties also indicated that there are costs associated with switching own-label suppliers, with estimates of switching time (including obtaining the relevant MAs, manufacturing and designing the relevant labels) ranging from six months (for an existing supplier to start supplying another customer) to up to three years. However, in relation to clinical sleeping aids, existing customers who have previously delisted (or experienced interruptions in the supply of) their own-label product have subsequently been able to reintroduce that product or source a replacement own-label product from another supplier.

144. In this case, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any basis.

Vertical effects

145. There is a vertical link between the Parties given that Perrigo contract manufactures certain branded OTC products for Omega, specifically:

(a) analgesics;

(b) hayfever and allergy relief; and

(c) clinical sleeping aids.

146. The CMA assessed whether there was any prospect of vertical effects in any of these three markets, specifically, the risk of input foreclosure and/or customer foreclosure.

[41] *Merger Assessment Guidelines*, from paragraph 5.8.1.

Input foreclosure

147. An input foreclosure theory of harm arises where, post-merger, the merged entity may have the ability and incentive to foreclose rival pharmaceutical companies in competition with Omega at the wholesale level by raising the price (or withholding supply) of products it supplies upstream to these rivals.

148. The Parties submit that these overlaps do not give rise to any competition concerns as a result of input foreclosure.

149. The CMA notes that Perrigo does not supply any other pharmaceutical company with OTC branded products in any of the three overlaps at paragraph 144 above. The CMA considers, therefore, that there is no realistic prospect of input foreclosure arising from the Merger.

Customer foreclosure

150. A customer foreclosure theory of harm arises where, post-merger, the merged entity would have the ability and incentive to foreclose upstream manufacturers or suppliers of OTC products by internalising the supply of OTC products and ceasing to source these from upstream rivals.

151. The Parties submit that these overlaps do not give rise to any competition concerns as a result of customer foreclosure.

152. The CMA notes that the merged entity would only have the ability to successfully foreclose customers if it was itself an important customer of contract manufacturers or suppliers in relation to one or more OTC products.

153. In relation to OTC analgesics and OTC hay fever and allergy relief, the CMA considers that Omega (as a purchaser of upstream contact manufactured products) does not have shares of supply of OTC branded products at the wholesale level that suggest it is an important customer of upstream contract manufacturers/suppliers (ie [10-20]% in both cases). The CMA considers that there is no realistic prospect of customer foreclosure arising post-Merger in relation to these two products.

154. With regard to OTC clinical sleeping aids, Omega does have a high share of wholesale supply, and can be considered an important customer of upstream suppliers. However, Omega does not purchase OTC clinical sleeping aid products from any other contract manufacturer or supplier other than Perrigo. The CMA therefore considers that there is no realistic prospect of customer foreclosure arising as a consequence of the Merger in relation to clinical sleeping aids.

Conclusion on vertical effects

155. In light of the above, the CMA considers that there is no reasonable prospect of a substantial lessening of competition in relation to any of the vertical overlaps arising from the Merger.

Third party views

156. The CMA has sought views on the Merger from customers and competitors of the Parties. Third party comments have been given due consideration by the CMA and have been referred to in this decision where relevant.

157. A small minority of customers that responded to the CMA's questions raised concerns about the Merger to some degree, particularly in relation to a reduction in their negotiation strength where they currently source both branded and own-label products from the Parties. Two customers raised specific concerns regarding the Parties' combined strength in the supply of OTC clinical sleeping aids. Such concerns have been taken into account by the CMA in its assessment.

158. Third party competitors saw the Merger as not giving rise to concerns, seeing the two Parties as largely complementary in their business models.

Decision

159. The CMA does not believe that it is or may be the case that the Merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

160. The Merger will therefore **not be referred** under section 33(1) of the Act.

Sheldon Mills
Senior Director, Mergers
Competition and Markets Authority
9 March 2015