COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Number: 58/AM/May00

In the matter between

GLAXO WELLCOME plc	**First Applicant**
SMITHKLINE BEECHAM plc	**Second Applicant**
And	
THE COMPETITION COMMISSION	**Respondent**

REASONS FOR THE TRIBUNAL'S DECISION

Approval

1. On 28 July 2000 the Competition Tribunal issued an order approving the intermediate merger between Glaxo Wellcome plc and Smithkline Beecham plc with conditions. The conditions for the approval of the merger appear below.

2. The Commission had prohibited the merger because it was concerned that the merger would result in the merging parties having high market shares in two therapeutic categories. The merging parties agreed to out license products in each of the therapeutic categories identified by the Commission in order to lessen the competition concerns of the Commission. Consequently the Commission and the merging parties brought to us a consent order reflecting their agreement.

3. During the hearing we expressed concern that the merger was likely to lessen or prevent competition in another (third) therapeutic category. The merging parties agreed to out license one of the drugs in this category as well.

4. The above undertakings by the merging parties addressed our competition concerns as well as those of the Commission. The conditions we have set for the approval of the merger reflect the undertakings made by the merging parties in the consent order submitted to us prior to and during the hearing.

The merger transaction

5. This is an international merger of equals between Glaxo Wellcome plc and SmithKline Beecham plc. This merger is to be effected by way of a scheme of arrangement in terms of section 245 of the United Kingdom Companies Act of 1985. The two merging firms are registered in England and Wales with subsidiaries operating around the world.

6. In terms of the merger agreement both firms would be acquired by a new company called Glaxo SmithKline plc.

7. The European Commission conditionally approved this merger in May 2000; our decision is largely based on the decision of the European Commission.

Evaluating the merger

8. SmithKline Beecham is mainly involved in the research, development, manufacture and marketing of pharmaceuticals, vaccines, over-the-counter medicines and health products. In terms of the information the parties have provided to us about 32 per cent of SmithKline Beecham's international turnover derives from non-pharmaceutical activities.

9. Glaxo Wellcome's business is in the research, development, manufacture and marketing of pharmaceutical products. In terms of the information supplied to us by the parties Glaxo Wellcome does virtually no other business outside of pharmaceuticals products.

10. Since both parties are involved in the research, development, manufacture and marketing of pharmaceutical products, the merger will result in overlaps in a number of therapeutic categories for human pharmaceuticals.

<u>The relevant products market</u>

11. The relevant product market is the market for the research, development, manufacture and marketing of specific categories of pharmaceutical products. As a general rule of thumb we define this market by reference to the Anatomical Therapeutic Chemical Classification (ATC) level 3 devised by the European Pharmaceutical Marketing Research Association. This is the classification commonly used by competition authorities around the world, especially the European Commission, in defining markets for pharmaceutical products. The ATC classification is a hierarchical classification with 16 categories. Each category has four levels, the first level is the most general and the fourth level is the most specific. In the third level (ATC 3) products are classified into therapeutic categories in terms of their intended use. Each therapeutic category constitutes a market.[1]

1 This technique is not always foolproof as certain products within the same ATC3 category are not always substitutes for one another, i.e., the market could be construed more narrowly than ATC3. Conversely, a product may also compete with a product in another ATC3 category. For purposes of this

The relevant geographic market

12. This is a merger between multinational pharmaceutical companies whose subsidiaries manufacture and supply their products worldwide. The approach of the European Commission is that the geographic market for pharmaceutical products is national in scope; this is the approach they followed in their definition of the relevant geographic market when this merger came before them. The European Commission's view is that the sale of pharmaceutical products is influenced by the administrative procedures or purchasing policies in force in each Member State. Prices of products are directly or indirectly influenced by the State in some countries, the prices for products may therefore differ from one Member State to another. Brand and pack-size strategies and distribution systems also differ between Member States.

13. The same considerations apply to the South African market. In any event this observation is common cause between the Commission and the merging parties and requires no further consideration.

Impact on competition

14. As appears below the combined market share of the merging parties' products will be very high post-merger in three therapeutic categories. The therapeutic categories in question are anti-virals (excluding anti-HIV) (J5B), topical anti-biotics (D6A) and anti-emetics (A4A). The new company would hold market shares of 85,6 percent, 65,3 percent and 38,2 percent in these markets, respectively. Table 1 below shows the market share of the merging parties before and after the merger in these therapeutic categories:

	ANTIVIRALS (EXCLUDING HIV) (J5B)	**TOPICAL ANTIBIOTICS (D6A)**	**ANTI-EMETICS (A4A)**
SMITHKLINE BEECHAM'S SHARE	Famciclovir 17,5%	Bactroban 55%	Granisteron ("Kytril") 5,2%
GLAXO WELLCOME'S SHARE	Zelitrex 40,2% Zovirax 27,8%	Polysporin 5% Cicatrin 4,3% Neosporin 0,5%	Zofran 22,4% Valoid 10,6%
POST-MERGER MARKET SHARE	85,6%	65,3 %	38,2%

Table 1.

15. For this reason, the merging parties have voluntarily agreed to out license

decision it has not been necessary for us to consider this issue.

products in each category to lessen the competition concerns of the Tribunal and the Commission. In terms of this agreement SmithKline Beecham has undertaken to out license Granisteron (trade name Kytril), in the anti-emetics category and Famciclovir in the anti-virals category; Glaxo Wellcome has undertaken to out license Polysporin, Cicatrin and Neosporin in the topical antibiotics category.

16. Incidentally, the European Commission also found that the merger would negatively affect competition in the same areas that we have identified and approved the merger subject to the parties out licensing some of the products in the identified areas to reduce their market share post-merger.

17. The undertaking by the parties to out license some of their products means that in those therapeutic categories where the merger would otherwise raise competition concerns the merged entity will inherit the market share of one of the merging firms only. That way the merger does not increase the merging parties' market share in those therapeutic categories.

18. We therefore approve this merger on condition that the merging parties will out license products in the identified therapeutic categories as follows:

ANTI-EMETICS (A4A)

Granisetron - a pharmaceutical product manufactured by or for SmithKline Beecham for anti-emetic use in the Republic of South Africa under the brand name Kytril.

TOPICAL ANTI-BIOTICS (D6A)

Polysporin - a pharmaceutical product manufactured by or for Glaxo Wellcome in topical ointment form and sold in the Republic of South Africa for use in the treatment of superficial skin lesions and other infected wounds and burns.

Cicatrin - a pharmaceutical product manufactured by or for Glaxo Wellcome in powder and ointment form sold in the Republic of South Africa for use in the prevention of superficial infections in minor abrasions, burns and cuts.

Neosporin - a pharmaceutical product manufactured by or for Glaxo Wellcome in topical ointment form and sold in the Republic of South Africa for use in the treatment and prevention of infected wounds, burns or skin grafts.

ANTI-VIRALS (EXCLUDING ANTI-HIV) (J5B)

Famciclovir - a pharmaceutical product manufactured by or for

SmithKline Beecham in oral form and sold in the Republic of South Africa for use in treatment of genital herpes and herpes zoster infections under the brand name Famvir.

19. Drafts of the terms of these license conditions which meet our approval are attached to this decision as Appendixes "A", "B" and "C".

Public interest considerations

20. On the day of the hearing we received a submission regarding the merger from the Aids Law Project which acts as the legal representatives of the Treatment Action Campaign (TAC). The TAC is a voluntary organization that campaigns for affordable healthcare in the country, particularly for people living with HIV/AIDS. They requested that we approve the merger on condition that the merging parties allow generic competition for all medicines needed for the treatment of opportunistic infections in HIV/AIDS and anti-retrovirals for HIV. The TAC claimed that the merging parties dominated the market in the above medicines and identified a number of products manufactured or imported by the merging parties. The TAC complained about high prices of drugs used for the treatment of patients with HIV/AIDS. They claimed that if the merger is allowed to go through without the proposed condition relating to generic products the merging firms could charge excessive prices that would make it difficult for most HIV/AIDS patients to afford treatment.

21. The TAC submitted to us that this merger will give the parties a monopoly in the market for the production of HIV anti-retrovirals (J5C) and drugs used for the treatment of opportunistic infections associated with HIV/AIDS. Regarding the latter the TAC submitted a list of drugs manufactured by Glaxo Wellcome and SmithKline Beecham. The TAC did not however classify the products into therapeutic categories to determine overlaps resulting from the merger.

22. We requested the Commission to investigate the concerns raised by the TAC.

23. The Commission found that Glaxo Wellcome produces a number of HIV anti-retrovirals, but no evidence that SmithKline Beecham also produces drugs falling under this therapeutic category. The Commission concluded therefore that there was no product overlap in this therapeutic category and recommended that we not impose another condition on the merging parties relating to this therapeutic category.

24. With regard to drugs used for the treatment of opportunistic infections associated with HIV/AIDS the Commission also recommended that no further condition be imposed on the merging parties. Using the ATC3 classification the Commission found that the only overlap in the drugs listed by the TAC was in relation to drugs falling under the therapeutic category A4A (anti-

emetics)[2]. The drugs in this therapeutic category are used for the prevention and relief of nausea and vomiting by both patients with HIV/AIDS and those who do not have the disease. Since the merging parties had already undertaken to out license Granisteron ("Kytril") the Commission found that the overlap in this therapeutic category raised no competition concerns.

25. The Commission, however, noted the concerns of the TAC and undertook to liaise with them to consider whether to launch an investigation pursuant to the TAC's submission.

26. We are sympathetic to the cause of the TAC. However, in the absence of proof of product overlaps in the HIV treatment category in this merger we agree with the recommendations of the Commission. We find no basis to impose a further condition on the merging parties pursuant to the submission by the TAC.

27. With regard to the effect of the merger on employment, there is not enough information at this stage for us to make a finding. Decisions relating to how the restructuring necessitated by the merger will be effected have not been finalised. The information given to us by the parties suggests that the merger will result in some job losses as the two firms consolidate their operations. According to the parties this will affect mostly white-collar workers who are highly skilled and experienced who can easily find alternative employment. The parties also indicated that they would provide support to all affected employees to help them secure other employment. We note that the South African Chemical Workers Union, which represents most of the merging parties' employees was notified of the merger and did not file any submissions with the Commission or with us.

_____ **28 July 2000**

N.M. Manoim **Date**

Concurring: D.H. Lewis; U. Bhoola

2 The drugs manufactured by the merging parties falling in this therapeutic category appear in Table 1 above.