EuropaBio response White Paper “Towards more effective EU merger control”
3 October 2014

EuropaBio welcomes the opportunity to comment on the European Commission’s consultation document: “Towards more effective EU merger control”.

EuropaBio is the European Association of BioIndustries. Our members are involved in research, development, testing, manufacturing and commercialisation of biotech products and processes in human and animal healthcare, diagnostics, bioinformatics, chemicals, crop protection, agriculture, food and environmental products and services. EuropaBio also counts a number of National Biotech Associations in its membership who in turn represent more than 1800 biotech SMEs.

This response focuses on the proposed new regime regarding non-controlling minority shareholdings and the consequences hereof on availability of corporate venture capital for developing biotech companies.

We recommend that the EU Merger Regulation (“EUMR”) regime is not amended as proposed in the White Paper.

A notification requirement as suggested for acquisition of non-controlling minority shareholdings would generate additional restraints on biotech companies’ abilities to attract corporate venture capital, which is crucial to maintaining a global leverage in the field, especially amongst emerging European biotech companies.

Furthermore, the Commission already has the power to investigate most if not all structural links under Article 101 TFEU and Article 102 TFEU.

1. New and developing biotech ventures have over the last decade experienced a shortage of fresh capital. Several traditional VC funds are shifting their investments away from the high-risk, early-stage financing of biotech start-ups and into later-stage opportunities and existing portfolios. VC funds specialising in early-stage biotech investments have subsequently become increasingly more selective and unable to meet the greater demand for patient capital.

In the wake of this development, corporate venture capital has come to play an important role in the capitalisation of new biotech companies. Corporate venture capital was involved in 19.4% of all deals in 2011 and accounted directly for almost 10% of the totally invested amount. Often pharmaceutical corporate venture funds syndicate

investments in biotech with traditional venture investors, where the highly specialised market knowledge of the corporate ventures is a prerequisite for the participation of the traditional venture investors. Frequently, corporate venture funds from different pharmaceutical companies participate in the same syndication.

In addition to capital, corporate venture funds offer an invaluable access to industry intelligence, which are essential for developing the right strategies in biotech companies.

It is vital for the continuous development of biotech sector that availability of “intelligent” capital is not hampered by regulatory initiatives, which discourage investments being made in biotech companies.

2. There is a significant risk that the proposed amendments of the EUMR regarding non-controlling minority shareholdings will reduce the amount of high-risk, “intelligent” capital available for biotech.

A requirement for “information notice” with any >5% minority investments that have a “competitively significant link” would inevitably demand a comprehensive collection and assessment of information that would not otherwise be involved in the transaction.

Thus information collection would increase the transactional costs, which will reduce the capital available for developing the company, especially with each participant in the syndicated investment having to comply with the requirements. It is noted that many corporate venture investments even above 5% ownership are on EUR 1-digit million levels only. If investigation procedures were to be opened the biotech companies would be burdened with significant additional costs, which do not serve a purpose as long as the current EUMR is complied with at a parental level.

Especially with emerging biotech companies, capitalisation regularly has to be dealt with at the fast pace, and hence a 15 days hold on the final closing would in many cases create problems for the biotech company.

Intellectual property rights and trade secrets, including revenues, customer segments and future product portfolio are key assets in most biotech companies. An obligation to publicise this in an information notice will dilute the value of the company significantly or cause the biotech company to seek non-industry knowledgeable capital.

The dynamic nature and agility of small biotech companies might cause sudden changes of strategies, opportunities in new market, changes in technology application etc. The risk of the authorities commencing investigations up to 6 months after the information notice will potentially collide with this, and might cause the corporate venture fund to restrain the activities of the biotech company in order to be able to invest.
Corporate venture investments are not structurally motivated by a possibility of impacting competition in the internal market through concentrations\(^2\). The primary drivers of such investment are a strategic interest in following innovation in the industry. In this context it is also important to note the success rate of innovative biotech Research & Development programmes (low single digit for preclinical stage programmes and only 20-25% for products which make it in to the first testing in man [phase I]. This success rate when combined with the (relatively) low investment level makes the associated minority, non-controlling shareholdings held by each investor simply not meaningful as fare as “exercise of control” is concerned.

Furthermore, the European Commission already has the power to investigate most if not all structural links under Regulation 1/2003.

3. **Referring to the above we recommend that the proposed amendments of the EUMR regarding non-controlling minority shareholdings are not implemented.**

   In the event that the proposal is implemented, we recommend excluding minority investments in companies that have no products or turn-over and therefore are critically in need of venture capital funds. Specifically, we recommend that the turn-over of the investors in a syndicate would be disregarded for the purposes of this process and that only the target biotech company’s turn-over would be considered. If there is no product or turn-over, presumably one must conclude that there is no competition.

We strongly encourage the European Commission to ensure that any future solutions should take into account the specific nature and needs of the business model of biotech companies’ that are highly dependent on investment for development and growth.

We remain at your disposal should you have any questions or would like to discuss this matter further.

Yours sincerely,

Nathalie Moll
Secretary General

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