EN

Case No COMP/M.5033 - PHILIPS / RESPIRONICS

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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COMMISSION OF THE EUROPEAN COMMUNITIES

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sirs,

Subject: Case No COMP/M.5033 – Philips / Respironics
Notification of 30 January 2008 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 30 January 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the Merger Regulation) by which the undertaking Koninklijke Philips Electronics N.V. ("Philips", The Netherlands) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Respironics Inc. ("Respironics", USA) by way of public bid announced on 21 December 2007.

I. THE PARTIES

2. Philips is a multinational company which engages in the research, development, manufacture and sale of a wide range of electronic products, including lighting products (e.g. light boxes and dawn simulators), domestic appliances, consumer electronics and medical systems. Through its Philips Healthcare division Philips is amongst others active in the market of patient monitors and, as a result of Philips' acquisition of Avent[2], it is also active in the retail market for soothers.

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1 OJ L 24, 29.1.2004 p. 1.

2 Case COMP/M.4265 *Philips/Avent.* Commission decision of 28.08.06.

3. Respironics develops, manufactures and distributes medical devices used primarily for the treatment of patients suffering from sleep and respiratory disorders. Its products are used primarily in homes, hospitals, alternative care facilities and emergency medical settings. Amongst others, Respironics supplies OEM capnography components and spirometry modules that can be integrated in patient monitors and produces ventilators used in the critical care area of the hospital. As part of its portfolio for neonatal intensive care units it sells specialty soothers to hospitals. Further, Respironics' US-based subsidiary Apollo Health supplies amongst others light boxes and dawn simulators (however, contrary to Philips, Respironics does not supply any dawn simulators in the EEA).

II. THE CONCENTRATION

4. On 20 December 2007, a wholly owned subsidiary of Philips and Respironics signed an Agreement and Plan of Merger. On 3 January 2008, Philips commenced a tender offer for all of the issued and outstanding shares of common stock of Respironics.

5. As the proposed transaction would provide Philips with sole control over Respironics, it constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. The transaction has a Community dimension pursuant to Article 1(3) of the Merger Regulation. The parties have a combined aggregate worldwide turnover in excess of EUR 2,500 million (Philips EUR 26,976 million, Respironics EUR 951 million) and a Community-wide turnover in excess of EUR 100 million (Philips EUR 10,253 million, Respironics EUR 151 million). In France, Germany and the UK the parties' combined aggregate turnover is more than EUR 100 million and in these countries the aggregate turnover of each of the parties is more than EUR 25 million. The parties do not achieve more than two thirds of their Community-wide turnover in one and the same Member State.

IV. THE RELEVANT MARKETS

A. Relevant product markets

Light boxes

7. Light boxes, also referred to by Philips as "energy lights", are lighting appliances that produce light with the intensity and quality of natural daylight, without unpleasant dazzle or glare. Most light boxes are used for both light therapy and for normal lighting. When used for light therapy, such products aim to counteract the tiredness, low spirits and lack of energy that some people experience in the winter months, i.e. for people with Seasonal Affective Disorder ("SAD"). Light boxes are "low-tech" products consisting of a lamp and basic electronics, e.g. for a simple timer or intensity programming.

8. The Commission has not previously assessed the markets on which these products compete. The vast majority of the respondents to the market investigation confirmed that light boxes constitute a separate market from other lighting products. For the purpose of the present case, therefore, the relevant product market can be defined as light boxes.

Soothers[3]

9. A soother is a rubber, plastic, or silicone nipple given to a baby or other young child to suck upon. The use of a soother generally has a calming effect. Both Philips and Respironics produce soothers, however, the notifying party does not consider them to be part of the same product market.

10. Speciality soothers, as produced and sold by Respironics to hospitals in Europe, are only used in special instances, such as for preterm babies, babies with sucking difficulties or for babies with mouth development problems. Soothers for preterm babies are modelled after the size and shape of the preemie thumb, which facilitates the important sucking behaviour normally learned in utero. These soothers are mainly sold to hospitals and not through normal retail channels.

11. Philips is active through its Avent brand in the "mass market" segment for "normal" soothers. Such "normal" soothers are produced for at term babies without special needs and are sold to end users through the retail channels.

12. The Commission has not previously assessed the markets on which these products compete. The large majority of the customers and competitors responding to the market investigation confirmed that the two types of soothers are part of different product markets. In the present case, it can however be left open if "specialty" soothers sold to hospitals and "normal" soothers offered in the retail channels are part of the same product market, since the transaction will not raise competition concerns under any alternative product market definition.

Patient monitors

13. Patient monitors are devices which take measurements of physiological parameters as a representation of a patient's well-being. They can measure a number of parameters simultaneously and are used together with other medical equipment in particular ventilation equipment, anaesthesia machines and in some case with clinical information systems. Patient monitors can be designed as a configured monitor, i.e. the parameters to be measured are built-in during the manufacturing process and cannot be changed, or can be designed according to a modular structure. In the latter case the monitors have a number of slots in which modules to measure different parameters can be inserted.

14. The Commission investigated the patient monitors market in case M.3083 – *GE/Instrumentarium*[4] and found in that case that the patient monitor market could be split up in accordance with the care area of the hospital in which the monitor is used i.e. (i) perioperative ("PO") monitors used in induction areas, operating rooms and post-anaesthesia care units, (ii) critical care ("CC") monitors used in intensive care units, neo-natal intensive care units, coronary care units and emergency rooms and (iii) general ward ("GW") monitors. The notifying party, which is active in the production and sale of these three categories of patient monitors, agrees with these previous findings of the Commission. The market investigation also generally confirms the existence of separate product markets for the three types of patient monitors, even though some respondents noted that the boundaries between these markets are becoming more blurred, as in particular PO and CC monitors are increasingly viewed as part of the same market.

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3 Also known as "dummies" or "pacifiers".

4 Case COMP/M. 3083 *GE/Instrumentarium,* Commission decision of 2 September 2003 April 2003.

OEM capnography components

15. The measurement of the concentration or partial pressure of carbon dioxide (CO2) in respiratory gases is called "capnography". The measurement of CO2 can take place by means of a PO or CC monitor with a built-in OEM capnography module. The use of OEM capnography modules in GW monitors is rare.

16. The notifying party submits that all OEM capnography components belong to one single product market as they are all based on the same technology, i.e. "infrared gas analysis".

17. The Commission has not previously assessed the markets on which capnography components compete. A large majority of the respondents to the market investigation considered that OEM capnography components constitute a separate relevant product market as in their view there are no available substitutes. Further, most respondents indicated that there was no need to further split up the market for OEM capnography components, e.g. on the basis of the applied technology, product presentation, or intended use. Therefore, OEM capnography components are considered as a relevant product market for the purposes of this case.

Ventilation equipment for critical care applications

18. Ventilation equipment for critical care applications supports or replaces the breathing activity of the patient. It consists of the following main components: ventilators, oxygen supply equipment, ventilation monitoring and functional accessories. In a previous decision[5] the Commission's investigations confirmed the market definition for ventilation equipment for critical care as the relevant product market[6]. In the present case, the notifying party did not oppose this market definition. In view hereof, it is considered for the purposes of the present case that the relevant product market consists of ventilation equipment for critical care applications

B. Relevant geographic markets

Light boxes

19. The notifying party submits that the relevant geographic market for light boxes is EEA-wide or at least comprise Northern Europe, where it is the absence of natural daylight during the winter months that creates the demand for light boxes. The notifying party estimates that around 60-70% of sales of light boxes are made through internet distributors, which would show that distribution through traditional retail channels or the provision of after-sale services are not decisive to reach customers in any given Member State.

20. The market investigation provided mixed results. A number of respondents pointed to price differences between Member States for the products at issue as well as nationally organised distribution, which could be an indication of national markets. Others considered the market to be at least EEA-wide.

21. In the present case, however, the relevant geographic markets can be left open, since the transaction will not raise competition concerns whether it is defined as EEA-wide, northern Europe or on a national basis.

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5 See Case COMP/M. 2861 *Siemens/Drägerwerk/JV,* Commission decision of 30 April 2003.

6 See Case COMP/M. 2861 *Siemens/Drägerwerk/JV,* Commission decision of 30 April 2003.

Soothers

22. The notifying party considers the relevant geographic market for "speciality" and "normal" soothers to be EEA-wide. Most producers of soothers are global companies with a centrally organised production. Soothers can be easily transported and there are no technical or regulatory barriers to cross border sales. The market investigation largely confirmed these views, even though some customers suggested a national dimension of the market.

23. In the present case, however, the relevant geographic market can be left open, since the transaction will not raise competition concerns under any alternative geographic market definition.

Patient monitors

24. In its *GE/Instrumentarium* decision the Commission considered that the markets for PO, CC and GW monitors national in scope, as local presence, such as customer support, office and training facilities etc. are required.

25. However, the notifying party is of the opinion that the geographic scope of the market for patient monitors is EEA-wide, as major competitors are global companies with centrally organised production for all European sales, transportation costs are negligible compared to the sales prices of monitors and there are no import barriers within the EEA.

26. Even though some respondents to the market investigation considered that the relevant geographic market could be considered EEA-wide, or even global, the majority of the respondents confirmed that the relevant geographic market is national. There are different buying patterns and corresponding product preferences, prices are not uniform at the EEA-wide level and, local distribution and sales networks are required to compete effectively. The respondents to the market investigation stressed in particular the importance of a local presence of the suppliers of patient monitors, since customers demand local contacts whether at the point-of-sale or for after-sales services. In view hereof and in line with the previous Commission decisions, the geographic market for patient monitors can be defined also in the present case as national.

OEM capnography components

27. The notifying party considers the relevant geographic market for OEM capnography components for PO and CC monitors to be worldwide. Although the Commission has not investigated before the markets on which OEM capnography components compete, it considered in a decision in an analogous case[7] that the OEM markets for medical devices components concerned could be worldwide. It left however the geographic market definition open and analysed the effects of the transaction also on the basis of an alternative EEA-wide market.

28. A majority of the respondents to the market investigation considered that the market for OEM capnography components can be defined as EEA-wide. However, in the present case the relevant geographic market can be left open, since the transaction will not raise competition concerns under any alternative geographic market definition.

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7 See Case M.4300 - *Philips/Intermagnetics,* Commission decision of 7 November 2006 . This case concerned OEM markets for magnets and radio frequency coils.

Ventilation equipment for critical care applications

29. In a previous decision the Commission considered that the geographic market for ventilation equipment for critical care applications was national[8], in view, of amongst others, differences in customer preferences and differing national approaches in ventilation solutions. As these circumstances are also present in the case under review, the geographic market for ventilation equipment is defined as national for the purposes of the present case.

V. COMPETITIVE ASSESSMENT

30. The proposed transaction results in horizontally affected markets for light boxes, potentially horizontally affected markets for soothers, and vertically affected markets for i) OEM capnograpy components and CC monitors and for ii) ventilation equipment and CC monitors.

A. Horizontal relationships

Light boxes

31. Both Philips and Respironics are active in the light boxes market, although the latter only entered the market in October 2007 following its purchase of the US based company Apollo Health. Philips has been selling light boxes for about ten years.

32. The notifying party estimates the combined market share of the merged entity on an EEA-wide light boxes market to [10-20]% (Philips [10-20]%, Respironics [0-10]%). At a national level, the proposed transaction would lead to affected markets in The Netherlands ([20-30]%: Philips [20-30]%, Respironics [0-10]%) and the UK ([10-20]%: Philips [0-10]%, Respironics [10-20]%). Total sales by the parties on these markets are relatively small. Sales of e.g. Respironics in the UK and The Netherlands in 2007 amounted to respectively EUR […] and EUR […]. On both markets a large number of competitors are active, which include Lumie, Litebook, Sunnex Biotechnologies, S.A.D Lightbox Company, Innojok Oy, Britebox Light Therapy, Davita, HealthLight, Morning Sunrise/Gullwing, Eurosolar and MicroMark.

33. The market investigation confirmed that there are no significant barriers to entering the light box market. The products concerned do not involve sophisticated technology, and there are no significant intellectual property barriers. The ease of entry is demonstrated by several examples of recent entry. Most entrants have been small, privately owned companies that have developed a design, had others (e.g. Chinese companies) manufacture the product and then used the Internet or retailers to distribute their products.

34. Considering the combined market shares of the merged entity and the presence in the market of multiple competitors the proposed transaction would not significantly impede effective competition on the market for light boxes in the common market or in a substantial of it .

Soothers

35. The notifying party considers that the speciality soothers sold by Respironics to hospitals in Europe belong to a product market which should be distinguished from the market for

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8 See Case COMP/M. 2861 *Siemens/Drägerwerk/JV* Commission Decision of 30 April 2003.

"normal" soothers distributed by Philips in retail. Therefore, according to the notifying party, the proposed transaction will not lead to any horizontal overlap.

36. The market investigation generally supported the view that "normal" soothers and "specialty" soothers are likely to be part of different products markets given the different use and distribution channels. However, even on the basis of a hypothetical single market for soothers, the proposed transaction would not significantly impede effective competition. In the EEA, and, in case of national markets, in Germany, France, the UK, Italy and Spain the proposed transaction would lead, as a result of the limited sales by Respironics, to a market share increment of less than [0-10]%. In addition, due to their different use and distribution channels, the parties' products would not be considered as close substitutes and the parties would face competition from various other suppliers both with respect to retail sales of "normal" soothers as well as sales to hospitals of "specialty" soothers. In view hereof, the proposed transaction would not significantly impede effective competition in the common market or in a substantial of it on any soothers market.

B. Non-horizontal relationships

CC monitors - OEM capnography products

37. The proposed transaction will result in a vertically affected market for the supply of OEM capnography products to manufacturers of CC monitors[9]. On the upstream market for OEM capnography products Respironics has an estimated worldwide market share of around [20-30]% in 2007. It has a similar market share in the EEA. On the downstream market for CC monitors, Philips has an EEA-wide market share of [40-50]% in 2007 for CC monitors and of more than [20-30]% in 21 EU Member States with market shares of up to [60-70]% in a number of small markets (e.g. Latvia).

38. According to the notifying party, the proposed transaction is unlikely to lead to input foreclosure, as the merged entity would lack both the ability and incentive to foreclose Philips' competitors in CC monitors markets.

39. OEM capnography products do not constitute an "important input"[10] for manufacturers of CC monitors. CC monitors routinely can measure up to 12 parameters, one of which is capnography. Further, from all patient monitors sold in Europe only about [10-20]% include a capnography module. These OEM capnography modules represent on average between [10-20]% of the cost of a CC monitor. In addition, most of Philips' competitors of CC monitors have their own capnography technology – not only major competitors such as GE and Draeger, but also smaller suppliers such as Mindray and Nonin. Alternative sources of supply include the OEM capnography products from the market leader Oridion ([40-50]% market share) and other established competitors such as Datex Ohmeda (fully owned by GE) ([0-10]% market share), Welch/Allyn ([0-10]% market share), Treymed ([0-10] % market share), and PHASEIN Medical. The market investigation confirmed that none of these competitors are facing capacity constraints.

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9 With respect to PO patient monitors, the transaction does not lead to any vertically affected markets as the market shares of Resironics (OEM capnography) and Philips (PO monitors) would not exceed 25% under any alternative geographic market definition.

10 See §34 of the Commission Notice on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

40. Respironics has contractual obligations to its OEM customers which would prevent it from changing its supply policy in the short term. The market investigation confirmed that the average duration of supply contracts amount to 3-5 years. Such a period would be sufficient for customers to find alternative sources of supply with suitable technology adapted to their specific needs. In view of the technical complexity of patient monitors and the necessity to adapt the OEM components, switching to an alternative supplier of OEM capnography may require up to six months of R&D and an additional number of months to obtain all necessary regulatory approvals and would generate some additional costs. The respondents to the market investigation confirmed however, that the time and costs involved with switching are not of such a nature as to prevent switching. Most of Respironcs OEM capnography customers are large and sophisticated medical devices manufacturers with significant R&D spending[11] and can therefore more easily switch to other suppliers of capnography technology or use or develop their own captive technology.

41. According to the notifying party, the proposed transaction would not lead to customer foreclosure, as Philips would lack the ability to foreclose other capnography OEM suppliers. Philips does not account for a significantly large proportion of total demand for capnography technology to be able to drive the alternative technology suppliers out of the market. Apart from patient monitors, OEM capnography products are used e.g. for transport monitors, anaesthesia machines, ventilators and sleep recorders. Suppliers such as Treymed, Welch Allyn, and Datex Ohmeda have all been able to establish viable OEM capnography businesses without relying on Philips as a customer. Further, the market investigation did not raise any concerns with respect to customer foreclosure.

42. In view of the above, the transaction would not lead to any significantly impediment to effective competition due to the vertical relationship between the Respironics' OEM capnography activities and Philips' activities CC monitors.

CC monitors - Ventilation equipment for critical care applications

43. A third party suggested, with reference to previous Commission Decisions[12], that the proposed transaction might raise competition concerns as Philips may complicate or eliminate interconnectivity between Respironics' critical care ventilation equipment and CC monitors of other brands than Philips.

44. Currently, Respironics ventilation equipment for critical care applications can be interconnected with a large number of patient monitors. It uses two protocols for interfacing to multi-parameter monitors: the VueLink proprietary protocol, which is specifically designed to interface to Philips patient monitors and the "RS-232" communication protocol (a standard open industry protocol) that allows any other patient monitor with appropriate hardware and software to interface with Respironics' critical care ventilation equipment.

45. Although Philips would post-merger have the possibility to limit interconnectivity between Respironics' critical care ventilation equipment and Philips CC monitors, it would lack the commercial incentive to do so. In particular, Respironics is a small player in the critical care ventilation equipment market in the EEA. In 2007, Respironics sold in total […]

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11 Nearly 95% of Respironics 2007 OEM Capnography sales are accounted for by four customers: GE, Draeger, Philips and Maquet.

12 I.e. Cases COMP/M. 2861 *Siemens /Drägerwerk/JV* Commission Decision of 30 April 2003 and COMP/M. 3083 *GE/Instrumentarium* Commission Decision of 2 September 2003.

critical care ventilators to four hospital customers in the EEA, representing a value of around EUR […]. These sales took place in Italy and the UK and would represent market shares in these countries not exceeding [0-10]%. In the US, Respironics has a market share of around [0-10]%. Limiting the interconnectivity of Respironics' ventilation equipment would overall reduce its overall sales prospects, as the business lost from sales to hospitals, which value interoperable ventilators would outweigh the possible gain in sales resulting from a possible exclusive interconnection with Philips CC monitors.

46. Philips' principal competitors for patient monitors all have their own ventilator activities. GE acquired through the acquisitions of Datex Ohmeda and Engstrom a full line of anaesthesia machines and critical care ventilation equipment, whereas Draeger, Spacelabs and Datascope also offer anaesthesia and critical care ventilator equipment and, more recently, Chinese vendors like Mindray and Goldway have become active in this market. In addition, there are a number of suppliers of ventilation equipment for critical care applications that are not affiliated with patient monitor suppliers (e.g. Marquet, Puritan Bennett, Hamilton Medical, Bear Medical, Bird Medical, Bunnell Medical, Sensor Medics, VersaMed and Taema).

47. Under these circumstances, the transaction would not lead to any significant impediment to effective competition in the common market or in a substantial of it due to a reduction or elimination of the interconnectivity of Respironics' critical care ventilation equipment with the CC monitors of Philips' competitors.

VI. CONCLUSION

48. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Articles 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
signed
Neelie KROES
Member of the Commission