

EN

***Case No COMP/M.6343 - APAX/  
KINETIC CONCEPTS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

---

Article 6(1)(b) NON-OPPOSITION  
Date: 07/10/2011

***In electronic form on the EUR-Lex website under document  
number 32011M6343***



## EUROPEAN COMMISSION

Brussels, 07/10/2011

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

C(2011)7271

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

### **To the Notifying Party:**

Dear Sir/Madam,

**Subject: Case No COMP/M.6343 – APAX/ KINETIC CONCEPTS, INC  
Notification of pursuant to Article 4 of Council Regulation (EC) No 139/2004<sup>1</sup>**

1. On 2 September 2011, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which investment funds advised by APAX Partners LLP ("APAX") acquire control of Kinetic Concepts, Inc. ("KCI").

### **I. THE PARTIES**

2. APAX is a UK limited partnership which provides investment management and investment advisory services to private equity funds investing primarily in Europe in a range of industry sectors. APAX controls two portfolio companies that operate downstream from KCI in the operation of private acute general hospitals in the UK (General Healthcare Group Ltd., "GHG") as well as in Sweden, France, Norway and Germany (Capio AB, "Capio").
3. KCI is a US global medical technology company that develops, manufactures and markets therapies and products for wound care, regenerative medicine and therapeutic support. Its wound care business represents the significant majority of its EEA revenues (approximately [...]%).

---

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

## **II. THE OPERATION**

4. Funds controlled by APAX will indirectly, through Special Purpose Vehicles, acquire the majority of voting shares ([...])% of KCI. The other indirect shareholders of KCI will be funds controlled by the Canada Pension Plan Investment Board ("CPPIB") and funds controlled by the Public Sector Pension Investment Board ("PSPIB")<sup>2</sup> that will hold [...]% and [...]% respectively.<sup>3</sup>.
5. According to the Investors Agreement Term Sheet, APAX will appoint [...] members and each of CPPIB and PSPIB will appoint [...] members of the target's Board. Additional Board members at closing include KCI's CEO [...] and - possibly - up to [...] independent directors [...]. All of KCI's Board decisions shall be taken by majority vote and must include the APAX nominees. CPPIB and PSPIB have no pooling agreement to coordinate voting in KCI.

## **III. CONCENTRATION**

6. APAX therefore will acquire sole control over KCI. The proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of Regulation 139/2004.

## **IV. EU DIMENSION**

7. The aggregate worldwide turnover of all the undertakings concerned is more than EUR5 billion (APAX: EUR [...] million; KCI: EUR 1 522 million, both in 2010) and the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million (APAX: EUR [...] million; KCI: EUR [...] million, both in 2010); neither APAX nor KCI achieves more than two-thirds of its Union-wide turnover in any one EU Member State.<sup>4</sup> The notified operation therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

## **V. COMPETITIVE ASSESSMENT**

### **V.1. RELEVANT MARKETS**

#### **V.1.1. Upstream Markets**

##### *Advanced wound care products*

8. KCI's main business is the development and sale of advanced wound care products that apply negative pressure (*i.e.*, vacuum pressure) to a wound site to promote healing. These devices are typically referred to as negative pressure wound therapy ("NPWT") products and can be classified as active wound care products.

---

<sup>2</sup> CPPIB and PSPIB are Canadian Crown corporations. Their purpose is the management of funds transferred to them in the best interest of contributors to and beneficiaries of - in the case of CPPIB - the Canada Pension Plan and – in the case of PSPIB - the pension plans of the Public Service, the Canadian Forces, the Royal Canadian Mounted Police and the Reserve Force Pension Plan.

<sup>3</sup> These shares relate to the ownership structure of the top special purpose vehicle.

<sup>4</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p 1).

9. In previous decisions relating to the market for wound care products, the Commission has subdivided wound care products into two categories: (i) traditional wound care products (*e.g.*, surgical dressings, fixation products, swabs) and (ii) advanced wound care products. It has described the latter as products designed to create a special healing environment by interacting and controlling certain aspects of the physical environment of the wound that have been developed to treat hard-to-heal wounds.<sup>5</sup>.
10. The Commission has further segmented advanced wound care products into (i) moist wound care products that "maintain optimum conditions for tissues to repair themselves"<sup>6</sup>, (ii) active wound care products, which "encourage better healing by interacting with the tissues at a physiological and cellular level"<sup>7</sup>, and (iii) biological active wound care products, which "either deliver bioactive compounds or are constructed from material having endogenous activity"<sup>8</sup>.
11. The Commission, however, has left open, at least for advanced moist wound care products, whether this family of products forms a single relevant product market or constitutes several distinct product markets.<sup>9</sup>
12. The Notifying Party considers that the segmentations previously considered by the Commission are not appropriate, as they consider that the moist, active and biological active product categories are all used for the treatment of acute and chronic wounds. Instead, it considers that in the vast majority of cases, products from each of the categories are either substitutable with each other, used in combination or used in sequence to treat a particular wound, depending on the type and severity of the wound, among other considerations.
13. In any event, KCI is not present in either moist or biological active wound care products, nor does it make any active wound care products other than NPWT products.
14. As in previous decisions, however, the precise product market definition can be left open, since the transaction does not raise competition concerns under any alternative possible market definition.
15. As to the geographic scope, the Notifying Party submits that the market is EEA-wide, or at least national, given that these products are essentially the same across the EEA, that intra-EEA transportation costs are very low, and that KCI ships its NPWT products in the entire EU from two single locations.
16. The Commission has so far left open the question of whether the geographic market for advanced wound care products is national or EEA-wide.<sup>10</sup> This question can also be left

<sup>5</sup> COMP/M.5190 - Nordic Capital/ConvaTec; COMP/M.4579 - Investor/Morgan Stanley/Mölnlycke; COMP/M.4367 – APW/Nordic Capital/APSA/Capio; COMP/M.3816 - Apax/Mölnlycke.

<sup>6</sup> COMP/M.3816 - Apax/Mölnlycke.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; COMP/M.5190 - *Nordic Capital/ConvaTec* (where the Commission discussed sub-segments within the moist wound care product category, but these sub-segments are not relevant in the present case as the Target does not produce moist wound care products).

<sup>9</sup> *Id.*,

open in the present case as the proposed transaction does not raise competition concerns under any of the alternative possibilities.

### ***Tissue Matrices***

17. KCI also develops and sells regenerative and reconstructive acellular tissue matrices for use in reconstructive, orthopedic, and uro-gynecologic surgical procedures to repair soft tissue defects, as well as for reconstructive and cosmetic procedures. Tissue matrices are biological soft tissue repair products made from synthetic, human or animal sources to promote remodelling and regeneration of lost or damaged tissue. They are used in a wide variety of tissue repair procedures such as breast or stoma reconstruction. KCI has only recently entered with tissue matrices in the EEA (2005), and this business segment only accounts for an estimated [...]% of KCI's EEA sales.
18. The Notifying Party submits that the geographic market for tissue matrices is similar to advanced wound care products as the products are essentially the same across the EEA, the intra-EEA transportation costs are very low and other than the CE mark approval, no other significant regulatory barriers exist for the sale of these products on an EEA-wide basis. The Notifying Party has, however, also provided market share information on the basis of national markets.
19. For the purpose of the present decision, the exact definition of the relevant market can be left open because the proposed transaction does not raise competition concerns under any of the possible alternatives market definitions.

### ***Specialty Hospital Beds***

20. KCI also supplies specialty hospital beds and related mattress replacements and mattress overlays. Considering that specialty hospital beds have numerous features and have a variety of capabilities not found on conventional hospital beds and which cater for differing needs, the Notifying Party submits that there is a market for specialty hospital beds and related mattress replacements and overlays that is separate from the market for conventional hospital beds. The Commission has not defined so far a specific product market for specialty hospital beds.
21. The Notifying Party proposes that the scope is at least EEA-wide, as there are no significant, regulatory or other restrictions that would limit the market for these products across Member States and the products are the same in every Member State.
22. For the purpose of the present decision, the exact definition of the relevant market can be left open because the proposed transaction does not raise competition concerns under any of the possible alternatives market definitions.

---

<sup>10</sup> See, for instance, COMP/M.4579 - *Investor/Morgan Stanley/Mölnlycke*. However, in COMP/M.5190 - *Nordic Capital/ConvaTec*, the Commission noted "strong indications" of a national geographic market for advanced wound care products (paragraph 38).

### **V.1.2. Downstream markets: Acute general hospitals**

23. APAX holds joint control over Capiو and GHG, companies that are active in the operation of private acute general hospitals in the UK (GHG) and in Sweden, France, Germany and Norway (Capiو).
24. The Commission has discussed the market for hospital services on numerous occasions<sup>11</sup>. For the UK, the Commission has defined a separate market for private acute general hospitals, distinguishing those private services from public healthcare provided through the National Health Service.<sup>12</sup> For France, the Commission noted that a distinction between private acute general hospitals and public acute general hospitals may not be relevant as patients are free to decide whether to go to a public or private hospital without taking into account any differences in cost, but left the exact definition ultimately open.<sup>13</sup>
25. The Notifying Party submits that the relevant market should be all acute general hospitals, including both public and private hospitals. In any event, the exact product market definition can be left open for the purpose of the present decision as the transaction does not result in competition concerns on the basis of each of both alternatives, i.e. a product market that encompasses only private acute hospitals or an overall market for private and public acute hospitals.
26. In previous decisions, the Commission has considered that the geographic market for acute general hospitals, including private acute general hospitals, is national from the perspective of insurers and local from the perspective of patients, but has left open the precise scope of the geographic market.<sup>14</sup>
27. However, for the purpose of assessing this transaction which does not horizontally affect hospital markets, (i.e. the choice of patients), but the relationship between hospital suppliers and purchasing hospitals (i.e. the alternatives regarding selling or purchasing), the assessment is based on national hospital markets.

### **V.2. COMPETITIVE ASESSMENT**

28. The parties' activities do not horizontally overlap. However, vertical relations exist between KCI's upstream advanced wound care, tissue matrix and specialty hospital bed products and the downstream acute general hospitals operated by APAX's portfolio companies GHG and Capiو.
29. Regarding tissue matrices, KCI's market share is marginal in the EEA (below [0-5%]) as well as on the basis of national market shares (0-5%).<sup>15</sup> As to specialty hospital beds, KCI

---

<sup>11</sup> COMP/M.5805 - 3i/Vedici Groupe; COMP/M.4788 - Rozier/BHS; COMP/M.4367 -APW/APSA/Nordic Capital/Capiو; COMP/M.4229 - APHL/L&R/Netcare/General Healthcare Group.

<sup>12</sup> COMP/M.4367 - APW/APSA/Nordic Capital/Capiو (paragraph 13); COMP/M.4229 - APHL/L&R/Netcare/General Healthcare Group (paragraph 13).

<sup>13</sup> COMP/M.5805 -3i/Vedici Groupe.

<sup>14</sup> COMP/M.4788 - Rozier/BHS (paragraph 14).

<sup>15</sup> According to estimates of the Notifying Party.

achieves a market share of well below 25% in the EEA and each of the countries concerned.<sup>16</sup>

30. KCI's market shares only exceed 25% with respect to active wound care markets and/or its sub-markets/-segments of NPWT products that are upstream to APAX' acute hospital markets.

#### **V.2.1. NPWT products – acute care hospitals - no input foreclosure**

31. The hospitals operated by Capio and GHG purchase advanced wound care products, also from KCI. On the basis of the narrowest possible product market definition (only NPWT products), KCI according to the Notifying Party achieves a market share of [80-90]% in volume as well as in value in the EEA. In the countries concerned by the transaction (Sweden, Norway, France, Germany and the UK), it achieved in 2010 market shares between [60-70]% and [80-90]% (volume terms) and between [70-80]% and [90-100]% in value terms.
32. The Notifying Party estimates that KCI's market shares are about [5-10]% lower in the wider active wound care segments/markets. In the overall advanced wound care product market, KCI would achieve market shares of below 25%.
33. However, even when taking into account the narrowest possible product market definition – NPWT products - the merged entity will neither have the ability nor the incentive to substantially foreclose its competing hospital operators' access to the input of wound care products. NPWT products do not account for a "*significant cost factor relative to the price of the downstream product*" nor are they a "*critical component without which the downstream product could not be effectively manufactured or sold*".<sup>17</sup>
34. First, KCI's NPWT products only represent a negligible proportion of Capio's as well as of GHG's hospital service costs (below [0-5]%)
35. Secondly, the KCI's NPWT devices are not essential inputs "without which" Capio's or GHG's competitors in the downstream market for acute general hospitals could not compete. According to the Notifying Party, all wounds that can be treated by NPWT devices can also be treated through alternative therapies such as traditional wound care dressings, other advanced wound dressings (*e.g.*, hydrogels, hydrocolloids, alginates), products containing growth factors, and other medical devices used for wound care besides NPWT, such as compression, ultrasound, laser, UV light, TENS (transcutaneous electrical nerve stimulation) collagen matrices, hyperbaric oxygen, and topical growth factors which are the most popular of the emerging therapies.
36. Even if the Notifying Party's statement that *all* wounds can be treated by other traditional or advanced wound care products is called into question, the Notifying Party submits that KCI's NPWT devices face increasing competition by other NPWT products. These are, first, NPWT products that use gauze dressing instead of the open-cell foam of KCI' products, an alteration which, according to a 2003 ruling of the European Patent Office, did not infringe KCI's patent. Secondly, in 2009 the UK Patents Court and the German

---

<sup>16</sup> Germany, France, Norway, Sweden and the UK, i.e. countries in which GHG or Capio operate acute hospitals.

<sup>17</sup> See paragraph 34 of the Non-horizontal Guidelines.

Federal Patent Office revoked KCI's patent altogether so that competitors could enter the market by using the same method.<sup>18</sup>

37. As a result of this increasing competitive pressure, KCI's market shares fell significantly in the period 2008-2010: market shares dropped from [90-100]% to [80-90]% in the EEA<sup>19</sup> with similar or even higher decreases in the individual countries, for instance the UK where KCI's shares fell from [90-100]% to [70-80]%.<sup>20</sup> As a consequence, according to the Notifying Party, KCI's prices<sup>21</sup> have declined as well.
38. In view of the above, it is not likely that the parties will have the ability to foreclose competitors' access to inputs. They would also lack the incentive to do so since a limitation of its NPWT sales to the supply of hospitals operated by Capio and GHG would not make any economic sense in view of the marginal to moderate market shares APAX achieves downstream (APAX has its highest share in the private acute care hospital market in the UK with an estimated [20-30]% according to the Notifying Party) and the low proportion which the hospitals run by Capio and GHG purchase compared to KCI's total wound care sales. Moreover, since APAX holds only [a minority] of the equity in Capio and [a minority] in GHG, it would obtain only [a minority] of the benefits. For these reasons, it can be concluded that APAX will have no economic incentive to stop supplying Capio and GHG competitors and thus there is no risk of input foreclosure.
39. Based on the analysis outlined above, it is concluded that the parties would not have the ability to significantly foreclose access to inputs following the merger.

### **V.2.2. No customer foreclosure**

40. APAX achieves shares of [0-5]% in the acute care hospital markets in most countries and has higher shares only in the segment of private acute care hospitals in the UK and Norway (with [20-30]% and [20-30]% respectively) according to the estimates submitted by the Notifying Party.
41. In view of these marginal to moderate shares in the downstream markets, the merged parties will have neither the ability nor the incentive to foreclose competitors in wound care products from access to acute hospital markets.

---

<sup>18</sup> The patent would have in any event expired in 2012.

<sup>19</sup> In value terms according to the Notifying Party's information.

<sup>20</sup> In value terms according to the Notifying Party's information.

<sup>21</sup> This refers to average daily rental prices that have declined by approximately [0-5]% every year according to the parties (KCI predominantly rents its NPWT devices, customers rarely purchase these devices).

## **VI. CONCLUSION**

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

*For the Commission  
(signed)  
Joaquín ALMUNIA  
Vice-President*