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***Case No COMP/M.6401 -
WATERLAND/ ALYCHLO/
OMEGA PHARMA***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 14/12/2011

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EUROPEAN COMMISSION

Brussels, 14.12.2011

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the Notifying Parties

Dear Sir/Madam,

**Subject: Case No COMP/M.6401 – WATERLAND/ALYCHLO/OMEGA PHARMA
Notification of 9 November 2011 pursuant to Article 4 of Council Regulation
(EC) No 139/2004¹**

1. On 9 November 2011, the European Commission received the notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which a fund managed by Waterland Private Equity Investment B.V. ("Waterland") and Alychlo NV ("Alychlo") acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the undertaking Omega Pharma NV ("Omega") by way of purchase of shares.

I. THE PARTIES

2. Waterland is a private equity fund manager headquartered in The Netherlands. It manages funds that invest in companies with activities in numerous business fields such as health care, tourism and insurance.
3. Alychlo is a Belgian holding company, ultimately controlled by Mr. Mark Coucke, the current CEO of Omega. Apart from the current majority shareholding in Omega, Alychlo holds minority shareholdings in some other companies.
4. Omega is headquartered in Belgium and a supplier of health and personal care products including OTC pharmaceuticals, which forms part of its core business. In addition Omega distributes third party OTC products and generic medicines.

¹ OJ L24, 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

5. Currently Omega is controlled by Couckinvest, a subsidiary of Alychlo. Couckinvest holds about a third of the voting rights in Omega, the remaining shares are in free float. In view of the presence at the shareholders' meetings over the last years, Mr. Coucke, via Couckinvest/Alychlo, exercises sole control over Omega.
6. Alychlo and Waterland intend to acquire joint control over Omega - and thereby delist it from NYSE/Euronext Brussels - by means of a public takeover bid in cash. Following the transaction, Alycho and Waterland – the latter indirectly via the vehicle HoldCo² - will acquire 49.56% and 48.88% respectively in Couckinvest, which will become the 100% shareholder of Omega. The remaining 1.56% in Couckinvest will be held by the Omega management.
7. All strategic decisions including decisions on the budget, business plan, major investments and the appointment of the senior management require the approval of both parties.

III. CONCENTRATION

8. As a consequence, Alychlo and HoldCo/Waterland will jointly control Omega, and the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. EU DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 2.5 billion³ (Waterland: EUR [...] billion; Omega: EUR 0.857 billion)⁴. The combined aggregate turnover of all the undertakings concerned is more than EUR 100 million in each of at least three Member States (combined aggregate turnover in [...]; in [...]; in [...]) and in these countries the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million (in [...]: Waterland: EUR [...], Omega: EUR [...]; in [...]: Waterland: EUR [...], Omega: EUR [...]; in [...]: Waterland: EUR [...], Omega: EUR [...]). The aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million (Waterland: EUR [...]; Omega: EUR [...]). In addition, neither Waterland nor Omega achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension pursuant to Article 1(3) of the Merger Regulation.

V. ASSESSMENT

V.1. RELEVANT MARKETS

10. The transaction only brings about minor horizontal and vertical effects. These effects are the result of the de facto control which one of the Waterland managed funds exercises over Arseus NV ("Arseus"). Arseus is a provider of healthcare services and products

² The other shareholder – with a minority shareholding - in HoldCO will be HAO Investments SARL which is owned by investment funds advised by several fund managing companies.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.4.2008, p. 1).

⁴ Alychlo does not achieve a turnover on its own but currently controls Omega via Couckinvest. Apart from that Alychlo has non-controlling interest in some other companies.

including, to a very limited extent, OTC pharmaceuticals and personal care products, which it mainly supplies in Belgium and The Netherlands as does Omega.⁵

V.1.1. Relevant product markets

V.1.1.1. Horizontal overlaps

Health/food supplements

11. Both parties supply their own (propriety) health or food supplement products in Belgium and the Netherlands. In the Netherlands, where the parties achieve somewhat higher market shares, these products are distributed through the retail channel and categorised by AC Nielsen as health supplements.⁶ Health supplements may contain vitamins and/or minerals and can be further sub-categorised according to their intended use, for instance, to achieve slimming or combat a lack of energy. Some of the parties' products are registered OTC pharmaceuticals, however, the majority of the products are classified as health/food supplements..
12. The Commission in previous decisions has dealt with single vitamin products and specialised vitamins⁷ in the area of pharmaceuticals as well as with multi-vitamins⁸. Regarding pharmaceuticals, the Commission has taken as a starting point for market definition purposes the Anatomical Therapeutic Chemical ("ATC") division of medicines by therapeutic use devised by the European Pharmaceutical Marketing Research Association ("EphMRA") and maintained by EphMRA and the "Midas" database of Intercontinental Medical Statistics ("IMS")⁹.
13. However, most of the parties' health/food supplements in the markets concerned are not registered pharmaceuticals and only some contain vitamins (see below, health supplements to boost energy levels where both parties' products are multi-vitamin products). As an alternative, the parties therefore suggest to further segment the relevant products according to their intended use and as categorised by AC Nielsen. This would be appropriate also because these products are promoted for specific usages. On that basis the main overlaps of the parties' activities concern health/food supplements in the form of tablets, capsules or drops for a) slimming/weight loss, b) urinary tract care and c) energy boosting.
14. In any event, the precise market definition can be left open as the transaction does not give rise to serious doubts on the basis of any of the alternative market definitions.

⁵ The fund managed by Waterland holds 26.2% in Arseus. Because of the presence and voting patterns at the shareholders' meetings in the previous years, this minority shareholding gives Waterland de facto controls over Arseus. Arseus was originally part of Omega – and Alychlo still holds 11% of Arseus' shares - but was spun off in 2007 [...]. According to the parties this also explains why Arseus' OTC activity is marginal and mainly ancillary to its core activities.

⁶ This corresponds to the IMS category of food supplements in database Intercontinental Medical Statistics ("IMS").

⁷ See COMP/M.5865 Teva/Ratiopharm.

⁸ See COMP/M.6162 Pfizer/Ferrosan Consumer Healthcare Business.

⁹ The EphMRA ATC classification, whilst very similar to the ATC classification maintained by the World Health Organization (WHO), is not exactly the same as the latter. The WHO classification uses similar categories but is based on active ingredients and serves a scientific, rather than commercial, purpose. Thus, a given active ingredient is classified in only one place in the WHO classification, whereas products based on it may be classified in more than one class of the IMS classification, depending on formulation and approved use in a given country.

Skin care products

15. The parties' activities also overlap as regards skin care products. This overlap mainly concerns specific categories of skin care such as products to treat skin irritation (inflammation and itchiness) and bath additives such as bath oil. Skin care products can be either sold in pharmacies, which is mainly the case for the parties' products in Belgium, or in general retail outlets, where the parties' products are sold in The Netherlands.
16. Only some of Omega's products in the relevant skin care segments are registered pharmaceuticals. This concerns the creams, gels and lotions of the brands *Creemicort-H*, *Diphamine* and *Caladryl*. Other products of Omega and all of Arseus are non-pharmaceuticals and mostly classified as cosmetics. According to the parties these products face competition from cosmetics sold via retail channels. However, since the parties' products in Belgium, the market mainly concerned, are sold via pharmacies, the parties have provided market share data for sales via pharmacies only (based on IMS data), excluding the mass market. Consequently, the market share data are based on a narrow product market definition. Furthermore, they have given market data for individual skin care sub-segments, a) skin care products to treat skin irritation such as inflammation and itchiness (IMS 06C) and b) bath additives such as bathing soaps and gels (IMS 85B) on the basis of IMS data.
17. The Commission in previous decisions has considered IMS categories as a relevant basis for market definition purposes in OTC pharmaceuticals including skin care products.¹⁰ As regards non-pharmaceuticals skin care products the Commission has considered bath and shower gels as a market potentially separate from other skin care products¹¹ but has not taken a final view on this. The Commission also considered in previous cases a distinction according to sales channels as well as between luxury and mass market products.¹²
18. In the case at hand, the precise product market definition can be left open as the transaction does not give rise to serious doubts even on the basis of the narrowest market definition (skin care products to treat skin irritation and bath additives that are sold through pharmacies).

Distribution of third party products

19. The parties are also both active in the distribution of third party health and care products to pharmacies (Belgium) and retailers (The Netherlands). As to OTC pharmaceutical products the Commission has considered the distribution of these as a whole and not on a product-by-product basis.¹³ Whether or not there are separate markets for different sales channels (pharmacies and retail) can be left open since even on the basis of the narrower definition the overlap between the parties is minimal and the transaction does not raise serious doubts.

¹⁰ See COMP/M.5530 GlaxoSmith-Kline/Stiefel Laboratories.

¹¹ See COMP/M.6221 Colgate Palmolive/Sanex Business.

¹² See COMP/M.5230 Capman/Litorina/Cederroth; COMP/M.5068 L'Oréal/YSL Beauté; COMP/M.4193 L'Oréal/The Body Shop.

¹³ See COMP/M.5865 Teva/Ratiopharm; COMP/M.2573 A&C/Grossfarma.

V.1.1.2. Vertical relationships

20. There is a potential (minor) vertical relation between some of the parties' own (propriety) upstream products and their distribution activities, although they currently do not distribute each other's products, with very few exceptions.¹⁴

Upstream markets

21. The parties have given data for those upstream product markets where either a) Omega or b) Arseus or c) both have a market share of >25%. With one exception all of these concern Belgium and data were given on the basis of IMS sub-segments.
22. Category a) concerns Omega's following upstream markets/segments: Nasal saline solutions, Products for respirator conditions (anti snoring), Anti wart treatment, Weight loss/slimming products, Pregnancy test kits, Ovulation test and measuring instrument, Make-up, Beauty products such as body milk and body lotion and Baby hygiene (skin care). The respective Arseus' markets/segments (b) are: Medical gloves and Newborn baby care accessories. Category c) only concerns Bath additives.
23. The Commission has previously dealt with some of these or similar product categories, i.e. pregnancy test¹⁵, make-up (but outside the pharmacy channel)¹⁶ and medical gloves¹⁷. It has considered sometimes further sub-segmentation (such as sub-categories of make-up products or powdered and non-powdered surgical gloves), but finally left the precise definition open. Since the markets are defined already narrowly (pharmacy channel although most of the products compete with those sold via retailers) and according to the parties their market shares would not differ significantly even on the basis of further sub-segmentation, the precise definition can also be left open for the purpose of the present case.

Downstream market

24. As already described, Omega and Arseus also both distribute third party health and care products. These downstream markets are discussed above under the heading "horizontal overlaps".

V.1.2. Geographic markets

25. The Commission in previous decisions defined the markets for OTC pharmaceutical products as being national in scope.¹⁸ As to skin care and other cosmetics sold also via retail channels also wider than national market were considered, but the precise market definition was left open. For the purpose of the present case the precise geographic scope of the relevant product markets can be left open since the transaction does not lead to serious doubts even on the basis of the narrowest (national) geographic markets.

¹⁴ Arseus distributes some health supplements for Omega.

¹⁵ COMP/M.4865 Siemens/Dade Behring (discussing the separation of rapid tests – to which pregnancy test carried out at home would belong – from clinical chemistry).

¹⁶ COMP/M.5068 L'Oréal/YSLB (distinguishing mass market and luxury cosmetics which here is not relevant because only make-up products sold via pharmacies are included).

¹⁷ COMP/M.4579 Investor/Morgan Stanley/Mölnlycke (concerning surgical gloves for hospitals).

¹⁸ COMP/M.6162 Pfizer/Ferrosan.

26. Similarly, the parties submit that the distribution markets for OTC pharmaceuticals and health/personal care products are national in scope because of country specific differences regarding the legal framework for pharmaceutical products and, as to non-pharmaceutical health care products, regarding the market conditions in the retail distribution channels. Consequently, the parties also set up their distribution organisation at national level. Since the transaction does not raise serious doubts on the basis of the narrowest possible markets, i.e. national markets, this question can also be left open.

V.2. COMPETITIVE ASSESSMENT

V.2.1. Horizontal effects

Health/food supplements

27. Regarding the overall market for health supplements in The Netherlands the parties would achieve a combined market share of [10-20]% with an increment of [0-5]% (Arseus). As to the relevant segments as described above, the parties would achieve the following market shares¹⁹:

Relevant market/segment	Market share Omega	Market share Arseus	Combined market share (rounded)
Slimming/weight loss health supplements, NL	[10-20]%	[0-5]%	[20-30]%
Urinary Tract Care health supplements, NL	[10-20]%	[0-5]%	[10-20]%
Energy boosting health supplements, NL	[20-30]%	[0-5]%	[20-30]%

28. The parties submit that Arseus' market shares for the three categories of health supplements in The Netherlands are overstated since they could not split Arseus' sales per category but included the total of Arseus' health supplement sales (€[...]) in each of the 3 categories. Accordingly, Arseus' presence is at best marginal.
29. If, alternatively, markets would be defined on the basis of vitamin and non-vitamin products, the parties' activities hardly overlap since Arseus focuses on homeopathic and non-vitamin products, except for one product which belongs to the energy boosting category. Thus, in the segment of energy boosting health supplements both parties' products are multivitamin products so that they also overlap in that respect, and the assessment would not change.
30. In any event, the increment is minor due to the negligible sales of Arseus. In view of the fact that also Omega's shares are not very high and considering the presence of numerous competitors including large international groups such as Bayer, serious doubts can be excluded.

Skin care products

31. As to the overall skin care market in Belgium the parties would achieve a market share of [5-10]%. The parties have also provided market share data for the segments of skin irritation care and bath additives. Most of the parties' products are sold only via pharmacies and some of Omega's skin irritation products are also registered (OTC)

¹⁹ According to the information of the parties based on data of AC Nielsen .

pharmaceutical products. Therefore, as mentioned above, the parties have based their assessment on the value of pharmacy sales²⁰, excluding the mass market:

Relevant market/segment	Market share Omega	Market share Arseus	Combined market share (rounded)
Skin Irritation care, BE	[20-30]%	[0-5]%	[20-30]%
Bath additives, BE	[30-40]%	[0-5]%	[30-40]%

32. Due to the exclusion of the mass (retail) market, the parties' market shares may be indeed overstated, since several of their products are likely to face competition from products sold via normal retail channels.
33. Moreover, Arseus' shares are negligible regarding these skin care markets and/or segments in Belgium. Finally, there are strong competitors present such as Novartis and Johnson & Johnson (skin irritation care) and L'Oréal and Beiersdorf (bath additives). Consequently, serious doubts can be excluded also regarding skin care products.

Distribution of third party products

34. Regarding distribution of third party products in The Netherlands Arseus and Omega achieve a combined market share of [10-20]% with an increment of [0-5]% (Arseus) according to the parties' estimates. In Belgium their combined market share is [0-5]% with Arseus achieving [0-5]%. Due to a fragmented market with many competitors serious doubts can be excluded.

V.2.2. Vertical effects

35. As to markets or segments that may be potentially affected, the parties have submitted the following market shares that concern - with one exception - Belgium²¹:
- a) Upstream markets where Omega alone achieves a market share >25%:
- Nasal saline solutions: [30-40]% (Belgium)
 - Anti snoring products: [20-30] % (Belgium)
 - Anti wart treatment: [50-60]% (Belgium)
[40-50]% (The Netherlands)
 - Weight loss products: [20-30]% (Belgium)
 - Pregnancy test kits: [30-40]% (Belgium)
 - Ovulation test and measuring instrument: [20-30]% (Belgium)
 - Make-up: [20-30]% (Belgium)
 - Beauty products (e.g. body milk and lotion): [30-40]% (Belgium)
 - Baby Hygiene (skin care): [20-30]% (Belgium)
- b) Upstream markets where Arseus alone achieves a market share >25%:
- Medical gloves: [30-40]% (Belgium)
 - Newborn baby care accessories: [20-30]% (Belgium)
- c) Upstream market where both parties' activities overlap and they achieve a combined market share >25% (see also above, under paragraph 31):
- Bath additives: [30-40]% (Belgium)
36. As mentioned already, these shares according to the parties overstate Omega's and Arseus' position in Belgium since they are based on pharmacy sales only, although many

²⁰ Based on IMS data.

²¹ The parties have based their market share information on IMS data.

of the products concerned compete with those distributed via the retail channels as mentioned above (see paragraphs 16 and 32).

37. In any event, the parties only achieve [0-5]% market share in the downstream distribution market in Belgium (with Arseus representing [0-5]%). In the Netherlands the combined distribution share is [10-20]% (with Arseus representing [0-5]%).
38. As a consequence vertical competition concerns can also be excluded. First, the parties do not achieve significant shares in the downstream markets. Secondly, the increment Arseus represents is minor – in the one horizontally affected upstream market (bath additives) as well as in the downstream markets. Finally, the upstream market shares of the parties in Belgium are based on a narrow, conservative basis (only pharmacy sales) and may indeed be overstated in comparison with competitors that sell similar products through retail channels, among them large international groups.
39. In view of these facts the parties will neither have the ability to foreclose upstream competitors' access to customers nor the ability or incentive to foreclose other distributors from access to input.

VI. CONCLUSION

40. 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