

***Case No COMP/M.4788 -  
ROZIER / BHS***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 21/08/2007

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## COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.08.2007

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sirs,

**Subject: Case No. COMP/M.4788 – Rozier / BHS**  
**Notification of 16/07/2007 pursuant to Article 4 of Council Regulation (EC) No. 139/2004<sup>1</sup>**

## I. INTRODUCTION

1. On 16 July 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("Merger Regulation") by which the undertaking Rozier Acquisition Limited ("Rozier", UK), belonging to the Cinven Group ("Cinven", UK), acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking BHS (Holdings) Limited ("BHS", UK) by way of purchase of shares.

## II. THE PARTIES

2. Cinven is a private equity business, which is engaged in the provision of investment management advice and services to a number of investment funds. The various investment funds managed by Cinven have controlling interests in several different trading companies, only one of which is active in the independent healthcare services sector – Partnerships in Care ("PiC"). Its operations are limited to the provision of long term specialist mental health care and psychiatric services across the UK. PiC does not provide any acute or elective healthcare services. Further to this, Cinven acquired Phadia AB ("Phadia"), which is active in the markets for in-vitro allergy diagnostics and autoimmunity systems, in January 2007.

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<sup>1</sup> OJ L 24, 29.1.2004 p. 1

3. BHS is the UK hospitals division of the BUPA Group, and is based in, and operates solely within, the UK. It consists of 25 acute care hospitals ("Hospitals"), and a diagnostic treatment centre. BHS is a private company that provides acute hospital services in the UK to both the public and private sectors. The services provided by the Hospitals consist of medical services to patients admitted as in-patients or day-patients to the Hospitals as well as out-patient consultations and diagnostic services ("Private Medical Services"). In the private sector, the Hospitals provide Private Medical Services to private patients. The cost of these services is either paid for by the patients themselves or by their private health insurer. With respect to the public sector, the Hospitals provide medical services to the UK National Health Service through Independent Sector Treatment Centres (ISTC), spot purchases and other procurement programmes.

### **III. THE OPERATION AND THE CONCENTRATION**

4. The Notification concerns the proposed acquisition of the entire share capital of BHS by Rozier, a company established by funds managed and advised by Cinven.
5. Cinven also proposes to acquire all of Dolphyn Court Properties Limited ("Dolphyn") from the BUPA Group. Dolphyn holds options to acquire certain property interests (comprising headleases and underleases) relating to [10-20] real estate assets (being some of the hospital sites which are occupied and managed by the hospitals business of BHS) (the "Options"). The Options have been put in place as part of an existing leaseback financing arrangement, which [...]. Other than the Options, Dolphyn has no material assets or liabilities and it is being sold with BHS so that the Options remain with the hospitals business of BHS.
6. The transaction consequently leads to the acquisition of sole control within the meaning of Article 3(1)(b) of BHS and Dolphyn by Cinven.

### **IV. COMMUNITY DIMENSION**

7. The transaction has a Community dimension pursuant to Article 1(2) of the Merger Regulation. The parties have a combined aggregate worldwide turnover in excess of € 5,000 million (Cinven € [...] million, BHS € [...] million), and at least two have a Community-wide turnover in excess of € 250 million (Cinven € [...] million, BHS € [...] million). Whilst BHS achieves more than two thirds of its Community-wide turnover in the UK Cinven does not achieve more than two thirds of its Community-wide turnover in one and the same Member State. The operation therefore has Community dimension.

### **V. RELEVANT MARKETS**

8. There is no horizontal overlap between the activities of BHS and those of the portfolio companies controlled by Cinven. However, the transaction results in a very minor vertical relationship between Cinven's portfolio company Phadia and BHS as Phadia is a provider of In Vitro Allergy Diagnostics to BHS in the UK.

#### **PRODUCT MARKETS**

##### *DOWNSTREAM MARKET*

9. BHS is active as a provider of private acute hospital services. According to the notifying party the relevant product market is the market for private medical services provided by

hospitals ("PMS") and comprising mainly diagnostics and 'elective' surgery, meaning that the patient's condition is not life-threatening and allows some choice as to the timing of the operation. It refers in particular to the report by the UK Competition Commission ("CC") on BUPA's proposed acquisition of Community Hospitals Group plc ("the CC report")<sup>2</sup> This market definition largely corresponds to previous Commission decisions where the Commission considered that there is a market for acute general hospitals and that in the UK there were good reasons to define a separate market for private acute general hospitals as opposed to public acute general hospitals provided by the National Health Service ("NHS").<sup>3</sup>

10. The psychiatric care services offered by Cinven's portfolio company PiC cover a wide spectrum of mental health and psychiatric disorders, including mental illness, personality disorder, learning disability and acquired brain injury. The notifying party submits that psychiatric care services provided in private hospitals concern a separate product market from acute private general hospital services. This is in line with the Commission's decision M. 4367 APW/APSA/Nordic Capital/Capio and with the view of the UK Competition Commission as set out in the CC report.

#### *UPSTREAM MARKETS*

11. Phadia is engaged in business activities in the product market of the provision of allergy diagnostic services.
12. Diagnostic tests can be performed either in vitro ("IVD"), or in vivo. Phadia's diagnosis systems are IVD tests. Although according to Cinven there are good arguments that a broader product market definition may be justifiable, Cinven has provided data on a narrower market definition, excluding in vivo diagnostic tests. IVD tests can be grouped in six main categories. This classification corresponds to the six main categories of IVD tests created by the European Diagnostic Manufacturers Association ("EDMA"). These first level groups are: (i) clinical chemistry, (ii) immunochemistry, (iii) haematology/histology, (iv) microbiology culture, (v) infectious immunology and (vi) genetic testing. According to this classification, Phadia is active in the immunochemistry segment. In Vitro Allergy Diagnostics, and In Vitro Autoimmune Disease Diagnostics are part of the Immunochemistry first level group<sup>4</sup>, and are identified within the EDMA classification as distinct categories within this group (1202 *Allergy Testing*, and 1210 *Autoimmune Disease Testing*). The notifying party submits that a product market definition at this level would be the most appropriate. The Commission has dealt with the IVD markets in a number of cases and has used the EDMA classification as a starting point for the definition of the relevant market.<sup>5</sup>
13. In view of the absence of any significant overlap between the parties' business activities in relation to these products, the precise definition of the relevant product market can be left open.

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2 British United Provident Association Limited and Community Hospitals Group plc: A report on the proposed merger; and British United Provident Association Limited, Salomon International LLC and Community Hospitals Group plc; and Salomon International LLC and Community Hospitals Group plc: A report on the existing mergers (CC report dated 7 December 2000).

3 See Case No M. 4229 APHL/Netcare/General Healthcare Group, paragraph 13; Case M.4367 APW/APSA/Nordic Capital/Capio, paragraphs 11-13.

4 As the Commission pointed out in Case No Comp/M.4321 – Siemens/ Bayer Diagnostics, "Immunochemistry tests use the chemical reaction of antibodies and antigens to identify substances (e.g. enzymes, drugs, hormones) found in relatively small concentrations in the samples tested, in order to diagnose a variety of medical problems (cancer, HIV, thyroid problems, etc.)".

5 See Case M.4321 Siemens/Bayer Diagnostics, paragraphs 10-26.

## GEOGRAPHIC MARKETS

14. In its previous decisions, the Commission indicated that the relevant geographic market for private acute hospitals was no broader than national<sup>6</sup>. The notifying party considers that the market is national in scope.
15. In the Siemens/Bayer Diagnostics decision<sup>7</sup> the Commission considered that the geographic market for the IVD products under consideration was national in scope. The parties agree with this definition.
16. For the purposes of this case the precise scope of the geographic markets can be left open as the competitive assessment would remain unaffected.

## VI. ASSESSMENT

17. According to the notifying party's estimate BHS has a market share of [15-25]% (by value) on the downstream market for private acute hospitals in the UK<sup>8</sup> while Phadia has [80-90]% market share upstream in the In Vitro Allergy Diagnostics market in the UK (by value), therefore leading to vertically affected markets.<sup>9</sup> However, in spite of the [...] market share of Phadia in the relevant segment, this vertical relationship is unlikely to raise competition concerns, in particular in relation to foreclosure, for the following reasons:
18. Currently BHS purchases [90-100]% of its In Vitro Allergy Diagnostics services (and no In Vitro Autoimmune Disease Diagnostics services<sup>10</sup>) from Phadia. While the transaction may increase the incentive for BHS to continue purchasing [...] its In Vitro Allergy Diagnostics services (and to purchase any actual or potential need of Autoimmune Disease Diagnostics services) from Phadia, it has to be noted that BHS's demand for these products is very small in absolute terms and accounts for only a tiny part of the overall UK demand (<[0-5]%).<sup>11</sup> It can therefore be excluded that the operation will have a significant effect on the potential customer base of Phadia's competitors and lead to concerns of customer foreclosure.
19. In view of the fact that BHS's demand for Phadia's In Vitro Allergy Diagnostics services represents only a very small part of Phadia's UK sales of these products (around [0-5]%)<sup>12</sup> it can also be concluded that Phadia would not have the ability or incentive to foreclose other customers from its products.<sup>13</sup> Even if Phadia decided to supply BHS to more favourable

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6 See also the view of the UK Competition Council, CC Report, paragraphs 2.68 to 2.72.

7 Case M.4321 Siemens/Bayer Diagnostics, paragraph 31.

8 If one would look at a market including private and public acute hospitals the joint market shares of the parties would be significantly lower.

9 For In Vitro Autoimmune Disease Diagnostics services the parties estimate total UK sales in 2006 to amount to €9.8 million, leading to a market share of Phadia of [15-25]%. This segment would therefore not be a (potentially) vertically affected market.

10 BHS purchases 100% of its autoimmune diagnostics from a third party. These purchases which amount to around €[...] represent less than [0-5]% of BHS's overall purchases.

11 According to parties' best estimates the total UK sales for In Vitro Allergy Diagnostics devices amounted to €5.9 million in 2006. The value of BHS's purchases of these products from Phadia in 2006 was less than €[...]. Major customers of Phadia were NHS hospitals ([80-90]%), and private hospitals ([10-20]%).

12 [0-5]% for Autoimmune Diagnostics.

13 The value of sales to BHS of €[...] in 2006 represents less than [0-5]% of Phadia's total annual worldwide turnover of € [...] million.

conditions such a strategy would not be capable to significantly impede competition on the downstream market for private acute hospitals. The total value of BHS's purchases from Phadia represent considerably less than [0-5]% by value of BHS' total purchases from all suppliers and there is no reason to believe that this situation would be substantially different for BHS's competitors. This implies that the application of more favourable commercial terms for BHS would provide it with an insignificant cost advantage over its competitors.

20. Consequently, it can be concluded that the transaction is unlikely to impede effective competition in the EEA or any substantial part of it.

## **VII. CONCLUSION**

21. 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 Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission  
signed  
Neelie Kroes  
Member of the Commission