Case M.7494 – Brocacef/ Mediq Netherlands

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 4(4)
Date: 17.04.2015

EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 17.04.2015

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party
and to the Authority for Consumers & Markets

Dear Sirs,

Subject: **Case M.7494 – Brocacef/ Mediq Netherlands**
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004[1] for referral of the case to the Netherlands and Article 57 of the Agreement on the European Economic Area[2].

Date of filing: 12.03. 2015
Legal deadline for response of Member States: 07.04. 2015
Legal deadline for the Commission decision under Article 4(4): 21.04. 2015

I. INTRODUCTION

1. On 12 March 2015, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Merger Regulation with respect to the transaction cited above. The notifying party requests the operation to be examined in its entirety by the competent authorities of the Netherlands.

2. According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the notifying party may request that the transaction be referred in whole or in part from the Commission to the Member State where the

[1] 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.

[2] OJ L 1, 3.1.1994, p. 3 ("the EEA Agreement").

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concentration may significantly affect competition and which present all the characteristics of a distinct market.

3. A copy of this Reasoned Submission was transmitted to all Member States on 12 March 2015.

4. By letter of 18 March 2015, Authority Consumers & Markets the Netherland's National Competition Authority (hereinafter referred to as "ACM") as the competent authority of the Netherlands informed the Commission that the Netherlands agrees with the proposed referral.

II. THE PARTIES

5. **Brocacef Groep N.V.** is active in the wholesale and retail sale of pharmaceuticals in the Netherlands. It is solely controlled by **PHOENIX Pharmahandel** GmbH & Co KG ("Phoenix Group"), a German-based operational wholesale company with activities in 25 countries active mainly in pharmaceutical wholesale (including parallel trade), retail and pharma services. PHOENIX Group is also engaged in trade of pharmaceutical products between various Member States, including in export of pharmaceutical products from the Netherlands to other Member States.

6. **Mediq Apotheken Nederland B.V.**, **Distrimed B.V.** and **Mediq Pharma Logistics B.V.** (together referred to as "Mediq") are active in pharmacy retail, pharmaceutical wholesale (including parallel trade) and pre-wholesale services in the Netherlands. Mediq is also engaged in export of pharmaceutical products from the Netherlands to other Member States.

7. Phoenix Group and Mediq are hereinafter together referred to as the "Parties".

III. THE OPERATION AND CONCENTRATION

8. The proposed transaction consists of the acquisition of the entire share capital of Mediq by Brocacef Groep N.V, ultimately (indirectly) controlled by Phoenix Group.

9. Consequently, the proposed transaction constitutes an acquisition of sole control by Phoenix Group over Mediq, and therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. EU DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Phoenix Group: EUR 21 792 million, Mediq: EUR […] million). At least two of them have an EU-wide turnover in excess of EUR 250 million (Phoenix Group: EUR […] million, Mediq: EUR […] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

11. Therefore, the proposed transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

V. ASSESSMENT

12. Depending on the market definition the transaction gives rise to a number of affected markets within the meaning of the Merger Regulation in relation to the market for the wholesale of medical products (prescription medicines, over-the-counter medicines ("OTC") and medical devices) in the Netherlands and the market for the retail sale of pharmaceuticals in the Netherlands.

13. Furthermore, there are numerous markets for manufacturing and marketing of various finished dose pharmaceuticals ("FDPs") in the Netherlands affected by the transaction.

14. The transaction does not give rise to any affected market outside of the Netherlands.

A Relevant markets

A.1 Product markets

(i) Wholesale of medical products

15. In previous decisions the Commission considered that the wholesale market of medical products may be subdivided on the basis of i) categories of wholesalers (full line and short line wholesalers due to the difference in product range offered, price and number of deliveries), ii) categories of customers (retail pharmacies, doctors and hospitals due to different purchasing and delivery patterns) and iii) categories of products (prescription medicine – branded or generic and OTC products, depending whether the medicine may be sold with or without prescription).[3]

(ii) Retail sale of pharmaceuticals

16. As regards the pharmacy retailing market, in accordance with previous practice of the Commission, the market may be segmented according to the type of product sold into prescription medicines and OTC medicines.[4] Moreover, ACM stated in a past decision that the pharmacy retail market in the Netherlands may be further subdivided by type of pharmacy: (i) regular pharmacies (the pharmacy 'around the corner'), (ii) polyclinic pharmacies (associated with a hospital) and (iii) self-dispensing general practitioners.[5]

(iii) Manufacturing and marketing of pharmaceutical products

17. In previous decisions concerning the pharmaceutical sector, the Commission has applied the ATC (Anatomical Therapeutical Chemical) classification devised for marketing purposes by EphMRA (European Pharmaceutical Marketing Association) as a basis for market definition of finished dose pharmaceuticals (FDPs) markets.[6] Furthermore, the Commission defined separate markets for prescription and OTC pharmaceuticals.[7]

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3 Case COMP/M.4301 *Alliance Boots/Cardinal Health*, paras 10 – 18, Case COMP/M.2573 *A&C/Grossfarma*, paras 10 – 13, Case COMP/M.7323 *Nordic Capital/GHD Verwaltung*, paras 27 – 29.

4 Case COMP/M.4301 *Alliance Boots/Cardinal Health*, paras 19 – 22.

5 Case 6989 *Brocacef – Llyods Nederland*, dated 23 November 2010.

6 For example Case COMP/M.5778-Novartis/Alcon.

7 COMP/M.3751-Novartis/Hexal, para 13.

A.2 Geographic market

(i) Wholesale of medical products

18. In previous decisions the Commission consistently considered that pharmaceutical wholesaling is either national or regional (sub-national) in scope, due to the emphasis placed by customers on the frequency and speed of delivery of medical products.[8]

(ii) Retail sale of pharmaceuticals

19. As regards the geographic market definition for retail sales of pharmaceuticals, the Commission considered that the market is national (from a supply side) or local (from a demand side).[9] The national character of the market derives from the existence of national chains of pharmacies, national advertising and promoting campaigns as well as from the fact that pricing decisions are usually taken on a national basis. Most importantly, the regulatory framework regarding the retail sale of pharmaceuticals has a national dimension. From the demand side, retail pharmacy markets were considered as fundamentally local in nature, e.g. limited to a certain radius around each pharmacy.

(iii) Manufacturing and marketing of pharmaceutical products

20. As regards the geographic market definition the Commission held that the relevant geographic market for manufacturing and marketing of finished dose pharmaceutical products was national in scope. This is demonstrated in particular by the fact that the demand and prices for pharmaceuticals vary substantially from one country to another and competition between pharmaceutical firms still predominantly takes place at a national level.[10]

B Assessment

21. The prosed transaction concerns the markets for the wholesale and retail sale of pharmaceutical products as well as marketing of finished dose pharmaceuticals in the Netherlands, where the activities of the Parties overlap as also confirmed by ACM.

22. On the basis of the information provided by the Parties in the Reasoned Submission, the proposed transaction is an appropriate candidate for pre-filing referral from the Commission to the Netherlands in accordance with Article 4(4) of the EC Merger Regulation.

Legal requirements for Article 4(4) referral

23. According to Article 4(4) of the Merger Regulation, a concentration may be referred to a Member State if it may significantly affect competition in a market or markets and where the markets in question are within a Member State and present all characteristics of distinct markets.

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8 Case COMP/M.4301 *Alliance Boots/Cardinal Health*, paras 23 – 25, Case COMP/M.2573 *A&C/Grossfarma*, paras 14 – 16, Case COMP/M.7323 *Nordic Capital/GHD Verwaltung*, paras 30 – 31

9 Case COMP/M.4301 *Alliance Boots/Cardinal Health*, paras 26 – 27.

10 COMP/M.3751 – *Novartis/Hexal*, paras 4, 5; COMP/M.5295 – *Teva/Barr*, para 19; COMP/M.5253 – *Sanofi-Aventis/Zentiva*, paras 28-30.

(i) The transaction may significantly affect competition in a market or markets

24. According to paragraph 17 of the Commission Notice on case referral, the existence of an affected market is generally considered sufficient to meet the requirements set forth in Article 4(4) of the Merger Regulation.

25. In the case at hand, the proposed transaction will generate a number of affected markets in the Netherlands depending on the product and geographic market definition.

26. As regards the wholesale of medicines in the Netherlands the estimated combined market share of the Parties in all types of medicines amounts to [20-30]%, and in the market for the wholesale of prescription medicine to [30-40]%.

27. As regards the overall retailing pharmacy market, the estimated combined market shares of the Parties reach [10-20]% at the national level. However, if the market were to be defined at a local level, in accordance with previous decision making practice of the ACM[11], the combined market shares would reach up to [above 90%] in some localities. For example, if the relevant geographic market for the pharmacies is considered to be within 2 km around the pharmacies, the transaction may lead to the combined market share exceeding 60% in eight locations in the Netherlands.

28. As regards the FDPs, there is a large number of FDPs in which the combined market shares of the Parties exceed [20-30]% in the Netherlands.

29. In light of the above, the first requirement set forth by article 4(4) of the Merger Regulation is met.

(ii) The market in question must be within a Member State and present all the characteristics of a distinct market

30. According to paragraph 18 of the Commission Notice on case referral, the second requirement set forth by article 4(4) of the Merger Regulation is satisfied if the geographic scope of the markets where competition is affected is national or narrower than national.

31. As indicated above, the markets for the wholesale and for the retail sale of pharmaceutical contain strong local elements and have been defined as national or narrower than national in scope.[12] Similarly, the relevant market for finished dose pharmaceuticals was considered national in scope.[13]

32. Therefore, the second legal requirement set forth by article 4(4) of the Merger Regulation is met.

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11 Ref. Case 6989 of 23 November 2010.

12 Case COMP/M.4301 *Alliance Boots/Cardinal Health*, paras 23 – 25, Case COMP/M.2573 *A&C/Grossfarma*, paras 14 – 16, Case COMP/M.7323 *Nordic Capital/GHD Verwaltung*, paras 30 – 3; 1COMP/M.3751-Novartis/Hexal, para 13.

13 Cases COMP/M.3751 – *Novartis/Hexal*, paras 4, 5; COMP/M.5295 – *Teva/Barr*, para 19; COMP/M.5253 – *Sanofi-Aventis/Zentiva*, paras 28-30.

(iii) Conclusion on the legal requirements

33. In view of the foregoing, the principal effects of the proposed transaction would be restricted to the Netherlands. Further, the markets in question present all the characteristics of distinct markets.

Additional factors

34. According to paragraphs 9 to 14 of the Notice on case referral, jurisdiction should only be re-attributed to another authority where the latter is the more appropriate for dealing with the concentration, and taking into account the benefits of one-stop-shop and legal certainty.

35. ACM has specific expertise in the assessment of markets in the sector concerned. Indeed, in 2010 ACM dealt with a merger (ref. Case 6989 of 23 November 2010) concerning the pharmacy markets where Brocacef Lloyds Nederland was part of the transaction.

36. In addition, given the infra-national scope of some of the affected markets the case may require investigative efforts at local level for which ACM seem better placed. Specifically, the customers in the concerned market are either pharmacies or end-consumers in the Netherlands, and therefore a market investigation carried out by ACM appears to be better suited to properly reach the demand side of the market, to understand its main characteristics and to deal with possible concerns.

37. Finally, a referral of the proposed transaction to ACM satisfies the need to preserve the benefit of a "one-stop-shop" as there are no affected markets outside the Netherlands. Accordingly, even in case of a referral of the proposed transaction, the benefit of the "one-stop-shop" would be preserved.

VI. REFERRAL

38. On the basis of the information provided by the parties in the Reasoned Submission, the case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market. The Commission considers, on the basis of the information submitted in the Reasoned Submission, that the principal impact on competition of the concentration is liable to take place on distinct markets in the Netherlands, and that the requested referral would be consistent with point 20 of the Commission Notice on case referral.

VII. CONCLUSION

39. For the above reasons, and given that the Netherlands has expressed its agreement, the Commission has decided to refer the transaction in its entirety to be examined by the Netherlands. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission
(Signed)
Alexander ITALIANER
Director-General