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*Case No IV/M.0023 -  
ICI / TIOXIDE*

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**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 28.11.1990

*Also available in the CELEX database  
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PUBLIC VERSION

MERGER PROCEDURE -  
ARTICLE 6(1) b DECISION

**Registered with advice of  
delivery**

1. Notifying party
2. Notifying party

Dear Sirs,

Subject: Case No. IV/M/023 - ICI/TIOXIDE  
Your notification of 30.10.1990 pursuant to Article 4 of  
Council Regulation No. 4064/89

Your above notification concerned an agreement between ICI and Cookson on 21.10.1990, according to which ICI will acquire Cookson's 50% shareholding in Tioxide Group PLC ("Tioxide") with effect from 1.1.1991.

The agreement was entered into on certain conditions, which are described in more detail below (par. 6).

By the transaction, ICI will be acquiring 100% ownership of Tioxide.

**I. THE OPERATION IS A CONCENTRATION UNDER THE MERGER REGULATION**

**CONCENTRATION**

1. The notified operation, whereby ICI acquires the sole control of Tioxide, which ICI prior to the operation controlled jointly with Cookson, is a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
2. Article 3(3) refers to control by whatever means, conferring the possibility of exercising decisive influence on an undertaking. Decisive influence exercised singly is substantially different to the decisive influence exercised jointly, since the latter has to take into account the potentially different interest of the other party or parties concerned.

3. Prior to the agreement, Cookson and ICI each owned 50% of the ordinary equity capital in Tioxide.

On the 27.2.1981, a "Memorandum" was entered between ICI and Cookson (then Lead Industries Ltd.). The Memorandum represented the basis for the relationship between the two parties.

According to the Memorandum, not only was Tioxide jointly owned by the above parties, it was also controlled jointly by them: the parties each appointed an equal number of directors to the Board, and they were to agree upon the appointment and conditions of service of the Chairman of the Board. None of the parties were involved with the day-to-day management of Tioxide. The parties had to agree all major medium and long term strategic decisions, including financial policies, including the provision of additional capital; business strategy and related capital programmes; levels of authority of the executive directors; and other "matters which might have a substantial interaction with one of the shareholders".

The Memorandum is incorporated into the Articles of Association of Tioxide of 24.2.1989.

4. On these facts, ICI and Cookson are considered to have previously controlled Tioxide jointly.

By changing the quality of decisive influence exercised by ICI on Tioxide, the transaction will bring about a durable change of the structure of the concerned parties. Tioxide will become a wholly owned subsidiary of ICI; and by acquiring the ownership of all assets of Tioxide as well as the uncontested influence on the composition and decisions, etc. of Tioxide, ICI will obtain full control of Tioxide within the meaning of Art. 3(1)(b) in connection with Art. 3(3) of the Regulation.

#### **COMMUNITY DIMENSION**

5. The notified concentration is of a Community dimension, as the aggregate worldwide and Community-wide turnovers of ICI and Tioxide in 1989 exceeded the thresholds laid down by Article 1(2) of the Merger Regulation, and as neither company achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State.

#### **CONCLUSION OF THE AGREEMENT**

6. The agreement between ICI and Cookson dated 21.10.1990 is conditional on events such as the approval of Cookson's shareholders in a general meeting and of the Commission under the Regulation and of such consents as are required under the terms of any financing agreements entered into by Cookson or any of its subsidiaries. The parties have to use all reasonable endeavours to ensure that the aforesaid conditions are fulfilled as soon as possible and before 30.4.1991.

The "agreement" referred to in Art. 4(1) of the Merger Regulation must be an agreement which is legally binding between the parties involved. This is the case with the agreement under consideration as it cannot be rescinded unilaterally and intends to create a legal relationship on which each party can rely.

7. On these grounds, the Commission finds that the notified concentration falls within the scope of the Merger Regulation.

## **II. NO SERIOUS DOUBTS AS TO THE COMPATIBILITY OF THE CONCENTRATION WITH THE COMMON MARKET**

### **THE RELEVANT MARKETS**

8. Titanium dioxide is a mature, large-volume chemical sold into mature markets, and is considered as a strategic raw material for most customers.
9. Tioxide is the world's second largest supplier of titanium dioxide. ICI is not involved in this business other than as a joint owner of Tioxide: there is no horizontal overlap between them. Over 60% of the sales of Tioxide in the EC in 1989 were for use in paint manufacturing.
10. ICI is the world's largest supplier of paints with 7% of the overall world market: ICI is Tioxide's (deleted) accounting for (deleted)% of its total sales. Tioxide currently supplies (deleted)% of ICI's titanium dioxide requirements in the Community for ICI's paint business. Because of the importance of this vertical relationship, also the paint markets are considered to be affected markets.
11. On the facts of the case, other vertical relationships between ICI and Tioxide in other markets are not considered to be significant, and thus there is no significant structural impact on these markets.

### **APPRAISAL UNDER ARTICLE 2**

#### **(i) Titanium dioxide**

12. The relevant geographic market for titanium dioxide is considered to be at least the Community. Elements which lead to this conclusion include the following:
  - most customers require that titanium dioxide suppliers are registered to the relevant ISO standard, implying homogeneous technical requirements across borders
  - 10% of the supply in the EC in 1989 was imported, 4% being from the US. An import duty of 6% would not therefore seem to amount to a barrier

- although there is an advantage in having local production facilities, translated into higher market shares in those countries where such facilities exist, the EC suppliers have sales in countries where they have no production facilities; e.g. in Germany, Tioxide has no local production facility, but still has a (deleted)% market share, although three other competitors do have local production there; similarly in France, Kronos has an (deleted)% market share where three other competitors have local production
- there would not appear to be a large degree of price variation between Member States.

13. This operation does not affect the market share of Tioxide in the market for titanium dioxide. However, the acquisition of sole control by ICI might strengthen the position of Tioxide in that market, for example in this case by access to the full financial resources of ICI and by the possibility of ICI acting independently in the market place.

Within the Community Tioxide has (deleted)% of that market in 1989. There are six other Community based competitors, the 3 largest being Kronos with (deleted)%, SCM with (deleted)% and Thann with (deleted)% of the EC market. Moreover, there are imports from 30 other countries accounting for 10% of the total market. Two of the US manufacturers, including Du Pont, the world number one, and a major Japanese manufacturer are said to be potential entrants in terms of Community-based production within the next five years.

14. On these facts, the acquisition of sole control by ICI does not create or strengthen a dominant position.

(ii) Paints

15. The paint industry is not highly concentrated. There are approximately 1.500 paint manufacturers in the EC, and in 1990 the 10 major paint manufacturers are estimated to account for 42% of the Community paint market.

16. ICI divides its paint business in the Community into four product groups: decorative paint, refinish paint, can coatings, and industrial. Supply considerations are similar for all the product groups, but the demand structure varies.

The raw material categories applicable to all the product groups and paint types are pigments, resins, solvents, and containers. Titanium dioxide is the most important raw material overall. The percentage of ICI's raw material and packaging expenditure accounted for by titanium dioxide is estimated as follows:

|                 |            |
|-----------------|------------|
| Decorative      | 28%        |
| Refinishing     | 6%         |
| Can             | 8%         |
| Industrial      | <u>5%</u>  |
| Overall average | <u>18%</u> |

Raw material and packaging costs are estimated to account for around half of total costs: overall, titanium dioxide accounts for around 8% of ICI's total cost for paints.

17. Without prejudice as to which is the relevant geographic or product market, there is no indication that ICI has a dominant position in any of the product groups in the UK, where it is strongest in the EC. Although it has the highest market share, there are many other competitors the most important of which are Casco Nobel, Kalon, Courtaulds, Hoechst, BASF, Midland, and Orkem.
  
18. As to the vertical aspects, no foreclosure effects are evident.  
  
ICI's competitors in the paints markets are not dependent on it for supply of titanium dioxide.  
  
With regard to the upstream integration, there would appear to be no material change: Tioxide already supplies (deleted) titanium dioxide requirements for paints.  
  
Titanium dioxide accounts for a relatively low proportion of the total cost of paint, so that it would not appear that ICI obtains a significant relative cost advantage over its competitors from the concentration.
  
19. The acquisition of sole control in Tioxide by ICI does not therefore create or strengthen a dominant position in the paints market.
  
20. Based on these facts, the Commission has found that the concentration raises no serious doubts as to its compatibility with the Common Market.

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For the above reasons and pursuant to Article 6(1)(b) of Council Regulation No. 4064/89, the Commission has therefore

- (1) decided not to oppose the concentration, and to
- (2) declare it compatible with the Common Market.

For the Commission