

***Case No COMP/M.3294 -
EXXONMOBIL / BEB***

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

Article 6(1)(b) NON-OPPOSITION
Date: 20/11/2003

*Also available in the CELEX database
Document No 303M3294*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, **20/11/2003**

SG (2003) D/233006

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

Subject: Case No COMP/M.3294 - ExxonMobil / BEB
Notification of 17.10.2003 pursuant to Article 4 of Council Regulation
No 4064/89¹.

1. On 17.10.2003, the Commission received a notification of a proposed concentration by which the undertaking ExxonMobil Gas Marketing Deutschland GmbH (“EMGMD”, Germany), belonging to the ExxonMobil group (“ExxonMobil”, USA), acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of one half of the gas marketing business (“ExxonMobil basket”) of the undertaking BEB Erdgas und Erdöl GmbH (“BEB”, Germany) by means of transfer of assets.
2. After examining the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and that does not raise serious doubts as to its compatibility with the common market.

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

I. THE PARTIES

3. ExxonMobil is active world-wide in the exploration, development, production and sale of crude oil and natural gas, the refining and sale of refined petroleum products, the development, production and sale of various chemical products, the production and sale of coal, and power generation.
4. BEB is a 50/50 German gas joint venture controlled by ExxonMobil and the Shell group (“Shell”) active in production, purchase, transport, storage and marketing of natural gas in Germany, mainly in the Northwest region.

II. THE OPERATION

5. ExxonMobil and Shell have agreed to split the business of (downstream) supply of gas (or “gas marketing business”) of BEB into two equal parts (namely, the “ExxonMobil basket” and the “Shell basket”). BEB will continue to be engaged in the business of production, transportation and storage of natural gas. The acquisition by Shell of its basket constitutes a separate concentration notified to the Commission on 22 October 2003 (Case COMP/M.3293 – Shell/BEB).
6. The Exxon basket will consist of employees, existing gas purchase and sales contracts and related contractual entitlements and rights to transport and storage natural gas, representing half of the business. [...].
7. The ExxonMobil basket assets will then be transferred to a partnership under the German law (Kommanditgesellschaften, or the “ExxonMobil KG”) formed by ExxonMobil through a wholly owned affiliate (ExxonMobil Gas Marketing Deutschland GmbH) acting as unlimited and controlling partner, and by BEB acting as limited and non-controlling partner.
8. BEB will no longer be authorised to enter into new gas marketing business and the ExxonMobil KG will be limited to handling the transferred activities, all new or renewal contracts being entered into by ExxonMobil for its own account. Consequently, from then on all German gas marketing will be conducted by ExxonMobil only.
9. In light of the above, the transaction leads to the acquisition by ExxonMobil of sole control of the ExxonMobil basket constituting a concentration in the sense of article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (EUR [...] million of which the ExxonMobil group excluding the ExxonMobil basket accounts for EUR [...] million and the ExxonMobil basket accounts for EUR [...] million). Each of ExxonMobil and the ExxonMobil basket have a Community-wide turnover in excess of EUR 250 million (ExxonMobil: EUR [...])

million and the ExxonMobil basket: EUR [...] million),² but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

IV. COMPETITIVE ASSESSMENT

Relevant product markets

11. The impact of the transaction is in the natural gas sector, concerning specifically BEB's gas marketing activities in Germany. In previous decisions³ the Commission has distinguished, upstream, separate markets for the exploration of oil and natural gas on the one hand and the development, production and sale of gas on the other hand, which coincides with the parties' definition. As to logistics, the Commission has also concluded in the past⁴ that gas transportation and gas storage form distinct markets. The parties agree with this.
12. With regard to the downstream supply of gas, the notifying party sees the sector in a period of transition and submits that it is not necessary to define the relevant markets. It states that two separate relevant product segments can be distinguished: (i) wholesale distribution (or "wholesale gas transmission"), where operators ("wholesale gas transmission companies", i.e. "wholesale distributors"⁵) aggregate gas that they obtain directly or indirectly from various producers and then sell to other wholesale distributors, local distributors and large end users, such as power generators or large industrial users, and (ii) local distribution, where operators ("wholesale distributors") purchase the gas from the wholesale distributors and sell it to large and small end users.
13. However, the Commission has, within wholesale (or wholesale transmission), further distinguished⁶ between two levels constituting separate relevant product markets: the "long-distance" wholesale and the "short-distance" (regional) wholesale. In the framework of "long-distance" wholesale, operators sell gas that they have imported directly from foreign producers and transport it over long-distance pipelines to the "short distance" (regional) wholesalers or directly to certain large end-customers such as large business users and electricity generators. The "short-distance" (regional) wholesalers sell to local distributors and to certain end customers.

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

³ Commission Decision of 29/09/1999 in Case No IV/M.1383 – Exxon/Mobil; Commission Decision of 13/06/2000 in Case COMP/M.1673 – Veba/Viag, OJ L188/10.07.2001; Commission Decision of 17/12/2002 in Case COMP/M.2822 – EnBW/ENI/GVS, OJ L248/30.09.2003.

⁴ Commission Decision of 29/09/1999 in Case No IV/M.1383 – Exxon/Mobil (paragraph 69).

⁵ The notifying party also refers to these as "wholesale redistributors".

⁶ Commission Decision of 29/09/1999 in Case No IV/M.1383 – Exxon/Mobil (paragraph 69).

14. The notifying party does not agree with this distinction between “short distance” and “long distance” wholesale markets. It argues that “short-distance” wholesalers increasingly have a choice to contract their own imports, or to buy local production, being able to re-formulate their purchase decisions in case long-distance wholesalers were to increase prices. ExxonMobil also points out that there are no significant either entry or exit barriers for importing gas into Germany, as it is possible to negotiate access to any infrastructure needed for delivery under third-party access rules.
15. A possible market definition could also focus on a distinction between categories of end customers, that is large business users and power generators on the one hand and small household and commercial customers on the other hand. The notifying party contends that such a sub-division is not realistic since: (i) gas is a commodity product with the same specifications for all users and provided through a common distribution chain, (ii) in Germany all customers are free to choose their supplier and suppliers are free to choose where they want to focus their marketing efforts, (iii) there are no barriers between any of these market segments, and (iv) the price differences are due to the various services supplied. In addition a distinction in large customers between customers which can be supplied on an interruptible basis and customers who cannot could be made.
16. However, for the purpose of this decision it is not necessary to decide on these issues since the assessment of the case does not change on any alternative.

Relevant geographic markets

17. In a previous decision⁷ the Commission considered the market for exploration of oil and natural gas to be worldwide and the market for development and production of natural gas to probably include the EEA, Algeria and Russia. It did not have to decide on the question, however. The same applies in the present case as under none of the conceivable market definitions competition problems arise.
18. As regards the downstream supply of gas, the notifying party submits that there exists a wholesale market which is at least national and possibly wider. This is due to the market evolution as a result of the ongoing liberalisation of the gas sector following the EC Gas Directive⁸. All Germany is interconnected by a series of transmission lines which, together with the non-discriminatory access to them, facilitates competing suppliers at national level to bid for the supply of gas to local distributors, power generators or industrial customers.
19. The Commission in the Exxon/Mobil case considered whether the wholesale markets might still be regional within Germany instead of national according to the traditional distribution areas of each regional operator, i.e. along the former regional monopolies, but leaving the final definition open. In a more recent case⁹ the Commission decided

⁷ E.g. Case No IV/M.1532 – BP Amoco / Arco, Commission decision of 19 September 1999.

⁸ Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

⁹ Commission Decision of 17/12/2002 in Case COMP/M.2822 – EnBW/ENI/GVS, OJ L248/30.09.2003.

that the market for “short-distance” (regional) wholesale of gas within Germany is still regionally limited to the previous incumbency areas prior to liberalisation and is likely to remain so in the future.

20. For the purpose of the present case these wholesale markets are considered to be no wider than national as customers continue to be supplied on a no wider than national basis. For the rest, the precise geographic definition for the wholesale transmission markets can be left open as the concentration does not give rise to competition concerns under any of the possible alternative definitions. The same applies to the possible definitions of markets according to customer categories.
21. In any event, regarding small end users (households and commercial customers), it is not necessary to take a final definition of the geographic markets as these segments/markets are not affected by the transaction.

Assessment

22. In general terms the proposed concentration does not lead to competitive concerns as it splits up the activities of downstream supply of gas so far conducted through their joint venture BEB, thereby creating an additional competitor. Post operation, the new entity’s combined market shares in gas supply markets (in Germany) will generally be lower than BEB’s own market shares before the operation.

Horizontal overlaps

23. The ExxonMobil basket and ExxonMobil’s other activities outside BEB overlap in the following possible product markets: (i) wholesale of gas (comprising both “short distance” and “long distance” wholesales) and, if the approach of a market sub-segmentation according to the type of customer is taken, (ii) sales to local distributors, (iii) sales to power generators and (iv) sales to industrial customers. Neither ExxonMobil nor BEB are active in the segment of households and commercial customers.
24. After the operation the new entity’s combined presence in the market will generally be smaller than BEB’s presence before the operation. The table below shows the new entity’s combined market shares in the possible markets where it is active before and after the transaction:

Alternative relevant product markets	Combined market share before the transaction (1)	BEB market share before the transaction	Combined market share after the transaction (2)
Wholesale	[10-15]%	[10-15]%	[0-10]%
Sales to local distributors	[0-10]%	[0-10]%	[0-10]%
Sales to industrial customers	[0-10]%	[0-10]%	[0-10]%
Sales to power generators	[<5]%	[<5]%	[<5]%

- (1) Includes ExxonMobil's market shares due to its activities outside BEB and 100% of BEB's market shares.
- (2) Includes ExxonMobil's market shares due to its activities outside BEB and ExxonMobil basket's market shares.

25. In BEB's traditional marketing area in Northwest Germany, the transaction also leads to a reduction in market share.

Alternative relevant product markets.	Combined market share before the transaction (1)	BEB market share before the transaction	Combined market share after the transaction (2)
Wholesale	[50-60]%	[50-60]%	[30-40]%
Sales to local distributors	-	-	-
Sales to industrial customers	[40-50]%	[30-40]%	[20-30]%
Sales to power generators	[10-20]%	[10-20]%	[0-10]%

(1) Includes ExxonMobil's market shares due to its activities outside BEB and 100% of BEB's market shares.

(2) Includes ExxonMobil's market shares due to its activities outside BEB and ExxonMobil basket's market shares.

26. With respect to sales to local distribution companies, the notifying party has not provided market share estimates on a regional level. However, [ExxonMobil's sales to local distribution companies after the transaction will be lower than those of BEB due] to the operation, leading to a corresponding reduction in market share.
27. The notifying party submits that it is not able to segregate share data for "long-distance" and "short-distance" wholesale markets/segments as no official statistical data on these are available and as wholesale distribution companies do not report sales in that manner. However, as all sales volume and market share data provided by ExxonMobil show that BEB's market share (sales volume) more than double the one of ExxonMobil's activities in Germany outside BEB (namely through MEEG) it can be assumed that a split between "long-distance" and "short distance" wholesales would follow the same pattern. This is confirmed by considering the most important constituents of "short distance" wholesales namely sales to local distributors, on the one hand and sales to end customers, on the other hand,¹⁰ (see paragraph 13) which are available, either in terms of market shares or of sales volumes, and are cited in paragraphs 24 to 26. If "long distance" wholesales were understood to comprise total wholesales minus sales to local distributors then ExxonMobil's respective share post

¹⁰ Sales to industrial end customers and power plants, however, will be partly attributable to long-distance wholesales (see paragraph 13).

transaction would also be smaller (in the BEB area)¹¹ than or at most equal (in Germany where ExxonMobil's wholesale share, as shown in paragraph 24, is low in any event)¹² to the share held by BEB alone prior to the transaction.

28. The horizontal overlaps arising as a consequence of the proposed operation therefore do not lead to the creation or strengthening of dominant positions on any market as the new entity's position after the transaction will generally be weaker than (and at most equal to) BEB's position prior to the transaction.

Vertical relations

29. Due to ExxonMobil's and BEB's¹³ activities in the upstream and logistics markets a number of vertical relationships in some of these markets arises. However, on account of none of these relationships does the operation give rise to concerns because:

- (i) as regards the vertical relationship between the upstream activities and downstream supply of gas, the new entity's combined downstream market shares in gas supply post merger will not be bigger than those of BEB (jointly controlled by Shell and ExxonMobil) before the proposed concentration, and its and BEB's combined upstream market shares will be below 25% on any conceivable geographic market delimitation;
- (ii) as regards the vertical relationship between logistics¹⁴-and supply, neither the market shares nor the situation of control on the logistics markets change and the new entity's combined downstream market shares in gas supply post merger will not be bigger than BEB's own shares before the proposed concentration.

30. The proposed operation therefore does not lead to the creation or strengthening of a dominant position on any vertically affected market.

Conclusion on assessment

31. In the light of the above, the proposed transaction does not lead to the creation or the strengthening of a dominant position.

¹¹ In the BEB area, BEB's pre-merger sales of wholesale distribution minus sales to local distributors are [...] BCM whereas ExxonMobil's combined post-merger sales will be [...] BCM.

¹² In Germany, BEB's pre-merger sales of wholesale distribution minus sales to local distributors are [...] BCM whereas ExxonMobil's combined post-merger sales will equally be [...] BCM.

¹³ BEB maintains its activities in the fields of production, transportation and storage of natural gas. (Cf paragraph 5 above.)

¹⁴ With regard to logistics activities it could also be noted that non-discriminatory access to transport and storage facilities will tend to be facilitated as a consequence of the settlement in the *Marathon* case (See IP/03/1129 of 29.07.2003 "Commission settles Marathon case with German gas company BEB") and the implementation of the Second EC Gas Directive (Directive 2003/55/EC of 26 June 2003).

V. CONCLUSION

32. 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 (EEC) No 4064/89.

For the Commission

(Signed)

Franz FISCHLER
Member of the Commission