

***Case No COMP/M.5238 -
INEOS / BASF ASSETS***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 31/07/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31/07/2008

SG-Greffe(2008) D/204978

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

**Subject: Case No COMP/M.5238 – INEOS/ BASF ASSETS
Notification of 26.06. 2008 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 26.6.2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which Ineos Group Limited ("Ineos", UK) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of a plant ("BASFA", UK), belonging to BASF plc (part of the BASF group), by way of purchase of assets.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. THE PARTIES AND THE OPERATION

3. Ineos is a global manufacturer of specialty and intermediate chemicals, among which Ineos manufactures, in plants located in Germany and USA, acrylonitrile ("ACN"). ACN is an intermediate chemical building block used in the production of a variety of downstream products, including acrylic fibre, engineering thermoplastic resins (e.g. adiponitrile ("ADN")), and acrylamide and acrylonitrile butadiene rubber ("NBR")².

¹ OJ L 24, 29.1.2004 p. 1.

² According to the PCI Acrylonitrile Ltd "World Acrylonitrile Report" –(PCI is the leading industry independent consultant) - approximately 45% of the total EU production of ACN is used in the production of fibres, 27% in the production of thermoplastic resins (such as ABS), 14% in the production of acrylamide and adiponitrile and 14% for other applications.

Ineos also produces acrylonitrile butadiene styrene ("ABS"), a thermoplastic product, which is also downstream from ACN.

4. BASF is a chemical company with a product portfolio ranging from chemicals, plastics, and agricultural products to crude oil and natural gas.
5. BASFA is a plant located at Seal Sands, Teesside, UK, and is engaged in the production of ACN, as well as certain by-products of ACN, that is, raw acetonitrile ("ACE")³, hydrogen cyanide ("HCN")⁴ and ammonium sulphate ("AMS")⁵. BASF also has an ADN plant at Seal Sands, which is not part of the proposed acquisition, and which BASF had publicly stated that it intended to close during the first quarter of 2009 ([...]).
6. INEOS has stated that the proposed acquisition fits in with its strategic commitment to ACN production and downstream applications such as ABS. INEOS claims that it will commit significant capital expenditure to BASFA, and seek to apply its existing experience, in running ACN plants, to Seal Sands with a view to achieving long-term operational security and improved performance.
7. In the notification it is stated that, in the absence of a sale of BASFA to INEOS, it will close BASFA. In particular, the ACN supplied to BASF's ADN plant at Seal Sands (amounting to [...]kt in 2007) will become surplus to BASF's requirements when this ADN plant is closed definitively early in 2009. As part of the notification BASF has submitted board papers which are intended to confirm this 'sell or close' strategy for BASFA.

II. CONCENTRATION

8. The proposed operation consists of the acquisition by Ineos, for a cash consideration, of BASFA, a collection of fixed and non-fixed assets which could be operated as a stand-alone business. The acquisition constitutes a concentration within the meaning of article 3(1)(b) of the Merger Regulation.
9. On completion of the acquisition, INEOS will enter into two [...] supply agreements relating to ACN supplies to BASF's facilities at Ludwigshafen and Antwerp, for a total [...] supply of [...] ktpa and [...] ktpa. INEOS may also continue to supply small amounts of ACN to BASF's ADN plant at Seal Sands until BASF closes this plant definitively.

III. COMMUNITY DIMENSION

10. The worldwide turnover of Ineos and BASFA [exceeds EUR 5 billion]. The Community-wide turnover of Ineos and BASFA is [in both cases greater than EUR 250

³ ACE – a solvent used primarily in pharmaceutical applications.

⁴ HCN – a building block for a diverse range of derivatives such as methyl methacrylate and adiponitrile.

⁵ AMS – used as a sulphur-containing fertiliser.

million⁶]. Neither Ineos nor BASFA have more than two thirds of their EU turnover in one and the same Member State. Therefore the proposed operation has a Community dimension.

IV. ASSESSMENT

11. As mentioned above, BASFA is only active in relation to ACN and its by-products. Ineos is active in relation to merchant and captive sales of ACN and in relation to merchant sales of the downstream product ABS. Lastly, Ineos is active worldwide in relation to ACN technology licensing and ACN catalyst sales.

a) Product market definition

ACN

12. In line with previous Commission decisions, the parties claim that ACN constitutes a distinct product market.⁷ This has been confirmed by the Commission's investigation in the present case.

ABS

13. ABS belongs to the group of thermoplastic resins, which the Commission considered in previous decisions either as an overall market⁸, or for which it distinguished between different grades of thermoplastic resins⁹. The relevant grade of engineering thermoplastic resin for the purposes of this notification is ABS, as Ineos is only active on the market for ABS.
14. In any event, it is not necessary to define the product market for ABS in the present case, since the proposed operation will not give rise to a significant impediment to effective competition regardless of the exact market definition.

⁶ BASFA's ACN output has historically been used mainly for internal consumption by BASF. In 2007 about [10-20]% of Seal Sands total production was sold to 3rd parties, with a value of ca. [...] euros. The turnover figure for internally consumed ACN has been calculated on the basis of publicly quoted prices for ACN contract sales in Europe, as published by PCI, on the basis of an average European contract price for delivered ACN, less a discount of [...] per cent, which is an industry average for contracts based on the publicly quoted contract price

⁷ Paragraph 11 of the Commission's decision in Case No. COMP/M.2345 – *Deutsche BP/Erdölchemie* and Case No. COMP 4682 – *INEOS/Lanxess Engineering Thermoplastic Resins Business* at paragraph 12.

⁸ Commission's decision in Case No. IV/M.1682 – *Ashland/Superfos*.

⁹ Commission's decision in Case No. COMP/M.3578 – *BP/Nova Chemicals/JV*.

Technology licensing and ACN catalyst sales

15. In a previous case¹⁰, the Commission has decided that the markets for technology licensing and ACN catalyst sales constitute two distinct product markets. For the purposes of this decision, the precise definition of the product market for technology licensing and ACN catalyst sales can be left open as the proposed operation will not give rise to a significant impediment to effective competition on any of these markets, regardless of the precise scope of the markets.

b) Geographic market definition

ACN

16. As far as the relevant geographic market for ACN is concerned, the parties consider that it is world-wide in scope. They assert that there are few barriers to imports, resulting in historically active trade between different regions of the world (North America, Europe and Asia). The parties also assert that any consideration of European demand must include Turkey in view of the fact that Turkey has a major indigenous producer selling to, and a major indigenous consumer buying from Europe, and that Turkey has significant ACN import and export flows. Imports from outside EU27+Turkey amounted to around 19% of total EU27+Turkey ACN consumption in 2007¹¹.
17. The responses to the Commission's investigation in the current case revealed some variation as to the views of third parties on the geographic scope of the ACN market. A majority of respondents took the view that it was European in scope (with or without Turkey), some considered it to be worldwide in scope; only one correspondent considered it to be narrower than European.

ABS

18. In previous cases, the Commission analysed the ABS market both on an EEA level¹² and on a global level¹³. Ineos submits that the market for ABS could be global as it is readily transportable, it is actively traded between continents and there are few barriers to imports.

¹⁰ Commission's decision in Case No. COMP/M.2345 – *Deutsche BP/Erdölchemie*

¹¹ Source : PCI.

¹² Commission's decision in Case No. IV/M.1682 – *Ashland/Superfos*

¹³ Commission's decision in Case No. COMP/M.3578 – *BP/Nova Chemicals/JV*

Technology licensing and ACN catalyst sales

19. In a previous case, the Commission indicated that the geographic markets for both technology licensing and ACN catalyst should be world wide¹⁴.

Conclusion on geographic markets

20. In any event, the precise geographic scope of the markets for ACN, ABS, technology licensing and ACN catalyst sales may be left open in the present case, since the proposed operation will not give rise to a significant impediment to effective competition on any of these markets, regardless of the precise geographic scope of the markets.

c) Assessment

ACN

21. BASFA has a current maximum achievable ACN output capacity of about [...] kilo tonnes per annum ("ktpa"). BASFA ACN output has historically been dedicated mainly to satisfying internal BASF downstream requirements. The three principal internal BASF consumers are the BASF ADN plant also located at Seal Sands, a styrenics business at Antwerp, Belgium, engaged principally in the production of ABS, and a plant at Ludwigshafen, Germany, using ACN in a variety of downstream applications, primarily ABS and NBR.
22. BASFA has limited ACN storage capacity at Seal Sands, only about [...] kt or some [...] supply. Due to intermittent excess ACN production at Seal Sands over recent years, BASF has sold limited volumes on the spot market for the purpose of balancing inventory (BASF has also bought limited volumes of ACN on the spot market from time to time, for the same purpose, when temporary deficiencies materialised).
23. Over the period 2005-2007, BASF sold on average [small volumes] of ACN to third parties on the spot market, of which [the majority] was sold to traders and the remainder directly to consumers. In early 2008, BASFA has increased its spot sales of ACN due to operational difficulties that have led to a temporary closure of the downstream ADN plant of Seal Sands, thus freeing some additional ACN capacity that has been placed on the merchant market through spot sales.

(i) Market shares

24. Like BASF and INEOS, a number of producers of ACN are vertically integrated into downstream markets such as ADN and ABS, and therefore for the purposes of competitive analysis a distinction must be made between ACN used for internal consumption ("captive"), and ACN sold to third parties on the "merchant" market, the two segments together constituting total ACN consumption.

¹⁴ Commission's decision in Case No. COMP/M.2345 – *Deutsche BP/Erdölchemie*

25. As a proportion of total worldwide consumption (captive and merchant) in 2007, INEOS had a share of [10-20]%, BASFA [0-10]%, thus [20-30]% combined¹⁵. The corresponding figures for merchant sales only were [20-30]% for INEOS and [0-5]% for BASFA, since BASFA has historically made only limited spot market sales to third parties. Therefore on a worldwide market basis, combined post-merger market shares are not such as to cause competition concerns.
26. The combined 2007 EEA market shares for ACN would be as follows¹⁶:
- total consumption (captive and merchant sales): Ineos [30-40]% + BASFA [10-20]% = [50-60]%
 - merchant sales only : Ineos [40-50]% + BASFA [0-5]% = [40-50]%
27. Post-merger, ACN that was previously sourced in-house, from BASFA, by BASF for its Antwerp and Ludwigshafen plants, will be supplied under pre-arranged [...] supply contracts by INEOS (see above). As a consequence, these tonnages could nominally be considered as 'merchant' sales, in that they are transformed from BASF self-supply into BASF purchases from a third party, INEOS. However in this respect there will be no real change in the competitive dynamics of the EEA ACN merchant market as a consequence of the merger; BASF's Antwerp and Ludwigshafen plants will continue to be supplied by BASFA as before, and the tonnages will not be contestable until the agreed supply contracts expire, at which time INEOS will be obliged to compete with other ACN suppliers for the renewal of these contracts. Consequently, the additional capacity which will in principle be available for sales of the merged entity will at maximum be [...] ktpa, which accounts for only ca. [10-20]% of the total consumption of the EEA market.
28. Moreover, Ineos supplies one of its current major customers, [...], directly by pipeline at [...] plant at [...] in [...]. [...]. The INEOS Köln plant has a production capacity of ca. [...] ktpa, out of which the [...] plant takes [...] ktpa. In order to protect its own commercial interests¹⁷, [...] has a long-term ACN supply agreement with Ineos¹⁸, with the pricing terms fixed for the entire duration of the supply relationship. ¹⁹ Therefore INEOS' supplies to [...], which represent about [10-20]% of the EEA ACN merchant market, are only nominally part of this merchant market and, for unavoidable physical reasons, are in any event not contestable by other ACN competitors.

¹⁵ All market share figures sourced from PCI

¹⁶ On a EEA+Turkey market, the combined 2007 market shares for ACN would be:

- total consumption (captive and merchant sales): Ineos [30-40]% + BASFA [10-20]% = [40-50]%
- merchant sales only : Ineos [30-40]% + BASFA [0-5]% = [30-40]%

¹⁷ [...] has no realistic alternative supplier as it has no infrastructure to receive large tonnages of ACN by other means.

¹⁸ The supply contract between Ineos and [...] has a duration of [...] years and it is due to expire at the end of [...].

¹⁹ [...].

29. Therefore, whilst INEOS already has a significant share, [40-50]% of the EEA ACN merchant market, the proposed acquisition would not lead to a material change in this respect, since for the foreseeable future the contracts to supply BASF are not contestable, as is already the case for supplies to [...] at [...].

(ii) Addition of capacity to supply the EEA ACN merchant market

30. Post-merger INEOS, after fulfilling the above-mentioned ACN supply agreements with BASF, and after refurbishment of the ACN plant at Seal Sands, estimates that it would have about [...]ktpa of spare ACN capacity available.

31. This spare capacity that INEOS would acquire has no existing third-party customers, since, apart from some sporadic spot market sales, it has been used to satisfy captive consumption. EEA demand for ACN is declining, and is forecast to decline a further 10% in the period 2008-12²⁰. Therefore, post-merger any EEA ACN market share increase could only be gained by Ineos at the expense of other suppliers.

32. On the EEA merchant market INEOS faces strong competition from DSM and Repsol ([20-30]% and [10-20]% market shares respectively). Apart from its own imports from the USA, amounting to around [0-10]% market share in 2007, INEOS must also compete with other imports from the USA, Brazil and Russia, which accounted for about [10-20]% market share in 2007²¹.

33. The 2007 average capacity utilisation rate of EU27 + Turkey is estimated by PCI at about 85 per cent of 'nameplate' capacity, and as such is considered to leave significant room for increased output by existing plants. The nameplate capacity of a plant is usually defined as the maximum sustainable rate at which the plant can operate on a daily basis. The actual maximum annual average utilisation rate of an ACN plant is around 96 per cent of the nameplate capacity (source: PCI). The difference between the annual nameplate capacity and maximum annual average utilisation rate (i.e. the 4 per cent) is explained principally by scheduled turn-arounds and unplanned outages (which naturally reduce the operating time of a plant, and which affect all plants to differing degrees during a year). The additional annual production available in the EU27 + Turkey can be calculated. Using PCI's 2007 data, this figure is:

- 96% of nameplate capacity (1100kt) in the EU27 + Turkey for all production = 1056kt

- minus 939kt actual production

= 117kt, or some 10 per cent of EU27 + Turkey total sales in 2007 of 1145 kt.

34. Therefore Ineos' European competitors post-merger would have spare capacity to respond to any attempt by the merged entity to raise ACN prices or to reduce output.

²⁰ In the EU27 + Turkey, total ACN consumption is expected to continue to decline from 1363 kt in 1990 to around 1057 kt in 2015 (source PCI).

²¹ All market share figures sourced from PCI

(iii) Ineos' post-acquisition strategy for BASFA

35. Ineos has stated that it intends to use BASFA ACN output in part to supply its existing European ACN customers. BASFA output would be partially used in place of its (ie Ineos') current imports to Europe from its US plants²². The latter would be diverted to meet demand for ACN in Asia and elsewhere in the world, where demand is more buoyant than in the stagnant European market (see above). Ineos has provided the Commission with estimates of cost efficiencies resulting from the diversion of its US production from Europe to Asia, savings which are forecast as some [10-20]% of total logistics costs. During the course of its investigation the Commission received third-party input which indicated that substitution of current imports from the USA by part of BASFA ACN output would be a strategy likely to be adopted by Ineos.
36. The remaining capacity at BASFA would be used to target extra-EEA demand as well as EEA demand, but, as stated above, any EEA ACN market share increase could only be gained by Ineos at the expense of competitors, who have existing spare capacity.

(iv) BASF's strategy for BASFA absent the proposed acquisition by Ineos

37. BASF states that it has endeavoured on a number of previous occasions ([...]) to sell the Seal Sands ACN plant ([...]). It has been a matter of industry speculation that the Seal Sands ACN plant was (and for some considerable time has been) for sale. INEOS is, however, the only company that has taken its interest in the plant to a level of detailed due diligence, contract negotiation and finally now contract signature.
38. In the absence of a sale of the Seal Sands ACN plant to INEOS, BASF has stated that it would close the plant within approximately [...] (the time required for an orderly rundown). [...]. The Commission's investigation in the current case has found that there is a significant degree of third-party opinion that BASF would indeed close BASFA absent the sale to Ineos.
39. During the course of its investigation, the Commission received input from a competitor and customer of Ineos, which contended that in fact BASF did not intend to close BASFA absent the sale to Ineos, but, on the contrary, intended to use the ACN capacity which would be freed up by the closure of the Seal Sands ADN plant to enter the EEA ACN merchant market as a strong independent supplier.
40. It should be noted that during the period necessary for carrying out the closure of Seal Sands absent the sale, BASF had anticipated that the available ACN capacity liberated by the closure of the ADN plant would have been offered temporarily on the merchant market [...]. This could explain why the competitor considers BASF as a potential competitor on the ACN merchant market. [...]. Limited and temporary sales during a

²² In 2007, Ineos imported from its US plants [...]kt. As mentioned, BASFA has a maximum achievable ACN output capacity of about [...]ktpa, out of which a maximum of [...] will be committed to BASF's plants in Antwerp and Ludwigshafen. If Ineos will use [...]kt of BASFA capacity to replace its current imports from its US plants, it will still have at least [...]kt of spare capacity to be marketed on the European market

short-term plant closure and exit strategy do not characterise BASF as a (potential) merchant market entrant.

(v) Conclusion regarding ACN

41. The commission's investigation indicates that the transaction, regardless whether BASFA could be seen as a potential entrant to the merchant market, will not significantly affect competition in the markets concerned, where alternative suppliers with spare capacity will remain a sufficient constraint on the merged entity. This conclusion is further enforced considering BASFA's historic role as a captive supplier to BASF, with only spot market sales to third parties, and an industry reputation as a producer prone to frequent operating difficulties and production shut-downs.

ABS

42. Ineos submits that the proposed transaction would not alter the competitive landscape of the ABS market. Particularly, the proposed transaction would not give Ineos the ability or the incentive to foreclose its competitors on the upstream ACN market nor on the downstream ABS market.

43. With regard to customer foreclosure, Ineos does not have a significant degree of market power in the downstream market of ABS; indeed, Ineos' shares vary, depending on the product and geographic market definition, from [20-30]% to [0-10]%. Moreover, most of Ineos additional ACN capacity is already committed through long term contracts (see above). In particular, one such supply agreement will be entered with BASF (the market leader with a [30-40]% market share on the EEA market for ABS resins) for its ABS facility: this will guarantee [...] years of security of supply for BASF. Furthermore, as the supply agreement will be on fixed terms and conditions, this will give Ineos no influence on BASF's activities. Lastly, it should be noted that ABS is only one of the possible uses of ACN.

44. With regard to input foreclosure, it should be noted that the proposed transaction does not change the number of merchant suppliers²³ and does not create any new vertical links. Moreover, as Ineos acquires new capacity that was not previously on the market, it will have an incentive to actively seek merchant market sales.

Technology licensing and ACN catalyst

45. Ineos is the world leader in ACN technology licensing and has a [50-60]% market share of production capacity supplied in the market for ACN catalyst sales. In light of Ineos's position on the upstream markets of ACN technology and ACN catalyst sales, it needs to be assessed whether the combined entity would have an incentive to foreclose its competitors on the downstream market for ACN production by restricting their access to the necessary ACN technology and ACN catalysts.

46. Ineos submits that the proposed transaction will have no impact on either market as Ineos is not acquiring technology or access to catalysts. Moreover, Ineos is currently

²³ [...].

supplying catalyst to BASF's Seal Sands plants. Lastly, Ineos claims that there are other competing licensors worldwide and that, in relation to catalyst, customers can easily switch to other suppliers.

47. Respondents to the market investigation have confirmed that both markets are characterized by the presence of strong and credible competitors and that the impact of the transaction on these markets would not be significant.

Overall conclusion

48. Overall, the Commission shares the view among the majority of respondents in the Commission's investigation which see the proposed transaction as neutral in competition terms, or even likely to be pro-competitive due to the increase of available ACN capacity on the merchant market.

V. CONCLUSION

49. 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,
Meglena KUNEVA
Member of the Commission