EN

Case No IV/M.904 - RSB / TENEX / FUEL LOGISTIC

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(a) INAPPLICABILITY
Date: 002/04/1997

Also available in the CELEX database
Document No 397M0904

Office for Official Publications of the European Communities

L-2985 Luxembourg

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.04.1997

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

To the notifying parties

Dear Sirs,

Subject : **Case No IV/M.904 - RSB/TENEX/Fuel Logistic**
Notification of 26.02.1997 pursuant to Article 4 of Council Regulation (EEC) No 4064/89

1. On 26.02.1997 the Commission received a notification concerning the establishment of a new joint venture company - Fuel Logistic GmbH ("FL") - between RSB Logistic Projektspedition GmbH & Co. KG ("RSB PSG"), and AO Techsnabexport ("TENEX").

2. After examination of the notification the Commission has concluded that the notified operation falls outside the scope of application of Council Regulation No. 4064/89.

I. THE PARTIES' ACTIVITIES AND THE OPERATION

3. RSB PSG is in the business of forwarding and transporting of nuclear products and hazardous goods, open cast mining logistics and dispatch services. RSB PSG belongs to the Rheinbraun group of companies, which is ultimately controlled by RWE AG.

TENEX exports rare earths, metals, uranium-containing substances and other non-military nuclear products, and is controlled by the Russian Federation. It does not engage in the forwarding and transport of nuclear goods.

FL has been set up by the parent companies to serve as joint corporate vehicle for the use of RSB PSG's forwarding facilities for nuclear products by TENEX.

Rue de la Loi 200, B-1049 Bruxelles/Wetstraat 200, B-1049 Brussel - Belgium
Telephone: exchange 299.11.11
Telex: COMEU B 21877. Telegraphic address: COMEUR Brussels.

II. CONCENTRATIVE JOINT VENTURE

1. Joint Control

4. The joint venture will be jointly controlled by the two parents. Even though RSB PSG will hold only 20% of the shares and TENEX will hold 80% of the shares the voting majority for all management decisions of a general nature (business plans, investment and finance plans, major investments, appointment of senior management, the minority shareholder has the special right to appoint one of the at least one managing directors of the company) is more than 80%. These decisions therefore have to be taken unanimously by both parents, thus ensuring control of the joint venture by both parents.

2. Full Function on a Lasting Basis

5. The joint venture does not constitute a concentration within the meaning of article 3 Council Regulation No. 4064/89 because it does not perform on a lasting basis all the functions of an autonomous economic entity.

6. The joint venture does not have the resources that would enable it to operate a business activity on a lasting basis on a market.

a. Market

7. According to the shareholders' agreement FL shall perform forwarding functions related to the transport of nuclear products. While a number of RSB PSG's competitors do provide both forwarding and transportation services themselves, RSB PSG sees itself and its main competitors as forwarders only. Whether forwarding constitutes a separate market can be left open in the present context, because, for the reasons set out below, the joint venture is not in a position to operate as a full function entity on such a market.

b. Assets

8. The parties indicate in their notification that the service of forwarding nuclear products would require special container and wrapping equipment as well as transportation equipment and specialised staff training (technical know-how) in order to be conducted in a safe and professional manner. The joint venture however does not dispose of any of those assets to conduct its business. According to the parties it would appear that the joint venture will not have any assets apart from some office equipment. Initially the joint venture will not have its own staff, which will only be employed once FL becomes economically viable. It will operate from the offices of one of the parent companies and will initially not possess any packaging equipment required for the forwarding of nuclear goods.

9. The lack of assets necessary for the forwarding of nuclear products can not be attributed to the joint venture still being in a start up period. While the parties have indicated that the joint venture will have its own staff and its own equipment once the company will be economically viable, they have not submitted any concrete plans for such a development. In particular the parties have not indicated if and to what extent

any know-how, which according to the parties is essential for the conduct of forwarding services in question here, will be transferred to the joint venture. On the contrary, the shareholders' agreement specifies that in exercising its forwarding functions the joint venture shall utilise the forwarding and transportation services of the parent RSB PSG and the entire RSB group of companies (§1 of the shareholders' agreement). The parties state in the notification that the joint venture "will serve as a corporate vehicle for the use of RSB PSG's forwarding facilities for nuclear products by TENEX" (p.5). All this indicates that the assets and the know-how necessary to carry out the functions of a forwarder are not being transferred to the joint venture.

10. Moreover it follows from this clause that the forwarding activities, which are, according to the parties, the only business activities carried out by RSB PSG in the field in question here, will in fact be provided by this parent company. This leaves no room for the joint venture to fulfil all the functions of a forwarder for nuclear products. The "forwarding functions" of the joint venture are therefore limited to auxiliary function for the forwarding activities of the parent RSB PSG.

11. The same would be true if RSB PSG were to provide transport services as well, as the shareholders' agreement seems to suggest, since according to this agreement, both, forwarding and transportation services, are to be carried out by the parent.

12. This assessment is further confirmed by § 2 of the shareholders' agreement, which provides for the conditions under which the joint venture may use third parties other than RSB PSG to provide the services in question. This clause provides nowhere for the possibility of the joint venture itself to provide the forwarding services instead of RSB PSG. This would suggest that the joint venture is not in a position to do so.

13. The contract setting up the joint venture (Gesellschaftsvertrag), and which defines its activities in a wider sense than the provisions of the shareholders' agreement (provision of logistical services, concerning the forwarding, the transport and the sending of goods of all kinds, particularly uranium, concentrates, compounds and other products needed in the nuclear industry, in particular in trade with Russia) can not invalidate the previous conclusions: what is relevant for the present assessment is how the parties regulate the actual activities of the joint venture amongst themselves.

c. Use of the parent's distribution network

14. The reliance of the joint venture on the resources of one of its parents can therefore not merely be seen as the "use of the distribution network " of a parent company in the sense of number 14 of the Commission notice[1]. This exception already presumes that a joint venture operates as a full function entity, which is not the case here.

[1] Commission Notice on the distinction between concentrative and cooperative joint ventures under Council Regulation (EEC) no 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ C 385, 31. 12. 1994, p.1).

d. Provision of services mainly to the parents

15. The absence of the joint venture from the market is further highlighted by the fact that it will provide its services mainly to one of the parent companies: It will "perform its forwarding functions related to the transport of nuclear products in particular coming from and consigned to TENEX" (§ 1 shareholders' agreement). The parties indicate that reliance on the business of one of the parents will be limited to the start up period only and that FL plans to provide transport facilities for nuclear products to and from CIS-countries in the future once the initial phase is over.

16. However there are no indications that the reliance of the joint venture on the business of one of its parents is indeed limited to a start up period. The parties have provided no factual evidence that the joint venture will be in a position to provide a significant proportion of its activities to third parties in the future. The shareholders agreement on the contrary states quite clearly that the main purpose of the joint venture is to provide the specified services to TENEX.

17. In fact the preamble of the shareholders' agreement provides that TENEX wants to extend its spectrum of services and include forwarding services, transportation and shipping of nuclear products; § 2 of the shareholders' agreement obliges TENEX to "make its best efforts to transact its customers orders for forwarding services, transportation and shipping via the Fuel Logistic GmbH." It would thus seem that it is not so much the joint venture but TENEX that would be the provider of these services on the market towards its suppliers and its customers.

V. CONCLUSION

18. For the above reasons the Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3(2) of the Merger Regulation and consequently does not fall within the scope of this Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No. 4064/89.

19. The Commission will treat the notification pursuant to Article 5 of Commission Regulation No. 3384/94 as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Council Regulation 17/62 as requested by the parties in their notification.

For the Commission,