



## **Final Report of the Hearing Officer<sup>1</sup>**

### **Dow/DuPont**

### **(Case M.7932)**

#### **I. Introduction**

1. On 22 June 2016, the European Commission (the "Commission") received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation<sup>2</sup>, by which The Dow Chemical Company ("Dow"), ultimate parent company of the undertaking comprising the Dow group, and E.I. du Pont de Nemours and Company ("DuPont"), ultimate parent company of the undertaking comprising the DuPont group, enter into a full merger within the meaning of Article 3(1)(a) of the Merger Regulation (the "Transaction"). Dow and DuPont will be referred to collectively as "the Parties".

#### **II. Procedure**

2. The Commission's first phase investigation raised serious doubts as to the compatibility of the Transaction with the internal market and the EEA Agreement. On 11 August 2016, the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation. The Parties submitted written comments to the Article 6(1)(c) Decision on 26 August 2016.

#### **Statement of Objections**

3. On 7 December 2016, the Commission adopted a Statement of Objections ("SO") in which it took the preliminary view that the Transaction would significantly impede effective competition, including product and innovation competition, in crop protection. The SO also preliminarily found that the Transaction would significantly impede effective competition in acid co-polymers and ionomers (together, "polyolefins").
4. The Parties were given until 21 December 2016 to reply to the SO. They submitted a joint reply on that date, requesting a formal oral hearing.

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<sup>1</sup> Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").

<sup>2</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

### Access to the file

5. The Parties have received access to the file via DVD and by means of encrypted e-mail on 8 and 20 December 2016, on 6 and 23 January 2017, on 2, 15 and 16 February 2017 and on 2, 10 and 13 March 2017. A data room was organised on 14, 15 and 16 December 2016 for the external advisers of the Parties.
6. The Parties requested DG Competition to provide access to less redacted versions of the non-confidential data room reports, and then brought this request to me. The external advisers were thus allowed to access the confidential versions of these reports on Commission premises, on 22 December 2016 and on 6 January 2017, in order to prepare new non-confidential versions and confidential submissions directed to the Commission.
7. Although there were discussions, primarily between the Parties and DG Competition, about the possibility or feasibility of special arrangements at the formal oral hearing to allow discussion of information that was confidential vis-à-vis the Parties themselves, the Parties did not pursue this in a formal request to me, following the renewed access to the confidential data room reports. During the formal oral hearing, the Parties mentioned that they were unable to discuss this confidential information, but it appeared to me that the ways in which they were able to refer in a non-confidential way to the confidential elements were sufficient for the rights of the defence.

### Interested third persons

8. BASF SE ("BASF") and Finchimica S.p.A ("Finchimica") applied to be admitted as interested third persons on 17 October 2016 and 16 December 2016 respectively. They were admitted on 24 October 2016 and 21 December 2016 respectively.
9. Following the Parties' request for a formal oral hearing, a number of entities and natural persons contacted me to seek to appear at the formal oral hearing. These contacts did not express the interest of those entities in the outcome of the proceedings in accordance with Article 5(1) of Decision 2011/695/EU, and could not therefore be regarded as applications to be heard as an interested third person.<sup>3</sup> I explained therefore the procedure and requirements for applying to be heard as an interested third person and the nature and function of the formal oral hearing.
10. The formal oral hearing is a private hearing, the primary purpose of which, as can be seen from, *inter alia*, recitals 14, 19, articles 10(4), 11(1) of Decision 2011/695/EU, and articles 11, 14 of the Merger Implementing Regulation<sup>4</sup>, is to safeguard the rights of the defence, in particular the right to be heard, by giving the notifying

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<sup>3</sup> The Commission did not use its discretionary power under Article 16(3) of the Merger Implementing Regulation of inviting any third person, not being an "interested third person", to express their views at the oral hearing.

<sup>4</sup> Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 33, 30.4.2004, p. 1 (the "Merger Implementing Regulation").

parties and other involved parties (within the meaning defined in article 11(b) of the Merger Implementing Regulation – "parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentrations") the opportunity to develop their arguments in a formal oral hearing. Those natural or legal persons that have demonstrated a sufficient interest to be entitled to be heard may also, where appropriate, be afforded the opportunity to participate in the hearing. The formal oral hearing in merger proceedings, as with the oral hearing in proceedings under Articles 101 and 102 of the Treaty on the Functioning of the European Union, is not a public meeting or a consultation but rather an opportunity for parties to be heard in supplementing their written submissions or comments.

11. Following my explanations, four entities made an application to be heard as interested third persons, and I admitted the European Landowners' Organization ("ELO"), EuropaBio and Rothamsted Research as interested third persons in the current proceedings. With respect to one entity, following its application to be heard, I considered that it did not demonstrate a "sufficient interest" in accordance with Article 11 of the Merger Implementing Regulation, and informed it of this in writing, in accordance with Article 5(3) of Decision 2011/695/EU.
12. After the formal oral hearing, Bayer Aktiengesellschaft and Monsanto Company, competitors of the Parties, applied to be, and were, admitted to the proceedings as interested third persons.
13. All these interested third persons received a non-confidential version of the SO and were given the opportunity to make known their views. All interested third persons who applied before the date of the formal oral hearing requested to participate in the formal oral hearing requested by the Parties. I acceded to the requests from each interested third person, with the exception of Rothamsted Research, which withdrew its request to attend the formal oral hearing.
14. [Two interested third persons] made comments in their written submissions about the length of time between when they were informed of the formal oral hearing and the formal oral hearing itself. In this regard, it should be noted that applications to be admitted to the proceedings as an interested third person are not directly connected with the formal oral hearing. Such applications can be submitted from the date of the notification of the merger, which was published by the Commission<sup>5</sup>.

### **Competition authorities**

15. The national competition authorities of each Member State were invited to the formal oral hearing. Upon request, on the basis of Article 6(2) of Decision 2011/695/EU, I also invited representatives of the US Department of Justice to attend as observers in accordance with the *1999 Administrative Arrangement on Attendance* within the framework of the *Cooperation Agreement between the EU*

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<sup>5</sup> The prior notification in this case was published in the Official Journal of the European Union: OJ C 239, 1.7.2016, p. 15.

*and the USA*<sup>6</sup>, after having received both the consent of the Parties and satisfactory assurances regarding confidentiality and the use of information.

### **Formal oral hearing**

16. The formal oral hearing was held on 9 January 2017 and was attended by the Parties, as well as their external legal and economic advisers, the interested third persons BASF, Finchimica, ELO and EuropaBio, some of whom were assisted by external advisers, relevant Commission services, the competition authorities of four Member States (Germany, Finland, France and Sweden), and the US Department of Justice.
17. The Parties and the Commission requested and were granted closed sessions for parts of their presentations and question and answers sessions.

### **Letters of Facts**

18. On 20 January 2017 the Commission addressed to the Parties a first Letter of Facts, where it pointed out additional evidence in the Commission's file in support of the preliminary findings. The Parties submitted written comments to the first Letter of Facts on 30 January 2017.
19. On 1 February 2017 the Commission addressed to the Parties a second Letter of Facts, where it informed the Parties about further additional factual elements in support of some of the preliminary conclusions. The Parties submitted written comments to this second Letter of Facts on 6 February 2017.

### **Commitments**

20. On 7 February 2017, the Parties submitted a first set of commitments. Consequently, the Commission further extended the review period by 15 working days pursuant to Article 10(3) of the Merger Regulation. The aforementioned commitments were market tested from 8 February 2017. In light of the results of the market test, the Parties submitted a final set of commitments on 17 February 2017 ("Final Commitments").

### **The draft Decision**

21. The draft Decision declares the Transaction, as modified by the Final Commitments, compatible with the internal market and the EEA Agreement, subject to compliance by the Parties with the Final Commitments as conditions and obligations attached to the draft Decision.
22. I have reviewed the draft Decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which the Parties have been afforded the opportunity of making known their views.

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<sup>6</sup> Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America (OJ L 95, 27.4.1995, p. 47).

### **III. Conclusion**

23. Overall, I consider that the effective exercise of the procedural rights has been respected in this case.

Brussels, 16 March 2017

Joos STRAGIER