

***Case No IV/M.1097 -  
WACKER / AIR  
PRODUCTS***

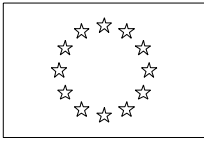
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**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 04/08/1998

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4.08.1998

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No IV/M.1097 - WACKER / AIR PRODUCTS**

Notification of 2.7.1998 pursuant to Article 4 of Council Regulation N/ 4064/89

1. On 2.7.1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No. 4064/89 by which the undertakings Wacker-Chemie GmbH ("Wacker") and Air Products and Chemicals Inc ("Air Products") acquire within the meaning of Article 3(1)b of the Council Regulation joint control of a newly created Dispersion Company ("DC") and a Powder Company ("PC").
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

**I. THE PARTIES AND THE OPERATION**

3. Wacker is a German company with a worldwide presence mainly active in the production and distribution of semiconductors, polymers, silicones and materials such as silicon carbide and advanced ceramics. Wacker is jointly controlled by the Wacker family and the German undertaking Hoechst AG.
4. Air Products is a US based global company with its main activities in production and distribution of industrial gases, equipment and chemicals.
5. The operation consists of the simultaneous creation of the joint venture companies, DC and PC, by Wacker and Air Products.

6. DC will be created as a US limited partnership and will be active in the production and distribution of dispersions.
7. PC will be established as a German GmbH & Co and will mainly be engaged in the manufacture and sale of powders and to a lesser extent in the production of dispersions.

## **II. CONCENTRATION**

8. The proposed transaction is a concentration within the meaning of Article 3 of Regulation 4064/89. The parties have claimed that although there will be in fact two joint venture companies, the transaction amounts to one overall concentration in which the parents will share joint control. However, the question whether there is one or two concentrations can be left open, because in any event both would have Community dimension and could be treated in the same decision, and moreover there is nothing to prevent taking into account in the competitive assessment the overall impact of the two considered together.

### **Joint control**

9. The two joint ventures will be established simultaneously through the same Master Agreement. Air Products will indirectly have a 65% interest in DC and Wacker will, through direct and indirect shareholdings, have a 35% interest. Wacker will have an 80% shareholding in PC and Air Products will hold the remaining 20% of the shares.
10. The Master Agreement between the parties states that each party has the right to object to the appointment of Senior Management and the adoption of budgets, business plans and major investments in the joint venture where it holds a minority interest. These rights do not, however, constitute absolute veto rights as Wacker and Air Product ultimately will have casting votes in PC and DC respectively.
11. In cases where the final decision regarding the strategic commercial policy of a company is left to one party's discretion only, joint control does normally not exist. However, in the present case the Commission considers both joint ventures to be jointly controlled by the notifying parties because in cases of disagreement between the parties the casting votes can only be exercised after a three stage arbitration and reconciliation procedure, stretching over a ninety days period, has been complied with.<sup>1</sup>
12. In addition, the fact that Wacker and Air Product both hold minority positions in the joint venture where the other party is the majority shareholder constitutes a disincentive for the parties to act independently of each other as an arbitrary treatment of a party in one joint venture could result in a similar treatment of the other party in the other joint venture.
13. On the basis of the above it is concluded that Wacker and Air Product will exercise joint control over PC and DC.

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<sup>1</sup> Commission notice on the concept concentration, OJ C 66/11 para. 37, 2.3.98.

### **Full-function character**

14. PC and DC are going to perform, on a lasting basis, all the functions of an autonomous economic entity. In particular, both notifying parties will transfer for an indefinite period existing sites and staff for the production and distribution of powders and dispersions as well as other resources necessary for the joint ventures to operate independently in the market. Moreover, both joint ventures will carry out short and long term research and development in order to enhance existing technology in use.
15. The parents will, in the initial stage, support the joint ventures in their marketing activities. The parents will, however, only act as commercial agents giving the joint ventures full control over their pricing policy. The joint ventures will purchase a high percentage of their total supplies of raw materials from the parents at arm's length conditions. These shares will be reduced after the starting up period and in any event, both joint ventures will add substantial value in the production and distribution processes.
16. The joint ventures are therefore full-function joint ventures within the meaning of Article 3 of the Council Regulation.

### **III. COMMUNITY DIMENSION**

17. The combined aggregate worldwide turnover of the parties to the concentration exceeded ECU 5,000 million in 1997 (Wacker: ECU 2,371 million, Hoechst: ECU 26,603 million and Air Products: ECU 3,942 million) and each of at least two of the undertakings concerned had a Community-wide turnover of more than ECU 250 million (Wacker: ECU 1,372 million, Hoechst: ECU 11,776 million and Air Products: ECU 1,192 million). The undertakings concerned did not achieve more than two-third of their aggregate Community-wide turnover within one and the same Member State. Hence, the proposed operation has a Community dimension.

### **IV. THE RELEVANT MARKETS**

#### **Relevant Product Markets**

18. The joint ventures will be active in the production of dispersions, powders and solid resins (and related products), respectively. All these products are currently manufactured on the basis of vinyl acetate monomer (VAM). The production of VAM will not be transferred to either of the joint ventures, but the joint ventures will source a substantial amount of VAM from Wacker or companies affiliated in the Hoechst group.

#### **Dispersions**

19. Dispersions (also called emulsions or lattices) are aqueous polymer substances (solid substances dispersed in water), which are manufactured on the basis of emulsion polymerisation procedure. Raw materials are basic monomers such as vinyl acetate, styrene, butadiene, acrylonitrile, acrylate, and chloroprene as well as so-called functional monomers such as acrylic acid, acrylamid etc. Dispersions are obtained by co-polymerisation of basic and functional monomers in water with the aid of other chemical agents.

20. The use of different basic monomers leads to the production of the various dispersion types, e.g. SB-latex (X-SB and H-SB), acrylate, polyvinyl acetate (PVAC), vinyl-acetate ethylene (VAE) and speciality latex (CR, NBR, VPR, polybutadiene etc.). These different types are used to various extents in a number of applications including adhesives, nonwoven fabrics/textiles, paper coating, cement admix and paints. Dispersions types are produced in a number of different grades, which are individually designed to meet specific customer's need. Customers' sourcing policy for dispersions is primarily based on the need to obtain the specific grade, which matches the technical requirements for their production. In general, one or more grades from one or more suppliers are tested and "qualified" by the customer according to the formulation of its final product. From the demand side these grades may be difficult to substitute, involving time and substantial costs. However, this does not appear to be sufficient to further divide the market into different submarkets corresponding to individual grades or groups of grades. Indeed, the important degree of supply-side substitutability must be taken into account. Major suppliers do normally supply a number of different grades across the range, and have generally the technical capability to switch production to other or new grades.
21. Dispersions will be DC's primary activity. DC will produce dispersions, which are based on VAM, i.e. PVAC, VAE and S/A and Acrylate.
22. In case No. IV/M.751 – Bayer/Hüls, the Commission defined the relevant product market for dispersions on the basis of the type of dispersions and left open the issue of whether a delineation along fields of application may be correct in other cases. The exact delineation of the product market, according to types or applications, can be left open in the present case, as in none of the possible market definitions the creation of the two joint ventures will give rise to the creation or strengthening of a dominant position.

#### Powders

23. Re-dispersible powders are obtained from dispersions via a drying process. They have the same chemical composition as the dispersions from which they originate. Powders have the advantage that they are lighter to transport because they have the moisture content removed. Storage is also easier because they have less volume. However, they are more expensive than emulsions because more processing is needed.
24. Powders will be PC's primary activity. PC will produce powders, which are based on VAM, i.e. PVAC, VAE and S/A and VAC copolymers.
25. Whether re-dispersible powders comprises a market distinct from dispersions, in general or for specific applications such as e.g. cement admix applications, can be left open in the present decision, because in any case, the creation of the two joint ventures will not lead to the creation or strengthening of a dominant position. Also, for the same reason, the question can be left open of whether the powders market should be further segmented according to types or field of application.

#### Solid resins and further processed products

26. Some of the PVAC which results from the processing of VAM is in a solid state (rather than dispersed in water), i.e. is a solid resin. Solid resins are used primarily as adhesives, gum bases and for modifying polymers. Some of the solid resin is sold as

such, and some of it is further processed to produce polyvinyl alcohol (PVA). The PVA sold on the market can be used in adhesives applications, for paper coating, textiles and for emulsion polymerisation as well as, to produce polyvinylbutyral (PVB). For the present case it is not necessary to establish whether solid resins, PVA and PVB constitute relevant products markets as such or whether some alternative market delineations would be more appropriate. The market investigation has shown that no competition concerns would arise whatever market definition is retained.

### VAM

27. VAM is the basic raw material used by DC and PC for the production of dispersions and powders. The joint ventures will not be active in the VAM market. However, as explained above, there will be a vertical relationship between the joint ventures and Wacker and Hoechst, which are amongst the largest EEA producers. Therefore, VAM would be a vertically affected market. It is not necessary for the purpose of the present analysis to decide whether VAM constitutes a relevant market in itself or whether other market definitions would be more appropriate, as the creation of the two joint ventures will in any case not give rise to competition concerns.

### **Relevant Geographic Markets**

28. In case No. IV/M.751 – Bayer/Hüls, the Commission defined the relevant geographic market for dispersions as EEA-wide. In particular, the Commission excluded a wider definition, given the cost associated to the transport of these products, mainly of commodity-type, over longer distances. The investigation carried out by the Commission in the present case confirms this conclusion, and in particular excludes the possibility for this market to be larger than the EEA. The argument put forward by most competitors and by the parties themselves that commercial relationships in this business are more and more established at world-wide level - the major customers having production sites spread world-wide and seeking to qualify suppliers to cover their overall sourcing for specific products - is still not sufficient to overcome the barriers created by the physical distances. Also, the presence of some significant imports from North America or the Far East of certain higher-value speciality emulsions does not contradict this conclusion, as they have no substantial impact on the overall EEA demand which is met by EEA suppliers.
29. Basically, the same reasoning applied to dispersions applies to the powder market. However, powders are of higher value and lighter than dispersions, so that the incidence of transport costs is substantially reduced. The market for powders is therefore at least EEA-wide and may be larger.
30. The investigation has indicated that the same considerations can be applied to the markets for solid resins and further processed products. The markets for these products are EEA-wide, and tend to be larger for higher-value speciality products.
31. As for the market of VAM, it is not necessary to decide upon its geographical dimension, as in any case the concentration(s) will not give rise to serious concerns for competition.

### **V. ASSESSMENT**

32. The concentration will affect the markets for dispersions, powders, solid resins and further processed products (PVA and PVB). DC and PC will be primarily engaged in dispersions and powders respectively. PC will also produce solid resins, PVA and PVB.
33. As regards VAM, which is a vertically affected market due to Wacker and Hoechst's extensive production, the investigation carried out by the Commission has shown that the concentration is not expected to have any significant impact on the availability of VAM to other dispersion producers within the EEA, nor will it have serious effects on other VAM producers.

### Dispersions

34. Whilst Air Products's presence in this area is very significant in the US and at worldwide level, its sales in Europe have so far been very limited. As a consequence, the overlap between Wacker and Air Products at EEA level is marginal.
35. On a market including all dispersions types (PVAC, VAE, VAC copolymers, Acrylates, SBR, NBR, etc.) Wacker has had in 1997 a market share of [...]² % and Air Products of [...]³ %. Major competitors include: Vinamul ([...]⁴ %), Clariant ([...]⁵ %) and Vinavil ([...]⁶ %) - which produce in particular the same type of dispersion as the parties (PVAC, VAE, VAC copolymers); and also BASF ([...]⁷ %), DOW ([...]⁸ %), Polymer Latex ([...]⁹ %) Rhône Poulenc ([...]¹⁰ %), Rohm & Haas ([...]¹¹ %) and Atochem ([...]¹² %) – which are also or mainly active in other dispersion types (Acrylates, SBR, NBR, etc.).
36. As to the different types of dispersions, the only overlap concerns VAE, where Air Products has had a market share of about [...]¹³ %, which is due to sales of certain special grades to a limited number of clients for nonwoven applications. In this respect it is noted that a narrower product market definition including only those special grades in which Air Products is active can be excluded for reasons of supply-side substitutability, as explained above.

### Powders

37. Air Products has not been present on this market in the EEA, where Wacker holds a very important market share of [...]¹⁴ % in 1997. Air Products on the other hand has a very significant presence in the US ([...]¹⁵ %). However, the US market is very

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small if compared to the EEA (about [...]16 % to [...]16 %), thus Air Products' sales contributed to the joint venture are relatively minor if compared to those of Wacker. Moreover, if the geographic market is taken as larger than EEA then it would tend to be worldwide, thus including non-US competitors. This would reduce the combined share of Wacker and Air Products below their current shares in the EEA and US respectively. Against this background, customers and competitors have confirmed that the operation will have no significant impact on this market. In particular, powders are to a large extent used for cement admix application, where they are in direct competition with dispersions. In a market including dispersions and powders for cement admix applications, the market share of Wacker at EEA level is substantially lower ([...]17 %), major competitors including BASF ([...]18 %), Clariant ([...]19 %), Elotex ([...]19 %).

#### Solid Resins and further processed products

38. Air Products is not present in the market for solid resins in the EEA and its US sales are minor if compared to those of Wacker. Therefore, in spite of Wacker's high market share in the EEA in 1997 ([...]20 %), the operation does not raise any concerns for competition. Major competitors are present in Europe, including Rhône Poulenc ([...]21 %), Clariant ([...]22 %), Vinavil ([...]23 %), and UCC ([...]24 %).
39. As to the EEA market for PVA, Air Products and Wacker have had in 1997 market shares of [...]25 % and [...]26 % respectively. Major competitors are Clariant ([...]27 %), Erkol ([...]28 %) and the US Dupont ([...]29 %). There are substantial imports in the EEA in this market, namely – apart from the US - from Japan, Taiwan and China.
40. Although Air Products sells in the EEA certain speciality grades which have been claimed to be difficult to substitute, this cannot be taken as causing serious concerns for competition. The presence of other important suppliers, including for these products some US and Far East producers which are well established in Europe and which have the technical capability to develop new products or grades will prevent any risk that the joint venture achieves a dominant position.

#### Conclusion

41. In the light of the above, it can be concluded that the concentration(s) do(es) not raise serious doubts as to its compatibility with the common markets. In all the affected

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markets, there is no risk that the creation of the two joint ventures create or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

## **VI. ANCILLARY AGREEMENTS**

42. The parties have submitted a number of contractual obligations they wish to be cleared as ancillary restrictions. These contractual obligations covers non-competition, non-disclosure, non-solicitation, right of first offer, preferred vendor status, supply agreements and the granting of IP licenses.
43. The non-competition clause in the Master Agreement (Clause 4.5) prevents Wacker and Air Products from engaging, directly or indirectly, in any business or activity within the scope of the joint ventures for as long as the notifying parties remain parents of the joint ventures and [...] <sup>30</sup> years beyond. The Commission considers that this clause reflects the parents withdrawal from the market assigned to the joint ventures and hence it is an integral part of the transaction to the extent it refers to the product markets and geographic markets where the joint ventures will be active at the time of completion of the notified concentration. The Commission does not consider the extended [...] <sup>30</sup> years period of non competition following a parents disposal of its interest in a joint venture to be an integral part of the notified operation nor to be ancillary to it. The justification of this clause would have to be assessed in relation to future transactions upon termination of the present joint venture(s). Therefore, it can not be considered as directly related and necessary to the present operation.
44. The non-competition clause in the PC Partnership Agreement (Clause 13) is covered by this decision to the same extent as the non-competition clause in the Master Agreement.
45. The non-disclosure provisions in the Dispersion Holding Company Joint Venture Agreement (Clause 13.2) , Dispersion Operating Company Joint Venture Agreement (Clause 14.2) and the PC Partnership Agreement (Clause 12) impose obligations on the parties not to disclose to third parties any confidential information pertaining to the agreements for the duration of the agreements and for a period of [...] <sup>31</sup> thereafter. The Commission considers that, to the extent that these provisions could constitute appreciable restrictions of competition, they could be viewed as follows:
- for the period the notifying parties remain parents of the joint ventures, they would be necessary to protect the value of the assets transferred or made available to the joint venture;
  - for the [...] <sup>31</sup> years period after the termination of the joint ventures, they would be ancillary to the concentration up to a five years period, because of the substantial know-how being transferred to the joint ventures. The parties have not provided sufficient reasons as to why non-disclosure should be covered for an additional [...] <sup>30</sup> years.

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46. The Master Agreement states that the parties shall refrain from soliciting (Clause 4.2) employees of the joint ventures for as long as Wacker is a parent of DC and Air Products is a parent of PC. This obligation is necessary for the implementation of the agreement in that it protects the value of the business contributed to the joint ventures and is therefore covered by this decision, subject to the same limitations of scope identified in respect to the non-competition clauses above.
47. The Dispersion Holding Company Joint Venture Agreement (Clause 11.4), the Dispersion Operating Company Joint Venture Agreement (Clause 12.4) and the PC Partnership Agreement (Clause 10.2) impose an obligation on each party to give the other party a right of first offer if the parent intends to dispose any of its interest in a joint venture. The obligation is necessary to protect the parents' ownership interest in that it prevents the parents from involuntarily having a new partner entering into the joint venture. It can therefore be considered to be ancillary to the concentration.
48. The Dispersion Operating Company Joint Venture Agreement (Clause 19.3) and the PC Partnership Agreement (Clause 14) state that the parents shall be preferred vendors for services and materials that the joint ventures require. The parties claim that this provision is not a restriction on competition since the joint ventures are free to buy elsewhere if the parents can not provide the best prices and conditions. In the absence of the necessary information, the Commission cannot consider these clauses in general as being ancillary to the concentration. Insufficient information has been submitted as to which product/services would be covered by this clause and as to the respective markets involved, the only exception being the supply of VAM from Wacker to PC.
49. The preferred vendor clause in respect of Wacker's supply to PC is designed to protect Wacker's interest to have a safe outlet for its VAM. Wacker is in turn obliged by a long-term supply agreement to buy the ethylene which it uses to produce VAM. To the extent it could constitute an appreciable restriction of competition, the Commission considers that the preferred vendor status clause in respect to Wacker's supply of VAM to PC is ancillary to the present operation for a period of three years, i.e. a start-up period, lacking any objective justification for it to be covered for a longer period.
50. Furthermore, the parties claim that two identical clauses existing in the Agreement on Supply of PVA by Air Products to PC (Clause A) and in the Agreement on Supply of PVA by Air Products to DC (Clause A) whereby PC and DC agree to buy PVA from Air Products should be regarded as ancillary for a period of [...] <sup>32</sup>, to the extent they fall under Article 85 of the EC Treaty. The Commission considers that this clause is necessary to guarantee continuity of supply to the joint ventures in the start-up period and continuity of outlets to Air Products. However, the duration of [...] <sup>32</sup> proposed by the parties does not appear to be sufficiently motivated. The Commission considers that this clause can be covered as ancillary up to a three years period, which appears to be sufficient to allow switching customers/suppliers in this industry.
51. The License Agreement Wacker/PC (Clause 2 and 5) and the License Agreement Air Products/DC (Clause 2 and 5) grant PC and DC irrevocable, worldwide, exclusive and royalty free rights to use technology, patents and trademarks relating to the use

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and sale of powders and dispersions and impose confidentiality obligation on the licensed technology up to [...] <sup>33</sup> years following the expiration of the joint venture agreements. As to the restrictions connected with the granting of licenses, the Commission considers that they are necessary to the implementation of the concentration since the licenses serve only as a substitute for the transfer of property rights. As to the confidentiality clauses, the Commission considers that a duration of [...] <sup>33</sup> years has not been sufficiently motivated by the parties. The Commission considers that based on the elements provided by the parties, the clauses - to the extent they might constitute restrictions of competition - can only be covered as ancillary up to five years after the termination of the joint venture agreements.

## **VII. CONCLUSION**

52. 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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No. 4064/89, as amended by Regulation 1310/97, and Article 57 of the EEA Agreement.

For the Commission,

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