

***Case No IV/M.1162 -
GE / BAYER***

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

Article 6(1)(b) NON-OPPOSITION
Date: 11/06/1998

*Also available in the CELEX database
Document No 398M1162*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.06.1998

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M. 1162 - GE/BAYER

Notification of 07.05.1998 pursuant to Article 4 of Council Regulation N/ 4064/89

1. On 07 May 1998 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) N° 4064/89 by which the companies General Electric Company (GE), and Bayer AG (Bayer) create a joint venture to which they will transfer their entire silicone business interests in Europe, Africa, India, and some parts of Asia.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) N° 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES' ACTIVITIES AND THE OPERATION

3. General Electric Company (GE) is an independent public company registered in the USA. It is a diversified corporation active in different fields through subsidiary companies. This operation will directly affect its wholly owned subsidiary General Electric Plastics BV(GEP BV), which is the European business of General Electric Plastics (GEP).
4. Bayer AG (Bayer) is a diversified chemical and pharmaceutical corporation producing a wide range of products and services in different areas from health care to plastics, speciality chemicals and imaging technologies.

5. The operation consists of two transactions: the first one consists of the creation of a joint venture company to which the parties will transfer all its interests in the silicones business in Europe, Africa, India, Pakistan and the Middle East (collectively the “JV Region”). The second part of the operation is designed as an acquisition by GE of the sole control over Bayer silicone business located outside the territory in which the joint venture will operate. The notified operation is the transaction referred to the J.V.; the second operation is of no relevance to the transaction in Europe given the small value of Bayer silicone interests outside the JV Region.
6. As a result of the above mentioned agreements, Bayer will not retain any business in the silicone markets outside the joint venture company, whereas General Electric will retain its own activities in the US and the rest of the world. Bayer will retain no activities in any upstream or downstream market, nor will be present in a neighbouring market.

II. THE CONCENTRATION

7. The operation is a concentration in the meaning of Article 3.1(b) of Council Regulation N° 4064/89. According to the parties the new company is devised as a full function joint venture. It will be owned 50.1% by GE and 49.9% by Bayer and both parties will hold co-decision rights on major issues concerning the JV. GE and Bayer will be represented with an equal number of members at the shareholders committee and the Bayer representatives will have veto rights on important issues. The fact that the management power in the management board isn't equally balanced between the parties is not an impediment to confirm joint control of both parent companies over the JV, given that co-decision rights in major issues have been established.
8. Through Bayer's veto rights, the parties must reach agreement on all major decisions concerning the JV. Co-decision rights are established for both parties in the Foundation Agreement in issues such as the structure of the management bodies (appointment of members of Management Board), the approval and review of the JV's business plan and the acquisition, disposals or licencing of industrial or intellectual property rights held by the JV, the conclusion or amending of material contracts and long term contracts when outside the ordinary course of business.
9. The JV will undertake the full range of silicone related activities within the JV region, and other than an initial injection of working capital by the parents, the JV is intended to be self funding. It will encompass the silicone activities of the parents, including manufacturing, research and development, technical services, marketing and sales. The JV appears to be a full function joint venture.

Error! AutoText entry not defined. Bayer is exiting the silicones industry and that will held no other interest in this sector except through its interest in the new joint venture company. Therefore it will be absent from any upstream, downstream and neighbouring markets. However the parties declare that Bayer is active in the production of raw materials for polyurethane sealants. This is of no material relevance given the minimum marketshare (below 1%).

III. COMMUNITY DIMENSION

10. The operation has a community dimension. The joint world-wide turnover of the undertakings concerned exceeds ECU 5.000 million in 1997 (80.103.7 MECU for GE and 27.140 for Bayer). The aggregate EC-wide turnover of at least two of the undertakings concerned exceeds ECU 250 millions (12.299.7 MECU for GE and 11.804 MECU for Bayer) but they do not achieve more than two-third of their aggregate Community-wide turnover within one and the same Member State. The notified operation has therefore a community dimension in accordance with Article 1(2) of the Merger Regulation

IV. MARKET DEFINITION

Product markets.

11. The notified merger affects the sector of silicones. The parties have broken down the silicon products into five product groups: intermediates, fluids, specialities, elastomers and sealants. Of these, only intermediates as measured by volume, elastomers and sealants would be affected product markets in the EU.
12. The parties recognise that from an end use point of view, the silicones business would comprise several thousands of micro markets, depending on the specific application for which the silicones are used. If such an approach was to be followed, and given the different focus of GE's and Bayer's respective silicones businesses, the notified transaction would present very limited horizontal overlaps. Furthermore, considerations of supply side substitutability would lead to regroup together the different micro markets.
13. For the purposes of the present case, a precise market definition is not needed, and the five product groups, generally recognised in the industry to analyse the silicones markets, are sufficient to assess the impact of the notified merger. When needed, an assessment at narrower segments will be carried out.

Geographic market.

14. In view of the absence of barriers to trade, the low impact of transport costs, the purchase patterns of customers, the homogeneity of price levels and the substantial intra-community trade flows, the narrowest conceivable geographic market would be the EU. If a world market was to be considered, the notified transaction would not raise serious doubts about its compatibility with the common market, even if GE's substantial activities in the US and elsewhere in the world are taken into account.
15. For these reasons, the precise market definition might be left open for the purposes of assessing the present case.

V. ASSESSMENT

16. The shares of silicone sales worldwide and EU wide by value allows to identify the main players in the silicone markets:

Table 1.: Share of Silicone Sales by Value, 1997

	World-wide %	EU-wide %

Dow Corning	[...] ¹	[...] ²
GE	[...] ³	[...] ⁴
Bayer	[...] ⁵	[...] ⁶
Wacker	[...] ⁶	[...] ⁷
Rhone-Poulenc/Rhodia	[...] ⁸	[...] ⁶
Shin Etsu	[...] ⁸	[...] ⁵
Hüls/Sivento	[...] ⁵	[...] ⁸
Others	[...] ⁸	[...] ⁶

17. Intermediates represent about 8% of total sales of silicones, fluids about 12%, elastomers 22%, sealants 28% and specialities 31%.
18. The parties' combined share of sales of intermediates in the EU is [...] by value and [...] by volume. Dow Corning, and Hüls/Sivento are the leading suppliers in the EU, with shares of about [...], Rhone-Poulenc and Wacker Chemie also have shares larger than the share of the merged entity. About 90% of the production of intermediates is for captive use.
19. For fluids, the combined share of the parties is below 15% both in volume and value. In addition to the other silicone players, compounders and traders are active in this business.
20. The combined share of the parties with respect to sales of specialities in the EU is below 15% in both volume and value. In addition to the other silicone players, compounders and transformers are also active in this area, such as Theodore Goldsmidt and Osi (each with an overall share estimated at between 15% and 20%).

1 Deleted business secret: between 35% and 45%

2 Deleted business secret: between 25% and 30%

3 Deleted business secret: between 15% and 20%

4 Deleted business secret: between 5% and 15%

5 Deleted business secret: between 0% and 5%

6 Deleted business secret: between 10% and 15%

7 Deleted business secret: between 15% and 25%

8 Deleted business secret: between 5% and 10%

9 Deleted business secret: below 15%

10 Deleted business secret: below 20%

11 Deleted business secret: below 30%

Even if specialities are broken in narrower product groups (adhesives/dehesives, emulsions/antifoams, resins and paint additives for coatings, foam stabilizers, impregnating agents, and others), only two groups would constitute affected markets, but the combined market share of the parties would remain below 25%.

21. With respect to elastomers, the merged entity will become the leading producer in the EU, with a share of [...] ¹² by value and [...] ¹³ by volume. Elastomers may be subdivided into three distinct groups: heat cure rubber (HCR), designed for products made using the press or extrusion methods, liquid silicone rubber (LSR), designed for products using the liquid injection technique, and room-temperature vulcanisation-2 component (RTV-2C), which comprises two products which when mixed, allow the resultant elastomer to cure at room temperature. It is used for artists moulding materials, teeth moulds for dentists, etc.
22. Total sales of HCR in the EU amounted to less than 150 MECUS and sales of LSR to less than 50 MECUS in 1997. The parties' combined share of sales of HCR in the EU is of [...] ¹⁴ by value ([...] ¹⁵ by volume). The JV will face competition mainly from Dow Corning (share in the EU of [...] ¹³ by value) and Wacker Chemie ([...] ¹³). For LSR, the parties will attain a combined share of [...] ¹⁶ by value ([...] ¹⁷ by volume). Main competitors in the EU are Dow Corning (share of [...] ¹⁸ and Wacker Chemie (share of [...] ¹³ GE's sales represent only [...] ¹⁹ of sales in the EU, so it adds a relatively small share to Bayer's pre-existing position.
23. Bayer's and GE's activities in these two areas only partially overlap. GE focuses its sales on finished products sold to industrial customers. Bayer sells more basic product to compounders who further process the basic elastomer and subsequently sell the end product to industrial users.
24. End users for HCR and LSR are the motor vehicle industry, electrical and electronic industry, household appliances/office equipment and the pharmaceutical and food industry. The typical customers are therefore large multinationals, which are said to exert significant purchasing power. This would be reflected in the evolution of Bayer's average price for LSR, which has decreased by [...] ²⁰ in the period 1990-1997. Customers typically follow a dual sourcing policy, with no exclusive relations with their suppliers.
25. With respect to LSR, where the concentration is quite high, the parties note that Shin Etsu, a Japanese producer with a small presence in silicones in Europe, offers a

¹² Deleted business secret: below 35%

¹³ Deleted business secret: below 40%

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¹⁹ Deleted business secret: below 5%

²⁰ Deleted business secret

competitive product range of state-of-the-art LSR and would face no significant barriers to enter the EU.

26. With respect to RTV-2C, the combined share of the parties is below 25%.
27. With respect to sealants, the combined share of the parties is of [...] ²¹ by value and [...] ²² by volume. Dow Corning ([...] ²¹ by value), Wacker Chemie ([...] ²³) and Rhone-Poulenc ([...] ²⁴) are the main competitors. Other smaller companies account for the remaining 10%. Virtually all sales of sealants by Bayer consist of sales of basic polymer to compounders, whereas GE supplies already compounded sealants.
28. In the light of the above elements there are no grounds to conclude that a dominant position could be created or reinforced by the operation. The enquiry carried out by the Commission has confirmed the above analysis.

VI. ANCILLARY RESTRAINTS

29. The JV is obliged to contract for certain services (heat, electricity, water) from Bayer, given its location inside the Leverkusen site. In so far as this would constitute a restriction of competition, it would be ancillary to the concentration. Furthermore, the agreements contain a non-compete clause expressing the lasting withdrawal of the parents from the market of the JV. These provisions are covered by the present decision.

VII. CONCLUSION

30. For the above reasons, the Commission decides 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) N°4064/89 and Article 57(52) of the EEA Agreement.

For the Commission,

²¹ Deleted business secret: below 30%

²² Deleted business secret: below 35%

²³ Deleted business secret: below 25%

²⁴ Deleted business secret: below 20%