

***Case No IV/M.1287 -
ELENAC / HOECHST***

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

Article 6(1)(b) NON-OPPOSITION
Date: 24/11/1998

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24.11.1998

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 parties

Dear Sirs,

Subject: Case No IV/M. 1287 – ELENAC/HOECHST

Notification of 22.10.1998 pursuant to Article 4 of Council Regulation No 4064/89

1. On 22 October 1998 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which Elenac SA and Elenac GmbH (“Elenac”), jointly controlled by the Royal Dutch/Shell group and BASF AG, acquire within the meaning of Article 3(1)(b) of the Council Regulation control over the European polyethylene (PE) and world-wide PE technology licensing business (“PE business”) of Hoechst AG (“Hoechst”).
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 with the EEA Agreement.

I. THE PARTIES AND THE OPERATION

3. Elenac is active in the manufacture and sale of PE and the licensing of PE technology. The formation of Elenac was cleared under the Merger Regulation on 23.12.1997 (Case No IV/M.1041 BASF/SHELL).
4. Hoechst PE business comprises the German PE activities of Hoechst as transferred to Hostalen Polyethylen GmbH (“HPG”), the Spanish PE activities of Hoechst Iberica S.A. as transferred to Hostalen Polietileno S.L. (“HPSL”) and the PE business of Hostalen Polyethylene UK Ltd. (“HPUK”). The German PE activities include Hoechst PE resins manufacturing plants at Frankfurt-Höchst, Knapsack and Münchsmünster, the R & D facilities at Frankfurt-Höchst, all proprietary rights relating to PE, STHD-Technology, LDPE-Technology and metallocene technology to the extent related to PE as well as the worldwide licensing activities relating to STHD-Technology and

LDPE-Technology. The Spanish PE activities include Hoechst PE resins manufacturing plant at Tarragona.

II. CONCENTRATION

5. Elenac is acquiring the whole of Hoechst PE business and thus sole control. This operation is a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. Elenac and Hoechst PE businesses have a combined aggregate worldwide turnover in excess of ECU 5,000 million (Shell, [...] million; BASF, [...] million, and Hoechst PE business, [...] million). Each of them has a Community-wide turnover in excess of ECU 250 million (Shell, [...] million; BASF, [...] million, and Hoechst PE business, [...]). The undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one Member State. The notified operation therefore has a Community dimension.

IV. COMPATIBILITY WITH THE COMMON MARKET

A. RELEVANT PRODUCT MARKET

Polyethylene

7. PE is a thermoplastic belonging to the family of polyolefins, which also include Polypropylene and polybutadiene. These products are derived from base chemicals (olefins) through a process known as polymerisation. PE is derived from ethylene. There are three main types of PE, with varying characteristic properties: low density PE (“LDPE”), linear low density PE (“LLDPE”) and high density PE (“HDPE”). Within each of these three families, there are different grades produced by varying the conditions of polymerisation or by using different additives. In previous cases¹, the Commission considered that the relative ease with which manufacturers can switch production from one grade to another gives rise to a high degree of supply-side substitutability.
8. Third party comments broadly confirmed this analysis. However, for the purpose of this decision, it is not necessary to decide whether the product market of PE resins has to be divided further into two or three relevant product markets according to their characteristic properties or their applications, because, in all alternative definitions proposed, the concentration will not raise serious doubts as to its compatibility with the common market.

¹ Case No IV/M.550 - Union Carbide/Enichem, Case No IV/M.1041 – BASF/Shell and Case No IV/M.1163 Borealis/IPIC/OMV/PCD

PE-Technology

9. In the Union Carbide/Enichem decision², the Commission concluded that there is a PE technology market distinct from the market for the production and sale of PE, owing to the fact that most PE producers that have developed their own PE production technology offer it for license. Therefore a large number of PE producers operate under technology license, and licensing is organised as a distinct business activity. Within the PE technology, a distinction can be made between high pressure process (to manufacture LDPE) and low pressure process (to manufacture HDPE), the latter including solution, slurry and gas phase technologies. Furthermore, PE processes can also be differentiated as regards their use of catalysts (e.g. metallocene catalysts). In the above-mentioned Union Carbide/Enichem decision, the Commission, taking into account the future demand trends for PE products, made a distinction between high-pressure and low-pressure processes.
10. However, for the purpose of the present case, it is not necessary to decide whether these segments constitute relevant product markets, because irrespective of the precise market definition to be adopted in this respect, the assessment of the notified concentration would not change.

B. RELEVANT GEOGRAPHIC MARKET

Polyethylene

11. In the previous decisions referred to, the Commission found that the relevant geographic market for PE resins covers the whole of Western Europe. Transport costs are relatively low and there are substantial trade flows between those countries, whereas imports from elsewhere face significant customs duties and are insignificant. Third party responses in the present case supported this view.

PE-Technology

12. In the Union/Carbide decision³, the Commission came to the conclusion that the PE technology market has a world-wide geographic dimension. No evidence was received to justify taking a different approach in the present case: licensors remain active world-wide and there appears to be no geographic constraints on the licensees' choice of supplier.

C. ASSESSMENT

Polyethylene

13. Elenac manufactures LDPE, LLDPE and HDPE. The Hoechst PE business manufactures HDPE only. According to the parties the combined market share for Elenac and Hoechst PE business will be [$<20\%$] on an overall PE market. On the

² Case No IV/M.550 - Union Carbide/Enichem

³ Case No IV/M.550 - Union Carbide/Enichem

segment for HDPE, the only area of overlap, the combined market share amounts to approximately [$<25\%$]. Strong competitors remain active on the PE market, such as Borealis/PCD (approximate market shares: [$<25\%$] on the overall PE market, [$<25\%$] on the segment for HDPE), Polimeri Europa (PE [$<15\%$], HDPE [$<15\%$]), DOW (PE [$<15\%$], HDPE [$<10\%$]), BP (PE [$<15\%$], HDPE [$<15\%$]), DSM/Vestolen (PE [$<15\%$], HDPE [$<15\%$]), Petrofina (PE [$<10\%$], HDPE [$<15\%$]), and Solvay (PE [$<10\%$], HDPE [$<15\%$]).

PE-Technology

14. Elenac is endowed with BASF's tubular reactor high pressure LDPE technology and BASF's gas-phase low pressure LLDPE/HDPE technology. Shell licences the low pressure Spherilene PE technology process. The Hoechst PE business licences both low pressure technology (slurry process) and high pressure (tubular) technology. With respect to PE technology licensing the combined market share of the parties (calculated on the basis of PE plant capacity operating under licences granted by the parties) will be [$<20\%$] in the licensing of low pressure technology and [$<20\%$] in the licensing of high pressure technology.
15. In terms of market shares (calculated on the basis of PE plant capacity operating under third-party licence), Union Carbide's Unipol gas-phase production technology accounts for about [$<40\%$] of worldwide plant capacity with respect to the licensing of low pressure technology. Other competitors active in the licensing of low pressure technology include Phillips (about [$<25\%$]), BP (about [$<15\%$]), Novacor (about [$<15\%$]) and Mitsui (about [$<15\%$]). The main licensor of high pressure technology is ICI/Simon Carves (representing more than 40% of the capacity). Other competitors in the licensing of high pressure technology are Exxon (about [$<30\%$]) and DSM (about [$<15\%$]).

Conclusion

16. As the combined shares of the parties in any market in which they overlap do not exceed [$<25\%$] and significant competitors are present throughout the range, it is considered that the operation is unlikely to raise serious doubts as to its compatibility under the Merger Regulation. This conclusion is confirmed by the answers obtained from competitors and customers during the inquiry.

VI. ANCILLARY RESTRICTIONS

17. The parties have requested that certain provisions of the purchase agreement, if restrictions, be considered as ancillary to the concentration.

Intellectual Property

18. To the extent that intellectual property rights and/or intellectual property rights agreements relating to PE and technology for its manufacture are owned by or licensed to Hoechst on the Transfer Date and such rights were not transferred or (sub-)licensed to HPG under the Contribution Agreement, Hoechst, pursuant to Clause 3.1(d) of the Transfer Agreement, agrees to grant Elenac a [...] licence, such licence to be exclusive to the extent possible. Pursuant to Clause 3.1(e) of the Transfer Agreement Hoechst agrees to grant Elenac a world-wide exclusive licence of all trademarks rights relating to the Hoechst PE businesses.

19. These clauses can be considered as ancillary to the concentration, because they serve as a substitute for the transfer of property rights. They are in line with the Commission Notice regarding restrictions ancillary to concentrations.

Non-Competition Clause

20. Pursuant to Clause 20.4 of the Transfer Agreement Hoechst agrees not to compete with the Hoechst PE businesses for a period of [<5] years.
21. This clause and its duration are in line with the Commission Notice regarding restrictions ancillary to concentrations, since it guarantees the transfer to the acquirer of the full value of the assets transferred.

Ethylene Supply Agreement

22. Ethylene is the principal raw material in the production of PE. PE producers, which need access to secure supply of ethylene, are typically backward integrated into ethylene. Amongst the major PE producers, Hoechst has been the exception since Hoechst was never active on the upstream market for ethylene. Hoechst's German PE production sites at Frankfurt-Höchst, Knapsack and Münchsmünster were supplied with ethylene on the basis of long term olefin supply agreements originally concluded between Hoechst and the ethylene producers DEA Mineralöl AG ("DEA") and VEBA Oel AG ("VEBA"). In the context of its present intra-group restructuring Hoechst transferred all its olefin supply agreements to its newly founded subsidiary HPO, which ensures the supply with ethylene and propylene for companies belonging to Hoechst group. The present olefin supply agreements between HPO and DEA/VEBA cannot be terminated before [...].
23. Pursuant to § 1 of the Ethylene Supply Agreement, concluded between HPO Hoechst Aktiengesellschaft & Co. Procurement Olefin KG ("HPO") and HPG, HPO will guarantee a minimum supply of [...] t/a ethylene to the production sites at Frankfurt-Höchst and Knapsack as well as a minimum supply of [...] t/a ethylene (increased to [...] t/a from [...]) to the production site at Münchsmünster. HPG is obliged to take these quantities. This agreement started on 1.1.1998 and cannot be terminated before [<10 years] for Frankfurt-Höchst and Knapsack and before [<10 years] for Münchsmünster.
24. The Ethylene Supply Agreement can be regarded as a transitional arrangement necessary for the effective implementation of the concentration. Hoechst, respectively its legal successor HPO, is [...] entitled to obtain fixed minimum quantities of ethylene under the present olefin agreements with DEA and VEBA until [...], to which HPG had access as part of the Hoechst group. The ethylene supply agreement ensures that HPG has continued access to secure supply through HPO for this period. The supply obligation is therefore aimed at guaranteeing and adjusting the quantities previously supplied within the vendor's group, and hence is in line with the Commission Notice regarding restrictions ancillary to concentrations. Given the specific supply situation of Hoechst, the duration of the Ethylene Supply Agreement does not exceed what the implementation of the concentration reasonably requires.
25. 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 (EEC) No 4064/89.

For the Commission,