

***Case No IV/M.1337 -
KOCH INDUSTRIES /
SABA / HOECHST***

Only the English text is available and authentic.

**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

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M.1337 – Koch/Saba/Hoechst

Notification of 21.10.1998 pursuant to Article 4 of Council Regulation N/ 4064/89

1. On 21.10.1998, the American company Koch Industries, Inc. (“Koch”) and the Mexican company Imasab S.A. de C.V. (“Saba”) notified the proposed acquisition of certain parts of the polyester assets of Hoechst AG (“Target”), formerly known under the name of Trevira, by Arteva BV, a Dutch holding company jointly controlled by Koch and Saba through their respective 50% stake and formed for the purpose of effecting this transaction.

I. THE PARTIES

2. Koch is a privately held U.S. corporation active worldwide in refined products, chemicals, gas liquids, crude oil services, mineral services, capital services, road and construction materials, chemical technology, and agriculture.
3. Saba’s primary activities are in the fields of textiles (production of yarn and fabrics), real estate, food, and the operation of hotels as well as other activities in the tourism industry.
4. Hoechst’s main business activities are in the field of life sciences and focus on health care/pharmaceuticals, biotechnology, genetic engineering, chemicals, and nutrition.

II. THE OPERATION

5. The notification concerns the acquisition by Arteva B.V. of Hoechst polyester activities in terephthalates, certain polyester polymer resins, industrial fibres, and polyester staple and textile filament. In Europe, the Target comprises: (i) all assets necessary for the on-going concerns of the business to be acquired, including real estate, intangible and tangible assets, inventory, intellectual property rights, accounts receivable, transferable contract rights, and other item set forth in the agreement; (ii) the Target's interests in certain joint venture entities active in these businesses; and (iii) three subsidiaries of Hoechst (Hoechst Trevira Vlissingen B.V., Industriepark Bobingen GmbH&Co KG, and Industrial Park Vlissingen B.V.).
6. In addition to the companies and assets to be acquired in Europe, Arteva B.V. will also acquire assets related to the acquired businesses in North America. In Turkey, where the Target's assets were owned by joint ventures between Hoechst and a local company, Arteva B.V. is expected to acquire Hoechst's shareholdings in these joint ventures.
7. The proposed transaction will result in an acquisition of joint control within the meaning of Article 3(1)(b) of Council Regulation (EEC) No 4064/89.

III. COMMUNITY DIMENSION

8. The combined aggregate world-wide turnover of the undertakings concerned exceeds 5.000 million ECU (Koch [...] ¹ million ECU, Saba [...] million ECU, Target [...] million ECU). Two of the three parties have a Community-wide turnover in excess of 250 million ECU (Saba has no sales in the EEA at all), no party to the merger achieves more than two thirds of its aggregate Community-wide turnover in one and the same Member State. Therefore, the operation has a Community dimension. It does not constitute a co-operation case under the EEA-Agreement, pursuant to Article 57 of that Agreement.

IV COMPETITIVE ASSESSMENT

9. Koch, Saba and the Target have no overlapping activities. Saba has no sales and no activities in the EEA. However, there is a vertical relationship between Koch and the Target resulting in two affected markets.

1. Relevant product markets

10. The base chemical for the production of polyester is paraxylene ("PX"). Through an oxidation process, PX is transformed into pure terephthalic acid ("PTA") or dimethyl terephthalate ("DMT"), two forms of terephthalic acid. An amorphous polyester polymer ("APP") is then created by reacting either PTA or DMT with a di-

¹ 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.

functional alcohol, most often mono-ethylene glycol (“MEG”). APP is used to generate a variety of end products, which can be segmented into six general categories:

- a) polyester packaging resin (“PPR”)
- b) industrial fibres
- c) textile fibres
- d) non-wovens
- e) PET film
- f) engineering plastics.

11. The Target manufactures only the first three products, PPR, industrial and textile fibres. Textile fibres, however, are manufactured and, for the most part, sold in North America and account for less than [$<5\%$] of the world market. The European textile fibre business of the former Trevira is excluded from the transaction for it has been sold to another company.
12. **PX** is an aromatic product processed from mixed xylenes or toluene, which are themselves chemical petroleum products. PX is a freely traded commodity of which prices are published on a regular basis. Koch manufactures PX at a plant in Texas and supplies customers in North America and Europe from that location. It does not have a PX manufacturing facility in Western Europe. In 1997, Koch sold [...] KT of PX into Western Europe, accounting for approximately [$<10\%$] of Western European merchant sales.
13. **DMT and PTA** are terephthalates derived from PX. For nearly all end-uses, DMT and PTA are interchangeable. DMT is easier to recover and to purify but PTA needs lower capital and operating costs (less of raw material and by-product handling). Thus, DMT and PTA should be considered together in any relevant market assessment. The Target is active in the production of DMT only. Its share of the total terephthalate market (DMT and PTA taken together) was approximately [$<10\%$]. Even if one would consider a separate market for DMT, the share of the Target of the 1997 Western European merchant market for DMT was only [between 10% and 20%].
14. **APP** is an intermediate polymer based on terephthalates and carried out in two phases. First, in the “esterification phase”, the basic monomer is formed by a reaction of DMT or PTA with MEG. Second, in the “polymerisation phase”, the monomers are linked into “chains” to form a polymer. The resulting polymer is cooled in a water bath and subsequently cut into chips, which are then used to create various polyester products. Most APP is used captively, but the Target has also sales on the merchant market. APP is identified by the parties as an affected market.
15. **PPR** is made of polyethylene terephthalate (“PET”) and is commonly referred to as “PET resin”. Over 80% of Western European PPR demand is for use in carbonated soft drink and still mineral water bottles. The Target’s share of Western European merchant PPR sales was approximately [between 10% and 20%].
16. **Industrial Fibres** are sold principally in “yarn” form into a variety of products segments serving different end-use applications. Industrial fibres are distinguished by

their denier (density/thickness) and number of filaments. The Parties consider that, based on considerations of supply-side substitutability, it is more appropriate to consider industrial fibres as a single relevant market. Demand side-considerations would probably lead to a further segmentation of the market for industrial fibres by deniers into, roughly, tire cord, technical filament, and sewing thread. However, the precise product market definition can be left open, since in any possible definition the competitive assessment would not change. Industrial Fibres are identified by the parties as an affected market.

2. Relevant geographic markets

17. According to the parties the relevant geographic market for APP and industrial fibres is at least as broad as Western Europe and probably world-wide. APP and industrial fibres may be shipped economically over long distances. Transport costs are relatively insignificant as a proportion of average sales value (within EU for APP approximately 5% and from US and Asia to EU 8.15% of final prices and for industrial fibres within EU 3% and from US and Asia to EU 5-7%). There are no tariffs or other obstacles to intra-EU trade. All Western European APP and industrial fibre manufacturers supply customers from only one or very few locations within Western Europe. Imports accounted for approximately 18% of APP sales and 14% of industrial fibre sales. APP prices are virtually identical across Western Europe. While there are certain price differences for industrial fibres depending on the denier of the yarn and the end use, prices do not differ materially between EU Member States for the same denier or the same end use.

In its decision M.984 Dupont/ICI the Commission concluded that the geographic market for one of the polyester end products (PET films) is at least as broad as Western Europe for the same reasons cited above. The question whether the scope of the geographic market for APP and Industrial fibres is broader than the Western European can be left open, since the notified operation does not give rise to dominance in either definition.

3. Assessment

18. As neither Koch nor Saba is active in the Target's fields of business, there is no horizontal overlap, and thus no addition of market share as a result of the Transaction. However, the transaction results in a vertical relationship between Koch and the Target, since Koch is supplying the base chemical PX to the Target. Therefore, APP and industrial fibres are affected markets, in which the Target has a share of [between 25% and 35%] each.
19. However, Koch will retain its PX business and, in any case, has a market share in this market of less than [<10%] in Europe. Several other large multinational PX producers such as Exxon or Enichem have larger shares of sales on the European merchant market. Exxon, for example, which is also supplying the Target, has European sales more than three times larger than Koch. Furthermore, Koch's PX activities will not be part of the joint venture. After the transaction Koch will continue to sell PX into the merchant market and will remain free to deal with any company it chooses. The Target will continue to purchase PX from Koch (as Hoechst has in the past), sales arrangements will be made on an arm's length basis and Arteva B.V. will remain free to purchase PX from any source.

20. Consequently, the transaction does not lead to a foreclosure effect or other vertical concern. Since there is no addition of market shares either, the proposed transaction will not give rise to any creation or strengthening of a dominant position as a result of which effective competition could be significantly impeded in the EEA.

V ANCILLARY RESTRICTIONS

21. The notifying parties have submitted a number of ancillary restrictions.
- (1) *Protective covenants.* Hoechst has undertaken not to compete worldwide in those sectors of the polyester industry being affected by the transaction for a period of [...] years. Given that both know how and goodwill are transferred the Commission considers this agreement by Hoechst not to compete as an ancillary restriction insofar as it affects the conduct of the business within the EEA.
 - (2) *Conduct of business:* Hoechst has agreed not to make any material change to its polyester business prior to completion of the Transaction. This clause does not seem to constitute an appreciable restriction of competition.
 - (3) Finally, Hoechst has undertaken not to discuss or negotiate with any third party before closing about a sale or other disposition of the assets affected by the transaction. Also this clause does not seem to constitute an appreciable restriction of competition.

Provisions (2) and (3) are inherent to the duty to negotiate in good faith and are contractual arrangements, which relate to stages before the establishment of control within the meaning of Article 3, paragraphs 1 and 3 of the Regulation. As explained by the Commission in its Notice regarding restrictions ancillary to concentration, these provisions cannot be covered by the present decision.

VI. CONCLUSION

22. 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 EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No. 4064/89.

For the Commission,