

***Case No COMP/M.1378 -  
HOECHST / RHÔNE -  
POULENC***

Only the English text is available and authentic.

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

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Article 6(2) NON-OPPOSITION  
Date: 30/01/2004

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## COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.01.2004  
SG-Greffe (2004) D/200330

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 -  
COMMITMENTS  
DECISION AMENDING  
ARTICLE 6 (1)(b) DECISION

### To the notifying parties

Dear Sirs,

**Subject: Case No COMP/M.1378 – Hoechst/Rhône-Poulenc**

Notification of 24.06.1999 pursuant to Article 4 of Council Regulation No 4064/89 (the “Decision”)

Your request of 29.01.2004 relating to the commitment for the Divestiture of Rhodia

#### **1. INTRODUCTION**

1. On **24.06.1999** Hoechst and Rhône-Poulenc notified their concentration (which led to the creation of Aventis) to the Commission. The Commission cleared the transaction on **09.08.1999** subject to commitments. In one of the commitments, Rhône-Poulenc committed to divest its chemical activities by selling its 67.3% stake in Rhodia and to keep the management of Rhodia separate from Wacker-Chemie until the date of the Rhodia divestiture (the “Rhodia Commitments”).
2. The merged entity retained the chemical activities of Hoechst in Wacker-Chemie, a 50/50 joint venture with the Wacker family. The Rhodia Commitments were intended to remove competition concerns over the overlap markets for silicone sealant, silicone elastomer, and polymer powder, made up of the chemical activities of Rhodia controlled by Rhône-Poulenc and those of Hoechst in Wacker-Chemie.
3. The Rhodia Commitments were designed to address the competition concerns over the overlap markets by means of a structural remedy requiring the exit of Rhône-Poulenc from Rhodia and the maintenance of the independence of Rhodia from Wacker-Chemie

in the meantime. The purpose of the latter limb of the Rhodia Commitments was to ensure that there will be no risk of co-ordination of the competitive behaviour of these entities whilst awaiting the severance of the structural link created between previously entirely independent undertakings by the merger of Hoechst and Rhône-Poulenc.

4. All references to Rhône-Poulenc and Hoechst in this note are references to Aventis and vice versa.

## 2. BACKGROUND

5. On **13.09.1999** Rhône-Poulenc submitted a “*Schema de désinvestissement*” for the Commission’s approval setting out the modalities for the disposal of its stake in Rhodia. The “*Schema de désinvestissement*” provided that:

- (1) Rhône-Poulenc would sell 42.3% of its shares on the stock market and would issue Exchangeable Notes for the remaining 25% which may be exchanged into Rhodia shares by the note holders any time until **22.10.2003**. The shares underlying the Exchangeable Notes were to be held in escrow by Paribas Luxembourg pursuant to an Escrow Agreement dated **21.10.1999** who would act as listing agent on behalf of the note holders.

- (2) As from **30.06.2001**, Rhône-Poulenc would give a “*pouvoir en blanc*” or blanc proxy to the Chairman of Rhodia – Mr. Tirouflet - which under article L225-106 of the French Code de Commerce means that the Chairman must vote the Rhône-Poulenc stake in Rhodia in accordance with resolutions approved by the Conseil d’Administration of Rhodia made up of between 10 and 12 members only 2 of whom would be appointed by Rhône-Poulenc so as to ensure that Rhône-Poulenc was no longer “*en mesure d’exercer le contrôle ni une influence déterminante*” over the Conseil d’Administration of Rhodia.

- (3) Should the note holders not wish to exchange their notes for shares in Rhodia upon the maturity of the notes on **22.10.2003**, and in the event that Rhône-Poulenc’s shareholding in Rhodia after **22.10.2003** is over 5%, Rhône-Poulenc has six months until **22.04.2004** to reduce its shareholding in Rhodia to below 5%.

6. The Commission on **15.09.1999** approved the Schema de désinvestissement. A summary of the Schema de désinvestissement was published in the French Bulletin d’Annonces Obligatoires on **20.10.1999** as well as in Rhône-Poulenc’s Offering Memorandum for the Exchangeable Notes issued around **15.10.1999**.

7. By letter dated **26.07.2002** and follow-up e-mails dated **13.08.2002** and **21.08.2002**, Aventis informed the Commission that in view of the current stock market conditions<sup>1</sup>, it was unlikely that any of the note holders would seek to exchange their notes for Rhodia shares upon maturity of the notes on **22.10.2002**. Therefore, Aventis asked to re-purchase the notes for cash via a public tender offer, with a view to:

- (1) selling the shares in Rhodia on the stock market; and/or

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<sup>1</sup> The Rhodia share price had declined from over € 20 in 1999 to below € 10 in 2002.

- (2) selling the shares to an interested strategic (whether financial or industrial) investor; and/or
- (3) selling the shares to a financial institution with a view to an on-sale in another 3 to 5 years time during which time Aventis would retain its exposure to any downside in the value of the shares whilst sharing part of the up side with the financial institution;

before **22.04.2004**.

8. On **06.09.2002**, the Commission approved the request subject to the following conditions being met:
  - (1) Aventis maintains in full force and effect all of the arrangements in the Schema de désinvestissement pending full and final divestiture of the entirety of Aventis' shareholding in Rhodia;
  - (2) Aventis procures the full and final divestiture of 20.1% of its stake in Rhodia by **22.04.2004** either by means of a sale of the Rhodia shares on the stock market or through a sale to an interested strategic (whether financial or industrial) investor;
  - (3) Aventis disposes of the remaining 4.9% by **22.10.2004** at the latest also in accordance with the two above-mentioned options; and
  - (4) the Commission approves the modalities of sale and the purchaser(s) of the shares (in the event that the shares are sold to one or more strategic investors) meet(s) the Commission's purchaser criteria as set out in its Notice on Remedies.
9. In its letter, the Commission stated that the above conditions were without prejudice to any further conditions which the Commission may impose upon completion of its investigation into allegations made by certain minority shareholders that Aventis may be exercising *de facto* control over Rhodia, so as to preserve the independence of Rhodia's management from any decisive influence by Aventis pending the full and final divestment of Aventis' shareholding in Rhodia.
10. Since then, Aventis contends that it has neither been able to sell its stake in Rhodia on the stock market nor to a strategic investor principally because in the meantime the Rhodia share price continued its downward trend sliding further from just below € 10 in the summer of 2002 to just over € 5 in the spring of 2003. [...].
11. Thus, on **16.04.2003**, Aventis entered into a transaction with Credit Lyonnais, [...] (Closing Date **02.05.2003**) whereby Aventis sold 9.9% of its holding in Rhodia to Credit Lyonnais [...] under which Aventis [description of Aventis' interest in the future development of the share price of Rhodia for a period of up to five years] [...].
12. [...].
13. Meanwhile, the financial affairs of Rhodia deteriorated further with the share price declining to below € 3 in the autumn of 2003. This led to the resignation of Mr. Tirouflet, the Chairman of the Conseil d'Administration of Rhodia, on **03.10.2003** and his replacement by a two man team – Mr. Clamadieu as Chief Executive Officer

(“CEO”) and Mr. Nanot as Chairman. The new team promptly announced a restructuring plan to be agreed with the company’s bankers with a view to the banks extend the company’s credit facilities so as to enable Rhodia to pay back some of its most pressing debts amounting to over € 1 billion as of **30.11.2003** subject to implementation of an agreed restructuring plan designed to reduce the banks’ exposure to Rhodia [...]

(1) [...]

(2) [...]

(3) [...]

### **3. SUBMISSION OF THE REQUEST BY AVENTIS FOR REVIEW OF THE RHODIA COMMITMENTS**

14. Against the backdrop of the continued spiralling decline of Rhodia’s fortunes, on **20.11.2003**, Aventis submitted a request inviting the Commission to decide that:

“(i) *given in particular Aventis’s changed position with respect to Rhodia and Wacker-Chemie, the transaction entered into with Crédit Lyonnais on April 16, 2003, and any substantially similar transaction including a partial or total sale of Aventis’s remaining shareholding in Rhodia and a financial agreement relating to Rhodia’s share performance, are not inconsistent with the undertaking relating to the sale by Aventis of its shareholding in Rhodia given in Case IV/M.1378 Hoechst/Rhône-Poulenc and its conditions of application, and that*

(ii) *given in particular the increased urgency of a restructuring of Rhodia resulting from the recent significant worsening of Rhodia’s financial condition, the April 22, 2004, deadline for the divestiture of Aventis’s remaining 15.3% holding in Rhodia set forth in the Commission’s letter of September 6, 2002 is extended by at least 12 months.”* (hereinafter referred to as the “Review Request”)

15. The Review Request is made under the following paragraph of the Rhodia Commitments:

*“If the market conditions are such that the sale would cause a particularly serious prejudice for the company, Aventis shall justify its position to the Commission, knowing that in any case it will have lost majority control, in both law and in fact, at the above mentioned date. Aventis will therefore be no more than a shareholder, and shall preserve no position or power of an industrial holding while awaiting the complete sale of Rhodia which may occur within a delay which shall be examined by the Commission having regard to the conditions at that moment.”*

16. The Review Request is based on the following submissions:

(1) Aventis does not control and cannot influence the commercial behaviour of Rhodia and Wacker-Chemie. Aventis cannot, therefore, interfere with

competition between Rhodia and Wacker-Chemie on the above-mentioned overlap markets.

- (2) Notwithstanding that Aventis' employees remain members of the boards of both Rhodia and Wacker-Chemie legal provisions of French and German law prevent them from passing on information for the purposes of co-ordinating Rhodia's and Wacker-Chemie's competitive conduct.
  - (3) Even in the hypothesis that such Aventis employees could take steps that might ultimately affect competition on the markets in which Rhodia competes with Wacker-Chemie, none of them would have any incentive to act in this way because Rhodia's performance on these markets does not significantly affect its overall performance and thus will not affect Rhodia's stock price. The three overlap businesses represented between [...] of Rhodia's 2002 world-wide turnover.
  - (4) Thus, Aventis is of the view that the divestiture of Rhodia has not been necessary to preserve competition in the overlap markets following the loss of joint control by Aventis over Wacker-Chemie in early 2001. Nevertheless, Aventis explicitly chose not to request a waiver of the divestiture of Rhodia commitment.
  - (5) Aventis submitted further that the banks financing Rhodia take the view that [...].
  - (6) [...].
  - (7) Rhodia's ever worsening financial situation has led to the appointment of a new management team on **03.10.2003**. Rhodia's former chairman and CEO, Jean-Pierre Tirouflet resigned on the same day leaving his place to Yves René Nanot as Chairman and Jean-Pierre Clamadieu as CEO.
  - (8) [...].
  - (9) Consequently, Rhodia's management have developed a new restructuring plan which they have presented to the lending banks. [...].
  - (10) [...].
17. In view of Aventis' submissions under (1) to (4) of the previous paragraph, the Commission indicated to Aventis that it may wish to apply for a waiver or amendment of the Rhodia Commitments.
18. With regard to Aventis' submissions under (5) to (10) of paragraph 16 above, following receipt of the Request, the Commission issued a series of Article 11 requests for information to check the probity of Aventis' submissions. The results of that investigation by and large confirm the submissions made by Aventis in most major respects.[...].
- 4. AVENTIS' REQUEST FOR A WAIVER AND/OR AMENDMENT**
19. On **27.01.2004** Aventis requested the Commission to confirm that the undertaking relating to the sale by Aventis of its shareholding in Rhodia has been without object at

least since the spring of 2001 when Aventis reduced its share in Wacker-Chemie to less than 50% (hereinafter referred to as the “Waiver Request”).

20. The Waiver Request of **27.01.2004** as well as (ii) of the Review Request of **20.11.2003** were withdrawn on **29.01.2004** and replaced by a request to replace the Rhodia Commitments with new commitments relating to Aventis’ participation in Wacker-Chemie under which Aventis undertakes to divest its participation in Wacker-Chemie by a set date and to maintain the independent management of Wacker-Chemie and Rhodia in the meantime. The commitments provide for automatic expiry if certain events should occur prior to the expiry of the deadline and for review of the commitments by the Commission in specific circumstances (the “Wacker Commitments”).

## **5. ASSESSMENT OF AVENTIS’ AMENDMENT REQUEST**

### **5.1 Situation of Rhodia and Wacker-Chemie**

#### *5.1.1. Situation of Rhodia*

21. Aventis contends that it has lost control over Rhodia. However, for the purposes of this decision which deals with the replacement of the Rhodia Commitments with the Wacker Commitments as from the date of notification of this decision, it is not necessary to take a position on the past control situation in Rhodia which can be left open.
22. It is clear from the Commission’s investigations into the Review Request, that all concerned (i.e. Rhodia’s lending banks and minority shareholders) are unanimous that the current financial situation of Rhodia means that its recovery and possible survival as an independent competitor is dependent upon the successful realisation of its restructuring plan in a manner that does not destabilise the existing capital structure of Rhodia. [...].
23. [...]. The Commission understands that this tight timing is required by Rhodia’s lending banks. [...].

#### *5.1.2. Situation of Wacker-Chemie*

24. On **16.12.2000**, Hoechst entered into a restructuring agreement (Restrukturierungsvertrag) with the other shareholder of Wacker-Chemie, the A. Wacker Familiengesellschaft (“Familiengesellschaft”). This contract provided for a transfer of the Hoechst participation to the Familiengesellschaft in four steps for a total consideration of [...]. The four steps were as follows:
  - (1) [...] As a consequence, Hoechst’s shareholding was reduced to 49.02%. [...]
  - (2) [...].
  - (3) [...].
  - (4) [...].
25. Hoechst filed a lawsuit against Familiengesellschaft [...], arguing that Familiengesellschaft has violated its obligation under the restructuring agreement. The case may be decided this year, but can be appealed to the Oberlandesgericht (“OLG”).

26. Looking at the above series of events an argument can be made that Hoechst has lost *de jure* joint control over Wacker-Chemie as of **20.03.2001**, when it lost parity with the other shareholder Familiengesellschaft in the Supervisory Board of Wacker-Chemie. There are no minority rights provided for in the Articles of Association of Wacker-Chemie, nor in the rules of the Supervisory Board of Wacker-Chemie, which takes decisions by simple majority. There are no special shareholders agreements providing for any such minority rights for Hoechst. Hoechst, therefore, has become a minority shareholder and enjoys the general minority protection rights under German company law. This has been confirmed by Wacker-Chemie in its reply dated **18.12.2003** to the Commission's request for information.
27. Hoechst, however, still has three members of the Wacker-Chemie Supervisory Board, among them Dr. Oldenburg, Legal Counsel of Aventis. According to Wacker-Chemie's reply dated **18.12.2003** to the Commission's request for information, Dr. Oldenburg has access to figures down to business units, but "*not normally*" to prices and volumes of individual products. Aventis submits that the status of its relations with the Familiengesellschaft, the majority shareholder and now sole controller of Wacker-Chemie, precludes it from having any *de facto* influence.
28. Such a conclusion is supported by several additional facts and circumstances. On two occasions Hoechst was outvoted on important decisions in the Supervisory Board. [...].
29. In any event Aventis has undertaken to divest its stake in Wacker-Chemie by a set deadline, subject to the provisions of the Wacker Commitments set out in Annex 1 of this decision.

## **5.2. Remaining competition concerns**

### *5.2.1 Aventis' allegations that there are French and German law provisions that prevent directors of Rhodia and Wacker-Chemie from passing information*

30. Aventis contends that even though members of its organs – Langlois, Bruel and Oldenburg - remain members of the boards of Rhodia and Wacker-Chemie respectively, legal provisions of French and German law prevent them from passing on information for the purposes of co-ordinating Rhodia's and Wacker-Chemie's competitive conduct.
31. However, as a matter of policy the implementation of the Rhodia Commitments which is the exclusive responsibility of the Commission cannot be subordinated to presumed compliance with national company law provisions of which the Commission has no jurisdiction to act.
32. Moreover, the Commission has a clear policy not to accept undertakings in merger control which are purely behavioural and equate to a mere promise to respect the law. To the contrary, if there is a potential risk of co-ordination, the Commission is obliged to ensure that any undertaking is as structural as possible in order to avoid situations which facilitate co-ordination. In the case at hand it is obvious that there is a potential risk for co-ordination since Aventis has a share in two firms competing in the same markets. Having delegates in the board of both companies can serve as a facilitating device.



*5.2.2 Aventis' allegations regarding lack of economic incentive to co-ordinate the commercial activities of Rhodia and Wacker-Chemie*

33. Aventis maintains that there is also no economic incentive for Rhodia. All three businesses together account for less than [...] of Rhodia's 2002 worldwide operating income and between [...] of Rhodia's worldwide turnover.
34. The Commission finds that the turnover generated by Rhodia and Wacker-Chemie in each of the three overlap markets and their combined market shares is not negligible bearing in mind current financial situation of both companies and the economic conditions in the chemicals sector. In 2002, sales of Rhodia and Wacker-Chemie in the market for polymer powder were less than [...] million respectively, amounting to a combined market share of [...]. In the market for silicone sealants, Rhodia and Wacker-Chemie's sales figures for 2002 is less than [...]. The combined market share is around [...]. Lastly, in the market for silicone elastomers, Rhodia and Wacker-Chemie had sales of less than [...] in 2002, resulting in a combined market share of around [...]. Given these market shares, the depressed state of the chemicals sector as well as the financial situation of both companies the economic incentive to co-ordinate their competitive behaviour on the overlap markets cannot be excluded without conducting a full market investigation.
35. However, in the very exceptional circumstances facing Rhodia, the delay involved in such a course of action may seriously prejudice Rhodia's future survival as an independent competitor. In the circumstances, the Commission finds that acceptance of the Wacker Commitments in place of the Rhodia Commitments would be the most proportionate way forward.

*5.2.3 The Commission's acceptance of replacement of the Rhodia Commitments with the Wacker Commitments*

36. The Commission considers that the replacement of the Rhodia Commitments with the Wacker-Chemie Commitments is the most proportionate way forward in the very exceptional circumstances of this case, namely:
  - (1) the rapidly deteriorating financial situation of Rhodia [...]
  - (2) the fact that Aventis has lost control over Wacker-Chemie; and
  - (3) the fact that the Wacker Commitments does not only require Aventis to divest its participation in Wacker-Chemie by a given date but also to maintain the management of Rhodia separate from Wacker-Chemie in the meantime.
37. The foregoing is all the more appropriate in the very specific circumstances of this case since Aventis has consistently made public that it will focus on life sciences and divest all remaining non-core activities such as the chemical businesses it inherited from the merger in 1999. To this end:
  - (1) Aventis, entered into the above-mentioned restructuring agreement with Wacker-Chemie in January 2001. The full and final implementation of that agreement has been frustrated only because it is currently the subject of pending litigation of a purely financial nature.
  - (2) [...].

- (3) In the light of the foregoing, Aventis entered into [...] on 16 April 2003 with Credit Lyonnais (as amended on 30 April 2003) taking effect as of 02.05.2003 pursuant to which it transferred 9.9% of its share capital in Rhodia and associated voting rights.

## 6. CONCLUSION

38. In the light of the considerations set forth in the present decision, Annex 1 of the Decision shall be replaced by Annex 1 of the present decision.
39. This decision is adopted in application of Articles 6 (1) (b) and 6 (2) of Council Regulation (EEC) No. 4064/89 and enters into effect on the date that it is notified to Aventis.
40. Save for the confirmation in paragraph 42 below, this decision does not imply any confirmation that the Rhodia Commitments entered into by Aventis to date have been fulfilled.
41. The Commission hereby confirms the transaction entered into by Aventis with Credit Lyonnais on **16.04.2003**, and any substantially similar transactions, are not inconsistent with the “*irrevocable mandate to progressively sell the participation in Rhodia at market price by means of progressive placements with financial institutions*” provided for in the third bullet point of Part II of Annex 1 to the Decision.

For the Commission

*(signed)*

Mario MONTI

**Commitment Of Aventis S.A. Concerning  
Its participation in Wacker-Chemie GmbH**

I. Independent Management

The management of Rhodia shall be kept separate from all other chemical activities originating from, or belonging to Hoechst, to avoid any risk of coordination of competitive behaviour of these companies.

Aventis undertakes to ensure that there will be no directors in common to the boards of Rhodia and of the ex-Hoechst chemical companies, and also, that no director of Aventis having been a former director of Hoechst, shall form part of the Board of Directors of Rhodia.

II. Divestiture of Wacker-Chemie

Aventis undertakes to divest its participation of 49% in Wacker-Chemie before [...].

III. Automatic expiry

This commitment shall automatically expire (i) upon the sale by Aventis of its participation in Wacker-Chemie, or (ii) upon the sale by Rhodia or Wacker-Chemie of their respective activities in the three markets whose overlap caused the Commission to require the commitment concerning the divestiture of Rhodia contained in the Commission's decision in Case No. IV/M.1378 Hoechst/Rhône-Poulenc, or (iii) upon Aventis's reduction of its participation and economic interest in Rhodia to less than 5%.

IV. Review

Aventis may request the Commission to review the undertaking in Section II, including by extending the deadline [...], in particular in view of any developments in the current and any future litigation between the shareholders of Wacker-Chemie concerning the restructuring agreement of 16 December 2000, or in view of the substantial elimination of the overlaps in the chemical activities of Rhodia and Wacker-Chemie, or in view of any exceptional circumstances showing good cause.

V. Final provisions

This commitment shall replace the commitment concerning the divestiture of Rhodia contained in the Commission's decision in Case No. IV/M. 1378 Hoechst/Rhône-Poulenc in its entirety, including its modalities of application approved by the Commission in its letters dated 15 September 1999 and 06 September 2002.

Signed on behalf of Aventis S.A.