

***Case No COMP/M.2345 -
DEUTSCHE BP /
ERDÖLCHEMIE***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 26/04/2001

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, **26.04.2001**
SG (2001) D/288149

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 party

Dear Madam, Dear Sir,

Subject: Case No COMP/M.2345 – BP / Erdölchemie

Notification of 23.02.2001 pursuant to Article 4 of Council Regulation No 4064/89

1. On 23.02.2001, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (“the Merger Regulation”) by which the undertaking Deutsche BP AG, controlled by BP Amoco p.l.c (“BP”), acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Erdölchemie GmbH (“EC”) by way of the purchase of Bayer’s 50% shareholding.
2. The notification was declared incomplete on 21.03.2001. The parties completed the notification with the requested information on 22.03.2001.
3. After the examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

I. THE PARTIES AND THE OPERATION

4. BP is the holding company of a multinational oil exploration, petroleum and petrochemical group.
5. EC is a manufacturer and seller of petrochemicals with manufacturing facilities at Köln-Worringen in Germany, which was established by Bayer AG ("Bayer") and BP under German law in 1957.
6. Bayer is a large multinational conglomerate, active in: (i) health care (prescription and over the counter medications, diagnostic systems and household insecticides); (ii) agriculture (crop protection and animal health products); (iii) chemicals (chemical feedstocks, raw materials and intermediates); and (iv) polymers (plastics, rubber, polyurethanes, coating, special raw materials and fibres).
7. The purpose of EC was to establish a co-operation in petrochemicals between BP, as an oil company, and Bayer, as a manufacturer of chemicals. Since its creation, EC's share capital has been held 50/50 by the Parties. Moreover, each of BP and Bayer appoint an equal number of directors to EC's board, and must agree on all major strategic decisions. EC is thus currently jointly controlled by BP and Bayer. Despite this joint control, EC has been seen in the market as operating independently from its parents. This can be explained by reference to the diverging interests of its parents with Bayer being an important purchaser of EC's output and BP a competing producer.
8. The notified transaction concerns the acquisition by Deutsche BP of the 50% of the share capital of EC which it does not already control. This transaction represents thus a change from joint to sole control over EC and constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

II. COMMUNITY DIMENSION

9. The undertakings concerned have, in the calendar year 1999, a combined aggregate world-wide turnover of more than EUR 5 billion² (BP EUR 115224 million³; EC EUR 1298 million). The 1999 aggregate Community-turnover of each of the parties exceeded EUR 250 million (BP EUR [...] million⁴; EC EUR [...] million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension pursuant with Article 1(2) of the Merger Regulation.

III. RELEVANT MARKETS

10. EC's product range comprises the production of some 20 bulk chemical products. The product range of EC overlaps with that of BP for the following products : ethylene,

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

³ Including 50% of EC turnover.

⁴ Including 50% of EC turnover.

ethylene oxide, ethylene glycol, acrylonitrile, butadiene, propylene, benzene, gasoline blends, and the polyethylenes LDPE and C4-C6 LLDPE.

A. Product Markets

11. In line with previous decision for some of the products concerned, the market investigation has confirmed that ethylene, ethylene oxide, ethylene glycol, acrylonitrile (ACN), butadiene, propylene and benzene constitute separate product markets. With respect to the relevant polyethylenes, the Commission has stated in *Dow/UCC (case COMP/M.1671 paras. 24-45)* that the relevant product markets are either the combination of C4 LLDPE, C6 LLDPE and LDPE or C4 LLDPE and C6 LLDPE together and LDPE individually. As regards gasoline blends, no competition concern arises whatever market definition is being adopted in view of the limited merchant sales by both BP and EC.
12. Other than on the above ‘horizontal’ markets, BP is active on Linear Alpha Olefins downstream from ethylene and in ACN technology licensing and ACN catalyst sales. The market investigation has indicated that *ACN technology licensing* and *ACN catalyst sales* constitute separate product markets. As regards Linear Alpha Olefins (LAOs) downstream from ethylene, it is not necessary to define the product market in view of the absence of a competition concern stemming from this transaction with respect to BP’s involvement in LAOs as explained below at paragraphs [63 – 65].

B. Geographical Markets

13. BP considers that the appropriate geographical market for all these products is, in line with previous decisions in bulk chemical mergers⁵, at least Western Europe (EEA + Switzerland). For ACN, ACN technology licensing and ACN catalyst sales, BP argues that the market is world-wide.
14. It is not necessary for the purposes of this decision to define the geographical market for *ethylene* as no competition concern would arise whether one would take into account a Western European market or a regional or national market. No competition concern would arise either if ethylene were to be considered to be part of a wider product market.
15. Although *ethylene oxide* (“EO”) is a hazardous product and therefore relatively costly to transport over long distances, almost all customers and competitors have agreed with BP’s assertion that the relevant geographic market is Western Europe even if the product is generally not transported over longer distances than 200 km. It is, however, not necessary, for the purposes of this decision, to define the relevant market as no competition concern arises on a Western European or a more regional market.
16. For *ethylene glycol*, BP argues that the appropriate geographical market definition is at least Western Europe, given that it is not a hazardous product, and so is relatively easy to transport (e.g. by road, rail or sea). Nor are there any particular legal restrictions on this transport. Thus there is a high level of cross-border trade within Western Europe. In addition, a uniform benchmark West European contract price exists. However, BP has

⁵ See, for example, Case IV/M.098 *Elf/BC/Cepsa*, Case IV/M.361 *Neste/Statoil*, Case No IV/M.550 *Union Carbide/Enichem*, Case IV/M.591 *Dow/Buna*, Case COMP/M.663 *Dow/DuPont*, Case COMP/M.1337 *Koch Industries/SABA/Hoechst* and, most recently, Case COMP/M.2092 *Repsol Quimica/Borealis*.

referred to certain elements in support of a world-wide market. Nevertheless, this point can be left open as no competition concern arises irrespective of the market definition applied..

17. BP argues that the relevant geographical market for *acrylonitrile* (“ACN”) is world-wide given that there are few barriers to import resulting in historically active trade between different regions (North America; Europe and Asia) of the world. More generally, pricing trends across the three regions show a high degree of statistical correlation, which shows that price rises in one region can quickly be restrained by increased imports from another. For instance, BP’s only production plant is based in the USA and exports of this plant account for almost 10% of Western European consumption. The view that there is a world-wide market has been confirmed by most Western European customers and European and American competitors.
18. However, the market investigation has also brought to light certain elements that seem to indicate that it might be more appropriate to assess the geographical dimension on a Western European basis as the competitive conditions in Western Europe appear to be different to those elsewhere. The elements supporting a more regional market definition are the following :
 - (a) differing regional demand/supply balances. Consumption of ACN in Asia is higher than local production; although new plants have been built and will continue to be built in Asia, the continent will remain a net importer. Western European demand and supply is generally in balance. Western European producers have been exporting, but American and Eastern European product has been imported. For the future, it is expected that there will be a growing deficit. The US production largely exceeds local consumption and the surplus production is and will have to continue to be exported world-wide.
 - (b) the existence of import duties of some 8.5% in the EEA and in the US. Although the effect of this duty is neutralised for those consumers of ACN who export their downstream products (mainly synthetic fibres), it constitutes a barrier for consumers who sell their ACN derivatives locally.
 - (c) differing ACN pricing methods in the USA compared to Europe and Asia. More than 95% of ACN consumed in the US is sold under long-term contracts based on pricing formulas. The formulas are usually negotiated at the beginning of the contract; prices are most often automatically adjusted quarterly using the formulas. Costs for raw materials (propylene and ammonia) are the largest components. The largest-volume customers usually have long-term contracts of five years or more; other customers will typically have 3 to 5-year contracts. In Europe and Asia, spot purchases occur and the contracts are of a shorter duration with price negotiations taking place every quarter. In view of these contractual differences, prices in Europe have been more volatile than in the US, but on average lower than those in the US.
 - (d) [...] export co-operation agreements between US producers. [...] The US producer Sterling [has an] export co-operation [agreement] with BP. Sterling and BP have set up Anexco, an export JV for sales to regions outside North America and Europe. In addition, BP is Sterling’s non-exclusive distributor for sales of up to [...] ktpa of ACN in Europe and Turkey. [...]
19. It is, however, not necessary for the purposes of this decision to define the relevant market for ACN as on either a world-wide or a Western European market no competition concerns arise.
20. BP considers that the appropriate geographical market definition for *butadiene* is at least Western Europe, given that it is a commodity which is widely traded across borders, by

barge, rail, pipe, truck and refrigerated ship. The price benchmark used in Europe is the quarterly Western European Contract Price. BP also states that there are good arguments to support a wider market definition, given that Western Europe has an oversupply of material relative to its indigenous demand, and so is a net exporter of butadiene (in 1999, c.300ktes was exported from Western Europe, out of total production of 2000ktes). There are no significant barriers to imports into Western Europe, although the relative oversupply within the region makes imports uncommon. Mexico and the US are net importers of butadiene, with material (including substantial BP sales) moving from Western Europe to these regions. In view of the above arguments that have been confirmed by customers and competitors alike, the Commission considers that the relevant market is at least the Western European merchant market.

21. In line with previous cases⁶, BP considers that the appropriate geographic market definition for *propylene* is Western Europe.
22. BP considers the appropriate geographical market definition for *benzene* to be at least Western Europe, given that there is a considerable amount of cross-border trade within the EEA. This is primarily due to the fact that benzene is relatively easy to transport, although water access is required. Moreover, benzene is also shipped on a very large scale between the continents, suggesting again that the appropriate market definition may in fact be wider than Western Europe. For example, c.17% of West European demand was met by imports from outside this region. It is, however, not necessary to decide on the exact geographical market definition as no competition concern arise irrespective of a Western European or a world-wide market definition.
23. In view of the limited merchant sales by both EC and BP of *gasoline blends*, no competition concerns can arise irrespective of the geographical market definition.
24. With respect to the *polyethylenes*, the Commission has stated in *Dow/UCC* (para 48) that the relevant geographical market is Western Europe.
25. For ACN technology licensing and ACN catalyst sales, the market investigation has indicated that they constitute separate product markets with a world-wide dimension, at least from the perspective of Western European customers. For LAO, it is not necessary to define the geographical market any further in view of the absence of a competition concern stemming from this transaction with respect to BP's involvement in LAO as explained below at paragraph [63 – 65].

IV. COMPETITION ASSESSMENT

A. Horizontal effects

Ethylene

26. With respect to ethylene, no competition concern would arise as on a Western European market, the combined market share of BP and EC would be around 10%. On a regional or national market, no overlap would occur as EC sells only on the Germany-Benelux pipeline systems whereas BP is not active on these.

⁶ See in particular Case IV/M.361, *Neste/Statoil*, para 25, and Case COMP/M.2092, *Repsol Quimica/Borealis*, para 16.

EO

27. On a West European EO merchant market, BP estimated that the combined market share of BP and EC is [35-45%] in 1999 and gives as estimates for its major competitors: Shell, Ineos, Condea, LaSeda and BASF [all < 25%]. The market investigation confirmed the parties' own market share at around [35-45%], but showed considerable adjustments of their competitors' individual shares. However, almost all customers have indicated that they can relatively easy switch to alternative suppliers and the competitors have indicated that a substantial additional volume could be brought on the merchant market by them by either ongoing capacity increases, possibilities for de-bottlenecking, switching away a small part of the EO used captively (accounting for around 80% of European production) to merchant sales. There are therefore no competition concerns on a possible West European EO merchant market. No such concerns arise either on a more regional market. Sales of BP and EC only overlap in Italy and France and for the customers in these countries there are also alternative suppliers available.

Ethylene glycol

28. On a West European ethylene glycol merchant market, the combined market share would be below 10% and even lower on a world-wide market. Therefore, no competition concern arises.

Butadiene

29. On the West European butadiene merchant market, the merged entity would be the largest player with a market share of [20-30]%. Competitors are Shell, Atofina, Oxeno/Huls, Repsol, DSM, Huntsman, Exxon/Mobil, Borealis, BASF and OMV. The market investigation has indicated that two of them have a market share between 10% to 20% and five of them between 5% to 10%. The market investigation has also confirmed that five customers account for almost the totality of demand. They all multi-source and none of them has expressed a concern arising out of this concentration. The Commission therefore considers that the operation will not give rise to competition concerns on the West European butadiene merchant market.

Propylene

30. On the West European propylene merchant market, the combined market share of the merged entity would be below 15%. Therefore, no competition concern arises on this market.

Benzene

31. On a West European benzene merchant market, the combined market share of the merged entity would be below 15%. On a possible world-wide market, the market share would be considerably below 5%. Therefore, no competition concern arises on these markets.

Polyethylenes

32. On a possible combined C4+C6 LLDPE+LDPE [polyethylene] market, the merged entity would have a combined market share of around 10%. On the alternative markets, namely LDPE on the one hand and C4+C6 LLDPE on the other hand, the merged entity would have a share of [5-10]% and [approximately 20]% respectively. The merged

entity's share of the possible C4+C6 LLDPE market is below that of Polimeri (estimated [25-30]%) and four other European based competitors have, according to BP, market shares of between 8% to 14%. In addition, the parties argue that Sabic, a Middle East producer, is an established player on the market and that current levels of asset utilisation are low. In view of this, the Commission considers that there are no competition concerns on any of the possible West European [polyethylene] merchant markets.

ACN

(a) Capacity, production, merchant sales

33. A widely used report in the industry estimates that the world-wide ACN capacity amounts to some 5198 kt in 1999 of which 1265 kt is located in Western Europe. This report estimates that the world-wide production accounts for some 4514 kt in 1999 of which some 1040 kt produced in Western Europe. BP has estimated the world-wide and Western European merchant market to account for some 3644 kt and 871 kt respectively. The detailed sales information gathered by the Commission from almost all players active in Western Europe is largely coherent with the BP estimate. It must, however, be pointed out that the [...] kt sold by EC in 1999 to Bayer or companies controlled by Bayer (and that, therefore, in 1999 constituted captive sales) are included in the above merchant market figures in order to reflect the situation post-merger.
34. BP produces ACN in its two US plants that, with a total 700 kt capacity, account for some 13% of world-wide capacity. In addition, BP has off-take rights for some [...] kt out of Sterling's US production plant (total capacity some 360 kt) for which it supplies the feedstock and receives the finished product in return. BP also sources some [...] kt from EC. As part of the ACN technology licence to the South-African producer Sasol, BP purchased and resold Sasol's export volume, accounting for [...] in 1999. That plant is now mothballed. [In addition, BP operates various geographic swaps with other producers. BP also markets some Sterling material (see para 18(d)). It also purchases material from other producers on a spot and contractual basis.]
35. EC produces ACN in its Dormagen plant that has a capacity of 275 kt out of which [...] kt was produced in 1999. EC sells, as indicated above, some [...] kt to BP and purchases [...] kt from [another European producer]. EC is also active in swaps. EC's merchant market sales (production + stocks/additional purchases from other producers – sales to BP) in 1999 accounted for [...] kt. [A large percentage of this was] sold to Bayer or to companies controlled by Bayer in Western Europe. Non-Bayer related customers located in Western Europe totalled only sales of [...] kt; another [...] kt was sold on export markets [...].
36. There are over 30 other ACN producers. They either operate one or more plants of so-called world-scale, comprising a production capacity between 200 – 400 kt, or smaller plants of some 50 – 100 kt. Producers operating a world-scale plant include DSM, BASF and Enichem located in Western Europe; Sterling, DuPont, Cytec and Solutia located in the USA; Pemex in Mexico; and Asahi, CPDC, Tae Kwang and Formosa Plastics in Asia. The European producers as well as Sterling are already selling material in Western Europe. Smaller operators already active (directly or via traders) on the Western European merchant market are (a.o.) Repsol (Spain), Veba (Germany), Lukoil (Bulgaria and Russia) and Pemex (Turkey).

(b) Market Shares

37. On a possible world-wide ACN merchant market, the merged entity would account in 1999 for [25-35%] (BP [20-25%] + EC [5-10%]). On a possible Western European market, the merged entity would account for [35-45%] (BP [15-20%] + EC [20-25%]). If one were to exclude the [...] kt supplied by EC to the Bayer group, the world-wide and Western European market shares would be [25-30%] (BP [...]% + EC [...]%) and [20-25%] (BP [...]% + EC [...]%) respectively.
38. The Commission does not have a complete overview of the market shares of the other producers on a possible world-wide market. However, the information available indicates that the other major producers have a merchant market share of around 5% each. On a Western European market, BP estimates that its main competitors are DSM , Enichem and Repsol [all 10-20%]. The Commission's investigation has broadly confirmed these estimates. Other competitors active in Western Europe with around 5% market share [...] are Petkim, Lukoil, BASF, Veba and Hoechst⁷.

(c) Purchasing behaviour of Western European consumers

39. The merchant market demand in Western Europe totalled in 1999 some 871 kt. A few customers like Montefibre, Bayer, Acordis and Dow accounted for over 2/3 of total demand. This is also reflected in the parties' sales portfolio. Bayer and its subsidiaries accounted in 1999 for [...]% of EC's sales in Western Europe. BP's five largest Western European customers account for [>85%] of its sales in Western Europe.
40. The larger customers all multi-source and most of them purchase via contract and on the spot market. The supply contracts with the producers have a typical duration of 3 years, provide for a specified tonnage and contain quarterly price negotiations. The remainder of demand is purchased on the spot market by means of multiple purchases of smaller quantities from a multitude of traders. This material typically originates from American, Turkish or Eastern European producers.
41. Depending on the location of the customers' plants, supply is via pipeline, ship, rail or truck. Supply by pipeline occurs via a specifically dedicated customer pipeline linking the ACN production facility with the nearby plant of the customer. In those circumstances and for that particular plant, the customer will purchase most of its requirements from the co-located producer via means of a long-term supply agreement. This is the case for EC's pipeline supplies to Bayer Dormagen (ABS production) and Fraver⁸ Dormagen (fiber production). However, both Bayer and Fraver operate other plants that can and are supplied by other producers. Hence, they have direct experience of actual price competition and the price resulting from this experience is reflected in the "locked in" pipeline purchase price. Some customers such as Acordis and Montefibre have the possibility via their own tanks at sea ports to receive directly imports via ocean-going vessels. This gives them additional leverage to operate on the spot market as any purchase from a trader would require less logistical organisation. Important quantities of ACN are also transported from the production plant of the Western European producers

⁷ Hoechst as since then stopped its ACN production.

⁸ Fraver purchased on 1.1.2001 Bayer's fibre business at Dormagen as well as Bayer's 70% stake in Faserwerke Lingen.

or from the tanks at a nearest harbour via rail (tanks). Finally, for smaller lots, trucks are used.

42. In the quarterly contract price negotiations for the contracted quantities, the buyer will use its knowledge of the offers available on the spot market as well as the regional prices that are reported every month in a leading consultancy report widely used in the industry.

(d) Market developments

43. The ACN market is a very cyclical market. For example, in May-June 1995, the T1 Import Price (ACN on which the import duty has to be paid) for Western Europe (as reported by PCI) peaked at \$ 1480/t. Its recent low was around January 1999 with a price of \$ 330/t. The price increased again to \$ 950/t in July 2000. In March 2001, the price has dropped back to \$ 600/t. The gross margins that ACN producers obtain differ therefore considerably over the years. For instance, the year 2000 was a “good” year because of the shortage on the Asian market resulting from delays in scheduled start-ups of new plants. In 2000, EC obtained an average gross margin of [...] DM/t (DM [...] /t for its sales in Western Europe; [...] DM/t for the spot exports to Asia). This compares to an average margin of DM [...] /t in 1998 (DM [...] /t for Western Europe; DM [...] /t for exports to Asia), considered by EC to be a more representative year. It can be noted that on its overall profit/loss accounts for the period 1995 up to February 2001, EC has lost money on its ACN business [...]. It is furthermore expected that for the years 2001 and 2002 producers will only be able to cover their variable costs.

44. The price/margin situation correlates closely to the supply/demand balance. World-wide demand has grown in 1999 with 1.1%, an estimated 5.3% in 2000 and the growth for the next ten years is estimated to be close to 3% per year. In Western Europe, demand has decreased with 0.1% in 1999, is expected to have grown 0.1% in 2000 and the estimated demand within 10 years will be less than 15% higher than today. On the other hand, while the capacity utilisation in 1999 was only 87% (a capacity utilisation ratio of above 90% is considered by producers as indicating a profitable market), it increased to an estimated 91% in 2000. However, in November 2000 Solutia started up its new 250 kt plant in the US turning this company from a net purchaser on the market into a net seller. In July 2000, Formosa Plastics started to operate one of its reactors of its new 200 kt plant in Taiwan and is now operating the full capacity of the plant. These start-ups as well as some additional small scale plants in Asia added some 10% to the installed capacity and, with the increased capacity being larger than the market growth, this led to a displacement of existing supply agreements resulting in the significant drop in prices.

(e) Alternatives to the merged entity for the Western European ACN customers

45. It results from the above market shares, that BP is already by far the largest supplier of the world-wide merchant market and the change from joint to sole control over EC will further strengthen its position, in particular in Western Europe. The most significant change stems from, as indicated above, the end of the “captive relationship” between Bayer and EC.
46. However, Bayer and Fraver, the new owner of ACN consuming businesses purchased from Bayer, as well as the other consumers will have viable alternatives available to the merged entity in the form of (i) more production by the other Western European producers; (ii) more permanent volume produced by some Eastern European producers; and (iii) additional export volume from US producers.

47. The capacity utilisation rate of 82% for the Western European producers was relatively low. Using the high 96% capacity utilisation rate that was attained in the (very high price) year 1995 as a “maximum”, a potential of an additional 100 kt production is available (in addition to the estimated production for 2000 and 2001). Added to this are low-cost capacity increases for another estimated 100 kt. These 200 kt represent some 20% of current total consumption (merchant market + captive) in Western Europe. In addition, some further increased production may be possible resulting from the use of improved catalysts. [Western European producers can increase capacity]. It must, however, be added that no new capacity is expected to be built in Western Europe in view of the limited demand growth.
 48. Whereas the Eastern European producers have in the past operated a “hit and run strategy” not running their plants continuously but only when high margins could be obtained, there is now a more steady supply thereby realising an additional export volume of some 50 kt that may go to Western Europe. Whilst some Western European customers have expressed concerns regarding the quality of the Eastern European product, an estimated 18 kt has nevertheless been purchased in 1999.
 49. The largest source for additional material becoming available for Western European customers that, therefore, would have a restraining effect on the merged entity, is the US. This additional source of export material results from the start-up of the 250 kt Solutia plant in the US and the loss of sales this has led to for Solutia’s US suppliers as well as the displacement resulting from the Asian start-ups. All in all, BP considers that there is a [300-400] kt surplus capacity in the US which is not linked to BP and is available for export to any region, including the EU.
 50. Sterling currently faces an oversupply of around [...] kt resulting mostly from the loss of its [...] kt supply agreement to Solutia prior to the start-up. This material will have to be placed partly in Western Europe as the further ‘absorption’ possibilities for the Anexo JV are limited. Particular reference is made to [Sterling’s activities in Europe].
 51. Solutia has currently an estimated export potential of [...] kt that they will export either directly or via spot traders or through [...].
 52. Asahi has off-take rights for [...] kt of [the ACN plant of another ACN producer]. Asahi will try to sell this material to [...] customers, thereby displacing other sales, or it will be exported. Currently it is exported to Asia resulting in Asahi cutting production at its Asian plants. As [...], it is legitimate to expect Asahi to look for sales opportunities in Europe.
 53. BP estimates that Cytec exported some [...] kt in 1999. Since then, its need to export has increased by [...] kt in view of the recent closure of their former acrylic fibre plant (which had been sold to Sterling), [...].
 54. The general picture of additional export material available in the US and the potential for this to be sold to Western European customers has been confirmed by the Commission’s market investigation.
- (f) Technology licensing for additional plants no longer controlled by BP
55. No new ACN plant is expected to be constructed in Western Europe in view of the limited demand growth. However, the expected world-wide growth of some 3% will

absorb, over time, the current overcapacity on the market. With annual growth rates in Asia of 5% or more as well as some capacity rationalisation, a capacity shortfall is expected to start developing in the 2003/2004 timeframe and the construction of new plants, especially in Asia is therefore likely.

56. BP was in the past the sole licensor of ACN technology and still is the main licensor. The Commission investigated the leverage that could result from this position on the ACN merchant market. It appears from the market investigation that, in view of the current competition in the licensing market such leverage is no longer possible.
57. BP has concluded in the past certain licensing agreements whereby the licensee was not allowed to export any ACN outside the country of production other than via BP as well as licensing agreements that contained evergreen secrecy clauses thereby prohibiting the licensees to lodge patents for any improvements and/or licence out themselves the technology after the expiry of the licence. [However, all European and North American producers can increase capacity.]
58. In addition, new actual or potential licensors have emerged since 1995. In that year, Solutia licensed its technology to the South Korean company Tae Kwang⁹ that started production in May 1997. Also Solutia's new US plant is based upon its own technology. Asahi has granted three licences for its technology to Sinopec for small scale plants in China of which one is already operational as well as to the former Soviet Union. Asahi's Korean subsidiary will proceed with its [...] kt project using Asahi technology. Finally, another licensor is about to start granting licences.

(g) Competitive ACN catalysts market

59. With respect to sales of catalysts, the market investigation has broadly confirmed BP's claim that there are alternative licensors now although BP accounts for an estimated 65-70% of existing licensees. Other existing competitors are Nitto/Mitsubishi, Solutia and Sinopec. In addition, Asahi has decided at the beginning of this year to sell its own catalyst, used so far only in projects where it had an equity participation, to the free market.
60. [Existing customers of BP catalyst have supply alternatives.] In general, customers denied that BP could use its position to leverage on the downstream ACN market.

(h) Conclusion

61. BP is by far the leading player on the world-wide merchant market having the largest production capacity, access to additional material from other competitors and with a very strong position in ACN technology licensing and catalyst sales. As a consequence of the proposed operation it will acquire sole control over EC, one of the largest European producers who sells a large extent of its production via pipeline to two locked-in customers.
62. However the Commission considers that the operation does not lead to competition concerns on the world-wide or Western European ACN markets because (i) the possibility of the locked-in customers to obtain their pipeline supplies from EC at

⁹ [...]

competitive prices; (ii) prices for Western European customers will remain competitive in view of their alternatives to supplies from BP in the form of additional production by Western European producers and potential for increased exports from Eastern Europe and the US in the short term; (iii) the possibility for all actual or potential world-wide ACN producers to build new capacity to face expected increased future demand via technology not controlled by BP.

B. Vertical effects

(a) LAOs

63. The original Form CO identified only one market where one of the parties have a market share in excess of 25% that is either upstream or downstream to the products described above and that has not been dealt with above, namely concerning Linear Alpha Olefins.

64. BP has indicated that LAOs is a generic term, but with regard to those LAOs downstream from ethylene, BP is active in Europe through a plant in Belgium (with a capacity of 300 ktpa). The only other player present in the EU is Shell (UK, 270 ktpa). These producers face imports into the EU from the Czech Republic (Spolana, capacity 70-80 ktpa), Russia (NZK, 60 ktpa) and South Africa (Sasol, 250 ktpa). BP (470 ktpa) and Chevron (700 ktpa) are also active in the US. LAO is also exported from the EU (in particular to Japan and elsewhere in Asia), suggesting that the appropriate geographical market definition is indeed world-wide. On this measure, BP estimates it has [25-35%] of total free market sales, with Chevron having [20-30%], Shell [20-30%], Sasol [<10%] and others [around 15%] (E Europe/ Far East). BP considers that Shell currently sources the majority of its ethylene for LAO production internally (Shell currently has c.6% of total ethylene production capacity, as compared to BP's 5% and EC's 4%), and the rest from producers other than BP or EC. There are no ethylene supply links from BP or EC to non-European LAO producers. BP estimates its share of free market sales in LAOs in 2000 at the EU level at [30-40%], with Shell having [30-40%], Spolana and Chevron [<10%] each and Sasol [<10%]. BP's major LAO customers are [...].

65. In light of the above and the merged entity's market share of around 10% on the ethylene market, the Commission considers that no competition concern arises out of this vertical relationship.

(b) ACN technology licensing and catalyst sales

66. For the reasons indicated in paragraphs [55-60], BP's position in these markets does not lead to a competition concern.

V. ANCILLARY RESTRAINTS

A. The parties' case

67. The Parties consider two long term supply agreements, concerning the supply of toluene from EC to Bayer and the supply of chlorine and caustic soda from Bayer to EC, to be directly related to, and necessary for, the implementation of this Transaction, and they therefore request that they be treated as ancillary restrictions. These agreements and the parties' reasons for considering them to be ancillary, are as indicated below.

(a) Toluene supply agreement

68. This agreement provides that EC will supply Bayer with c. [...] kt pa of toluene. This amount constitutes [...] % of EC's production capacity and [...] % of Bayer's demand in Western Europe. The duration of the agreement is [...] years.
69. Toluene is produced from refinery reformat and cracker pygas. Bayer sources toluene to produce high quality TDI ([...] %), nitro-toluenes ([...] %) and chlor-toluenes ([...] %). EC supplies Bayer's production sites in Dormagen, Uerdingen and Leverkusen. In Dormagen, EC and Bayer are linked by a dedicated pipeline, and [...] kt of the total quantity of toluene supply is delivered via that pipeline, which is the most efficient, cheapest and safest means of delivery. Logistically, it would be very difficult to deliver toluene to Bayer Dormagen by any means other than the pipeline, as no other appropriate facilities currently exist. The Bayer plant in Uerdingen is supplied by barge, and has a demand of [...] kt pa. for TDI grade quality. BP argues that there are no other suppliers available which would be able to provide Bayer with the same specifications of toluene in the same quality and quantity as EC. As regards the demand of the Uerdingen plant for TDI grade toluene, without the supplies of EC, Bayer would have to import TDI grade toluenes from outside Europe, and so would incur very significant additional costs. Therefore, without the guaranteed supply from EC, Bayer would need to construct its own toluene extraction plant. However, this is not economically viable.
70. EC has only one other toluene customer, namely [...]. [It] will not be negatively affected by this agreement in any way. In addition, it should be noted that EC plans to debottleneck its toluene capacity by approximately [...] kt pa.
71. Overall, this agreement simply reflects the commercial reality that has existed since about 1960.
- (b) Chlorine and caustic soda supply agreements
72. This agreement provides that Bayer will supply EC with c. [...] kt of chlorine per year. EC uses chlorine in its production of propylenoxide. The duration of the agreement is [...] years.
73. Chlorine is a basic chemical which is used mainly in PVC, polycarbonate and polyurethanes. Within Europe chlorine is generally used captively and on-site, since its properties make transportation dangerous. Therefore, it is also transported exclusively via pipeline from the Bayer Dormagen site to the adjacent EC plant. Bayer has undertaken major investments (of c. [...]) in order to expand its manufacturing capacity for chlorine. These substantial investments were made on the basis that Bayer could rely on a long supply agreement, since they will only be written off over [...] years until the year [...]. Due to the almost exclusive captive and on-site use of chlorine within Europe, it would be almost impossible for Bayer to find other buyers.
74. Also, EC depends upon a guaranteed long term supply agreement, given that it is not in a position to switch easily to another supplier, since the chlorine is supplied via the Bayer/EC pipeline. Due to safety reasons and the high investment necessary for unloading, storage and transportation facilities by EC, other means of transport would not be viable solutions. Moreover, the relatively large quantity demanded by EC could not be transported over a long distance due to logistical reasons. Construction of its own chlorine production plant would not be economically viable for EC.

75. BP argues that this agreement will not have any negative effects on third parties since Bayer does not supply other companies in significant quantities - i.e. almost all chlorine is used captively or transported via pipeline to EC.
76. Caustic soda is a by-product of chlorine production. It is used for various purposes, e.g. water treatment. The quantity of c. [...] kt supplied to EC is only a very minor portion of the total quantity of [...] kt of chlorine. The major part is sold to the free market. Due to its by-product quality, the supply agreement for caustic soda from Bayer to EC would necessarily have the same term as the chlorine supply agreement.
77. In support for their request for ancillary treatment, BP refers to the Commission's previous decisions concerning chlorine in RWE-DEA/Enichem Augusta (M.612) and Carbide/Enichem (M.550).

B. The Commission's assessment

78. The Commission considers that, in so far as the toluene supply agreement constitutes a restriction, the agreement cannot be considered as ancillary for longer than three years. Within such time period, it should be possible for Bayer to find alternative suppliers for the requested quality as Bayer sources already now [the majority] of its Western European demand via alternative suppliers. Likewise, EC should be in a position to find other outlets within that timeframe if necessary.
79. With regard to the chlorine supply agreement, the Commission agrees with the parties' reasoning. However, and in line with its previous decision on an ancillary chlorine supply agreement (case COMP/M.612 - RWE-DEA/Enichem Augusta, the case M.550 - Carbide/Enichem deals with an ethylene supply agreement) the agreement cannot be considered as ancillary for longer than five years. The parties did not provide any arguments that would justify a deviation from the Commission's position taken in this previous case. Furthermore, there is no justification given for ancillary treatment of the caustic soda supply agreement. The simple fact that this product is a by-product of chlorine production does not justify ancillary treatment.

V. CONCLUSION

80. 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 and Article 57 of the EEA Agreement.

For the Commission,

(signed)
Mario MONTI
Member of the Commission