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*Case No IV/M.235 -
ELF AQUITAINE -
THYSSEN / MINOL*

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 04.09.1992

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Bruxelles le, 04.09.1992

PUBLIC VERSION

MERGER PROCEDURE -
Art. 6(1)b decision

To the notifying Party

Dear Sirs,

Subject: Case n° IV/M.235 - Elf Aquitaine - Thyssen / Minol
Your notification of 03.08.1992 pursuant to article 4
of Council Regulation N° 4064/89

1. The proposed concentration concerns the acquisition by Elf Mineralöl GmbH (EMO), a subsidiary of Société Nationale Elf Aquitaine (SNEA), of Minol Mineralölhandel AG (Minol) and other assets held in trust by the Treuhandanstalt. The Treuhandanstalt is a trust institution created under public law by the German State in March 1991 to hold in trust as State property the shares of formerly state-owned enterprises in the former GDR, and to privatise, reorganise and administrate such assets. Thyssen Handel Berlin GmbH (THB), a company of the Thyssen group, is also involved in the operation.

Description of the operation

2. The operation forms part of the privatisation of East German industry following reunification. As result of the deal, Elf will invest 4,5 billion DM in the construction of a new refinery at Leuna and it will acquire Minol's distribution network of petroleum products in East Germany.

More specifically, the agreement signed on 23 July 1992 between, on the one hand, a consortium established between the Elf and Thyssen groups, and, on the other hand, Treuhandanstalt, Leuna Werke and Minol⁽¹⁾, comprises the following operations which all form an integral part of the deal:

⁽¹⁾ Leuna Werke and Minol are two formerly state-owned East German companies whose shares are held in trust by the Treuhandanstalt.

- EMO and THB will acquire 98% and 2% respectively of the capital of Minol, a company engaging in the marketing and distribution of petroleum products through a network of service stations;
- Leuna 2000, a limited partnership between EMO (2/3) and THB (1/3) will acquire certain land and ancillary facilities for the purpose of building and operating a new refinery at Leuna. The existing refining facilities at Leuna and Zeitz will be managed by RMG Raffinerie 2000 Management GmbH (RMG), a company owned by EMO (2/3) and THB (1/3), pending construction of the new refinery, and they will be dismantled thereafter;
- Leuna 2000 will also acquire a 52,5% shareholding in Mineralölverbundleitung GmbH (MVL), which owns and operates a pipeline and storage network in the new Bundesländer. These MVL shares are currently held in trust by the Treuhandanstalt. From an economic point of view, the operation of the MVL pipeline is linked to the operation of the refineries at Leuna and Zeitz.

The parties

3. SNEA and the companies in the Elf group operate in three main sectors, namely petroleum products (exploration, production, refining and distribution), chemicals (petrochemicals and fine and specialty chemicals) and hygiene-health (pharmaceuticals, parapharmaceuticals, cosmetics and bio-industries). The main activities of the Thyssen Group include production of steel, specialty steel, capital goods and manufactured products, trading in scrap raw materials and steel, project management and construction of process plants and pipelines.
4. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation N° 4064/89 and does not raise serious doubts as to its compatibility with the common market.

I. CONCENTRATION

5. Since, following the completion of the operation, EMO, either directly or through Leuna 2000 and RMG, will acquire control of Minol and the other assets involved, the operation constitutes a concentration within the meaning of Article 3(1)(b) of the Regulation.

II. COMMUNITY DIMENSION

6. The operation has a Community dimension. The worldwide turnover of the SNEA group in 1991 was 28,777 million ECU and the corresponding figure for Minol was about 1,277 million ECU. The SNEA group had a Community-wide turnover of 17,411 million ECU and all of Minol's turnover was realized in the Community. The two undertakings did not achieve more than 2/3 of their aggregate Community-wide turnover within one and the same Member State.

III. COMPATIBILITY WITH THE COMMON MARKET

7. The operation relates to the privatisation of Minol and other assets by the Treuhandanstalt. The only activities affected by the operation are refining and distribution of petroleum products.

The process of refining leads to the production of a number of petroleum products, of which the following are affected by the operation: motor fuels, fuel oil, liquid petroleum gas, bitumens, lubricants, jet fuels, bunkers and naphtha.

8. The undertakings to be acquired are active only in the new Bundesländer. However, in the present case it is not necessary to determine the exact scope of the relevant geographic market, since, as set out below, even under the narrowest market definition no dominant position will be created or reinforced as result of the proposed concentration.

Refining of petroleum products

9. The Elf group's share of the total German refining capacity is currently estimated at about 1,5%. In the short to medium term after the completion of the operation, Elf's share is expected to increase to 5%-8%.

Even assuming that the relevant geographic market were the new Bundesländer, the proposed concentration will not create or reinforce a dominant position in that market. Elf's current share of the East German refining capacity through its 8.33% shareholding in PCK Schwedt is estimated at 5%. PCK Schwedt is a refinery owned by a joint venture in which DEA and VEBA are the main shareholders. Until 1996, when the new refinery at Leuna is built, Elf's share of the East German refining capacity will increase to about 45%, through its operation and management of the Leuna and Zeitz refineries. When the new refinery is built and the Leuna and Zeitz refineries are dismantled, Elf's share will amount to 30% at the most. In view of the above and of the fact that the remaining refining capacities will be held by strong competitors, the Commission considers that there will be no creation or strengthening of a dominant position in East Germany.

Distribution of petroleum products

10. Elf's market share of the German market, both at present and following completion of the proposed concentration, is low. Elf's share is currently estimated at 2% of the total consumption of petroleum products in Germany, and between 2% and 10.2% in narrower product sub-markets. Its present network market share is estimated at about 2%. Combined with that of Minol, it will reach about 10%, and the parties estimate it at around 6-8% by the end of the century.
11. In East Germany Elf will take over Minol's distribution network of service stations, which is composed of 896 stations out of a total of about 1340 stations in the whole of East Germany. In 1991 the estimated market share of Minol in East Germany was 76% in terms of volume of sales (77% of sales of gasoline, 75% of sales of gasoil).

However, these market shares are being eroded and they will decrease further, because of the market changes taking place in East Germany. In fact, in terms of market power, Minol's current network is less important than its size would indicate. Moreover, new and important competitors have entered or are planning to enter the market.

- (i) Out of the 878 stations operated by Minol or under Minol's brand name (excluding highway service stations) Minol owns only 265, which represent 45,9% of Minol's sales of gasoline and 41% of Minol's sales of gasoil. [...] ⁽²⁾ of these stations are currently the object of restitution claims, [...] ⁽³⁾.

Most of the remaining stations are owned by local communities, private persons or cooperatives and they are operated by Minol under short-term (generally one-year) dealer contracts (460 stations). Loss of contract to competition is, as a result, possible. In fact, during the period from 1/1/1991 to 30/6/1992 Minol lost 114 of these stations to competitors and independent operators.

122 stations are currently operated by 6 Joint Ventures between Minol, on the one hand, and Aral, DEA, Agip, May and Wahrlich, on the other hand. [...] ⁽⁴⁾.

Finally, the size of Minol's network will be further reduced, because under the agreement with the Treuhandanstalt, Elf is obliged to sell 10% of Minol's service stations to medium sized competitors (average quality mix).

The quality of the service stations in Minol's network, in terms of equipment, location and other criteria, is varied. A large part of the service stations requires restructuring in order to be able to meet Western standards. According to a report prepared for the parties by the Dresdner Bank, [...] ⁽⁵⁾ stations were qualified as "transfer stations" (to be divested) and the ability of further stations to survive was questioned. [...] ⁽⁶⁾.

- (ii) Since 1990 291 new service stations have been built in East Germany by important competitors (Esso, Shell, BP, Aral, DEA, Agip, Total, Fina, Jet) and 359 further stations are under construction or concrete planning. According to Elf's competitors, by 1996, 1225 new service stations will be in operation in East Germany.

(2) Over 100. The exact figure is a business secret.

(3) Confidential information relating to stations which are currently the object of restitution claims.

(4) Details of the joint venture agreements which constitute business secrets.

(5) Deleted business secret.

(6) Deleted business secrets.

Elf itself is planning to build [...] ⁽⁷⁾ new service stations by 1996 to counterbalance part of the above mentioned losses of service stations from the existing Minol network. In order to compensate partly for these losses the Treuhandanstalt has agreed to offer Elf suitable sites for the construction of new service stations. Elf has stated in this respect that these sites are intended for the replacement of some of the lost service stations and not for the construction of additional stations. The Commission has taken this statement into account in assessing the market situation in East Germany.

The market evolution in East Germany is demonstrated by Minol's loss of market share within a short period of time. Only in the first half of 1992 Minol's estimated share fell to 59% of total East German sales (65% of sales of gasoline, 56% of sales of gasoil), and, during the same period the share of its competitors doubled ⁽⁸⁾. For the reasons set out above, it is expected that Minol's share will decrease further in the future (Elf has stated that it expects to maintain a 34% market share by 1996 and a 25% market share by the year 2000).

As a result, it is concluded that Minol's current market shares are subject to a downward trend and Minol's real market power in the East German market for distribution of petroleum products is less than these shares would indicate.

12. Competitors argue that Elf's right, under the Management Agreement with the Treuhandanstalt, to manage the existing refineries at Leuna and Zeitz, pending construction of the new refinery, gives Elf access to the products of the refineries on most favourable terms and, as a result, it creates an unfair competitive advantage. This will happen because the losses of the refineries will be borne by the Treuhandanstalt and Elf will therefore be able to supply its own service stations under conditions more favourable than market conditions, at the expense of the tax-payer.

However, it is considered that Elf will not be able to operate the refineries to its own advantage for the following reasons. The Management Agreement provides that the manager of the refineries, namely Elf, shall try to obtain the most favourable conditions for the refineries with regard to all sales and supply contracts, and that it shall deal with affiliated companies at arm's length and on commercially reasonable terms. In order to ensure that these safeguards are properly enforced, the Treuhandanstalt has stated in a letter to the Commission that it shall exercise

(7) Deleted business secret.

(8) If independent operators are excluded and market shares are calculated on the basis of the sales made by service stations operated by Minol or other petrol companies, the evolution of market shares would be the following:

- in terms of gasoline: in 1991, Minol 85%, others 15%;
in the first half of 1992, Minol 65%, others 35%.
- in terms of gasoil: in 1991, Minol 75%, others 25%;
in the first half of 1992, Minol 66%, others 44%.

its inspection rights under the Management Agreement both by an internal team of experts and through certification by an independent consultancy. The aim of the inspection will be to verify, on the basis of objective market data (such as Platt, Oil Market Report, Reuter), that the products of the refineries are priced according to market conditions.

13. Minol's distribution network also includes 50 depots of various sizes of a total capacity of about 504,900 m³. The three largest depots representing 65% of Minol's total capacity are Rostock (137,500 m³), Seefeld (60,000 m³) and Hartmannsdorf (130,700 m³). 16 depots, including the one in Rostock, are currently the object of restitution claims.

The total capacity of the depots operated by independent companies in East Germany is estimated at about 240,000 m³. However, competitors argue that, in the short-term, this capacity is not considered to be sufficient to meet supply needs, at least in certain parts of East Germany, for the following reasons. First, a large part of that capacity can only be used for the storage of diesel and heating oil, and not for the storage of gasoline for which a special license is required. Second, depots can be considered as substitutable sources of supply only within a certain range (normally about 100 to 150 km, less in East Germany, in view of poor road conditions), especially for service stations with small storage capacity. Supplies from West Germany (including West Berlin), to East Germany were made in the past only to a limited extent (up to 25% in the last six months). Moreover, although several depots of significant capacity are planned to be built by oil companies or independent operators in East Germany, it is estimated that they will not be operational for another few years.

On the basis of the above it could therefore be argued that, over the next few years, Elf's competitors in East Germany would depend to a certain extent on Minol's depots for their supplies. However, at the Commission's request, Elf has sent to competitors which operate service stations in the new Bundesländer legally binding offers to enter into a general agreement on the use of Minol's depot facilities. Under these agreements, Elf will engage to give competitors throughput rights and supplies from Minol's depots on commercially acceptable terms based on local conditions (cost + margin). Arbitration by mutually agreed independent experts will be provided in case of disputes relating to the application of the agreement. The general agreement shall be valid for an initial period of two years, to be extended if the competitor has not developed sufficient alternative solutions for reasons outside its control. The offer will be open for at least one month after it has been made.

14. With regard to highway service stations in East Germany, the situation is as follows. Out of a total of 44 stations Minol operates 18 on its own, and 16 more stations through joint ventures with competitors. The number of service stations operated by competitors alone were 14 as of July 1992.

It is doubtful whether there is a separate relevant market for highway service stations in Germany, because no toll system exists and drivers can easily use service stations

off the highways. The exact definition of the relevant market can be left open, however, since even under a narrow market definition, no dominant position will be created or reinforced for the following reasons:

- after the dissolution of the joint ventures, Minol will operate about half of the service stations concerned;
- competitors are planning to open new highway service stations in East Germany in the near future;
- under the agreement with the Treuhandanstalt, the 18 stations operated by Minol will be transferred to the Autobahn Holding Company, which intends to lease them to Minol under 25-year lease agreements. It is considered that this intended lease constitutes a separate operation which falls outside the scope of the notified concentration.

15. In view of the parties' position in the markets for refining and distribution of petroleum products as well as the ongoing market evolution in East Germany, and on the basis of the above-mentioned statements of the Treuhandanstalt and the legally binding and irrevocable offers made by Elf, it is concluded that the proposed concentration will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6 (1) (b) of Council Regulation No. 4064/89.

For the Commission,