EN

Case No COMP/M.3110 - OMV / BP (SOUTHERN GERMANY PACKAGE)

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REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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COMMISSION OF THE EUROPEAN COMMUNITIES

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NOT TO BE PUBLISHED

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

Subject: Case No COMP/M.3110 – OMV / BP ("Southern German Package") Notification of 02.05.2003 pursuant to Article 4 of Council Regulation No 4064/89[1]

1. On 02/05/2003 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (Merger Regulation) by which the undertaking OMV Aktiengesellschaft ("OMV", Austria) acquires, within the meaning of Article 3(1) (b) of the Merger Regulation, sole control of certain of BP p.l.c.'s ("BP", UK) business activities in Southern Germany.

2. After examining the notification, the Commission has concluded that the notified operation falls within the scope of the Council Regulation (EEC) No. 4064/89 and that it does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

3. The OMV group is mainly active in the exploration and production, refining and distribution of mineral oil products. It operates a service station network under the brand names OMV and Stroh. Under the name Austria Mineralöl, OMV also markets

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).

heating oil. Further, OMV is active in the chemical industry and the exploration, production and distribution of gas.

4. BP is the holding company of a multi-national exploration, petroleum and petrochemicals group comprising four core businesses: (1) the exploration and production of crude oil and natural gas; (2) oil refining, marketing, supply and transportation; (3) manufacturing and marketing of petrochemicals and related products, and (4) solar energy.

II. THE TRANSACTION

5. The transaction concerns the acquisition by OMV of shares in certain BP subsidiaries (especially formed for the purpose of this transaction) and certain BP assets, essentially a number of service stations in Southern Germany, a shareholding in the Bayernoil refinery and a shareholding in the Transalpine oil pipeline. By this operation, OMV will acquire sole control of the business operations known under the name of "Southern Germany Package" ("Package").

6. The Package comprises more specifically (i) 247 service stations located in Germany; (ii) part of BP's Bayernoil refinery business, including a 45% participation in Bayernoil Raffineriegesellschaft mbH (hereinafter "Bayernoil refinery" or "Bayernoil") as well as related assets and products; and (iii) an 18% interest (and corresponding throughput rights) in the three TAL-companies (Transalpine Ölleitung in Österreich Gesellschaft mbH, Deutsche Transalpine Ölleitung GmbH and Società Italiana per l´Oleodotto Transalpino S.p.A.), which are operating the Transalpine pipeline system going from Northern Italy via Austria into Bavaria for the supply of crude oil to the Southern German refineries (hereinafter „TAL").

7. In the merger control proceedings before the German Federal Cartel Office in the case BP/E.ON[2], which was initially notified to the Commission[3] and then partially referred to the German Federal Cartel Office FCO)[4], BP committed to sell certain assets to third parties. BP's Bayernoil business consists of refining activities, including a share of the Bayernoil refinery's capacity. Bayernoil operates a crude oil refinery producing diesel, petrol, liquid petroleum gas (LPG), jet fuel (Jet A1), light fuel oil, heavy heating oil, bitumen, naphtha and propylene. By selling the Southern Package, BP will have complied with all its divestiture commitments.

8. BP will retain a direct shareholding of 10% in Bayernoil and an indirect shareholding of 25%. The remaining 20% are held by Agip. BP will also retain a 4% interest in TAL.

9. The German FCO has been informed of the present transaction. By letter of 4 March 2003, the German Federal Cartel Office acknowledged that it considers OMV to be a suitable purchaser of the Southern Germany Package.

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2 Federal Cartel Office, B 8-130/01-BP/E.ON

3 Case No. COMP/M.2533 - *BP/E.ON*.

4 Case No. COMP/M.2533 - *BP/E.ON*, Article 9 decision of 6 September 2001.

III. CONCENTRATION

10. Through the above purchase, OMV acquires sole control of the business of the Package. In the light of the above, it can be concluded that the operation constitutes a concentration within the meaning of Article 3 (1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

11. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion[5] (OMV €7,079 million, Package €[…] million). Each of the companies have a Community-wide turnover in excess of EUR 250 million (OMV €[…] million, Package €[…] 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.

V. RELEVANT MARKETS

12. The proposed transaction will result in (mostly small) horizontal overlaps in (i) crude oil refining; (ii) the retail sale of fuel and, to a negligible extent, the supply of automotive lubricants at retail stations; (iii) the wholesale supply of diesel; (iv) the wholesale supply of light heating oil; (v) the wholesale supply of heavy fuel oil; (vi) the ex-refinery supply of jet fuel; (vii) the supply of naphtha; (viii) the supply of bitumen and (ix) the supply of propylene.

13. It will not result in acquisition of control by OMV of the Bayernoil refinery, but it will give OMV a right to its output. OMV already operates its Burghausen refinery in Germany. The additional participation (from 7% to 25%) in TAL will confer neither unilateral control nor veto rights to OMV, but will only increase throughput rights. All TAL throughput is for captive use by the participants. The Package makes no sales of any product outside Germany. The Parties identify the following product markets:

I. <u>Product markets</u>

(a) Crude oil refining

14. The Commission has suggested that crude oil refining constitutes a separate market, *e.g.* in *BP/Mobil* [6]. However, this market is closely linked to the market for non-retail refined products (ex refinery sales). However it is not necessary to determine whether a crude oil refining market exists separately from non-retail fuel sales as no competition problems arise on either market.

(b) Retail fuel sales

15. Retail fuel sales are sales made to motorists from branded and unbranded service stations. The products sold are predominantly motor gasoline and diesel. The

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[5] 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.

[6] E.g. Case No. IV/M.727 - *BP/Mobil*;

Commission has consistently considered that the relevant market comprises retail sales of all motor fuels without the need for a further distinction[7].

(c) Non-retail fuel sales

16. Non-retail fuel sales comprise fuel sales to various categories of buyers, in particular wholesalers, who may resell to independent retailers and chains. In previous decisions, the Commission has considered that on the wholesale level each refined product (motor gasoline, Diesel, Liquefied petroleum gas (LPG), Light heating oil, and Heavy fuel oil) constitutes a relevant product market[8].

(d) Jet fuel supply

17. In previous decisions, the Commission has considered that there is a single product market for aviation jet fuel[9]. A distinction may however be made between ex refinery jet fuel sales and into plane or retail sales.

18. Retail or into plane supply (or "fuelling services") comprises supply of jet fuel at the airport under contract with the airlines, and arrangements with servicing companies that operate the airport fuelling infrastructure (storage, hydrant pipelines) and perform actual into plane fuelling services with tank trucks to the plane for a fee paid by the suppliers.

19. Ex-refinery supply comprises supply of refinery product to the into plane suppliers and the direct into plane supply. However it is not necessary to determine the precise product market for jet fuel supply as no competition problems arise on any of the alternative markets.

(e) Bitumen

20. In its decision *BP/Mobil*[10], the European Commission concluded that bitumen forms a separate product market.

(f) Propylene and naphtha

21. The Commission has considered that the petrochemical feedstock propylene constitutes a product markets separate from other petrochemicals[11]. The Commission has not, in previous decisions, determined whether naphtha constitutes a separate product though this seems likely given its chemical characteristics, uses and price.

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7 E.g. Case No. IV/M.727 - *BP/Mobil*; Case No. IV/M.1013 - *Shell UK/Gulf Oil*; Case No. IV/M.1383 - *Exxon/Mobil*.

8 E.g. Case No. IV/M.1383 - *Exxon/Mobil*; Case No. IV/M.727 - *BP/Mobil*; Case No. IV/M.1013 - *Shell UK/Gulf Oil*.

9 E.g. Case No. IV/M.1383 - *Exxon/Mobil*; .

10 Case No. IV/M.727 - *BP/Mobil.*

11 Case No. Comp/M.2345 – *Deutsche BP/Erdölchemie*; see also Case COMP/M. 2092 - *Repsol Quimica/Borealis* and Case IV/M.361- *Neste/Statoil, for naphtha Case No IV/M. 1178-Koch/Eurosplitter.*

However, given the minimal overlaps created by the transaction with respect to these products, the parties consider that the relevant product market can be left open.

II. Relevant geographic markets

(a) crude oil refining

22. The parties submit that the relevant geographic market for crude oil refining follows that of the relevant refined product and is national in scope. However, if such a market exists (see point 14) the geographic market definition may be left open for purposes of this decision because under any alternative geographic market definition, the parties' combined share does not reach 15%.

(b) retail fuel sales

23. The Commission has found the market for retail fuel sales to be national. In its *Exxon/Mobil* decision, the Commission rejected that Eastern and Western Germany constitute separate geographic markets and did not distinguish between retail sales off/on motorways with respect to the German market[12].

(c) non-retail fuel sales

24. In previous decisions the Commission has left open the question of whether the relevant geographic market for the wholesale of each of the refined products is regional or national[13]. In the case of Heavy fuel oil, which is a refinery by-product sold to large industrial customers for power generation or space heating the market is unlikely to be smaller than national. Given that on the basis of any alternative market definition the parties' combined-firm share would not exceed 15%, for purposes of this notification the geographic market definition can be left open.

(d) ex-refinery supply and into-plane or retail sale of jet fuel

25. The Parties submit that the relevant geographic market for the ex-refinery supply of jet fuel is at least national. On the narrowest possible market, i.e. local markets for supply to individual airports, there would be one affected market: supply to Munich airport.

26. Similarly for into plane sales of jet fuel, only on the narrowest geographic market definition, Munich airport, would there be an affected market.

27. The determining factor for finding local markets for the airport being supplied may be that the fuelling infrastructure is an essential facility at the retail level at each airport. This is in line with the Commission Decisions in cases Exxon/Mobil and Total/Fina/Elf, where airport infrastructure bottlenecks controlled by the merging parties where considered special circumstances leading to the finding of individual airport markets[14]. In this case the essential parts of the infrastructure are owned by the airport and not by the suppliers. However, for the purpose of this decision it is not

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12 *See footnote 8*

13 Cases No. IV/M.1383 – Exxon/*Mobil; IV/M.1628 –TotalFina/Elf.*

14 Cases No. IV/M. 1383 and M. 1628.

necessary to finally decide on the geographic markets, since on all alternative markets the transaction does not raise competition concerns.

(e) bitumen

28. The notifying parties consider that the relevant geographic market for bitumen is at least national and indeed wider. In line with Commission practice, the scope would be national[15]. In any event, given that also on a wider than national market the parties' combined-firm share would not exceed 15%, the geographic market definition can be left open for the purposes of this transaction.

(f) propylene and naphtha

29. The Commission has considered the relevant geographic market for the supply of propylene to be Western Europe[16]. For naphtha, it appears that the scope of the geographic market is also at least Western European as naphtha is an internationally traded product.

VI. COMPETITIVE ASSESSMENT

Horizontal overlaps

(a) Crude Oil Refining

30. OMV's only refining activities are in Austria and Germany. Both OMV and the Southern Germany Package are active in the refining of crude oil in Germany, through the Burghausen (OMV) and Bayernoil (Package) refineries respectively. On a national basis, since OMV's share of German refining capacity is [0-5]% and the share of the Southern Germany Package [0-5]% [5-10]% combined), the transaction will not result in any affected market for the refining of crude oil. On a wider than national basis (Germany and Austria together), the parties' combined share is [10-15]% (OMV [5-10]% and Package [0-5]%).

(b) Retail fuel sales

31. The parties' combined share with respect to the retail sale of fuel in Germany is minimal, being [0-5]% for OMV and [0-5]% for the Package, a combined [0-5]% share, based on the number of stations as well as on volume.

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15 Case No. IV/M.727-BP/Mobil. The FCO in the BP/E.ON case found a German national market for bitumen and did not find regional markets.

16 Case No. Comp/M.2345 – *Deutsche BP/Erdölchemie*; see also Case COMP/M. 2092 - *Repsol Quimica/Borealis* and Case IV/M.361- *Neste/Statoil*.

(c) Non-retail fuel sales

32. The parties are both active in the distribution of diesel and light heating oil on the wholesale level in Germany[17]. The Parties are also both active in the supply of heavy fuel oil in Germany.

33. Based on estimates of total supply in Germany, the Parties' estimated shares would be [0-5]% and [0-5]% ([5-10]% combined share) respectively in light heating oil, and [0-5]% and [5-10]% ([5-10]% combined share) in diesel. On the narrower market for light heating oil of Southern Germany, the combined share is [10-15]% (OMV [5-10]% and Package [5-10]%). On the wider than national market for light heating oil consisting of Germany and Austria together, the shares are [5-10]% and [0-5]%, a combined share of [5-10]%. For diesel, on the market comprising both Germany and Austria, shares would be [0-5]% for OMV and [0-5]% for the Package, a combined share of [5-10]%. On a larger European wide market, the combined shares would thus also be below 15%. According to the parties their market share for diesel in Southern Germany is approximately [5-10]% (OMV [0-5]%, Package [5-10]%)

34. Based on 2001 data from the Federal Office for Economics and Export Control, total supplies in Germany of heavy fuel oil were estimated at 6.9 million tons. On this basis, the Parties' shares would be only [0-5] % and [0-5]% respectively, a combined share of [0-5]%. On the wider market consisting of Germany and Austria together, the combined share also is less than 15%. (OMV [0-5]% and Package [0-5]%, a combined share [5-10]%). On a larger European wide market, the combined shares would thus also be below 15%.

35. Thus for none of these product markets competition problems arise.

(d) Jet fuel supply

36. In the market for *into plane supply* to Munich airport, the concentration would not result in overlaps, since the market share of the Package will continue to be retailed by BP. However, even if one attributes BP's retail share taken from the Package to OMV, OMV's market share would be [30-35]% (ex-Burghausen [30-35]% and BP, [0-5]%). Given that OMV faces competition from Lufthansa, Shell, Exxon Mobil, Agip and Total Fina Elf this market share will not give rise to competition concerns. All these suppliers compete on an equal footing given that the essential parts of the fuel supply infrastructure are owned by the airport (see also point 38 below).

37. Concerning *ex-refinery* supply of jet fuel, a number of different markets may be distinguished:

    a) Under a German wide *ex-refinery* jet fuel market definition, the Parties' combined share would be [5-10]% (OMV [5-10]% and Southern Package [0-5]%) on a national basis (2001 sales) and the operation would raise no competition concerns. If a German and Austrian market is considered OMV's market share would be less than 15%.

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[17] OMV also sells minimal amounts of light heating oil directly to end-consumers in the immediate vicinity of the Burghausen refinery. The volumes sold by OMV on the retail level were estimated at less than one 1 kt in 2001.

b) On the basis of *refinery output supplied to Munich Airport* (the worst case scenario), OMV would supply directly and indirectly [55-60]% the airport's requirements. This total is made up as follows, direct OMV sales […]%, sales to Lufthansa and other airlines […]% and sales to competitors (BP, Agip, TFE and ExxonMobil) […]%. These sales are covered by existing supplies from OMV's wholly owned Burghausen refinery and are all made under contracts subject to annual renegotiation. As a result of the transaction OMV will supply an additional [0-5]% share of the airport's requirements through its one-year contract with BP for jet fuel from the Bayernoil refinery. If all the third party sales were attributed to OMV, the effect of the transaction would thus be a maximum combined share of [55-60]% of ex refinery supply.

38. Even on this basis, however, with all supply contracts with airlines and with OMV's competitors being re-negotiable on a yearly basis, there is no guarantee that the present market shares will continue for the future. In addition, at the present at least [35-40]% of Munich's requirements are being supplied by OMV's competitors from five other nearby refineries (Bayernoil, Ingolstadt, Leuna, Floersheim depot and Godorf). While Burghausen's (450 kt) capacity is almost fully used, these other refineries have a total of some 350 kilotons spare capacity (this figure excludes OMV's share of the surplus capacity at the Bayernoil refinery in which it has 45% interest). Since (rail) transport costs do not appear to be significant in this context, the conclusion is that competitors will continue to have the opportunity to secure supplies from other sources already supplying the Airport at present. In addition, two more refineries would be potential supply sources to the Airport with rail transport costs equivalent to (Karlsruhe) or slightly higher (Lingen) than for the existing sources.

39. Furthermore, airline customers for jet fuel could, at least to some extent, choose to refuel ("tankering") at other airports within "short haul" distance, i.e. at distances of 3 flight hours or less from Munich. (The parties' estimate that 2/3 of jet fuel supplied to Munich is used on short haul flights).

40. Under these circumstances the operation will not give rise to competition problems in relation to the supply of jet fuel.

(e) Other refined Products

41. OMV and the Southern Germany Package both supply polypropylene, naphtha and bitumen to third parties. Also with respect to these products, the parties combined firm share does not exceed 15%:

a) OMV had minimal sales of bitumen ([…] tonnes in 2001) to third parties in Germany in 2001 and 2002. Based on total estimated supplies in Germany the estimated share of the Package would be [0-5]%. On the wider market consisting of Germany and Austria together, the combined share is also below 15% (OMV [5-10]% and Package [0-5]%, a combined share [10-15]%). On a larger Western European basis, the share would thus also be below 15%.

b) For naphtha, based on IEA Statistics (EU production), each party's estimated share would be less than [0-5]% (combined [0-5]%) EU-wide.

c) For propylene, based on (merchant market) sales of […] kt by OMV, and total estimated Western European merchant market sales of 4 million tons, the Parties' combined share is estimated at [0-5]%.

Vertical relations

42. The concentration does not result in any vertically affected markets; all market shares being clearly below 25% for any related products.

43. In the light of the above, it can be concluded that the operation does 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 thereof.

VII. CONCLUSION

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

For the Commission

(signed)
Mario MONTI
Member of the Commission