

***Case No COMP/M.3733 -
DOW / DDE***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 26/04/2005

***In electronic form on the EUR-Lex website under document
number 32005M3733***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26/04/2005

SG-Greffe(2005) D/201950

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Sir/Madam,

**Subject: Case No COMP/M.3733 – DOW / DDE
Notification of 18.03.2005 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 18/03/2005, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 (“the Merger Regulation”), according to which the undertaking The Dow Chemical Company (“Dow”, USA) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of parts of the undertaking DuPont Dow Elastomers L.L.C. (“DDE”, USA), which is currently jointly controlled by E.I. du Pont de Nemours and Company (“DuPont”, USA) and Dow.
2. After 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.

I. THE PARTIES

3. Dow is the ultimate parent company of the Dow group of companies, which is active in plastics and chemicals, agricultural sciences, hydrocarbon and energy products and services.
4. DDE is a joint venture formed in 1996 and ultimately controlled by Dow and DuPont each with 50% of the shares. It is active in the elastomer business. The Commission

¹ OJ L 24, 29.1.2004 p. 1.

approved the creation of the DDE joint venture in 1996² The parts of DDE to be acquired by Dow are [description of the business to be acquired, comprising the ethylene elastomers product business, including the NORDEL[®] and ENGAGE[®] products and the TYRIN[®] product business] (referred to as the “Target Business”).

II. THE OPERATION AND THE CONCENTRATION

5. Pursuant to the series of agreements³ signed between Dow and DuPont, Dow exercised on 29 December 2004 its option to acquire certain assets from DDE. The option also triggered the sale of Dow’s remaining equity interest in DDE to DuPont. As a result, Dow will acquire sole control of the Target Business and sell its remaining equity interest in DDE to DuPont.
6. The proposed transaction concerns a change from joint control of the Target Business by Dow and DuPont to sole control by Dow. Therefore the operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

7. On 17.02.2005 the parties submitted to the Commission a referral request pursuant to Article 4(5) of the Merger Regulation which was transmitted to all Member States. No Member State expressed its disagreement within the period of 15 working days of receiving the reasoned submission. Therefore, the transaction is deemed to have Community dimension.

IV. COMPETITIVE ASSESSMENT

Introduction

8. The Target Business comprises the following elastomers: (i) NORDEL[®], which is an ethylene propylene terpolymer rubber (“EPDM”), (ii) ENGAGE[®], a polyolefin elastomer (“POE”) sold in two types of grades: ethylene octene dipolymer rubber (“EOM”) and ethylene butene dipolymer rubber (“EBM”), and (iii) TYRIN[®], a chlorinated polyethylene product (“CM”).
9. Although there exist a theoretical horizontal overlap between Dow and the target business, Dow is also active in a number of markets which are upstream and downstream of the target business and the main impact of the transaction stems from these vertical relationships.
10. In particular, Dow is active upstream in the production of ethylene, propylene and high-density polyethylene, which are used for the production of elastomers, and downstream in the production of polypropylene compounds (“PP compounds”), compounds for wires and cables and ostomy film, which use elastomers as raw materials.

² Case No IV/M.663 – Dupont/DOW, decision of 21.02.1996

³ Option Agreement, Asset Distribution Agreement and Interest Purchase Agreement, dated October 27, 2004.

Relevant markets

Horizontally related markets

11. With respect to elastomers, the product markets concerned are the markets for synthetic elastomers. There are a large number of synthetic elastomers which are classified according to their chemical composition. In its Dow/DuPont⁴ decision, the Commission found that each synthetic elastomer constitutes a separate product market. Generally, each synthetic elastomer has specific characteristics (e.g. heat and oil resistance) and/or costs which define the applications for which they may be used. These characteristics arise from the elastomer's chemical composition. Furthermore, the production of each family of synthetic elastomer requires equipment and techniques specific to that family so that it is not possible to switch the use of a facility designed to produce one elastomer to another.
12. The relevant product markets for the proposed concentration are therefore those synthetic elastomer markets acquired by Dow, namely: (i) EPDM, (ii) POE (produced in two types of grades: EOM and EBM), and (iii) CM.
13. There is a third type of grades of POE called ethylene-hexene dipolymer rubber ("EHM") but the transaction does not affect this product as neither Dow nor the Target Business make it. In any case, the question whether POE constitutes a single relevant product market or whether it can be further segmented into various separate relevant product markets (namely EOM, EBM and EHM) can be left open since the transaction does not give rise to competition concerns under either alternative.
14. With respect to the geographic scope, in its Dow/DuPont decision the Commission found that the relevant geographic market for both POE and CM was at least EU-wide, and probably larger, leaving the final definition open. The same approach can be taken in this case since, under the narrower market definition, namely the EU, the transaction does not give rise to competition concerns.
15. EPDM is not an affected market at either the EU or national levels, and therefore it is not necessary to *define* the relevant geographic market for this product.

Vertically related markets

Upstream markets

16. Only ethylene and high-density polyethylene give rise to vertically affected markets upstream.
17. Ethylene has been previously defined by the Commission⁵ as a separate relevant product market. Regarding the geographic scope, it has been concluded that the relevant geographic market is a function of the extent of the available pipeline network.

⁴ Case IV/M.663 – DOW/DuPont

⁵ Case IV/M.2389 – Shell / DEA, decision of 20 December 2001.

18. High-density polyethylene has been previously defined by the Commission⁶ as a separate relevant product market, and it has been concluded that the relevant geographic market is Western Europe.

Downstream markets

19. Only ostomy film and PP compounds constitute vertically affected markets downstream.
20. Ostomy film is used for the production of ostomy bags, which are used by patients who have undergone operations for colon cancer and therefore need a discrete way of collecting body waste. For the purposes of this case, the relevant product market is ostomy film.
21. With respect to the relevant geographic market, the parties submit that it is world-wide, although they provide figures also at European level. The definition of the relevant geographic market can be left open since the final assessment, either at EU or at worldwide level, does not change.
22. With respect to PP compounds, Dow is only active in the production of these compounds for automotive applications. However, the question whether PP compounds for automotive applications constitutes a separate relevant product market or whether it belongs to a wider market comprising all PP compounds can be left open since, under the narrower product market definition, the transaction does not give rise to competition concerns. The geographic market definition can be also left open since, either at national or at EU level, the transaction does not give rise to competition concerns.

Assessment

Horizontal overlaps

23. The formation agreement establishing the DDE joint venture in 1996 made a clear separation, by application, of the areas in which Dow and DDE would be active in the sale of EOM. Thus, Dow ([20-30]%) sells EOM as a plastomer for certain applications, such as flooring, films and film-type adhesives, woven and non-woven fibres or coatings, whereas DDE ([30-40]%) sells EOM as an elastomer for such applications as general rubber, automotive, aerospace or wire and cable. Therefore, the current transaction does not introduce any significant competitive change in the market structure as the JV formation agreement precluded Dow from competing with DDE and the transaction itself is a change from joint to sole control.
24. Regarding EBM grades, they were not covered by the non-compete clauses set out in the joint venture formation agreement since at that time the parties only sold EOM. DDE started selling EBM only in the fourth quarter of 2003.
25. Dow produces FLEXOMER[®], which is also an EBM. However, Dow's presence in EBM through FLEXOMER[®] is very small. The parties' best estimate indicates that, if

⁶ Case IV/M.1671 – Dow Chemical / Union Carbide, decision of 3 May 2000.

EBM were to be considered as a separate relevant product market, the combined market share at EU level would be below [0-10]%.

26. In light of the above, the transaction does not give rise to competition concerns with respect to POE.

Vertical effects

27. The transaction gives rise to vertically affected markets only with respect to Ethylene, high-density polyethylene, ostomy film and PP compounds for automotive applications.
28. Ethylene is used for the production of POE and EPDM. Dow's market share is below [20-30]% in any region in which Dow sells ethylene and in which Dow is connected to a public pipeline network. Downstream, DDE's market shares are [30-40]% for POE and below [10-20]% for EPDM.
29. However, the transaction is not likely to produce anti-competitive effects. Firstly, as almost all ethylene produced by Dow is consumed captively, its position in the merchant market is limited to less than [0-10]%, so that any attempt to foreclose current DDE competitors is not likely to happen. DDE competitors could easily turn its purchases to other important competitors in the ethylene market in Europe such as Huntsman ([10-20]%), Total ([10-20]%), BP ([10-20]%) or Shell ([10-20]%). Secondly, POE is only manufactured by DDE in the USA (and not in Europe) and, since ethylene is not traded world-wide, a scenario in which DDE re-directs all its ethylene purchases to Dow foreclosing Dow's competitors is not possible.
30. High-density polyethylene is produced by Dow and used by DDE for the production of CM. The market shares are [0-10]% for Dow in the upstream high-density polyethylene market and [60-70]% for DDE in the downstream CM market. However, DDE's consumption of high-density polyethylene is very small (around [...] kT in 2004) compared to the Western Europe merchant market (around [...] kt), representing less than [0-10]%. Therefore, the strong position of DDE in the CM market will not be enough as to reinforce the position of Dow in the high-density polyethylene market. Furthermore, foreclosure effects in the CM market are not likely to happen since there are sufficient alternative suppliers of high-density polyethylene, such as BP ([20-30]%), Basell ([20-30]%), Borealis ([10-20]%) or Atofina ([10-20]%).
31. Regarding the ostomy film market, it is concentrated in three countries (Ireland, Denmark and France) which account for around [70-80]% of the market size. Dow's shares in these countries are [80-90]% in Ireland, [70-80]% in Denmark and [70-80]% in France. At European level, Dow has a market share of around [60-70]%. Although DDE's position in the CM market (used for the production of ostomy film) is very high ([60-70]%) the transaction will not give rise to competition concerns. First, the consumption of CM for the purposes of producing ostomy film is very small. Second, none of Dow's competitors in the ostomy film market uses CM for the production of ostomy film. [...].
32. Dow's market share in the PP compounds for automotive applications market is [0-10]% at EU level and below [20-30]% in all Member States. POEs produced by DDE are used as raw materials for the production of Dow's PP compounds products, and therefore, since DDE's market share is [30-40]%, these markets are vertically affected.

33. However, anti-competitive effects are unlikely. Firstly, Dow's presence in the downstream market is relatively small ([0-10]%), so it is very difficult to foresee any negative impact in the upstream POE market. Secondly, it would be difficult for Dow to foreclose its competitors in the PP compounds market leveraging its strong position in the POE market. Some competitors in the PP compounds for automotive applications market such as Basell ([20-30]%), ExxonMobil ([0-10]%) or Mitsui are already backwards integrated, so cannot be directly affected. Furthermore, POE grades sold by DDE which are suitable for the production of PP compounds for automotive applications represent less than [20-30]% at EU level.
34. In addition, it should be noted that the target business is currently jointly controlled by Dow, and therefore, the proposed transaction is unlikely to make any significant change to the competitive situation. Furthermore, no third parties have expressed negative concerns with regard to the transaction.

V. CONCLUSION

35. 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 (EC) No 139/2004.

For the Commission

(signed)
Neelie KROES
Member of the Commission