

***Case No COMP/M.4028 -
FLAGA / PROGAS / JV***

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

Article 6(1)(b) NON-OPPOSITION
Date: 26/01/2006

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.01.2006

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sir/Madam,

Subject : Case No COMP/M.4028 – Flaga / Progas / JV

1. On 14 December 2005, the Commission received 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”) by which the undertakings Flaga GmbH (“Flaga”, Austria) controlled by Eastfield International Holdings, Inc. and Progas GmbH & Co KG (“Progas”, Germany) controlled by Familie Julius Thyssen Beteiligungsgesellschaft mbH acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of a newly created company constituting a joint venture (“JV”) by way of purchase of shares. In a mutually interconditional transaction, Flaga acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Progas Flüssiggas HandelsGmbH (“Progas Austria”, Austria), controlled by Progas, by way of purchase of shares.

I. THE PARTIES AND THE OPERATION

2. Flaga is an Austrian company active in the wholesale and retail sales and distribution of liquefied petroleum gas (“LPG”). It is a wholly owned subsidiary of Eastfield International Holdings, Inc., a holding company incorporated in Delaware, USA. Eastfield International Holdings, Inc. is a wholly owned, indirect subsidiary of UGI Corporation, a Pennsylvania corporation listed on the New York Stock Exchange.
3. Progas is a German company active in the wholesale and retail sales and distribution of LPG. It is wholly owned by the Familie Julius Thyssen Beteiligungsgesellschaft mbH, which is a German privately held family company.

4. Progas Austria is a wholly-owned Austrian subsidiary of Progas which is active in the wholesale and retail sale and distribution of LPG in Austria.
5. By the proposed transaction, Flaga and Progas set up a joint venture company (“JV”) which they will own on a 50:50 basis. The JV will be jointly controlled by Flaga and Progas. The JV will control the former subsidiaries of Flaga and Progas in the Czech Republic, Hungary, Poland, Slovakia and Romania: Flaga will contribute to the JV all of the equity securities issued by its LPG operating subsidiaries in the Czech Republic and in Slovakia, and Progas its operating subsidiaries in Poland, Slovakia, Czech Republic, Hungary and Romania. The JV will have its own independent management, charged with determining and carrying out its day-to-day commercial policies and will have sufficient assets and resources required to conduct its daily operations as an autonomous economic entity. For these reasons, the creation of the JV is to be considered as a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
6. In a mutually interconditional transaction, Progas will sell all of the equity interests it owns in Progas Austria, its LPG distribution system in Austria, to Flaga. Progas Austria will become a wholly-owned subsidiary of Flaga and not a subsidiary of the newly created JV. According to the draft share purchase agreement, the two transactions are conditional upon each and can only be implemented together¹. Since both transactions are therefore closely connected in that they are linked by condition, they are treated as one and the same concentration.

II. COMMUNITY DIMENSION

7. The notified concentration does not meet the turnover thresholds of Article 1(2) and 1(3) of the Merger Regulation, because the combined aggregate worldwide turnover of Flaga and Progas is less than EUR 500 million (Flaga EUR [...] million, Progas EUR [...] million in 2004). Furthermore, the combined aggregate turnover of Flaga and Progas is not more than EUR 100 million in each of at least three Member States.
8. On 27 October 2005 the parties informed the Commission in a reasoned submission, that the transaction, which is a concentration within the meaning of Article 1 of the Merger Regulation and is capable of being reviewed under the national competition laws of at least three Member States, should be examined by the Commission. The Member States which according to the reasoned submission are competent to examine the concentration (Austria, Germany and Poland) did not within 15 working days express their disagreement to the request of referral. The case was therefore deemed to have a Community dimension.

III. RELEVANT MARKETS

Relevant product market

9. The parties of the concentration are both active in the wholesale and retail sales and distribution of LPG. LPG consists of a mixture of butane and propane gas, which are the by-product of either oil refining or natural gas extraction. Despite a number of

¹ „...sollen die [...] genannten Beschlüsse und Verträge (zusammen: „Maßnahmen“) nur gemeinsam durchgeführt werden und sich wechselseitig bedingen, so dass bei Unterbleiben einer dieser Maßnahmen auch die anderen Maßnahmen nicht durchgeführt werden.“, draft share purchase agreement between the parties.

technical differences (different pressures and boiling points, which determine how they are stored and conditioned), butane and propane appear mutually interchangeable for most uses (with the exception of LPG car fuel, which is always a mixture of the two gases)².

10. LPG is used for cooking, hot water production, heating or cooling in the residential sector and the commercial sector, for the heating of greenhouses, drying of cereal, weeding and heating of breeding places in the agricultural sector as well as for industrial food production, ceramics, special metallurgical processes, welding asphalt treatment and as autogas.
11. While in the past the Commission considered LPG to constitute a separate market³, not substitutable to most other energy sources, the parties submit that nowadays the relevant product market should include alternative energy sources, especially natural gas and possibly electricity. According to the parties, a wider market definition would be justified by the fact that the natural gas network has significantly expanded over the past five years throughout Europe. The parties also submit that in local areas where natural gas is not present, electricity appears to be a very close substitute to LPG sold in bulk. The market investigation has confirmed that in the presence of a developed network, natural gas is considered as an alternative energy source. However, respondents to the market investigation also pointed out that access to a gas network is not yet provided everywhere. For the purpose of the present decision it can be left open whether the relevant product market comprises other energy sources than LPG, since, regardless of the precise market definition the transaction will not give rise to competition concerns
12. Because of the different kinds of methods of distribution and the different composition of LPG products (propane, butane, or a mixture of both) Flaga and Progas submit that the general LPG market should be divided into the following three market segments: LPG sold in bulk (“bulk”), LPG sold in cylinders (“cylinders”), and LPG sold as car fuel (“autogas”). This is line with previous Commission practice⁴. This subdivision of the LPG market has been confirmed in the framework of the market investigation.

LPG sold in bulk

13. LPG sold in bulk is characterized by the supply of propane from storage facilities of the LPG distributors, such as Flaga and Progas, directly to the end-customer. According to the parties, the majority of bulk tanks installed at customer locations are owned by the LPG distributors and leased to the customer. The supply agreements for the delivery of propane are generally exclusive annual agreements terminable by the customer upon six months prior notice. Switching can take place after the first year of the supply contract. Customers can also own their own tank, although this is less common.
14. In light of the same methods of distribution and the same product forms, the parties submit that it is not necessary to break down the bulk market any further. However,

² COMP/M.1628 - *TotalFina/Elf*

³ COMP/M.1628 - *TotalFina/Elf*

⁴ COMP/M.1628 - *TotalFina/Elf*

in *TotalFina/Elf*⁵ the Commission considered a possible distinction between LPG sold in bulk for mainly domestic purposes (small bulk segment) and LPG sold in bulk for industrial use (medium and large bulk segment) but left the exact market definition open. A number of respondents to the Commission's market investigation have confirmed this further distinction. The costs in installing the bulk tanks seem to vary significantly depending on the tank size. However, for the purpose of this decision, the definition of the relevant product market for LPG sold in bulk can be left open, since, regardless of the precise market definition, the transaction will not give rise to competition concerns.

LPG sold in cylinders

15. Cylinders contain LPG based on propane or propane mixed with butane. According to the parties, the cylinders are usually returnable cylinders owned by the LPG distributor. They are first bottled in bottling centers before being sold to end-users. These bottling centers are usually located at a bulk storage facility/storage depot. The cylinders then get delivered by truck to the customers, who are the end users, or to distributors. These distributors can be branded dealers, non-branded dealers or retail stores (i.e. service stations, supermarkets, superstores and through traditional outlets like hardware shops, grocery shops and bars).
16. According to the parties, it is not necessary to further differentiate the cylinder market. This is line with previous Commission practice⁶ and has been confirmed by the market investigation.

Autogas

17. Autogas is a niche product that is used by vehicles with a dual system (fuel and autogas). It has a particularly low emission status and is very environment-friendly. Therefore it is taxed lower than fuel and diesel in many countries.
18. In *OMV/BP*⁷ the Commission considered retail fuel sales and non-retail fuel sales as separate relevant product markets. In previous decisions⁸, the Commission had furthermore taken the view that for retail fuel sales, the relevant market comprises retail sales of all motor fuels (motor gasoline, diesel and autogas) without the need for a further distinction. For the purpose of this decision, the definition of the relevant product market for retail sales of autogas can be left open, since, regardless of the precise market definition, the transaction will not give rise to competition concerns.
19. Concerning the wholesale of autogas, the parties submit that it is particularly easy to distribute. LPG distributors buy the mixture of propane and butane and deliver it to the gas stations either from their storage depots or directly from the refinery. According to the parties, their customers are mainly small, independent gas stations, which are in competition with the service stations operated by the multinational

⁵ COMP/M.1628 - *TotalFina/Elf*

⁶ COMP/M.1628 - *TotalFina/Elf*

⁷ COMP/M.3110 – *OMV/BP*

⁸ 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*.

companies like OMV, Shell, BP and Agip. In *OMV/BP*⁹ the Commission considered the wholesale of LPG a separate product market. For the purpose of this decision, the definition of the relevant product market for wholesale autogas can be left open, since, regardless of the precise market definition, the transaction will not give rise to competition concerns.

Relevant geographical market

20. In the notification, the parties suggested that the LPG market is national in scope. According to the parties, the LPG distribution is organized on a national level, although, with the enlargement of the EU and the disappearance of barriers, there seems to be an element of cross-border trading in some markets in Central European countries. Moreover, according to the parties, LPG is a product that is generally transported over short distances, so that the geographical market could even be considered as regional, especially in big countries.
21. The proposed geographical definition of the various affected markets¹⁰, i.e. national, appears consistent with the previous practice of the Commission¹¹ and has been broadly confirmed by the market investigation.

IV. COMPETITIVE ASSESSMENT

22. There is no overlap between the parties' activities in three of the five countries where the JV will be active (Hungary, Poland and Romania). Furthermore, the parties are not active on the Austrian autogas market, and only have a [0-10]% market share on the market for retail sales of autogas in the Czech Republic and Slovakia. Therefore, the market investigation has focused on the markets for (i) LPG sold in bulk in Austria, the Czech Republic and Slovakia; (ii) LPG sold in cylinders in Austria, the Czech Republic and Slovakia; and (iii) wholesale sales of autogas in the Czech Republic and in Slovakia.
23. The parties submit that they do not acquire enough volume of LPG to purchase it directly from the refineries and that they buy around [...] of their LPG supply from [...]. The parties buy the remaining LPG from traders who have significantly greater buyer power to obtain LPG directly from the refineries. The parties submit that the proposed transaction should put the JV in a position to buy LPG directly from the refineries and therefore enable it to compete more vigorously with the vertically-integrated major oil companies. The market investigation confirmed that vertical integration increased to a certain extent the flexibility in product acquisition, storage and distribution. However, it was generally not considered as the key success factor in the LPG markets.
24. The parties consider that the Czech and Slovak markets for LPG sold in bulk, LPG sold in cylinders and wholesale sales of autogas are undergoing rapid change and are expanding. They furthermore believe that demand in these countries is growing and that there are numerous new market entrants. The market investigation has confirmed that barriers to entry are relatively low in these countries.

⁹ COMP/M.3110 – *OMV/BP*

¹⁰ Austria, the Czech Republic and Slovakia in the present case

¹¹ COMP/M.1628 - *TotalFina/Elf*

25. By contrast, the parties submit that the Austrian markets for LPG sold in bulk and cylinders are mature. Future growth is expected to be minimal. This has been confirmed by the market investigation. Major competitors stated that the Austrian LPG markets are contracting, given that an increasing number of customers have recently switched to renewable energies.

LPG sold in bulk

26. The parties submit that despite ownership of the tank by the LPG distributor and the existence of an exclusive supply contract, customers do at times purchase LPG from other LPG distributors on a spot basis. However, respondents to the market investigation pointed out that the bulk storage tank is usually owned by the supplier and that in these cases it would be illegal to use it for storage of LPG supplied by competitors.

Austria

27. On the Austrian market for LPG sold in bulk, the parties' combined market share in 2004 was [20-30]% (Flaga [20-30]%, Progas [0-10]%). Major competitors include Primagas ([10-20]% market share in 2004), Tyczka ([10-20]% market share in 2004), BP ([10-20]% market share in 2004) and OMV GAS ([10-20]% market share in 2004).
28. On the basis of a further sub-delineation of the market into small bulks and medium/large bulks, the parties' combined market share on the Austrian market for small bulk LPG in 2004 was [30-40]% (Flaga [20-30]%, Progas [0-10]%). Main competitors include Primagas ([20-30]% market share in 2004), BP ([10-20]% market share in 2004) and Drachengas ([0-10]% market share in 2004). According to the market investigation, small bulk customers are particularly protected by the Austrian consumer law. While suppliers usually insist on exclusive supply contracts and keep the ownership of the storage tanks, small bulk customers have contracts which can be terminated at two months notice. Furthermore, residential customers have the right to terminate immediately a supply contract in case they do not agree with price increases.
29. On the Austrian market for industrial bulk, the parties' combined market share in 2004 was [0-10]% (Flaga [0-10]%, Progas [0-10]%). Major competitors include Tyczka ([30-40]% market share in 2004), OMV Gas ([30-40]% market share in 2004) and Primagas ([10-20]% market share in 2004).
30. For both alternative market definitions as regards LPG sold in bulk, the proposed transaction will only lead to a limited increments in market share on the market in Austria. The market remains sufficiently fragmented, with a number of differently sized competitors. Although the parties' market share is higher on the hypothetical market for residential bulk customers, it still is not indicative of dominance in the present case, and the parties would be likely to face strong competition from a number of competitors, in a sufficiently fragmented market. Furthermore, this customer group is particularly protected by Austrian consumer law regarding the right to terminate a supply contract, particularly in case of price increases. In view of the above and independently of the market definition, the proposed transaction does not raise any competitive issues on the Austrian market for LPG sold in bulk.

Czech Republic/Slovakia

31. On the Czech market for LPG sold in bulk, the parties' combined market share in 2004 was [20-30]% (Flaga [10-20]%, Progas [0-10]%). Major competitors include Bohemia Gas/Primaplyn ([20-30]% market share in 2004), Shell Gas ([0-10]% market share in 2004) and Tomegas ([0-10]% market share in 2004).
32. On the basis of the further sub-delineated market definition (small vs. medium/large bulk), the parties' combined market share on the Czech market for small bulk LPG in 2004 was [20-30]% (Flaga [10-20]%, Progas [10-20]%). Major competitors include Bohemia Gas ([10-20]% market share in 2004) and Primaplyn ([0-10]% market share in 2004). According to the market investigation, 50% of these residential customers own their storage tank and can therefore freely choose their supplier.
33. On the Czech market for industrial bulk, the parties' combined market share in 2004 was [20-30]% (Flaga [10-20]%, Progas [0-10]%). Major competitors include Bohemia Gas ([10-20]% market share in 2004), Primaplyn ([0-10]% market share in 2004) and Shell Gas ([0-10]% market share in 2004).
34. Independently of the market definition, the proposed transaction will lead to a small increment in market share on the market for LPG sold in bulk in the Czech Republic. The market will remain sufficiently fragmented, with a number of active competitors. Furthermore, the market investigation has confirmed barriers to entry to be low. In view of the above, the proposed transaction does not raise any competition concerns on the Czech market for bulk.
35. On the Slovak market for LPG sold in bulk, the parties' combined market share in 2004 was [20-30]% (Flaga [20-30]%, Progas [0-10]%). Their main competitor is Probugas ([50-60]% market share in 2004) with many small competitors accounting for the rest of the market.
36. On the basis of a narrower market definition, the parties' combined market share on the Slovak market for small bulk LPG in 2004 was [20-30]% (Flaga [20-30]%, Progas [0-10]%). Their main competitor is Probugas ([50-60]%) with many small competitors accounting for the rest of the market.
37. On the Slovak market for industrial bulk, the parties' combined market share in 2004 was [20-30]% (Flaga [20-30]%, Progas [0-10]%). Their main competitor is Probugas ([50-60]% market share in 2004) with many small competitors accounting for the rest of the market.
38. Independently of the market definition, the proposed transaction will only lead to a small increment in market share on the market for LPG sold in bulk in Slovakia. Furthermore, the parties face strong competition by the market leader Probugas while the rest of the market remains sufficiently fragmented. Moreover, the market investigation has confirmed barriers to entry to be low. In view of the above, the proposed transaction does not raise any competitive issues on the Slovak market for bulk.

LPG sold in cylinders

39. The sale of LPG in cylinders requires bottling facilities for filling the cylinders, which the parties own or have access to. The parties then distribute the filled

cylinders to end-customers, retail stores or local dealers, who sell them to end-customers. Customers pay a deposit for each cylinder, but there are no switching or exchange costs when the cylinder is returned. The customer gets back the deposit when returning the cylinder.

Austria

40. On the Austrian market for LPG sold in cylinders, the parties' combined market share in 2004 was [30-40]% (Flaga [30-40]%, Progas [0-10]%). Major competitors include BP ([20-30]% market share in 2004), Drachengas ([10-20]% market share in 2004), Primagas ([10-20]% market share in 2004) and Tyczka ([0-10]% market share in 2004).
41. The notifying parties have large automated bottling facilities and regularly fill cylinders also for competitors on a contractual basis. The parties therefore submit that entry barriers are very low. According to the parties, switching costs are also negligible. Even though there are a few exclusive distribution agreements, they are of a short term nature and easy to terminate. This has been confirmed by the market investigation.
42. Furthermore, the proposed transaction will only lead to a small increment in market share on the market for LPG sold in cylinders in Austria, and the market will remain sufficiently fragmented. The transaction therefore does not give rise to any competition concerns on this market.

Czech Republic/Slovakia

43. On the Czech market for LPG sold in cylinders, the parties' combined market share in 2004 was [20-30]% (Flaga [10-20]%, Progas [0-10]%). Major competitors include Shell Gas ([10-20]% market share in 2004), Linde Gas ([10-20]% market share in 2004), Tomegas ([0-10]% market share in 2004) and Bohemia Gas/Primaplyn ([0-10]% market share in 2004).
44. On the Slovak market for LPG sold in cylinders, the parties' combined market share in 2004 was [20-30]% (Flaga [20-30]%, Progas [0-10]%). Their main competitor is Probugas ([50-60]% market share in 2004) with many small competitors accounting for the rest of the market.
45. According to the parties, market entry is easy since access to a bottling facility and a cylinder truck is all that is needed. This has been broadly confirmed by the market investigation.
46. In view of the above, the proposed transaction does not give rise to any competition concerns on these markets.

Autogas in the Czech Republic and Slovakia

47. On the Czech market for autogas wholesale, the parties' combined market share in 2004 was [30-40]% (Flaga [10-20]%, Progas [10-20]%). Major competitors include Conoco ([10-20]% market share in 2004), Primaplyn ([10-20]% market share in 2004) and Agip ([0-10]% market share in 2004).
48. On the Slovak market for autogas wholesale, the parties' combined market share in 2004 was [40-50]% (Flaga [20-30]%, Progas [20-30]%). Major competitors include

Probugaz ([20-30]% market share in 2004) and Slovnaftlyn (>5% market share in 2004).

49. According to the parties, retail pricing in the autogas market is to a large extent determined by the pricing of the strong, vertically-integrated oil companies, e.g. Shell and BP, that sell LPG at their captive retail gas stations, which in turn affects the daily “spot” price for autogas on the wholesale level as well. This has been broadly confirmed by the market investigation.
50. According to the parties, because of generally low barriers to entry, there are many small “one-man” businesses that enter the market. The market investigation has confirmed that barriers to entry on the Czech and Slovak markets for the wholesale sale of autogas are relatively low.
51. In view of the above, the proposed transaction does not give rise to any competition concerns on these markets.

IV. CONCLUSION

52. 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)
Joaquín ALMUNIA
Member of the Commission