

***Case No COMP/M.4798 -
BP / ASSOCIATED
BRITISH FOODS / JV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 30/08/2007

***In electronic form on the EUR-Lex website under document
number 32007M4798***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30/08/2007

SG-Greffe(2007) D/205259/6

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.4798 - BP/Associated British Foods/JV
Notification of 25.07.2007 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 25.07.2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which BP plc ("BP", United Kingdom) and Associated British Foods Plc ("ABF", United Kingdom) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the newly created Vivergo Fuels Limited ("Vivergo Fuels", United Kingdom) by way of purchase of shares.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation but does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. THE PARTIES

3. **BP** is an energy company, active on a world wide level in the exploration, development and production of oil and gas, in the refining, manufacturing and marketing of oil products and petrochemicals and in the development of renewable energies.
4. **ABF** is an international diversified food, ingredients and retail group, active on a worldwide level.

II. THE OPERATION

¹ OJ L 24, 29.1.2004 p. 1.

5. The operation consists of the establishment of Vivergo Fuels by a joint venture agreement (JVA) between BP (through its subsidiary BP Biofuels), ABF (through its subsidiary ABF Investments) and DuPont (UK) Limited ("DuPont", UK), which will control 45%, 45% and 10% of shares respectively.
6. The joint venture will design, construct and operate a bio-ethanol plant in the UK which from 2009/2010 on will produce and market bio-ethanol to customers primarily for use as a blending material for biofuels and as co-product distillers' dried grains with solubles ("DDGS").

III. CONCENTRATION

7. The proposed operation constitutes a concentration within the meaning of Article 3(4) of the Merger Regulation as it will perform on a lasting basis all the functions of an autonomous economic entity.

Joint control

8. Under the terms of the JVA, each of ABF and BP will have possibility of blocking any major decision of the Joint Venture and, as a result, will have to reach common understanding in determining the commercial policy of the JV. ABF Investments and BP Biofuels will each have the right to appoint two directors to the board of the Joint Venture. There is a list of reserved board matters which require the approval of the directors appointed by both parties [...]. Du Pont will not have such rights and therefore is not a controlling party. ABF and BP will therefore have joint control over the Joint Venture.

Full functionality

9. The Joint venture will have adequate resources to perform on a lasting basis all the functions of an autonomous economic entity. It will operate independently on the market; it will have sufficient assets, and its own employees and management, and will be an active and independent market player in the production and supply of bio-ethanol selling the product freely to third parties in the market place. It is not envisaged that it will make significant sales of bio-ethanol to its parent companies to the extent that it would not be considered a full-function entity.

IV. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (BP EUR 211,776 million, ABF 8,768 million)². Each of them have a Community-wide turnover in excess of EUR 250 million (BP EUR [...], ABF [...]), 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. COMPETITIVE ASSESSMENT

A. RELEVANT MARKETS

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).

11. The notifying parties submit that the relevant product markets concerned by the transaction are the ones for:
- the purchase of grains as a feedstock (upstream of bio-ethanol),
 - the production of bio-ethanol,
 - the production of non-grain food ingredients ("NGFI") (co-product of bio-ethanol),
 - the retail and non-retail sale of bio-fuels (downstream of bio-ethanol), and
 - the supply of animal feed (downstream of NGFI).

Horizontal issues

Production of bio-ethanol

12. **Bio-ethanol** is ethanol that is produced from the fermentation of sugars derived from plants (as opposed to synthetic ethanol produced from natural gas or naphtha). Bio-ethanol can be sub-divided into bio-ethanol for specific uses such as alcoholic drinks or fuel. The joint venture will produce bio-ethanol for bio-fuels. The Commission has not previously dealt with these markets. Whilst BP does not produce any bio-ethanol, ABF, through its subsidiary British Sugar plc, will in September 2007 put on stream in the UK a relatively small bio-ethanol plant and therefore the creation of the JV gives rise to a horizontal overlap.
13. According to the parties the geographic scope of the market for supply of bio-ethanol is global or at least EEA-wide since there is considerable intra-Community trade, transport costs are low and imports from countries outside the EEA (such as Brazil, China or Ukraine) account for a significant share of supply on the EEA market (12% in 2006).
14. It is not necessary for the purpose of this decision to delineate the exact scope of the product and geographic market as the transaction at hand does not raise competition concerns under any alternative market definition.

Supply of NGFI

15. The bio-ethanol production process results in the production of a secondary "co-product" in the form of distillers' dried grains with solubles ("DDGS") that is obtained after the removal of ethanol during the distillation process, by condensing and drying at least three-quarters of the solids of the resultant stillage. The resulting product is turned into pellets and can be used as an ingredient in animal feed. The Commission has previously considered the DDGS to be part of a separate **NGFI** market consisting of the by-products of the oil milling industry, fish meal and the by-products of the starch and ethanol industry (including DDGS, corn gluten feed and corn germ meal)³. The NGFI is a part of a wider animal feed ingredients market. Whilst ABF is currently active in the production and supply of NGFI, the proposed JV will produce small amounts of DDGS, which as already stated form part of the NGFI market.

3 Case No. COMP/M. 4042 Toepfer/Invivo/Soules.

16. The notifying parties submit that the relevant geographic market for all animal feed ingredients, including NGFI, is at least EEA-wide since NGFI are a commodity of which considerable quantities are imported into the EEA (30% in 2005). Although the Commission has traditionally considered the market for NGFI to be EEA-wide, it has also examined the possibility of narrower market definitions which it has however left open.⁴
17. For the purpose of this decision it is not necessary to delineate the exact scope of the product and geographic market as the transaction at hand does not raise competition concerns under any alternative market definition.

Vertical issues

18. Both BP and ABF are active in a number of markets which may be considered upstream (supply of grains) or downstream (supply of animal feed and the retail and non-retail sale of fuels) of the production of bio-ethanol or NGFI.

Supply of grains

19. Grains and wheat in particular, are used as a feedstock in the production of bio-ethanol. ABF is active in the supply of grains through Frontier, the agricultural merchandising business jointly controlled with Cargill⁵. The JV will use grains to produce in the production of bio-ethanol. In line with the previous Commission decisions⁶ the parties consider that the relevant product market upstream should be the market for the **supply of grains** since any other subdivision would be irrelevant for the purpose of this case as any type of grain without differentiation can be used for the production of bio-ethanol.
20. The parties submit that the geographical scope of the market for supply of grains is at least EEA-wide given the lack of barriers to and the existence of trade between the EEA countries. Although the Commission has not dealt precisely with the market for supply of grains, it has considered in respect of other agricultural commodities, such as oil seed and intermediate oil seed products that the geographical scope of the market is global or at least EEA-wide.⁷

The supply of animal feed

21. Downstream from the production and supply of NGFI (part of a wider animal feed ingredients market) is the market for **supply of animal feed** to farmers and farm cooperatives on which an ABF subsidiary, AB Agri is active. According to the previous Commission decision, there is a separate market for complete feed and for premix (containing additives of a higher nutritional value)⁸.

4 Case No. COMP/M.4042 Toepfer/Invivo/Soules

5 See Case No COMP/ M. 3534 in respect of the creation of the Frontier joint venture.

6 Case No. COMP/M.230 Cargill/Banks, Case No. COMP/M.3385 Cargill/BCA.

7 Case No. IV/M.1376 Cargill/Continental Grain.

8 Case No. COMP/M.2956 CVC/PAI Europe/Provimi

22. As regards the geographical scope of the animal feed market, the Commission has previously held⁹ that this market is at least national given the fact that demand is strongly influenced by national demand characteristics and the transportation costs are high so they limit the distance over which animal feed can be transported.
23. However, for the purpose of this decision, the exact scope of the product and geographic market for the supply of animal feed can be left open as the transaction at hand does not raise competition concerns under any alternative market definition.

Retail and non-retail sales of bio-fuels

24. The parties submit that downstream from the market for bio-ethanol there is a market for the sale of motor fuels. Bio-ethanol is added to traditional fuels (under current fuel specifications up to 5%) to constitute so-called bio-fuels which are sold through the same channels as "non-bio" gasoline blends. In line with previous Commission practice¹⁰, the market for the sale of motor fuels and therefore by assimilation for the sale of bio-fuels, can be further sub-divided in a market for **retail sales** and a market for **non-retail sales**. While retail sales of fuels involve sales to motorists through service stations forecourts, the non-retail sales consist principally of sales to three categories of customers, i.e. non-integrated retailers, independent resellers and industrial and commercial consumers. Whilst ABF is active in neither of those markets, BP is active in both of them.

Non-retail sale of bio-fuels

25. The Commission has previously found that non-retail sales of fuels are divided into sales of gasoline, diesel, fuel oil and LPG¹¹. Although the Commission has not expressly considered the sale of bio-fuels, it appears appropriate, for the reasons stated above, to assimilate bio-fuels to non-bio fuels. Moreover, the parties submit that at the non-retail level, bio-diesel and bio-gasoline should be considered as a part of the same market as many regulatory regimes in the EU do not specify, when it comes to the obligations imposed on motor fuels suppliers pursuant to the Bio-fuels Directive, the exact division between bio-gasoline and bio-diesel.
26. With respect to the geographic scope of the non-retail sale of bio-fuels market, the parties submit that it is at least EEA-wide due to the high import and export rates, relatively low transportation costs and same level of prices throughout the EEA. However, the Commission has previously held that the geographic market for ex-refinery supply of bio-diesel may be regional on the basis of the focus of consumption, or even national due to regulatory differences in various Member States.
27. It is not necessary for the purpose of this decision to conclude on the exact scope of the product and geographic market for the non-retail sale of bio-fuels, as the transaction does not raise competition concerns under any alternative market definition.

Retail sale of bio-fuels

9 Case No. COMP/M.2956 CVC/PAI Europe/Provimi

10 Case No. COMP/M.1383 Exxon/Mobil

11 Case No. COMP/M. 1628 Totalfina/Elf.

28. The parties submit that in line with the Commission's past practice, the relevant product market is constituted by the retail sales of motor fuels with no need for a further segmentation between gasoline, diesel, LPG, bio-gasoline and bio-diesel¹². However, the Commission has held in the past that there is a separate product market for the retail sale of fuels on motorways, where demand is distinct and different in nature, and the sale of fuels off-motorways¹³.
29. In line with the past Commission's decisions, the parties submit that the geographic market for retail sales of fuels is national in scope due to overlapping catchments areas of service stations¹⁴.
30. It is not necessary for the purpose of this decision to conclude on the exact scope of the product and geographic market for the non-retail sale of bio-fuels, as the transaction does not pose competition problems under any alternative market definition.

B. ASSESSMENT

31. Should the narrowest possible market definitions be retained, the only affected product markets would be the market for non-retail sales of bio-fuels in Germany and the Austrian market for on-motorway retail sales of bio-fuels.

Non-retail sales of bio-fuels

32. On the EEA-wide market basis, BP's share of supply on the downstream non-retail sales of bio-fuels market is [0-10%]. Should narrower national markets be considered, this share would be below 25% on all national markets where BP is active except for Germany where its share of supply would be [25-30%]. However, given the modest future shares of the parties on the supply of bio-ethanol market and a relatively low BP's share on the non-retail sales of fuels market, it is unlikely that present transaction could create any possible foreclosure effects.

Retail sales of bio-fuels

33. On the basis of national markets for overall retail sales of fuels, BP's market share in terms of volume is below 25% in all countries where BP is active. Although the parties have originally submitted that with regard to the Luxembourg market this share attains [25-30%], after a more detailed research the notifying parties have submitted more recent and more detailed figures according to which BP's market share on this market is below 25% and attains only [15-20%]. On the basis of narrower product markets, i.e. on-motorway and off-motorway retail sales of fuels, BP's market shares are below 25% in all countries except for Austria, where BP's share of on-motorway retail sales of fuels reaches [25-30%]. Given the modest future shares of the parties on the supply of bio-ethanol market and a relatively low BP's share on the retail sales of fuels market be it on-motorway or off-motorway, it is unlikely that present transaction could create any possible foreclosure effects.

¹² See for example Case No. COMP/M. 1383 Exxon/Mobil.

¹³ See for example Case No. COMP/M. 1628 Totalfina/Elf.

¹⁴ See for example Case No. COMP/M. 1383 Exxon/Mobil.

VI. CONCLUSION

34. 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