

***Case No COMP/M.5445 -
MYTILINEOS / MOTOR
OIL / CORINTHOS
POWER***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 30/03/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30-03-2009

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

For information – Legal representative:

Dear Sir/Madam,

Subject: Case No COMP/M.5445 - MYTILINEOS/ MOTOR OIL/ CORINTHOS POWER
Notification of 25.02.2009 pursuant to Article 4 of Council Regulation No 139/2004¹

1. On 25 February 2009 the Commission received a notification of a proposed concentration within the meaning of Article 4 of the Merger Regulation by which Mytilineos holdings S.A. ("Mytilineos", Greece) and Motor Oil (Hellas) Corinth Refineries S.A. ("MOH", Greece) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of Corinthos Power S.A. ("Corinthos Power", Greece), a company constituting a joint venture, by way of purchase of shares.

THE PARTIES

2. **Mytilineos** is the holding company of Mytilineos group, which is active in various markets such as: (i) metallurgy and mining, (ii) EPC (i.e. engineering, procurement and construction) projects, (iii) energy including electricity generation and wholesale supply and (iv) defense vehicle manufacturing.
3. **MOH** operates in Greece in the petroleum refining sector. It is also active, through its subsidiaries, in the sale of petroleum products (retail and non-retail sales of automotive fuels, jet fuel, fuel oil, lubricants, etc).

¹ OJ L 24, 29.1.2004 p. 1.

4. **Corinthos Power** is a company incorporated in Greece currently wholly controlled by MOH. It holds an installation license for the development of a gas fired power plant of 395.9 MW capacity.

THE OPERATION

5. The envisaged operation involves the acquisition by Mytilineos of 65% stake in Corinthos Power through a special purpose vehicle, namely, ARGYRITIS GH AVEE, while the remaining 35% will be retained by MOH. Pursuant to the Joint Venture agreement, Corinthos Power will develop and operate the above mentioned 395.9 MW gas fired power plant.
6. MOH will be entitled to appoint the Chairman of the Board of Directors while Mytilineos will nominate the CEO. In addition, although Mytilineos will have the majority of voting rights within the Board of Directors, MOH will enjoy veto rights with respect to some strategic decisions of the joint venture including the approval of the annual budget and the business plan². Therefore, both parties will jointly control Corinthos Power.
7. The Agreement giving effect to the transaction also states that at a later stage all Mytilineos' shares in Corinthos Power may be transferred to Endesa Hellas, a joint venture between Mytilineos and Endesa S.A.³. However, there is no exact timeframe foreseen for this future change of control[...]. Finally, under the current transaction, the joint venture can operate [...]before Endesa Hellas acquires any rights on shares in Corinthos Power. Therefore, any possible future transfer of shares from Mytilineos to Endesa Hellas does not form part of the present transaction.
8. Corinthos Power will be a full function joint venture given that it will perform on a lasting basis all the functions of an autonomous economic unit and will have an indefinite duration. Moreover, according to the Joint Venture Agreement, Corinthos Power has the right to use the necessary land for the construction of the power plant by virtue of a [...] years lease agreement. In operational respects, it will be autonomous from its parents with regard to its management as it will have its own board of directors and CEO dedicated to the company's affairs. Furthermore, it is intended to carry out its business for its own benefit in accordance with its own business plan and annual budget. Finally, according to the Joint Venture Agreement, it is foreseen that Corinthos Power will have sufficient financial resources to operate independently on the market.

² Art. 7 of the JV agreement.

³ See Art. 7.2.5 of the JV agreement. Mytilineos and Endesa Desarollo S.L , ultimately controlled by Endesa S.A, are both shareholders of Endesa Hellas, holding, respectively, 49.99% and 50.01% of shares and voting rights. Subject to the provisions of the Shareholders Agreement, Endesa Desarollo S.L. shall at all times hold the Majority Percentage of the shares and voting rights in Endesa Hellas. [details of company governance]. **Endesa Hellas** is active in the following sectors: (i) construction and operation of thermal power plants (coal and natural gas), (ii) renewable energy sources. In addition, it holds a supply license of 310 MW to operate in the retail sale market for electricity. [Details on the use of the license].

9. It follows from the above that the joint venture is considered to be full functional and the operation constitutes a concentration within the meaning of Article 3.1(b) of the ECMR.

COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁴ (EUR 5000 million). Each of them have a Community-wide turnover in excess of EUR 250 million (Mytilineos: EUR 385 million, MOH: 2 254 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.

RELEVANT MARKETS

Relevant product markets

11. The envisaged transaction involves the following markets: (i) generation and wholesale supply of electricity, (ii) wholesale supply of refined oil products, and (iv) construction.

Generation and wholesale supply of electricity

12. The Commission has already defined, in its previous decisions, generation and wholesale supply of electricity as a separate market encompassing domestic generation of electricity at power stations within a certain geographic market as well as the electricity that is physically imported into this geographic market via interconnectors to be sold on to retailers⁵. The parties support this view.

Wholesale supply of refined oil products

13. MOH, one of the parents of Corinthos Power, is active in the market for wholesale supply of refined oil products which is vertically related to the market for generation and wholesale supply of electricity where the joint venture is intended to be operative.
14. In its previous decisions the Commission considered wholesale supply of refined oil products as being a distinct market from the sales through retail channels. Moreover this market can be further segmented along the individual types of products e.g (i) leaded and unleaded gasoline, (ii) diesel fuel and (iii) domestic heating oil⁶. For the purpose of the present transaction, affected markets are the sub-markets for (i) fuel oil or a certain type thereof ("LSFO") and (ii)

⁴ 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).

⁵ See Case No COMP/M. 4180 –Gaz de France/Suez, par. 674, Case No COMP/M.3883 – GDF/CENTRICA/SPE, par. 9, Commission decision of 26 XI 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (case COMP39.388-German electricity wholesale market).

⁶ COMP/M.1628 – Totalfina/Elf par. 27.

for diesel or a certain type thereof ("ADO")⁷ since they are the main fuels used for power generation by oil fired power plants in Greece⁸. In this regard, it is to be noted that an estimated 7% to 10% of electricity produced in Greece originates from oil fired power plants using either diesel or fuel oil.

15. In addition, the Commission held that within the wholesale level a further segmentation may be necessary between ex-refinery cargo sales and non-retail sales⁹.
16. Despite the large quantities associated with sales of refined oil products to power generators, from the parties' submissions there is no information pointing towards a market for ex-refinery cargo sales when MOH supplies oil products to electricity generators. This is in particular because these are supplies to final industrial consumers as they are made with a view to being used for power generation rather than for further resale and/or retail supply downstream.
17. In addition, whilst MOH produces refined diesel (ADO) products, it purchases fuel oil (LSFO) from other refineries outside Greece which, in turn, are delivered directly to the final client's port facilities in Greece. Therefore, MOH is not involved in any onward logistics and supply operations from the port facility (as it would particularly occur in the case of ex-refinery cargo sales) but would simply manage the contractual relationship with its costumers.
18. Therefore, MOH's sales to power plants can be best categorized as non-retail sales rather than as ex-refinery sales.
19. However, there is no need to ultimately decide on the product market definition as the envisaged transaction does not give rise to competition concerns.

⁷ According to the parties' submissions, diesel oil can be used as a backup fuel by certain gas fired power plants in case of natural gas supply disruption.

⁸ Due to the existing environmental legislation, all inland combustion sources are obliged to use fuels of low sulfur content as of September 1st 2007. Hence, diesel consumed must adhere to Automotive Diesel's (ADO) specifications (50 ppm max Sulphur, 10 ppm by January 1st 2009) while Fuel Oil's (LSFO) sulphur content must be 1%wt max.

⁹ COMP/M.4926 - Basell/ Berre L'Etang Refinery, COMP/M.1383 - Exxon/Mobil, COMP/M.727 - BP/Mobil, COMP/M.3291 - Preem / Skandinaviska Raffinaderi, COMP/M.4348-PKN/Mazeikiu.
The *ex-refinery cargo sales* consist of large volume sales by refiners directly at the refinery gate or delivered by primary transport (i.e. generally by rail, pipeline, ship or barge) to client terminals (storage facilities) inland or abroad. The customers in this case are wholesalers, traders or internal wholesale arm of the refiners which usually own or rent large storage facilities. The *non retail sales* consist, instead, of smaller volumes usually directed from the supplier's inland storage facilities, which are delivered by secondary transport (generally by truck) to the clients premises. Customers are generally branded and unbranded service stations, independent smaller resellers, industrial and commercial consumers (e.g. transport companies) and public institutions (hospitals, army).

Construction

20. METKA, a subsidiary of Mytilineos, is active in the market for construction, including construction of power plants. Therefore, a further vertical relationship arises given that METKA has in recent years undertaken the construction of a number of power plants in Greece.
21. Previous Commission decisions defined the market for construction as a separate market. A further delineation between the markets for construction of large projects¹⁰ as opposed to the market for the construction of smaller projects¹¹ was also considered without taking a definitive position on the market definition. Moreover, according to the Commission's practice, the market for construction projects can be further divided into "building construction", "civil engineering" and "mechanical and electrical services"¹². In that respect, METKA operates on all three of the relevant construction activity submarkets.
22. In the parties' view the market for the construction of power plants cannot be considered as a distinct relevant product market, because of the supply-side substitutability among the companies active in the construction of big utility projects. In any case, the exact delineation of the relevant product market can be left open, given that the notified concentration does not give rise to any competition concerns.

Relevant geographic markets

Generation and wholesale supply of electricity

23. From a geographical perspective, the Commission has consistently considered this market to be national in scope¹³. In the case of Greece, a distinction may be made between the interconnected system (i.e mainland Greece and interconnected islands) and the non-interconnected system¹⁴. The latter includes certain islands which account for approximately

¹⁰ Large projects are power plants, other utilities projects, roads, factories, etc.

¹¹ See for example: a) case COMP/M.1877 BOSKALIS/HBG, at par.7 et seq. with regard to the distinct market for dredging projects where it is mentioned that: "...a distinction is made between large international projects and small national projects on the basis of the value of the projects", b) case M 3754 STRABAG / DYWIDAG at par.13.

¹² See for example case M 874 AMEC /FINANCIERESPIE BATIGNOLLES/ SPIE BATIGNOLLES.

¹³ See Case No COMP/M. 4180 – Gaz de France/Suez, par. 696 et seq, Case No COMP/M.3883 - GDF/CENTRICA/SPE, par. 21, Commission decision of 26 XI 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (case COMP39.388-German electricity wholesale market).

¹⁴ See Case No COMP/M.3440 – ENI/EDP/GDP par. 76 et seq. and case Edison/Helpe (Case No COMP/M.5249).

8% of total Greek electricity demand¹⁵. For the purpose of the present case the exact definition of the geographic market can be left open since the joint venture will be active only on the Greek interconnected system and in any case there are no competition concerns as a result of the concentration.

Wholesale supply of refined oil products

24. The Commission in its previous decisions considered different geographic scopes for the two segments of the wholesale market. For the market for ex-refinery cargo sales of refined oil products the geographic scope was either likely to be EU/Western Europe wide¹⁶, EEA or CEE-wide, including the Baltics¹⁷ or regional wide (in Scandinavia)¹⁸, without deciding on the market definition. With regards to the market for non-retail sales it considered that markets could be regional¹⁹ or national in scope²⁰.
25. The notifying parties maintain that based on the characteristics of the Greek markets for wholesale supply of fuel oil and diesel, there does not exist a national market but rather the market should be regarded as being EU or at least regional. (i.e. Greece and neighboring countries, such as Italy, Romania, Bulgaria, Turkey, Cyprus, Serbia and countries of Middle East and North Africa)
26. In any event, the geographic market definition can be left open as no concerns result from the transaction concerned.

Construction

27. The Commission considered the geographic scope of the markets for construction as being national or EEA wide²¹ without taking a definitive position on the market definition. The parties argue that the relevant market should be the whole of the EU, since most of the large projects are awarded through tender procedures in which many foreign companies participate. In any event, METKA's market share does not exceed 15% under any possible market definition.

¹⁵ See also recital 172 in the Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite (COMP Case 38700) where the Commission only addressed the interconnected system in its competition analysis.

¹⁶ COMP/M.727 - BP/Mobil

¹⁷ COMP/M.4348-PKN/Mazeikiu.

¹⁸ COMP/M.3291 - *PREEM/SKANDINAVISKA RAFFINERADI*

¹⁹ COMP/M.3291 - *PREEM/SKANDINAVISKA RAFFINERADI*

²⁰ COMP/M.3543 - PKN Orlen/Unipetrol.

²¹ Case No COMP/M.3754 – Strabag / Dywidag, COMP/M.5200 Strabag/Kirchner, COMP/M.1877 BOSKALIS/HBG

28. The same considerations apply to a possible submarket for the construction of power plants. However, for the purpose of the present case there is no need to ultimately decide on the geographic market definition as no competition concerns arise from the envisaged transaction.

IV. COMPETITIVE ASSESSMENT

29. Based on the above, the envisaged transaction relates to the following markets. The vertically affected markets for (i) wholesale supply of diesel and fuel oil and the market for generation and wholesale supply of electricity and (ii) construction and the market for generation and wholesale supply of electricity. In addition, a minor horizontal overlap exists in the market for generation and wholesale supply of electricity.

Vertical relationships

Wholesale market for diesel and fuel oil/ Generation and wholesale supply of electricity

30. On the wholesale market for refined oil products in Greece, MOH has a market share of [20-30]% for diesel (or [30-40]% with respect to ADO) and [20-30]% for fuel oil (or [30-40]% with respect to LSFO).

31. Under any wider geographic market definition (EU-wide or regional), MOH's market shares would be well below 15% for both diesel and fuel oil.

32. The parties submit that [60-70]% of the domestic market for the wholesale of respectively (i) diesel or ADO separately and (ii) fuel oil or LSFO separately is held by the biggest competitor on these markets, Hellenic Petroleum (HELPE). After taking into account MOH's market shares, direct imports are deemed to represent the remaining [0-10]% of these markets. Imports are undertaken both by big end customers and other major international oil companies such as Shell and BP and Greek fuel retailers EKO, AVIN.

33. None of the parties' power plants (Corinthos Power or the power plant assets of the Mytilineos group companies²²) use fuel oil or diesel to produce electricity.

34. However, the market investigation showed that between 7 to 10 % of the electricity sold in Greece is generated from petroleum products at power plants operated by the electricity incumbent, Public Power Corporation S.A. ("PPC"). These power plants use either diesel (ADO) or fuel oil (LSFO) as their main fuel. Moreover, PPC uses approximately [30-40]% of the diesel purchased as back up fuel for [a number of] its power plants [...]. Other power

²² Mytilineos group has a total installed capacity of 334 MW in thermal projects and of 18.6 MW in RES projects in Greece.

plants in Greece, belonging to the HELPE/ Edison JV and to Heron S.A, store quantities of diesel (but not fuel oil) which can be used as a back up fuel to natural gas²³.

35. Moreover, the market investigation confirmed that, after winning PPC's public bid, MOH became the [...] diesel (ADO) supplier of its power plants for 2008 and of around [30-40%] of its power plant requirements for fuel oil (LSFO) for the same year. The remaining [60-70%] of PPC's supplies, for 2008 were provided by [another undertaking].
36. However, the Commission investigation showed that no foreclosure issue arises from the envisaged transaction. First, PPC uses international public bids to purchase fuel for its power plants²⁴. Second, the commercial relationship between PPC and MOH commenced only in 2008 while in previous years PPC was supplied by [another undertaking] for diesel and [two undertakings] for fuel oil. Therefore, there is no long term dependency on MOH. Third, the market investigation confirmed that, at least for fuel oil which is the most widely used petroleum product for electricity generation in Greece, there can be alternative sources of supply for PPC. In any event, the parties stress that due to PPC's buyer power, a potential foreclosure would not have any impact on the downstream market for generation and wholesale supply of electricity.
37. Moreover, the parties further argue that a potential foreclosure of Corinthos Power's competitors in the electricity market is also ruled out with regard to competitors who use diesel as back-up fuel as the only non-PPC power plants using such products belong to the HELPE/Edison JV, of which one of the parents is active in petroleum refining and supply market, and to Heron S.A²⁵ which can use alternative sources of supply such as EKO, SHELL, BP and HELPE.

Construction/Generation and wholesale supply of electricity

38. On the market for construction the parties estimate METKA's (the construction subsidiary of Mytilineos) market share to be well below [0-10]% in Greece and substantially lower were the market be considered to be EU-wide. Moreover, according to the parties, METKA faces competitive pressure from bigger national and other EU competitors²⁶ which are active in the Greek market.

²³ According to the parties the ADO and LSFO fuels used for electricity generation are the same as those used be used for other purposes. (e.g for diesel cars)

²⁴ Total quantities of fuel purchased by PPC for the years 2008 and 2009 were purchased through tender procedures while for years 2005, 2006 and 2007 through direct negotiations with the suppliers.

²⁵ HERON S.A., a subsidiary of TERNA, is licensed for the construction and operation of thermoelectric power plants fuelled with natural gas. HERON S.A. owns and operates a 147 MW gas fired power plant in Viotia- an area next to Athens. Also, HERON S.A. has another 435 MW combined cycle gas fired power plant under construction.

²⁶ According to data in the Decision of the Hellenic Competition Commission number 372/2007 the domestic market for construction is highly competitive, while the biggest company in the field had in year 2006 a market share below 20%. In addition, according to the above decision, METKA (data for year 2006) was not included in the 5 biggest companies in the market and the parties argue that this is still the case up to date.

39. On the possible submarket for the construction of power plants at national level, METKA would have, pursuant to the parties' estimates, a market share between [30-40]%²⁷ considering power plants either commissioned in the last ten years or whose tender documents were published in the same time frame. Under any wider geographic market definition its market share is estimated to be negligible.
40. The potential of foreclosure for the construction of power plants to the detriment of Mytilineos competitors on the downstream market for generation and wholesale supply of electricity is very unlikely in view of the existence of several national and international undertakings and consortiums which are interested and able to undertake construction of power plants in Greece, as submitted by the parties. In any event, the parties submit that METKA does not have any interest and motive to stop participating in tenders relating to construction projects for power plants.
41. Moreover, it must be stressed that the vertical relationship (by reason of Mytilineos' construction and electricity generation activities) exists pre-merger and the envisaged transaction would only lead to a very low potential increment (around [0-5]% in terms of installed capacity) on the market for generation and wholesale supply of electricity²⁸.

Horizontal issues

42. The envisaged transaction does not give rise to any direct horizontal overlap as currently Corinthos Power only holds a license but has no existing power plant operations. Nevertheless the transaction does give rise to a minor potential horizontal overlap on the market for generation and wholesale supply of electricity between Mytilineos and Corinthos Power. The post-merger combined market share, when Corinthos Power will be active in generation would be around [5-10]% of the total installed capacity in Greece, with Corinthos Power expected to hold [0-5]% while Mytilineos with its current presence has around [0-5]%. The Greek market is currently dominated by the vertically-integrated, majority State-owned company, PPC having a market share exceeding 80% of the total installed capacity at national level. In addition, there are other small competitors such as: Energiaki Thessalonikis and Heron with market share of [0-5]% and [0-5]% respectively. Therefore, no competition concerns can arise from the envisaged operation. In fact, the transaction will be pro-competitive given that it will increase the potential for competitive pressure on PPC.

²⁷ According to the parties' submissions, METKA's market share has been calculated by attributing to METKA the total number of MWs constructed alone or in consortia with other companies in the last 10 years. The same method has been used to reconstruct the relevant market.

²⁸ As a result of the transaction Mytilineos will have a post-merger market share of [5-10]% of the total installed capacity of the Greek market (Mytilineos [0-5]%; Corinthos Power [0-5]%).

VI. CONCLUSION

43. For the above reasons, the concentration does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement and it does not significantly impede effective competition. Thus, 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)
Günther Verheugen
Vice-President of the Commission