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***Case No COMP/M.5550 -
BP / DUPONT / JV***

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

Article 6(1)(b) NON-OPPOSITION
Date: 08/07/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 8.7.2009
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Sirs:

**Subject : Case No COMP/M.5550 – BP/ DuPont/ JV
Notification of 03/06/2009 pursuant to Article 4 of Council Regulation
No 139/2004**

1. On 03/06/2009, the European Commission received a notification of a proposed transaction by which BP plc through its subsidiary BP Biofuels North America LLC (“BP”) and E.I. du Pont de Nemours and Company (“DuPont”) (collectively, the “Parties”) will acquire within the meaning of Article 3(1)(b) of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“EC Merger Regulation”)¹ joint control of Biobutanol LLC (“JV”) by way of purchase of shares in a newly created company constituting a joint venture.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the EC Merger Regulation but does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES AND THE OPERATION

3. **BP** is one of the world’s largest energy companies with operations in more than 100 countries across six continents. The company’s main businesses are exploration, development and production of oil and gas; refining, manufacturing and marketing of oil products, petrochemicals, gas, power and renewables.

¹ OJ L 24, 29.01.2004, p. 01.

4. **DuPont** is a multinational diversified science company engaged in the research, development, production, distribution, and sale of a variety of chemical products, plastics, agro-chemicals, paints, seed, and other materials.
5. **JV** will be active for the development and commercialization of technologies to enable the production of butanol through the fermentation of biomass (“biobutanol”) for use primarily as a component in fuels. The JV aims to produce and distribute biobutanol to a very limited extent, mainly to demonstrate the effectiveness of the technology package rather than to enter in any future product market as a large scale manufacturer.

II. THE TRANSACTION AND THE CONCENTRATION

6. The proposed concentration involves the acquisition of joint control over the JV by BP and DuPont within the meaning of Article 3(1)(b) of the EC Merger Regulation.
7. The parties entered into a Limited Liability Company Agreement (“LLC Agreement”) relating to the JV on 04/05/2009. The LLC Agreement establishes a full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation².

III. COMMUNITY DIMENSION

8. BP’s worldwide turnover amounted to € 248,639 million and its Community-wide turnover amounted to € [...] million in 2008. DuPont’s worldwide turnover amounted to € 20,700 million and its Community-wide turnover amounted to € [...] million in 2008. The parties did not derive more than two-thirds of their aggregated Community-wide turnover within one and the same Member State. The transaction therefore has a Community dimension according to Article 1(2) of the EC Merger Regulation.

IV. RELEVANT MARKETS

1. Relevant product markets

(a) Production technologies of biobutanol, production of biobutanol

– Production technologies of biobutanol

9. Butanol is a flammable, primary alcohol, an oxygenated hydrocarbon. It can be produced from refined fossil fuels through the hydro formulation of propylene: such butanol is known as synthetic butanol. It can also be produced through the fermentation of sugars derived from biomass (corn, wheat, sugar cane and sugar beet) by microbes and is referred to as biobutanol.

² The JV will have management and staff dedicated to its operation on a full-time basis, the activities of the JV go beyond the performance of one specific function for the parents, the JV will perform actively in the market and its activities will not be limited to serving its parents, and the JV will be established for an indefinite period

10. The primary focus of the JV will be on the development and the licensing of a process for the production and commercialisation of [...] biobutanol [...] for use as a bio-component for motor fuels [...]³. Such process is not currently available.

– **Production and supply of biobutanol**

11. The market for biobutanol fuel components or fuels does not exist today. The parties submit that the JV will have a very limited presence in production and supply of biobutanol e.g., fuel testing, managing regulatory issues, supplying biocatalysts and other materials used in the production process and operating demonstration facilities.
12. With regard to traditional fossil butanol, it is envisaged that there will be limited demand-side substitutability between synthetic butanol and biobutanol. The parties claim that as a refined fossil-fuel product, synthetic butanol does not deliver the environmental advantage of biobutanol, and purchasers of synthetic butanol (chemical, solvent and painting manufacturers) require high level of purity that may not be guaranteed through the bio-fermentation process.
13. Compared with the biofuels currently blended with gasoline, mainly bioethanol, biobutanol has a number of clear advantages. It can inter alia. improve the properties of gasoline with a bioethanol component.
14. At the same time, bioethanol could in principle act as a significant competitive constraint upon the supply of biobutanol. The use of biobutanol will be dependant primarily on two factors: the cost of production compared to bioethanol and the prevailing price of crude petroleum.
15. Nevertheless, it cannot be excluded that biobutanol constitutes a separate product market from bioethanol not only by chemistry but also by its consumption pattern. As to the fossil butanol, it is clearly possible to identify different end uses to butanol compared with biobutanol. Therefore, it is likely that butanol and biobutanol are two separate product markets.

– **Conclusion**

16. The technology for the commercial production of biobutanol for use as a blending component for fuels is currently at the development stage and there is a certain degree of uncertainty relating to the ability of the JV and its competitors to commercialise a technology package and/or to commence production and supply of biobutanol. Against this background, it is difficult to delineate precisely relevant product markets. The question can be left open in any event as it does not impact the competitive assessment.

³ [...]

(b) Animal feed ingredients

17. When biobutanol is produced from grain feedstocks (wheat or corn), the biobutanol production process may result in the production of a co-product: distillers' dried grains with solubles (DDGS). The resulting product is turned into pellets and can be used as an ingredient in animal feed.
18. The Commission has previously considered the animal feedstuffs ingredients sector in a number of decisions.⁴ In those decisions the Commission has suggested that the relevant market for animal feed ingredients could relate to the distribution activities to compound feed manufacturers, farmer cooperatives and farmers. In that context the Commission has considered that there are separate markets for grain and non-grain feed ingredients ("NGFI")⁵. The Commission has defined NGFI as consisting of the by-products of the oil milling industry, fish meal and the by-products of the starch and ethanol industry (including DDGS, corngluten feed and corngerm meal).
19. The precise product market definition with respect to animal feed ingredients can nevertheless be left open as it will not affect the competitive assessment.

(c) Downstream markets

20. BP is present in the downstream supply chain of motor fuels. Biobutanol as a component in motor fuels will be supplied via a number of different possible channels including motor fuel retailers (e.g., oil companies or supermarkets which own integrated blending facilities as well as service stations) and independent blenders/resellers.
21. It is expected that the biobutanol will be physically mixed with a base gasoline (also potentially including bioethanol) to produce a finished gasoline blend meeting the specification required for the intended market. The resulting "bio-gasoline" blend will be sold through the same channels as "non-bio" gasoline blends. The two products meet the same quality and performance standards when used in the permitted concentrations (i.e., no modifications to vehicle engines are required and traditional gasoline and bio-gasoline are fungible).
22. Motor fuels (whether "bio" or "non-bio") are essentially distributed by producers in their own integrated retail network ("retail" sales); or sold to non-integrated retailers, independent resellers or major industrial and commercial customers ("non-retail" sales).
23. In non-retail sales, the Commission has previously found that different types of fuels form separate product markets (gasoline, diesel, fuel oil and LPG)⁶. As biobutanol is expected to be mixed with base gasoline, the Commission has further analyzed

4 See for example COMP/M.4042 Toepfer/Invivo/Soules, COMP/M.2693 Archer Daniels Midland Company/Alfred C. Toepfer International GmbH; COMP/M.2271 Cargill / Agribands; COMP/M.1348 Archer Daniels Midland Company / Alfred C. Toepfer International GmbH / InTrade N.V.; IV/M.1126 Cargill / Vandemoortele, IV/M.941, ADM / Acatos & Hutcheson / Soya Mainz, IV/M.866, Cereol / ÖSAT / Ölmühle.

5 COMP/M.4042, Toepfer / Invivo / Soules.

6 See for example, COMP/M.1628 Totalfina/Elf, and COMP/M.1859 ENI/GALP.

market shares with respect to non-retail sales of gasoline in recital 34 infra, in the only potential affected non-retail motor fuel market, Germany.

24. Retail sales consist of sales of motor fuels to motorists through service stations. In line with the Commission's previous 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 biodiesel⁷. For the purposes of this decision, there is no need to further analyze this market as it is not affected.

(d) Conclusion

25. In any event, it is not necessary to reach conclusions with regard to any of the product markets given that this will not affect the competitive assessment.

2. Relevant geographic markets

(a) Sales of technology for producing biobutanol

26. The technologies licensing market for processing of biobutanol is likely to be global. The licensing packages can be sold globally as they do not necessarily comprise any equipment components. This view appears to be shared by the parties who consider that, in order for the business to be viable, it would be necessary for the JV to commercialize the technologies packages to a large number of customers globally.

(b) Production and supply of biobutanol

27. It is likely that biobutanol will be produced on global or EEA-wide basis depending inter alia. on the availability of suitable feed stock. Therefore biobutanol, if it becomes commercially viable as a blending component for fuel (gasoline), will also be supplied and distributed to blenders on a relevant geographic market that is at least EEA-wide.
28. After blending, biobutanol will mainly be supplied as part of a gasoline blend in non-retail or retail markets as explained above in recitals 20-24. With regard to non-retail supply of fuels, the Commission has considered ex refinery market of gasoline (an important part of the non-retail market) as EU or Western European wide⁸.

7 See for example IV/M.1383 Exxon/Mobil.

8 Case IV/M.727 BP/Mobil. In COMP/M.3291 Preem/Scandinaviska, the Commission concluded that the market is at least Scandinavian.

(c) DDGS

29. Regarding the NGFI of which the DDGS form a sub-group, the Commission has traditionally considered that the market was EEA-wide but has also considered possibly narrower markets although it left the question open⁹.

(d) Conclusion

30. Given that the competitive assessment will not be affected by the geographic scope of the markets, it is not necessary to reach conclusions with regard to any of these geographic markets.

V. COMPETITIVE ASSESSMENT

1. Horizontal effects

31. The Commission has not identified any horizontally affected markets. The technology for the commercial production of biobutanol used as a blending component in fuels is at the development stage, and neither BP nor DuPont are active in the licensing of any technologies with respect to the production of biobutanol, or in the supply of butanol in any isomer form.
32. With regard to bio-components, even if biobutanol and bioethanol products were part of the same bio-component markets, the JV's and BP's market shares in the supply and production of biobutanol and bioethanol would remain negligible¹⁰. In DDGS, the parties' share would under all conceivable circumstances remain limited¹¹. The JV will not produce any DDGS for sale on the market; rather, the DDGS produced will go to waste. Therefore, serious doubts can be excluded.

2. Vertical effects

33. With regard to the production and supply of biobutanol upstream and blending and supply of gasoline downstream, the Commission has considered the ex refinery market (an important part of the non-retail market¹²) as EU or Western European wide. In such a market BP's share of supply would be [5-10]%.
34. The narrowest conceivable downstream market of gasoline would consist only of what is not included in the ex refinery market. If this part of the non-retail market

⁹ Case COMP/M.4042, Toepfer/Invivo/Soules.

¹⁰ In bioethanol, BP has only [0-5]% market share worldwide and [5-10]% market share in the EEA.

¹¹ Currently they do not have production. Market shares are estimated [0-5]% worldwide and [0-5]% in the EEA in 2011.

¹² Fuel sold to non-integrated retailers, independent resellers or major industrial and commercial customers.

were national in scope, the only market which could potentially be vertically affected would be Germany where BP's share of supply would remain modest¹³.

35. Even subject to the JV being able to create process technologies for a viable biobutanol product, the JV will at most have a minor position as it intends to use biobutanol mainly for demonstrating the effectiveness of the technology package rather than for entering in any future product market as a large scale manufacturer. The primary focus of the JV is on technology development and licensing technology packages. Therefore, the transaction does not give rise to serious doubts with regard to its vertical impact.

VI. CONCLUSION

36. 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

¹³ BP's estimated share of all non-retail supply of gasoline allocated to Germany is [20-30]%. BP's share of the hypothetical German national market would in reality be lower than [20-30]% due to the fact that the national non-retail market would not comprise the ex refinery market.