

*Case No IV/M.578 -
H O O G O V E N S /
KLÖCKNER & CO.*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(a) INAPPLICABILITY
Date: 11/04/1995

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EUROPEAN COMMISSION

Brussels, 11.04.1995

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

PUBLIC VERSION

To the notifyng parties

Dear Sirs,

Subject: Case N° IV/M. 578 - HOOGOVSNS/ KLÖCKNER & CO.
Notification of 15 March 1995 pursuant to Article 4 of Council Regulation N° 4064/89

1. This notification concerns the creation of a joint venture company, ODS - HOOGOVSNS HANDEL B.V. ("ODS"), which will group the stockholding operations of Hoogovens Staalverwerking en Handel B.V. ("Hoogovens") and Klöckner & Co. A.G. ("Klöckner") in the Netherlands. This decision is only concerned with those products which fall within the jurisdiction of the EC Treaty and which represent some [...] ⁽¹⁾ of the turnover of the companies forming the joint venture.
2. After examination of the notification the Commission has concluded that the proposed operation does not fall within the scope of Council Regulation N° 4064/89.
- I. THE PARTIES
3. Hoogovens is a subsidiary of Koninklijke Hoogovens en Staalfabrieken N.V. (the "Hoogovens Group") which is based in the Netherlands and engaged in the production and distribution of steel, semi-finished steel and aluminium products.
4. Klöckner is a German company which, together with its subsidiaries, is engaged in the distribution of steel, chemicals, textiles and fuels. Its ultimate parent company is VIAG A.G.

⁽¹⁾ Less than 25%.

II. THE OPERATION

5. Hoogovens and Klöckner intend to establish a joint venture company, the vehicle for which will be an existing subsidiary of Hoogovens, Pharnaces IJmuiden B.V., which will be renamed ODS. To this company will be transferred the shareholding of Hoogovens Handel B.V. ("HH"), Hoogovens Aluminium B.V. ("HAV") and Vuij B.V. ("Vuij"); Klöckner will transfer its shareholding in Oving-Diepeveen-Struycken B.V. Therefore, in the future, all the steel, aluminium, copper, lead and zinc stockholding businesses of the Hoogovens Group and Klöckner in the Netherlands will be carried out by ODS.

III. COMMUNITY DIMENSION

6. The combined aggregate worldwide turnover of the parties exceeds ECU 5,000 million. (Hoogovens Group: ECU 3,690 million and VIAG A.G.: ECU 12,297 million). The aggregate Community-wide turnover of each party exceeds ECU 250 million (Hoogovens Group: ECU 2,496 million and VIAG A.G.: ECU 8,906 million) and the parties do not achieve more than two-thirds of their turnover in one and the same Member State. Consequently the operation has a Community dimension.

IV. CONCENTRATION

Joint control

7. Hoogovens owns 49% of the shares and voting rights of ODS and Klöckner 51%. According to the agreement between the parties creating the joint venture, ODS will have a board of management consisting of at least two managing directors, one nominated by Hoogovens and one by Klöckner. The joint venture will prepare an annual business plan setting out sales targets, organization and marketing specifications together with personnel management objectives. This business plan will require the approval of both shareholders. ODS will therefore be jointly controlled by Hoogovens and Klöckner.

Autonomous economic entity

8. ODS will, from its creation, perform the functions that were carried out by other undertakings operating on the same market, being the stockholding market, and will acquire certain assets and liabilities of the Hoogovens and Klöckner steel and non-ferrous metal stockholding businesses in the Netherlands.
9. The presence of ODS's parent companies on the upstream markets of the production and distribution of steel (Hoogovens Group and Klöckner) and the production and distribution of aluminium (Hoogovens Group and VIAG A.G.) also need to be taken into consideration to assess whether the joint venture has a full function character. It is apparent that the Hoogovens companies, contributed to the joint venture, purchased some [...] ⁽²⁾ of their steel goods and [...] ⁽³⁾ of their aluminium products from Hoogovens in 1994 and [...] ⁽⁴⁾ from Klöckner. Conversely the Klöckner companies contributed did not purchase any goods from their parent company during 1994. In addition the joint venture does not make sales to its parent companies.

⁽²⁾ Less than 25%.

⁽³⁾ Between 60% and 80%.

⁽⁴⁾ Less than 10%.

10. Whilst the volume of aluminium purchased by the joint venture from Hoogovens would appear to be significant it should be noted that the related aluminium sales will only account for [...] ⁽⁵⁾ of the joint venture's total turnover. Consequently such purchases do not detract from the economic autonomy of the joint venture.
11. The Commission has also considered whether the fact that stockholding, which adds little value to the product concerned, is a sales agency operation or not. In this respect it should be noted that the Commission has taken several decisions ⁽⁶⁾ in which it was concluded that stockholding operations did have full function characteristics and were not sales agencies. This is also evidenced by the fact that there are a large number of independent stockholders operating in the Netherlands and the Community.
12. Accordingly, in the light of the above factors, the Commission has concluded that ODS will function as an autonomous economic entity.

Coordination of competitive behaviour

13. The joint venture will be engaged in the stockholding of steel and non-ferrous metals in the Netherlands. A possible risk of coordination between the parent companies therefore has to be assessed.
14. Firstly, both parent companies will continue to sell steel and aluminium in the Netherlands. However, the parent companies will remain active on the market for direct sales i.e. sales made directly from the producer to the consumer, which, in accordance with previous Commission decisions ⁽⁷⁾, has to be considered as a separate product market. Consequently, a risk of coordination between the parents can be excluded for this market.
15. Secondly, both parent companies remain active on the upstream market for the production of aluminium and therefore a possible risk of coordination has to be assessed. The joint venture is not the main customer of its parents for aluminium products and, in 1994, only made purchases to the value of [...] ⁽⁸⁾ of its parents' sales of aluminium on the Dutch market, all of which were made from the Hoogovens Group. A risk of coordination, as concerns aluminium, between the parents can, therefore, be excluded.
16. Finally, both parent companies will remain active on the same product market as the joint venture, that is the stockholding market, in the geographic areas neighbouring the Netherlands being north western Germany and Belgium. In the absence of trade barriers between the Netherlands and neighbouring countries the geographic market is considered to be regional and not, as asserted by the parties, confined to the Netherlands. This analysis is consistent with previous Commission decisions ⁽⁹⁾ where it was concluded that the geographic area serviced by an individual stockholding depot will be determined by transport costs and

⁽⁵⁾ Less than 10%.

⁽⁶⁾ IV/M.073 - Usinor/ASD
IV/M.503 - British Steel/Svensk Stål/NSD.

⁽⁷⁾ IV/M. 239 - Avesta/British Steel/NCC/AGA/Axel Johnson
IV/M. 563 - British Steel/UES

⁽⁸⁾ Less than 10%.

⁽⁹⁾ IV/M. 503 - British Steel/Svensk Stål/NSD

delivery times. Further confirmation of this is contained in an independent report, submitted by the parties, concerning steel stockholders in the European Community, which states that 46% of the enterprises surveyed have a market radius of 100 kilometres. In addition, several of the competitors contacted in this case, operating in either the Netherlands or Belgium or Germany, state that their largest customers are in fact outside their national territories.

17. As the joint venture will have depots in Rotterdam and Amsterdam and a sales office in Almelo (near the Dutch border with Germany) it has been concluded that the joint venture can serve both the Belgian market and the north western area of Germany. Consequently, for these reasons, there is a possibility of overlap between the stockholding activities of the parents both of which operate in the same geographic market as the joint venture.
18. In this respect it has been noted that the parents' stockholding activities generated total sales, in EC products, in 1994, of ECU [...] ⁽¹⁰⁾ million in north western Germany and Belgium, in comparison to the joint venture's sales of EC products of ECU [...] ⁽¹⁰⁾ million. The stockholding sales of the Hoogovens Group amounted to ECU [...] ⁽¹⁰⁾ million in Belgium and ECU [...] ⁽¹⁰⁾ million in north western Germany. Similarly the stockholding sales of Klöckner amounted to ECU [...] ⁽¹⁰⁾ million in Belgium and ECU [...] ⁽¹⁰⁾ million in north western Germany. These sales of the parents represent an estimated market share of between [...] ⁽¹¹⁾ and [...] ⁽¹¹⁾, on the relevant markets.

V. CONCLUSION

19. In the light of the above factors the Commission has concluded that the joint venture is jointly controlled and benefits from economic autonomy: consequently it is a full function joint venture within the meaning of the Regulation.
20. In addition the Commission has considered the possible risk of coordination of competitive behaviour. In this respect the fact that both parents are active in the direct sales market and in the upstream market of aluminium production does not detract from the concentrative nature of the joint venture.
21. In its Notice concerning the distinction between concentrative and cooperative joint ventures ⁽¹²⁾ the Commission has concluded that "there is normally a high probability of coordination where two or more parent companies retain to a significant extent activities in the same product market as the joint venture itself insofar as these activities are in the same geographic market". As both of the joint venture's parent companies are active in the same product and geographic market as the joint venture itself, it is clear that a high probability of coordination of competitive behaviour arises.
22. This probability has to be assessed to ascertain whether the cooperative elements are of minor economic importance in relation to the operation as a whole. As demonstrated above the joint venture's sales in 1994 were of a similar magnitude to those of the parent companies when operating in the same geographic market. In addition these sales were estimated to grant the parents a market share in the range of [...] ⁽¹³⁾ to [...] ⁽¹³⁾. Consequently the Commission has

⁽¹⁰⁾ Deleted business secrets.

⁽¹¹⁾ Between 5% and 20%.

⁽¹²⁾ OJ C385 of 31/12/94.

⁽¹³⁾ Between 5% and 20%.

concluded that the cooperative elements are not *de minimis* as defined in the Notice concerning the distinction between concentrative and cooperative joint ventures.

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For the above reasons the Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3 (2) of the Merger Regulation and consequently does not fall within the scope of this Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation N° 4064/89.

The Commission will treat the notification pursuant to Article 5 of Commission Regulation No. 2367/90 as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Council Regulation 17/62 as requested by the parties in their notification.

For the Commission,