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***Case No IV/M.591 -
DOW / BUNA***

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

Article 6(1)(b) NON-OPPOSITION
Date: 04/07/1995

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 04.07.1995

PUBLIC VERSION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.591 - Dow/Buna

Notification of 31.05.1995 pursuant to Article 4 of Council Regulation No 4064/89

1. On 31 May 1995 The Dow Chemical Company, Horgen/Schweiz notified an operation by which it will acquire a share of 80% in Buna SOW Leuna Olefinverbund GmbH (BSL) from Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) - the former Treuhandanstalt, Berlin.
- I. The parties
2. Dow Europe is the European management company of the Dow Chemical Company, Delaware/USA, the ultimate parent company of the Dow Group (Dow), a worldwide producer of petrochemicals, plastics, electrochemicals, agricultural chemicals and pharmaceuticals. BSL constitutes the remaining core of the publicly-owned Eastern German petrochemical industry by merging Buna GmbH, Sächsische Olefinwerke GmbH and Leuna Polyolefine GmbH. It is active mainly in Germany in the production and sales of petrochemicals and electrochemicals.

II. The operation

3. Under the Privatisation Agreement, the legal basis of the notified operation, Dow will acquire a share of 80% in BSL for a purchase price of 300Mio DM. For a transitional period BvS will own the remaining 20%. This period consists of the Restructuring Period of 5 years ending 31 May 2000 and a possible jointly decided extension of 2 years. The Agreement contains put-and-call options allowing BvS to sell and Dow to acquire this 20% share at any time after the latter of these dates.
4. The business plan which the parties agreed upon in the privatisation agreement, covers an investment program of about [...] ⁽¹⁾ for the restructuring period and is clearly intended to integrate BSL's business activities totally with the purchaser's group of companies.
5. The parties have identified two ancillary restrictions for which they request an assessment in conjunction with the concentration. These concern mining rights for the brine fields in Teutschenthal, and the operation of the new LLDPE/HDPE plant, requiring a Dowlex Licence, if the Privatisation Agreement is rescinded after closing (no later than 31.12.1995).

III. Community dimension

6. The concentration will have a Community dimension. The combined aggregate worldwide turnover of Dow and BSL in 1994 exceeded by far 5000 MEcu. The aggregate Community-wide turnover of each party concerned was also higher than 250 MEcu (Dow 1994 : 3 588 MEcu, BSL 1993 : 417 MEcu) and the two parties did not achieve more than two-thirds of their respective Community-wide turnover in one and the same Member State (Dow 25%, BSL 91% in Germany).

IV. Concentration

Joint control/no coordination

7. Until the exercise of one of the options mentioned above unanimity is required for certain decisions of the shareholders (Art. 16.2.3, 16.3, 17.3 of the Privatization Agreement). These include the approval of the annual budget and material business decisions not covered by the budget as well as certain instructions to the managing directors and ie. approval of transactions in excess of 500000 Ecu and higher thresholds. Unanimity is also required for the dismissal of the managing directors and members of the supervisory board and for election and removal of shareholders' representatives on the supervisory board. Also the transfer of any of its decision powers to any committees requires unanimity in the shareholders meeting.
8. Otherwise, Dow will appoint and dismiss the managing directors and will clearly have the industrial leadership in the JV during the transitional period. The business plan has been jointly decided on and the approval of BvS is required to any adjustments thereof. Although there is this strong industrial leadership of Dow in BSL, BvS clearly has an interest in putting into effect the jointly decided business plan during the restructuring of BSL.

⁽¹⁾ Deleted; business secrets.

9. As a result of the above-mentioned veto rights, joint control of Dow and BvS in BSL is established.
10. Only Dow remains active in BSL's markets. The other parent BvS holds some assets of BSL excluded from the transaction which however do not relate to BSL's markets. BvS is active on these markets only through the joint venture. Thus, there is no risk of coordination.

Autonomous entity

11. Until now BSL has performed all the functions of an autonomous economic entity under the sole control of BvS. It will now be operating under the joint control of Dow and BvS, even if Dow will play the role of industrial leader. The Privatisation Agreement, and in particular the Marketing and Sales Agreement annexed to it, provides that Dow will assume the obligation of purchasing as of 1 January 1996 at least 80% of the proven normal capacity of BSL production facility in each calendar year. This provision is aimed to give the JV a guaranteed level of sales for initial transitional period. In principle, Dow will pay a price to BSL that will represent the weighted average selling price for the product in the calendar quarter plus a discount. This does not, however, detract from the fact that BSL is an autonomous economic entity. According to the Marketing and Sales Agreement BSL will be free to sell through other distribution outlets.

V. Compatibility with the common market

a) Relevant product markets

12. The concentration involves the acquisition by Dow of control of BSL with its petrochemical and electrochemical production sites in Böhlen, Schkopau and Leuna. There are 31 relevant product markets identified by the parties in accordance with the product market definitions previously used by the Commission in the chemical sector.

b) Relevant geographic markets

13. In general, the products involved in the concentration are easily and safely transportable. Shipment is normally done by truck, rail and barge. There is considerable trade within Western Europe and also beyond. Western Europe should be considered the narrowest possible geographic market.

Narrower geographic market definitions could apply to products which are inflammable or of an otherwise hazardous nature. These products however are mainly used captively in integrated production facilities. Transport is by pipeline and if necessary by special transport facilities involving special security measures. This will be discussed when an affected market is in question.

These market definitions are generally confirmed by competitors and customers.

c) Effects of the concentration

14. The operation will not create or increase a dominant position in the common market or in a substantial part of it.

Affected markets

15. The proposed operation will create overlaps in 21 markets. Only four of these (glycol ethers, polystyrene, propylene glycols and propylene oxide) are affected markets. In another two markets (SBL, UPR) vertical relations have to be examined. For most products the market shares of the parties are insignificant in the context of the competitive market structures of the chemical industry. Some products are manufactured wholly or partially as intermediates for captive use, eg. chlorine.

Butadien/SBL

16. Butadien is an intermediate product used for the manufacture of styrene butadiene latex (SBL), synthetic rubber of styrene butadiene rubber (SBR), polybutadiene rubber (PBR) and acrylonitrile butadiene styrene (ABS).
The horizontal overlap is insignificant because the combined market share of the parties is about 5% in Western Europe.

17. As the market leader in the downstream SBL market, Dow has a share of 28% in Western Europe and will continue to rank fourth in terms of capacity behind Shell, Enichem and BP. Other producers with resources comparable to those of Dow are Repsol, Elf, DSM, Veba, Bayer and BASF. However, the vertical effect of the concentration is insignificant in view of BSL's share of 0.4% of the European butadien market.

18. BSL produces SBR and has in this downstream market a share of 12.5% in Western Europe. The major producers in terms of market shares are Enichem (42.5%), Shell (20%) and Bayer (20%). In view of the fact that Dow has a share in the Western European butadien market of only 4.4% the concentration will not create any dominant position in the downstream SBR market.

For the same reasons PBR is not vertically affected given that Dow does not produce any PBR and that BSL has a market share of 6.8% in Western Europe.
ABS is produced only by DOW.

Propylene glycols/UPR

19. The main use for propylene glycols (PG) is as a solvent in unsaturated polyester resins (UPR) and a variety of consumer products.

The combined shares of the parties of the Western European PG market is 31.8% (Dow 30%, BSL 1.8%). Arco is another leading player (32%). Other important competitors by resources and capacity are BASF, Erdölchemie, Hüls, Repsol and Enichem. Thus, also in this market the concentration will not lead to the creation of a dominant position.

20. The activities of BSL as a manufacturer of UPR give it a market share of 2.8%. Therefore Dow's high market share in propylene glycols does not give rise to any vertically affected

market. Furthermore, the concentration will not have a long-term impact in this market as Dow will shut down the PG production unit of BSL in mid-1997 at the latest.

Glycol ethers

21. This range of products is widely used as solvents, coalescents or coupling agents in consumer products. Dow has a share of nearly 20% and BSL under 2%. The main competitors are BASF (20%), BP (16%), Shell (12%), Union Carbide (10%) and Arco (9%). The leading players by capacity are BP and Dow.
22. The concentration would give Dow the highest share of the market but would not basically change the competitive structure of a relatively wide oligopoly in Western Europe. Again, the BSL production facilities for propylene oxide will be closed down in mid-1997 at the latest. PO is a base product for glycol ethers. Therefore, no structural long-term effect on this market will be caused by the notified concentration.

Propylene oxide

23. This is a liquid intermediate produced by eight major suppliers based in the EEA for the manufacture of polyols (about 60% of product output), propylene glycols, propylene glycol ethers and certain speciality chemicals. Due to its hazardous nature, transportation is relatively expensive and therefore traded including delivery costs. Nevertheless PO is freely moved around the world and indeed about 40% of EEA production is sold, while the rest is used captively. The market shares of Dow (17%) and BSL (3%) result in a combined share of 20%. Arco (42%) and Erdölchemie (30%) are the leading players. Dow's proposed shutting down of BSL's production facility, which sells about 2/3 of its production to the market, will have the effect of reducing supply. However, this effect is relatively small because BSL covers only about 5% of commercial demand and less than 2% of production capacity in Western Europe. Moreover, Dow has declared its intention of expanding its PO-unit in Stade by 50000 mt/a before shutting down BSL's 40000 mt/a unit.
24. According to the information provided in the notification and the answers given to the Commission's enquiries by competitors and customers, effective competition mainly results for the following reasons :
 - the market shares are unevenly distributed;
 - they differ significantly from year to year especially for the leader Arco;
 - the various producers have different degrees of production and distribution integration;
 - transparency of prices is difficult and influenced by long-term customers as well as spot sales;
 - customers include powerful chemical companies which are partly themselves PO producers. For example, Dow sells more than 85% of its PO sales to [...]⁽²⁾ sells 70% to [...]⁽¹⁾;
 - potential supply by producers who normally manufacture for captive use only.

⁽²⁾ Deleted; business secrets.

⁽³⁾ Deleted; business secrets.

Thus, the notified operation will not create or increase a dominant position in the European PO-market.

Low density polyethylene (LDPE/LLDPE)

25. LDPE is one of the main plastic commodities with similar properties and enduses as linear LDPE (LLDPE) with which it probably forms one product market. The low combined market share of Dow (< 13%) and BSL (3%) shows the limited effect of the concentration. Furthermore, by capacity the parties would hold the second place behind Enichem and ahead of eight other large producers (Borealis, Exxon, DSM, BP, Shell, BASF, Atochem and Repsol).

The notified concentration will therefore not lead to the creation or increase of a dominant position on this mature market.

Polystyrene (GPPS/HIPS)

26. Polystyrene is a thermoplastic made from styrene by means of a polymerisation process as general purpose-type PS (GPPS) and high-impact PS (HIPS). Both types can easily be processed and produced in different colours but at least the demand-side substitution is limited according to different properties : GPPS is transparent and rigid, HIPS is translucent and breakage resistant. However, it can be left open whether they form two separate markets because the closure of Buna's PS facilities will take place within two years. Therefore, no long-term structural effects will take place as a result of this concentration. Dow's market share in PS is nearly 17%; BSL has a share of 1%. In terms of capacity, Dow is and will be one of the major mass producers behind the leader BASF, with the concentration causing no lasting change.

VI. Competitive assessment

27. Having regard to the competitive structure of the six affected product markets, the maximum combined market shares of the parties in any market is 32% (propylene glycols). However, this is one of four markets without a long term impact by the concentration, as Dow will shut down the BSL-facility. No dominant position results on the vertical affected markets for SBL and UPR. Therefore, no dominant position arises as a result of the concentration.
28. As far as the market for propylene oxide is concerned, the Commission's investigation has confirmed that structural differences exist between five of the eight producers serving the market (Arco, Erdölchemie, Shell, Dow and Buna) which result in effective competition between them. This will continue after the concentration. Furthermore, the remaining three producers for captive use only (BASF, Enichem, Repsol) together with imports create potential competition in case of price increases. Therefore, also in this market the concentration will not create or increase a dominant position in the Western Europe.

VII. Ancillary restraints

29. The above mentioned ancillary restrictions⁽¹⁾ do not expressly include a non-competition clause since BvS retains no assets relating to BSL's markets. However, Dow and BSL have undertaken to comply with a non-competition obligation concerning the mining rights for the brine fields in Teutschenthal which are part of the operation contributed by BvS to BSL (Art. 5.8 and 32 of the Privatisation Agreement). Treuhandanstalt (now BvS) and Kali&Salz AG had agreed not to compete with their JV Mitteldeutsche Kali AG and to impose this obligation on a purchaser of assets which could be used for such competition. In accordance with the Commission's decision Kali&Salz/MdK/Treuhand (Case No IV/M.308) this restriction goes much further than restrictions directly connected to and necessary for the implementation of the concentration. Therefore it cannot be considered as ancillary to the proposed concentration.
30. Finally, the Privatisation Agreement (Art. 30.2.9ii) provides that Dow will manage the distribution of the output of the new LLDPE/HDPE plant (Dowlex Licence) if the Privatisation Agreement is rescinded after closing. This would then limit BSL's freedom to sell its products. Such restriction goes far beyond what is necessary to implement the concentration. Therefore, it would have to be notified under Art. 85.

VIII. Conclusion

31. For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89 and Article 57 of the EEA Agreement.
32. This decision is without prejudice to any decision which the Commission will adopt under state aid procedures regarding Dow/BSL.

For the Commission,

(4) See point 5.