

***Case No COMP/M.6167 -
RWA/ OMV WARME***

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

Article 6(1)(b) NON-OPPOSITION
Date: 30/06/2011

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EUROPEAN COMMISSION

Brussels, 30/06/2011

C(2011) 4834

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.6167 – RWA/ OMV Wärme
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹**

1. On 23/05/2011, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which "RWA Raiffeisen Ware Austria AG ("RWA", Austria) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of OMV Wärme VertriebsgmbH ("OMV Wärme", Austria) by way of purchase of shares². RWA and OMV Wärme are designated hereinafter as "the Parties".

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² Publication in the Official Journal of the European Union No C 162, 01 June 2011, p.8

I. THE PARTIES AND THE OPERATION

2. **RWA** is active in the purchase and sale of agricultural products, technical equipment, energy, building materials, gardening products and services. It is jointly controlled by BayWa Aktiengesellschaft ("BayWa", Germany) and RWA Raiffeisen Ware Austria Handel und Vermögensverwaltung eGen, Vienna ("RWA Genossenschaft", Austria) both holding 50% of the shares³. **BayWa** is an international trading and services company active in the wholesale and retail sale of agricultural products and commodities as well as consumer products. The shares in BayWa are held by Bayerische Raiffeisen-Beteiligungs AG (35.15%), Raiffeisen AgrarInvest GmbH (25.04%) and 39.81% are in free float. BayWa is not controlled by any entity. **RWA Genossenschaft** is an agricultural cooperative and acts as a holding company which is not controlled by third parties. It is not involved in any operational activities on the market. RWA/BayWa has activities in motor fuels and heating oil via its subsidiaries BayWa Vorarlberg, Genol, WHG, Raiffeisen Lagerhaus GmbH and Graninger + Mayr GmbH.⁴
3. **OMV Wärme** is mainly active in the wholesale and retail distribution of heating oil. It also keeps small quantities of diesel and gasoline [...]. It does not hold any stake or shareholding in any other entity. Currently, OMV Wärme is a wholly-owned indirect subsidiary (through OMV Refining and Marketing GmbH, "OMV R & M") of OMV.
4. The proposed transaction consists of RWA acquiring 51% of the share capital and voting rights and thus sole control of OMV Wärme. Of the remaining shares, 27% will be held by "Unser Lagerhaus" Warengesellschaft mbH ("WHG"), and 11% by BayWa Vorarlberg HandelsGmbH, both subsidiaries of BayWa. OMV R & M retains a (non-controlling) 11% financial stake. ⁵[...].

II. EU DIMENSION

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million⁶ (RWA/RWA Genossenschaft/BayWa: EUR *[...] million, OMV Wärme: EUR 380 million in 2010). Each of them has an EU-wide turnover in excess of EUR 250 million (RWA/RWA Genossenschaft/BayWa: EUR [...], OMV Wärme: EUR [...] in 2010), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

III. PRELIMINARY ASSESSMENT

6. The activities of RWA⁷/BayWa and of OMV Wärme overlap in the areas of the distribution of motor fuels and of heating oils.

³ M.1362 BayWa AG / RWA.

⁴ BayWa Vorarlberg is only active in heating oil and Graninger + Mayr GmbH only in motor fuels.

⁵ [...].

⁶ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

⁷ RWA Genossenschaft (apart from the activities of its 50% subsidiary RWA) has no activities in the markets where OMV Wärme is active in.

* Should read 7,918.

1. Relevant Markets

Motor Fuels

Product Market

7. In previous cases, the Commission has held that different stages of the distribution chain of refined oil products – in particular, ex-refinery sales, non-retail sales and retail sales – are separate product markets.⁸ For ex-refinery and non-retail sales, the market should be segmented by product, i.e., diesel, gasoline, etc. At the retail level, diesel and gasoline were considered as part of the same market⁹.
8. The "non-retail" market for motor fuels has been defined as sales of motor fuels to non-integrated retailers, independent resellers or major industrial and commercial customers¹⁰. However, as regards the delineation of "retail", the most recent Commission practice concerning the question which sales of motor fuels are covered by the term "retail" is not entirely conclusive¹¹.
9. The Commission has at times also considered a distinction between motorway service stations and non-motorway service stations.¹² With regard to Austria however, recent Commission practice does however not further sub-divide between retail sale of motor fuels into motorway and non-motorway sales¹³.
10. The Parties consider for motor fuels that the product market could be divided between "wholesale" which focuses entirely on sales to resellers (sub-divided by diesel and gasoline) and the "retail-sales (to all end-customers).
11. For purposes of the present case it is not necessary to determine the precise scope of the product markets, as no competitive concerns arise on any reasonable market definition.

Geographic Market

12. As regards the market for non-retail supply of motor fuels, the Commission has indicated that the relevant geographic market is national¹⁴ or even regional¹⁵ in scope. In

⁸ Cases M.4348-PKN / Mazeikiu, paragraph 8; M.4588 - Petroplus /Coryton Refinery Business paragraph 12; M.5005 - Galp Energia / Exxonmobil Iberia, paragraphs 6-9; M.5637 – Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings, paragraph 23; M.5846 – Shell / Cosan, paragraphs 16-17 / JV; M.5781 - Total Holdings Europe Sas/ Erg Spa/ JV, paragraph 9.

⁹ M.5846 – Shell / Cosan / JV, paragraphs 16-18.

¹⁰ Idem.

¹¹ In M.5846 – Shell / Cosan / JV from 2011 only sales from an "integrated retail network" (para 16) are considered to be "retail". However, this seems to be an isolated approach as in other current cases (For example: M.5637 – Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings, paragraph 29; M.5781 – Total Holdings Europe SAS / ERG SpA / JV, paragraph 16.; M.5629 – Normeston / MOL / Met JV, paragraph 19) retail sales of motor fuels are defined as sales "made to motorists from branded and unbranded service stations" or "through service stations", without distinguishing between branded/integrated and unbranded/non-integrated outlets.

¹² M.5005 - Galp Energia / Exxonmobil Iberia, paragraph 12; Case No COMP/M.5637 - Motor Oil (Hellas) Corinth Refineries/ Shell Overseas Holdings, Paragraph 29.

¹³ COMP/M.5796 – ENI / Mobil Oil Austria, paragraph 11.

¹⁴ M.4348 PKN / Mazeikiu, para 28; COMP/M.5005 –Galp Energia/ExxonMobil Iberia, paragraph 25; M.5637 Motor Oil (Hellas) / Corinth Refineries / Shell Overseas Holdings, paragraph 42.

other decisions, the Commission has found that the markets could be narrower than national as resellers and end-users seek a nearby source of supply in order to economise on transportation costs, but left the geographic market definition open¹⁶.

13. In the past, the Commission has either assessed the markets for retail supply of motor fuels at national level or it left the geographic market definition open.¹⁷ It has also been pointed out that there is a strong local element to the retail fuel market, as vehicle owners usually resort to service stations in their vicinity.¹⁸
14. The Parties submit that the relevant geographic market in this case for wholesale/non-retail is at least Austria and for retail is Austria, but that the geographic market definition may be left open.
15. For purposes of the present case it is not necessary to determine the precise scope of the geographic markets, since no competitive concerns arise on any basis.

Heating Oil

Product Market

16. As was already mentioned above in paragraph 7 concerning refined oil products, the Commission has found in the past, that different stages of the distribution chain – in particular, ex-refinery sales, non-retail sales and retail sales – are separate product markets.
17. Concerning the separation per consumer group, non-retail sales of heating oil has been defined as sales to branded and unbranded service stations, independent smaller resellers, industrial and commercial consumers (e.g. transport companies) and public institutions such as hospitals, the army etc.¹⁹ Concerning retail sale of heating oil, in a recent precedent²⁰, the Commission assessed it as one relevant market, without specifying the consumer group.
18. The Parties consider that potential product markets are also "wholesale", which entirely focuses on resellers and "retail (all end-customers)".
19. As to a separation between different types of heating oil (e.g. heating oil light, heating oil extra light and heating oil heavy (commonly abbreviated also to "HOL", "HOEL" and "HOH" respectively), the Commission has defined a single market for i) retail and ii) non-retail sale of heating oil (that includes all types of heating oils)²¹, but in other precedents it has also confirmed the product market of the non-retail sale of light

¹⁵ M.3291 Preem/ Skandinaviska Raffineradi, paragraphs 16-17.

¹⁶ M.5846 – Shell / Cosan JV, paragraph 19.

¹⁷ M.5781 Total Holdings Europe SAS / ERG SpA / JV, paragraph 31; M.5796 ENI / Mobil Oil Austria, paragraph 13; M.5846 – Shell / Cosan / JV, paragraph 21.

¹⁸ M.5781 Total Holdings Europe SAS / ERG SpA / JV, paragraph 31.

¹⁹ M.5637 – Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings, paragraph 38-39.

²⁰ M.5637 – Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings the Commission, paragraph 30

²¹ M.5637 – Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings, paragraph 30 and 39.

heating oil (typically used by companies or domestic households).²² With regard to Austria, in the recent M.5796 – ENI / Mobil Oil Austria case, a single market for heating oil was considered (in paragraph 7), but in an older precedent a HOEL market was defined for Austria.²³

20. The Parties consider that a distinction should be made between i) HOL, ii) ("HOEL") and iii) ("HOH").
21. For purposes of the present case it is not necessary to determine the precise scope of the product markets beyond the above definitions, since no competitive concerns arise on any basis.

Geographic Market

22. Also, the Commission has in past merger decisions²⁴ identified various elements suggesting that competition in non-retail and retail distribution of refined oil products was national in scope, however, in most instances it has not found it necessary to reach a firm view on this issue.
23. The Parties submit that the relevant geographic markets in this case are Austria and, as far as non-retail level of heating oil extra light is concerned, Austria and the adjacent regions/neighbouring countries.
24. For purposes of the present case it is not necessary to determine the precise scope of the geographic markets, since no competitive concerns arise on any reasonable basis.

2. Competitive Assessment

Motor Fuels

25. According to the data submitted by the Parties, their combined market shares on an Austrian market for both retail (i.e. sales to motorists from branded and unbranded service stations) and non-retail (i.e. sales of motor fuels to non-integrated retailers, independent resellers or major industrial and commercial customers) supply of all motor fuels, of diesel and of gasoline would not exceed [10-20]%.
26. The Parties would have around [0-5]% of the retail motor fuel outlets.
27. With regard to a possible distinction between on- and off-motorway the Parties submit that they do not operate on-motorway outlets. Taking into account that the vast majority (over 90%) of retail motor fuels are sold off-motorway, the Parties' combined market share remain below [0-5]% for off-motorway sales of motor fuels.
28. Therefore there are no affected markets for motor fuels on a national (i.e. Austria) basis.

²² M.3110 – OMV / BP ("Southern German Package"), paragraphs 12 and 16; , M.4545 – Statoil / Hydro, paragraphs 19-21; M.5445 – Mytilineos / Motor Oil / Corinthos Power, paragraph 14; M.5781 – Total Holdings Europe SAS / ERG SpA / JV, paragraph 12.

²³ M.1819 – Rheinbraun / OMV / COKOWI, paragraph 19

²⁴ M.3110 OMV / BP (Southern Germany Package), paragraph 23-24; M.4002 OMV / Aral CR paragraphs 15-22.

29. With respect to a possible geographic market by individual Austrian State, the Parties submit that the estimated combined 2010 market shares are above [10-20]% on the product market of non-retail supply of diesel in: [...] ([20-30]%), [...] ([20-30]%), [...] ([10-20]%), [...] ([20-30]%).
30. The Parties submit that, the increment brought about by the transaction is minimal, except in the State of [...].²⁵
31. As regards [...] the Parties submit that those geographic areas are amongst the smaller federal States in Austria. Smaller geographical areas make it more likely that competitive pressure is exerted from neighbouring areas. It is sufficient to only include one other neighbouring Austrian State in a "market" share calculation in order to have "market shares" dropping below [10-20]% or even [5-10]%, indicating that competitors have significant presence in these neighbouring geographical areas. With regard to [...], it is also argued that the actual market size is larger and, correspondingly, the Parties actual market share lower.
32. In the view of the above and of the fact that none of the combined market shares exceeds [30-40]%²⁶ in these area face competition from large international oil companies such as BP, Shell, ENI, MOL, OMV or ConocoPhillips amongst others, no competition concerns are expected to arise from the proposed transaction in the markets for motor fuels.

Heating Oil

33. The Parties' estimated market share in Austria is above [10-20]% in the following possible product markets:
1. Non-retail supply of: heating oils (the three types of heating oils²⁷ combined, [10-20]%), HOEL ([20-30]%) and HOL ([20-30]%)²⁸,
 2. Potential market of retail supply of HOL²⁹ ([10-20]%).

In addition, the Parties' combined market share is [10-20]% in the retail markets (to domestic customers) of heating oils and HOEL.

34. The Parties submit that several strong competitors are active on this market. Concerning non-retail sales of HOEL, these include: MOL (20-25%), Shell Austria (10-12%), BP (10%), ENI/AGIP (8-10%) and a number of smaller companies with market shares of up to 10%.

²⁵ OMV Wärme market share is below [0-5]% in all possible affected market, except for non-retail supply of diesel (OMV Wärme: 10-20]%, RWA/BayWa: [10-20]%) in [...].

²⁶ Only in one potential product- and geographic market (non-retail supply of diesel in [...]) is the estimated combined market share very close to [20-30]% (being [20-30]%).

²⁷ HOEL, HOL and HOH (i.e. extra light , light and heavy heating oil).

²⁸ [...].

²⁹ In the Parties' approach, this product market comprises all sales made to private / domestic households. In order to distinguish "retail" from "non-retail" customers, the Parties have chosen a limit of an annual demand of 10.000 litres of HOEL and HOL, respectively, as, from their experience, customers above this limit, are primarily commercial customers, industrial customers or public institutions.

35. For non-retail sales of HOL, the Parties face the same strong competitors, BP (25-30%), Shell Austria (10-15%), ENI/AGIP (5-10%), MOL (3-5%), and a number of smaller companies with market shares of up to 10%.
36. In addition, the Parties argue that concerning the non-retail supply of heating oil there are substantial physical imports. Approximately 45% of HOEL sold in Austria is imported. Several independent refineries in neighbouring countries compete non-retails' heating oil supplies). Moreover, prices of HOEL are based on international benchmark prices (e.g. Platts Rotterdam) and HOEL may be transported over long distances. Retailers can import heating oil from outside of Austria and regularly do so.
37. The Parties submit that OMV's Schwechat refinery is the world's only producer of HOL. Its use is currently restricted by law to relatively large oil burners³⁰ and demand is falling rapidly.³¹
38. On the basis of the above it is unlikely that that there would be any competition concerns on any heating oil markets in Austria. Market shares are comparatively low on the national market and there is competitive pressure from the major oil companies.
39. With respect to a possible geographic market by individual Austrian States, the following product markets are potentially affected:
1. Non-retail sales of heating oils in seven States the combined market shares are between [10-20]%-[20-30]%
 2. Non-retail sales of HOEL: in seven States the combined market shares are between [10-20]%-[30-40]%. The market share is above [30-40]% in [...].
 3. Non-retail sales of HOL: in eight States the combined market shares are between [10-20]%-[40-50]%. Markets shares are above [30-40]% in the States of [...].
 4. Non-retail sales of HOH: two States are potential affected markets (market shares are [10-20]% and [10-20]%).
 5. Potential product market of retail of all heating oil: four States are potential affected markets (the combined market shares are between [10-20]%-[30-40]%). Only in [...] are market shares above [30-40]%
 6. Potential product market of retail of HOEL: four States are potential affected markets (the combined market shares are between [10-20]% - [30-40]%). Except in [...], market shares remain below [20-30]%
 7. Potential product market of retail of HOL: five States are potential affected markets (the combined market shares are between [10-20]%-[30-40]%). The market shares are above of [30-40]% in [...].

³⁰ With power in excess of 70kW.

³¹ HOL generates higher carbon emissions than HOEL, and from 2018, its use will only be permitted in burners with power in excess of 400kW. In addition, limits to the allowed NOx emissions will be tightened further.

40. In the non-retail product markets, the Parties will face competition from the major oil companies. In addition there are no barriers to customers seeking supplies in the neighbouring Austrian States and indeed from adjoining countries. It is therefore unlikely that any competition concerns will arise in relation to non-retail supplies of heating oil.
41. Concerning the market shares on the various potential product markets for retail sales the Parties combined market shares exceed [30-40]% only in [...] and in no case they exceed [40-50]%. Given that there are no barriers for retail customers seeking fuel oil and that competitors cover the country with a network of supply depots the high market shares are unlikely to be translated into market power. It is unlikely that any competition concerns will arise in relation to retail supplies of heating oil
42. The Parties also argue that the proposed transaction practically eliminates the current vertical integration between OMV Wärme and OMV's refining. [...]. By contrast, the entity once sold will be solely controlled by a trading and distribution company and will be able to source its requirements from the cheapest source.
43. In the view of the above, no competition concerns are expected to arise from the proposed transaction in the markets for heating oil under any potential geographic market definition.
44. As to co-ordinated effects, given the low levels of concentration and the large number of competitors that customers have access to, both at the wholesale and the retail level, tacit collusion is not plausible in the distribution of heating oil in Austria, neither before, nor after the transaction.
45. As outlined before, no competition concerns are expected to arise from the proposed transaction.

IV. CONCLUSION

46. For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission
(signed)
Joaquín ALMUNIA
Vice-President*