

*Case No IV/M.663 -
Dow / Dupont*

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 21/02/1996

*Also available in the CELEX database
Document No 396M0663*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.02.1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

TO THE NOTIFYING PARTIES

Dear Sirs,

Subject : Case No IV/M.663 - DUPONT/DOW

Notification of **19 January 1996** pursuant to Article 4 of Council Regulation No 4064/89

1. On 19 January 1996, Dow Chemical Company (DOW) and E.I. Du Pont de Nemours and Company (DUPONT) notified the Commission of their intention to combine their world wide elastomer operations into a joint venture Dupont Dow Elastomers L.L.C. (DDE).
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application of Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I THE PARTIES

3. DOW is a Delaware corporation whose main activities are in energy and base and speciality chemicals throughout the world.
4. DUPONT is also a Delaware corporation active in the fields in energy and basic chemicals on a world wide basis.

II THE OPERATION

5. DDE will be formed in accordance with a Formation Agreement (signed 16 January 1996) and a Limited Liability Company Agreement between DOW and DUPONT and two of their subsidiaries, Wenben Inc (WENBEN) and Dupont Elastomers Inc (DEI).
6. DDE will be a limited liability company organised under the Delaware Limited Liability Company Act. It will have two share holders WENBEN and DEI each with 50 % of the shares. Therefore DOW and DUPONT will each hold 50 % of DDE indirectly.
7. The parent companies will contribute their existing world wide synthetic elastomer businesses to the venture. In particular, DOW will contribute its chlorinated polyethylene (CM) and ethylene octene dipolymer rubber (EOM) products while DUPONT will contribute polychloroprene rubber (CR), chlorosulphonated polyethylene (CSM), ethylene propylene terpolymer rubber (EPDM), alkylated chlorosulphonated polyethylene (ACSM), ethylene acrylic rubber (EAM), polyacrylate rubber (AM), fluoroelastomer (FKM) and perfluoroelastomer (FFKM) products. In addition, DOW will grant the joint venture a worldwide licence to its new INSITE metallocene catalyst technology to make and use synthetic elastomers and an exclusive licence to sell such synthetic elastomers for use within the business purpose of the joint venture.
8. DOW has entered into an agreement to acquire joint control of Buna SOW Leuna Olefinverbund GbmH (BUNA), a German chemical company. BUNA produces, inter alia, SBR (styrene butadiene rubber) a synthetic elastomer used mainly in the production of tires. This operation which is conditional upon the approval of a 5 year state aid plan has not yet been completed. DOW's acquisition of joint control of BUNA was authorised on 4 July 1995 by a Commission decision under Council Regulation No 4064/89. Therefore BUNA is not part of the proposed operation.

III CONCENTRATION

JOINT CONTROL

9. Each of the parent companies has 50 % of the shares in DDE. Each of the parent companies has the right to appoint an equal number of Member Representatives to the Member Committee. These representatives, who will never be employees of DDE, will have certain powers, in particular :
 - set the overall policy and vision of DDE;
 - recommend to the annual meeting of Members the dividend policy of DDE and the level of dividends to be declared;
 - to elect or appoint the officers of DDE
 - to approve capital expenditure above certain levels;
 - to approve the business and strategic plans and the annual operating plans of DDE;
 - to determine the banking policy of DDE and approve all borrowings by DDE above certain levels.
10. The decisions of the Members Committee, at which at least one representative of each of the parents must be represented, must be unanimous. As each of the parents will therefore have a right of veto over the principal decisions concerning the joint venture, they will exercise joint control over the company.

FULL FUNCTION ENTITY

11. The parents will each contribute a number of products to the joint venture and all the rights to elastomers currently under development. The parties will also contribute the other assets of their elastomer businesses. Due to the complexity of the plants concerned and their location, this may be effected by the transfer of complete and independent operating sites (dedicated sites), certain identifiable facilities connected solely with the production, research, marketing, etc of elastomers which are located within larger sites operated by DOW or DUPONT (dedicated facilities) and capacity utilisation rights to manufacturing facilities not principally dedicated to the elastomer business located on sites operated by DOW and DUPONT.
12. Although DDE will enter into agreement for the supply of certain raw materials, these agreements are not exclusive and will allow DDE to purchase from third parties if such third parties offer more competitive prices.
13. DDE will therefore perform on a lasting basis all the functions of an autonomous economic entity.

ABSENCE OF COORDINATION

14. The formation agreement provides that the joint venture shall represent DOW and DUPONT's all business interests within the "business purpose" of the joint venture, that is the discovery, development, design, manufacture, distribution, marketing and sale of high quality elastomers on a global basis and specifically provides for the elimination of product competition within the "business purpose". In the light of the considerable investment needed to reenter the business it may be concluded that neither parent is likely to reenter the market independently.
15. DOW's interest in BUNA will not be contributed to DDE. First the operation has yet to be completed and secondly because SBR the only elastomer produced by Buna is only one of a large range of products manufactured by the company. SBR is used in very large part, for the production of tires. The assets contributed by DOW and DUPONT to DDE do not produce SBR.
16. DUPONT has a 50 % interest in a Japanese company Dupont-Showa Denko (DSD) which produces Neoprene (CR), a synthetic elastomer. The remaining 50% is held by Showa Denko, a Japanese company. All of DSD's production is sold in Japan. DSD is a full function joint venture with its own sales and marketing operation. Dupont's interest will not be transferred to DDE on completion. Instead DUPONT will attempt to restructure the operation and transfer it at a later date by means of separate agreement. Showa Denko has no other interests in the production synthetic elastomers except for a very small tonnages of CM. If the planned integration of DUPONT's interest in DSD fails to materialise, the DSD joint venture cannot serve as a vehicle for co-ordination between Dow and Dupont as Dow will no longer have any interests in synthetic elastomers apart from its interest in DDE.
17. The operation does not therefore give rise to coordination of competition.

CONCLUSION

18. The operation constitutes a concentration with the meaning of Article 3(1)b of the Regulation.

IV COMMUNITY DIMENSION

19. The combined aggregate turnover of the parties exceeded 5,000 million Ecu in 1994. (DOW 16,826 million Ecu and DUPONT 33,081 million Ecu). The European Union turnovers at 3,589 million Ecu and 3,670 million Ecu respectively, exceeded 250 million Ecu. The parties do not generate more than two thirds of their aggregate community wide turnover in one and the same Member State. The operation therefore has a Community dimension.

V COMPATIBILITY WITH THE COMMON MARKET**RELEVANT PRODUCT MARKET**

20. The products to be contributed to the joint by its parents are

Neoprene	(CR - polychloroprene rubber)
Hypalon	(CSM - chlorosulphonated polyethylene)
Nordel	(EPDM - ethylene propylene terpolymer rubber)
Vamac	(EAM - ethylene acrylic rubber)
Ascium	(ACSM - alkylated chlorosulphonated polyethylene)
Advanta and Viton	(FKM - fluoroelastomer)
Kalrez and Zalak	(FFKM - Perfluoroelastomer)
Tyrin	(CM - chlorinated polyethylene)
Engage	(EOM - ethylene octene dipolymer rubber)

In addition the Formation Agreement also includes a number of families of synthetic elastomers not currently produced by the parties. These are :

BR	Butadiene rubber
[...]	
NBR	Nitrile rubber
HNBR	Hydrogenated nitrile rubber
IIR	Isobutene isopropene rubber
AM	Polyacrylate rubber
ECO	Epichlorohydrin.

21. Generally speaking each of the families of synthetic elastomers have specific characteristics and/or costs which define the applications for which they may be used. These characteristics (such as heat and oil resistance) arise from the elastomer's chemical composition. The products are homogenous and a customer can expect one supplier's CR to be directly substitutable for another producers CR. Synthetic elastomers are essentially commodity products

22. Furthermore with very limited exceptions the production of each family requires equipment and techniques specific to that family so that it is not possible to switch the use of a facility designed to produce elastomer A to produce elastomer B.
23. Synthetic elastomers are rarely if ever used without being mixed with other products in a process called compounding. The mixture is then subjected to moulding or extrusion to produce the final product and must then be vulcanised or heat treated to give the rubber chemical and thermal stability.
24. DDE with only insignificant exceptions will carry out no compounding and will produce no finished products. It will sell its output to compounders or to those end users who undertake their own compounding. In this situation it is not necessary to look to the end user markets.
25. Although natural rubber still accounts for approximately 33 % elastomer consumption in most applications it is not competitive to synthetic elastomers. In particular it is not competitive with the product range of the DDE joint venture. Natural rubber suffers from the handicap of having very low resistance to temperature and oil, two key requirements of elastomers.
26. The Commission's investigations indicate that for certain applications there are limited possibilities for substitution between families of synthetic elastomers (between EOM and EPDM and between CM and CR). In the case of EOM the tonnage sold in 1994 was extremely small so that its addition to the market for EPDM which is 90 times larger would have no significant effect. CR and CM appear to be substitutable only for some applications in the wire and cable business. The total sales in 1994 of CR and CM to the wire and cable sector, including those applications for which substitution is not possible, are estimated to be about [...] ⁽¹⁾ of the total sales of these product families. The possibilities of substitution are not judged to be near the level at which the pairs of products could be regarded as a single market. The relevant product markets are the markets for the individual synthetic elastomers.

RELEVANT GEOGRAPHIC MARKET

27. The joint venture will be based in the USA and will have the following production facilities :

Beaumont, Texas USA	CSM, EPDM
Deepwater, New Jersey USA	FKM
Elkton, Maryland USA	FKM
Louisville, Kentucky USA	CR
Ponchartrain, Louisiana USA	CR
Tralee Park, Delaware USA	FFKM
Dordrecht, Netherlands	FKM
Maydown, N. Ireland	CR
Utsanomiya, Japan	FFKM
Plaquemine, Louisiana, USA	CM
Stade, Germany	CM
Freeport, Texas USA.	EOM

⁽¹⁾ deleted - business secret : less than 10 %

28. The products are of comparatively high value and transport costs are not a major constraint on the competitiveness of products. It is feasible to transport the products over large distances for instance DOW and DUPONT supply all their customers requirements for CSM, FFKM and EOM from the USA or Japan.
29. Both the producers and the consumers of synthetic elastomers are generally large and often multinational companies whose production plants are widely located. For most of the families of products the joint venture will have only one or two plants to supply its customers world wide. As there is only very limited overlap between product families here will be no change in the supply pattern as a result of the proposed concentration.
30. Prices for synthetic elastomers are virtually the same throughout Western Europe. The parties use a system of delivered prices for all Western Europe. Their prices are therefore substantially uniform, subject to changes of exchange rates.
31. The relevant geographic market is therefore at least the European Union and probably larger. It is not necessary to define the geographic market exactly if the proposed transaction does not give rise to competition problems at the European Union level it will not give rise to problems on any larger market.

ASSESSMENT

32. The synthetic elastomer operations of DOW and DUPONT are complementary. DOW produces an CM and EOM, while DUPONT produces CR, CSM, EPDM, ACSM, EAM-AM, FKM and FFKM.
33. For the synthetic elastomers which will be produced by the joint venture there is no significant overlap and therefore no increase in market shares so that the market situation will not change as a result of the concentration. However there is a limited degree of substitutability between EOM and EPDM and between CR and CM.
34. DOW is the only producer of EOM. DUPONT manufactures EPDM and has a market share of [...] ⁽²⁾ in Western Europe. As the tonnage of EOM sold in Western Europe is very small compared to that of EPDM ([...] ⁽³⁾ tonnes against [...] ⁽³⁾ tonnes) if the relevant market were to be considered as that for EOM and EPDM the market share would be only [...] ⁽⁴⁾ and would not give rise to any problems of dominance.
35. DOW is the only significant supplier of CM in Western Europe. DUPONT has a [...] ⁽⁵⁾ of the Western European market for CR. Responses to the Commission's enquiries indicate that there is strong competition in the market for CR and therefore also in the combined market for CR and CM if it were to exist. Bayer, Enichem and a number of non-European manufacturers supply CR to the Western European market. Neither CR, which was first produced commercially in 1931, nor CM which was introduced in the 1960s enjoy patent protection so that there are no technical barriers to the entry of new producers of these products. The Commission does not consider that CR and CM form part of the same market (see point 26 above) but even if it were so there is adequate remaining competition to restrain the behaviour of DDE.

⁽²⁾ deleted - business secret : 0 - 10 %

⁽³⁾ deleted - business secret

⁽⁴⁾ deleted - business secret : 0 - 10 %

⁽⁵⁾ deleted - business secret : 30 - 50 %

36. The joint venture will inherit very substantial market shares for a number of product families not previously discussed (CSM, ACSM, EAM-AM, FFKM). This is because either DOW or DUPONT was the sole producer of the product family in question or that there are one or two alternative suppliers. There are no blocking patents for any of the products so that there are no technical barriers to entry. Most of these product families are produced and sold in comparatively small quantities. Furthermore the creation of DDE will not strengthen the parties market position as only [...] ⁽⁶⁾ currently produces these product families so there will be no addition of market share.
- 37 DOW and DUPONT are both very large companies with ample financial resources. The proposed joint venture will not therefore result in additional financial resources being made available which would create or strengthen a dominant position.

VI ANCILLARY RESTRAINTS

38. The Formation Agreement for DDE provides that neither DUPONT nor DOW or any of their affiliates shall compete with the joint venture and that DUPONT and DOW shall offer the rights to any new technology developments within the scope of the joint venture's business purpose to DDE. DOW and DUPONT are prohibited from acquiring businesses whose main activity falls within the scope of DDE's business purpose and must offer to DDE any parts of other acquisitions falling within DDE's business scope. Finally if either parents sells its interest in DDE it may not enter the synthetic elastomers market for a period of at least five years.
39. These non-competition provisions are directly related to the notified operation and necessary for its continued operation. They express the continued withdrawal of DOW and DUPONT from the synthetic elastomer market and may, therefore, be regarded as ancillary to the operation.
40. Both DOW and DUPONT will grant to DDE licences to their respective elastomer technologies and the right to use DOW and DUPONT trade marks to the materials included in the businesses contributed to the joint venture. In so far as these licences are restrictive in effect they allow DDE to produce and market the products transferred to the joint venture and may be regarded as ancillary to the operation
41. DDE will enter into non exclusive contracts with its parents for the supply of raw materials. These agreements allow DDE to purchase its requirements from third parties if the third party can offer more competitive prices. However the parents are obliged to supply DDE. The agreements ensure that DDE has access to raw materials and provide the joint venture with security of supply. These agreements do not restrict competition.

VII CONCLUSION

42. It follows from the above that the proposed concentration would not create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market or in a substantial part of it.

⁽⁶⁾ DUPONT

* *
*

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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission,