

Modifying Order

124 F.T.C.

IN THE MATTER OF

OERLIKON-BUHRLE HOLDING AG

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3555. Consent Order, Feb. 1, 1995--Modifying Order, Sept. 9, 1997*

This order reopens a 1995 consent order -- involving Oerlikon-Buhrle's acquisition of Leybold AG -- and modifies the consent order by substituting a prior notice provision for the prior approval provision of the consent order.

ORDER REOPENING AND MODIFYING ORDER

On May 12, 1997, Oerlikon-Buhrle Holding AG ("Oerlikon"), the respondent named in the consent order issued by the Commission on February 1, 1995, in Docket No. C-3555 ("order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter.

Oerlikon asks that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and consistent with the Statement of the Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement"),¹ to eliminate the requirement that Oerlikon obtain the prior approval of the Commission before acquiring certain assets or interests relating to the manufacture and sale of compact disc metallizer machines or turbomolecular pumps. Oerlikon's Petition was on the public record for thirty days until May 14, 1997, and no comments were received. As discussed below, the prior approval requirement of paragraph VII of the order is set aside and a limited prior notice provision is substituted in paragraph VII.

The Commission, in its Prior Approval Policy Statement, concluded that a general policy of requiring prior approval is no longer needed, citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior approval or prior notice may be appropriate in the public interest in certain limited circumstances. For example, a narrow prior approval provision may be appropriate "where there is

¹ 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger," and "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. The need for prior approval or prior notice will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

When a petition is filed to reopen and modify an order pursuant to the Prior Approval Policy Statement, the rebuttable presumption is that the public interest requires reopening the order and modifying it consistent with the announced policy. Setting aside the prior approval requirement in the order would be consistent with the announced policy. Characteristics of the markets identified in the complaint and order suggest, however, that a limited prior notice provision would be appropriate. The markets identified in the complaint remain concentrated, and an acquisition by Oerlikon of a significant competitor in one of the markets may not be reportable under the Hart-Scott-Rodino Act. A prior notice requirement would ensure the opportunity to review any such transactions. Therefore, consistent with the Prior Approval Policy Statement, paragraph VII of the order should be modified to substitute a prior notification provision for the prior approval provision.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph VII of the order be, and it hereby is, modified as of the effective date of this order as follows:

VII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Oerlikon Buhrle shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the manufacture of turbomolecular pumps;

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale of turbomolecular pumps;

C. Acquire any of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the manufacture of compact disc metallizers; or

D. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale of compact disc metallizers.

Provided, however, that this paragraph VII shall not apply to the acquisition of products or services in the ordinary course of business, or of any non-exclusive license to any patent or other form of intellectual property (excluding assets of the Leybold Compact Disc Business and Balzers-Pfeiffer).

The prior notifications required by this paragraph VII shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee shall be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made and has been made pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IN THE MATTER OF

EXXON CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9281. Complaint, Sept. 11, 1996--Decision, Sept. 12, 1997

This consent order requires, among other things, the respondent to produce a nationwide consumer education campaign informing consumers that regular gasoline, not high octane gasoline, is right for most cars, and also requires the production of a free consumer brochure, concerning gasoline octane, to be distributed, for two years, to Exxon's service stations nationwide. In addition, the consent order prohibits Exxon from making claims concerning the engine cleaning ability of any gasoline or the effect of any gasoline on automobile maintenance or maintenance costs without adequate scientific evidence to substantiate the claims.

Appearances

For the Commission: *Theodore H. Hoppock, Joel Winston, Beth Grossman, Sydney Knight and Michael Dershowitz.*

For the respondent: *S. William Livingston, Robert D. Wick and Eugene I. Lambert, Covington & Burling, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Exxon Corporation, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a New Jersey corporation with its principal office or place of business at 225 E. John W. Carpenter Freeway, Irving, Texas.
2. Respondent has advertised, offered for sale, sold, and distributed gasoline and other petroleum products to the public, including Exxon Supreme 93 octane gasoline, Exxon Plus 89 octane gasoline, and Exxon Regular 87 octane gasoline.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or caused to be disseminated advertisements for Exxon gasoline, including but not necessarily