

IN THE MATTER OF

MONTEDISON S.P.A, ET AL.

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-3580. Consent Order, May 25, 1995--Modifying Order, Jan. 9, 1998

This order reopens the proceeding and modifies the 1995 consent order (119 FTC 676) by eliminating the prior approval provision and substituting a limited prior notice provision for certain acquisitions.

ORDER REOPENING AND MODIFYING ORDER

On August 11, 1997, Montedison S.p.A ("Montedison"), Montell N.V. ("Montell"), Shell Oil Company ("Shell"), Royal Dutch Petroleum Company, and The "Shell" Transport and Trading Company p.l.c. ("the petitioners"), filed a Petition To Reopen And Modify Order ("Petition") in Docket No. C-3580 ("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 and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions ("Prior Approval Policy Statement").¹ The Petition requests that the Commission reopen and modify the order to eliminate the prior approval provision set forth in paragraph VII of the order. The Petition was placed on the public record for thirty days and one comment was received. The Commission has determined to reopen the order and to grant the Petition in part.

The complaint in this matter alleged that the petitioners' formation of Montell, a joint venture that merged the majority of Shell's and Montedison's worldwide polyolefins businesses, violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by lessening competition and tending to create a monopoly in, among other markets, the licensing of polypropylene technology, polypropylene technology and the licensing of polypropylene catalysts and catalyst technology "throughout the world."²

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

² Complaint ¶¶ III and V.

The complaint alleged, among other things, that the formation of Montell would eliminate actual competition between Montedison and Shell in the relevant markets; substantially increase the level of concentration in the relevant markets; increase Montedison's and Shell's ability to unilaterally exercise market power in the relevant markets; and reduce Montedison's and Shell's incentives to license polypropylene technology or polypropylene catalysts to polypropylene resin manufacturers that compete with Montell.³

The order required Shell to divest the "Properties to Be Divested," as defined in paragraph I.Q of the order.⁴ On December 21, 1995, the Commission approved Shell's application to divest the "Properties to Be Divested" to Union Carbide Corporation. Under the order, the petitioners are prohibited from acquiring without the prior approval of the Commission any stock or related assets of any concern engaged in certain enumerated activities.⁵

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.⁶ The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."⁷

³ *Id.* at ¶ V.

⁴ Order ¶ VII.

⁵ The covered activities are:

- "1. The research and development... or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world;
2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world; or
3. The manufacture or sale of Propylene Polymers in the United States or Canada"

Order ¶ VII.

⁶ Prior Approval Policy Statement at 2.

⁷ *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval 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 the provision, attempt the same or approximately the same merger." The Commission also said that "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."⁸

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."⁹ The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.¹⁰ Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in this order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the order in Docket No. C-3580 to set aside the prior approval requirement.

The Commission also stated that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive acquisition that would not be subject to the premerger notification and waiting period requirements of the HSR Act. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.*

structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

Based on the record, the Commission has determined that the limited circumstances which the Prior Approval Policy Statement identifies as appropriate for retention of a narrow prior approval requirement, that is, a credible risk that, but for the prior approval provision, the petitioners would attempt the same or approximately the same merger, do not exist in this matter. Accordingly, pursuant to the Prior Approval Policy, the Commission has determined to delete the prior approval requirement of paragraph VII of the order.

The Commission has also determined that the record in this case shows a credible risk that the petitioners could engage in future anticompetitive acquisitions covered by the order that would not be reportable under the HSR Act. The order contains a broad prohibition on acquiring any stock or related assets of any concern engaged in propylene polymers research and development, or licensing of propylene polymers research and development technology or catalyst technology anywhere in the world.¹¹ The petitioners could acquire the exclusive polypropylene or catalyst technology of one of the few firms competing with the respondents around the world that licenses such technology on a world-wide basis. Such an acquisition could foreclose the entry of the licensor into the relevant markets as a competitor of the respondents, but would not be reportable under the HSR Act if the acquired entity has not made substantial sales of the technology being acquired in the United States market. Even where the acquired technology has been used to construct a polypropylene plant in the United States, the revenue realized by the foreign firm for licensing its technology would not ordinarily be reportable under the HSR Act.¹²

Given the non-reportable nature of these types of transactions, there exists a credible risk that the petitioners could engage in unreportable anticompetitive acquisitions supporting prior notice

¹¹ Order ¶ VII.

¹² The acquisition of assets located outside the United States, to which no sales in or into the United States are attributable, is not subject to the requirements of the HSR Act. In addition, the acquisition of assets located outside the United States, to which sales in or into the United States are attributable, is not subject to the requirements of the HSR Act unless, as a result of the acquisition, the acquiring person would hold assets of the acquired person to which such sales aggregating \$25 million or more during the acquired person's most recent fiscal year were attributable. See 16 CFR 802.50.

substitution for paragraphs VII.A.1 and 2 and VII.B.1 and 2, the technology and licensing activities covered by the order.

The record contains no evidence that there exists a credible risk that the petitioners could engage in future anticompetitive acquisitions of stock or assets of any concern engaged in the manufacture and sale (as opposed to research and development) of polypropylene in the United States or Canada that would not be reportable under the HSR Act.¹³ Even if such a transaction were to occur, the purchase price likely would be far in excess of \$15 million and, therefore, reportable under the HSR Act. There is no evidence in this record that any company engaged in the manufacture and sale of polypropylene in the United States or Canada could be acquired for less the \$15 million, or that any competitively significant assets of companies described in paragraphs VII.A.3 and VII.B.3 of the order have been offered for sale at a price below \$15 million. Therefore, the Commission has determined to delete paragraphs VII.A.3 and VII.B.3 from the order consistent with its determination to delete the prior approval requirement and substitute a prior notice provision for the acquisitions described in paragraphs VII.A.1 and 2 and VII.B.1 and 2 of the order.

Although the Petition does not explicitly seek such modification, the Commission may reopen the order and substitute a prior notice provision for the prior approval provision because the petitioners seek relief from the prior approval provision under the Prior Approval Policy Statement. In the Prior Approval Policy Statement, the Commission stated that although "a general policy of requiring prior approval is no longer needed, . . . the Commission reserves its equitable power to fashion remedies needed to protect the public interest," including ordering narrow prior notification requirements in certain limited circumstances.¹⁴ Because the petitioners seek reopening of the order pursuant to the Prior Approval Policy Statement, they have invoked the Commission's authority to modify the order consistent with the Statement. Setting aside the prior approval requirement and modifying the order by substituting the lesser obligation of filing prior notification for acquisitions not otherwise reportable under the HSR Act is consistent with the Prior Approval Policy Statement.

¹³ Order ¶¶ VII.A.3 and VII.B.3.

¹⁴ Prior Approval Policy Statement at 2.

Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to reopen the proceeding in Docket No. C-3580 and modify the order to delete the prior approval requirement of paragraph VII and to substitute a prior notification requirement for paragraphs VII.A.1 and 2 and VII.B.1 and 2. The Commission has also determined to delete paragraphs VII.A.3 and VII.B.3 of the order.

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

It is further ordered, That paragraph VII of the order in Docket No. C-3580, issued on May 25, 1995, be, and it hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That for ten (10) years from the date this order becomes final, Shell, Montedison and Montell shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, other than the acquisition by Shell or Montedison of additional shares of Montell, engaged in at the time of such acquisition, or within two (2) years preceding such acquisition engaged in,

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world; or

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world.

B. Acquire any assets used for or previously used for (and still suitable for use for),

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world; or

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world.

Provided, however, these prohibitions shall not relate to the construction of new facilities or the acquisition of new or used equipment in the ordinary course of business from a person other than the persons referred to in paragraph VII.A of this order. Provided, further, that this paragraph VII of this order shall not apply to the acquisition of Technipol by Montell following completion of the divestiture of the Properties to Be Divested and expiration of the attached Hold Separate Agreement.

Notification required under this provision 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 will 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 respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating the 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 or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

BRAKE GUARD PRODUCTS, INC., ET AL.

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

Docket 9277. Complaint, Sept. 27, 1995--Final Order, Jan. 15, 1998

This final order prohibits, among other things, the Washington-based corporation and its president from misrepresenting the performance characteristics of the braking devices, the availability of insurance discounts resulting from installation of the devices and their compliance with certain government standards. In addition, the final order prohibits the respondents from continuing advertisements that claim their add-on braking system performed as effectively as factory installed antilock braking systems and prohibits the company from using the term ABS in marketing their braking devices. The final order requires the respondents to notify distributors and consumers of FTC findings.

Appearances

For the Commission: *Theodore Hoppock, Janet Evans, Mamie Kresses, Sydney Knight and C. Lee Peeler.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Brake Guard Products, Inc., a corporation, and Ed F. Jones, individually and as an officer and director of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Brake Guard Products, Inc., is a Washington corporation, with its offices and principal place of business located at 1047 W. Garland Avenue, Spokane, Washington.

Respondent Ed F. Jones is or was at relevant times herein an officer and director of Brake Guard Products, Inc. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices