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Case M.7273 - GERDAU EUROPE / ASCOMETAL

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 7(3)

Date: 13.5.2014



EUROPEAN COMMISSION

Brussels, 13.5.2014
C(2014) 3281 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

**Subject: Case M.7273 – Gerdau Europe/Ascometal
Commission decision pursuant to Article 7 (3) of Council Regulation
No. 139/2004¹ - Request of derogation**

1. We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 ("the Merger Regulation") with regard to the proposed acquisition by Gerdau Europa ("Gerdau", Spain) of assets of Ascométal SAS ("Ascometal", France) submitted pursuant to Article 7(3) of the Merger Regulation on 28 April 2014.

I. THE PARTIES AND THE OPERATION

2. Gerdau is a Spanish subsidiary of Gerdau SA, a mother company of an industrial group headquartered in Brazil. Gerdau group is mainly dedicated to the production and commercialization of steel products, through its mills located in fourteen countries in the Americas, Asia and Europe. The Gerdau group produces for the following end-markets: (i) construction of houses, non residential construction, infrastructure, industrial and commercial construction; (ii) agriculture and automotive; as well as (iii) shipbuilding, oil and gas. The products manufactured by the Gerdau group include: billets and plates, bars, concrete iron, products ready for use, steel for large structures, wire rod, cables and nails.

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.

3. Ascometal operates three steel plants in France (located in Les Dunes, Hagondange and Fos-sur-Mer); three cold finishing centres in France (located in Custines, Allevard and Le Marais) as well as an R&D center (Creas) and a warehouse in Cluses. Ascometal is focused on manufacturing high alloyed steel products, in particular, (i) blooms and billets; (ii) bars; (iii) wire rods, and (iv) drawn wire, which are then sold to Ascometal's clients either directly or through independent distributors. Ascometal's clients include companies active in the following sectors: (i) automotive; (ii) mechanical engineering, (iii) springs, (iv) bearings and (v) oil and gas.
4. According to the information provided by Gerdau, in recent years Ascometal suffered a significant decrease in its turnover² mainly due to the macro-economic conditions and in particular the decline in demand from the automotive industry and for engineering steel products. As a result, Ascometal is now facing a judicial reorganisation procedure (*redressement judiciaire*) which was opened before the Commercial Court of Nanterre on 7 March 2014. The court has also appointed a judicial administrator to assist the management of Ascometal, as well as a creditor's representative. The Commercial Court of Nanterre has scheduled a hearing for 14 May 2014, during which it will select the purchaser of Ascometal's assets.
5. On 7 April 2014 Gerdau submitted a formal offer before the Commercial Court of Nanterre (the "Offer") for the purchase of most of the movable and immovable assets of Ascometal, in particular (i) the plants in: Hagondange, Les Dunes, Custines, Cluses and Le Marais; (ii) part of the plant in Fos-sur-Mer relating to the blooming mill, the wire rod mill and thermal treatment; (iii) the hydroelectric power plants in Allevard and (iv) the R&D centre in Creas. Gerdau proposed in the Offer that it will maintain 1,377 employment contracts and create a maximum of 146 new posts as a result of the optimisation of the capacity in Les Dunes plant.
6. According to the information provided by Gerdau, it intends to file an improved offer with the judicial administrator on 9 May 2014. The improvements will relate to an increase in the number of employment contracts, which Gerdau will propose to maintain (by 100 to 150 posts) and an increase in the contribution to the redundancy plan, which will finance the non-transferred employees.

II. EU DIMENSION

7. The undertakings concerned have a combined aggregate world-wide turnover of EUR [>5,000] million (Gerdau Group EUR [>5,000] million and Ascometal EUR [>250] million). Each of them has an EU-wide turnover in excess of EUR [>250] million (Gerdau Group EUR [>250] million and Ascometal EUR [>250] million), and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The proposed Transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

III. THE APPLICATION FOR DEROGATION

8. Pursuant to Article L.642-2 V of the French Commercial Code, offers submitted in the course of *redressement judiciaire* which are subject to any condition precedent

² Between 2011 and 2013 Ascometal's net sales decreased by [...]%.

will be automatically rejected by the commercial court. Furthermore on the basis of Article L.642-5 par. 1 of the French Commercial Code the court is to select the bidder, which guarantees the long term implementation of the transaction. In view of these provisions Gerdau requested in the Offer for the transfer of Ascometal's assets to take place on the business day following the date of the court hearing during which the purchaser will be selected. Gerdau submits that, should its Offer be chosen by the commercial court, approximately four months after it enters into possession of Ascometal's assets it would need to implement the purchase agreement and benefit from the full ownership of the business it would be already operating. Thus, in order to be able to submit a binding offer during the court hearing scheduled for 14 May, Gerdau applied for a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation.

9. Gerdau further argues that the suspension obligation and the legal impediment for Gerdau to take over Ascometal's assets resulting therefrom could lead to serious harm to Ascometal, because it would prolong its current instable financial situation, jeopardise the stability of its business, threaten the jobs of more than 1,900 employees as well as harm Ascometal's reputation in the market. Gerdau notes that if no suitable purchaser is found in the course of the procedure of *redressement judiciaire*, it may be converted into judicial liquidation procedure (*liquidation judiciaire*), which in turn leads to the liquidation of assets and ceasing of activities. Such a result could also, in Gerdau's view, give rise to damages to Ascometal's creditors and employees. According to Gerdau, its Offer is the best reorganisation solution for Ascometal, providing it with long term stability and viability. Finally, Gerdau notes that the lack of derogation from suspension obligation puts it clearly at a disadvantage as compared with the other potential bidders for Ascometal's assets, which might not need to fulfil such regulatory burdens.

IV. THE CONDITIONS FOR DEROGATION PURSUANT TO ARTICLE 7(3) OF THE EC MERGER REGULATION

10. Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on reasoned request, grant derogation from the obligation imposed in Article 7(1).
11. Article 7(3) of the Merger Regulation provides that, in deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.
12. Derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where suspension provided for in the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.

(A) THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE MERGER REGULATION

13. The proposed transaction constitutes a concentration within the meaning of Article 3 of the Merger Regulation and has an EU dimension according to

Article 1 thereof. Hence the operation falls under the suspension obligation laid down in Article 7(1) of the Merger Regulation.

(B) THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND THIRD PARTIES

14. According to the information provided by Gerdau, confirmed by public sources and by the judicial administrator, Ascometal suffers from financial difficulties and is currently subject to the procedure of *redressement judiciaire* under French law.
15. Relevant provisions of the French commercial law require that offers submitted in the course of the procedure of *redressement judiciaire* have to be unconditional or otherwise are declared inadmissible by the relevant commercial court. As a result, the fact that the proposed transaction is subject to the suspension obligation resulting from Article 7(1) of the Merger Regulation implies that Gerdau is not in a position to participate in the bidding process as it is not able to make an unconditional offer for the assets of Ascometal. This implies that Gerdau is placed at a disadvantage vis-à-vis other bidders for Ascometal's assets. In the past, one of the factors considered by the Commission, when deciding whether a derogation from the suspension obligation should be granted was that it would create a level-playing field among the different bidders.³
16. While Gerdau is not the only bidder for Ascometal's assets,⁴ the judicial administrator confirmed that the Offer is solid and viable. It should be noted that Gerdau is the only industrial bidder for Ascometal's assets, while the other bidders offering to acquire control over Ascometal's industrial assets are financial investors.⁵
17. The existence of other offers does however not guarantee that a purchaser for Ascometal's assets will indeed be selected by the Commercial Court of Nanterre and that a liquidation procedure is not opened. Therefore a decision not to grant the requested derogation may potentially also have harmful effects on Ascometal, its creditors and employees.
18. Against this background, it is possible to conclude that the suspension obligation imposed by Article 7(1) could lead to serious harm to Gerdau and potentially also to Ascometal, its creditors and employees. Furthermore, on the basis of the information submitted by Gerdau, granting Gerdau a derogation from the stand-still obligation would not have adverse effects on any third party.

(C) THE THREAT TO COMPETITION POSED BY THE CONCENTRATION

19. Both parties to the transaction are active in the markets for the production and direct supply of steel products.

³ Cases: COMP/M.3488 *3i/VSS/The Telegraph*, COMP/M.5491 *Federal Mogul/TMD Friction Group* and notably COMP/M.6696 *Sofiproteol/Actifs Doux*, where the derogation from suspension obligation was granted in the course of the procedure of *redressement judiciaire*.

⁴ There are in total four bidders offering to acquire control over Ascometal's industrial assets.

⁵ According to Gerdau, other industrial bidders would only be interested in taking over very limited parts of Ascometal's assets, i.e. either its hydroelectric plants or a single industrial site. This information has been confirmed by the judicial administrator.

Relevant markets

20. In previous decisions, the Commission has distinguished steel products based on the chemical composition of the steel (metallurgical characteristics) on the one hand and according to the physical shape of the product on the other.
21. Based on chemical composition, the Commission has distinguished four broad categories of steel products: (i) carbon steel, (ii) stainless steel and (iii) specialty steels and (iv) electrical steel.⁶
22. Carbon steel is carbon-based steel containing no or very little amounts of alloying elements. Stainless steel is defined as steel containing 10.5% or more of chromium and less than 1.2% of carbon.
23. Specialty steels are characterised by their high levels of purity, are generally more expensive than other steel products and have been designed for specific purposes. Specialty steels can be further divided into (i) engineering steel, (ii) high speed steel and (iii) tool steel. In addition, the Commission has also considered distinguishing among tool steel products between (i) cold-work steels, (ii) hot-work steels and (iii) plastic mould steels.⁷
24. As to the physical shape, the Commission has held that long steel products constitute a distinct relevant product market, separate from flat products. In addition, the Commission has considered potential segmentations of long steel products between (i) ingots and billets, (ii) wire rod, (iii) hot rolled and forged bars, (iv) bright bars and (v) drawn wire.
25. According to Gerdau, the Parties' activities do not overlap in the production and supply of carbon, stainless or electrical steel in the EEA.⁸ However, both Gerdau and Ascometal are active in several potential markets for the production and supply of engineering steel long products.
26. In previous decisions, the Commission has considered that the relevant geographic market for engineering steel long products is EEA-wide or at least EEA-wide.⁹

Preliminary assessment

27. As regards the production and direct supply of engineering steel long products, the combined market shares of the parties would reach [5-10]% in the EEA.¹⁰ In the narrower potential segments of engineering steel long products, the combined market shares of the parties would remain at most [10-20]% in the EEA (for hot

⁶ COMP/M.6962 – *Renova Industries/Schmolz&Bickenbach*, paragraphs 11-8, COMP/M.6471 – *Outokumpu / Inoxum*, paragraphs 116–7; COMP/M.5211 – *Outokumpu / Sogepar*, paragraph 10; COMP/M.3778 – *Böhler-Uddeholm / Buderus*, paragraph 11; and COMP/ECSC 1351 – *Usinor/Arbed/AcerItalia*, paragraph 13.

⁷ COMP/M.3778 – *Böhler-Uddeholm / Buderus*, paragraph 17.

⁸ Gerdau, but not Ascometal, is active in the supply of stainless steel and tool steel in the EEA.

⁹ E.g. COMP/M.4211– *Schmolz + Bickenbach / Ugitech*, paragraph 16, and COMP/M.3778 – *Böhler-Uddeholm / Buderus*, paragraphs 35–6.

¹⁰ Gerdau has estimated the parties' market shares on the basis of EU data, including Croatia.

rolled and forged bars). Gerdau further submits that the production and direct supply of specialty steel long products is fragmented in the EEA.¹¹

28. As a result, in view of the information submitted by Gerdau, it can be concluded at this stage that the proposed transaction would not lead to horizontally affected markets in the markets for the production and direct supply of steel products or its narrower segments identified on the basis of the past decisions of the Commission.
29. In addition, according to Gerdau the proposed transaction does not lead to any vertically affected markets.

Conclusion

30. Therefore, on the basis of the information provided by Gerdau it appears *prima facie* that the transaction is not likely to pose a threat to competition within the EEA.

(D) BALANCE OF INTERESTS

31. Based on the above, it appears that the suspension obligation would put Gerdau at a disadvantage vis-à-vis other bidders participating in the process and could potentially affect Ascometal and its creditors and employees. Moreover, granting a derogation does not appear to have adverse effects on one or more of the parties or on any third party. Finally, it is unlikely that granting a derogation would result in significant anti-competitive effects. Therefore the Commission finds that a derogation can be granted in accordance with the application and to the extent specified below.

V. TERMS AND CONDITIONS

32. According to Article 7 (3), 4th sentence, of the Merger Regulation, a derogation from the suspension obligation laid down by Article 7 (1) thereof may be made subject to conditions and obligations in order to ensure effective competition.
33. On 7 May 2014, Gerdau committed to submit a complete notification to the Commission within 6 weeks of the date of the judgement of the Commercial Court of Nanterre that would select Gerdau as the bidder that will take over the assets of Ascometal.
34. Based on the preceding considerations, the Commission has decided to grant a derogation from the suspension obligation with regard to the proposed concentration subject to the following condition:
 - Gerdau shall submit a complete notification to the Commission within 6 weeks of the date of the judgement of the Commercial Court of Nanterre that would select Gerdau as the bidder that will take over the assets of Ascometal, in order to allow the assessment of the compatibility of the proposed concentration with the internal market.

¹¹ See offer submitted by Gerdau for the Ascometal assets on 7 April 2014.

VI. CONCLUSION

35. The Commission considers that the reasons given for derogation from the suspension obligations meet the requirements set out in Article 7(3) of the Merger Regulation.
36. Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation, Gerdau is granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation in accordance with the foregoing terms and conditions until the Commission takes a final decision under the relevant provisions of the Merger Regulation.

For the Commission

(signed)

Joaquín ALMUNIA

Vice-President