



EUROPEAN COMMISSION
DG Competition

Case M.7538 - KNORR BREMSE / VOSSLOH

Only the English text is available and authentic.

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

Article 6(1)(a) INAPPLICABILITY
Date: 21/05/2015

***In electronic form on the EUR-Lex website under document
number 32015M7538***



EUROPEAN COMMISSION

Brussels, 21.5.2015
C(2015) 3551 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Sir/Madam,

Subject: Case M.7538 – KNORR BREMSE / VOSSLOH
Commission decision pursuant to Article 6(1)(a) of Council Regulation No 139/2004¹ and Article 57 of the Agreement on the European Economic Area²

- (1) On 13 April 2015, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking KB Holding GmbH (“KB Holding”, Germany), the holding company of Knorr-Bremse AG (Germany), acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Vossloh Aktiengesellschaft (“Vossloh”, Germany), by way of public bid³. KB Holding is hereinafter referred to as “the Notifying Party” while KB Holding and Vossloh are together referred to 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 OJ L 1, 3.1.1994, p. 3 (“the EEA Agreement”).

³ Publication in the Official Journal of the European Union No C 128, 21.4.2015, p. 10.

1. THE PARTIES

- (2) **KB Holding** is the holding company of Knorr-Bremse AG (KB). KB is mainly a manufacturer of braking systems for rail and commercial vehicles. It also produces other subsystems for trains, such as door systems and heating, ventilating and air conditioning ("HVAC") systems, as well as electronic control and driver assistance systems for commercial vehicles.
- (3) **Vossloh** is a publicly listed company that manufactures rail infrastructure and rail technology. It produces locomotives and local trains, fastening systems, switch systems and electrical systems. It also provides rail supporting services⁴.
- (4) KB Holding currently holds a minority stake of 29.99% in Vossloh and is the latter's largest shareholder. The acquisition by KB Holding of the minority stake in Vossloh was cleared by the German and Austrian competition authorities in 2012.⁵

2. THE CONCENTRATION

- (5) On 20 January 2015, KB Holding announced its public bid for Vossloh⁶. That voluntary public takeover offer to Vossloh's shareholders was intended to extend the current 29.99% minority shareholding in order to obtain a firm and stable quorum in the future annual general meetings of Vossloh and thus to acquire control over Vossloh on a lasting basis. That public takeover offer concerned all shares in Vossloh, i.e. all Vossloh shareholders could potentially accept the offer and tender their shares.
- (6) KB Holding notified the transaction as a potential acquisition of control by way of a voluntary public takeover offer. Whilst KB Holding indicated in the notification that the exact amount of shares it would acquire was unknown since this would be dependent on the acceptance rate, it did envisage that it would acquire sufficient shares for the public takeover offer to result in KB Holding's acquiring sole control over Vossloh.
- (7) KB Holding's previous shareholding did not confer control over Vossloh. According to KB Holding, this is because the 29.99% shareholding does not result in a stable majority in the annual general meeting of Vossloh on a long duration basis which could result in a structural change in the market.
- (8) The voluntary public takeover offer ended on 2 April 2015, during which 0.22% of the share capital and the voting rights of Vossloh were offered. Together with the number of shares already held, KB Holding currently controls 30.21% of the share capital and the voting rights of Vossloh. In fact, KB Holding knew at the time of notification on 13 April that it had only acquired a further 0.22% shares despite stating in the notification that the exact amount of shares it would acquire was unknown since this would be dependent on the acceptance rate. As such, the notification was based on an erroneous premise.

⁴ Vossloh offers modernisation services for traction control systems for rail vehicles.

⁵ FCO's decision B 9 – 166/11 of 15 March, 2012, para. 52-61.

⁶ The offer document was published on 16 February 2015.

- (9) In its submission of 18 May 2015, KB Holding submits that the notified transaction will result in a change of control although only 0.22% of the shares in Vossloh have been tendered. This is because (i) the acquisition of 0.22% of Vossloh's shares through the proposed transaction will result in a de facto majority in future shareholder meetings if the attendance rate does not change, and (ii) the intention of KB Holding to acquire control over Vossloh remains.
- (10) However, in its submission of 6 March 2015, KB Holding itself considered that it is evident that attendance has been volatile not allowing a stable majority on a lasting basis. According to KB Holding, the attendance in the last two years was significantly higher than in 2012, showing a significant volatility. Hence, KB Holding on 6 March 2015 stated that it cannot trust to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years. KB Holding further argued that it is rather depending on further individual circumstances what the exact attendance (rate) in the annual general meeting is going to be. Moreover, KB Holding argued in its submission of 6 March 2015 that the majority attained at the last shareholder meeting was a very small majority (0.015%) resulting from a below-average attendance. Therefore, in KB Holding's own view, it could not be concluded that KB Holding is likely to have a stable majority of the votes at the shareholders meeting.
- (11) KB Holding in its 18 May 2015 submission, however, has argued that given that already the 29.99% in 2014 resulted in a de facto majority at the 2014 Vossloh shareholders' meeting, the addition of 0.22% will result in a de facto majority in future shareholder meetings if the attendance rate will not change. Moreover, it can be expected that KB Holding will have a de facto majority in the 20 May 2015 annual meeting as the composition of shareholders has not changed significantly compared to 2014.
- (12) KB Holding has further argued that it has the intention, following the public bid, to acquire further shares over the stock market or through over-the-counter sales from institutional shareholders and as such, the good faith intention within the meaning of Article 4(1) of the Merger Regulation demonstrated by the public bid has not changed. According to KB Holding, in the case at hand, the intention to acquire control does not require an additional proof such as a signed contract. This is because additional shares can be acquired via the stock exchange immediately and at any point of time after the consummation of the public offer. In the public offer document published on 16 February 2015, KB Holding has expressly reserved the right to purchase shares outside the public offer. KB Holding concludes that, as soon as this is legally permissible *i.e.* after the merger control clearance in China and the consummation of the public offer, KB Holding will acquire additional shares. In this context, it should be noted that the acquisition of additional share is an integral consequence of the successful public offer and the intention to buy additional shares has existed from the beginning.
- (13) The Commission examined whether in the present case the 30.21% shareholding would be sufficient to give KB Holding de facto control over Vossloh under Article 3(1)(b) of the Merger Regulation. A minority shareholding can give rise to de facto sole control over another undertaking where it is established that it is highly likely that the shareholder will have a stable majority at future shareholders' meetings, which would allow that shareholder to exercise decisive influence over strategic

decisions such as the appointment of senior management, the business plan or the budget.⁷ Elements which can be taken into account in such a forward-looking analysis are, inter alia, attendance rates of shareholders' meetings in previous years. Doing so requires, however, a high likelihood that what happened in the past is a good indicator for the future.

- (14) The presence of the voting stock over the past three years was respectively 48.02%, 79.43% and 59.95%. The 2012 – 2014 average amounts to 62.47% of the voting capital. In the years 2007 through 2011, when KB holdings did not hold any shares in Vossloh, the attendance in Vossloh's annual general meetings was on average 61.9%. Therefore, a stake of less than 31% would not have conferred a majority at the shareholders meeting. Therefore, KB's shareholding post public bid of 30.21% does not constitute a majority of votes consistently throughout the last years.
- (15) There is no clear trend in shareholders attendance rates. It has fluctuated over the last years in such a way that it cannot be predicted that a clear stable majority is likely to be achieved in the future by KB Holding. Moreover, it should be noted that in 2014, KB Holding, with its 29.99% shareholding, achieved a majority at the shareholders' meeting by a margin of only 0.015%. Even with its current 30.21% shareholding, it would have achieved the majority in 2014 by a margin of 0.235%. Although the remaining shares are relatively widely dispersed with the six next largest shareholders holding 24.7% together (the two next largest shareholders after KB Holding hold between 5-6% each with the following four shareholders holding between 3-5% each), given the small margin by which KB Holding has had the majority in 2012 and 2014, the attendance (whether in person or by proxy) of one or two small shareholders could tip the balance. The attendance rate also does not necessarily appear to reflect the importance of agenda items. The highest shareholder attendance took place in 2013, when Mr.Thiele (who controls KB Holding) was being voted on as a member of the Supervisory Board and the 2014 attendance rate was at a meeting where the business plan for Vossloh for 2014-2017 was being debated, including debate on restructuring and divestment. The Commission considers that taking into account the attendance rates at past shareholder meetings, the shareholder structure, past agenda items and the very small margin by which majority has been achieved at past shareholder meetings, there is not sufficient evidence to allow the Commission to conclude that KB Holding, with its additional 0.22%, would have a stable majority at future shareholders' meetings. The Commission also notes that KB Holding itself considered that a 29.99% shareholding did not allow de facto control in particular given the volatility in attendance rates and the thin margin by which majority had been attained. As such the current shareholding cannot be considered to constitute de facto control.
- (16) In the absence of de jure or de facto control, KB Holding's acquisition of a minority shareholding in Vossloh does not constitute a notifiable concentration within the meaning of the Merger Regulation.
- (17) Finally, in respect of KB Holdings argument that the intention to acquire further shares post public bid on the stock market, the Commission first notes that a mere statement that it has the intent to acquire further shares over the stock market or

7

Commission Consolidated Jurisdictional Notice, paragraph 59.

through over-the counter sales is not sufficient to constitute a good faith intention within the meaning of Article 4(1) of the Merger Regulation. Whilst it is the case that KB Holding is now free to acquire further shares, and that it reserved this right in the public offer, the fact remains that the acquisition of a shareholding that would equate to de jure or de facto control remains too uncertain.

3. CONCLUSION

- (18) For the above reasons, the European Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3 of the Merger Regulation and consequently does not fall within the scope of that Regulation. This decision is adopted in application of Article 6(1)(a) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission
(Signed)
Margrethe VESTAGER
Member of the Commission*