



EUROPEAN COMMISSION

DG Competition

***Case M.8286 - RHI / MAGNESITA REFRATARIOS***

Only the English text is available and authentic.

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

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Decision on the implementation of remedies - Art. 6(1)(b)  
in conjunction with 6(2) - Purchaser Approval

Date: 29/11/2017



## EUROPEAN COMMISSION

Brussels, 29.11.2017  
C(2017) 8183 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

### To the notifying party:

Dear Sir or Madam,

**Subject: Case M.8286 - RHI / Magnesita Refratários  
Approval of Intocast AG as purchaser of the RHI Divestment Business  
and Magnesita Divestment Business following your letter of 15  
September 2017 and the Trustee's Reasoned Opinion of 22 September  
2017**

### **I. FACTS AND PROCEDURE**

1. By decision of 28 June 2017 ('the Decision') adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004<sup>1</sup> and Article 57 of the Agreement on the European Economic Area<sup>2</sup>, the Commission declared the operation by which RHI AG ('RHI', Austria) intended to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of Magnesita Refratários S.A. ('Magnesita', Brazil) (together the 'Parties') compatible with the internal market and with the functioning of the EEA Agreement subject to full compliance with the commitments annexed to the

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<sup>1</sup> 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.

<sup>2</sup> OJ L 1, 3.1.1994, p.3 (the 'EEA Agreement').

Decision and the conditions and obligations contained therein (the 'Commitments').

2. Under Section B of the Commitments the Parties commit to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to the Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 22 of the Commitments.
3. In particular, the Commitments provide that the Parties shall divest, or procure the divestiture of (i) RHI's entire dolomite business in the EEA, and (ii) Magnesita's entire business for the production and supply of basic shaped unfired refractories from magnesite ('BSRM – unfired') within a deadline set forth in the Commitments ((i) and (ii) together the 'Divestment Business'). The Divestment Business *inter alia* comprises the commitment to enter into an offtake agreement to provide the Purchaser, [pricing information] with the right for a period of [period] to acquire sintered magnesia for the production of all dolomite products up to a maximum volume per year (the 'RHI Offtake Agreement'), as well as the commitment to enter into an offtake agreement to provide the Purchaser, [pricing information], with the right for a period of [period] to acquire sintered magnesia from Magnesita's mines in Brazil up to a maximum volume per year (the 'Magnesita Offtake Agreement').
4. By letter of 15 September 2017, the Parties proposed Intocast AG ('Intocast') for approval by the Commission as purchaser of the Divestment Business and submitted the proposed Divestment Umbrella Agreement, Share Purchase Agreement, Asset Purchase Agreement and related agreements (the 'Proposed Agreement').
5. On 22 September 2017 RSM Corporate Finance LLP, the appointed Monitoring Trustee (the 'Trustee'), submitted a Reasoned Opinion with an assessment of Intocast's suitability as a purchaser (the 'Report') and, in particular, indicated that it fulfils the criteria of the purchaser requirements in section D of the Commitments attached to the Decision. In this assessment, the Trustee also indicated that, on the basis of the Proposed Agreement, the Divestment Business would be sold in a manner consistent with the Commitments. The Trustee nonetheless observed that [observations of the Trustee regarding divestment agreements].
6. On 2 October 2017, the Commission sent questions in writing to the Trustee regarding Intocast.
7. On 7 and 10 October 2017, the Trustee replied to the Commission's questions.
8. On 13 October 2017, Intocast met the Commission at the Commission's premises and explained that they fulfil the criteria set for a purchaser.
9. On 15 October 2017, the Trustee submitted [operational information].
10. On 17 October 2017, the Trustee submitted an update to its initial Report.
11. On 15 November 2017, RHI submitted documentation (namely Amendments to Divestment Umbrella Agreement and Certain Divestment Agreements; and Amendment Agreement) [observations regarding divestment agreements]. On the same day the Trustee submitted its Fourth Report dated 15 November 2017, acknowledging that there are no outstanding material transaction issues. The

Trustee nonetheless noted that certain residual questions relating to the transfer or certain customers were still outstanding.

12. On 24 November 2017, the Trustee informed that the residual questions relating to the transfer of customers had been resolved.

## **II. ASSESSMENT OF THE PROPOSAL**

13. Intocast is active in the production and supply of refractory products, with a particular focus on unshaped refractory products, and also in other basic industry segments such as the production and supply of casting auxiliaries, as well as metallurgical slag additives.
14. Intocast operates out of thirteen offices in Germany and has additional offices across the globe. It has eight production facilities in Germany, including in Ratingen, Krefeld and Duisburg as well as further facilities in China, France, Great Britain, Norway, Russia, Spain, Slovakia and South Africa. In 2016, Intocast generated turnover of EUR [...] million and Intocast's turnover is projected to [...] to EUR [...] million in 2017.
15. A more detailed description of Intocast's activities in the refractory industry is provided in section (c) below.
16. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:
  - a. The Purchaser shall be independent of and unconnected to the Parties and their Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).
  - b. The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
  - c. The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
  - d. The Purchaser shall be active in the refractory industry.

### **(a) Independence from the Parties**

17. RHI submits that there are no structural links between the Parties and Intocast. Furthermore, RHI submits that since 2014 there have been no commercial relationships between Intocast and Magnesita and transactions between Intocast and RHI during that period were limited to *ad hoc* transactions at arms' length related to the sale of third party refractory products and they have not exceeded a combined value of EUR [value] annually. Therefore, RHI submits that Intocast is independent of and unconnected to the Parties and their affiliates.

18. In its Report, the Trustee agrees that Intocast is independent from the Parties.
19. Therefore, on the basis of the information made available to the Commission by RHI and the Trustee, the Commission finds that Intocast is independent of and unconnected to the Parties and their affiliates.
  - (b) **Financial resources, proven expertise and incentive to maintain and develop the Divested Business as a viable and active competitor**
20. RHI submits that Intocast possesses the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitor. RHI notes Intocast has access to sufficient funding to maintain the Divestment Business, which is also profit-making on a standalone basis. According to the RHI, Intocast has substantive experience in the refractory industry, including in growing through acquisitions, and the acquisition of the Divestment Business provides it with an opportunity to expand its product portfolio significantly.
21. In its Report, the Trustee submits that Intocast is capable of ensuring the viability of the Divestment Business and of achieving a structural change in the markets at play. The Trustee further observes that Intocast has significant experience in the markets and that it has concluded a number of acquisitions both within and outside the EEA in recent years.
22. The Commission notes that the purchase of the Divestment Business by Intocast constitutes a major financial and economic undertaking for Intocast. For instance, [...].
23. On the request of the Commission, the Trustee has provided further information on [...].
24. Based on the information made available to the Commission, the Commission considers that Intocast is likely to have suitable financial arrangements in place and to be able to finance the transaction.
25. Furthermore, based on the information made available to the Commission, and taking into account the advantageous Off-take Agreements into which the Parties are to enter into with Intocast for the benefit of the Divestment Business in line with the Commitments, the Commission considers that Intocast is likely to be able to remain profitable and to further develop the Divestment Business.
26. The Commission further considers that Intocast has the required expertise given the substantive experience of Intocast's senior management in the refractories industry and Intocast's track record in growing through acquisitions. The acquisition also provides Intocast with an opportunity to expand its product portfolio considerably and likely provides for synergies and cross-selling opportunities.
27. Therefore, on the basis of the information made available to the Commission by RHI and the Trustee, the Commission concludes that Intocast has the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable business and active competitor.

**(c) Absence of prima facie competition problems**

28. RHI submits that the acquisition of the Divestment Business by Intocast gives rise to no competition concerns. In particular, there are no material overlaps between Intocast and the Divestment Business: Intocast's market share does not reach [0–5]% in any of the relevant markets where an overlap between Intocast and the Divestment Business may exist. Based on the information available to RHI, the acquisition is not subject to merger control filings in any jurisdiction.
29. The Commission notes that there are no material overlaps between Intocast and the Divestment Businesses. The activities of Intocast and the Divestment Business are product-wise mostly complementary given that Intocast produces and supplies primarily unshaped refractories, while the Divestment Businesses primarily produces and supplies shaped refractories.
30. Therefore, on the basis of the information made available to the Commission, the Commission concludes that prima facie competition concerns are not likely to arise as a result of the acquisition of the Divestment Businesses by Intocast.
31. This prima facie assessment is based on the information available for the purpose of this buyer approval and does not prejudice the competition assessment of the acquisition of the Divestment Business by Intocast by a competent competition authority under applicable merger control rules.

**(d) Activities in the refractory industry**

32. According to Section D of the Commitments, the purchaser shall be active in the refractory industry.
33. Intocast is a supplier of various refractory products with production assets in the EEA and with a product portfolio that complements that of the Divestment Business. The Commission therefore concludes that the requirement of the purchaser being active in the refractory industry is fulfilled.

**III. ASSESSMENT OF THE PROPOSED AGREEMENTS**

34. In line with the observations of the Trustee, the Commission notes that the Proposed Agreement concluded between RHI and Intocast contains certain differences compared to the Commitments. For instance, [information regarding divestment agreements].
35. In light of the information made available to the Commission by RHI and the Trustee, the Commission considers that those differences do not constitute material deviations from the Commitments.
36. The Commission has further assessed the pricing formulae included in the Off-take Agreements. In light of the information made available to the Commission by RHI and the Trustee, the Commission considers that the formulae are in line with the Commitments.
37. Finally, the Commission observes that (i) the Proposed Agreement, as amended by the Amendments to the Proposed Agreement, concluded between RHI and Intocast does not include [information regarding divestment agreements] and that (ii) RHI

and Intocast have reached an agreement with regard to [information regarding divestment agreements].

38. Therefore, the Commission concludes, in agreement with the assessment of the Trustee in the Reasoned Opinion dated 22 September 2017 that the Divestment Business is sold in a manner that is consistent with the Commitments.

#### **IV. CONCLUSION**

39. On the basis of the above assessment, the Commission approves Intocast as a suitable purchaser for the above-mentioned reasons.
40. Moreover, on the basis of the Proposed Agreement, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
41. This decision only constitutes approval of the proposed purchaser identified herein and of the Proposed Agreement. This decision does not constitute a confirmation that the Parties have complied with their Commitments.
42. This decision is based on paragraph 22 of the Commitments attached to the Commission Decision of 28 June 2017.

*For the Commission*

*(Signed)*

*Johannes LAITENBERGER*

*Director-General*