EUROPEAN COMMISSION
DG Competition

Case M.6471 - Outokumpu/Inoxum

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Decision on the implementation of the commitments - Purchaser approval
Date: 13.01.2014

EUROPEAN COMMISSION

Brussels, 13.1.2014

C(2014) 150 final

PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

Dear Sirs,

Subject: Case No COMP/M.6471 - Outokumpu/Inoxum

Approval of ThyssenKrupp AG as purchaser of the Divestment Business pursuant to the Commitments

1. BACKGROUND

1.1. The Decision

1. On 10 April 2012, Outokumpu Oyj ("OTK", Finland) notified to the Commission its intention to acquire sole control pursuant to Article 3(1)(b) of Council Regulation (EC) No 139/2004[1] ("the Merger Regulation") of the whole of the undertakings Inoxum GmbH and Nirosta GmbH (together "Inoxum", OTK and Inoxum jointly referred to as the "Parties"), the stainless steel division of ThyssenKrupp AG ("TK", Germany), by way of purchase of shares.

2. By decision of 7 November 2012 ("the Clearance Decision"), adopted in application of Article 8(2) of the Merger Regulation, the Commission concluded that the proposed transaction was likely to result in a significant impediment to effective competition through non-coordinated effects, by means of the creation of a dominant position in the EEA market for cold rolled ("CR") flat stainless steel products. The Commission however declared the notified operation compatible with the internal market and with the EEA Agreement, subject to full compliance with

[1] L 24, 29.01.2004, p. 1-22.

the commitments submitted by OTK on 19 October 2012, annexed to the Clearance Decision ("the Commitments").

1.2. The Commitments

3. Under Section B of the Commitments, OTK committed to divest or procure the divestiture of the following ("the Divestment Business"):

   (i) Inoxum's production units (including all the related sales and marketing activities and personnel) at the Terni stainless steel production site ("AST");

   (ii) Inoxum's stainless steel service centre ("SSC") in Ceriano Laghetto ("Terninox", Italy) and OTK's SSC in Willich ("Willich", Germany); and

   (iii) at the option of the purchaser, OTK and Inoxum's SSCs located in France (Tours) and the United Kingdom (Birmingham), and Terninox warehouses in Padova, Ancona, Florence, and Bologna ("Terninox warehouses", Italy). At the option of the purchaser, the divestiture package also includes Terni's forging business (*Societá delle Fucine*).

4. OTK committed to find a purchaser and enter into a final binding sale and purchase agreement ("SPA") for the Divestment Business within [Confidential] from the date of adoption of the Clearance Decision (First Divestiture Period, "FDP").

5. The FDP was thus originally set to expire on [Confidential].

6. Following requests by OTK, the Commission extended the FDP until [Confidential] by Decision of [Confidential], and subsequently until [Confidential] by Decision of [Confidential].

7. During the extended FDP, the Commission has rejected a request for a waiver of the Commitments by Decision of [Confidential], a request for a third extension of the FDP by Decision of [Confidential], and a request for a modification of the Commitments by Decision of [Confidential].

1.3. OTK's request for purchaser approval

8. On 29 November 2013, OTK and TK signed a framework agreement ("FWA") for the sale and purchase of the Divestment Business, including all optional assets except the Birmingham SSC. In addition to the Divestment Business, TK will also acquire additional assets, and namely: (i) the downstream tube-making business Tubificio di Terni; (ii) OTK's sales offices and service centres in Barcelona (Spain) and Gebze (Turkey). These assets are together referred to as the "AST Business".

9. Pursuant to the FWA, TK will also acquire OTK's high performance alloys business, conducted through its VDM division (the "VDM business").

10. The consideration paid by TK for the AST and VDM businesses will be the loan note originally issued as part of the OTK/Inoxum transaction (the "Loan Note").

11. By letter of 29 November 2013, OTK submitted to the Commission a Reasoned Proposal presenting TK for approval by the Commission as purchaser of the Divestment Business. The Reasoned Proposal aims to demonstrate that TK meets

the purchaser requirements in the Commitments and that the Divestment Business is being sold in a manner consistent with the Commitments. TK submitted its business plan for the development of the AST business to the Commission on the same day (the "Business Plan").

12. Following a meeting with OTK, the Commission sent a request for information to OTK on 4 December 2013, to which OTK replied on 6 December 2013.

13. The Commission also sent a request to information to TK regarding the Business Plan and its incentives to maintain and develop the Divestment Business on 2 December 2013, to which TK replied on 4 December. Following a meeting with TK, the Commission sent another request for information on the Business Plan to TK on 5 December 2013. TK replied to this request on 9 December 2013.

14. In addition, the Commission held a conference call with the hold-separate manager (the "HSM") of the Divestment Business on 5 December 2013, and received written information from the HSM on the Divestment Business' situation and prospects on 9 December 2013.

15. Finally, the Commission received additional information in writing from OTK on 16 December 2013.

2. MONITORING TRUSTEE'S REPORT

16. The Monitoring Trustee submitted its report on 7 December 2013.

17. In its report, the Monitoring Trustee (the "Trustee") concludes that that TK fulfils the purchaser requirements set out in the Commitments and that the Divestment Business is being sold in a manner which is materially consistent with the Commitments.

3. ASSESSMENT OF TK'S SUITABILITY AS A PURCHASER

18. Under section D of the Commitments, the purchaser for the Divestment Business must be:

   i. independent of and unconnected to OTK;

   ii. both (a) have the financial resources, proven expertise and incentive and (b) exercise the options in the present Commitments to purchase or exclude certain assets currently part of the Divestment Business with a view to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors; and

   iii. neither be likely to create prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

19. Following an analysis of the information submitted by OTK, TK, the Trustee and the HSM, the Commission concludes that TK complies with the requirements of the Commitments set out in Section D thereof. The fact that TK owned some of the

Divestment Business assets before the merger cleared on 7 November 2012 is not in itself an impediment to reacquire these assets if all the requirements set out in the Commitments are met.

3.1. Independence

20. A number of financial, contractual and structural links existed between TK and OTK, mainly as a result of OTK's acquisition of Inoxum. Up to 29 November 2013, in particular, these links consisted of the following:

    i. TK owned a 29.9% minority shareholding in OTK;

    ii. [Confidential]:

        a. [Confidential];

        b. [Confidential]; and

        c. [Confidential];

    iii. TK's CFO, Mr Guido Kerkhoff, being a member of OTK's board of directors; and

    iv. A number of commercial arrangements, including [Confidential].

21. OTK submits that an important rationale for TK in its acquisition of the AST and VDM Businesses is to [Confidential]. [Confidential], these links, together with all remaining structural links between OTK and TK, will be eliminated as a result of the transaction at the latest as of closing of TK's acquisition of the Divestment Business ("Closing"), with the exception of some contractual links that will be terminated shortly thereafter or that are not relevant from a competition point of view. In particular:

    i. TK has entered into an agreement with [Confidential], for the sale of its entire 29.9% shareholding in OTK;

    ii. As regards the financial links:

        a. [Confidential];

        b. [Confidential]; and

        c. [Confidential];

    iii. TK's CFO has resigned from OTK's Board of directors; and

    iv. The majority of the existing contractual links do not give rise to any possible competition concern, and the remaining links will be terminated either before Closing or after a transitional period at the latest by the end of [Confidential].

22. On the basis of OTK's statements, the Commission considers that the divestment of TK's interests in OTK, the termination of the financial links between OTK and TK, and the resignation of TK's CFO from OTK's board eliminate these links

effectively before Closing, and therefore before TK will enter into the EEA CR market and become a competitor of OTK.

23. As regards the contractual arrangements between OTK and TK, the Commission considers that the bulk of these arrangements do not *prima facie* materially affect competition. These contracts can be divided into four groups.

24. First, there are a number of [Confidential] arrangements in place between OTK and TK [Confidential].[2] These agreements are not capable of materially affecting competition, [Confidential] TK has announced the divestment of its business activities in Calvert to a consortium formed by ArcelorMittal and Nippon Steel & Sumitomo Metal Corp.[3]

25. Second, there are some [Confidential] agreements between OTK and TK. These contracts essentially relate to [Confidential]. OTK has confirmed in writing that these contracts have either already been terminated, or relate only to the Bochum site and will be therefore terminated once Bochum's melt-shop is closed.[4]

26. Third, there are a number of agreements for the [Confidential]. These agreements are essentially related to the Inoxum legacy and are therefore transitional. Furthermore, they are not directly related to AST, and are not capable of influencing strategic aspects of OTK's business activity.

27. Fourth, there is a large number of [Confidential] agreements between OTK and TK for the provision of various services, [Confidential]. These contracts are of negligible monetary value and refer to non-core activities of OTK and TK. Therefore, they are unlikely to materially affect competition between OTK and TK.

28. There appear to be only three agreements which could have some, albeit limited, impact on the competitive behaviour of OTK and TK. These contracts relate to the [Confidential].

29. With respect to these contracts, the Commission notes the following:

    i. OTK has confirmed in writing that it has initiated contacts with [Confidential] with the aim to split the [Confidential] agreement. OTK has also undertaken to use its best efforts to have this contract split as of closing, and does not see any obstacle thereto.

    ii. The contracts for the [Confidential] only relate to Germany, and therefore will not provide OTK with any transparency as to the cost structure of AST. In any event, OTK has confirmed in writing that it will not renew these contracts, which will both expire by [Confidential].

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2 There is also [Confidential]. However, given the negligible impact on the business of TK and OTK, this agreement is unlikely to raise competition concerns.

3 See http://www ft.com/intl/cms/s/0/f507bb98-59cf-11e3-874d-00144feabdc0 html?siteedition=intl

4 OTK has publicly announced that it plans to close the Bochum melt shop during 2014 instead of the originally planned end of 2016, see https://newsclient.omxgroup.com/cdsPublic/viewDisclosure.action?disclosureId=574918&lang=en

iii. OTK has until now used the [Confidential]. OTK has already closed its melt-shop in Krefeld and expects to shut down the melt-shop in Bochum by end of 2014.[5] The [Confidential] agreement has therefore only a transitional nature, as OTK will not need access to [Confidential] after having closed its two German melt-shops. In any event, the cost of [Confidential] only represents a relatively small component of the total costs of stainless steel CR production,[6] and will therefore not provide TK with significant transparency on OTK's overall production costs.

30. On the basis of the information provided by OTK and TK, the Commission therefore concludes that OTK and TK have already taken or are taking the necessary measures to ensure the independence of TK at the latest by end of 2014.

3.2. Financial resources, proven expertise, exercise of the options in the present Commitments and incentive to maintain and develop the Divestment Business as a viable and active competitor

3.2.1. Financial resources and proven expertise

31. TK is one of the largest German and European conglomerates. TK has sufficient financial resources to finance the acquisition and to develop AST as a viable and active competitor in the EEA marketplace.

32. OTK argues that TK has all the necessary industry expertise for being able to develop AST's business. Until less than one year ago, TK controlled most of the assets comprised in the Divestment Business and the other former Inoxum business. Prior to the Inoxum transaction, it was the largest stainless steel producer in the EEA. In addition, TK continues to be active in carbon steel.

33. The Commission notes that TK has suffered losses and write-offs in the recent past, which contributed to increase its net debt to equity ratio ("gearing") to a significant level.[7]

34. However, the Commission also notes that TK is a multinational conglomerate with global net sales in the financial year 2012/2013 of EUR 38 559 million for continued operations, and total equity of EUR 2 511 million as at 30 September 2013.

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5 See https://newsclient.omxgroup.com/cdsPublic/viewDisclosure.action?disclosureId=584929&lang=en and https://newsclient.omxgroup.com/cdsPublic/viewDisclosure.action?disclosureId=574918&lang=en

6 According to OTK, the price for the [Confidential] of stainless steel is approximately EUR [Confidential]/tonne, compared to the [Confidential] cost of approximately EUR [Confidential] / tonne, and the cost for [Confidential] of approximately EUR [Confidential] / tonne. Taking into account raw material costs, [Confidential] only represents [Confidential]% of the total costs of production for CR.

7 See http://www ft.com/cms/s/0/4aaa5c08-25ba-11e3-8ef6-00144feab7de html#slide0

35. In addition, TK has confirmed in writing and submitted internal documents showing that its liquidity reserves cover its funding needs for the next two years, and that these reserves would be sufficient to sustain the initial negative cash flows it foresees for the Divestment Business. TK has also confirmed that it has already implemented measures to reduce its gearing level, in particular through a capital increase, and will thus have enough equity to sustain the initial losses foreseen for the Divestment Business.

36. TK is also the previous owner of AST, and a well-established industrial player in the area of carbon steel. TK also operates ThyssenKrupp Materials ("TKM"), a large international network for the distribution of metals, including stainless steel. As such, the Commission considers that TK possesses and has access to the expertise necessary to run the Divestment Business.

37. In view of these factors, the Commission considers that TK has the financial resources, the necessary expertise and the ability to maintain and develop the Divestment Business as a viable and active competitive force.

3.2.2. Exercise of the options in the present Commitments

38. The Commission notes that TK has exercised all the options included in the Commitments,[8] with the exception of the option for the purchase of the Birmingham service centre. The Commission also notes that TK will also purchase from OTK three additional assets as part of the AST business, and namely (i) Tubificio di Terni; (ii) a service centre in Barcelona (Spain); and (iii) a service centre in Gebze (Turkey).

39. As a result, TK will own and operate a combination of assets that, on the basis of TK's Business Plan, appears to be able to perform well from an industrial and financial perspective, and to constitute a strong and independent competitor in the EEA CR market.

40. As regards Birmingham, the Commission notes that this service centre does not appear to be essential to ensure AST's viability, especially considering that TK operates a large distribution network (TKM) that would more than compensate for Birmingham's exclusion. The Commission also notes that none of the bidders involved in the divestiture process during the FDP expressed an interest for Birmingham, and that this service centre would have therefore been likely excluded from the Divestment Business regardless of the identity of the purchaser.

41. In view of these elements, the Commission concludes that TK has exercised the options in the Commitments with a view to maintain and develop the Divestment Business as a viable and active competitor.

3.2.3. Incentive

42. Pursuant to Section D of the Commitments, a suitable purchaser must also have the incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors. This

[8] TK has confirmed in writing that its offer includes the BA line LBA2.

requirement is in line with the standard purchaser requirements provided for at paragraph 48 of the Commission's Notice on Remedies.

43. Consistent with the principles outlined in the Remedies Notice, and in the absence of a tailor-made purchaser requirement clause,[9] the Commission has in its previous practice approved buyers with a financial rather than strategic interest in the divestment business, such as private equity funds. This is because in normal conditions also financial purchasers maintain and develop a business at least in the medium term with a view to maximising its value, thereby seeking to improve its financial and industrial position and competitiveness and actively competing in the market.

44. The Commission by contrast cannot approve a purchaser that would not maintain and develop the divestment business at least in the medium term, but rather resell it to a third party shortly after acquiring it. Depending on the circumstances of the divestiture, therefore, the parties may have to ensure that the purchaser will maintain the divested business as a competitive force in the market and will not sell on the business within a short time-span.[10]

45. In the present case, the Commission notes that by selling Inoxum to OTK in 2012, TK exited the stainless steel business as part of its wider plan of focussing on its engineering activities and rebalancing its assets towards value-added, downstream markets.[11]

46. In addition, as admitted by both OTK and TK, the rationale of TK's acquisition of the Divestment Business is mainly financial, rather than strategic.[12] TK has publicly confirmed that "taking back [AST] is not a strategic move for us because we still want to move out of stainless".[13]

47. The Commission has therefore verified whether TK will have an interest to maintain and develop the Divestment Business at least in the medium term in competition with OTK and the other competitors in the EEA CR market, or whether it would find it more profitable to pursue in the short term alternative strategies to exit once more the stainless steel industry.

48. For that purpose the Commission has assessed the assumptions of TK's Business Plan and the likelihood that such Business Plan would be implemented. The Commission has also explored whether TK would likely find it more profitable to

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9 See for example paragraph 49 of the Remedies Notice.

10 See Notice on Remedies, paragraph 106 and in particular footnote 5.

11 http://www ft.com/intl/cms/s/0/f5d4e4e6-4bfe-11e1-98dd-00144feabdc0 html?siteedition=intl#axzz2nuxGtjIn

12 See OTK's reasoned submission proposing TK as suitable purchaser for the Divestment Business and TK's reply to the Commission's request for information of 2 December 2013.

13 http://www reuters.com/article/2013/12/11/stainless-outokumpu-thyssenkrupp-idUSL6N0JP4E420131211

pursue alternative strategies such as shutting down the Divestment Business, or selling it to a third party in the short run.

49. On the basis of the information submitted by TK, the Trustee and the HSM, the Commission considers that TK's Business Plan is generally based on sound assumptions, and that TK has reasonable chances to succeed in returning AST to profitability. Moreover, there are a number of upsides in TK's Business Plan whose positive impact has not been fully taken into account, and which may imply that TK's plan could achieve even better results. Even if on some other more limited points TK's Business Plan appears to be overly optimistic, this is not sufficient to invalidate the overall positive results of the Commission's assessment.

50. As regards alternative scenarios, the Commission has assessed whether TK would find it profitable to (i) dismantle AST and sell the assets to recoup the costs of closure; or (ii) resell AST to a third party in the short term.

51. As regards the first scenario, the Commission considers in line with estimates of TK and the HSM that the costs associated with AST's closure would likely be significant and potentially exceed EUR [Confidential]. Moreover, both TK and the HSM have estimated that the revenues that would likely stem from the sale of the individual assets would be limited and clearly not sufficient to recoup the substantial costs of closure. The Commission therefore considers it unlikely that TK would in the short term close down AST and resell the assets to compensate for the closure costs.

52. As to the second scenario, the Commission firstly notes that TK has confirmed orally[14] and in writing[15] that it does not expect to sell AST in the short run to a third party.

53. In addition, the Commission notes that OTK’s attempts to sell AST during the FDP have shown that the price offered by potential bidders in the current market conditions is likely to be not very attractive. TK has also confirmed in writing that it will assign a substantial book value to AST. Therefore, TK would likely incur a significant write-down if it were to sell AST to a third party in the short term. Such write-down would likely further deteriorate TK's gearing, and therefore could cause a potential harm to TK's viability.

54. On the basis of the information provided by TK, therefore, the Commission considers that it is appropriate to conclude, on balance, that TK would likely keep the Divestment Business within its perimeter at least in the medium term rather than reselling it to a third party within a short time-span.

55. In the light of these elements, the Commission considers that TK has the incentive necessary to maintain and develop the Divestment Business as a viable and active competitive force in the EEA cold-rolled stainless steel market for a sufficient period of time after the acquisition.

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14 Such confirmation was provided in the course of a meeting on 5 December 2013.

15 See TK's responses to RFI of 2 December 2013 and 6 December 2013.

3.3. Absence of *prima facie* competition concerns and risks of delayed implementation

56. The Commission notes that TK’s acquisition of the Divestment Business, which requires notification under the relevant merger law provisions of the European Union and a number of other jurisdictions, is unlikely to raise competition concerns as the transaction results in appreciable horizontal overlaps only with respect to the distribution of stainless steel products in some EEA Member States, and in particular in Germany, where it appears that in any event the combined shares of the parties would be in the region of [40-50]% under the narrowest market definition possible. Without prejudice to the results of the future investigation on the matter, therefore, at this stage it appears unlikely that the transaction would result in competition problems.

57. With respect to any remaining implementation risks, the Commission notes that the transaction is particularly complex, and that consent from a number of stakeholders has to be obtained before Closing.

58. The Commission however notes that OTK and TK have already secured (i) [Confidential],[16] (ii) [Confidential], and (iii) [Confidential].

59. Furthermore, OTK has entered into an agreement with an independent auditor to prepare an Independent Business Review ("IBR") of OTK's activities. On [Confidential], the independent auditor submitted a final draft report to OTK concluding that "*based on the assumptions formulated by the management currently no risk of insolvency and a positive continuation outlook can be assumed*" for both OTK as a group and for selected OTK entities acting as selling parties in the sale of the AST and the VDM Businesses. In view of the far-reaching measures taken by OTK and the involvement of most of OTK's creditors, it appears likely at this stage that the final IBR will confirm that OTK is a going concern.

60. In view of these factors, the Commission considers that the acquisition of the Divestment Business by TK does not indicate any *prima facie* competition concerns, and that the risk of implementation is of a customary and acceptable level.

4. ASSESSMENT OF THE FWA

61. Under the FWA, TK will purchase from OTK AST and all optional assets except the Birmingham SSC. In addition to the Divestment Business, TK will also acquire additional assets, and namely: (i) the downstream tube-making business Tubificio di Terni; (ii) OTK's sales offices and service centres in Barcelona (Spain) and Gebze (Turkey).

62. As discussed in Section 3.1 above, OTK and TK will ensure that before Closing TK will be independent from and unconnected to OTK. Moreover, as discussed in Section 3.2.2 above, the exercise of the options as described in the FWA is consistent with the Commitments. Lastly, as indicated in Section 3.3, the risk of implementation of the FWA is of a customary and acceptable level.

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[16] [Confidential].

63. In view of these factors, and on the basis of the information provided by OTK, the Commission concludes that the FWA is consistent with the Commitments.

5. CONCLUSION

64. On the basis of the above facts and their assessment, the Commission approves TK as a suitable purchaser of the Divestment Business. The Commission also concludes that the Divestment Business is being sold in a manner which is consistent with the Commitments.

65. This decision only constitutes approval of the proposed purchaser identified herein and of the FWA. This decision does not constitute a confirmation that OTK has complied with its Commitments.

66. This decision is based on clause 16 of the Commitments attached to the Clearance Decision

For the Commission,

(Signed)
Alexander ITALIANER
Director General