Final Report of the Hearing Officer [1]

(M.8900 – Wieland/Aurubis Rolled Products/Schwermetall)

Introduction

1. On 13 June 2018, the Commission received a notification of a proposed concentration by which Wieland Werke AG ("Wieland") would acquire, within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004[2], sole control of the whole of Aurubis Flat Rolled Products business ("ARP"), and the whole of Schwermetall Halbzeugwerk GmbH & Co. KG ("Schwermetall") ("Proposed Transaction").

2. On the basis of the first phase investigation, the Commission considered that the Proposed Transaction raised serious doubts as to its compatibility with the internal market and the EEA Agreement. As a result, on 1 August 2018, the Commission adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation ("Article 6(1)(c) decision").

3. On 3 August 2018, Wieland asked for an extension of 10 working days pursuant to Article 10(3) second subparagraph, first sentence of the Merger Regulation.

4. On 23 August 2018, Wieland and ARP submitted written comments to the Article 6(1)(c) decision.

5. On 4 October 2018, during a formal State of Play meeting, the Commission informed Wieland and ARP that its preliminary view that the transaction was likely to lead to a significant impediment of effective competition remained at that point in the second phase investigation.

6. On 8 October 2018, the Commission adopted a decision extending the procedure by 10 days pursuant to Article 10(3) second subparagraph, third sentence of the Merger Regulation.

7. On the same day, Wieland provided a second draft remedy proposal, which was formally submitted on 17 October 2018. The Commission did not market test this proposed set of commitments.

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1 Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation"), OJ L 24, 29.1.2004, p. 1.

8. On 24 October 2018, the Commission adopted a statement of objections ("SO") which was notified to Wieland on 25 October 2018. ARP and Schwermetall also received non-confidential versions of the SO pursuant to Article 13(2) of Commission Regulation (EC) 802/2004[3] on 8 November 2018.

9. On 3 December 2018, Wieland submitted a new set of commitments. These commitments were market tested on 7 December 2018.

10. The Commission sent three Letters of Facts to Wieland, on 30 November 2018, on 11 December 2018 and on 14 December 2018. Wieland submitted its observations to these Letters of Facts on 7 December 2018, 17 December 2018 and 19 December 2018 respectively.

Access to the file

11. Wieland was granted access to the Commission's file on 25 October 2018. Subsequent access to the file was provided on 13 December 2018, 17 December 2018, 21 December 2018, 16 January 2019 and 23 January 2019. Access to confidential data and information relied upon by the Commission in the SO was granted to Wieland's economic advisors in accordance to the data room procedure on 30-31 October 2018, 6 November 2018 and 4 December 2018.

12. There were no complaints or further requests regarding access to file that were addressed to the Hearing Officer.

Reply to the SO and formal oral hearing

13. The initial deadline for Wieland to submit its comments to the SO was 9 November 2018. This deadline was extended to 12 November 2018 and Wieland responded by this date.

14. In its response to the SO, Wieland requested to be heard orally. The formal oral hearing was held on 19 November 2018.

Interested third persons

15. Three undertakings were admitted as interested third persons in these proceedings. All three interested third persons were provided with a non-confidential version of the SO and given a time-limit within which to submit their observations. Non-confidential versions of the interested third persons' written comments were made available to Wieland. None of the interested third persons requested to participate in the oral hearing.

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[3] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p.1

Procedural complaints

Claim of incomplete market investigation

16. In its response to the SO and during the oral hearing, Wieland argued that the Commission had failed to collect sufficient quantitative data and that the Commission had relied too heavily on internal documents as a source of evidence. More specifically, Wieland considered that the Commission should have gathered more quantitative data on capacities and production volumes from third parties. Wieland also questioned the reliability of the qualitative evidence used by the Commission in the SO, in particular as regards internal documents, arguing that these are subjective, susceptible to misinterpretation, and not necessarily representative of an official position within Wieland or ARP.

17. As a first point, it must be recalled that Wieland's criticism of the Commission's reliance on internal documents does not seem to be consistent with the case law, which establishes that there is no hierarchy between the types of evidence used by the Commission in merger cases, as the Commission's task is to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation.[4]

18. Second, the General Court has consistently confirmed that the Commission cannot be required to carry out further investigations where it considers that the preliminary investigation of the case has been sufficient.[5] On this point, however, I note that whether or not the investigation file contains sufficient evidence to support the Commission's theory of harm is ultimately a question of substance and not of procedure.

Criticism of the fact that the Commission did not market test the remedies offered on 17 October 2018

19. In its response to the SO, Wieland criticised the Commission for (again) not market testing the remedy package it submitted on 17 October 2018 (i.e. a few days prior to the adoption of the SO)[6]. Wieland questioned the appropriateness of the Commission's stance arguing that the failure to market test the commitments constituted a breach of "due process".

20. According to the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004

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4 See T-342/07, *Ryanair Holdings v Commission*, EU:T:2010:280, paragraph 136 and T-175/12, *Deutsche Börse AG v Commission*, EU:T:2015:148, paragraph 133.

5 See, for example, T-141/94, *Thyssen Stahl v. Commission*, EU:T:1999:48, paragraph 110; T-758/14 *Infineon Technologies v. Commission* EU:T:2016:737, paragraph 110.

6 Wieland had also offered remedies during the first phase of the investigation that the Commission did not market test because they were not such as to eliminate its serious doubts in a sufficient and clear-cut manner.

(the "Remedies Notice") in order for the commitments to be accepted by the Commission at a pre-SO stage, these would have to remove the "serious doubts" raised by the Commission in its Article 6(1)(c) decision.[7] The Remedies Notice also confirms the Commission's discretion in consulting third parties as to any proposed remedies, by stating that the Commission will conduct a market test of submitted commitments, "*when considered appropriate*."[8] In this case, the Commission did not consider that it would be appropriate to market test the remedies offered on 17 October 2018, since these did not remove its "serious doubts". This was effectively an assessment on the substance of the case that was within the Commission's discretion and, contrary to Wieland's position, does not amount to a breach of "due process".

21. In any case, it is noted that the Commission did market test the commitments offered following the SO by Wieland on 3 December 2018.

Letters of facts and request for second oral hearing

22. As mentioned above, on 30 November 2018 the Commission addressed a first letter of facts ("First LoF") to Wieland. The First LoF referred to both (a) pre-existing evidence that was not expressly relied on in the SO but which, on further analysis of the file, the Commission considered relevant to support arguments set out in the SO; and (b) additional evidence brought to the Commission's attention after the adoption of the SO.

23. In its observations to the First LoF, Wieland argued that a letter of facts can only be used to make parties aware of *new* evidence obtained after the adoption of the SO, but not to present additional evidence which was already available at the time of the SO. According to Wieland, the fact that the First LoF was mainly based on "pre-existing evidence" would partially deprive the oral hearing of its purpose as it would postpone a substantial part of the discussion and defence to a point in time after the oral hearing, which is (according to Wieland) the only opportunity to contest the evidence relied on by the Commission in front of a wider audience. To remedy this alleged problem, Wieland requested a supplementary oral hearing. DG Competition rejected Wieland's request on 19 December 2018 and Wieland referred the matter to the Hearing Officer on 20 December 2018.

24. On 21 December 2018, the Hearing Officer rejected Wieland's request for a supplementary oral hearing. The starting point for the assessment is the fact that Regulation 802/2004[9] only provides for the right to request a formal oral hearing when the Commission sends a statement of objections. Having examined the First LoF and compared it with the SO, the Hearing Officer found that the First LoF did

7 See Remedies Notice, paragraph 18.

8 See Remedies Notice, paragraphs 80 and 92.

9 Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing the Merger Regulation, OJ L 133, 30.04.2004, p. 1.

not contain any new objections compared to those already set out in the SO, but merely identified further evidence supporting the same objections.[10] The fact that some of this further evidence was already in the file at the time the SO was issued is immaterial, since the relevant criterion for distinguishing between a supplementary statement of objections and a letter of facts is whether or not *new objections* are formulated. Finally, as there was no indication that the case team deliberately withheld evidence until after the oral hearing so as to deprive the oral hearing of its purpose, the Hearing Officer did not see any legal rule or principle that would preclude the Commission from including in a letter of facts evidence that was already in the file at the time of the SO.

Draft decision

25. In the draft decision, the Commission concludes that the Proposed Transaction is likely to result in a significant impediment to effective competition in the market for rolled products in the EEA through the removal of an important competitor and the creation of a dominant position for Wieland. The draft Decision also concludes that the commitments of 3 December 2018 would not eliminate the significant impediment to effective competition that would result from the Proposed Transaction. The draft decision therefore declares the Proposed Transaction incompatible with the internal market and with the Agreement on the European Economic Area.

26. I have reviewed the draft decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which Wieland has been afforded the opportunity of making its views known.

27. In view of the above, I consider that the effective exercise of procedural rights has been respected in this case.

Brussels, 31 January 2019

Joos STRAGIER

[10] See, by analogy, Judgment of 20 March 2002 in Case T-23/99 *LR af 1998 A/S v Commission*, EU:T:2002:75, paragraphs 186-195.