



EUROPEAN COMMISSION
DG Competition

***Case M.9917 – LIBERTY /
ASCOVAL / HAYANGE***

Only the English text is available and authentic.

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

Article 7(3)
Date: 16/07/2020



Brussels, 16.7.2020
C(2020) 5020 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Subject : **Case M.9917 – LIBERTY/ASCOVAL/HAYANGE**
Commission decision pursuant to Article 7(3) of Council Regulation
N° 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²
Request for derogation

Dear Sir or Madam,

- (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 of sole control by Liberty House Group (‘Liberty’) of Ascoval Saint-Saulve (‘Ascoval’) and France Rail Industry (‘FRI’) (Ascoval and FRI are jointly referred to as the ‘Targets’),³ as submitted pursuant to Article 7(3) of the Merger Regulation on 9 July 2020.

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 Liberty’s request for a derogation to the suspension obligation (para. 4) presents the proposed concentration as an acquisition over Ascoval and France Rail Industry Holding (‘FRIH’, in liquidation), which is FRI’s parent company. However, Liberty’s offer documentation (Offre de reprise, section 4) refers to a bid for FRI, as FRIH’s main asset, in line with the Specifications for the Filing of Bidding Offers (in French, the *Cahier des Charges pour Dépôt des Offres* issued by the Strasbourg Regional Court

1. THE PARTIES AND THE TRANSACTION

- (2) **Liberty** is an international metals and industrial group, specialising in commodities, metals, recycling, and manufacturing of steel, aluminium and engineering products. Liberty is headquartered in London.
- (3) **Ascoval** operates a steel mill located in Saint-Saulve, France, specialised in the production of steel-related products, notably semi-finished carbon steel products such as blooms and billets. Ascoval is currently directly controlled by Olympus Steel Limited, a 100% subsidiary of Olympus Steel 2 Limited, which is in turn controlled by Greybull Capital LLP ('Greybull').
- (4) **FRI** is active in the production of rails, offering a wide range of steel rail products and operating from a single site in Hayange, France. FRI is owned by France Rail Industry Holding ('FRIH'), which is also ultimately controlled by Greybull.
- (5) The concentration concerns a potential acquisition of sole control by Liberty of Ascoval and FRI within the meaning of Article 3(1)(b) of the Merger Regulation (the 'Transaction' or the 'Proposed Transaction').
- (6) Ascoval and FRI are two business units ultimately controlled by Greybull. The Proposed Transaction is to be achieved by Liberty concomitantly acquiring 100 % of the shares and voting rights of Ascoval and 100% of the shares (and rights attached to the shares) held by FRIH in the capital of FRI.⁴
- (7) The acquisition of the Targets forms part of a single concentration within the meaning of Recital 20 of the Merger Regulation for the following reasons:
 - (a) Point 12 of the Specifications for the Filing of Bidding Offers (in French, the *Cahier des Charges pour Dépôt des Offres*, a document issued by the Strasbourg Regional Court that lays down the requirements and specifications that bidding offers must comply with to be deemed admissible in the bidding process for FRIH) clearly orders that: *'The bidders shall expressly confirm that any bidding offer over the assets and activities of FRIH is indivisible from the purchase of the shares of ASCOVAL SAINT-SAULVE'*, failing which any offer would be inadmissible.
 - Such requirement in the *Cahier des Charges pour Dépôt des Offres* represents a *de jure* link between the two acquisitions guaranteeing that none of the transactions would be carried out without the other within the meaning of paragraphs 39 and 43 of the Consolidated Jurisdictional Notice ('CJN');
 - (b) Paragraph 9.8 of Liberty's Offre de Reprise FRIH dated 10 July 2020 specifies that the offer for FRIH is *'indivisible from the proposed acquisition of 100 % of the shares and voting rights of the company Ascoval Saint-Saulve'*.

in relation to the liquidation of FRIH). It is therefore more accurate in the present context to refer to FRI as one of the two targets, rather than FRIH (the parent entity that is being liquidated).

⁴ See Liberty, Offre de Reprise FRIH, 10 July 2020, section 4. The offer perimeter also includes debts owed by FRI to FRIH and the FRI brand.

- (c) The acquisitions of Ascoval and FRI by Liberty are also interdependent from an economic point of view within the meaning of paragraph 38 of the CJN. These acquisitions concern two businesses managed for a common commercial purpose. [Liberty's envisaged strategy for Ascoval and Hayange].⁵ Therefore, there is a strategic alignment of the Targets.
- (8) Therefore the Transaction is a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

2. EUROPEAN UNION DIMENSION

- (9) Given that both FRI and Ascoval are currently ultimately owned by Greybull, they are part of the same group for the purpose of allocating turnover under Article 5(4) of the Merger Regulation.
- (10) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (combined EUR [...] billion: Liberty EUR [...] billion, FRI and Ascoval combined EUR [...] million). Each of them has an EU-wide turnover in excess of EUR 250 million (Liberty EUR [...] billion, and FRI and Ascoval jointly EUR [...] million), and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
- (11) The Proposed Transaction therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

3. THE APPLICATION FOR DEROGATION

- (12) Liberty submits that both Targets are under great financial distress, [degraded financial situation].
- (13) Liberty submits that the Targets have total liabilities that largely offset their current assets, [degraded financial situation].
- (14) Given their financial difficulties, the Targets are not able to secure long term financing from banks, or to find other forms of funding. [Long term financing situation].
- (15) [Long term financing situation]. For this reason, Liberty submits that it is essential that the transactions can be completed quickly in order to inject new urgent funding (from Liberty) and then secure long term financing from banks.

3.1.1. *The situation of FRI*

- (16) **FRI** is [degraded financial situation], and [degraded financial situation] FRIH filed for bankruptcy on 6 July 2020, with liquidation being ordered the same day. The sale of FRI's shares will be implemented as part of such insolvency proceedings.⁶
- (17) FRI has total liabilities of EUR [...] million, which largely offset its current assets and to date FRI has been unable to [degraded financial situation].

⁵ Liberty, Offre de Reprise FRIH, 10 July 2020, paragraph 3.3.

⁶ Which includes 100% of its shares and any receivable FRIH may have against FRI.

(18) According to its financial advisors, FRI will run out of liquidity [degraded financial situation]⁷.

3.1.2. *The situation of Ascoval*

(19) **Ascoval** is [degraded financial situation].⁸ [Degraded financial situation].

(20) Ascoval has been facing financial difficulties for several years and undergoing pre-insolvency safeguard proceedings in France since November 2017 ('sauvegarde de justice' as provided for in Articles L 620-1 et seq. of the French Commercial Code) followed by judicial reorganisation proceedings ('redressement judiciaire' as provided for in Article L 631-1 of the French Commercial Code).

(21) On 2 May 2019, the Strasbourg Judicial Court (the 'Strasbourg Court') originally approved the asset disposal of Ascoval to Olympus Steel Limited (mother company of British Steel Limited).

(22) Olympus Steel Limited planned a business plan for the integration of its business units including industrial synergies identified between Ascoval, FRI and FN Steel (a subsidiary of British Steel Limited). However, when British Steel Limited was put under compulsory liquidation in the United Kingdom on 22 May 2019, Olympus Steel Limited lost the opportunity to put in place the identified synergies.

(23) In addition, the COVID-19 crisis has added to Ascoval's difficulties. [Production level].

(24) [Degraded financial situation].

(25) [Degraded financial situation].

3.2. **The measures to be put in place**

(26) [Degraded financial situation].

(27) To ensure the business continuity of both FRI and Ascoval, the sale of FRI is conditional upon the acquisition of Ascoval's shares by the same bidder.

(28) On 17 July 2020, Liberty's offer will be presented to the Strasbourg Court. The Strasbourg Court will issue its judgment, and may select a bidder by judgment expected on 20 or 21 July 2020. By this judgment, the selected bidder will be granted ownership of and sole control over the Targets.

(29) The judicial liquidation proceedings that FRI is undergoing and which ties the acquisition of both FRI and Ascoval has two essential features:

(a) All bidders must have satisfied (or waived) any potential condition precedent by the court hearing at the latest (in this case, 17 July 2020); and

(b) The Strasbourg Court's judgment will have as a consequence that FRI's ownership will be transferred to the successful bidder on the day following this judgment becoming final (i.e. when all French recourses have lapsed).

⁷ Updated cash flow forecast (Hayange) June 2020, page 5.

⁸ [...] report 'Project [...] – Review of short-term cash forecasts', July 2020.

This is to allow the successful bidder to inject the amounts necessary to fund FRI's operations in the short and medium term.

- (30) Therefore, if Liberty is not granted a derogation from the standstill obligation pursuant to Article 7(3) of the Merger Regulation, it will be excluded from the bidding process for the acquisition of FRIH, as not all condition precedents for it to take ownership of the Targets would be satisfied (or waived). Given that Ascoval's sale is conditional upon the acquisition of FRI's shares, Liberty will also be unable to acquire Ascoval.
- (31) In view of the financial distress of the Targets, as described above, Liberty submits that it is essential for Liberty to be able to take control over the Targets upon the judgment becoming final. The acquisition of the Targets' shares will automatically result in a transfer of all employees, contracts, assets and liabilities of the Targets. This will allow them to continue operating as going concerns outside of any insolvency proceedings. Further, if selected as the bidder, Liberty will inject EUR [...] into FRI upon the Strasbourg Court issuing the Endorsement Ruling.

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

- (32) 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 the basis of a reasoned request, grant a derogation from the obligation imposed by Article 7(1).
- (33) Derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where the suspension required under the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.
- (34) Article 7(3) of the Merger Regulation provides that in deciding upon 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.

4.1. The Transaction falls under the suspension obligation pursuant to article 7(1) of the merger regulation

- (35) Given that the proposed Transaction qualifies as a concentration with EU dimension within the meaning of the Merger Regulation, it falls under the suspension obligation laid down in Article 7(1) of the Merger Regulation.

4.2. The effects of the suspension on the undertakings concerned and third parties

- (36) According to the information provided by Liberty, both Targets are in serious financial distress. This information has been supported by documentation provided by the Parties (such as the Targets' financial statements, the report drafted by [...] regarding Ascoval's shortage of cash short-term, and the Specifications for the Filing of Bidding Offers issued by the Strasbourg Court regarding FRIH's insolvency proceedings). This situation of financial distress of the Targets has been confirmed by [...], and by the fact that FRIH is in judicial insolvency proceedings.

- (37) As mentioned in Section 3.2 above, if Liberty is not granted a derogation from the standstill obligation pursuant to Article 7(3) of the Merger Regulation, it will be excluded from the bidding process for the acquisition of FRI, as not all condition precedents for it to take ownership of the Targets would be satisfied (or waived).
- (38) According to Liberty, in the absence of credible bidders willing to inject liquidity in the Targets, it is very likely that FRI would be liquidated and that Ascoval [degraded financial situation].
- (39) Liberty therefore submits that this would result in a loss of significant business opportunities on both sides – for Liberty and for the Targets.
- (40) Against this background, given the impossibility in the present case to complete merger control proceedings by 17 July 2020, the Commission concludes that the suspension obligation imposed by Article 7(1) could lead to serious harm to FRI and Ascoval, on the one hand, and Liberty, on the other hand. Furthermore, on the basis of the information submitted by Liberty, a derogation from the standstill obligation would not have adverse effects on any third party. To the contrary, it would enable the Targets to continue their operations outside of insolvency proceedings, to the benefit of customers and suppliers.

4.3. The threat to competition posed by the concentration

- (41) The Parties to the Transaction are active at various stages of the steel processing chain. Ascoval is active in the EEA supply of semi-finished carbon steel products, including blooms and billets. FRI is active in the EEA supply of finished steel products, namely long steel products, and within these, rails. Liberty is active in the upstream markets for the production and supply of raw materials, scrap, production and supply of semi-finished and finished steel products.

4.3.1. Market definition

- (42) Within the steel production, the Commission has held in previous decisions that semi-finished and finished steel products constitute two separate product markets.⁹
- (43) The Commission has further distinguished semi-finished steel products based on shape, although to date it has not determined whether all these three types of products constitute a single relevant product market:¹⁰ (i) blooms (used to produce heavy sections and rails); (ii) billets (used to produce bars, wire rods and light sections); and (iii) slabs (an intermediate product used as internal feedstock).¹¹

⁹ Commission decision of 5 February 2014, COMP/M.6974 – *Metinvest/Lanebrook/Southern Gok*, paragraphs 26-27; Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraphs 13-17.

¹⁰ Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraph 15.

¹¹ Commission decision of 7 May 2018, COMP/M.8444 – *ArcelorMittal/Ilva*, paragraph 195; Commission decision of 7 November 2012, COMP/M.6471 – *Otokumpu/INOXUM*, paragraph 118; Commission decision of 13 February 2004, COMP/M.4085 – *Arcelor/OYAK/Erdemir*, paragraph 22; Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraph 14.

- (44) The Commission has held that there are two further product markets within finished steel products: (i) flat steel products; and (ii) long steel products.¹² These two are manufactured in different rolling mills and used in different applications. Flat steel products are generally manufactured from slabs, whereas long steel products are generally manufactured from billets and blooms.¹³ The Parties do not overlap in the production and supply of flat steel products.
- (45) Within long steel products, several product categories can be further distinguished: (i) drawn wire products; (ii) wire rods; (iii) merchant bars; (iv) reinforcing bars; (v) tubes; and (vi) sections¹⁴. Sections can be divided between (i) light sections; (ii) heavy sections (beams); (iii) retaining structures; and (iv) rails¹⁵.
- (46) In terms of geographic market definition, the Commission has generally considered the production and supply of semi-finished and long finished carbon steel products as EEA-wide in scope.¹⁶
- (47) For rails, specifically, the Commission has previously found that the scope of the relevant geographic market is at least EEA-wide, and possibly wider.¹⁷
- (48) The Parties' activities overlap in the following markets:
- (a) The EEA market for the production and supply of semi-finished carbon steel products, and within this market, in (i) the carbon steel blooms segment, and in (ii) the carbon steel billets segment;
 - (b) The EEA markets for the production and supply of finished long carbon steel products and its segments.
- (49) On the basis of the information submitted by Liberty, it can be concluded that the horizontal overlaps are limited and that the vertical relationships do not raise, *prima facie*, any issues of foreclosure.

4.3.2. *Prima facie* assessment

4.3.2.1. Horizontal overlap

- (50) The horizontal overlaps arising from the Proposed Transaction are the following: (i) Liberty's and Ascoval's overlap in the production of carbon steel blooms and billets; and (ii) Liberty's and FRI's overlap in the supply of finished long carbon steel products.

¹² Commission decision of 5 February 2014, COMP/M.6974 – *Metinvest/Lanebrook/Southern Gok*, paragraph 126; Commission decision of 13 February 2004, COMP/M.4085 – *Arcelor/OYAK/Erdemir*, paragraph 23.

¹³ Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraphs 16-17; Commission decision of 13 February 2004, COMP/M.4085 – *Arcelor/OYAK/Erdemir*, paragraph 23.

¹⁴ Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraphs 46-60; Commission decision of 13 February 2004, COMP/M.4085 – *Arcelor/OYAK/Erdemir*, paragraph 24.

¹⁵ Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraphs 46-60.

¹⁶ See, for example, Commission decision of 5 February 2014, COMP/M.6974 – *Metinvest/Lanebrook/Southern Gok*, paragraphs 30-32 (although in this case the geographic market definition was left open); Commission decision of 21 December 2006, COMP/M.4408 – *Tata/Corus*, paragraph 10; Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraphs 62-70.

¹⁷ Commission decision of 2 June 2006, COMP/M.4137 – *Mittal/Arcelor*, paragraph 66; and Commission decision of 11 September 2001, COMP/ECSC.1357 – *VA Stahl/Thyssen Schienen Technik*, paragraph 15.

- (51) However, none of the overlaps will lead to affected markets.
- (52) On the basis of the information provided by Liberty, the Parties' combined 2019 market shares on the market for the production of blooms and billets in the EEA would be [0-5]%.
- (53) As regards the production and supply of finished long carbon steel products, FRI is only active in the production and supply of rails – a sub-segment of steel profiles. Liberty is, however, not active in the production and supply of rails.
- (54) If a wider market definition were to be considered, the overlap between Liberty's and FRI's activities would be limited. Based on the information provided by Liberty, in 2019 Liberty's and FRI's combined market shares on the EEA market for the (i) supply of finished carbon steel products would be [0-5]%, (ii) supply of long carbon steel products would be [0-5]% and (iii) supply of profiles products would be below 15%.
- (55) However, as regards profiles, Liberty submits that rails (produced by FRI) cannot be substituted with medium and light profiles (produced by Liberty) and vice versa.
- (56) As part of its assessment, the Commission also sought the opinion of customers of the Parties,¹⁸ which have generally confirmed that Liberty is not active in the supply of rails and acknowledged the existence of alternative suppliers of steel blooms and billets and semi-finished and finished long carbon steel products in the EEA, including profiles.
- (57) In view of the above, the Transaction does not raise *prima facie* competition concerns as regards horizontal overlaps, in particular in view of the relatively modest market position of the merged entity and the other remaining suppliers active in the relevant markets.

4.3.3. Potential foreclosure

- (58) There are two vertical links arising from the Proposed Transaction:
- (a) Between the (upstream) market for raw materials and the (downstream) market for semi-finished products. First, there is no risk of input foreclosure because Liberty does not supply raw materials (scrap) to Ascoval [Liberty's production of scrap]. Second, there is no risk of customer foreclosure as suppliers of raw materials have multiple alternatives to Ascoval.
- (b) Between the (upstream) market for semi-finished carbon steel products (blooms and billets) and the (downstream) market for rails/finished long carbon steel products. The combined market share of Ascoval and Liberty is far below 30% ([0-5]%) on the upstream market for blooms and billets and the combined market share of Liberty and FRI on the downstream market for finished carbon steel products (including any potential sub-segmentations as discussed in paragraphs (44) and (45)) is also below 30% (between 5-15% depending on the sub-segmentation). Therefore, in view of these limited market shares, any risk of input foreclosure through a reduction of rail producers' or long finished carbon steel products producers' access to semi-

¹⁸ Questionnaire sent to customers of the Parties by email on 10 July 2020.

finished product such as blooms and billets can be excluded. Customer foreclosure can also be excluded. Semi-finished products such as blooms and billets are used for the production of various finished steel products. Therefore, suppliers could continue selling their blooms to other players active in the supply of long carbon steel finished products (not just rails).

- (59) In view of the above, the Transaction does not does not raise *prima facie* competition concerns as regards vertical links due to the unlikely foreclosure effects.

4.3.4. Conclusion

- (60) Therefore, it appears *prima facie* that the Transaction is not likely to pose a threat to competition within the EEA, both with respect to horizontal and vertical overlaps.

4.4. Balance of interests

- (61) On balance, it appears that whilst the suspension obligation could seriously affect the financial situation of the Targets (Ascoval will [degraded financial situation], while FRI runs the risk of being liquidated) and the business opportunities of Liberty, no threat to competition caused by the operation can currently be identified, and a derogation does not appear to generate adverse effects on third parties. Therefore, the Commission finds that derogation can be granted in accordance with the application and to the extent specified below.

5. CONCLUSION

- (62) The Commission considers that the reasons given by Liberty for derogation from the suspension obligations meet the requirements set out in Article 7(3) of the Merger Regulation.
- (63) On the basis of the above considerations, and in accordance with Article 7(3) of the Merger Regulation and Article 57 of the EEA Agreement, Liberty is granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation in accordance with its application and until the Commission takes a final decision under the relevant provisions of the Merger Regulation.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President