Merger Control: Main Developments between 1st May and 31st August 2006 (1)

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Introduction

Merger and acquisition activity continued at high levels both in terms of notifications received and decisions adopted during the four months from May to August. A total of 125 notifications were made as compared to 111 in the previous trimester. The Commission also adopted 115 final decisions in this trimester as compared to 101 in the previous trimester. These figures represent a marked increase compared to the same period in 2005. Of the 115 final decisions adopted during the period 107 were approvals without conditions pursuant to Article 6 (1) (b) ECMR and 4 were decisions subject to conditions and obligations pursuant to Article 6 (2) ECMR. Of the unconditional clearance decisions adopted 60 were taken in accordance with the simplified procedure. The Commission also adopted during the reference period 4 decisions after a second phase investigation. Of these 4 decisions, 2 decisions were adopted without conditions pursuant to Article 8 (1) ECMR while 2 were adopted conditionally subject to commitments pursuant to Article 8 (2) ECMR. The Commission also opened 3 Phase II investigations (Article 6(1) (c) ECMR) during this period.

The Commission also received 2 post-notification requests for referral pursuant to Art. 9 during this period. No Art. 9 referral decisions were adopted during this trimester.

In addition the Commission received a total of 20 pre-notification requests from parties for referral pursuant to Article 4 ECMR. Of these requests 15 involved requests for the Commission to accept jurisdiction of cases which were notifiable in several Member States (Art. 4 (5)) referrals). The remaining 5 cases involved requests for the Commission to refer the case to a Member State (Art. 4 (4) referrals). During the same period, the Commission adopted 19 decisions pursuant to Article 4 ECMR accepting referral requests, 13 under Article 4 (5) ECMR and 6 under Article 4 (4) ECMR.

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

A — Decisions taken under Article 6 (2)

Axalto / Gemplus

In May the Commission conditionally approved the proposed acquisition by the Dutch company Axalto of Gemplus (Luxemburg). Both parties to the transaction are active worldwide in the production and sale of smart cards, such as SIM cards for mobile phones, payment cards and government and identification cards. The parties also provide products and services related to the administration of already issued SIM cards. SIM card administration is carried out through Over-The-Air ("OTA") platforms, which enable mobile phone operators to control a SIM card without a physical connection.

The Commission’s market investigation concluded that, despite the strong positions of the two companies, the transaction would not directly lead to price increases or to a decrease in the pace of innovation. However the Commission also found that the merged entity would have had both the ability and incentive to harm its competitors through misusing its intellectual property rights. Indeed, the transaction would combine two important intellectual property portfolios. Furthermore, as the two companies had sold a substantial number of OTA platforms, the Commission found that they would be in a position to hinder the activity of other card manufacturers by making the latter's SIM cards incompatible with their OTA platforms. Therefore, the Commission deemed that the proposed transaction as initially notified was likely to weaken competition and thus raise serious doubts as to its compatibility with the Single Market.

In order to address these problems Axalto undertook to grant a ten-year licence of the combined entity’s patent portfolio. Furthermore, Axalto undertook to disclose interoperability information to ensure the compatibility of competitors’ SIM cards with its OTA platforms. The Commission concluded that the commitments were suitable to remedy the competition concerns and granted its approval of the transaction subject to fulfilment of these undertakings.
**Orica/Dyno Nobel**

In May the Commission approved the proposed acquisition by the Australian company Orica Ltd. ("Orica") of most of the businesses of the Norwegian company Dyno Nobel ASA ("Dyno") outside North America and Australia. The transaction had been referred to the Commission by the national competition authorities of Sweden, Germany and Norway.

Both parties to the transaction are active in the explosives and detonators industry. Orica is a publicly listed Australian company active in mining services, chemicals, consumer products and fertilisers. Dyno manufactures and sells commercial explosives and initiating systems (detonators). The proposed operation involved the acquisition by Orica of almost all of Dyno's business in Europe, Africa, Asia and Latin America. The Dyno operations in the USA, Canada, Australia and New Zealand had been sold as a separate company. The parties were both active in the markets for commercial explosives in Norway and Sweden as well as in the European-wide market for initiating systems. Explosives and detonators are used in the mining, quarrying and construction industries.

In Norway and Sweden Dyno is by far the largest supplier of explosives followed by Orica which is the next largest competitor. The proposed transaction would have given the merged entity a dominant position in these countries. However Orica undertook to divest a subsidiary, Orca Scandinavia Mining Services, which comprises its entire explosives business in those two countries. This divestiture would remove the competition concerns that would have been created by the merger and would restore the competitive situation to the pre-merger situation. The Commission therefore cleared the operation subject to fulfilment of Orica’s divestiture commitment.

**Mittal / Arcelor**

In June the Commission granted conditional clearance to the proposed acquisition of the company Arcelor S.A. (Luxembourg) by the Mittal Steel Company N.V. Both parties to the transaction are major steel producers. Mittal Steel, a company controlled by the Mittal family, is the world’s largest steel producer. It is incorporated in the Netherlands and listed on both the New York and Amsterdam stock exchanges. Arcelor is the largest European steel producer and was created through the merger of the European steel producers Aceria, Arbed and Usinor in February 2002. The group is listed on the Brussels, Luxembourg, Paris and Madrid stock exchanges.

The Commission’s market investigation showed that the two companies’ activities were largely complementary, both geographically and in terms of product range. Geographically Arcelor is principally active in Western Europe as well as South and North America, with relatively minor operations in Eastern Europe and Asia. By contrast Mittal Steel is active principally in North America, Central and Eastern Europe and Africa and has only a minor presence in Western Europe.

In terms of product range Mittal and Arcelor’s activities in the European Economic Area (EEA) only overlap in the production and direct sale of a number of carbon steel products. Mittal is not active in stainless or speciality steel whereas Arcelor is active in this area. As regards carbon steel products Mittal achieves the majority of its sales in long products (such as bars, beams and rods) while Arcelor is active mainly in flat products (such as plates and coils). In steel distribution Mittal has limited activities while Arcelor has a strong position in Western Europe.

The Commission concluded that the proposed transaction would not give rise to competition concerns in the EEA markets for steel products with the exception of heavy section beams, a specific type of long carbon steel product. However Mittal offered remedies that would remove the concerns identified by the Commission in this area and the Commission was able therefore to grant approval to the transaction subject to implementation of these remedies in full.

**Linde / BOC**

For a more extensive treatment of this case please see the article on page 50 of this Newsletter

In June the Commission gave conditional approval to the proposed takeover of the UK-based company BOC by the German company Linde. Both companies are active in industrial and specialty gases. The initial market investigation found that the proposed acquisition could have created significant competition problems by removing an important competitor of Linde on a number of gas markets. The competition concerns were removed however by the remedy package offered by the parties which included the divestiture of Linde’s industrial gases business in the UK and BOC’s industrial and specialty gases business in Poland. The approval is further conditional on divesting several helium wholesale supply contracts of both Linde and BOC. Linde also undertook to break to a defined extent structural links with Air Liquide following from the existing joint ventures of BOC and Air Liquide in Asia. In the light of these commitments the Commission concluded that
the proposed operation would not significantly impede effective competition within the EEA or any substantial part of it.

B — Decisions taken under Article 8

Inco / Falconbridge

For a more extensive treatment of this case please see the article on page 41 of this Newsletter

On 4 July the Commission granted conditional clearance to Inco's acquisition of the Canadian company Falconbridge. Both parties to the transaction are Canadian companies active in the mining, processing and refining of nickel and other metals. The Commission's in-depth investigation had shown that the concentration, as initially notified, would have led to a substantial impediment of effective competition on certain nickel and cobalt markets in the EEA. To address the Commission's concerns, the merging parties undertook to divest Falconbridge's only nickel refinery and related assets and proposed to sell these assets to Lion Ore, an international mining company. The Commission concluded that the proposed transaction, as modified, would not significantly impede effective competition in the EEA or a significant part of it.

Omya / J.M. Huber

On 19 July the Commission gave conditional clearance, after an in-depth market investigation, to Omya's acquisition of US-based J. M. Huber's on-site precipitated calcium carbonate ("PCC") business. The transaction involved the sale by Huber of twelve PCC production facilities which are purpose built paper mill sites designed to provide a ready supply of minerals used in paper production. Six of these plants are in the EEA. The remainder are located in the US, Canada, Brazil and Russia. The case was referred to the Commission by the Finnish Competition Authority who had taken the view that the proposed transaction was liable to affect trade between Member States and significantly affect competition. The referral request was joined by the competition authorities of Austria, France and Sweden. The Commission's in-depth investigation revealed that the concentration, as initially notified, would have led to the elimination of a potential competitor in the market for the supply of calcium carbonates for paper coating. To restore effective competition, Omya and Huber undertook to divest a PCC plant in Finland together with the PCC coating technology developed by Huber. The Commission concluded that the proposed transaction, as modified, would not significantly impede effective competition in the EEA or a significant part of it. The Commission's clearance decision was conditional upon full compliance with these divestiture commitments.

Ineos / BP Dormagen

For a more extensive treatment of this case please see the article on page 56 of this Newsletter

The Commission cleared the proposed acquisition by the UK-based company, Ineos, of BP's Ethylene Oxide/Ethylene Glycol business in Dormagen, Germany. Ineos is a UK company active worldwide in the production, distribution, sales and marketing of intermediate and speciality chemicals. The business which Ineos proposed to acquire consisted of a plant located in Köln/Dormagen (Germany) manufacturing ethylene oxide and ethylene glycols and currently controlled by BP.

Ethylene oxide is a colourless gas, produced by the partial oxidation of ethylene and is hazardous, highly inflammable, explosive, toxic and carcinogenic. It is used for the production of glycols which are used mainly in the textile industry and as an intermediate for the production of other derivatives such as detergents, refrigerants and personal care products.

The Commission found that the combined entity would have high market shares in the merchant market for ethylene oxide. However the investigation also revealed that competitors would have the ability and the incentive to react to any attempted price increases by the combined entity. Furthermore there were indications from the market investigation that substantial new capacity for ethylene glycols was being commissioned in the Middle and Far East, producing ethylene glycols at substantially lower cost than in Europe. As a result imports of ethylene glycols to the EEA could be expected to increase. The subsequent reduction of ethylene glycol production in the EEA would then result in spare capacities of ethylene oxide, which could be diverted to the merchant market. Given the number of market players and their ability to divert part of their ethylene glycols production into the ethylene oxide merchant market, the Commission concluded that there would be sufficient alternative suppliers to constrain any anti-competitive behaviour by Ineos. It therefore granted an unconditional approval of the proposed acquisition.
C — Cases abandoned

China International Marine Containers / Burg Group

A proposed acquisition by China International Marine Containers ("CIMC") of the Dutch Burg Group ("Burg") which had been notified in February was effectively abandoned during the Commission's Phase II investigation. The transaction had been notified to the Commission in February and the Commission had decided to open a Phase II investigation in March. The Commission had subsequently issued a statement of objections and provisionally concluded that the transaction would create a quasi-monopoly position in the market for standard ISO tank containers leading to a significant impediment of effective competition. Additionally the Commission had taken the preliminary view that the planned deal would also impede effective competition in the market for specialised ISO tank containers by removing the best-placed entrant. ISO tank containers are cylindrical tanks, supported by a frame, that conform to the International Organization for Standardization (ISO) container manufacturing standards. They are used for the transportation of hazardous and non-hazardous liquid cargoes in container ships, where they can be easily piled next to standard freight container boxes.

During the course of the in-depth investigation the parties informed the Commission of their decision to abandon the deal. After a detailed investigation of the parties' plans in this regard the Commission was satisfied that the planned transaction would be effectively abandoned. It was therefore not necessary to take any formal decision in the case.