EUROPEAN COMMISSION

Hearing Officer

Final Report of the Hearing Officer[1]

Outokumpu/Inoxum

(COMP/M.6471)

1. BACKGROUND

1. On 10 April 2012, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004[2] ("the Merger Regulation") by which the undertaking Outokumpu Oyj ("Notifying Party") would acquire within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Inoxum GmbH and Nirosta GmbH (together "Inoxum"), the stainless steel division of ThyssenKrupp AG ("TK") by way of purchase of shares (the "proposed transaction").[3] The Notifying Party and Inoxum are designated hereinafter as the "Parties".

2. WRITTEN PROCEDURE

2. Based on a market investigation, the Commission raised serious doubts as to the compatibility of the transaction with the internal market and adopted a decision pursuant to Article 6(1)(c) of the Merger Regulation on 21 May 2012.[4] The Notifying Party submitted its written comments on the Article 6(1)(c) decision on 4 June 2012. During the phase II investigation, informal information exchanges took place on a regular basis between the Directorate General for Competition ("DG Competition") and the Parties, as well as weekly status update telephone calls.

3. DG Competition also sent several formal requests for information pursuant to Article 11 of the Merger Regulation to the Parties. A state of play meeting between DG Competition and the Parties took place on 8 June 2012. A second state of play meeting took place on 6 August 2012.

4. A statement of objections was sent to the Parties on 9 August 2012 (the "SO").

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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").

2 OJ L 24, 29.1.2004, p. 1.

3 OJ C 116, 20.04.2012, p. 4.

4 OJ C 154, 31.05.2012, p. 2.

2.1. Access to file: redacted answers in certain market questionnaires

5. The Notifying Party received access to the file via CD-ROM on 10 August 2012.

6. On 13 August 2012, the Notifying Party requested clarification regarding, and further access to, the redacted answers in certain market questionnaires. In order to address potential confidentiality issues, the Notifying Party suggested restricted access to its external advisors only. After an exchange of emails and telephone calls, DG Competition agreed to grant the Notifying Party's external advisors further access subject to a non-disclosure agreement. Access was granted on 21 August 2012. On 28 August 2012, the Notifying Party complained to me that access to the file had been unjustifiably delayed, and that this had impaired the ability of the Notifying Party to fully exercise its rights of defence.

Factual background

7. In the course of its investigation of the case, DG Competition sent a number of questionnaires to competitors, customers and other market players. These questionnaires were sent in two formats, namely as "e-questionnaires" and "word questionnaires" (i.e. in MS Word format). The procedural dispute concerned only the e-questionnaires.

8. The e-questionnaires contained mainly two types of questions; the first type required a typed answer whereas the second required a response in table format. The e-questionnaires were accompanied by an explanatory note on how to answer the questions, particularly on how to deal with confidentiality issues. In both question formats, the e-questionnaire would ask the respondents to indicate whether the responses were considered confidential or not and, if the former, to provide a non-confidential version of the response. However, upon receiving the completed e-questionnaires, DG Competition found that they had not been completed properly by many respondents and decided to carry out additional redactions in order to comply with its duty not to disclose party confidential information. DG Competition received responses that can broadly be classified into three categories:

- The first category included respondents who replied correctly to the e-questionnaires and provided appropriate non-confidential versions when requested by the forms (category I information).

- The second category included respondents who had indicated that certain responses were confidential, but provided an exact copy of their confidential response as their non-confidential response (i.e. despite indicating that the response was confidential, no redactions were made to the confidential response) (category II information). [5]

[5] The e-questionnaires automatically copy / paste the confidential response into the non-confidential response box when a respondent indicates that its response is confidential, so it is then up to the respondent to redact any information which is confidential. If the respondent does not react to the prompt from the e-questionnaire, the non-confidential version of the response will reflect the confidential version.

- The third category included respondents who had indicated that certain responses were not confidential, but where DG Competition believed that such responses were, in fact, confidential vis-à-vis the Parties (category III information).

9. DG Competition therefore made additional redactions *ex officio* to category II and III information.

10. At the time of access to the file on 10 August 2012, the Parties were not made aware of this unilateral redaction exercise that was carried out by DG Competition. It was only during the course of the email exchanges and telephone conversations that took place after access to the file was granted that it became clear to the Parties that DG Competition had redacted information which respondents had not expressly marked as confidential. DG Competition accepted the Notifying Party's suggestion of providing access to the external advisors to the unredacted versions of the e-questionnaire responses it had received, viz. the versions that were submitted by the respondents prior to the DG Competition redaction exercise, on condition that the external advisors sign a non-disclosure agreement. Such access was granted on 21 August 2012.

Complaint

11. The Notifying Party's complaint referred specifically to the category III information described above. The Notifying Party disputed the "*Commission's unilateral decision to redact a large number of responses which were not deemed confidential by the respondents themselves*" and submitted that the Commission should have addressed this issue with the Notifying Party prior to access to the file being granted.

12. On the former point, the Notifying Party submitted that the Commission may only redact information that is marked as non-confidential in situations where it is not possible to obtain the consent of the data provider for the proposed redactions. Furthermore, it argued that the Commission must provide specific reasons for any unilateral redactions.

Assessment

13. Having investigated the matter, I am convinced that, in this case, there were justified concerns that category II information providers had not properly understood how to prepare the non-confidential versions of the responses they had marked as confidential. In respect of category III information, there were also justified concerns that information providers had failed to identify information that was confidential.

14. Given the Commission's obligation under Article 339 of the Treaty on the Functioning of the European Union to protect business secrets and other confidential information, and given the time constraints which made it impossible to contact all of the information providers to clarify the matter with them,[6] it was in my view appropriate for DG Competition to make redactions *ex officio*.

6 As the EU Courts have recognised, the conduct of proceedings in merger cases, including the exercise of the right to be heard, must be adapted to the need for speed, which characterises the general scheme of

15. However, DG Competition should have recorded on the accessible file which redactions it had made, and the reasons for doing so, and should have fully informed the Parties. Indeed, while the need for speed in merger proceedings can justify *ex officio* redactions, it cannot justify not informing the parties to the proceedings of such redactions, and the reasons for them.[7] If the Parties had been informed about the issue before the access to the file, the solution of granting full access only to the Notifying Party's external advisors subject to a non-disclosure agreement could have been reached already at that point in time.

16. Whilst it could be said that there has been a procedural irregularity in the conduct of this case, I consider that such procedural irregularity did not actually infringe the Parties' rights of defence in the present case, given that (i) the Parties accepted the restricted access procedure thereby enabling their external advisors to view and comment on the e-questionnaire responses in their original non-confidential form as submitted by the data providers to the Commission; (ii) the Parties did not request an extension of time in respect of the additional access; and (iii) there are no indications that the Parties have not been able to comment in full on the additional information they were given.

2.2. Letter of facts

17. On 23 August 2012, at 17h39 – less than 24 hours before the expiry of the deadline to reply to the SO – DG Competition sent to the Notifying Party a document entitled "Letter of Facts", the stated purpose of which was to inform the Notifying Party about pre-existing factual elements which were not expressly relied on in the SO but which, on further analysis of the file, the Commission had concluded were potentially relevant to substantiate its final decision. In addition, the cover letter indicated that the Letter of Facts also set out a number of corrections to the SO, where errors had been identified in certain paragraphs as well as a clarification of the information contained in the SO, without altering the conclusions drawn therein.

18. The Letter of Facts indeed contained two parts: The first part of the Letter of Facts carried the heading "New information / evidence that corroborates the objections already set out in the SO", and contained a list of quotes from documents in the Commission file, grouped under headings such as "Paras 318-328 (BA)" or "Paras 383-403 ([confidential])", preceded only by the statement that "*[t]he Commission draws the [Notifying Party's] attention on the following additional evidence in relation to the paragraphs of the SO indicated below"*.

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the Merger Regulation and which requires the Commission to comply with strict time-limits for the adoption of the final decision: Judgments of the General Court of 27 November 1997 in Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2186, paragraph 113, of 28 April 1999 in Case T-221/95 *Endemol Entertainment* v *Commission* [1999] ECR II-1330, paragraph 84, of 22 October 2002 in Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071, paragraph 100, and of 4 February 2009 in Case T-145/06 *Omya* v *Commission* [2009] ECR II-145, paragraph 33, and of the Court of Justice of 10 July 2008 in Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Commission* [2008] ECR I-4951, paragraphs 49 and 90-91.

7 Compare with Judgment of the General Court of 25 October 2002 in Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4389, paragraph 105.

19. The second part of the Letter of Facts was entitled "Clarification of the information contained in the SO without altering the conclusions drawn in the SO" and was mainly composed of textual replacements for specific paragraphs of the SO which were said to contain errors.

20. The Notifying Party was given until 28 August 2012 at noon (that is, one and a half working day beyond the deadline to reply to the SO) to examine the additional factual elements and to provide its views on the facts as well as on the conclusions the case team drew from them.

Complaint

21. The Notifying Party responded to the Letter of Facts on 28 August 2012. In its response, the Notifying Party raised "serious procedural issues" with the approach followed by the case team. By separate letter dated 28 August 2012, the Notifying Party complained to me about "serious procedural irregularities" in that (i) the Letter of Facts did not introduce "new" evidence, but contained elements already available to the Commission before it compiled its SO, (ii) the Letter of Facts did not explain the conclusions drawn by the Commission from the "new" evidence, (iii) the clarifications in the second part of the Letter of Facts altered the conclusions drawn in the SO, and (iv) the replaced new paragraphs of the SO also contained errors (for which the Notifying Party provided the corrections).

Assessment

22. As regards the second part of the Letter of Facts,[8] I consider that, where the Commission discovers clerical errors or counting or calculation errors in an SO which it has sent, it is normal that it informs the addressees of the SO of these errors and corrects them as soon as possible. Depending on the circumstances, this may create a need to extend the deadline for responding to the SO. In the present case, the Notifying Party did not request an extension either of the deadline to reply to the SO or of the additional deadline to respond to the Letter of Facts. As is apparent from the response to the Letter of Facts, the Notifying Party was in fact fully able to respond to the corrigendum.

23. As regards the first part of the Letter of Facts, there are two issues to be considered: (i) the fact that the Letter of Facts was sent before the Parties had responded to the SO and contained information which was already in the Commission's file when the SO was drafted, and (ii) the lack of explanations as to the conclusions which the Commission intended to draw from the pieces of evidence.

24. First, the EU Courts have recognised that there is no provision which prevents the Commission from sending to the parties after the statement of objections fresh documents which it considers support its argument, subject to giving the undertakings the necessary time to submit their views on the subject.[9]

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8 "Letter of Facts" would appear to be a misnomer for what was in reality a corrigendum to the SO.

9 Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraphs 40-41, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 190.

25. However, in my view there is a difference between the situation where the Commission identifies and communicates new evidence in reaction to the response to the SO submitted by the parties, and a situation where the Commission does so before the parties have responded to the SO. It also makes a relevant difference whether new evidence has only become available after the sending of the SO for reasons out of the Commission's control, for instance due to a late response by a third-party information provider, or whether the information was already available at the time of the drafting of the SO.

26. Sending a letter of facts before the response to the SO, containing information which was already in the file when the SO was drafted, without giving a new time limit for responding to the SO of equal length as the initial time limit, amounts in my view to a circumvention of the normal deadlines for the sending of the SO and the response. Therefore, this should in my view be avoided.

27. Second, it is clear that the Commission cannot use in its final decision evidence on which the Parties have not been allowed to give their views. According to the relevant case law, *"the important point is not the documents as such but the conclusions which the Commission has drawn from them"*.[10]

28. In my view, the mere reference in the first part of the Letter of Facts to paragraph numbers in the SO (see point 18 above) does not suffice as an explanation of what conclusions the Commission intended to draw from the quoted pieces of evidence.

29. However, the Commission determined in the end that the evidence contained in the first part of the Letter of Facts was not necessary to support the draft decision. Since this evidence has not been relied upon by the Commission in the draft decision, the Parties' procedural rights, specifically their right to be heard, have thus not been impaired.

3. ORAL PROCEDURE

30. The formal oral hearing was held on 30 August 2012 and was attended by: the Parties and their legal and economic advisors; the relevant Commission services; and representatives from the competent authorities of six Member States, i.e. Germany, France, Hungary, Poland, Finland and Sweden.

4. PROCEDURE AFTER THE FORMAL ORAL HEARING

4.1. Remedies

31. The Commission and the Parties started engaging in discussions on possible remedies shortly before the issuance of the SO. On 19 September 2012, the Notifying Party submitted a formal remedy package consisting in the divestment of a combination of its assets in Sweden, Italy, Germany, UK and France. The Commission launched a market test on this remedy proposal on 20 September 2012. Upon the Commission's suggestion, the Parties also appointed experts to provide an independent analysis of the remedies. On the basis of its assessment, the Commission concluded that the remedies submitted on 19 September 2012 would not solve the competition concerns identified by the Commission, as they raised

[10] Case 107/82, *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 27.

serious doubts as to whether the assets to be divested would be competitive and viable in the form proposed by the parties, whether a suitable purchaser could be found, and whether such purchaser would have the ability and incentive to compete effectively and on a lasting basis in the EEA CR market.

32. The parties, therefore, submitted revised remedies to the Commission on, respectively, 1 and 9 October 2012. These revised offers, however, did not alter the Commission's initial assessment.

33. On 19 October 2012, the Notifying Party submitted further revised remedies, which included a more extended offer of assets for divestment, in particular, as regards certain production lines at Inoxum's production site in Terni, Italy. The Commission concluded that the revised remedies of 19 October 2012 were sufficient to address the concerns which the Commission had raised regarding the compatibility of the proposed transaction with the internal market.

5. THE DRAFT DECISION

34. Pursuant to Article 16(1) of Decision 2011/695, the Final Report shall consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.

35. Upon review of the draft decision, I conclude that it does not deal with any objection in respect of which the Parties have not been afforded the opportunity of making known their views.

6. CONCLUSION

36. I conclude that the effective exercise of the procedural rights of the Parties has been respected in this case.

Brussels, 30 October 2012

(signed)

Wouter WILS