SLAUGHTER AND MAY

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European Commission prohibits proposed steel joint venture between Tata Steel and thyssenkrupp

On 11 June 2019 following an in-depth Phase 2 investigation, the European Commission **prohibited** a proposed joint venture between Tata Steel and thyssenkrupp. This is the tenth merger to be blocked by the Commission in the last ten years, and the third this year.

The proposed joint venture

Tata Steel is a diversified steel producer, headquartered in India and operating globally. It has a number of production sites across the EEA, with its main production hubs located in Port Talbot in the UK and IJmuiden in the Netherlands. thyssenkrupp is a diversified industrial group of companies, operating across a number of business sectors, including the production of steel. It is headquartered in Germany, where its main production hubs for flat carbon and electrical steel are located.

The proposed joint venture would have brought together the flat carbon steel and electrical steel businesses of Tata Steel and thyssenkrupp in the EEA. thyssenkrupp and Tata Steel are the second and third biggest producers of flat carbon steel in the EEA respectively.

The Commission's decision

The Commission's decision to block the proposed joint venture centred on concerns in two areas: metallic coated and laminated steel products for packaging, and automotive hot dip galvanised steel products. The Commission expressed concern that the joint venture would have resulted in a reduced choice of suppliers and higher prices for customers, specifically:

- In the markets for metallic coated and laminated steel for packaging, the Commission considered that the proposed joint venture would have created a market leader in what is already a highly concentrated market.

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- In the market for automotive hot dip galvanised steel, the Commission considered that the proposed joint venture would have removed a significant competitor in circumstances where only a few providers have the capacity to supply significant volumes.

In reaching its decision, the Commission has stated that it considered whether imports of steel products from outside the EEA could represent an alternative source of supply for customers in the EEA. In this context, the Commission took into account feedback from certain customers who noted that the increased lead times for delivery, and the qualitative standards of the specialist steel products they required, meant they did not consider imports to be a viable alternative to the parties' products.

Ultimately, the Commission concluded that the competitive pressure exerted by the remaining competitors in these markets, and by imports from outside the EEA, would not have been sufficient to ensure effective competition.

Although the parties offered remedies to address the Commission's concerns – including the divestment of assets in both markets – the Commission did not consider the proposed remedies sufficient. Specifically, in the Commission's view:

- The proposed divestments did not include the assets required for the production of the necessary steel inputs to manufacture the relevant products. The purchaser of the divestment assets would therefore likely have been dependent on the parties to provide these inputs.

- In metallic coated and laminated steel for packaging, the proposed divestment would only remove a small part of the overlap between the parties' businesses.

In the wake of a discussion with the Commission on 10 May 2019, Tata Steel and thyssenkrupp announced that they did not expect the Commission to approve the joint venture. Both parties released statements noting that the Commission had made clear it would not approve the joint venture without more extensive divestment commitments. The parties resolved not to offer additional remedies, stating that this would undermine the viability of the joint venture. As a result, the Commission prohibited the proposed transaction.

Conclusion

This is the third merger to be prohibited by the Commission in 2019, out of a total of ten prohibitions over the last ten years. It follows the prohibition of **two mergers in one day** in February this year (Siemen's proposed acquisition of Alstom and Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall).

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Merger control

CMA clears PayPal's takeover of iZettle

On 12 June 2019 the Competition Markets Authority (CMA) issued its **final report** unconditionally clearing Paypal Holdings, Inc.'s acquisition of iZettle AB, concluding that the merger did not result in a substantial lessening of competition in the UK. PayPal and iZettle both provide mobile point of sale (mPOS) services in the UK. mPOS services – which operate through the use of a card reader linked to a mobile phone app – enable businesses to accept payments from customers 'offline'. These provide an alternative to 'traditional' point of sale (POS) services which operate through standalone devices connecting to a payment system via WIFI or a wired connection.

PayPal had originally completed its acquisition of iZettle on 20 September 2018. On 5 December 2018 the CMA **referred** the case to an in-depth Phase 2 investigation, in which it considered in detail how competition between PayPal and iZettle would have been likely to develop absent the merger.

In its Phase 2 investigation, the CMA considered the following **theories of harm**: (i) whether the merger would reduce competition in the supply of offline payment services via mPOS devices in the UK, such that iZettle's customers (typically small and medium-sized businesses) would pay higher prices or receive a lower quality service; and (ii) with respect to the supply of omni-channel payment services (enabling customers to accept payments across all sales channels and devices through a single payment processing platform) to small, micro and nano customers, whether the merger would reduce competition by preventing potential entrants from entering the market.

In its final report clearing the merger, the CMA concluded that:

- While iZettle and PayPal are two of the largest suppliers of mPOS devices, their customers are also willing to switch to 'traditional' POS devices. POS providers account for 90-100 per cent of overall offline payment processing, while the two largest POS suppliers to smaller merchants – Worldpay and Barclaycard – account for almost 60 per cent of the market and will continue to constrain the merged entity. Moreover, other mPOS-only providers such as SumUp and Square, which have grown significantly in recent years, will continue to constrain the merged entity.

- As regards the omni-channel payment services market in which both parties are also active, iZettle would only have been able to develop its offering slowly and would have remained a marginal player for the foreseeable future. The CMA also found that other significant competitors would have been more important constraints on PayPal than iZettle.

CMA publishes update to research on past merger remedies

On 18 June 2019 the CMA published an **update** to its ongoing review of past merger remedies. The CMA's update forms part of a rolling series of evaluations, which started in 2007. In its update the CMA sets out

the key learnings from its research across 18 case studies to date and highlights its three most recent case studies: (i) ***Müller / Dairy Crest***; (ii) ***Reckitt Benckiser / K-Y***; and (iii) ***ICAP / Tullett Prebon***.

All three evaluations involved hybrid "quasi-structural" remedies based on more complex divestitures. Each remedy aimed to create a new competitor in the relevant market so as to replace the competitive restraint lost because of the merger. However, the divestiture packages did not constitute stand-alone businesses: in each case, the acquirer purchased assets or contractual rights (e.g. a supply agreement, IP licences or key personnel employment contracts).

With respect to *Müller / Dairy Crest*, in which the CMA accepted undertakings in lieu of a reference to Phase 2 (UILs), the remedy required the merger parties to allow a new competitor to supply milk to supermarkets in specified regions via a 5-year supply agreement. The CMA concluded it was too soon to tell whether the remedy would result in an effective long-term competitor in the relevant markets. It noted that what limited success the remedy had had to date was, among other factors, thanks to the proactive engagement of the merger parties in the process.

In similar fashion, the CMA noted the long-term success of the remedy was also uncertain in *Reckitt Benckiser / K-Y*, in which the remedy accepted after a Phase 2 investigation was an 8-year licensing agreement that allowed the use by a third party of the K-Y brand and formulation for personal lubricants. The ongoing risk is that the success of the remedy is dependent on the success of the third party's rebranding exercise once the licensing agreement expires.

In *ICAP / Tullett Prebon*, where the CMA accepted UILs, the remedy required the transfer of individual brokers (since these were the main assets of the merging parties' businesses). The CMA stressed the unusual nature of the remedy, given that its success is dependent on the individual transferees' cooperation with the transfer. However, while the remedy's long-term goal of building a strong competitor in the oil-based brokering sector was still uncertain, the CMA concluded that the remedy had been successful thus far.

Overall, the CMA concluded that these hybrid remedies have higher risks than standard structural divestment remedies. In the CMA's view, it had ensured their success to date through active management and the prudent selection of third parties. However, in all three cases, the CMA concluded that the longer-term success of the remedies remains uncertain.

State aid

The interplay between arbitration awards and EU law - General Court rules in favour of investors in *Micula* case

On 18 June 2019 the EU General Court (GC) upheld an **appeal** brought by Viorel and Ioan Micula (two investors holding Swedish citizenship) against a Commission decision that had concluded that compensation awarded by an arbitration tribunal, and paid by Romania to the Micula brothers, breached EU State aid rules.

Prior to Romania's accession to the EU (in 2007), Romania offered tax incentives to those investing in 'disfavoured' regions. In 2005, as part of the accession process, Romania repealed these incentives to align its State aid policies with EU State aid rules. The Micula brothers, however, launched ICSID (International Centre for Settlement of Investment Disputes) arbitration proceedings against this decision. The arbitration tribunal ruled that Romania had infringed a bilateral investment treaty between Romania

and Sweden and ordered Romania to compensate the investors. But, in March 2015, the Commission decided that payment of the compensation constituted incompatible State aid (as paying compensation would result in advantages equivalent to those provided for in the investment incentive scheme). It therefore ordered Romania to recover any compensation paid. The Micula brothers (and related companies) appealed the Commission's decision to the GC, which has annulled the Commission's decision in its entirety. The GC in particular held that:

- The Micula brothers' "*right to receive the compensation at issue arose and began to take effect at the time of when Romania*" repealed the incentives in 2005, which was before Romania's accession to the EU. The arbitral award, in 2013, was "*simply the recognition of that right*" and the subsequent implementation (payment of the compensation) by Romania, in 2014, merely represented "*the enforcement of that right*".

- As the EU State aid rules were not applicable to Romania before its accession, the Commission could not exercise its State aid enforcement powers to censure the Romanian investment scheme for the period predating accession.

- Therefore, the arbitral tribunal was not required to apply EU law to events occurring prior to accession and the Commission was wrong in exercising its powers retroactively.

The GC did leave open the possibility that the Commission could re-examine part of the award covering a 27-month period after Romania had acceded to the EU. The Commission had, however, in any case exceeded its powers as it did not "*draw a distinction between the periods of compensation for the damage suffered […] before or after accession*".

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