

Summary of Commission Decision**of 23 January 2008****declaring a concentration compatible with the common market and the functioning of the EEA Agreement****(Case COMP/M.4781 — Norddeutsche Affinerie/Cumerio)****(Only the English version is authentic)****(Text with EEA relevance)**

(2008/C 161/08)

On 23 January 2008, the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings⁽¹⁾, and in particular Article 8(1) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address:

http://ec.europa.eu/comm/competition/index_en.html

I. SUMMARY

1. On 30 July 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 ('EC Merger Regulation') by which the undertaking Norddeutsche Affinerie ('NA', Germany) acquires within the meaning of Article 3(1)(b) of the EC Merger Regulation control of the whole of the undertaking Cumerio SA ('Cumerio', Belgium) by way of a public bid announced on 27 June 2007.
2. NA is a German public limited company with production facilities in Hamburg, Emmerich and Lünen (Germany). NA produces copper cathodes (in Hamburg and Lünen). These copper cathodes are then processed into copper rod (Hamburg and Emmerich) and copper shapes (both cakes and billets in Hamburg). Downstream of the shapes production, through its subsidiary Prymetall GmbH & Co. KG ('Prymetall') in Stolberg (Germany), NA is also active in the production and sale of semi-finished copper products. Downstream of the copper rod production Prymetall produces shaped wires. Moreover, NA holds (indirectly, through Prymetall) 50 % in Schwermetall Halbzeugwerk GmbH & Co. KG ('Schwermetall', Germany), which produces copper shapes and pre-rolled strips. The other partner in the JV Schwermetall is Wieland Werke AG ('Wieland', Germany), itself a producer of copper shapes (only for own internal processing), as well as a producer of semi-finished copper products and final copper products. Both Wieland and Prymetall purchase copper shapes and pre-rolled strips from Schwermetall. Finally, NA holds a 60 % share in Deutsche Giessdraht GmbH ('Deutsche Giessdraht', Germany), a producer of copper rod jointly controlled with Corporacion Nacional del Cobre de Chile ('Codelco', Chile), which holds the remaining 40 %.
3. Cumerio is a Belgian public limited company with production facilities in Olen (Belgium), Pirdop (Bulgaria), Avellino (Italy) and, through its subsidiary Swiss Advanced Materials AG, in Yverdon-les-Bains (Switzerland). Cumerio is active in the production of copper cathodes (Olen, Pirdop), of copper rod (Olen, Avellino) and of copper shapes (both cakes and billets in Olen), and further downstream of the copper rod production, to a lesser extent, of copper wires (Avellino) and profiles (Yverdon-les-Bains). Unlike NA, further downstream of the shapes and pre-rolled strips production, Cumerio is not active in the production of semi-finished copper products.
4. The Austrian holding A-TEC Industries AG ('A-TEC'), an international industrial group with operations in drive systems, plant engineering, machine tools and metallurgy, has a share of 13,75 % in NA and a share of 25 % plus 1 share in Cumerio. A-TEC holds 100 % of the shares in Montanwerke Brixlegg AG ('Brixlegg') which is the main competitor of NA and Cumerio for copper shapes.
5. The proposed transaction consists of the acquisition of sole control over Cumerio by NA via a public takeover offer for all outstanding shares, options and warrants.
6. In order for the Commission to be able to dismiss any possible serious doubts in Phase I, the parties submitted on 28 August 2007 a remedy proposal offering for sale the entire copper shapes business line of Cumerio.
7. The market test of the remedy proposal was fairly negative. The Commission concluded, given the information available in Phase I, that the doubts as to potential unilateral effects in the market(s) for copper shapes could not be dismissed. The Commission therefore decided on 18 September 2007 to open a Phase II investigation.
8. The market investigation in Phase II revealed that the position of the new entity on the EEA merchant market for copper shapes will remain under the competitive pressure of both in-house producers of copper shapes and purchasers of copper shapes that may integrate upstream. Furthermore, on the basis of the characteristics of the market for

⁽¹⁾ OJL 24, 29.1.2004, p. 1.

copper shapes, its structure, the constraints exercised by the overcapacity and the competitive pressure exercised by the downstream markets of semi-finished copper products, it is concluded that the transaction does not threaten to significantly impede effective competition on the market for copper shapes in the EEA. In view of this, the new entity will not have the ability to undertake any successful strategy of input foreclosure on the downstream markets for semi-finished copper products.

9. Therefore, a clearance decision pursuant to Article 8(1) of the Merger Regulation is proposed for adoption.

II. EXPLANATORY MEMORANDUM

A. THE RELEVANT PRODUCT MARKETS

10. The sector of activity affected by the proposed transaction is the copper industry.

1. Copper industry

11. Copper is a natural product that is gained from copper ore. After extraction from the copper mine, copper ore is enriched in processing facilities into copper concentrate. Both copper concentrate and copper scrap are used to produce copper cathodes. To comply with the London Metal Exchange (LME) standard of 'grade A' copper cathodes, the most widely used standard in international trade, the cathodes must have a copper content of at least 99,9935 % and a defined maximum level of the various impurities such as silver, lead, phosphorous and others which make up the remaining 0,0065 % or less. Non-LME certified cathodes are called off-grade. The LME is the world's leading trading market for copper. The 'LME price' is thus considered as the 'world copper price'.
12. Copper cathodes, are the main inputs to produce both copper rod and copper shapes.
13. Copper rod is a thin, long, round piece of copper, mostly produced in diameters of 8 mm. Copper rod is the main feedstock for power cables, installation cables and communication cables and wires. Copper rod can also be further processed into for example drawn and shaped wires, profiles and nuggets.
14. There are two different kinds of copper shapes: billets and cakes. Billets are copper shapes with a circular section, with a diameter varying from 100-800 mm and a length of around 600 mm. Cakes are copper shapes with a rectangular section and weight up to 25 ton per cake. Copper billets are further transformed into tubes, bars and profiles, whereas copper cakes are the feedstock for pre-rolled strips and other rolled copper materials.

15. The parties' activities overlap in the production of copper scrap, copper cathodes, by-products stemming from copper smelting and electrolysis, copper rod, copper shapes. Although Cumerio is not active as a producer of downstream copper products made out of copper shapes, these markets will be analysed with respect to both unilateral and vertical effects on the market for copper shapes.

2. Copper scrap

Product market definition

16. The Commission has in previous decisions indicated that there is a distinct product market for copper scrap. The existence of a distinct product market for copper scrap has been confirmed by the market investigation.
17. It has been claimed by one respondent to the market investigation that the refining of copper scrap under a so-called tolling arrangement might constitute a product market which is distinct from the market of copper scrap.
18. The market investigation has shown that not only copper shapes producers, but all copper refiners, within and outside the EEA, use copper scrap as an input. There is significant trade in copper scrap. The market investigation confirmed that scrap tolling is one among several ways to dispose of copper scrap in a profitable way. The Commission therefore concludes that from a demand-side perspective scrap tolling is substitutable with selling scrap to refiners and possibly scrap traders.

Geographic market definition

19. The market investigation has confirmed that suppliers and traders of copper scrap offer their scrap on a world-wide basis, and that many EEA-based buyers of scrap also purchase from sources outside the EEA.

3. Copper cathodes

Product market definition

20. As the present transaction does not raise any competition concerns on the product market for cathodes, the question whether LME-grade and off-grade cathodes constitute a single product market or are rather to be distinguished, can, in line with previous Commission decisions, be left open.

Geographic market definition

21. With respect to the geographic market definition, the respondents to the Commission's market investigation in the present transaction confirmed, in line with previous Commission decisions, that copper cathodes are traded world-wide.

4. Copper rod

Product market definition

22. The production of copper rod can be achieved by two different processes: (i) by continuous casting and rolling; or (ii) by direct casting. While copper rod is being produced in various diameters ranging from 8 to 25 mm, 95 % of the overall European copper rod production relate to only one diameter, i.e. 8 mm, which serves as a standard product.
23. The notifying party considers that the market for the production and supply of copper rod constitutes a single relevant product market and that no distinction between the two production processes or between the various diameters is necessary. This is in line with previous Commission decisions.
24. The market investigation shows that the substitutability between copper rod (i) by continuous casting and rolling or (ii) by direct casting from a *demand-side perspective* is mainly one-sided.
25. With regard to a potential further subdivision according to the different diameters of copper rod ranging from 8 to 25 mm the market investigation has shown that the different diameters are being used for different applications and most customers purchase copper rod of several different diameters. The market investigation confirmed the high degree of *supply-side substitutability*.

Geographic market definition

26. In line with previous decisions of the Commission and in view of the dispersion of suppliers of copper rod in Europe, the market investigation has shown that there are overlapping geographical circles around production sites which influence each other's competitive situation. Therefore, the geographic market is to be defined as EEA-wide.

5. Copper shapes

Product market definition

27. Copper shapes are copper products cast in a semi-continuous or a continuous process into billets or cakes. Depending on the copper content and the content of impurities, the notifying party distinguishes copper shapes of different qualities such as e.g. oxygen-free (OF-Cu), special-electrolytic (SE-Cu), electrolytic (E-Cu) and phosphorus-bearing (Ph-bearing Cu).
28. With respect to demand-side substitutability between billets and cakes, the market investigation indicated that billets and cakes are not interchangeable, and constitute distinct product markets from their point of view.
29. With respect to the supply-side substitutability of copper shapes, the notifying party has submitted that shape

suppliers can easily switch from the production of billets to the production of cakes and *vice versa* within a short period of time and without any significant investment. The same has been stated on the possibility of switching the production between the various copper qualities of the shapes.

30. Although it may not be possible for every copper producer/processor to switch easily between the production of cakes and billets on the same production line, the market investigation has confirmed that from the point of view of supply-side substitutability, billets and cakes are interchangeable.
31. With respect to the various copper qualities, the market investigation has shown that these can in general be produced on the same production lines, with none or only minor additional costs. It has been confirmed that from the supply-side substitutability point of view, shapes of different copper qualities do not constitute distinct product markets, with the possible exception of OF-Cu shapes.
32. However, since Cumerio does not produce OF-Cu shapes, it can be left open whether OF-Cu shapes constitute a distinct relevant product market, as it does not affect the competitive assessment of the transaction.

Geographic market definition

33. The notifying party submits that the relevant geographic market for shapes is at least EEA-wide. The market investigation confirms that transport costs are relatively low compared to the value of copper shapes. More importantly, the market investigation confirmed that the EEA-based suppliers of the merchant market for copper shapes sell all over the EEA and to some extent outside the EEA, in Asia and North-America.

6. Markets downstream of copper shapes

Product and geographic market definition

34. Copper shapes are further processed into semi-finished copper products. The market investigation confirms that there are different applications for copper products downstream of shapes, the most important of which are electrical engineering and the electronic industry; the construction industry; telecommunications; automotive industry; machine construction.
35. In view of the fact that Cumerio is not active in the production of downstream semi-finished copper products, it is not necessary for the assessment to precisely define the boundaries between the different markets for the various semi-finished copper products, and to decide their exact geographic extension, either EEA or worldwide.

B. COMPETITIVE ASSESSMENT

1. Unilateral effects

Non-coordinated effects on the market for copper scrap

36. During the market investigation, a few customers have expressed concerns that the transaction might lead to the creation of buyer power, whereby the new entity could seek to take advantage of its position as one of the reduced number of buyers of copper scrap to lower the price thereof.
37. As stipulated in the *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* ('Horizontal Merger Guidelines'), increased buyer power, if established, is not in itself sufficient to conclude that competition may be significantly impeded.
38. It appears to be very unlikely that significant buyer power would be created through the transaction. The aggregate share of demand for copper scrap of the new entity would be around [10-15] %. The new entity will face competitive pressure from many rivals, and will not be in a position to enter into anti-competitive behaviour on this market.
39. In view of the above, it can be concluded that the proposed transaction will not lead to unilateral effects as a result of which effective competition will be significantly impeded in the world-wide market for copper scrap.

Non-coordinated effects on the market for copper rod

40. Following the transaction the new entity would become the largest supplier of copper rod in the EEA. While [80-90] % of the production were sold to third parties, the rest of this volume was used by copper rod suppliers internally for their own production of wires, cables and profiles. On the merchant market for copper rod, the new entity would have a combined market share of around [30-40] %. In relation to the total production of copper rod, including production which is used internally, the new entity's combined market share would be around [20-30] %.
41. Although some respondents to the market investigation who purchase copper rod raised concerns that the increased market share of the combined entity might lead to higher prices and less choice, such concerns can be dispelled. First, the new entity will face a number of major competitors active all over the EEA. Secondly, most customers source copper rod from two to three different suppliers and consider several other suppliers as an alternative option. Thirdly, most suppliers of copper rod have spare capacity and could increase sales on the merchant market or expand their overall production in case of a price increase for copper rod.
42. The existence of other strong competitors together with the current situation of overcapacity for copper rod within the

EEA as well as the potential expansion of the current production by competitors will continue to act as a competitive constraint and limit the ability and incentive for the new entity to raise prices after the transaction.

Non-coordinated effects on the market for copper shapes

43. The main characteristic of the consumption of copper shapes in the EEA is the high proportion of in-house consumption: in-house consumption of copper shapes is nearly five times higher than merchant sales.
44. On the merchant market, the parties are the main supplier of copper shapes in the EEA. The combined market share of the parties on the merchant market for copper shapes in the EEA is around [50-60] %. In a market for copper shapes excluding OF-Cu qualities, the combined market share of the parties in the EEA would be around [50-60] %. Montanwerke Brixlegg, which belongs to A-TEC, is the main competitor with a market share of around [20-30] %.
45. Overall, the market investigation has shown that the production and use of copper shapes in the EEA, either in-house or through the merchant market, is driven by dynamics situated both upstream and downstream of the copper shapes production.
46. First, the copper price affects the whole value chain of the copper industry since it represents around 95 % of the value (in-house consumption) or sales price (purchases on the merchant market) of copper shapes. Only less than 5 % of the value or sales price of copper shapes constitute the value added by the producers of copper shapes (the 'transformation fee').
47. Secondly, the competitive dynamics are strongly influenced by the different degrees of vertical integration of the various actors and/or their location in the value chain. As the largest customers of the notifying party on the merchant market for copper shapes have at the same time an important in-house production of their own, they limit their dependence on the notifying party. Other important in-house producers of copper shapes use their entire copper shapes production to produce semi-finished copper products.
48. The Commission has investigated to what extent an increase of prices on the EEA merchant market for copper shapes could be sustainable. The market investigation has confirmed that the availability of a considerable amount of spare capacity for the production of shapes will continue to exert a competitive constraint on the new entity and prevent it from increasing prices of copper shapes.
49. In addition, should prices on the merchant market for copper shapes increase, there is a possibility that non-integrated users of copper shapes would integrate upstream and thus become active as producers of copper shapes.

50. Furthermore, the market investigation confirmed that the downstream markets for semi-finished copper products exercise competitive pressure on the upstream market for copper shapes. This is the case first because there are more sellers (participants in the merchant market) on the downstream markets for semi-finished copper products than on the upstream market for shapes; secondly because the integrated sellers have excess capacity, as the new entity would have; thirdly because the sellers on the downstream markets for semi-finished copper products face competition from non-copper products; and fourthly because they face strong competition from rivals outside Europe for the semi-finished copper products that serve for electric and electronic applications.

51. On the basis of the characteristics of the market for copper shapes, its structure, the constraints exercised by the overcapacity and the competitive pressure exercised by the downstream markets of semi-finished copper products, it is concluded that the transaction does not threaten to significantly impede effective competition on the market for copper shapes in the EEA.

2. Vertical effects

52. It has been submitted to the Commission that the new entity would have the ability and the incentive to follow a foreclosure strategy on the markets for semi-finished copper products produced on the basis of its position on the market for copper shapes. These concerns pointed to a possible discrimination in favour of the new entity's subsidiaries (i.e. Schwermetall and Prymetall) who are present on the downstream markets for semi-finished copper products.

53. As stipulated in the Non-Horizontal Merger Guidelines, non-horizontal mergers *'pose no threat to effective competition unless the merged entity has a significant degree of market power (which does not necessarily amount to dominance) in at least one of the markets concerned'*.

54. As demonstrated above, the position of the new entity on the EEA merchant market for copper shapes will remain under the competitive pressure of both in-house producers of copper shapes and purchasers of copper shapes that may integrate upstream. In view of this, the new entity will not have the ability to undertake any successful strategy of input foreclosure on the downstream markets for semi-finished copper products.

55. Furthermore, even if the new entity decided to implement such a strategy, and some purchasers of copper shapes face, as a result, transitional difficulties in sourcing the copper shapes they need as an input, the markets for semi-finished copper products are, as demonstrated above, competitive and at least EEA-wide. Consequently, any concern of a reduction of consumer welfare can be dispelled.

56. As a consequence, the transaction does not threaten to significantly impede effective competition on the markets for semi-finished copper products.

3. Coordinated effects

57. The Commission has further investigated whether the fact that A-TEC, the main competitor of the parties on the EEA market for copper shapes, who is also an important minority shareholder in both NA and Cumerio, could give rise to coordinated effects on this market. The new entity and A-TEC's subsidiary Brixlegg would have a combined market share of around [70-80] % on the EEA-wide merchant market for copper shapes. When excluding OF-Cu shapes, the new entity and Brixlegg would have a combined market share of around [70-80] %.

58. The Commission currently has no indications that A-TEC and the new entity have the intention to coordinate their market behaviour on the market for copper shapes.

59. For coordination to be sustainable, three conditions as set out in the Airtours judgment and incorporated in the Horizontal Merger Guidelines would have to be fulfilled.

60. First, only the credible threat of timely and sufficient retaliation keeps companies away from deviating from terms of coordination. This requires in general that markets are sufficiently transparent to allow coordinating companies to monitor to a sufficient degree whether companies are deviating. The result of the market investigation with regard to the transparency of price conditions in this market is mixed. Should the new entity and A-TEC try to coordinate their competitive behaviour, it can indeed not be fully excluded that A-TEC's position as a minority shareholder might provide A-TEC with access to information on NA which it would not have if such a shareholder relationship did not exist.

61. Secondly, coordination is not sustainable unless the consequences of deviation are sufficiently severe to convince coordinating companies that it is in their best interest to adhere to the terms of the coordination. In case of detected deviations of a potential coordination by the new entity or A-TEC, their ability and means of retaliation would seem to be quite different in view of their different capacity and market position. The fact that the new entity will have more spare capacity and a market share almost three times as high as A-TEC is likely to give the new entity a higher ability to retaliate than A-TEC. At the same time, the minority shareholding might provide A-TEC with the possibility to take advantage of its shareholding to retaliate by either using information it would not have as a simple competitor or by opposing the new entity's business policy as a major shareholder. In view of this it cannot be excluded that the A-TEC and the new entity might consider each other as able to react to deviations of a potential agreement.

62. Thirdly, for coordination to be successful, the actions of non-coordinating companies and potential competitors, as well as customers, should not be able to jeopardise the outcome expected from coordination. If coordination were aimed at reducing overall capacity for copper shapes in the market, this would only hurt consumers if non-coordinating companies are unable or have no incentive to respond to this decrease by increasing their own capacity sufficiently to prevent a net decrease in capacity, or at least to render the coordinated capacity decrease unprofitable.
63. Even if the new entity together with A-TEC managed to implement a coordination strategy which would not be fully jeopardised by competitors, the competitive conditions on the downstream markets for copper products would prevent these attempts from having any anti-competitive effects on the downstream markets by raising prices for copper products to consumers.
64. As a consequence, it can be concluded that the proposed transaction will not lead to coordinated effects as a result of which effective competition would be significantly impeded on the EEA-wide market for copper shapes.

III. CONCLUSION

65. For the reasons mentioned above, the decision concludes that the proposed concentration will not significantly impede effective competition in the Common Market or in a substantial part of it.
66. Consequently the concentration should be declared compatible with the Common Market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(1) of the EC Merger Regulation and Article 57 of the EEA Agreement.
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