Anticipated acquisition by Tronox Holdings plc of TiZir Titanium & Iron A.S.

Decision not to accept undertakings in lieu of reference

ME/6905/20

The CMA's decision not to exercise its discretion to accept undertakings in lieu of reference under section 73(2) of the Enterprise Act 2002 given on 18 January 2021. Full text of the decision published on 26 February 2021.

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Introduction

1. Tronox Holdings plc (**Tronox**), through a wholly owned subsidiary, has agreed to acquire 100% of the shares in Tizir Titanium & Iron A.S. (**TTI**) (the **Merger**). Tronox and TTI are together referred to as the **Parties** and, for statements relating to the future, the **Merged Entity**.

2. On 4 January 2021, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).[1]

3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, in order to allow the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a

[1] See CMA case page for the Merger.

phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a phase 2 investigation pursuant to section 33(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 11 January 2021); if the Parties indicated before this deadline that they did not wish to offer such undertakings; or if the undertakings offered were not accepted.

The Proposed Undertaking

5. On 11 January 2021,[2] Tronox offered the CMA the following behavioural undertaking (the **Proposed Undertaking**), under which:

   (a) Tronox would commit to offer to sell a minimum annual volume of [✂] of chloride slag (the **Minimum Annual Volumes**) to independent customers for a period of [✂] years, [✂].

   (b) Tronox would sell the Minimum Annual Volumes by entering into binding supply contracts (the **Supply Contracts**) with independent customers in the first instance. The Supply Contracts would contain terms and conditions [✂].

   (c) To the extent that Tronox had not entered into Supply Contracts with independent customers representing the Minimum Annual Volumes by 15 September each year for the following year, any shortfall would be offered for sale by auction (the **Annual Auction**), which would be carried out by an independent third-party monitor (the **Trustee**). Tronox would not be obliged to supply chloride slag below a reserve price. The reserve price would be [✂].[3] The terms and conditions (aside from price) under which Tronox would sell under the Annual Auction [✂].[4]

   (d) Tronox would supply the chloride slag [✂] from [✂].

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[2] Tronox submitted an initial UIL offer on 5 January 2021, followed by a revised offer on 11 January 2021.
[3] TZMI is a consulting and publishing company which specialises in mineral sands, titanium dioxide and coatings industry. .
[4] In the event of a dispute over non-price terms, the Trustee would determine the final terms and conditions.

Assessment of the Proposed Undertaking

6. In the SLC Decision, the CMA concluded that it is or may be the case that the Merger may be expected to result in an SLC as a result of:

   (a) horizontal unilateral effects in the supply of chloride slag globally (excluding China) including the supply of chloride slag in the UK; and

   (b) vertical effects between the upstream supply of chloride slag globally (excluding China) including the supply of chloride slag in the UK, and the downstream supply of TiO2 piment for mass applications (ie plastics and coatings end-applications) in Europe (including the UK).

7. When considering whether to accept undertakings in lieu of a reference (**UILs**) in phase 1 of its investigation, the CMA has an obligation under the Act to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any resulting adverse effects (section 73(3) of the Act).[5]

8. Accordingly, in order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation. UILs are therefore appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear-cut and capable of ready implementation.[6] Further:

   (a) in relation to the substantive competition assessment, the clear-cut requirement means that 'there must not be material doubts about the overall effectiveness of the remedy'; and

   (b) in practical terms, the requirement for remedies to be capable of ready implementation means that 'UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted'.[7]

9. The CMA's starting point in deciding whether to accept UILs offered is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).[8]

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[5] Mergers remedies (CMA87), December 2018 (**Remedies Guidance**), paragraph 3.30.
[6] Remedies Guidance, paragraph 3.27.
[7] Remedies Guidance, paragraph 3.28.
[8] Remedies Guidance, paragraphs 3.27 to 3.28 and 3.30 to 3.31.

10. At phase 1, the CMA is generally unlikely to consider that a behavioural undertaking will be sufficiently clear-cut to address the identified competition concerns as it will not address the SLC at source (unlike a structural remedy), may give rise to a number of risks which can reduce its effectiveness or create competition concerns elsewhere, and can be difficult to monitor and enforce.[9] Nevertheless, despite its preference for structural remedies, the CMA does not inevitably refuse behavioural remedy offers, in particular where a structural remedy would be clearly impractical or is otherwise unavailable.[10]

11. In the present case, for the reasons set out below, the CMA has material doubts that the Proposed Undertaking would effectively remedy the competition concerns identified in the SLC Decision:

(a) The Proposed Undertaking is limited to a period of [✂] years. Although the expected duration of the SLC is difficult to predict, the CMA has not seen evidence of any foreseeable development, such as planned entry in the supply of chloride slag outside China, that suggests that the SLC is time-limited and, in particular, that it would be limited to the next [✂] years. For a remedy to be considered clear-cut, the CMA considers that it is not appropriate to rely on future events or future actions taken by third parties (eg entry or expansion) for which the CMA cannot be sufficiently certain as to their occurrence, timing or sufficiency.

(b) The Minimum Annual Volumes are [✂], but represent [✂] of TTI's total capacity. The Minimum Annual Volumes therefore fall significantly short of the chloride slag capacity that would be removed from the merchant market as a result of the Merger.[11] The Minimum Annual Volumes also remain unchanged for the duration of the Proposed Undertaking and therefore make no allowance for potential future increases in TTI's capacity absent the Merger. The CMA considers that a supply commitment based on the Minimum Annual Volumes would fall significantly short of restoring both the competitive structure of the relevant market and competition to the levels that would have prevailed absent the Merger, and therefore would not comprehensively address the concerns identified in the SLC Decision.

(c) The Proposed Undertaking would not place an obligation on Tronox to ensure that supply to independent customers is on competitive terms and

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[9] Remedies Guidance, paragraphs 3.5(a) and (c) and 3.32.
[10] Remedies Guidance, paragraph 3.32.
[11] In particular, absent the Merger, the volumes sold to Tronox by TTI may have changed in the future upon the termination of the current supply agreement, which could have led to TTI supplying increased volumes to other third party customers.

conditions ie those that would have prevailed absent the Merger. Although Tronox has agreed it would supply the Minimum Annual Volumes on terms and conditions that are [✂][12], the CMA considers that [✂] are not necessarily equivalent to those that would have existed absent the Merger (as these may have changed to reflect changes in market conditions and different customers may have negotiated different terms). The CMA also considers that it would be difficult to ascertain in any event what these would have been. The CMA also considers that there is a risk of market distortion and unintended consequences arising from specifying terms and conditions for future supply to independent customers upfront which may, over the duration of the remedy, become obsolete or where their relative importance to independent customers may change.

(d) The design of the Annual Auction is complex, and the CMA is concerned it would not lead to prices (or other terms) that equate to those that would have prevailed absent the Merger. For example, if market prices started falling at the time of the Annual Auction (in September), this may not be captured in [✂]. This could result in bids being below the reserve price (but in line with current market prices) but there would be no obligation for the Merged Entity to supply. In addition, the reserve price would be based on [✂] in circumstances where Rio Tinto would have a near monopoly position in chloride slag outside China as a result of the Merger. The proposal that Tronox has no obligation to supply below the reserve price may limit the constraint it exerts on other suppliers of chloride slag. Finally, .

12. Second, the CMA has material doubts over the implementation of the remedy. These doubts include that the Proposed Undertaking would create ongoing monitoring and enforcement risks for the duration of the remedy. Even if the full Minimum Annual Volumes were supplied under the Supply Contracts such that there was no need for the Annual Auction, there would still be a need (for either the CMA, an independent monitor or the Trustee) to monitor the terms and conditions offered to the independent customers and potentially to resolve any disputes between customers and the Merged Entity.

13. The CMA therefore considers there is a significant risk that the Proposed Undertaking would not effectively restore competition to the level that would have prevailed absent the Merger. The CMA considers the Proposed Undertaking is not clear-cut and would not fully address the competition concerns identified in the SLC Decision. The CMA does not consider that

[12] Under the Proposed Undertaking, Supply Contracts would contain terms and conditions [✂] and contracts entered into following any Annual Auction would have terms and conditions [✂].

these issues could be addressed through further modifications of the Proposed Undertaking in the phase 1 process.

Decision

14. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.

15. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.

16. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA will proceed to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

Andrea Gomes da Silva
Executive Director, Markets and Mergers
Competition and Markets Authority
18 January 2021