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June
2022

The EU General Court upholds the decision of the Commission to block a joint venture between two large steel producers *(ThyssenKrupp / Tata Steel)*

MERGERS, JOINT-VENTURE, COAL AND STEEL, JUDICIAL REVIEW, EUROPEAN UNION, MERGER (PROHIBITION), MERGER (NOTION), SIEC TEST (MERGER)

EU General Court, *ThyssenKrupp / Tata Steel*, Case No. T-584/19, Judgement, 22 June 2022

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e-Competitions News Issue June 2022

On 22 June 2022, the EU's General Court ("GC") *fully dismissed* thyssenkrupp's appeal against the European Commission's ("Commission") *decision* to block its proposed joint venture ("JV") with Tata Steel in 2019.

This is the first time that the GC has considered the prohibition of a "gap" case under the *EU Merger Regulation* ("EUMR") since it *annulled* the Commission's prohibition of CK Hutchison's proposed acquisition of Telefónica UK (O2) in 2020 ("CK Hutchison") (see our previous blog post here). A "gap" case is a merger in an oligopolistic market that does not result in the creation or strengthening of an individual or collective dominant position. Rather, it risks causing a "significant impediment to effective competition".

This result may indicate a return to a more traditional approach by the GC as regards "gap" cases than that demonstrated in the CK *Hutchison* judgment. The judgment also provides helpful guidance on the interpretation of the EUMR and other legal instruments (such as the *Market Definition Notice* and the *Notice on Remedies*). The key findings are:

- **Standard of proof:** In order to block a "gap" merger, the Commission must show with a sufficient degree of probability that the transaction significantly impedes effective competition in the internal market or in a substantial part of it.
- **SSNIP test:** The Commission is not required to apply the SSNIP (small but significant and non-transitory

increase in price) test when assessing substitutability between products — it is only one of the methods available to the Commission when defining the market.

- **Remedies:** When assessing remedies, it is not necessary to demonstrate that the remedies remove the entire overlap between the merging parties or re-create fully the pre-merger structure in affected markets.

- **Requests for Information** ("RFI"): There is no procedural error where the Commission fails to take additional steps (beyond sending systematic reminders) to ensure that recipients respond to an RFI.

Background

In 2018, thyssenkrupp and Tata Steel, who were the second and third largest producers of flat carbon steel in the European Economic Area ("EEA") respectively, notified the Commission of their intention to establish a JV to combine their flat carbon steel and electrical steel activities in the EEA. Despite the fact that the JV would not create a dominant player within the market, the Commission had serious concerns that the merger would reduce competition and lead to increased steel prices. While the parties offered to divest automotive and packaging plants in Spain, Belgium and the UK to allay the Commission's concerns, the Commission deemed the proposed remedies insufficient. As a result, in June 2019, the Commission blocked the proposed JV. Thyssenkrupp contested the Commission's decision on various grounds, but the GC dismissed thyssenkrupp's arguments in their entirety and upheld the Commission's prohibition decision.

Key Findings

- **Standard of proof.** In CK Hutchison, the GC stated that when determining the existence of a significant impediment to effective competition, the Commission has "*to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration*" (para. 118). This test lies between a "*balance of probabilities*" (as asserted by the Commission) and "*beyond all reasonable doubt*".

In the *thyssenkrupp* judgment, however, the GC confirms that it is for the Commission to show "*with a sufficient degree of probability, in its decision declaring a concentration incompatible with the internal market, that the transaction significantly impedes effective competition in the internal market or in a substantial part of it*" (para. 280). While a "*sufficient degree of probability*" arguably lies between the "*balance of probabilities*" and "*all reasonable doubt*" parameters set out by the GC in *CK Hutchison*, it is notable that in thyssenkrupp the GC used different language to describe the applicable legal standard. In fact, the GC did not refer to *CK Hutchison* in *thyssenkrupp*, despite thyssenkrupp reportedly seeking to rely on the earlier ruling (which was made by a separate chamber of the GC). As a result, there is a degree of uncertainty as to the treatment of "gap" cases, which practitioners will hope the European Court of Justice ("ECJ") will clarify when it rules on the Commission's appeal in *CK Hutchison*.

I n *thyssenkrupp*, the GC also concluded that the body of evidence on which the Commission relied in its prohibition decision could not be regarded as manifestly insufficient. In particular, although economic studies are relevant in establishing the likely development of a market situation, the absence of evidence of that type is not in itself decisive. In the present case, the Commission relied on actual market conduct and general principles of rational economic behaviour, as well as on economic data that the parties presented for the purposes of rebutting their economic analysis (paras. 279 and 288).

- **SSNIP test.** The GC ruled that the Commission is not required to apply the SSNIP test when defining relevant markets. While the SSNIP test is a recognised method for assessing supply-side substitutability, the Commission "*may also take into account other tools for the purposes of defining the relevant market, such as market studies or an assessment of customers' and other competitors' points of view*" (para. 74). Further, the GC explained that, when defining the relevant geographic markets, the Commission is not bound to use the SSNIP test for assessing whether customers would switch to suppliers located elsewhere in the short term and at negligible cost (para. 154).

- **Remedies.** The GC accepted that the Commission had appropriately assessed the remedies that the parties had offered, except for one minor point. The GC clarified that it is not necessary to demonstrate that the remedies remove the entire overlap between the parties or re-create fully the pre-merger structure in affected markets (para. 782). That said, the Commission did not err in its remedies assessment, having assessed whether the remedies were comprehensive and effective in addressing the competition concerns from all points of view, including the removal of the full overlap and the viability of the divestment business (in terms of the size, scope and geographic location of the assets as well as the lack of upstream integration) (paras. 775, 776 and 869). Lastly, in relation to the principle of proportionality, the GC held that the Commission is not required to seek out less onerous solutions compared to the commitments proposed by the merging parties, nor does the Commission have to accept insufficient commitments (paras. 908 and 913).

- **RFIs.** The Commission is not required to take additional steps (beyond sending systematic reminders to recipients that failed to meet the deadline) to ensure that third parties respond to RFIs. This is because: (i) the Commission has the ability — not an obligation — to request information from market participants, (ii) the Commission may, but is not compelled to, impose a fine or penalty payment where market participants fail to respond to requests for information made by Commission Decision, and (iii) the Commission has to comply with strict time limits for the adoption of the final decision, therefore additional steps are likely to prolong the time limits, and would not be compatible with the need for speed in an investigation. The GC affirmed that the Commission enjoys a broad discretion with respect to RFIs (paras. 950-955).

Further to this, the applicant alleged procedural error as the percentage of responses received was on average less than 50%, and thus the Commission would not be able to draw clear conclusions from the replies. Thyssenkrupp argued that this was a failure to adhere to a fair, unbiased, and balanced process. However, the GC noted that the rate of reply to the RFIs in the markets in which the Commission found a significant impediment to effective competition was on average above the 50% threshold and, accordingly, the Commission could rely on conclusions drawn from these RFI responses (para. 956).

Next steps

It remains to be seen whether thyssenkrupp will appeal the GC's decision but, following the judgment, a thyssenkrupp spokesperson announced that the company "*continue[s] to believe that the EU Commission's prohibition of the joint venture with Tata Steel Europe in 2019 was a disproportionate step.*" Thyssenkrupp has two months and ten days from notification of the decision to bring an appeal against this GC decision before the ECJ.

In the meantime, the Commission and others will be looking closely at the ECJ decision on the Commission's appeal in *CK Hutchison*.