SUMMARY OF COMMISSION DECISION

of 11 December 2018

declaring a concentration compatible with the internal market and the functioning of the EEA Agreement

(Case M.8909 – KME/MKM)

(notified under document C(2018) 8497)

(Only the English text is authentic)

(Text with EEA relevance)

(2020/C 216/10)

On 11 December 2018 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 on the website of the Directorate-General for Competition, at the following address:* http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2

(1) On 4 June 2018, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 ('the Merger Regulation') by which KME AG ('KME', Germany) intends to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of MKM Mansfelder Kupfer and Messing GmbH ('MKM', Germany) by way of purchase of shares (the 'Transaction'). KME and MKM are referred to as the 'Parties'. The undertaking that would result from the Transaction is referred to as the 'merged entity'.

I. **THE PARTIES AND THE TRANSACTION**

(2) KME, a European industrial group based in Germany, is active in the manufacturing and marketing of copper and copper alloy products, including tubes. KME operates several production sites in Germany, Italy, France, Spain, the United States of America, and China. KME is a wholly owned subsidiary of Intek Group S.p.A., a listed joint stock corporation under Italian law, with headquarters in Milan, Italy.

(3) MKM, incorporated in Germany, is a manufacturer of intermediate and semi-finished products made from copper and copper alloys. MKM manufactures, inter alia, copper wire, pre-rolled strip, rolled products and tubes. MKM has one plant in Germany. MKM is present worldwide through sales partners in 24 countries. The sole shareholder of MKM is Copper 1909 BidCo GmbH, a German limited liability company, which is indirectly owned by Copper KG, a German limited partnership whose sole General Partner is Copper GP, a German limited liability company.

(4) The Transaction will be implemented through execution of a Sale, Purchase and Transfer Agreement by which KME will acquire the entire share capital of Copper GP and all limited partnership interest in Copper KG and therefore indirect sole control over MKM. The Parties concluded a Term Sheet on 28 March 2018.

II. **EU DIMENSION**

(5) The Parties have a combined worldwide turnover above EUR 2 500 million ([2]) and an EEA-wide turnover of each of the Parties is above EUR 100 million. In Germany, France and Italy, the combined turnover of KME and MKM is more than EUR 100 million and the individual turnover of each of KME and MKM is more than EUR 25 million. None of the Parties achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State. The Transaction has therefore an EU dimension.

([1]) OJ L 24, 29.1.2004, p. 1.

([2]) Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

III. **THE PROCEDURE**

(6) On 23 July 2018, based on its market investigation, the Commission raised serious doubts as to the compatibility of the Transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

(7) On 8 August 2018, the Parties requested an extension of the legal deadline by ten working days pursuant to the first sentence of the second subparagraph of Article 10(3) of the Merger Regulation.

IV. **ASSESSMENT**

(8) The Transaction concerns the production of semi-finished copper and copper alloy rolled products (the 'rolled products') and the production of sanitary copper tubes, which are extruded products, in the EEA. The relevant product and geographic markets are defined below.

1. **Relevant market definitions**

1.1. *Pre-rolled strip*

(9) Pre-rolled strip is a thin strand of copper or copper alloy, which is a key input for manufacturing rolled products. The Commission considers that the market for pre-rolled strip is separate from the market for rolled products because there is no demand side substitution and only limited supply side substitution between pre-rolled strip and rolled products. The Commission considers that the market for pre-rolled strip is EEA-wide in scope.

1.2. *Rolled products*

(10) The Commission considers that the relevant market is the overall market for rolled products, which is highly differentiated. The Commission takes the view that the rolled products market consists of multiple segments determined by different manufacturing parameters, technical product characteristics and different requirements for rolled products in different end-applications. The Commission also takes the view that within the rolled products market there are more commoditised market segments, on the one hand, and high value market segments, on the other hand. The Commission found that the level of know-how and sophistication of equipment, intensity of competition and market dynamics in the more commoditized market segments differ from high value market segments. In line with the precedents and based on the results of the market investigation, the Commission considers that the geographic market for rolled products is EEA-wide.

1.3. *Sanitary copper tubes*

(11) The Commission takes the view that sanitary copper tubes constitute a distinct product market and, in line with its precedents, considers that it does not include sanitary tubes made of other materials, such as plastic and multilayer tubes. The geographic market definition for sanitary copper tubes could be national or EEA-wide and can ultimately be left open.

2. **Competitive assessment**

2.1. *Two transactions taking place shortly one after the other in the same industry and the application of the priority rule*

(12) Following the notification of the Transaction, on 13 June 2018, Wieland Werke AG ('Wieland') notified to the Commission its intention to acquire within the meaning of Article 3(1)(b) of the Merger Regulation Aurubis Flat Rolled Products and the 50 % stake of Aurubis in Schwermetall, a 50/50 joint venture of Wieland and Aurubis. The subsequently notified transaction ('Wieland/ARP/Schwermetall') partly affects the same markets as the Transaction in the present case: pre-rolled strip and rolled products made of copper and copper alloys.

(13) In case of parallel investigations into concentrations affecting the same relevant markets, the Commission's constant practice is that the first notified transaction is assessed on its own merits and on the basis of the market structure prevailing at the time of that notification. In the present case, the Commission assesses the Transaction on the basis of a market structure where Wieland and Aurubis are treated as two separate entities.

2.2. *Assessment of horizontal non-coordinated effects in the rolled products market*

(14) The Commission established that the Transaction would lead to moderate combined market shares in terms of volume ([20-30] %) and in value (([20-30] %) on the rolled products market. In addition, the Commission observed that in the period of 2015-2017 KME's sales were declining and it was losing market shares, which was also reflected in KME's weak financial performance. In light of this and considering the growth in demand of rolled products, the Commission considers that KME's competitive relevance on the rolled products market has been declining and that it could not be counterbalanced by MKM's growth.

(15) The evidence in the case shows that KME has a broad portfolio of rolled products serving commoditised and high-end segments, MKM focuses on the commoditised market segments by producing largely pure copper rolled products. Accordingly, the Commission complements its analysis on the overall market for rolled products with the assessment of the commoditized segments, where the activities of the Parties overlap, namely roofing copper/DHP and electrical copper/ETP.

(16) The Commission has established that in the commoditised market segments, where Parties closely compete, there is overcapacity and many competitors are present.

(17) The Commission takes the view that after the Transaction, competitors will be in a position to defeat any likely price increase by the merged entity for the following reasons.

(18) First, the Commission considers that after the Transaction, the merged entity will continue to face strong competition from several competitors, most of which are present in the commoditised segments of pure copper and brass rolled products. Furthermore, in case of a price increase following the Transaction, competitors currently focusing on the high-end market segments could quickly re-enter and serve the commoditised segments because they would have the necessary capabilities and would have the incentive to supply these segments.

(19) Second, the Commission considers that available spare manufacturing capacity and the technology in the industry enabling an easy switch for production between different materials, particularly in relation to commoditised products, would exert a strong competitive constraint on the Parties' ability to raise prices after the Transaction.

(20) Third, the Commission found that imports from Turkey and Serbia, though relatively small, concern mainly the commoditised part of the market and exert competitive constraint on the established EEA-based players such as the Parties.

(21) Fourth, the Commission considers that post-Transaction customers will be able to pursue their multi-sourcing strategies constraining the merged entity's incentive to increase prices. A majority of respondents to the market investigation submitted that they source rolled products not only from the Parties but also from other suppliers within and outside the EEA. The customers of the Parties submitted to have three to ten approved rolled products suppliers. In addition, the results of the market investigation confirmed that qualification processes in the commoditised segments, if at all necessary, would not pose a significant barrier for customers to switch suppliers in case of a price increase after the Transaction.

(22) The Commission also observes that while majority of the Parties' customers who responded to the market investigation raised concerns regarding the likely price increases after the Transaction, those customers expressed their views taking into account also the other publicly announced merger (that is Wieland/ARP/Schwermetall). Given that the respondents have likely envisaged a scenario where the number of available suppliers was further reduced due to two mergers, the Commission considers that the results of the market investigation in the present case were likely more negative than would have been justified if only the Transaction was considered.

(23) The Commission has also analysed customers' concerns regarding very few available suppliers for a specific copper strip for radio frequency cables. The Commission established that the product represents a very small segment and the reason for only few available suppliers could be lack of commercial interest due to limited demand size. Nonetheless, the Commission considers that in case of a price increase after the Transaction other competitors would have incentive to enter the segment, where customers usually support the qualification process.

(24) In light of the above, the Commission concludes that the Transaction would not lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects in the rolled products market, including in the more commoditised segments where the Parties mainly overlap. In particular, an assessment of the overlaps in roofing copper/DHP and electrical copper/ETP segments would not lead to different results.

2.3. *Assessment of vertical non-coordinated effects in the rolled copper products market*

(25) The Commission has also assessed the vertical relationship arising from the Transaction which combines upstream activities of MKM (KME is not present) in the pre-rolled strip merchant market and the Parties' downstream activities in the rolled products market.

(26) The Commission found that the Transaction would not lead to a significant impediment to competition due to vertical non-coordinated effects on the rolled products market. The Commission took the view that there was no risk of input foreclosure because after the Transaction the merged entity would not have the ability to foreclose competitors due to lack of market power upstream and the existence of other alternative suppliers. In addition, there was no evidence that MKM would have attempted to foreclose in the past.

(27) If the MKM's position in pure copper or bronze segments were considered, the conclusion would not be different from the one reached in relation to the overall market. While the MKM's share of sales of pre-rolled strip in these segments would be higher, the Commission found that credible alternative suppliers exist, which are already active on these segments.

(28) The Commission also found that the incentives of the merged entity to continue selling pre-rolled strip to the merchant market would likely not change after the Transaction because the merged entity will continue to have large spare capacity exceeding its current total needs and any expansion plans on the rolled products market. Accordingly, the merged entity would have incentive to maximize the utilization of its production line for pre-rolled strip in order to reduce the costs.

(29) The Commission also takes the view that any foreclosure strategy of the merged entity would not have a significant effect on competition in the rolled products market because MKM's customers of pre-rolled strip do not depend on purchases from MKM to compete on the rolled products market. Furthermore, the costs of other competitors in the downstream market of rolled products could not be raised by the merged entity either because they are vertically integrated (for example, Wieland, Aurubis, EGM, and Sofia Med), or because they purchase pre-rolled strip from other suppliers.

2.4. *Assessment of the horizontal non-coordinated effects in the sanitary copper tubes market*

(30) The Commission takes the view that the Transaction would not significantly impede effective competition in the markets for sanitary copper tubes in the EEA and in the national markets where Parties' activities overlap (that is Austria, Belgium, Germany, France, Czechia, Denmark, Hungary, and the Netherlands) as a result of horizontal non-coordinated effects in particular for the following reasons:

a) Despite the high market shares in some Member States in the EEA, there remains a large number of credible competitors at the EEA level and in each national market, which should be in a position to exert competitive constraints on the merged entity. Competitors which are active in sanitary tubes made of other materials such as aluminium, plastics and PEX also exert a more indirect constraint on the merged entity;

b) Competitors have significant available capacity in sanitary copper tubes (exceeding the sales volume of the merged entity) which would enable them to increase supply in order to defeat any price increase after the Transaction. Competitors also have the incentives to increase the supply because, as the evidence suggests, they could increase the available capacity without incurring significant costs;

c) Barriers to entry or to expansion into a national market are not particularly significant (necessary national certification can be easily obtained; national presence can be organized through an independent agents at little cost, while direct sales without national presence are also possible). Therefore, should the price increase after the Transaction, competitors with free capacity could increase supply in national markets where they are already present or enter national markets where they are not yet active.

(31) In addition to the reasons outlined above, the Commission notes that in recent years KME, which holds [20-30] % volume share at the EEA level, has been experiencing difficulties when serving the sanitary copper tubes market. The market share data and internal documents of KME show that, in the period 2015-2017, its sales decreased to the benefit of its competitors, in particular in Austria, France, and Denmark.

(32) The Commission also notes that MKM is a small competitor, which accounts for only [5-10] % of the demand at the EEA level. Furthermore, MKM sells only non-Sanco tubes whereas KME distributes both Sanco and non-Sanco tubes (Sanco means Sans Corrosion and is a quality label). Therefore, the overlap exists only in relation to non-Sanco tubes, which accounts in general for half of the demand.

(33) The majority of customers did not express concerns as regards the impact of the Transaction in any of the affected national markets except for Germany. Roughly half of the German customers having responded to the market investigation submitted they were concerned that the Transaction would eliminate one German alternative to KME and lead to concentration of production capacity. The Commission has assessed these concerns against the backdrop of market characteristics: available excess capacity held by competitors; recent entries of Italian and Polish producers; low expansion barriers; the fact that the Parties compete only for less than half of the overall demand (only non-Sanco tubes). Hence, the Commission considers that the Transaction would not lead to a significant impediment to competition on the market for sanitary tubes in Germany.

2.5. *Assessment of the horizontal coordinated effects in the sanitary copper tubes market*

(34) The Commission also takes the view that it is not likely that after the Transaction coordination on the market for sanitary copper tubes will increase due to reduced number of competitors in the countries where Parties activities overlap because there are alternative suppliers, which have large available capacities and the entry barriers are low. The Commission has not found any mechanisms through which a tacit coordination scheme in sanitary copper tubes could be made easier to implement or rendered more sustainable after the Transaction.

V. **CONCLUSION**

(35) For the reasons mentioned above, the Commission concludes that the proposed concentration would not significantly impede effective competition in the internal market or in a substantial part of it. Consequently, the Commission declares the concentration compatible with the internal market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.