

2 The merger situation

2.1. On 5 October 1989 British Steel announced that it had reached agreement with the owners of Walker for the purchase of the share capital of that company for £330 million. The purchase was conditional on a number of regulatory and other approvals, including those from the European Commission and the authorities of the United Kingdom and the Republic of Ireland. The purchase would not include Walker's aviation interests.

2.2. The Secretary of State for Trade and Industry referred the proposed merger to the MMC on 21 December 1989. The text of the reference is given at Appendix 1.1. It is a reference of the proposed merger as a whole. On 22 December the Department of Trade and Industry issued a press release (full text at Appendix 2.1) which said:

The Secretary of State considers that there are possible effects on competition in the United Kingdom steel stockholding market which deserve investigation by the MMC. The decision to make a reference to the MMC does not in any way prejudge the question of whether or not the merger concerned would be against the public interest. It is for the MMC to report on this after investigation.

The merger falls to be considered by the European Commission under the Treaty of Paris (European Coal and Steel Community). Some 90 per cent of the products of British Steel and Walker fall under the Treaty of Paris. Under the Treaty, authorisation is required for any merger in the steel sector. The EC Commission is still considering the merger.

The Secretary of State accepts that predominant responsibility for this merger lies with the EC Commission. He has taken this into account in making his decision to refer the merger to the MMC. He considers that there are competition concerns attached to the aspects of the merger that are not covered by the Treaty of Paris that merit an MMC investigation. For those aspects, he will have powers to require undertakings regarding conduct, and also possibly regarding divestment, if the MMC find that the merger may be expected to operate against the public interest.

2.3. British Steel argued before us that the MMC had no jurisdiction to investigate and report upon the proposed merger, at least in so far as it concerned Paris products. Under the terms of the Fair Trading Act, the MMC would have the duty to reach definite conclusions on the public interest in the light of a survey of the general position with respect to the merger as a whole. But the European Commission had exclusive competence to investigate and grant or refuse authorisation for the merger as regards those products, pursuant to Article 66 of the Treaty of Paris on the control of concentrations (Appendix 2.2). It was, therefore, impossible for the MMC to fulfil their obligations under the Fair Trading Act without violating the overriding provisions of the Treaty of Paris. British Steel, therefore, contended that in those circumstances the making of an unlimited reference to the MMC was ultra vires the Secretary of State. It argued that the EC's jurisdiction under the Treaty of Paris in respect of the steel products listed in Annex 1 of the Treaty (see Appendix 2.3) was exclusive, and that to investigate and report on the proposed merger as a whole would inevitably encroach upon that jurisdiction.

2.4. British Steel, in its written submission, contended that:

- (a) The Secretary of State has acted ultra vires in the making of the reference. If, however, the Secretary of State does not vary the reference or accept that it is void, any challenge by British Steel before the Courts would cause delay and increase the costs of completion of the merger.

- (b) An 'investigation and report' by the MMC into the reserved (ie ECSC) product areas forms part of the United Kingdom's decision processes in merger control: the United Kingdom, including the MMC, has lost sovereignty in this area.
- (c) Thus the MMC can investigate and report on non-ECSC products but if, upon preliminary investigation into the proportion of ECSC and non-ECSC products affected by the merger, they conclude that they cannot comply with their statutory duties without a full investigation into ECSC product areas, they should decline to exercise jurisdiction on the grounds that to do so would exceed United Kingdom's sovereign powers.
- (d) If they conclude that it is feasible to report on non-ECSC products without breaching the exclusive jurisdiction of the EC Commission, they would be able to do so.

2.5. The Commission of the European Communities (EC) gave us its opinion on the issue of jurisdiction in a formal submission. The EC said that in the present case it considered that we might make whatever inquiries, in relation to Paris products and markets, we considered necessary for the purpose of making our recommendations in connection with products which fell under the EEC Treaty (ie Rome products). The full text of the submission is at Appendix 2.4. The EC also gave us comments on the main issues arising on the merger. These are summarised in paragraphs 5.26 to 5.28.

2.6. We were aware that British Steel was anxious that the EC's decision on its proposed acquisition of Walker (which the EC had had under consideration since British Steel's first announcement on 5 October 1989) should not be unduly delayed, and that the EC itself regarded the matter as urgent. The EC indicated that it did not intend to issue a decision while we were continuing with our investigation and report. However, in view of the urgency of the matter it hoped that we would be able to accelerate the process so as to present our report to the Secretary of State for Trade and Industry by the middle of March. We undertook to use our best endeavours to do so, and so informed British Steel and Walker.

2.7. We ourselves consulted leading Counsel on the issue of jurisdiction. We are advised, and we accept, that the effect of sections 2(1) and (4) of the European Communities Act 1972 is that United Kingdom national legislation, including the Fair Trading Act, must be read subject to the provisions of the Treaty of Paris. The Treaty gives exclusive jurisdiction to the European Commission in respect of Paris products. Article 8 of the Treaty imposes a duty on the High Authority (now the European Commission) to ensure that the objectives of the Treaty are attained. No role is given or reserved to member states. The exclusivity of the European Commission's role on Treaty issues was confirmed by the European Court of Justice in Case 30/59 *Staalcoolenmijnen* [1961] ECR 1. We are advised and accept that the effect of the Treaty is to preclude us from exercising our powers under the Fair Trading Act to investigate and report on whether, as regards Paris products, the proposed merger may be expected to operate against the public interest. To do so would intrude upon the exclusive jurisdiction of the European Commission in respect of Paris products. We are further advised, and accept, that we can only use our powers under the Fair Trading Act to investigate and report to the Secretary of State, and through him to Parliament, on the effect of any proposed arrangements on the United Kingdom public interest. Where, as in this case, we are precluded from doing this in respect of Paris products by the overriding effect of Community law, it would be *ultra vires* the MMC to use the power to investigate and report for any other purpose.

2.8. We accordingly told British Steel and Walker that we considered that:

- (a) the MMC had jurisdiction to continue this inquiry;
- (b) the Treaty of Paris precluded them from investigating and reporting on whether, as regards Paris products, the proposed merger might be expected to operate against the public interest;

- (c) the MMC, however, retained their jurisdiction to investigate and report on the proposed merger in so far as Rome products were concerned;
- (d) in the circumstances this would involve:
- (i) determining whether or not a merger situation qualifying for investigation arose;
 - (ii) determining which products supplied by the parties were Paris products and which were not;
 - (iii) considering the effect of the merger on the United Kingdom public interest regarding the Rome products; and
 - (iv) for the purpose of (iii) obtaining and considering information about the Paris products so that (iii) might be assessed in the proper context.

2.9. We have carried out our investigation and report within these constraints.