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Two global cement players merged and although their footprint in Europe is rather complementary, their activities overlapped to a great extent in Belgium in a number of markets. In order to remedy the serious doubts in first phase, the entire overlap caused by the merger in Belgium and its surrounding regions was divested.

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In this case, an in-depth assessment of the customers’ sourcing behaviour and of the Parties delivery distance allowed the Commission to understand that competition takes place within a certain distance from the customers’ plants rather than EEA-wide.
FedEx/TNT: Signed, sealed, delivered: Clearance without remedies of 4-to-3 merger in the small package delivery services sector

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In January 2016, following an in-depth investigation opened in July 2015, the Commission concluded that the acquisition of Dutch-based TNT by US-based FedEx would not give rise to competition concerns and issued an unconditional clearance decision.

Three years earlier, in January 2013, the Commission prohibited the proposed acquisition of TNT by UPS (UPS/TNT). This article highlights the main reasons for clearing FedEx/TNT and what made this case different from UPS/TNT.

1. Small packages matter a great deal

Many businesses and consumers rely heavily on affordable and reliable small package delivery services, in particular with the growth of e-commerce.

Small package deliveries are a growing network industry, with high barriers to entry, in particular for international services. The services offered by the various suppliers are highly differentiated in terms of delivery speed, quality (track & trace and other add-on features) and coverage (origin and destination). Some suppliers only operate nationally and are road-based; others operate international networks including air transportation.

Some features are common to all small package delivery networks. A van/feeder picks up the small package at the customer’s location and drives it to a local sorting centre. At the local sorting centre, the packages are sorted depending on their destination. Packages destined for more distant European or extra-EEA countries are sent to an air hub, from which they are flown to their destination hub - overnight in the case of intra-EEA express services. At the destination hub, they are sorted again and dispatched for delivery to their final destination by another van. Conversely, packages with a destination in a neighbouring country, for example, would most probably reach the destination hub by road. Throughout the journey the small package is scanned to varying degrees (depending, for instance, on the frequency of scanning) at all major junctions to allow for track & trace by both sender and recipient.

Both FedEx and TNT provide such small package delivery services on a global basis. They are two out of four of the so-called integrators currently operating in the small package delivery sector in Europe. Integrators have full operational control over all transportation assets, sufficient geographic coverage on a global level, a hub-and-spoke operating model, a proprietary IT network, and the reputation of reliably delivering small packages on time (so-called ‘end-to-end’ credibility). The other two integrators are German-based DHL, owned by Deutsche Post, and US-based UPS.

2. Express and deferred: Defining the relevant market

In line with the previous decisional practice in UPS/TNT, the relevant market for small package delivery services includes consignments under 31.5 kg, the weight a person can carry without the aid of machinery. The Commission made a distinction as to whether the packages picked up in an EEA country are delivered within the same country (domestic markets), to a different EEA country (international intra-EEA markets) or to a country outside the EEA (extra-EEA services markets).

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In a nutshell

This is the second major merger review in the small package delivery services markets, following the prohibition by the Commission of the proposed UPS/TNT deal in 2013. The acquisition of TNT by FedEx will reduce the number of integrators from 4 to 3 in the small package delivery markets for express cross-border EEA deliveries (intra-EEA) and for extra-EEA (express and deferred) deliveries. In all these markets the merged entity’s market position will be moderate and amongst integrators, FedEx and TNT are not particularly close competitors. The Commission also conducted a price concentration analysis and found efficiencies arising from the Transaction.
Furthermore, for international intra-EEA markets, the Commission identified a market for express delivery services (with a next day delivery commitment) as separate from the market of deferred-standard delivery services (with a longer time frame commitment). These findings were based on the fact that the two types of services require different infrastructures, that a significant number of customers depend on express deliveries, and that express delivery services are also considerably more expensive.

On the other hand, for extra-EEA markets, the Commission considered the express and deferred services to be sub-segments of the same market, given that integrators essentially use the same network with the same supply chain (including sorting in air-hubs, long haul flights and customs clearance). Furthermore, all integrators compete directly for both types of services, and there were indications that prices for express and deferred extra-EEA services move together, thereby not contradicting the finding that express and deferred belong to the same market.

From a destination perspective, while leaving the product market definition open, the Commission assessed the impact of the transaction on both a worldwide and major trade lane basis (North America, Middle East, South and Central America, Asia, Africa and the rest of Europe).

As for the geographic market definition, i.e. the origin of the delivery, the Commission carried out the assessment of the impact of the transaction on a national level for both the intra-EEA and the extra-EEA small package delivery services markets.

3. Key elements of the competitive analysis

International intra-EEA express and extra-EEA deliveries of small packages are a network industry, which requires a presence in all EEA countries and all major world trade lanes. Such presence in turn necessitates investment in infrastructure all along the value chain (from pick-up to sorting, line-hauls, hubs, air networks, planes and delivery). A number of operators provide intra-EEA services, including the four integrators, national postal operators, freight forwarders and other courier companies. Some of these are also active in the provision of extra-EEA services.

Nevertheless, out of the companies offering small package delivery services, the integrators have the tightest control over their network and are the only ones with a seamless express network covering all EEA countries. This enables them to offer the fastest and most reliable express service of all suppliers, whereas the non-integrated players only exert a limited competitive constraint on the integrators for express intra-EEA and even less for the extra-EEA small package deliveries. Therefore, assessing the impact of the transaction was done on the most conservative basis, taking into account only the competitive constraint arising from the other integrators on the various possible markets.

FedEx and TNT have moderate market shares in most relevant markets

In order to establish clearly the market positions of FedEx and TNT and to assess their relative market power, the Commission undertook a market reconstruction exercise, as in UPS/TNT. The Commission collected revenue data for each of the four integrators for (i) international intra-EEA express small package shipments from 30 national markets (that is to say all EEA countries except Liechtenstein) to destinations within the EEA, and for (ii) extra-EEA small package shipments from these 30 national markets to the world and to the six main world trade lanes, namely North America, South America, the Middle East, Asia/Pacific, Africa and the rest of Europe.

Overall, the combined revenues of the parties correspond to less than 30% of the total revenues generated through express intra-EEA small package deliveries. Each of the two other integrators that offer such services, namely DHL and UPS, generate more revenues on that segment. The combined entity would not be the market leader in any of the 30 national markets, and its market share would not exceed 40%.

The Commission also analysed the markets for extra-EEA deliveries to the rest of the world and to each of the six major world lanes. 52 markets were reviewed in more detail, as in some of them the parties would have a combined market share over 40%, whereas in others one of the remaining integrators would have a market share of less than 20%. As further explained below, this detailed analysis confirmed that the parties are not particularly close competitors. TNT is not an important competitive force that would be eliminated by the transaction, and DHL and UPS would be able to constrain the merged entity. Moreover, the majority of customers did not express concerns as to the possible negative impact of the acquisition of TNT by FedEx. Last, a large proportion of FedEx’s market share on these lanes actually derives from a few big customers who could easily switch suppliers, resulting in the market shares of the merged entity remaining highly contestable.

FedEx and TNT are not close competitors

Even though both FedEx and TNT are integrators and therefore competitors in intra-EEA express and extra-EEA small package delivery services in the 30 national markets in the EEA, the Commission found a number of elements showing that they are not close competitors.

First, FedEx and TNT focus on different customer groups. FedEx's business focus is on customers with significant extra-EEA delivery needs. This is due to its limited ability to compete successfully for customers of stand-alone intra-European/domestic small package delivery services, due to its weaker EEA-wide network resulting in a higher cost base compared to the other integrators. This in turn translates into a weaker market position vis-à-vis TNT and the other two integrators. TNT, on the other hand, does not suffer from these limitations intra-EEA and focuses on
customers with standalone international intra-EEA and domestic/deferred delivery needs (forming the vast majority of its revenues). However, as concerns extra-EEA deliveries, TNT is a weaker competitor since it owns a very limited air network in comparison to the other integrators and purchases capacity from commercial or cargo airlines.

Second, analysing the Parties’ bidding data, the Commission identified UPS and DHL as FedEx’ closest competitors for intra-EEA express and extra-EEA deliveries on a significantly larger percentage of the opportunities, as compared to TNT.

Third, the Commission’s market investigation confirmed that the Parties are not close competitors in either intra-EEA express or extra-EEA deliveries, as indicated in particular by the Parties’ customers (e.g. in terms of pricing, range and quality of services, reliability, geographical reach, track & trace, etc.).

TNT is not a maverick

As regards both intra-EEA express and extra-EEA deliveries, TNT does not have specific qualities that would make it stand out among competitors and exert more of a competitive influence than its market share or similar measures would suggest (the so-called ‘important competitive force’).

TNT’s cost position is not more advantageous than the cost positions of DHL and UPS in either intra-EEA express or extra-EEA deliveries. In addition, the evidence showed TNT has not been able to expand its market position at the expense of the other integrators in the recent years. Moreover, the Commission could verify that TNT cannot be considered an aggressive price setter in these markets. Finally, TNT is clearly the weakest of the four integrators as regards extra-EEA deliveries.

DHL and UPS will compete effectively with the merged entity after the transaction

Post-transaction, the merged entity will face two strong and capable competitors in both intra-EEA express and extra-EEA small package deliveries. Based on the results of the Commission’s market reconstruction, DHL will remain the market leader. Also, the respondents to the market investigation considered that post-transaction sufficient viable alternatives would remain (in particular DHL and UPS were named) for customers’ international delivery needs.

Therefore, in case of a price increase by the merged entity, customers could switch to another provider, in particular since the majority of customers are multi-sourcing and consider switching easy. Equally, DHL and UPS could easily increase their service supply and thereby cater for additional demand without incurring significant additional cost. DHL and UPS also have the ability to organise the pick-up and delivery of small packages in/to all countries. Therefore, even if either of the two has a lower share on a specific market for extra-EEA deliveries, this is not indicative of an inherent weakness in its service on that market. Equally, they do not suffer from capacity restrictions.

Last, non-integrators also exert some competitive pressure, in particular in relation to extra-EEA deferred services.

Positive feedback from the market investigation

The vast majority of customers who responded to the Commission’s first and second phase market investigation expressed neutral or even positive views about the overall effects of the proposed transaction on the various markets concerned. The vast majority of the respondents were of the view that the transaction would bring together the complementary strengths of FedEx, notably on the markets for extra-EEA small package delivery services, and of TNT on the markets for intra-EEA small package delivery services. In particular, on the extra-EEA delivery markets, the relative majority of respondents considered that the impact of the transaction would be positive, followed by those who considered it to be neutral.

Price concentration analysis

Following the competitive assessment in the UPS/TNT decision, the Commission undertook a price concentration analysis linking the transaction prices for international intra-EEA express delivery services on a given lane (an origin-destination country pair) to the number of competitors on the same lane, where the presence of competitors was weighted by their coverage of business addresses in the origin and destination country. At the same time, the Commission noted the limitations of such an analysis for the current case, mostly due to the fact that such an analysis does not take into account the weaknesses of market players, e.g. high pick-up and delivery costs that are not captured by the geographical coverage (less of an issue for the UPS/TNT case).

The relationship between the price and the number of competitors was estimated using a regression model. The regression model also controlled for other explanatory factors that may potentially affect prices, such as costs, distance between origin and destination countries, size of customer (as measured by the total number of consignments from the client across all lanes) and fixed effects for each origin and destination country. Furthermore, the post-merger response also depended on the pre-merger number of competitors on a given lane.

The Commission also allowed for similarities among transactions on the same lane that were not captured by the explanatory variables of the regression model (lane-level clustering). Using this approach, the Commission estimated a 0-5% expected price increase for FedEx’s services, which it found not differing statistically significantly from zero. However, in the absence of the lane-level clustering assumption the same price increase was found to be statistically significantly different from zero. This indicates that the statistical significance of the expected price increase is unstable. Similar insights were derived for TNT but with a smaller expected price increase. Therefore, the
Commission concluded that the results of the price concentration analysis cannot be used as reliable evidence in the context of the competitive assessment of the transaction.

**Efficiencies matter: network cost savings**

The notifying party submitted a comprehensive efficiency assessment indicating that the transaction is expected to give rise to significant efficiencies, in particular from the integration of FedEx’s relatively inefficient small intra-EEA operations into TNT’s larger intra-EEA network. The logic behind these efficiencies is that the larger the scale and density of the small package delivery network, the lower the unit costs of the service provision for the provider.

The main categories of efficiencies affecting express intra-EEA services were pick-up and delivery (PUD) cost savings and air network cost savings. In particular, the merger is expected to substantially reduce FedEx’s large PUD costs, and also to have a strong impact on the type of aircraft used to transport express packages (which also affected a significant portion of the cost of express packages).

The Commission checked the verifiability of these efficiencies and their merger specificity, i.e. that the expected PUD cost savings and air network cost savings could not be achieved to a similar extent by less anti-competitive alternatives such as an outsourcing agreement. Furthermore, the estimated impact of costs on prices from the regression analysis used in the price concentration analysis also indicated that achieved efficiencies would be passed through to a large extent to consumers, more than offsetting the impact of any estimated price increase. Finally, the time window for the realisation of the identified efficiencies was estimated to be three years.

**TNT is not the provider of choice for SMEs**

Certain participants in the market investigation suggested that the transaction was likely to have a greater impact on SMEs, in particular in the form of price increases. Allegedly, TNT was offering lower prices than all other integrators and was therefore the provider of choice for SMEs engaging in e-commerce activities. According to these market participants, SMEs generally single source, rely on integrators due to their need for different types of services, and lack bargaining power so they ‘pay the most’, as they pay list prices. It was suggested that post-transaction, the merged entity would be unlikely to have an incentive anymore to be the ‘maverick integrator’ for SMEs, since two close competitors would merge.

The Commission investigated the issue of SMEs in great detail during the in-depth investigation and concluded that the transaction would not impact SMEs more than other customers. First, similarly to other customers, the majority of SMEs had a positive or neutral view of the transaction overall, as well as of its impact on service offer and quality. Furthermore, the market investigation did not confirm that SMEs single source or pay list prices. SMEs responding to the market investigation, including those active in e-commerce, indicated that they generally multi-source their intra-EEA and extra-EEA express deliveries and they negotiate volume discounts in advance. Second, TNT could not be said to be a ‘maverick’ or a market leader in the SME sector, in particular since it was not a price setter in the market. Third, while TNT had had occasional campaigns targeting SMEs, this was part of ordinary competitive behaviour to attract customers and did not reflect a structurally different market position. In any case, TNT had not expanded its market position with regard to SMEs over the past years; on the contrary there was a decrease in its SME customer base between 2013 and 2015. Fourth, TNT (as well as FedEx) did not appear to provide any differentiated products specifically aimed at SMEs that other integrators could not also provide, or to have a focus on these customers. The Commission considered that both DHL and UPS are already providing tailored service offerings on their websites for SMEs and were likely to continue to do so. In addition, the vast majority of responding competitors confirmed that services to SMEs would not require any extra assets and resources and that the requirements of SMEs in relation to small package deliveries are different from other businesses.

**5. Comparison with UPS/TNT**

The Commission’s first merger case on the small package delivery sector, UPS/TNT in 2013, resulted in a prohibition decision. The circumstances of that case, however, were significantly different to those in FedEx/TNT, which the Commission unconditionally cleared, while applying the same framework of analysis.

First, in the UPS/TNT case, the Commission found that, on a number of intra-EEA express markets, not only were the combined market shares much higher than in FedEx/TNT, sometimes in excess of 50%, but the merger would also effectively reduce the number of competitors from three to two. On such markets, FedEx was considered as a significantly smaller competitor that would not have been able to constrain the combined entity. On those markets the combined entity would therefore only face competition from DHL. Conversely, FedEx/TNT is a much more complementary transaction, as FedEx and TNT are strong in different markets. The merged entity would thus face competition on both intra-EEA and extra-EEA markets from two other strong integrators, DHL and UPS, which, based on the facts of this case, would prevent any negative effects from materialising.

Second, UPS was arguing at the time of its proposed acquisition of TNT that even though much smaller, FedEx was undergoing significant expansion on intra-EEA markets that would allow it to effectively constrain the combined entity. The evidence available to the Commission at the time did not suffice to establish that FedEx would indeed grow sufficiently to compete with the combined entity and with DHL in the short term. During the FedEx/TNT investigation, it was indeed confirmed that such expansion had not occurred, as FedEx’s market position had only
marginally increased in intra-EEA markets during the three years between the two proposed concentrations.

Third, the economic analysis showed that the two proposed concentrations would have different impacts on prices. The application of the same economic model credibly showed the likelihood of particularly significant price increases in the UPS/TNT case, notably in Eastern Europe and Scandinavia. However, as described above, in FedEx/TNT it was not possible credibly to demonstrate price increases.

Fourth, even though UPS had submitted that the UPS/TNT merger would bring about significant efficiencies, this claim was only partially substantiated. The substantiated efficiencies were weighed against the projected price increases in the various national intra-EEA markets. As a result of this exercise, the Commission concluded that in a number of markets, efficiencies would not suffice to outweigh the expected price increases. Conversely, by applying the same, if not a stricter, test to the verifiability of the efficiencies claimed by FedEx, the Commission identified higher efficiencies. Although price increases were not credibly established in the FedEx/TNT case, if the statistically not robust 0-5% price increase identified in the price/concentration analysis was considered, the verified efficiencies of the combination of FedEx and TNT would significantly surpass it.

6. Conclusion

This decision proves that even after an in-depth analysis and its previous prohibition decision concerning the same market and target, the Commission can unconditionally approve a 4-to-3 merger if, based on the facts of the case, it does not have a significant negative effect on competition.

To that end the Commission rigorously analysed the potentially negative effects of the takeover of TNT by FedEx. It could be shown based on a market reconstruction that the combined market position of the parties was rather moderate in most markets. The parties were furthermore not close competitors and no important competitive force would be removed by the merger. This was mirrored in the reaction of customers, the vast majority of whom adopted a neutral or even positive stance on the merger.

The Commission applied the same rigorous assessment standard as in the earlier UPS/TNT case also with regard to economics. It carried out a price concentration analysis which did not show a price increase statistically different from zero. The Commission also found that the transaction would give rise to verifiable, merger-specific efficiencies due to network cost savings that would benefit customers.

For all these reasons, the Commission cleared the takeover of TNT by FedEx.
ABI/SAB: The emergence of a global beer giant and its challenges for merger review

Jean-Christophe Mauger, Julia Fischer

1. Introduction

On 24 May 2016, the Commission cleared the acquisition of SABMiller plc (SAB, United Kingdom) by Anheuser-Busch InBev SA/NV (ABI, Belgium), subject to conditions.

ABI and SAB are global producers and distributers of beer and other beverage products. The transaction brought together the two biggest global brewers and number three and four in the EEA. ABI’s annual sales amount to approximately USD 47 billion in 2014, which makes it the largest brewer globally with a number three position in the EEA. SAB, with sales of about USD 27 billion in 2014, is the second largest brewer globally, holding the number four position in the beer market in the EEA.

The €90.1 billion transaction was announced on 11 November 2016 when ABI declared its intention to make an offer to acquire the entire share capital of SAB. It was notified to the Commission on 30 March 2016. The Commission declared the transaction compatible with the internal market subject to conditions after the initial phase I investigation on 24 May 2016.

This truly global merger was reviewed by more than 23 competition authorities worldwide, including the US Department of Justice and the Chinese Ministry of Commerce (MOFCOM) which both made their approval of the merger subject to remedies.

The Commission’s phase I investigation revealed that national beer markets are highly concentrated with oligopolistic features, favouring coordination. Against this background, the Commission found that the merger would raise concerns in a number of countries in Western, Central and Eastern Europe. The Parties submitted remedies to dispel the Commission’s concerns.

2. The beer industry – a mirage of diversity

When looking at the beer shelf in the supermarket, one gets the impression that the beer market must be a highly diversified and competitive market due to the number of beer brands on offer. However, looking below the surface, at the brand owners’ level, we discover that in reality the beer market is highly concentrated and that the same big global brewers - the biggest being ABI, SAB, Heineken and Carlsberg – reign over the competitive landscape in most countries. While national markets and the presence of the respective brewers differ widely from country to country, at least two of the biggest four brewers are always present and in most cases hold leading positions. More than that, at a closer look the national markets reveal oligopolistic features as outlined in more detail in Section IV. Given this market structure and a history of cartel cases in the beer industry, it is not surprising that the proposed merger confronted merger control authorities with a range of challenges.

3. Market definitions

Corresponding to the broad diversity of beer products, the market investigation confirmed that the beer market – which has to be distinguished from markets for other alcoholic beverages – can be sub-segmented by different criteria: beer type (e.g. lager, ale, stout), way of distribution (on-/ off-trade), and brand positioning. The latter qualifies a beer brand depending on its marketing and price level as “discount”, ‘mainstream’, ‘premium’ or ‘super premium’ beer. However, the market investigation revealed also that these concepts vary widely in different regions and countries. Furthermore, brands from different levels can interact with each other. Thus, the Commission concluded that the above criteria for sub-segmenting the beer markets should not be applied rigidly for the purpose of assessing the transaction’s
effects on competition. Rather, they provide a framework for the Commission to take account of all the particularities of the relevant markets.

As regards the geographic scope, the Commission found that beer markets are national. Beer markets can differ widely from country to country, as producers adapt their business model, marketing and distribution according to the customers in different markets whose taste, preferences, consumer behaviour, habits and economic background diverge across the EEA.

4. The Commission’s assessment of the transaction

The Commission’s investigation confirmed that beer markets in Europe are in general highly concentrated with oligopolistic features. In all countries (with the exception of Germany) the number of players is limited with a consistent presence of at least two of the four global brewers (ABI, SAB, Heineken and Carlsberg) and the biggest three beer players per country account in the majority of countries for 70% or even more.

In addition, the Commission found evidence that barriers to entry and expansion in the beer industry are generally high, due among other things to substantial brand development costs, the relevance of distribution networks, and scale.

In its investigation, the Commission also took into consideration the history of several past cartel cases, many of which resulted in the Commission and national competition authorities fining brewers and retailers participating in beer cartels.

It is against this background that the Commission concluded that the merger between ABI and SAB would lead to anti-competitive effects.

a) Non-coordinated effects

France, Belgium, the Netherlands, Italy, United Kingdom, Czech Republic, Slovakia, Hungary, Poland and Romania were identified as potentially affected markets. In contrast, direct overlaps in the Czech Republic, Poland, and Slovakia were very limited at most. This reflects the complementary footprint of ABI and SAB pre-merger.

As regards the Netherlands, the United Kingdom, France, Italy, Romania and Hungary, the market investigation provided evidence that, in view of the existing high concentration of the beer markets as well as the high barriers to entry and expansion, the merger between ABI and SAB would have eliminated SAB as an important competitive force on the beer market and thus raised competition concerns.

b) Structural links between ABI’s distributor and SAB

From the investigation it also became apparent that even in countries where there were only very limited (if any) overlaps, namely in the Czech Republic, Hungary, Poland, Romania and Slovakia, the merger was likely to harm competition. In these countries (except Poland) ABI’s brands are distributed by another major brewer that was one of SAB’s closest competitors in those countries pre-merger, as well as in Poland. The investigation indicated that already pre-merger ABI exercised significant influence on this distributor/brewer, who depends to a substantial extent on the ABI products it distributes. Therefore, the Commission concluded that the merger would have created a structural link between the SAB business and its competitor acting as ABI’s distributor, reducing the competitor’s incentives to compete.

c). Coordinated effects – coordination on prices

Finally, the phase I investigation also provided evidence that the merger would increase the risk of price coordination among brewers in Europe.

In this context, the Commission found that the pre-merger situation already facilitated coordination due to high market concentration, consistent presence of certain big brewers, high price transparency due to highly elaborated price monitoring systems used by brewers, the availability of in-depth third party market intelligence, and the use of price letters in the industry.

Considering this market structure, the evidence suggested that brewers find it more profitable to benefit from higher prices than to compete aggressively. In other words, large brewers are value- rather than volume-driven players. To finely calibrate their prices, players in the beer industry use sophisticated revenue management tools which take rivals’ past and likely future strategy into account. In particular, brewers monitor closely whether price increases were followed by competitors in the past or not.

The Commission concluded from the Parties’ internal documents that within this framework of price modelling, often a price leader was identified as one who defines a frequency and the level of price increase which was then supposed to be followed by its competitors (“followers”). The Commission also found evidence that in the event of deviation from the pricing scheme set by the market leader, a brewer might consider low-market share markets as fight-back opportunities where fighting would have less economic impact. The Commission came to the conclusion - based on the evidence - that such fight-back opportunities could be identified not only in another market segment within one country, but also across different countries in Europe.

Finally, the investigation showed that outsiders would not be able sufficiently to defeat attempts to increase prices as retailers lack the necessary countervailing buyer power and smaller competitors are unable to disrupt coordinated outcome.

The Commission concluded that through the merger: (i) the number of large brewers would be reduced in markets that are already highly concentrated; (ii) the increased multi-market contacts between such brewers would increase retaliation potential, and (iii) swinging markets might be tipped into clearer leadership.
5. The successive remedies packages

From the very beginning of the merger proceedings, the Parties pro-actively addressed potential horizontal effects of the merger in the United Kingdom, Italy, France and the Netherlands by offering to divest SAB’s brands Peroni, Meantime and Grolsch. During the merger proceedings Asahi was already identified and submitted by the Parties as the proposed buyer.

Yet, in the light of the additional concerns identified by the Commission, a second remedy package ("the CEE package") was submitted by the Parties later in the proceedings. This package in essence removed the entire overlap of the Parties’ activities in the EEA. The CEE package comprised the whole of SAB’s beer business in the Czech Republic, Slovakia, Hungary, Romania and Poland.

The CEE package thus removed the full overlap between the Parties’ activities and eliminated the creation of new long term contractual links between SAB and ABI’s distributor in Hungary, Romania, the Czech Republic and Slovakia. Furthermore, with the divestment of SAB’s entire European business, the number of markets where ABI would have had a significant market position and would compete against other major brewers does not increase.

These successive remedies allowed the Commission to clear the merger in phase I.

6. Conclusion

The main difficulty of this case was to gain sufficient knowledge about the highly differentiated and segmented national beer markets and their dynamics, and in particular the interactions between different beer brands, also across segments. A further challenge was to investigate and assess the effects of the future structural link between ABI’s distributor in the CEE countries and the SAB business, as well as to examine possible coordinated effects of the merger within the limited timespan of a phase I investigation.

During the entire investigation, the Commission cooperated closely with national competition authorities in other jurisdictions, including the U.S. Department of Justice and the Australian National Competition and Consumer Commission. This cooperation enriched the Commission’s investigation and deepened the mutual understanding of market dynamics that are typical for the beer markets.

As a result of its investigation the Commission identified likely anti-competitive effects concerning different countries which, in the end, were all dispelled by the additional remedies offered by the Parties.
HeidelbergCement/Italcementi: Let’s get concrete...
Silvia Modet, Mauro Sibilia

Overview
On 26 May 2016, the Commission cleared the acquisition of building materials company Italcementi S.p.A. (Italy) by its competitor HeidelbergCement AG (Germany) subject to the divestment of Italcementi’s activities in Belgium.

Both HeidelbergCement and Italcementi are global companies integrated along the cement value chain, active in the production of grey and white cement, ready-mix concrete, aggregates (i.e. sand, gravel, etc.), and other related products. The European activities of the two companies were mainly complementary from a geographical perspective. HeidelbergCement is active in northern, western, and central Europe, whereas Italcementi’s focus was mainly in southern Europe, operating cement facilities in Italy, France, Spain, Greece, and Bulgaria but also in Belgium.

Other than the Belgian markets, the transaction brought some overlaps along the French-German border, which were cleared unconditionally after a detailed analysis investigating potential coordination using the border as a coordination focal point.

The Commission’s investigation pointed to serious doubts as to the compatibility of the transaction with the internal market in Belgium and its surroundings, in relation to grey cement and ready-mix concrete. HeidelbergCement addressed these concerns by committing to divest the entire Italcementi business in Belgium centred on its subsidiary Compagnie des Ciments Belges S.A. (CCB). The commitments also addressed certain viability concerns in relation to the limestone supply of CCB’s cement plant in Belgium.

On 25 July 2016, HeidelbergCement announced that Cementir Holding would be purchasing the divestment business. On 4 October 2016, the Commission approved Cementir Holding as the purchaser, and the divestment to Cementir was closed on 25 October.

Over the last few years, the cement industry has undergone a wave of transformations which include the Lafarge/Holcim merger, cleared with substantial divestments in numerous countries to Irish rival CRH in 2014, as well as the restructuring of Cemex with asset swaps in Spain, Czech Republic and Germany, and more recently, the proposed sale of its business operations in Austria, Hungary and Croatia.

The French/German border as a potential coordination focal point
Italcementi is producing grey cement in France whereas HeidelbergCement runs several cement plants in Germany. The catchment areas of their plants primarily overlapped in Rhineland-Palatinate and Saarland, northern Alsace and Lorraine.

Combined sales shares of the parties were estimated between 20% and 30% in some areas of the French/German border region, and between 30% and 40% in others.

In a nutshell
Two global cement players merged and although their footprint in Europe is rather complementary, their activities overlapped to a great extent in Belgium in a number of markets. In order to remedy the serious doubts in first phase, the entire overlap caused by the merger in Belgium and its surrounding regions was divested.

As the supply of limestone is essential for producing cement, the divestment was structured so as to ensure the long term viability of the business.

Overlaps in the French-German border region

Certain market characteristics, including among others the rather low levels of imports/exports across the border and certain differences between French and German prices, the former being.

The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

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generally higher than the latter, prompted the Commission to investigate potential coordinated behaviour and the effects the merger would bring about in facilitating it.

The Commission’s Chief Economist Team (CET) conducted a series of quantitative analyses to assess whether the prices for grey cement in the French/German border region showed a pattern of current or past coordination which would have to be taken into account in assessing whether the acquisition would increase the likelihood of future coordination or facilitate pre-existing coordination.

First, the CET examined whether the observed price pattern in the overlap area differed from the corresponding price patterns outside the overlap area, and in particular whether observed border region prices may be driven by coordination and not only by volume, distance, customer type, cement type and Incoterms¹, for which the Commission was able to control in its analysis².

In this regard, significant price differences – not explained by other factors – showing that the price level in the French/German border region is higher than the price level outside the border region could serve as an indication of coordination between the Parties. In other words, in the absence of coordination any substantial price differences would likely have been competed away.

The CET’s analysis confirmed that prices in the French/German border region did not differ substantially from prices outside this area. This finding remained the same when controlling for differences in market concentration or the number of suppliers between the border region and the non-border region (in addition to differences in cement types, customer types, volume, distance and Incoterms across the regions).

The CET also ran a regression analysis on cement supplies outside the French/German border region to find the main factors explaining prices. Using the results of this regression analysis, the CET predicted how prices in the French/German border region should look in application to the factors identified. The result was that the predicted prices in the French/German border were similar to the actual prices, suggesting that prices in the French/German border were not ‘artificially’ high because of tacit coordination.

Second, the CET also analysed HeidelbergCement and Italcementi’s incentives to reallocate some supplies from inner-Germany or inner-France to the French/German border region, so as to ‘steal’ its rival’s customers in the border region (where, in case of coordination, prices would be supra-competitive).

This approach tests whether in case of collusion firms could deviate from a collusive agreement and capture substantial short term profits. Conversely, if firms could not deviate and capture substantial short term profits, there would be collusion. These benefits are higher the more successful the coordination, and illustrate the trade-off between short-run deviation profits and long-run collusive profits which would be sacrificed in case of deviation from the collusive agreement. That is, reallocation incentives and deviation incentives, respectively, are interlinked with the existence and success of coordination.

In this case, the Parties’ scope and incentives optimally to reallocate output from the surrounding areas in France and Germany to the French/German border region were found to be not substantial.

The results of these analyses, together with the outcome of the market investigation and a review of the Parties’ internal documents, enabled the Commission to discard potential coordination along the border as a result of the merger.

**Competition concerns in Belgium and surroundings**

In Belgium, HeidelbergCement operates an integrated cement plant in Lixhe and a "quasi-integrated" plant in Antoing-Ghent. It also runs an integrated plant (Maastricht) and two grinding plants (IJmuiden, Rotterdam) in the Netherlands. HeidelbergCement had no facilities in France but supplies certain quantities of cement to France from its Belgian plants.

Italcementi operated one integrated cement plant in Gaurain, Belgium. The plant is close to the border with France and has significant sales to French customers as well as to Dutch customers. In France, Italcementi was an important player with four cement plants.

An integrated cement plant covers the entire cement production process, whilst a grinding mill does not include the mining and the thermal process of producing clinker, but only the final grinding, blending and handling steps, with clinker and other raw materials being delivered from a separate plant or sourced elsewhere.

The number of competitors with production assets in Belgium is limited. LafargeHolcim is the only domestic competitor of the parties operating an integrated cement plant, whereas CRH operates two grinding stations.

The transaction therefore led to substantial overlaps in grey cement in Belgium and its surroundings, namely the south of the Netherlands and the north of France. Market shares both at national level in Belgium and at the level of several circular catchment areas drawn with radii of 150km or 250km around the HeidelbergCement and Italcementi cement production plants were above 50%.

The Commission’s market investigation showed that pressure from imports was limited. Furthermore, some customers consider imports and supply from grinding stations less suitable for

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¹ Note that, for the sake of simplicity, the Commission only distinguished sales delivered by the respective supplier from those picked up by customers.

² The Commission notes that such an approach inherently assumes that outside the overlap area, where customers are located such that one of the Parties is not considered as an alternative, there is no coordination between the grey cement suppliers.
applications requiring a constant quality of clinker/cement (for instance for the production of pre-cast cement or of adhesives). This limits the pressure exercised by grinding stations or terminals relying on imports as compared to integrated plants.

Italcementi, along with LafargeHolcim, has been an important source of rivalry to HeidelbergCement, which was found to benchmark its performance in Belgium against that of Italcementi and LafargeHolcim.

The market investigation confirmed that even before the concentration, HeidelbergCement’s conduct in the markets concerned was restrained by competitors only to a limited extent. The acquisition of Italcementi and its state-of-the-art cement plant in Gaurain would thus have been likely to further strengthen HeidelbergCement’s market power.

This was corroborated by numerous customers contacted during the market investigation, who generally expected less competition and further price increases in grey cement in Belgium. The acquisition would have eliminated competition between two close competitors in already concentrated markets in Belgium and its surroundings.

As to ready-mix concrete, HeidelbergCement operates 34 sites spread across the entire territory of Belgium. Italcementi’s operations were smaller, with 10 sites concentrated mainly in the centre and the west of Belgium. The transaction would have resulted in a number of significant overlaps in the local ready-mix concrete markets based on 25km catchment areas (combined market shares exceeding 40-50% with a sizeable increment in several catchment areas). Certain ready-mix concrete customers expressed concerns that the concentration would limit their choice of suppliers, and possibly lead to price increases, and similar views were expressed by some competitors.

Taking all these elements into account, the Commission raised serious doubts in relation to the markets for grey cement and ready-mix concrete in several catchment areas in Belgium and its surrounding regions.

Designing the remedy package for Belgium

To address these competition concerns in Belgium and surroundings, the parties proposed to divest the entirety of Italcementi’s business in Belgium, organised around CCB.

That divestment intended to eliminate the entire overlap between the Parties’ activities at national level in Belgium and the Netherlands, since Italcementi had previously made all of its sales in the two countries from its plant in Belgium. Also, as a result of the remedy, HeidelbergCement’s existing capacity would not be increased.

Post-divestment, some catchment areas would show market share increments where there are overlaps with Italcementi’s plants in France, albeit leading to limited combined market shares. The proposal therefore appeared sufficient to remove the competition concerns raised and presented a clear-cut solution in phase I.

The main asset to be divested was CCB’s integrated cement plant in Gaurain, including a yet-to-be opened limestone quarry (Barry quarry) located a short distance south-east of the plant.

The divestment package also included Italcementi’s network of ten ready-mix plants as well as aggregate quarries in Belgium. Moreover, some of Italcementi’s sales staff in France would be transferred in view of Gaurain’s large sales presence in France.

When analysing the remedy package, however, access to limestone became a main consideration for the viability of the divested business.

Ensuring the limestone supply of the divested business

The Gaurain cement plant was served by limestone extracted from its adjacent Gaurain quarry for nearly 100 years. This quarry was depleted and closed in 2012. The plant is now supplied by the Milieu quarry, which is located a short distance away and is operated by the Société des Carrières de Tournai (SCT).

SCT is a joint venture between CCB (Italcementi; 65% stake) and LafargeHolcim (35% stake). This partnership was entered into to exploit jointly (i) LafargeHolcim’s Milieu quarry and (ii) at a later stage Italcementi’s Barry quarry, and allows Italcementi to bridge the transitional period between the end of exploitation of its Gaurain quarry and the development of its Barry quarry. This arrangement is of key relevance, given that the extraction of limestone from the Barry quarry will require very lengthy and costly preparatory work. Nonetheless, supplies of limestone quarried under that JV arrangement are expected to be exhausted relatively quickly.

The Commission considered that this situation would lead to considerable uncertainty as to whether a suitable purchaser, with sufficient financial resources and expertise to carry out the required investment in the Barry quarry, would be found, as well as raising questions about the purchaser’s incentive to follow through on such significant investment plans in the long run.
This is why the Parties proposed additional quarrying capacity to complement CCB's existing reserves. In order to prevent the purchaser facing a shortage of limestone, HeidelbergCement committed to divest CCB's stake in the limestone joint venture with LafargeHolcim, STC, as well as a portion of its own limestone quarry in Antoing (already being exploited). In return, HeidelbergCement would retain a portion of the Barry quarry equivalent in reserves to the divested portion of the Antoing quarry.

The inclusion of the portion of the Antoing quarry ensures that CCB's divested business will have access to limestone. Indeed, the portion of the Antoing quarry provides enough additional reserves so that limestone extraction in Barry can be significantly delayed. This would enable the potential purchaser to exploit the Gaurain plant without incurring the investment necessary to develop the Barry quarry.

However, this solution required cooperation from LafargeHolcim and was therefore contingent on third party rights. According to the Commission's assessment, the selection of the quarry to be jointly exploited - Antoing rather than Barry - constituted an amendment to the JV agreement which required prior approval by LafargeHolcim.

To avoid a delay in the divestment due to lack of consent from LafargeHolcim or other potential obstacles in that respect, HeidelbergCement committed to not closing its acquisition of Italcementi until an agreement with LafargeHolcim had been reached on that matter. Also, any amendment of the JV agreement would need the Commission's approval prior to closing the divestment.

Whilst providing an additional safeguard, these provisions could not guarantee that an agreement with LafargeHolcim would be found. An alternative was therefore included in the commitments to provide for a solution in the event the Barry quarry needed to be opened in the short term, upon depletion of the Milieu quarry and in the absence of an agreement with LafargeHolcim for exploitation of the divested portion of Antoing quarry.

To address this scenario, HeidelbergCement committed to ensuring that the acquirer would open the Barry quarry by providing adequate incentives in the final binding sale and purchase agreement with the purchaser. Alternative incentives could be negotiated between HeidelbergCement and the acquirer, but would require prior approval by the Commission.

These incentives aim at ensuring that the purchaser would make the required investments in opening the Barry quarry, which in turn would ensure the medium- to long-term competitiveness and viability of the divested business. The inclusion of the incentives would increase the valuation of the divested business and therefore presumably increase the purchase price. To re-coup part of the purchase price, the purchaser would have to start and follow through with the opening of the Barry quarry. In this case, the purchaser would be able to exploit its own quarry without having to rely on third parties' limestone supplies.

The final commitments also clarified that should no agreement with LafargeHolcim be found, the Commission may approve the sale of the divestment package without including the portion of the Antoing quarry. This addresses the potential situation where, without an agreement with LafargeHolcim, the portion of the Antoing quarry is of limited use to the divested business.

After receiving agreement by Holcim (Belgique), now part of LafargeHolcim group, confirming that the operations of SCT could be extended to the exploitation of the portion of Antoing's quarry to be divested together with CCB's business, the JV agreement was modified to reflect the inclusion of the Antoing quarry in the contractual arrangements between CCB and Holcim (Belgique). The amendments included postponing the opening of the Barry quarry with the corresponding changes to the mining plan and additional practical arrangements. In a decision adopted on 4 October 2016, the Commission approved the amendments to the JV, and approved Aalborg, a subsidiary of Cementir, as the purchaser of the divested business.

**Conclusion**

In order to ensure that a suitable purchaser will acquire business assets divested in the context of merger review processes, the Commission requires the proposal of an up-front buyer in certain cases. This is particularly justified when there are considerable obstacles for a divestiture, such as third party rights, uncertainties as to finding a suitable purchaser, or considerable risks of preserving the competitiveness and saleability of the divestment business in the interim period before divestiture.

Similarly, specific circumstances may require the adoption of other conditions precedent in order to guarantee the viability of the divested business. This case illustrates that such conditions may need to be adapted to the facts at hand.
Plastic Omnium/Faurecia Exterior Business: The use of delivery distances in defining the geographic market and how supply-side concentration cancels out buyer power

Daniel Coublucq, Niccolò Namari, Pablo Serrana, Anna Székely

1. Introduction

In July 2016, the Commission cleared in first phase the acquisition by Plastic Omnium (France) of the plastic exterior business of Faurecia, subject to conditions.

The Commission’s market investigation identified competition concerns in the markets for the supply of plastic front and rear bumpers in several geographic markets, as well as the supply of front end modules (FEM) in the EEA. With regard to the various markets for plastic front and rear bumpers, the transaction would have reduced the number of competitors from three to two in some geographic areas and created a monopoly for supply to a number of car assembly plants in France. As for the FEM market, the transaction would have resulted in the largest market player acquiring its closest competitor, resulting in a market share in excess of 50% and significantly larger than that of the second largest competitor.

The proposed remedy completely removed the overlap in all the problematic areas.

Overview of the products subject to the investigation

Bumpers are the main part of the external front and rear parts of a vehicle which, together with other components integrated in it, contribute to the “look” of a car. Apart from the bumpers’ aesthetic function, they are originally designed to sustain an impact without damage to the frame and the safety systems.

Bumpers are made of plastic and are, for the most part, delivered to car manufacturers already painted in the colour of the vehicle on which they will be installed. There are two key steps in the bumper production process: injection moulding and painting, the latter being the technically more complicated and crucial step in the process. The bumper is a large and prominent component and it is of paramount importance that the colour tone perfectly matches that of the vehicle body, which is painted by the car manufacturer and – due to the different materials to which it is applied – with different paints. The technical difficulties related to painting make the painting process a crucial element of the production process.

FEMs are a pre-assembled combination of components such as lamps, fans, bumper systems, etc. that are fastened to the front of the vehicle chassis. FEMs are used only in vehicles that have an “open frame”. FEMs may include different components depending on the specific vehicle.

2. Plastic front and rear bumpers: defining the relevant geographic market

This automotive component case required a different geographic market definition than the usual Europe-wide scope. In this case, the Commission considered that only a much more local market definition, based on catchment areas around each of the car manufacturers’ plants, would effectively capture the competitive market conditions.

The starting point of the analysis was the information submitted by the notifying parties (the Parties) as regards their average delivery distance for bumpers. What emerged from the analysis was that the vast majority of bumpers manufactured by each of the Parties is delivered within a short distance from the production facility, with only a minor percentage of deliveries being transported over long distances.

In a nutshell

An in-depth assessment of the customers’ sourcing behaviour and of the Parties delivery distance allowed the Commission to understand that competition takes place within a certain distance from the customers’ plants rather than EEA-wide.

Also, the specificities of the affected markets, the competitive landscape, and the specificities of the products and production processes allowed the Commission to understand that customers – although concentrated and sophisticated – will not have sufficient countervailing buyer power in this case.
Following this observation, the investigation then turned to understanding (i) whether this was specific to the Parties and their business model, and (ii) the underlying reasons for the Parties' supply areas covering predominantly short distances.

To address the first point, the tender information submitted by customers was analysed to determine the exact delivery distance for each of the supply contracts entered into in the last five years. This analysis identified the geographic zones where the transaction proved to be more problematic. Once these areas were singled out, bidding information for each of the car manufacturers’ plants present in those areas was collected.

The Commission's analysis confirmed that deliveries over short distances are standard practice for the supply of bumpers. The majority of manufacturers send requests for quotations (RFQ) only to those suppliers having a manufacturing plant located within a certain geographic radius. Suppliers that submit a firm offer or are shortlisted in tenders are located within an even smaller geographical area. Winners are generally located within a 100km radius from the plant to which they will deliver. The declining distance at the different stages of the tender process and the significant difference in the average distance between the suppliers invited to tenders and those who submit a firm offer suggested that being close to the OEMs is an important competitive advantage for the suppliers and sometimes a prerequisite for the customer.

These observations provided a clear indication that competition takes place on a more local level than EEA-wide. In fact plants of manufacturers located outside the catchment area of a specific OEM plant generally do not compete for tenders with those located within that area.

The Commission also analysed the reasons why car manufacturers source bumpers only from producers located relatively close to their plants. Firstly, the degree to which delivery costs have an appreciable impact on the overall cost of the finished product was investigated. The information submitted by the Parties indicated that these costs are not significant. The investigation also confirmed that car manufacturers are generally not concerned about transport and logistic costs linked to the delivery of these components. Rather, car manufacturers are concerned about non-cost elements connected to the transport of the finished bumpers, and in particular (i) the risk of quality issues such as paint scratches and (ii) the need to ensure timely delivery of each bumper to the car assembly logistical chain.

With regard to the quality issue, OEMs feared that transport over longer distances could materially increase the frequency of bumpers being scratched, which would render them unusable on the production line. As the majority of bumpers are delivered painted and since – as explained above – painting is generally performed at the supplier’s premises, OEMs choose to limit this logistic risk by sourcing painted bumpers near the manufacturing plant where they will be installed on the vehicle.

With regard to the importance of timely delivery to the production site, the investigation indicated that timely delivery is linked to the model commonly used in the automotive industry to organise the production process: the Just in Sequence (JIS) model.

The JIS requires that components to be mounted on the vehicle in production must reach the production line at a specific point in time. To allow suppliers to organise their production and deliver the components at the desired moment, OEMs schedule the production order in advance of the start of production of the individual vehicle. However, the advance period provided by OEMs is short and generally ranges from some hours to a few days. For standardised products, short delivery notices may not represent a major hurdle. Bumpers, however, are customised products in the sense that the colour has to match the colour of the car body, and they often include a number of options chosen by the final customer. The OEM will only be informed of the ordered colour and the specific options required at the time the customer orders the car, which makes production forecasting very difficult. As a consequence the suppliers’ capability to comply with the JIS is greatly reduced as the distance of the production facility from the OEM assembly plant increases.

Increased distance between the production facility and the OEM's assembly facility requires additional facilities to manage the inventory and possible (re)sequencing. This generates additional costs likely to affect the competitiveness of the supplier's plant.

These findings explain the empirical observations of the delivery distances extracted from the tender information and prove that, even when dealing with sophisticated and global suppliers and customers, transport costs or – as in this case – non-cost elements can significantly narrow the geographic scope of the markets. Also, this case demonstrates that tender information can be a useful tool to understand the geographic market scope.

3. Plastic front and rear bumpers: competitive assessment

Given that competition for the supply of plastic front and rear bumpers takes place at a limited distance from the assembly plants, the Commission considered market shares (in terms of capacity) for local catchment area around each of the OEMs' assembly plants\(^1\). This analysis showed that the concentration would give rise to high combined capacity shares in a significant number of markets.

The market investigation showed that both Plastic Omnium and Faurecia are perceived as indispensable suppliers and close competitors to each other by OEMs, within the local catchment area.

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\(^{1}\) See also Case M.7567 Ball/Rexam, for the use of customer-centric catchment areas as the basis for the geographic market definition and the competitive assessment.
The Commission analysed the tender information collected from customers, as well. Given the local scope of the geographic market, the Commission analysed the identity of the competing bidders within each catchment area. In particular, for each catchment area, the Commission analysed the distances between the OEMs’ production plants and the bumper plants of the suppliers located within the catchment area. This analysis provides a measure of the geographical closeness of the Parties, based on the location of their plants. It showed that for a significant number of (local) markets, the Parties were closely competing with each other, with their plants being often the closest to the OEMs.

4. Buyer power

In recent years, a clear trend of consolidation can be observed in the global and European automotive industry caused by several factors such as the effects of the financial crisis, the global auto manufacturing expansion or new technologies. This tendency results not only in the increasing number of mergers but also in the fact that the Commission has to deal with markets with a high level of concentration on both the OEMs’ and the suppliers’ side. The question to what extent buyer power can be taken into consideration as a counterbalance to the eliminated competitive constraint therefore arises more and more often in combination with strong supply-side concentration.

Countervailing buyer power is the bargaining strength the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance and its ability to switch to alternative suppliers. In the present case the notifying Party argued that the car manufacturers are sophisticated customers that are able to exert competitive pressure on the suppliers. However, the market investigation did not confirm this view for various reasons which equally applied to all affected product markets.

The Commission found that OEMs could not credibly threaten to resort, within a reasonable timeframe, to alternative sources of supply. First, not all suppliers were regarded as credible by the car manufacturers. Second, for a number of car manufacturers any possibility of switching that existed pre-transaction would have been eliminated or significantly reduced as a result of the merger in a number of geographic markets.

The Commission also examined whether the OEMs could vertically integrate into the upstream markets, but found that for these products they cannot credibly threaten to turn to in-house production. First, only a few car manufacturers are technically capable of manufacturing these components in-house. Indeed, in terms of total EEA production capacity, only 11% of all bumpers are fully produced in-house (injection, painting, assembly), 4% are painted and assembled in-house, while 7% are only assembled in-house. Therefore, only 22% of the bumpers produced in the EEA have at least one step of their production process carried out by the OEM.

Second, even those car manufacturers that are – at least partially – able to carry out the manufacturing process do not usually possess the necessary technical equipment in all their manufacturing facilities. Only very few OEMs have fully internalised production, which weakens the threat of in-house production towards the suppliers.

Third, bidding data also confirmed that the suppliers did not compete with in-house production in any of the analysed tenders, which underlined the limited nature of the disciplining effect that the threat of internalisation might have.

Fourth, the fact that establishing the manufacturing facility would entail significant investment and lead time has to be taken into consideration. The market investigation supported the notifying Party’s claim that the indicative time-frame required to set up a new plant is two years and the investment required is in the range of €50 million. As a result, it can be concluded that internalising component manufacture does not only require a strong business case to support such investment, but would in any event would not be a timely response to the supplier’s decision to increase prices or otherwise deteriorate the quality or the conditions of delivery.

Finally, some OEMs indicated in the market investigation that a total or partial in-house supply of these components is not in line with their current and future business strategy.

The Commission also assessed whether OEMs would be able to sponsor a new entry or an established player to expand its activities on these markets. The market investigation did not confirm this claim. First, OEMs indicated that they refrain from committing to binding orders for a specific volume, but rather provide only indicative volumes. Second, the market investigation showed that car manufacturers prefer to multisource in order to show that car manufacturers prefer to multisource in order to support a new entry or a new competitor. Indeed, the threat of internalisation might have.

The lead time of setting up a manufacturing facility, hence entering the market, does not allow OEMs to counter the increase of market power that the merger would bring about in the short term.
The Commission also took the view that the upstream margins of the suppliers can be an indication of the effectiveness of the OEMs’ countervailing buyer power. In this case, the fact that Plastic Omnium was able to achieve a relatively high margin suggested that OEMs had more limited countervailing buyer power already pre-merger.

For the above reasons the Commission considered that contrary to the notifying Party’s claim, and despite the concentration at the level of car manufacturing market, the argument of countervailing buyer power could not be accepted. OEMs do not have the ability credibly to threaten suppliers to switch to another source of supply, internalise the manufacturing process or sponsor new entry in a timely manner.

5. Conclusion

The case underlines the necessity of concentrating on the specific features of the affected markets and assessing the possible impact of the transaction accordingly. Although the market for supply of automotive components has generally been defined as EEA-wide, the risk of quality issues and the need for timely delivery lead to local markets as regards the supply of plastic bumpers. Likewise, although the argument of countervailing buyer power is often used given the concentrated nature of the automotive industry, the market investigation did not confirm that it would be sufficient for OEMs readily to counter the increase in market power that the merger in the present case would have brought.