



Final Report of the Hearing Officer ¹

(M.7878 – HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia)

- (1) On 5 September 2016, the Commission received a notification of a concentration ("Proposed Transaction") pursuant to Article 4 of the Merger Regulation² by which the undertakings HeidelbergCement³ and Schwenk⁴ ("Notifying Parties") acquire, through their jointly controlled joint venture DDC⁵, joint control within the meaning of Article 3(1)(b) of the Merger Regulation of the whole of the undertakings Cemex Hungary⁶ and Cemex Croatia⁷ by way of purchase of shares.
- (2) On 22 June 2016, pursuant to Article 4(4) of the Merger Regulation, the Commission referred the assessment of the effects on the relevant markets in Hungary to be examined by the Hungarian Competition Authority.
- (3) On 10 October 2016, the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation.⁸
- (4) On 12 December 2016, the Commission adopted a Statement of Objections ("SO") in which it took the preliminary view that the acquisition of Cemex Croatia by HeidelbergCement and Schwenk would significantly impede effective competition in the markets for grey cement in the circular or modified 250km catchment areas around Cemex's cement plant in Split/Croatia. According to the SO, the Proposed Transaction could create a dominant position, would lead to non-coordinated effects arising from high combined market shares and likely price increases arising from the elimination of competition between HeidelbergCement/DDC and Cemex, as well as from insufficient remaining competition. The SO was notified to HeidelbergCement and Schwenk on 13 December 2016.

¹ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

³ HeidelbergCement AG.

⁴ Schwenk Zement KG.

⁵ Duna-Dráva Cement Kft.

⁶ Cemex Hungária Építőanyagok Kft.

⁷ Cemex Hrvatska dd., part of Cemex España, S.A, the holding company of the European subsidiaries of Cemex SAB de CV (hereafter referred to as "Cemex").

⁸ HeidelbergCement and Schwenk have brought annulment actions against this decision, actions which are currently pending before the General Court (Cases T-902/16 and T-907/16).

- (5) The Notifying Parties were granted access to the file on 13, 14 and 15 of December 2016 (CD-ROM handover, as well as by means of a quantitative and a qualitative data room exercise), and given until 3 January 2017 to reply to the SO. Subsequent access to the file (by CD-ROM handover or encrypted email form) was provided on 26 January 2017, 20 February 2017, 28 February 2017, 16 March 2017 and 22 March 2017.
- (6) Cemex sent its observations to the SO on 2 January 2017, and the Notifying Parties each replied to the SO on 3 January 2017. They all requested to be heard orally.
- (7) The formal oral hearing was held on 11 January 2017.
- (8) On 18 January 2017, the Commission extended the time limit to review the Proposed Transaction by 5 working days in accordance with Article 10(3) of the Merger Regulation. This time limit was further extended twice, each time by 15 working days: on 26 January 2017, upon the submission of commitments by the Notifying Parties which triggered the extension automatically pursuant to Article 10(3), first paragraph, final sentence, and again on 14 February 2017 by means of another decision under that Article 10(3), second paragraph, third sentence, to allow the Commission to review additional evidence provided by the Notifying Parties on 9 February 2017.
- (9) On 25 January 2017 the Commission addressed a letter of facts ("LoF") to the Notifying Parties, informing them about pre-existing evidence that was not yet expressly relied on in the SO but which, on further analysis of the file, the Commission considers relevant to support its arguments, as well as about certain additional evidence brought to the Commission's attention after the adoption of the SO. The Notifying Parties submitted written observations to this LoF on 1, 2 and 3 February 2017. Cemex submitted its written comments on the LoF on 31 January 2017.
- (10) In their observations to the LoF, the Notifying Parties and Cemex argued that a letter of facts can only be used to make the parties aware of *new* evidence obtained after the adoption of the SO, but not to present additional evidence which was already available at the time of the SO. Anything else would partially deprive the oral hearing of its purpose as it would allow the case team to withhold evidence until after the oral hearing. To remedy this alleged problem, the Notifying Parties requested a supplementary oral hearing.
- (11) I have rejected the Notifying Parties' request for a supplementary oral hearing. Article 14(1) and (2) of Regulation 802/2004⁹ only provides for the right to request a formal oral hearing in the written comments on the statement of objections, not in observations on a letter of facts.¹⁰ It is clear from the wording of the LoF, which links each piece of evidence to specific sections and paragraphs of the SO, that this

⁹ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing the Merger Regulation), OJ L 133, 30.04.2004, p. 1 (the "Merger Implementing Regulation").

¹⁰ See, by analogy, Judgment of 20 March 2002 in Case T-23/99 *LR af 1998 A/S v Commission*, EU:T:2002:75, paragraphs 186-195.

LoF does not contain any new objections compared to those already set out in the SO, but merely identifies further evidence supporting the same objections. The fact that some of this further evidence was already in the file at the time the SO was issued is immaterial, the relevant criterion for distinguishing between a supplementary SO and a letter of facts being whether or not new objections are formulated. There is no evidence that the case team would have deliberately withheld evidence until after the oral hearing, so as to deprive the oral hearing of its purpose.

- (12) On 26 January 2017 the Notifying Parties submitted commitments pursuant to Article 8 (2) of the Merger Regulation which were market tested from 1 February until 6 February 2017 ("the Commitments").
- (13) In the draft decision, the Commission concludes that the Proposed Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2 of the Merger Regulation, through non-coordinated effects, which could amount in particular to the creation of a dominant position in the markets for grey cement in the circular or modified 250km catchment areas around Cemex's cement plant in Split/Croatia, and that the Commitments do not eliminate the competition concerns entirely, and are therefore insufficient to render the concentration compatible with the internal market. Pursuant to Article 8 of the Merger Regulation, the draft decision therefore declares the Proposed Transaction incompatible with the internal market and the functioning of the EEA Agreement.
- (14) I have reviewed the draft decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which the Notifying Parties and Cemex have been afforded the opportunity of making known their views.
- (15) In view of the above I consider that the effective exercise of procedural rights has been respected in this case.

Brussels, 30 March 2017

Wouter WILS