

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 26 June 2002

declaring a merger to be compatible with the common market and the EEA Agreement

(Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK))

(notified under document number C(2002) 2315)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/754/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings<sup>(1)</sup>, as last amended by Regulation (EC) No 1310/97<sup>(2)</sup>, and in particular Article 8(2) thereof,

Having regard to the Commission Decision of 30 November 2001 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations<sup>(3)</sup>,

Having regard to the final report of the Hearing Officer in this case<sup>(4)</sup>,

(1) On 24 January 2002 Franz Haniel & Cie GmbH (Haniel) and Cementbouw Handel & Industrie BV (Cementbouw) notified the Commission under Article 4 of Council Regulation (EEC) No 4064/89 (the Merger Regulation) of a concentration whereby in 1999 they acquired joint control, within the meaning of Article 3(1)(b) of the Merger Regulation, of Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten (CVK, Netherlands) and its member undertakings through an agreement and by purchasing equity interests of RAG AG (RAG, Germany).

(2) The Commission examined the notification and found that the notified proposal fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and the EEA Agreement. It therefore decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation. After a thorough examination of the case, the Commission has now reached the conclusion that the notified merger proposal did create a dominant position which appreciably restricts competition in a substantial part

<sup>(1)</sup> OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.

<sup>(2)</sup> OJ L 180, 9.7.1997, p. 1.

<sup>(3)</sup> OJ C 261, 30.10.2003.

<sup>(4)</sup> OJ C 261, 30.10.2003.

of the common market. However, the commitments made by the parties remove the reservations about the merger from the competition standpoint.

## I. PARTIES AND OPERATION

### A. Parties

(3) Haniel is a diversified German holding company. In the building materials sector it is active in the manufacture and sale of wall-building materials such as sand-lime bricks, aerated concrete and ready-mixed concrete. Haniel's main centre of activities is Germany, but before the merger it was also active in the Netherlands through its stake in several sand-lime brickworks that are members of CVK. In 2002 it has also taken over the German undertaking Fels-Werke GmbH (Fels) and Ytong Holding AG (Ytong), which are both active, through subsidiaries, in the building materials sector in the Netherlands; however, Haniel has promised the Commission on certain conditions to sell Ytong's Dutch businesses<sup>(5)</sup>.

(4) Cementbouw is active in the building materials trade, construction markets, logistics and raw materials supply, ready-mixed concrete and the building materials industry in the Netherlands. Cementbouw is controlled by CVC Capital Partners Group Ltd (CVC), an investment trust with its registered office in the Canary Islands

(5) CVK sells sand-lime brick products in the Netherlands and controls the production of sand-lime bricks in its member plants. Its membership consists of all the sand-lime brickworks in the Netherlands. The following firms are members (the percentages show their respective stakes in CVK):

— Kalkzandsteenfabriek De Hazelaar BV (De Hazelaar) [...] (\*) %

— Kalkzandsteenindustrie Loevestein BV (Loevestein) [...] \* %

— Steenfabriek Boudewijn BV (Boudewijn) [...] \* %

— Kalkzandsteenfabriek Hoogdonk BV (Hoogdonk) [...] \* %

— Kalkzandsteenfabriek Rijsbergen BV (Rijsbergen) [...] \* %

— Kalkzandsteenfabriek Harderwijk BV (Harderwijk) [...] \* %

— Kalkzandsteenfabriek Roelfsema BV (Roelfsema) [...] \* %

— Kalkzandsteenfabriek Bergumermeer BV (Bergumermeer) [...] \* %

— Anker Kalkzandsteenfabriek BV (Anker) [...] \* %

— Vogelenzang Fabriek van Bouwmaterialen BV (Vogelenzang) [...] \* %

— Van Herwaarden Hillegom BV (Van Herwaarden) [...] \* %

(6) The shares in De Hazelaar, Loevestein, Boudewijn, Hoogdonk and Rijsbergen belong to Haniel. The shares in Harderwijk, Roelfsema and Bergumermeer belong to Cementbouw. Haniel and Cementbouw each own [...] \* % of Anker, Vogelenzang and Van Herwaarden.

### B. Background to and implementation of the merger of 9 August 1999

(7) CVK has been in existence since 1947 and started out as a joint sales organisation for its members, the Dutch sand-lime brick manufacturers. In 1989 it was changed into a cooperative, to improve cooperation among the manufacturers.

(8) The originally independent sand-lime brickworks were taken over in due course by various groups. Before the merger in question was completed, five of the eleven CVK members (De Hazelaar, Loevestein, Boudewijn, Hoogdonk and Rijsbergen) were subsidiaries of Haniel. Three sand-lime brickworks (Harderwijk, Roelfsema and Bergumermeer) were subsidiaries of Cementbouw, which at the time was still part of the Dutch group NBM Amstelland BV (NBM Amstelland)<sup>(6)</sup>. Two works (Anker and Vogelenzang) were subsidiaries of RAG. Haniel owned [...] \* %, Cementbouw/NBM Amstelland [...] \* % and RAG [...] \* % of Van Herwaarden.

(\*) Parts of this text have been omitted in order to ensure that no confidential information is disclosed; these are contained in square brackets and marked with an asterisk.

(5) See Commission Decisions of 21 February 2002 in Case COMP/M.2495 — Haniel/Fels and of 9 April 2002 in Case COMP/M.2568 — Haniel/Ytong.

(6) NBM Amstelland sold Cementbouw to CVC at the beginning of 2001.

(9) In 1998 the Dutch competition authority, Nederlandse Mededingingsautoriteit (NMa), was notified of a proposed merger whereby CVK would acquire control over its members, all eleven of whom were sand-lime brick manufacturers in the Netherlands. Control would be transferred after the conclusion of a pooling agreement (*poolingovereenkomst*). This notification came after the initiation of cartel proceedings against CVK by the public prosecutor, initially under the Dutch competition rules in force up to the end of 1997 and [...]\*. The NMa authorised the notified merger by decision of 20 October 1998 (7). It took the view that the pooling agreement together with the corresponding changes to CVK's articles (*statuten*) ensured that the original business and organisational ties between the member companies and their owners would be broken in a way that ensured that CVK would acquire control over its members. Control of the member companies by their owners (Haniel, Cementbouw / NBM Amsteland, RAG) would also be ruled out by this means. In the NMa's opinion, the notified merger would not lead to the creation or strengthening of a dominant position on the Dutch market. [...]\*

(10) Before the merger was carried out, RAG had decided to surrender its shares in the CVK member companies and sell them to Haniel and Cementbouw. By acquiring these shares, Haniel and Cementbouw would, through their stakes in CVK member companies, each have 50 % of CVK. After the 'Heads of Agreement' had been concluded on 5 March 1999, the parties informed the NMa of their intentions. The NMa told the parties that the proposed sale would not constitute a merger under Dutch law, if it were carried out after the pooling agreement had been concluded.

(11) CVK and its member companies concluded the pooling agreement on 9 August 1999. CVK's articles were also altered on that date, to reflect the provisions of the pooling agreement (*statutenwijziging*). On the same day, the agreement by which RAG sold its shares to Haniel and Cementbouw was signed and implemented. Also on 9 August 1999, a 'cooperation agreement' between Haniel and Cementbouw was concluded, setting out *inter alia* how both firms intended to use their influence over CVK. [Examples of individual provisions of the cooperation agreement]\*.

## II. MERGER

(12) Under Article 3(1)(b) of the Merger Regulation, a concentration shall be deemed to arise where one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

(13) In the present case, by virtue of the agreements concluded on 9 August 1999 (pooling agreement, alteration of the articles, cooperation agreement) and the acquisition of RAG's shares in Anker, Vogelenzang and Van Herwaarden by Haniel and Cementbouw, which was agreed and implemented on the same day, Haniel and Cementbouw acquired control over CVK, and at the same stroke the latter acquired control over its eleven member companies.

(14) Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking, i.e. they have the power to block actions which determine the strategic commercial behaviour of an undertaking and are hence forced to reach a common understanding in determining the commercial policy of the joint venture. This is particularly the case where there are only two parent companies which share equally the voting rights in the joint venture (8).

(15) By buying RAG's shares, Haniel and Cementbouw acquired joint control of CVK. Their respective indirect stakes of 50 % in CVK enable Haniel and Cementbouw to exercise veto rights at the meeting of CVK members (*ledenvergadering*). These rights were created by the withdrawal of RAG, whose presence at the meeting would have made variable majorities possible and hence ruled out control of the meeting by the shareholders.

(16) The meeting of members decides who will sit on CVK's decision-making bodies. These are the managing board (*raad van bestuur*) and the supervisory board (*raad van commissarissen*). The articles and the pooling agreement impose restrictions on the meeting's choice, since no member of the managing board, and only a

(8) Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 5, recitals 19 and 20).

(7) Case 124/CVK Kalkzandsteen.

minority of the members of the supervisory board, may at the same time hold a position in the companies of the shareowners of the CVK members.

- (17) Choosing who sits on the decision-making bodies of a company is a basic strategic decision. A right to veto such a decision therefore gives its holder, for the purposes of the Merger Regulation, control over the company, in this case CVK, since the members of the decision-making bodies will not disregard the views of those who have the right to veto their decisions.
- (18) The acquisition of control of CVK from its members, through the conclusion of the pooling agreement, and the alterations to CVK's articles are also part of the merger and hence a subject of these proceedings. The pooling agreement provides that CVK's member companies will be managed in such a way that CVK is appointed as the institutional manager (*directeur*) of each member company — the shareholder(s) appoint(s) a further manager each — and has the power to instruct that company. The member companies' profits and losses are distributed among the shareholders in accordance with the latter's indirect shares in CVK, irrespective of the profits and losses made by the individual companies. Thus the individual member companies are brought together in an economic unit under the aegis of CVK, which consequently acts as a full-function enterprise for all sand-lime brick manufacturers on the market. All strategic decisions concerning CVK and its member companies are taken centrally by CVK's managing board.
- (19) Further light is shed on Haniel's and Cementbouw's acquisition of control of CVK by the cooperation agreement which they concluded in the context of the pooling agreement. This regulates various aspects of their cooperation within CVK (see paragraph 11). In addition, certain strategic decisions implemented by CVK's corporate management after the merger had been carried out — in particular the closure of three of the eleven sand-lime brickworks — were already being discussed in detail by Haniel and Cementbouw before the merger and thus, for the parties, plainly formed the basis for concluding the pooling agreement<sup>(9)</sup>. Collectively, the documents preparing the decisions of the Haniel group's management with regard to the merger in question show that, in Haniel's eyes at any rate, the pooling agreement would enable the parties jointly to control CVK<sup>(10)</sup>.
- (20) Indirectly through CVK, therefore, Haniel and Cementbouw also acquired control of the member companies. The operations took place within a narrow time frame and closely resembled each other. The legal acts giving Haniel and Cementbouw control of CVK and those giving CVK control of the eleven sand-lime brick companies were performed on the same day (9 August 1999) and were recorded by the notary in a uniform document. Moreover, it was the parties' intention to link the two acquisitions of control, so that one did not take place without the other. The conclusion of the agreements, which were submitted to the NMa, was thus postponed until the conclusion of the negotiations on the transfer of RAG's shares. This came about because RAG had in the meantime expressed the wish to withdraw from CVK, as it was no longer willing to be part of the cooperative's proposed new corporate structure. Economically too, therefore, the two acquisitions of control should be regarded as a unit. Even if one wanted to see these events as two transactions separated in time by a 'logical second', they are dependent on each other in such a way that they should be regarded as a single merger.
- (21) Haniel, too, took this line in its comments on the statement of objections and in the hearing. Cementbouw, however, proposed that, should the departure of RAG be seen as an acquisition of joint control over CVK by Haniel and Cementbouw — which Cementbouw disputes — the Commission's responsibility could relate only to that acquisition. CVK's acquisition of control over its member companies, on the other hand, was legally a separate concentration. It cannot be concluded that because the pooling agreement and the transfer of the RAG shares to Haniel and Cementbouw were agreed on the same day they form a single event in a legal or business sense; it was merely that practical difficulties which had not been described in full had prevented the pooling agreement from being concluded immediately after the NMa's authorisation on 20 October 1999. CVK's acquisition of control of the member plants, however, was legalised by the NMa's legally enforceable decision of 20 October 1998, so that there was no

<sup>(9)</sup> The planned closure of the Bergumermeer, Boudewijn and Vogelenzang works is mentioned in various internal documents of Haniel's as a basis for carrying out the CVK operation [details of the said documents]\*.

<sup>(10)</sup> [Reference to internal documents of Haniel]\*.

way the Commission's investigation in the present proceeding could cover that event as well.

- (22) The Commission cannot share Cementbouw's view. All the agreements concluded on 9 August 1999 constitute a single economic event, as a result of which a joint sales organisation for 11 hitherto legally independent sand-lime brickworks belonging to a total of three different parent companies was changed into a full-function undertaking jointly controlled by Haniel and Cementbouw. Haniel confirmed more than once that for the parties involved in the transaction of 9 August 1999 (Haniel, Cementbouw and RAG) all these agreements were interdependent and formed an economically unified whole. When asked, Cementbouw could not give a convincing explanation why the transaction authorised by the NMa was postponed for more than nine months and only implemented when RAG withdrew. The Commission therefore assumes that RAG would not have been prepared to take part in implementing the pooling agreement as an indirect shareholder in CVK.
- (23) From a formal point of view, admittedly, RAG did conclude the pooling agreement before the sale of its shares to Haniel and Cementbouw was completed. From the fact that the same notary officially recorded the pooling agreement and the alteration of the articles immediately before the sale of the RAG shares at the same meeting, and drew up a single document for the purpose, it is clear however that RAG can be said to have been involved in the implementation of the CVK structure authorised by the NMa only from a superficially formalistic perspective. Such a purely formal perspective is not enough to decide the question whether one or more business acquisitions constitute a concentration that has to be vetted under the Merger Regulation. The provision in the second paragraph of Article 5(2) of the Merger Regulation, which is not directly relevant here, also shows that an economic perspective is appropriate in this case. It can therefore be assumed that the agreements concluded on 9 August 1999 form a single concentration, whereby CVK acquired control over its member undertakings, and at the same time Haniel and Cementbouw acquired control over CVK.
- (24) It follows that the merger authorised by the NMa on 20 October 1998 is different to that carried out by the parties on 9 August 1999. The NMa authorised a merger that would have led only to CVK's acquisition of control over its member companies, without the shareholders acquiring control of CVK. When the NMa took its decision, the shares of the CVK member companies were held by three shareholders (Haniel, Cementbouw and RAG), which would have resulted in variable majorities in the members' meeting and, hence, no one would have had control of CVK. Even if one treats the acquisition of the eleven sand-lime companies by CVK as an independent acquisition of control, it still did not have a Community dimension. The operation on which the NMa took a decision was thus a concentration which did not have to be notified to the Commission under the Merger Regulation.
- (25) Only after it had taken its decision was the NMa informed by the parties that RAG intended to sell its stake in the sand-lime companies to Haniel and Cementbouw in the manner described. The NMa confirmed in an informal letter to the parties that it would not regard the sale of the RAG shares as a merger from the standpoint of Dutch competition law, if the pooling agreement was concluded and the alterations to the articles were made before the shares were transferred. Basically, it took the view that, by transferring control of their companies to CVK, the shareholders would lose direct control over them but would not acquire any indirect control over CVK. This, so the NMa reasoned, was due to the restrictions on the composition of CVK's organs contained in the alterations to the articles. It is therefore applying a criterion for control which according to the Merger Regulation is not relevant in this form. At the time of the correspondence, the cooperation agreement between Haniel and Cementbouw had not been submitted to the NMa.
- (26) Opposing this approach, Haniel objected that the legislator had deliberately followed the Merger Regulation when formulating the concept of control in the Dutch Merger Act. In accordance with the Commission's practice, too, having the same persons sitting on the management boards of the undertakings concerned could lead to the acquisition of control.
- (27) It should be noted that the legislator's intention that the concept of control should be interpreted in a way which corresponds as closely as possible to Community law does not necessarily have to lead, in legal terms, to an identical interpretation. The Commission cannot influence the way the Dutch authority interprets the concept, but it is definitely not acceptable that in its interpretation of the concept in the Merger Regulation the Commission should have to follow the

national authority's municipal law interpretation in an earlier decision. In the present case, the NMa decided that the fact that members of a joint venture's management bodies do not simultaneously occupy posts in the parent companies was crucial to its conclusion that the joint venture was not controlled by the parent companies. As regards the application of Article 3(3) of the Merger Regulation, the Commission cannot share this view, for the reasons already explained. Even if, in accordance with the Commission's practice, the fact that the members of managing bodies are the same persons may, depending on the pattern of the case, be used, together with other elements, to establish control, the opposite conclusion should not be drawn from this, namely that where the persons are not the same there is no control, even if it exists when the other relevant criteria apply.

(28) Since the operation examined by the Commission in these proceedings is therefore different from that notified to the NMa in 1998, and authorised in the decision of 20 October 1998, the national authority's decision will not be rendered ineffective by a Commission decision in the present case. Both authorities have acted in accordance with their respective powers. The proposal notified to the NMa by the parties at that time had no Community dimension because, if the tests of the Merger Regulation are applied, the three indirect parent companies of CVK (Haniel, Cementbouw and RAG) had no joint control of CVK, on account of the variable majority, and were therefore not involved in the merger themselves. However, as a result of RAG's withdrawal, the operation carried out on 9 August 1999 was, by virtue of the Merger Regulation, the basis for the joint control of CVK and simultaneously its member companies by the remaining parent companies, Haniel and Cementbouw, and therefore has a Community dimension. The examination of the concentration under merger control law was thus a matter for the Commission.

(29) The parties and CVK dispute the Commission's jurisdiction on the grounds that in the present case the Commission is setting aside the legally enforceable decision of the NMa and attacking the duly acquired legal positions of CVK and its members. The NMa confirmed to CVK, in the correspondence conducted before the agreement of 9 August 1999 was concluded,

that RAG's withdrawal from CVK did not represent a merger that had to be vetted again, provided the CVK company structure on which the authorisation decision of 20 October 1998 was based was put into effect beforehand.

(30) This objection is not sustainable. As already explained, the parties to the merger proceeding brought before the NMa, did not implement the proposal notified to the NMa, but instead carried out another merger through the agreement of 9 August 1999, which was not authorised by the NMa in that form. The NMa's confirmation in informal correspondence that a new notification was not necessary does not protect the merger from the application of the Merger Regulation or create a legitimate expectation in the parties or CVK, which would be unsoundly attacked by the present Commission decision. It is questionable whether the parties and CVK have met the requirements laid down by the NMa in the correspondence mentioned. As explained in paragraph 23, the CVK company infrastructure authorised by the NMa in its decision of 20 October 1998 before the sale of the RAG shares to Haniel and Cementbouw can at best be invoked in a superficially formalistic perspective. In any event, however, an informal written confirmation from a national authority cannot alter the division of jurisdiction in the Merger Regulation. Besides, since the national authority is not responsible for interpreting the Merger Regulation, that confirmation cannot give the undertakings involved a legitimate expectation that there is no duty to notify under the Merger Regulation. Nor did the NMa actually say this, for the relevant correspondence only mentions a possible duty to notify under Dutch law<sup>(11)</sup>.

(31) Nor is the enforceability of the NMa decision altered by the fact that, on the question of control, the Commission's assessment differs from that made by the NMa. Different legal or factual assessments by different authorities, each acting in accordance with their own powers, cannot always be avoided, especially if those authorities act on a different legal basis (Merger Regulation/national competition law). The legal position of the undertakings affected by the

<sup>(11)</sup> See the letter from CVK's legal adviser to the NMa dated 13 April 1999 and the NMa's letter to the legal adviser dated 28 April 1999.

respective decisions is not compromised thereby, for each authority's decision has a binding effect only in respect of the underlying set of facts, which is different in each case.

## V. COMPATIBILITY WITH THE COMMON MARKET

### A. The relevant product markets

(32) The enforceability of the NMa decision of 20 October 1998 cannot therefore prevent the Commission from exercising this jurisdiction. The transaction carried out on 9 August 1999 thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

(36) The merger relates to the production and sale of wall-building materials. CVK produces and sells sand-lime bricks and sand-lime walling units. In addition to its activities in the construction materials market, Cementbouw produces and distributes ready-mixed concrete and precast concrete walling units. Aside from its participation in CVK, Haniel was not active in the Netherlands until recently, but, after the takeover of Fels, it is active in aerated concrete and gypsum products; the takeover of Ytong, however, is not, on account of the promise to sell Ytong's Dutch operations, a takeover of a building materials business that is relevant to the assessment of this merger. In addition to sand-lime, concrete, aerated concrete and gypsum products, clay bricks are also used in wall building, as are, to a limited extent, steel plates and wooden panels.

### III. COMMUNITY DIMENSION

(33) The firms concerned achieve an aggregate world-wide turnover of over EUR 5 billion<sup>(12)</sup> (Haniel EUR 18,7 billion, CVC EUR 18,8 billion, CVK EUR 0,2 billion). Both Haniel and CVC have a Community-wide turnover of over EUR 250 million (Haniel EUR 17,5 billion, CVC EUR [...] billion, CVK EUR [...] billion). Neither Haniel nor CVC achieves more than two thirds of its Community-wide turnover within one and the same Member State; this is only the case with CVK (Netherlands). Consequently, the notified concentration has a Community dimension.

#### 1. The products

### IV. PROCEDURE

(34) After examining the notification, the Commission established that the notified concentration fell within the scope of the Merger Regulation and raised serious doubts about its compatibility with the common market and the EEA Agreement. On 25 February 2002 it therefore decided to initiate proceedings in accordance with Article 6(1)(c) of the Merger Regulation.

(37) Sand-lime bricks are masonry units prepared from lime and sand by adding water and then compressing and hardening them under steam pressure. The bricks are used exclusively for building walls. They are generally rendered, filled in with thin plaster or hidden from view by a facing wall. When sand-lime masonry is visible, it generally consists of facing bricks, which are produced only in small formats<sup>(13)</sup>. These form a separate market, which will not be discussed in detail here, as the parties produce such facing bricks only in small quantities. Besides sand-lime bricks, other, larger sand-lime walling units are used (usually measuring up to 900 × 625 × 300 mm in the Netherlands).

(35) On 25 April 2002 the Commission sent a statement of objections to Haniel, Cementbouw and CVK, on which Haniel commented on 11 May, and Cementbouw and CVK on 13 May 2002, in separate documents. At the request of the parties and CVK an oral hearing was held in Brussels on 16 May, in which a third undertaking, the builders' merchant Raab Kaarcher Baustoffen ('Raab Kaarcher'), also took part.

(38) Aerated concrete is a building material made from sand, lime and cement, to which aluminium powder is added during the manufacturing process. The powder reacts with water to form a fine porous structure. Aerated concrete products (blocks and other units) are used mainly in the construction of buildings. They can be used for both load-bearing walls — particularly in the case of blocks and very dense units — and non-load-bearing walls.

(39) Gypsum is a light wall-building material used only for non-load-bearing walls, as it has a very low load-bearing capacity. It is used in the form of gypsum plasterboards and planks.

<sup>(12)</sup> Turnover was calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on calculation of turnover (O) C 66, 2.3.1998, p. 25). Turnovers achieved before 1 January 1999 were calculated using the average ECU exchange rate and converted into euros in the ratio of 1:1.

<sup>(13)</sup> Maximum size: 240 × 175 × 113 mm.

- (40) Concrete is another widely used wall-building material. Concrete walls can be made by pouring mixed concrete on site (*in-situ* concrete) or by using precast concrete walling units. A third form of concrete comes in small-format concrete blocks. Concrete walls are built almost only as load-bearing walls.
- (41) In-situ concrete can be cast either by the traditional method of using formworks specially made on site or by 'tunnel forming' (*tunnelgietsbouw* in Dutch) using prefabricated tunnel formworks, whereby walls and ceilings are cast in a single process.
- (42) Precast concrete walling units are produced in factories to precise specifications, then transported to the site and incorporated in the building for which they are intended. They generally constitute entire walls and are thus considerably larger than the sand-lime bricks or blocks predominantly used in masonry work, and require heavy equipment.
- (43) Brick — the classic masonry material — is manufactured from a mixture of clay and water by firing at temperatures of over 1 000 °C. However, the size of individual bricks is limited, as the firing process causes deformations such as shrinkage and warpage. Jointing is therefore necessary when working with these products, in order to offset these deformations.
- (44) Steel plates are used mainly in non-residential construction, and to a lesser extent in residential construction. For example, they are used to fill in wall space in load-bearing concrete or steel structures. In such cases the wall usually consists of two steel plates with insulating material between them (metal sandwich plates).
- (45) Wooden panels are employed in industrial and residential construction, mainly in the form of prefabricated walling units used to close off the building on the outside where there are no load-bearing walls. In the Netherlands wood is used for load-bearing walls only in exceptional cases.
- building materials depend to a not inconsiderable extent on national building practices and traditions, as well as on conditions in the construction industry, and can sometimes vary considerably therefore between certain EEA states. In its investigation, the Commission has focused on conditions in the Netherlands, since it is only in that Member State that the merger has an effect.
- (a) Market definition used by the notifying parties (wall-building materials)
- (47) The parties claim there is a single market in wall-building materials, given the existing conditions of competition, in particular the lack of any price difference based on use and the fact that they are invariably sold via the building materials trade. This market includes all products which are used in the construction of walls: clay bricks, concrete blocks, sand-lime bricks, aerated concrete blocks, precast concrete walling units, sand-lime walling units, aerated concrete units, masonry mortar, *in-situ* concrete, steel plates, gypsum plasterboards and planks, and wooden panels. The parties argue that, when a building is designed, there is generally a choice of various solutions for constructing the walls.
- (48) The parties state that the architect or project developer generally defines the requirements to be met as regards the building's load-bearing capacity, age-resistance, ease of maintenance, thermal insulation, fire protection and noise insulation. In some cases the architect also makes a selection of building materials in the building's specifications, but, according to the parties, these specifications leave ample room for alternative solutions. Building contractors have a free choice of building materials, provided that the specifications are met. In the project proposal they can opt for a specific building material or put forward several possible solutions.

## 2. Definition of the relevant market

- (46) In determining the extent of a relevant market, the Commission has to consider various product market definitions. In so doing, it has to be borne in mind that the use and exchangeability of various wall-
- (49) The parties do concede, however, that the various wall-building materials are not entirely interchangeable for every purpose. In view of the considerable differences in the demands made on building materials, depending on whether they are used for load-bearing or non-load-bearing walls, the parties consider that there is a case for dividing the market in wall-building materials into materials for load-bearing and for non-load-bearing walls.



(b) Previous Commission practice  
(masonry/load-bearing masonry)

(50) In its Decision on Preussag/Hebel<sup>(14)</sup>, the Commission looked at two alternative product market definitions, but without adopting any firm position. On the one hand it considered the possibility of a market for all materials that can be used to build walls by the 'brick on brick' method (masonry), including clay bricks, sand-lime bricks, aerated concrete blocks and pumice blocks. Its investigations at that time suggested that these products were interchangeable at the building planning stage. Within this market definition, the Commission also considered that a further distinction could be made between load-bearing and non-load-bearing walls (load-bearing masonry). It took no account of precast concrete walling units or *in-situ* concrete.

(c) Practice of the German Bundeskartellamt (masonry)

(51) The Bundeskartellamt has consistently defined the relevant market in wall-building materials in a similar manner to that which the Commission initially envisaged in its Decision on Preussag/Hebel. In its decisions the Bundeskartellamt assumes the existence of a market in building materials for rising back-up masonry which takes in aerated concrete products, sand-lime products, bricks, pumice blocks and concrete blocks (masonry). The Bundeskartellamt does not distinguish between load-bearing and non-load-bearing walls. As far as the Bundeskartellamt is aware, the materials used in Germany for both types of wall are essentially the same.

(d) Practice of the NMa (building materials for load-bearing walls)

(52) By contrast, the NMa draws a distinction between load-bearing and non-load-bearing walls because, to its knowledge, different materials are used for each type of wall in the Netherlands<sup>(15)</sup>. Because of this difference in uses, sand-lime, which is used for both types of wall, is in competition with different materials in each case. The NMa has included all wall-building

materials used for load-bearing walls in its definition of the market in wall-building materials for load-bearing materials. This covers not only the above-mentioned wall-building materials for masonry referred to in recital 51 (the 'brick on brick' method), but also precast concrete units and *in-situ* concrete. However, it should also be pointed out that, in a subsequent decision, the NMa opened up the possibility of a distinction between *in-situ* concrete and other wall-building materials<sup>(16)</sup>.

### 3. Assessment

(53) On the basis of the information available to it and, in particular, the market investigation carried out by it in the case, the Commission, like the NMa, concludes — as in its Decisions of 21 February 2002 (Case COMP/M.2495 — Haniel/Fels) and 9 April 2002 (COMP/M.2568 Haniel/Ytong) — that there is a relevant product market in the Netherlands for building materials for load-bearing walls and a separate one for building materials for non-load-bearing walls. The former includes all building materials used for load-bearing walls, such as clay bricks, sand-lime, aerated concrete, concrete blocks, precast concrete wall units and, possibly, *in-situ* concrete. However, the result of the market investigation suggests that *in-situ* concrete, in particular that cast by tunnel forming, should be excluded; however, it is not necessary to settle this matter conclusively, since the question does not affect the assessment of the concentration. Likewise, the market for building materials for non-load-bearing walls covers all building materials used for non-load-bearing walls, such as sand-lime, aerated concrete, gypsum plasterboards and planks, steel sheets and wood.

(54) All the building materials included by the parties in their proposed market definition are suitable for the building of walls and are actually used for this purpose. The Commission's market investigation in the Netherlands has shown, however, that not all of these materials are in competition with one another.

<sup>(14)</sup> Case COMP/M.1866 — Preussag/Hebel, 29.3.2000; but compare the Decision of 21 February 2002 on Case COMP/M.2495 — Haniel/Fels and the Decision of 9 April 2002 on Case COMP/M.2568 — Haniel/Ytong.

<sup>(15)</sup> NMa, Decision of 20 October 1998 in Case 124/CVK — Kalkzandsteen.

<sup>(16)</sup> NMa, Decision of 29 February 2000 in Case 2427/NCD — Fernhout.

## (a) Properties of the various wall-building materials

- (55) Each of the abovementioned wall-building materials has specific properties that are taken into account in the selection of a specific wall-building material for a specific building project.
- (56) Sand-lime products are a cheap building material which, though they cannot achieve the size of aerated concrete precast products, nevertheless, with dimensions of up to 900 × 625 × 300 mm, are larger than traditional bricks. Furthermore, sand-lime products, like aerated concrete, have a smooth surface that does not have to be evened out by jointing. The walling units can be glued together. In addition, sand-lime products can be cut to shape at the factory in accordance with the building plans, so that walling units forming the gable or window openings can be pre-prepared. All these factors mean that less time and less expenditure on wage costs are needed than in the case of, for example, ordinary bricks. At the same time, sand-lime units do not require large-scale investment in heavy cranes, as in the case of precast concrete wall units, or casting moulds, as in the case of *in-situ* concrete. In the Netherlands, because of their excellent load-bearing properties, sand-lime is used for load-bearing walls and, to a lesser extent, also for non-load-bearing walls. In the Netherlands, it is estimated that some [60-80]\* % of sand-lime is used in load-bearing walls. When it is used in non-load-bearing walls, sand-lime has the disadvantage of being relatively heavy (about twice as heavy as aerated concrete). However, the material does have good sound-insulating properties and is suitable in particular for high, non-load-bearing walls, such as those often required in non-residential construction. Sand-lime is the traditional and most popular wall-building material in the Netherlands.
- (57) Precast concrete walling units do not require masonry work as they are already the size of the wall to be produced. Concrete as a product can be produced from relatively simple raw materials. However, fairly large-scale resources such as cranes must be used in erecting such walls, and this in its turn involves some investment costs. They are therefore used mainly for relatively large-scale projects. Precast concrete walling units are used mainly in industrial construction (in Dutch, *utiliteitsbouw*, abbreviated to *u-bouw*), and less in housing construction (in Dutch, *woningbouw*, the abbreviated form of which is *w-bouw*). However, their use in medium-sized projects involving 10 or more units, can also save costs, as the wall is produced at the factory and erection at the building site requires relatively little labour and takes relatively little time. The bigger the project, the lower the costs for the precast wall.
- (58) In-situ concrete requires the largest amount of on-site investment in its use, particularly *in-situ* concrete used

in tunnel forming. The manufacture and use of the frameworks required for repeated casting in the tunnel forming method are so costly that this method is economically viable only if there is a minimum of 30 to 50 residential units (over about 15 residential units according to other sources) and only if those units are identical in shape and size<sup>(17)</sup>. There is therefore little flexibility as to shape and size in construction using *in-situ* concrete in the tunnel forming method. However, flexibility is an important criterion in the Netherlands, even in the case of fairly large projects, so as to avoid uniformity. The tunnel forming method is not, therefore, an appropriate technique for relatively small building projects or projects which do not include rectangular shapes or repetitive use of the material. *In-situ* concrete is also used in the construction of both individual houses and high-rises, the load-bearing capacity of which is ensured by means of a cast concrete skeleton to which non-load-bearing wall-building materials are attached.

- (59) Aerated concrete is an expensive wall-building material. It is produced from high-grade, expensive basic materials with high energy costs. Large sections must be reinforced with steel, which further increases the price, since reinforced sections entail significant costs in the manufacture of the reinforcing elements. In contrast to steel reinforcement in the case of ordinary concrete, the steel used for reinforcement here has to be coated in order to protect against corrosion. The constructional properties of aerated concrete are somewhat more limited than those of sand-lime, but it is possible to use it to build up to two storeys with load-bearing walls. Aerated concrete does, however, have excellent thermal insulation properties. In Germany, some 80 % of the aerated concrete products used in wall building are used for load-bearing walls, while only 20 % are used in non-load-bearing walls. In the Netherlands, however, the ratio is the reverse: some 80 to 85 % of aerated concrete is used in non-load-bearing walls.
- (60) Gypsum is a light material. Because of this property, it is very well suited to non-load-bearing walls. The load-bearing demands placed on floors are small, and space is saved. Because of its lack of load-bearing capacity, gypsum is used only for non-load-bearing walls.
- (61) Bricks are relatively small wall building units, and because of their uneven surface they are usually jointed, although there are apparently also ways of

<sup>(17)</sup> The construction industry association VOB claims that the tunnel method can be a viable option where there are more than about 15 residential units. However, this depends on local circumstances, and in particular on the design of the houses and the degree of variation. Most market participants questioned regard the tunnel method as economically viable only where more than 30 to 50 residential units are involved.

gluing them together. Their use thus entails relatively high labour costs and is relatively time-consuming, and this makes bricks unsuitable for industrial construction methods.

(b) Distinction between wall-building materials for load-bearing walls and for non-load-bearing walls

(62) The market investigation showed that the decision as to which building material to use for a specific project is influenced both by the client and the architect and by the building contractor. Exactly how much influence on the choice of wall-building material is exercised by each of these three groups of persons varies from case to case.

(63) The client's precise preferences regarding, for example, aesthetics and building costs are factors here, as are the architect's specifications. Criteria which are of relevance in the selection of the various wall-building materials are quality, constructional properties, flexibility of use, appearance, the purchase price of the material and the costs involved in using it. The special requirements of the building project must be taken into account in this respect, as must the use to which the building is to be put, the necessary load-bearing capacity, resistance to ageing, fire protection, sound insulating properties, other technical capabilities, timetable and the overall costs of the project. The building contractor's main criteria, in so far as he has any options regarding the choice of wall-building materials, are costs and building speed. These in turn are influenced by his experience with specific building materials and the resources and facilities (e.g. cranes) available to him. As far as the cost factor is concerned, it must be borne in mind that the cost of materials is always just one part of the overall costs of erecting a wall.

(64) In its market investigation, therefore, the Commission surveyed all these decision-makers to determine the basis of their conduct in selecting wall-building materials. Similarly, the manufacturers of the various building materials were asked to provide information. In the Netherlands, the survey showed that, in selecting building materials, a fundamental distinction was made between the choice of building materials for load-bearing walls and building materials for non-load-bearing walls.

(65) The difference between load-bearing and non-load-bearing walls, as the terms suggest, is the load-bearing function of the relevant wall-building material. Load-bearing walls ensure the stability of a building. The relevant walls are often external walls. However, internal walls too may perform a load-bearing function.

Such walls must be distinguished from walls which do not have any function in supporting the building, but merely divide up the space or fill gaps inside a load-bearing framework (external or internal walls). Building materials used in load-bearing walls must meet certain requirements as to resistance to pressure, load-bearing capacity and stiffness. Building materials used in non-load-bearing walls, by contrast, must meet other, possibly contrary requirements. Lighter, non-load-bearing walls, for example, have the advantage of making fewer demands on the load-bearing capacity of the ceilings. Thin non-load-bearing walls for their part save space.

(66) These varying requirements in respect of load-bearing and non-load-bearing walls result, in the Netherlands, in different building materials being selected for these different purposes. In the Netherlands, the main material used in load-bearing walls is sand-lime. Sand-lime is used in [50 to 60]\* % of all load-bearing walls. Concrete is the next largest building materials category. *In-situ* concrete is used in [10 to 15]\* % of all load-bearing walls. At least two-fifths of this building material is used in tunnel forming<sup>(18)</sup>. A total of [5 to 10]\* % is accounted for by load-bearing walls made from precast concrete wall units. Aerated concrete and bricks, accounting for proportions of [0 to 2]\* % and [2 to 5]\* % respectively, play a very minor role.

(67) In the case of non-load-bearing walls, by contrast, gypsum products are the main materials used. They account for [40 to 50]\* % of the materials used in non-load-bearing walls. Next comes aerated concrete with [15 to 20]\* %, followed by sand-lime with [15 to 20]\* %.

(68) This demand-side pattern is typical of the Netherlands and differs fundamentally from that in other countries, such as Germany. In Germany, the proportions in the use of aerated concrete for load-bearing and non-load-bearing walls are just the reverse of those in the Netherlands. Whereas in Germany 80 % of all aerated concrete products are used to construct load-bearing walls, in the Netherlands 85 to 90 % of all aerated concrete products are used in non-load-bearing walls. In Germany, concrete plays a minor role in load-bearing walls in residential construction, while bricks and other masonry units feature prominently. In Belgium, by contrast, concrete blocks appear to be much more widespread than in the Netherlands and, together with bricks, to be the most common wall-building material. The use of *in-situ* concrete in tunnel forming is much less widespread in Germany and Belgium than in the Netherlands.

<sup>(18)</sup> According to the information provided by the parties, *in-situ* concrete accounts for [30 to 40]\* % of the materials used in tunnel forming; the market investigation suggested that the proportion might be even higher than that.

- (69) The reasons for these differences in demand-side behaviour stem, firstly, from differences in building traditions and aesthetic approaches and, secondly, from the advanced industrialised building methods used in the Netherlands.
- (70) In the Netherlands, building and construction activity is based on large-scale projects even in the residential sector. Less than 20 % of all new residential building relates to individual house building. In Germany, by contrast, the figure is more than 90 %. In the Netherlands, large areas are released by the government for building purposes, and on such areas the building and construction industry erects as much as several thousand residential units (e.g. what are known as *VINEX locaties*). In building projects on this scale, building materials that require high investment but involve lower wage costs, such as *in-situ* concrete using the tunnel forming method, are profitable. Consequently, bricks, which are labour-intensive at the building site (small size and need for jointing) and hence entail higher wage costs and are more time-consuming, are used to only a minor extent.
- (71) Sand-lime is the traditional building material in the Netherlands, since it is very cheap to produce and can be used with great flexibility, speed and on favourable cost terms in the building process (large units, cut to the required shape in the factory, no jointing necessary).
- (72) Aerated concrete, which is very widely used in Germany in load-bearing walls because of its good thermal-insulating properties, is, despite this advantage, not so widely used in the Netherlands because of its substantially higher price compared to sand-lime. In Germany, 30 cm-thick aerated concrete units are used for load-bearing walls. These have then only to be plastered and painted to produce a complete wall that meets high thermal-insulation requirements. There are no costs for facing masonry and additional insulation. In the Netherlands, by contrast, smooth, plastered external walls are not customary. The preference there is for facades which give the impression of brickwork. This is done by means of brickwork facing in front of the load-bearing wall and the insulation between wall and facing. This means that the cost advantage of aerated concrete, which does not need insulation and facing, is forfeited and hence that aerated concrete is a much more expensive building material than sand-lime. Consequently, aerated concrete is used only occasionally in the Netherlands for load-bearing walls in residential construction.
- (73) However, since aerated concrete costs about the same as gypsum walls, is relatively light, but affords better thermal insulation, aerated concrete products are used in the Netherlands for non-load-bearing walls. Sand-lime is also used here. This is because it has very good sound-insulating properties which may, in some cases, offset its disadvantages as a heavy building material. In addition, because of its constructional properties, it is particularly suitable for high, non-load-bearing walls, such as are required primarily in non-residential construction.
- (74) There is therefore only limited competition in the Netherlands between, on the one hand, products used in load-bearing walls and, on the other, those used in non-load-bearing walls. This prompts the Commission to draw a distinction in the Netherlands between a relevant product market in load-bearing walls and one in non-load-bearing walls. This is despite the fact that some wall-building materials that are suitable for load-bearing walls may also be used in non-load-bearing walls and vice versa. This applies in particular to sand-lime, which is the only wall-building material which is used to any significant extent equally in load-bearing and non-load-bearing walls. Firms which make products suitable for both types of wall are, in the market in load-bearing walls, in competition with a largely different set of competitors and faced with different competitive conditions from those applying in the market in non-load-bearing walls.
- (75) In setting its prices for products used in load-bearing walls, CVK, as the only sand-lime brick producer in the Netherlands, is not restricted by prices charged on the market in products intended for non-load-bearing walls. The Commission's market investigation shows that CVK is often aware of the specific use of its products<sup>(19)</sup>. Firstly, in many cases, the company knows the place where its products will be used, since it is itself often responsible for delivering them to a particular building site. Secondly, as regards the delivery of sand-lime walling units, that make up half its turnover, CVK has access to the architect's plans. In addition, Haniel has indicated that the thickness of a substantial portion of sand-lime products means that they can be used in load-bearing or non-load-bearing walls. This information was confirmed by Raab Karcher during the hearing. In view of the comments of the parties and CVK on the statement of objections and the discussion of this question at the hearing, the Commission therefore takes the view that CVK is in a position to differentiate its prices according to the perceived competitive situation. In this respect, implicit price differentiation between large and small building projects through bulk discounts and uniform transport prices is possible. CVK has said that it grants builders' merchants project- and contractor-specific discounts.

<sup>(19)</sup> In particular for elements cut for a specific use or for specific deliveries; see paragraph 56.

(76) Even if CVK cannot differentiate the prices of sand-lime brick products for load-bearing walls from those for non-load-bearing walls, it is to be assumed that it tailors its pricing strategy primarily to the requirements of the market in load-bearing walls, since it sells [60 to 80]\* % of its products on that market.

(c) Inclusion of *in-situ* concrete in the market in wall-building materials for load-bearing walls

(77) The results of the market investigation raise the question of whether and to what extent *in-situ* concrete is also to be included in the market in wall-building materials for load-bearing walls. This applies in particular to *in-situ* concrete used in tunnel forming. As already explained in recital 58, this technique involves high fixed investment costs which become worthwhile when only a certain number of units are to be built. According to various sources, this number is in the region of 30 to 50 residential units or, if they are of identical shape and size, as few as approximately 15 residential units. This means that this method is not an option, not only in the case of small projects, but also in the case of large projects in which, for aesthetic and social reasons, a repetitive building style is to be avoided. Irrespective of the exact number of residential units required to make tunnel forming economically viable, it can be concluded that sand-lime is not exposed to competition from *in-situ* concrete in relatively small-scale projects<sup>(20)</sup>.

(78) Furthermore, tunnel forming allows not only walls but also, as part of the same process, ceilings to be produced. For these reasons, a decision to opt for tunnel forming is not so much a price decision as a decision in favour of a particular system. For instance, if a builder working on a construction project wanted to switch from sand-lime products to *in-situ* concrete as part of the tunnel forming, this would result in not only a change in the wall construction materials, but also in a change in the materials used to make the floor and ceiling. This means that a changeover to tunnel forming would result in a change in the overall construction plan. That is why *in-situ* concrete used in tunnel forming would be a rather unusual option for those builders who currently use sand-lime products for their projects.

(79) In their comments on the statement of objections and in the hearing, the parties and CVK confirmed and consolidated their view that *in-situ* concrete in all forms must be regarded as the relevant product market.

(80) However, the question of whether *in-situ* concrete, and in particular *in-situ* concrete used in tunnel forming, should be viewed as belonging to the market in wall-building materials for load-bearing walls can, however, be left open, as it has no impact on the outcome of the negotiation. Although the parties deemed it appropriate to define the relevant product market, which includes all kinds of *in-situ* concrete, the planned merger has placed CVK in a dominant position on the Dutch market.

#### 4. Conclusion concerning the relevant product markets

(81) In view of the above, the Commission considers that, for the purposes of assessing the notified concentration, a distinction has to be made in the Netherlands between a market in building materials for load-bearing walls and a market in building materials for non-load bearing walls. As far as the market in building materials for load-bearing walls is concerned, the question of whether *in-situ* concrete, in particular that used in tunnel forming, is to be included in this market, may be left open, as it does not affect the assessment of the concentration.

### B. The relevant geographic market

(82) The parties define the relevant geographic market with regard to the Netherlands as national. Although a few firms involved in the building materials trade tend to operate on a regional basis, they argue, transport costs in the Netherlands are not of such significance that building materials cannot be supplied throughout the entire territory of the Netherlands. Wall building materials are transported by lorry, usually from the production site direct to the building site.

(83) The investigations have confirmed that the Dutch market is indeed national. The market investigation has shown that the prices charged for most wall building materials are calculated free at production site for delivery throughout the Netherlands, even though transport costs represent a not insignificant cost factor. CVK, as the only producer of sand-lime, can, moreover, supply any building site in the Netherlands direct from the nearest sand-lime works.

(84) Although imports of wall building materials from Belgium and Germany do apparently take place in the border regions of the Netherlands, these are marginal and do not justify incorporating parts of Belgium and Germany into the relevant geographic market. The market investigation has revealed the existence of

<sup>(20)</sup> It should be noted in this context that in many cases CVK knows the site where its products are to be used, (see recital 75).

barriers to market entry based, in particular, on building and industrial safety regulations. For example, bricks laid manually may not weigh more than 18 kg in the Netherlands which is not the case in other Member States. On the other hand, building standards in Germany mean that walls of comparable wall thickness must be stronger and, given the extra materials that requires, are more expensive than in the Netherlands. All the important undertakings that operate on the Dutch market in wall-building materials are also established in the Netherlands. Belgian and German producers operating in the Netherlands also do so via Dutch subsidiaries.

- (85) The Commission therefore takes the view that, for the purposes of this Decision, the relevant geographic market should be defined as a national market covering the entire territory of the Netherlands.

### C. Competitive assessment

- (86) The Commission has reached the conclusion that the merger in this case, i.e. the acquisition of control by CVK over its members and by Haniel and Cementbouw over CVK, has led to the emergence of a dominant position by CVK and its controlling parent companies Haniel and Cementbouw on the market in wall-building materials for load-bearing walls in the Netherlands.

- (87) In the following, there will first be a description of the dominant position as it stands today followed by an account of the extent to which it has arisen as a result of the merger.

#### 1. Dominant position of the parties

##### (a) Principles

- (88) The Court of Justice of the European Communities has defined a dominant position as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. Such a position does not preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an

appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

- (89) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among which the existence of very large market shares is highly important. Important evidence of the existence of a dominant position is, moreover, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest<sup>(21)</sup>.

##### (b) Market structure

- (90) In 2000, the total quantitative volume of the Dutch market in wall-building materials was [...] m<sup>3</sup>. In value terms, it had a volume of some EUR [...]\*. The market in wall-building materials for load-bearing walls had a volume of [...] m<sup>3</sup> and was worth EUR [...]\*. If *in-situ* concrete is excluded from the load-bearing walls market, the latter's volume shrinks to [...] m<sup>3</sup> and EUR [...]\*. If only *in-situ* concrete by the tunnel forming method is excluded, the market volume is [...] m<sup>3</sup> and EUR [...]\*<sup>(22)</sup>.

- (91) Below are the market shares (by volume) of the parties and of their main competitors including all wall-building materials for load-bearing walls and, alternatively, excluding *in-situ* concrete and *in-situ* concrete cast by the tunnel-forming method<sup>(23)</sup>:

<sup>(21)</sup> Case 85/76 Hoffmann-La Roche v Commission (1979) ECR 461, paragraph 39; see also Case T-102/96 Gencor v Commission (1999) ECR II-753, paragraphs 201 and 202.

<sup>(22)</sup> Assuming that [20 to 40]\* % of the *in-situ* concrete used in the Netherlands is cast using the tunnel-forming method; see footnote 18.

<sup>(23)</sup> The calculation is based on estimates made by the parties on the shares of the various building materials in the consumption of wall-building materials as a whole and broken down between load-bearing and non-load-bearing walls. In as much as wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is estimated to be used in load-bearing walls was taken into account. On the basis of its market investigation, the Commission considers these estimates to be basically accurate; however, precise statistical data are not available.

(in %)

Company	Building material	Market share		
		Load-bearing wall building materials, including <i>in-situ</i> concrete	Load-bearing wall building materials, excluding <i>in-situ</i> concrete used in tunnel forming	Load-bearing wall building materials, excluding <i>in-situ</i> concrete
CVK (Haniel/Cementbouw)	Sand-lime products	[50-60]*	[50-60]*	[60-70]*
Cementbouw	Precast concrete walling units <i>In-situ</i> concrete	[2-5]*	[2-5]*	[2-5]*
Haniel (Fels)	Aerated concrete	[0-2]*	[0-2]*	[0-2]*
<b>CVK + Cementbouw + Haniel</b>		<b>[60-70]*</b>	<b>[60-70]*</b>	<b>[60-70]*</b>
Mebin	<i>In-situ</i> concrete	[2-5]*	[2-5]*	0,0
NCD	<i>In-situ</i> concrete	[0-2]*	[0-2]*	0,0
Wienerberger	Clay bricks	[0-2]*	[0-2]*	[0-2]*
Hanson (Pioneer)	Clay bricks <i>In-situ</i> concrete	[0-2]*	[0-2]*	[0-2]*
Oudenallen	Precast concrete walling units	[0-2]*	[0-2]*	[0-2]*
Ytong	Aerated concrete	[0-2]*	[0-2]*	[0-2]*
CRH	Clay bricks	[0-2]*	[0-2]*	[0-2]*

(92) According to the Commission's findings, CVK alone has a share of more than [50 to 60]\* % of the market in wall-building materials for load-bearing walls. The second-largest market player is Cementbouw, which, together with Haniel, has acquired control of CVK as a result of the merger, with a market share of almost [2 to 5]\* %. Cementbouw owes its market position to its activities in the area of precast concrete walling units and *in-situ* concrete. Apart from through CVK, Haniel is active on the Dutch market only through the activities of Fels. The parties' joint market share is therefore almost [60 to 70]\* %. The next-largest competitor is the ready-mixed concrete manufacturer Mebin, with a market share of around [2 to 5]\* %. Other competitors have market shares of less than 2 %. The market share of CVK is therefore more than [10 to 15]\* times bigger than that of its leading competitor.

(93) If *in-situ* concrete were not to be included in the market in wall-building materials for load-bearing walls, the market share of CVK alone would be [60 to 70]\* % as CVK does not supply *in-situ* concrete. Including Cementbouw's market share, the parties would hold a combined market share of around [60 to 70]\* %. The largest independent competitor, Mebin, would then not be active in the relevant product market. This would

leave only a limited number of much smaller competitors whose market shares do not exceed 2 %, or indeed much less in some cases.

(94) If only *in-situ* concrete cast by the tunnel-forming method is excluded from the market definition, CVK's market share would be [50 to 60]\* %. Including Cementbouw's market share, the parties would hold a market share of around [60 to 70]\* %.

(95) The market positions of the parties and their competitors have — as the parties themselves state — hardly changed in recent years.

#### (c) Role of the various wall-building materials

(96) None of CVK's competitors in the Netherlands is active in the sand-lime brick sector. CVK is the only producer and supplier of this building material in the Netherlands. Sand-lime is, however, for the reasons given above, the traditional and most popular wall-building material in that country. Moreover, they are the only wall building material to be used to a significant extent in both load-bearing and non-load-bearing walls.

(97) *In-situ* concrete cannot be regarded as a material for which CVK is subject to considerable competitive pressure.

ure. On the one hand, *in-situ* concrete accounts for only [10 to 15]\* % of the market in wall-building materials, of which some [0 to 2]\* % is attributable to Cementbouw. According to data from the industry association VOBN, the share of *in-situ* concrete seems to have remained stable. According to some on the market, it has even declined slightly. Those questioned put this down to a trend towards small and more diversified construction projects. On the other hand, the competitive pressure on the market depends not only on the market position of one product but also on the market position of the competitors which supply that product. As indicated above, competitors on the market in wall-building materials are dispersed. The largest producer of *in-situ* concrete, Mebin, has a share on the overall market for wall-building materials for load-bearing walls of only [2 to 5]\* %, while that of other competitors is less than 2 %. By contrast, the parties have a market share of [60 to 70]\* %, with that of CVK alone standing at [50 to 60]\* %.

- (98) However, an important factor for the market position of competitors is which products they offer. This is particularly true in this case because the market in question is a differentiated product market on which a range of products compete with each other to varying extents for the same uses. In each case, it depends on the characteristics of the product and the specific situation whether a given product directly competes with another product, and — as explained in connection with the definition of the product market — it is consequently doubtful whether or not *in-situ* concrete should be included in the relevant market. In such a market, the ability to supply a specific product which is perhaps particularly appreciated by certain consumers or for certain uses may be important to a given firm's market position. Consequently, CVK's market position is strengthened over and above its market share by the fact that it is the sole manufacturer of sand-lime products in the Netherlands.

(d) Barriers to market entry

- (99) Notwithstanding the parties' and CVK's comments on the statement of objections and the discussion during the hearing, the Commission takes the view that there are substantial barriers to market entry. CVK controls all the sand-lime brickworks in the Netherlands and hence the production of by far the most important wall-building material in the relevant product market. The Commission's market investigation has shown that it would be possible for manufacturers of other wall-building materials to undertake the manufacture of sand-lime brick products only at great expense in terms of time and investment. The same is also true of other

wall-building materials such as aerated concrete. The production processes and hence the production plants are different for each wall-building material.

- (100) While Haniel has put the investment costs for a sand-lime brickworks at only some EUR [...]\*. The setting-up of a ready-mix concrete plant costs, according to Haniel, EUR [...]\*; Cementbouw has estimated these investment costs to be much higher. Moreover, the competitors questioned in connection with the investigation of the market have all stated that they would have considerable difficulties in expanding their existing capacities or launching production of another wall-building material. One competitor indicated that the establishment of a new sand-lime brickworks would require an investment of EUR [...]\*, that the necessary official authorisation would be difficult to obtain, and that building the works alone would take two years. In contrast to the parties' view that the market entry barriers are low, the Commission accordingly assumes that no competitive pressure is exerted by possible market entries such as to control CVK's room for manoeuvre on the relevant market. Consequently, there have been only a few market entrants in recent times, and these were all limited to the concrete sector.
- (101) There are also considerable excess capacities for sand-lime products, a fact which makes market entry an unattractive prospect, even now that CVK has closed three of its original eleven sand-lime brickworks. Moreover, CVK's remaining production facilities are evenly dispersed across the Netherlands, and it is therefore able to supply any customer from a local brickworks. The Commission's market investigation has shown that this factor also strengthens CVK's market position.

(e) Buyer power

- (102) Notwithstanding the parties' and CVK's comments on the statement of objections and the discussion during the hearing, the Commission takes the view that the customers of CVK have no buyer power. No one customer buys a substantial part of CVK's output. Although the five largest building materials traders (the largest of which has a sales share of [20 to 30]\* %) account for [60 to 80]\* % of CVK's sales, this does not give the largest buyer any power since there are enough other traders on the market. Moreover, some of these traders are buying associations (*inkoopcombinaties*). What is important is the fact that the dealers are dependent on dealing in CVK's products. Sand-lime is the most



important building material in the Netherlands. The next most important is concrete. However, this does not constitute an alternative for traders because neither *in-situ* concrete nor, to any appreciable extent, precast concrete walling units are marketed via them. Consequently, no other building material can replace sand-lime products for traders. This was confirmed by Raab Karcher during the hearing. It may be true that — as Haniel argued — the building materials trader risks losing the building project to concrete if his sand-lime brick offer is not cheap enough. However, this only means that the trader with his sand-lime brick offer — and indirectly also CVK — is in competition with concrete suppliers, not that the trader is in a position to exert buyer power on CVK.

- (103) Moreover, CVK has considerable influence on determining the prices charged to building firms. Although materials traders bear the financial risk of sale, it is building firms and not traders that decide which materials to use. As already explained in detail, CVK is generally well informed about the identity of users and the use to which its products are put. For example, bricks are supplied direct by the works situated closest to the construction project. According to CVK, discounts are granted to dealers, whereby they might be bound to supply certain construction firms or projects. Moreover, construction firms are widely dispersed and not in a position to exert buyer power themselves. Similarly, the demand component of the large Dutch building groups such as Bam Groep, Koninklijke Volker Wessels Stevin, Heijmans, Ballast Nedam and HBG is too small individually to exert any buyer power such as could offset CVK's dominance on the supply side.

(f) Influence of competition on the adjacent market

- (104) CVK's operational scope on the market in wall-building materials for load-bearing walls is not limited either by the conditions of competition on the adjacent market in wall-building materials for non-load-bearing walls, on which its market position is weaker. The Commission's comment in the statement of objections that CVK is aware, when setting prices, of whether its products will be used for load-bearing or non-load-bearing walls and gears its prices primarily to the conditions of

competition on the load-bearing-walls market, which for it is more important, was not refuted by the parties and CVK. Reference should be made to the comments in recitals 75 and 76 in this respect.

(g) Integration with Cementbouw

- (105) CVK's dominant position on the Dutch market in wall-building materials for load-bearing walls is also characterised by its structural links to its controlling parent company Cementbouw.
- (106) Cementbouw operates on the relevant market by supplying *in-situ* concrete and precast concrete walling units. In the area of precast concrete walling units, Cementbouw has a strong position in particular with regard to smaller units, which are principally used in residential construction, i.e. products which are readily substitutable for sand-lime products. Together, CVK and Cementbouw thus offer three or, (depending on the market definition), two of the most important wall-building materials for load-bearing walls. CVK/Cementbouw therefore have a considerably wider operational scope than competing suppliers of wall-building materials on a differentiated product market such as the one in question, since no other supplier is in the position of covering their customers' needs as comprehensively.
- (107) Cementbouw is also active on the downstream building materials trading market. Its building materials trading division is one of the largest wholesalers of building materials in the Netherlands, with a strong market position above all in the west, north and east of the country<sup>(24)</sup>. Some building materials dealers have indicated that those dealers belonging to Cementbouw receive preferential treatment from CVK. Both of these factors contribute to CVK-Cementbouw's considerably wider operational scope as compared to its competitors.

- (108) Cementbouw objected that the structural link between CVK and Cementbouw could not be taken into account in the competitive assessment, because CVK was not controlled by Cementbouw and both undertakings had in the past been in competition with one another. However, for the reasons set out in Section II of this Decision, the Commission starts from the assumption that Cementbouw controls CVK on a joint basis with

<sup>(24)</sup> See, for example, the 2000 Annual Report of NBM Amstelland (at that time Cementbouw's parent company).

Haniel. In assessing the effects of the merger, therefore, it cannot be assumed that Cementbouw and CVK operate independently of one another on the market as competitors.

(h) **Result**

(109) The parties' market position can be summarised as follows: CVK has by far the largest market share with more than [50 to 60]\* %. To this should be added Cementbouw's market share of almost [2 to 5]\* %, with the result that the parties have a combined market share of almost [50 to 60]\* %. The remaining market volume is fragmented and divided among competitors with market shares of just a few percent. CVK, moreover, is the only Dutch supplier of the most important building material in the Netherlands. The market power available to the parties is not offset by buyer power on the other side of the market. It should also be borne in mind that Cementbouw is active with other important building materials on the relevant market itself and on the downstream market of building materials trading. The combination of all these factors gives the parties a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

2. *Emergence of a dominant position as a result of the merger*

(110) On the basis of its investigations, the Commission takes the view that the parties' dominant position, as described above, arose as a result of the merger on 9 August 1999 of all of the Dutch manufacturers of sand-lime products into a full-function company, CVK, jointly controlled by Haniel and Cementbouw.

(111) Before this merger, the sand-lime brick works making up CVK were legally and economically independent of each other. Only the marketing of their products was centralised within the joint marketing organisation that was CVK. Neither the sand-lime brick manufacturers controlled by Haniel nor those controlled by Cementbouw or RAG achieved individual shares on the market in wall-building materials for load-bearing walls which led to the conclusion that there was a dominant position. According to estimates by Haniel, the market share of the Haniel works and the Cementbouw works

on the market in wall-building materials for load-bearing walls was some [20 to 30]\* % each, while that of the RAG works was some [5 to 10]\* %<sup>(25)</sup>.

(112) The fact that the sand-lime brickworks belonging to CVK were already linked to each other by a joint marketing organisation before the merger does not justify the view that these firms already held a dominant position via CVK and that the merger did therefore not significantly alter the market structure. Indeed, the conversion of a joint marketing organisation into a full-function company constitutes a structural change to market conditions which might lead to the emergence of a dominant position. This occurred in this case, since the merger permanently brings the 11 Dutch sand-lime brick manufacturers under the single management of CVK.

(113) While the joint marketing organisation which existed before the operation standardised only one — albeit important — aspect of the competitive conduct of the CVK works, namely the marketing of their products, all links in the value-added chain (research and development, purchasing, logistics, production, marketing, etc.) are now centralised within CVK, and all related strategic decisions determining the conduct and success of the firm in the competitive process are adopted uniformly by CVK's management.

(114) Moreover, the structural change to market conditions brought about by the creation of a full-function company is generally more permanent than the formation of a joint marketing organisation. While it is relatively easy for the members of a joint marketing organisation to withdraw from such an organisation and again operate independently without the need for extensive restructuring, it is possible in the case of a full-function company that the various functions of previously separate firms are integrated in such a way that it is either very difficult or indeed no longer possible

<sup>(25)</sup> According to figures presented to the supervisory board of Franz Haniel & Cie GmbH on 12 March 1999, the market shares of the Haniel works and the Cementbouw works in the Netherlands before the merger each stood at [40 to 50]\* %, with that of the RAG works at [15 to 20]\* %. Assuming that CVK's share of the relevant market was [50 to 60]\* %, Haniel and Cementbouw would each have had a market share of [20 to 30]\* % and RAG [5 to 10]\* %.

for the company to be split up and the original situation to be restored <sup>(26)</sup>.

(115) It should also be remembered that only as a result of the merger Cementbouw's activities on the relevant market and the downstream market of building materials trading inure to CVK as a whole.

(116) Finally, the view that the merger led to the emergence of a dominant position on the part of CVK on the Dutch market in wall-building materials for load-bearing walls is confirmed by some of the market developments uncovered by the Commission in its market investigation and by CVK's competitive conduct since the merger.

(117) While the price level for sand-lime had previously risen at a relative moderate rate ([0 to 5]\* % in 1999 and again in 2000), CVK increased its prices by [5 to 10]\* % in 2001 and [5 to 10]\* % in 2002. According to the information at the Commission's disposal, demand for wall-building materials actually declined in the same period, and the price of other products, especially bricks, fell or remained unchanged. A large number of customers have indicated that CVK imposes its prices unilaterally and is not prepared to negotiate. Raab Karcher also stated at the hearing that before 1999 despite the existence of the CVK marketing organisation individual price negotiations with individual sand-lime brick works had in individual cases been quite possible. Since the conversion of CVK into a full-function undertaking, however, the works which were members of CVK had refused individual talks with customers and referred them to the CVK central office in Hilversum.

(118) In response to its existing surplus capacities, CVK has closed three of its eleven sand-lime brick works (Bergumermeer and Vogelenzang in 2001, Boudewijn in 2002) with a combined production capacity of [...] bfw <sup>(27)</sup>. This corresponds to some [15 to 20]\* % of the total capacity of all CVK works.

(119) CVK is also said to have unilaterally imposed transport charges and conditions. Customers are said to have been required to purchase the glue required to construct sand-

lime brick walls also from CVK, which CVK in turn obtains from Cementbouw, because CVK refuses to abide by the guarantee if the glue of other manufacturers is used. Building material dealers and other market players have indicated that they have increasingly been passed over or marginalised by CVK and, as a result of unilateral price increases, have been required to accept reduced margins.

(120) Some of those questioned have stated that it has been made more difficult or impossible to import from Germany. On the one hand, the Dutch customers of German sand-lime brick works owned by Haniel and situated close to the border have been refused supplies. On the other, some of those questioned expressed the fear that CVK would no longer supply them with certain types of sand-lime brick elements not available in Germany if they obtained sand-lime bricks and units from Germany. This was also stated by Raab Karcher at the hearing. Raab Karcher also stated that a German sand-lime brickworks belonging to the Haniel group had recently increased its supply price by 55 %; Raab Karcher sees this as an attempt to direct demand back to CVK.

(121) CVK's conduct is described by many market players as monopolistic. Some have stated that competition has declined. Others have pointed to vertical links with Cementbouw's activities in the building materials trade.

(122) All of these factors suggest that CVK's conversion to a full-function company has put it in a position to behave, to a much greater extent, independently of its competitors and customers than had previously been possible for the joint marketing organisation. Whereas, before the merger, price competition between sand-lime brick manufacturers was essentially ruled out by the cartel, while those manufacturers nevertheless defined their business strategy independently, CVK is now able, as a result of the single management of the entire Dutch sand-lime brick industry, to focus all of the competition parameters (product development and diversification, capacity adjustment, production quantities, prices, etc.) centrally on profit maximisation for the overall company and thereby fully exploit the advantage of its unique position on the market vis-à-vis its competitors and customers.

(123) The parties and CVK are of the opinion that the merger has not had any impact on the market. CVK had existed as a marketing organisation since 1947 and was thus of longer duration than many full-function joint ventures. CVK had also, prior to 1999, from the point of view of demand-side firms, been operating as an integrated supplier on the market. The member works had not had any distribution structures of their own, so that, even

<sup>(26)</sup> In this case, for example, it was decided after conclusion of the pooling agreement to close three of the eleven existing sand-lime brick works (Bergumermeer, Boudewijn and Vogelenzang) with the consequence that, were CVK to be broken up, three of its eleven members would no longer have their own business operations.

<sup>(27)</sup> Abbreviation for *basiswaaforma*t (basic wall format), the standard unit of size for wall-building materials.

before the present merger, exit would not have been a straightforward matter. The changes in the competitive behaviour of the parties which are described by customers in the Commission's market investigation and which point to the development of market power are partly repudiated by the parties and partly attributed to other reasons. For example, the price increases for sand-lime are attributed to higher costs and are said to be in line with the general trend of prices. The 55 % price increase imposed by a German Haniel sand-lime brick-works and complained of by Raab Karcher at the hearing is said to involve a factory in the new German *Länder* which, prior to its takeover by Haniel, had sold surplus production in the Netherlands at below cost price.

(124) Even taking account of the comments of the parties and of CVK, the Commission maintains its view that the merger has brought about a structural change in market conditions. A joint marketing organisation cannot be equated in its effect on competition with an integrated full-function undertaking under single control even if it has existed for many years and even if the exit of individual members makes certain adjustments necessary, such as the establishment of their own distribution structures. Otherwise, mergers between previously independent undertakings which, before the merger, had formed a distribution organisation could be covered by the material criterion of merger control (creation or strengthening of a dominant position) only in exceptional cases. Furthermore, the information provided by Raab Karcher at the hearing indicates that even so solid a marketing organisation which had lasted so long as CVK was not in a position to deprive its members entirely of the scope for their own competitive action. Even if CVK had, with the price increases charged since 1999, been partly or entirely passing on cost increases to its customers, this indicates, in view of the existing surplus capacities, falling demand and stagnating or decreasing prices for competing wall-building materials, that CVK is to a substantial extent able to act independently of its competitors and customers. An undertaking fully exposed to competition is, under such circumstances, in general not able to pass on cost increases in full to its customers.

(125) Furthermore, it is by no means certain that, without the merger, CVK would still exist today in the form in which it had existed until 1999. [more detailed explanation of this statement in view of the fact that cartel proceedings

against CVK were in progress before the pooling agreement was notified at the NMa]\* It must therefore be assumed that the present dominant position of the parties was created as a result of the merger.

### C. Conclusion

(126) The Commission has therefore reached the conclusion that the merger has led to the emergence of a dominant position on the part of CVK on the market in wall-building materials for load-bearing walls in the Netherlands, as a result of which effective competition within the common market or a substantial part thereof is significantly obstructed.

### VI. COMMITMENT SUBMITTED BY HANIEL AND CEMENTBOUW

(127) In order to remove the Commission's misgivings in relation to the market in wall-building materials for load-bearing walls in the Netherlands, Haniel and Cementbouw initially submitted a draft commitment which essentially provided that Haniel and Cementbouw would end the cooperation agreement and would sell the holdings they had acquired in 1999 from RAG in the firms Anker, Vogelenzang and Van Herwaarden to an independent purchaser. The pooling agreement and the change in CVK's articles were to be maintained; the purchaser of the shares to be sold would have to undertake to participate in the pooling agreement and the current CVK structure.

(128) After the Commission had pointed out to the parties that, in its view, this draft commitment was not sufficient to resolve the competitive problem identified by the Commission, Haniel and Cementbouw submitted the commitment described below, the full text of which is set out in the Annex to this Decision.

(129) Haniel and Cementbouw undertake:

- (a) within [...] of the adoption of the Commission Decision, to revoke the pooling agreement, to undo the amendment to CVK's articles and to dissolve CVK;
- (b) to revoke the cooperation agreement with immediate effect;
- (c) simultaneously with the ending of the pooling agreement, to end the joint control of the firms Anker and Van Herwaarden [description of how this is to be achieved]\*;

- (d) insofar as the firm Vogelenzang, which at present has no business activity, were to resume its production, Haniel and Cementbouw undertake to end joint control of this undertaking in the same way as provided for in respect of Anker and Van Herwaarden.
- (130) Haniel and Cementbouw also undertake [commitment concerning CVK's internal organisation]\*.
- (131) The commitment also contains rules on the appointment of a trustee, whose task it is to supervise compliance with the commitment by the parties.
- VII. COMPETITIVE ASSESSMENT OF THE NOTIFIED MERGER IN THE LIGHT OF THE COMMITMENT SUBMITTED BY HANIEL AND CEMENTBOUW**
- (132) The commitments submitted by the parties initially in draft form are, in the Commission's view, not sufficient to dispel the competitive doubts as regards the Dutch market in wall-building materials for load-bearing walls. The draft commitments remove only the joint control of Haniel and Cementbouw over CVK, without at the same time removing CVK's dominant position created by the merger. The draft commitments are based on the assumption, which as explained in Section II of this Decision is incorrect, that only the acquisition of joint control by Haniel and Cementbouw over CVK was subject to examination by the Commission in these proceedings, while the simultaneously completed acquisition of control by CVK over its member undertakings was, because of the decision taken by the NMa on 20 October 1998, not subject to the Commission's jurisdiction.
- (133) The final commitments described in recitals 129 to 131 are, by contrast, in the Commission's view sufficient to resolve in an appropriate manner the abovementioned competitive misgivings.
- (134) As a result of these commitments, the effects of the merger as described in Section II are undone. Through the revocation of the pooling agreement and the cooperation agreement, CVK's control over its member undertakings is removed. This means that the undertakings wholly owned by Haniel, i.e. De Hazelaar, Loevestein, Hoogdonk, Rijsbergen and Boudewijn, and the undertakings wholly owned by Cementbouw, i.e. Harderwijk, Roelfsema and Bergumermeer, once again come under the sole control of their respective shareholders. The simultaneously restored joint control of the three joint ventures Anker, Van Herwaarden and Vogelenzang is removed by the following measures: in each instance, one of the two parties, i.e. Haniel or Cementbouw, will take over sole control of one of the two undertakings, Anker and Van Herwaarden.
- (135) [Means by which Haniel or Cementbouw will acquire sole control of Anker and Van Herwaarden]\*.
- (136) [Analysis of specific means by which Haniel or Cementbouw will acquire sole control of Anker and Van Herwaarden]\*.
- (137) The firm Vogelenzang does not at present have any business activity. The parties intend to sell the assets of this undertaking to a third party and to share the proceeds of the sale in proportion to their holdings. If, however, the business activity of Vogelenzang were to be resumed under the present shareholders Haniel and Cementbouw, one of the two parties will take over sole control of this undertaking in the same way as is provided for in the case of the firms Anker and Van Herwaarden.
- (138) The parties have also undertaken to dissolve CVK. [Description of the parties' motives in making this commitment and the steps needed to put it into effect]\*.
- (139) This means that, once the commitment has been fully complied with, CVK will cease to exist in its present form as a joint venture jointly controlled by Haniel and Cementbouw in which the entire Dutch sand-lime brick industry is combined under uniform direction. In place of the present CVK, there will be two competing suppliers of sand-lime brick to which the sand-lime brickworks solely owned or owned on the basis of a majority holding by Haniel and Cementbouw belong and which are integrated into the respective groups of Haniel and Cementbouw.
- (140) Even taking account of their respective continued supply of products on the relevant market in wall-building materials for load-bearing walls, it is not to be expected that Haniel or Cementbouw can individually or jointly retain a dominant position. Cementbouw is an undertaking which has long been operating on the Dutch market with ready-mixed concrete and precast concrete balling elements and which moreover is vertically integrated into the wholesale stage. Haniel, by contrast, has, in the building materials sector, hitherto operated mainly on the German market and entered the Dutch market only in the 1990s through the acquisition of various sand-lime brickworks belonging to CVK. With the recent acquisition of the aerated concrete manufacturer Fels, Haniel has added an essential product to its product

range on the Dutch wall-building materials market. This suggests that the two parties have differing interests on the Dutch market which (also in view of the geographical distribution of the works belonging to Haniel and to Cementbouw after the separation) rule out any risk of coordination following the ending of the distribution organisation that existed before the merger. This also applies because, given the small geographical size of the Dutch market, the location of a works does not significantly affect transport costs.

(141) [Analysis from the point of view of competition of specific means by which the commitment is to be put into effect]\*.

(142) [Analysis from the point of view of competition of specific means by which the commitment is to be put into effect]\*.

(143) The period of [...] allowed the parties for compliance with the commitment appears necessary, by way of exception, in view of the unusual circumstances of this case. In order to dissolve the existing, centrally integrated full-function undertaking CVK and, in its place, to establish two mutually independent sand-lime brick undertakings, the parties must be enabled to cope with all the organisational measures, including the associated labour-management and labour-law requirements described in paragraph 138. [More detailed explanation of this statement]\*. Thus, the present case, in which the merger being examined by the Commission was effected almost three years ago and has resulted in the creation of a new, integrated undertaking, whose dissolution is the subject of the commitment given by the parties, differs from the conventional case of a commitment to sell an already existing undertaking which can operate on a stand-alone basis<sup>(28)</sup>.

(144) The Commission has therefore come to the conclusion that, taking account of the commitment given by Haniel and Cementbouw, the notified merger will not give the parties a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

<sup>(28)</sup> See paragraph 14 of the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/ 98 (O) C 68, 2.3.2001, p. 3).

## VIII. CONDITIONS AND OBLIGATIONS

(145) The first sentence of the second paragraph of Article 8(2) of the Merger Regulation states that the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

(146) Measures that effect a structural change to the market will be imposed in the form of 'conditions'; implementing steps necessary to achieve this result will take the form of 'obligations'. If a condition is not fulfilled, the Commission decision declaring the concentration compatible with the common market is null and void. Where the undertakings concerned commit a breach of an obligation, Article 8(5)(b) of the Merger Regulation empowers the Commission to revoke a clearance decision; Article 14(2)(a) and Article 15(2)(a) of the Merger Regulation empower it to impose fines or periodic penalties on the parties<sup>(29)</sup>.

(147) In accordance with this basic distinction, the Commission decision should be made subject to the condition of full compliance with those commitments given by Haniel and Cementbouw that relate to the dissolution of CVK in its present form and the formation of two mutually independent sand-lime brick suppliers<sup>(30)</sup>. These commitments serve to offset the identified creation of a dominant position by the parties on the Dutch market in wall-bearing materials for load-bearing walls and hence to maintain competition on that market. All the remaining parts of the commitment, in particular the details regarding the trustee to be appointed by Haniel and Cementbouw, should be made the subject of obligations, since they are merely intended to ensure the implementation of the above-mentioned conditions.

## IX. ADDRESSEES OF THIS DECISION

(148) This Decision — like the statement of objections which preceded it — is addressed not only to the notifying parties, but also to the CVK joint venture jointly controlled by the parties. Exceptionally, the particular circumstances of this case militate in favour of including

<sup>(29)</sup> See paragraph 14 of the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/ 98 (O) C 68, 2.3.2001, p. 3, recital 12).

<sup>(30)</sup> Points 27, 28, 32 to 35 and 40 of the Annex.

CVK in the addressees of the Decision. Although CVK is, via its parent companies, indirectly an addressee already, it is not merely the target undertaking in this case. Rather, it is the instrument by which the merger took place, and CVK's direct involvement is also necessary for the commitment given by Haniel and Cementbouw to be fulfilled. CVK is a party to the pooling agreement, and the specified measures involve an amendment to CVK's articles.

#### X. CONCLUSION

(149) For these reasons, provided the commitments entered into by Haniel and Cementbouw are fully complied with, it can be accepted that the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Subject to full compliance with the commitments set out in the Annex, therefore, the concentration should be declared compatible with the common market and the EEA Agreement pursuant to Articles 2(2) and 8(2) of the Merger Regulation and Article 57 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The notified concentration by which Franz Haniel & Cie. GmbH and Cementbouw Handel & Industrie BV have, within the meaning of Article 3(1)(b) of the Merger Regulation, acquired joint control of the undertaking Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten and its member undertakings is hereby declared compatible with the common market and the EEA Agreement.

#### *Article 2*

Article 1 shall apply subject to the condition that the commitments entered into by Franz Haniel & Cie. GmbH and Cementbouw Handel & Industrie BV and set out in points 27, 28, 32 to 35 and 40 of the Annex are complied with in full.

#### *Article 3*

The obligation is attached to this Decision that the other commitments entered into by Franz Haniel & Cie. GmbH and Cementbouw Handel & Industrie BV and set out in the Annex must be complied with in full.

#### *Article 4*

This Decision is addressed to:

Franz Haniel & Cie. GmbH  
Franz-Haniel-Platz 1  
D-47119 Duisburg

Cementbouw Handel & Industrie BV  
Bennebroekerdijk 244  
2142 LE Cruquius  
The Netherlands

Coöperatieve Verkoop- en Produktievereniging van Kalkzand-  
steenproducenten  
Utrechtseweg 38  
1213 TV Hilversum  
The Netherlands

Brussels, 26 June 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

## ANNEX

The full wording of the conditions and obligations referred to in Articles 2 and 3, in the original German, can be consulted on the following Commission website:

[http://europa.eu.int/comm/competition/mergers/cases/decisions/m2650\\_de.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/m2650_de.pdf)

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