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***Case No COMP/M.4381  
– JCI/ Fiamm***

Only the English text is authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 8(2)  
Date: .10/05/2007



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10/5/2007

C(2007)1863 final

**PUBLIC VERSION**

**COMMISSION DECISION**

**of 10/5/2007**

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

(Case No COMP/M.4381 – JCI/ VB/ FIAMM)

**Commission Decision**

**of 10/5/2007**

**declaring a concentration to be compatible with the common market  
and the functioning of the EEA Agreement**

**Case No COMP/M.4381 – JCI/ VB/ FIAMM**

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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 (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup>, and in particular Article 8 [2] thereof,

Having regard to the Commission's decision of 4 December 2006 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the Objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations<sup>2</sup>,

Having regard to the final report of the Hearing Officer in this case<sup>3</sup>,

WHEREAS:

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1

<sup>2</sup> OJ C...

<sup>3</sup> OJ C...

## I. INTRODUCTION

1. On 26 October 2006, the Commission received a notification of a proposed concentration by which VB Autobatterie GmbH ("VB"), Germany, an undertaking jointly controlled by Johnson Controls Inc. ("JCI"), USA and Robert Bosch GmbH ("Bosch"), Germany, acquires sole control within the meaning of Article 3 (1) (b) of Regulation (EC) No 139/2004 ("the Merger Regulation") of the automotive starter battery business of FIAMM S.p.A. ("FIAMM SBB"), Italy.
2. After examination of the notification the Commission concluded, on 4 December 2006, that the notified operation fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the EEA Agreement. The Commission therefore initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation.
3. On 12 February 2007, the Commission addressed a Statement of Objections to the notifying party in which it detailed the negative effects that the proposed transaction would have on competition in the common market.
4. On 9 March 2007, the notifying party submitted a proposal for Commitments in order to resolve the negative effects of the proposed transaction as set out in the Statement of Objections and to enable the Commission to declare the transaction compatible with the common market and the EEA Agreement pursuant to Article 8(2) of the Merger Regulation. On 29 March 2007 the notifying party submitted a revised proposal for Commitments.
5. By letter of 27°April°2007, JCI informed the Commission that it no longer intended to pursue, through one or more of its subsidiaries - the acquisition of FIAMM SBB. The letter in question stated: "*[t]herefore, the parties have abandoned the notified concentration within the meaning of Art. 6(1)(c), second sentence of Regulation 139/2004, and hereby formally withdraw the notification of 26 October 2006.*". By a separate letter of the same day (27°April°2007), JCI communicated to FIAMM that it formally terminated its Final Offer related to the notified transaction as "*it is clear the the current terms of the transaction are unacceptable to JCI*". Subsequently, on 30°April°2007, JCI also issued a press release to this effect.
6. The Commission sent on 27 April requests for information under Article 11 of the Merger Regulation separately to JCI and FIAMM which both responded (by separate letters) on 30°April°2007. The requests for information were aimed to ascertain whether the withdrawal fulfilled the conditions set out in Article 6(1)(c), second sentence of the Merger Regulation. In order to make its assessment, the Commission takes into account its current practice as reflected by a "DG Competition Information note on Art. 6(1)c 2<sup>nd</sup> sentence of Regulation 139/2004 (abandonment of concentrations)" and as also set out in the "Draft Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings" published for comments on DG Competition's website on 28 September 2006.
7. The Information Note states that, as a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, format, intensity

etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the latest act. In the case of a binding agreement, proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by the parties will not be considered sufficient.

8. In the present case the notification was effected by JCI/VB on the basis of a document (the "Final Offer") signed by JCI only on 18°October°2006, which was stated to be provided following the Heads of Agreement (defining key potential contractual terms agreed upon between JCI and FIAMM) executed between JCI and FIAMM on 22°July°2007. Section 7 of the Final Offer is entitled "Acceptance of the PSA and ancillary agreements" and states that *"the PSA [Purchase and Sales Agreement] and the most significant annexes thereto, consisting of the Akuma Supply Agreement, the Avezzano Lease, the Trademark Assignment and Coexistence Agreement (collectively, the "Agreements") in the drafts negotiated by the Parties [...] have been duly initialled on each page, by an authorized representative of JCI [...] in acceptance by JCI of their terms and conditions as reflected therein, subject to non-material corrections agreed to by both parties"*. In addition, it is stated that *"it remains understood that the other schedules and annexes to the PSA are currently under negotiation between the Parties, provided that such annexes and schedules shall not impair in any manner the validity and effectiveness of this Final Offer"*. The validity of the Final Offer has been extended by JCI on a number of occasions during the present proceedings, most recently, by letter of 27°February°2007, until 1°May°2007.
9. In its reply to the Commission's request for information of 27 April 2007, JCI contends that it has the right to unilaterally terminate the Final Offer even after acceptance by FIAMM. It bases this argument on a statement contained in the letter of 27°February°2007 to FIAMM extending the validity of the Final Offer until 1 May 2007, whereby it is indicated that *"notwithstanding any provision in the Final Offer to the contrary, either party may terminate the Final Offer prior to May°1, 2007 by delivering written notice to the other party thereof in the event the terminating party deems in its sole discretion that Antitrust Clearance will not be received for a transaction that is economically acceptable for such party"*. JCI argues in particular that the reference to *"either party"* indicates that the termination right was meant to exist also after acceptance by FIAMM of the Final Offer
10. In its reply on the Commission's request for information of 27 April 2007, FIAMM stresses the fact that it formally accepted JCI's Final Offer by letter of 11 April 2007. Accordingly, in its response of 28°April°2007 to JCI's letter terminating the Final Offer, FIAMM stated that *"[a]s you are aware, by letter dated April°11, 2007 FIAMM formally accepted the Final Offer, hence the agreement on the Transaction became operational and fully binding upon our companies and, consequently, no unilateral withdrawal from such agreement is possible and lawful under Italian law"*. As regards the relevant legal situation, FIAMM explained that JCI's offer was subject to Italian law and that – despite the fact that some of the

details of the PSA were still under negotiation – under Italian civil law the acceptance of the Final Offer by FIAMM resulted in the conclusion of a preliminary contract ("*contratto preliminare*") whereby the parties bind and oblige themselves to execute a definitive agreement ("*contratto definitivo*"), whose main terms and conditions have been already provided in the preliminary contract. FIAMM also underlines that its acceptance of the Final Offer occurred after the final package of remedies had been negotiated and agreed by JCI and the Commission.

11. In a further submission dated 4 May 2007, JCI contests that JCI/VB could be legally forced to acquire FIAMM SBB and stated that in any event the large number of unresolved questions still to be negotiated between the parties would not allow Italian courts to order a specific performance. Furthermore, the duration of the court proceedings would make the implementation of the acquisition of FIAMM SBB as notified to the Commission impossible. JCI further submitted that according to press reports quoting the CEO of FIAMM, the company apparently would have abandoned the notified transaction and would be considering transactions with other buyers.
12. As regards the latter point, JCI's earlier informal contacts with the Commission's services had already led the Commission to send a further request for information to FIAMM on 3 May 2007. In its response of 4 May 2007 to the Commission's request for information of 3 May 2007, FIAMM stressed that the planned recapitalization agreement referred to in the press would have no impact on the transaction with JCI concerning SBB and confirmed that FIAMM did not consider the proposed Transaction with JCI to be abandoned. On the contrary the transaction would according to FIAMM be crucial to insure the successful negotiation of a recapitalization agreement in order to avoid a bankruptcy procedure.
13. Given the above, it appears that the undertakings concerned in the present case (JCI as the notifying party and FIAMM) disagree on whether or not the merger has been abandoned. They take different views on the effects of FIAMM's acceptance of the Final Offer on 11<sup>o</sup> April<sup>o</sup> 2007 and of JCI's subsequent invocation, on 27 April 2007, of the right to terminate the Final Offer foreseen in JCI's letter of 27 February 2007. It is noteworthy that the notifying party does not appear to contest that FIAMM's acceptance of the Final Offer gave rise to a binding agreement – indeed, its argument that either party could benefit from the termination provision is based on the acquisition by FIAMM of rights under the Final Offer after acceptance thereof. The Commission therefore considers that a binding agreement was probably concluded on 11 April 2007 and, in any event, notes that this is the view of one of the undertakings concerned.
14. However, the notifying party and FIAMM disagree on whether the purported termination of the Final Offer, as unilaterally undertaken by JCI after acceptance of the Final Offer by FIAMM, is a sufficient means to deprive that agreement of its effects and, therefore, to abandon the notified concentration. Having regard, in particular, to the terms of the termination clause in JCI's letter of 27 February 2007 and to the context in which that letter and FIAMM's subsequent acceptance letter of 11 April 2007 were exchanged, the position taken by FIAMM regarding the continued existence of a binding agreement cannot be regarded as so implausible that the Commission can dismiss it without a binding determination by the competent national judicial authorities.

15. In this regard it has to be noted that, in general, the possibility that one of the undertakings concerned would no longer wish to implement the proposed transaction, does not necessarily have any impact on the legal validity of an existing binding agreement. In particular, the subsistence of the Commission's competence to adopt a decision under Article 8 of the Merger Regulation in respect of a concentration based on an agreement that one of the concerned undertakings considers to be binding should not depend on an assessment of the likely outcome of future litigation and, in particular, of whether or not a timely judicial remedy requiring implementation of that agreement is likely to be available to the undertaking concerned which continues to plead for the validity of such agreement. This may be contrasted with a situation where all the parties to an agreement declare that they do not intend to implement it, in which case the Commission could expect that they would discharge the burden of demonstrating the abandonment of the concentration to its satisfaction by promptly adopting a binding joint document cancelling such agreement.
16. Therefore, the Commission considers that it remains unclear whether the concentration has been validly abandoned, and considers in particular that the undertakings concerned have not demonstrated to the satisfaction of the Commission that they have abandoned the concentration in accordance with Article 6(1)(c) of the Merger Regulation. This conclusion is without prejudice to any legal proceedings to be possibly initiated between the parties on this specific matter.

## **II. THE PARTIES AND THE OPERATION**

17. **JCI** is a global supplier of automotive components (seating, interior and batteries) and building control systems. Bosch is active worldwide in the areas of automotive technology, consumer goods and building technology (power tools, thermo-technology, security technology, broadband communication, household appliances) as well as industrial technology (automation technology and packaging technology).
18. **VB** is the automotive battery joint venture of JCI and Bosch. VB produces starter batteries for cars, commercial vehicles, motorcycles and boats. It operates seven production plants in Germany, France, Spain and the Czech Republic.
19. **FIAMM** is a family-owned supplier of automotive components (horns, antennas and starter batteries) and industrial (stand-by) batteries. The transaction concerns the assets of the automotive starter battery business of FIAMM (FIAMM-SBB).
20. The notified transaction is arranged as a mixed share and asset deal. For the purposes of the transaction, part of the assets of FIAMM-SBB will be transferred to a newly established subsidiary of FIAMM (“NewCo”). The shares in NewCo will be acquired by VB. In addition, certain other assets of FIAMM SBB that are owned by subsidiaries of FIAMM in Austria, the Czech Republic, France, Germany, Poland, Slovakia, Spain and the United Kingdom will be acquired by local VB subsidiaries.
21. FIAMM-SBB currently operates three production plants for automotive starter batteries, two in Italy and one in the Czech Republic. Only FIAMM SBB’s production plant located in Veronella (Italy) is intended to be integrated into the battery business of VB. VB will not acquire the automotive battery plant of FIAMM

in the Czech Republic (either the building or the machinery or equipment). The parties explain that FIAMM will convert this plant into an industrial battery plant over a certain period of time. As regards the starter batteries currently produced in this plant, VB (or a subsidiary of VB) will conclude an exclusive supply agreement for a period up to 31 March 2008. Furthermore, VB will acquire the machinery and equipment of FIAMM SBB's production plant in Avezzano (Italy) but not the land and buildings of this plant, which will be rented by VB. [...]\*

### **III. CONCENTRATION**

22. The proposed transaction consists in the acquisition of sole control by VB over FIAMM SBB. It therefore constitutes a concentration within the meaning of Article 3 (1) (b) of the Merger Regulation.

### **IV. COMMUNITY DIMENSION**

23. The parties have a combined worldwide turnover of more than EUR 2.5 billion<sup>4</sup> and the aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million. Furthermore, in each of at least three Member States ([...]\*, [...]\*, [...]\*) the aggregate combined turnover of the undertakings concerned exceeds EUR 100 million and in each of these Member States ([...]\*, [...]\*, [...]\*) the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million. The concentration therefore has a Community dimension pursuant to Article 1 (3) of the Merger Regulation.

### **V. INTRODUCTION ON THE COMMISSION'S INVESTIGATION**

24. During the investigation the Commission has contacted all relevant car and truck manufacturers, that is to say, original equipment manufacturers ("OEM") and original equipment suppliers ("OES"; OEM and OES are referred to together in this Decision as OE), a large number of customers in the Independent Aftermarket ("IAM") for automotive starter batteries as well as most of the competitors to the parties active in the EEA and neighbouring countries.
25. In the first phase market investigation the Commission received replies from 14 OE-customers active in the production of cars / LCV and/or trucks / HCV<sup>5</sup>. The questionnaire sent out to OE-customers in the course of the in-depth market investigation was answered by 13 car and truck manufacturers<sup>6</sup>.

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\* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk

<sup>4</sup> Throughout the decision, the term billion will be used to indicate one thousand million.

<sup>5</sup> Two of the companies are active in both segments, i.e. the production of cars / LCV and trucks / HCV and submitted separate replies for both segments. The Commission's file therefore includes all together 16 replies to the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>6</sup> One OE-customer only replied to this phase-II but not to the phase-I questionnaire. The Commission's market investigation therefore covered in total 17 different car and truck manufacturers.

26. The in-depth investigation as regards the IAM for automotive batteries mainly focused on those countries for which competition concerns were identified in the first phase market investigation (namely Italy, Austria, the Czech Republic and Slovakia<sup>7</sup>). In addition, the market investigation also covered neighbouring countries (Germany, France, Hungary and Poland) to guarantee representative data for analysing the geographical scope of the market and potential differences in the competitive environment at national level. The Commission received more than 120 replies to its questionnaire sent to IAM-customers in these countries.
27. The number of OE-customers concerned and contacted in the market investigation is very limited and customer-specific information would make it quite easy to identify the respective respondents. Since several OE-customers and IAM-customers raised serious objections against the proposed transaction and considering that the merged entity would have a very strong position in the relevant markets, the Commission did not reveal the exact identity of all customers in this proceeding, while giving the notifying party access to all the elements necessary in order to exercise its right of defence.
28. Each customer has been allocated a random number, which was used consistently in the proceedings<sup>8</sup>. For all IAM-customers, the allocated random number also indicated the country in which the respective customer is located. Furthermore, in the course of access to the Commission's file, the notifying party received a document indicating for each IAM-customer (i) the relevant distribution channel the customer is active in (for example, wholesaler, retail chain, car centre), (ii) whether or not the customer is a member of a buyer group, and (iii) whether the respective customer is considered as small (turnover < EUR 50 million), medium sized (turnover EUR 50 - 250 million) or large (turnover > EUR 250 million) company.
29. Neither the notifying party nor FIAMM have claimed that the Commission's approach of granting anonymity to customers has had any negative impact on the parties' rights of defence in this case.

## **VI. RELEVANT MARKETS**

### **A. RELEVANT PRODUCT MARKETS**

30. Both VB and FIAMM are active in the manufacture and supply of starter batteries. Starter batteries are used for starting combustion engines in passenger cars, trucks, motorcycles, boats and other vehicles. Batteries in general are composed of metallic plates with positive or negative electric charging (electrodes) and separators that prevent short circuits. The electrodes are submerged into a chemical solution called

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<sup>7</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 116 et seq.

<sup>8</sup> As regards OE-customers, the Commission allocated two different random numbers to those customers which are active in the production of cars / LCV as well as trucks / HCV and which provided separate replies for each segment. All together, following this exercise the Commission listed 17 different OE-customers. For all those questions for which the different entities of the same OE-customer submitted identical answers (e.g. as regards the questions relevant for defining the relevant product and geographic market), the Commission considered these replies – in all cases in favour of the notifying party – as being the reply of one OE-customer. Accordingly, the results of the market investigation reported in the following sections in some cases refer to a total number of replies less than 17.

the electrolyte. This process causes a chemical reaction that releases electrons, allowing them to flow through conductors thus producing electricity.

31. Most starter batteries use the lead-acid technology which was invented in the second half of the 19<sup>th</sup> century. It is called lead-acid technology because the electrodes are made of lead or a lead alloy and the electrolyte is constituted by sulphuric acid and water.

#### **1) Definitions submitted by the parties**

*(a) The definitions submitted by the parties in the Form CO*

32. In the notification of the transaction<sup>9</sup> the notifying party stated that there is one single relevant product market for automotive starter batteries, encompassing batteries used in passenger cars and light commercial vehicles (LCV) and batteries used in trucks and other heavy commercial vehicles (HCV). According to the notifying party both types of starter batteries use essentially the same technology, almost all players in the automotive starter battery market offer starter batteries for both cars/LCV and trucks/HCV and both types of starter batteries are also distributed in essentially the same way.
33. Despite also using the lead-acid technology, according to the parties' submission starter batteries for motorcycles provide a different voltage (6V instead of 12V) and are much lighter, smaller and more shock resistant than automotive starter batteries for cars / LVC and trucks / HCV. Based on these technical differences, the parties consider that starter batteries for motorcycles do not belong to the market for automotive starter batteries.
34. In the parties' view the market for automotive starter batteries should be further divided into (i) the market for automotive batteries supplied to OEM and OES businesses (together in the following: "OE-market"), and (ii) the Independent Aftermarket ("IAM") which consists essentially of wholesalers, buying groups, fast-fitters, car centres and supermarkets<sup>10</sup>.
35. As regards OEM and OES starter batteries, the parties argue that the two types of starter batteries constitute one single product market for the following reasons: (i) customers of OEM and OES starter batteries are essentially the same (that is to say, manufacturers of cars / LCV and trucks / HCV) and customers frequently purchase OEM and OES batteries jointly, (ii) existing price differences between OEM and OES starter batteries are mainly due to additional services offered by manufacturers in the OES segment which however are treated as "add-on" services by customers rather than differentiating product features, and (iii) the product lines in the OEM and OES segment are very homogeneous and launched on the same day.
36. The existence of a separate IAM product market for starter batteries, in the parties' view submitted in the form CO, is in particular due to (i) differences in the quality and technical specification standards, which are lower for IAM batteries compared

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<sup>9</sup> Form CO, p. 35 et seq.

<sup>10</sup> Form CO, p. 31 et seq.

to OEM/OES batteries, and (ii) the distinct groups of customers relevant in each of the relevant markets.

(b) *The definitions put forward by the Commission in its decision of 4 December 2006 initiating proceedings*

37. In its decision of 4 December 2006 initiating proceedings (in the following "the decision initiating proceedings" the Commission found that the results of the first phase market investigation contradicted the product market definition proposed by the parties, which includes in the same product market both starter batteries for cars / LCV and starter batteries for trucks / HCV and preliminarily concluded that the two types of automotive starter batteries constitute separate relevant product markets<sup>11</sup>.
38. Besides the existing technical differences (for example, capacity, cold-cranking capacity, dimensions), the Commission based its preliminary conclusion on the fact that all OE-customers and the overwhelming majority of IAM customers involved in the Commission's first phase market investigation indicated that they would not switch between the different types of starter batteries following a small but significant non-transitory price increase of 10% for one of the types with the price for the other type being stable.
39. In addition, the market investigation contradicted the parties' general assertion that both types of starter batteries are distributed in essentially the same way. In particular in the IAM, the structure of the demand-side is significantly different for starter batteries for cars / LCV and for trucks / HCV. Whereas for starter batteries for cars / LCV, supermarket chains, fast-fitters and car centres represent important distribution channels, these customers are almost not active at all in the distribution of starter batteries for trucks / HCV. According to the parties' own submission, in the IAM for starter batteries for trucks / HCV the most important distribution channels are wholesalers (a significant number specialized in the distribution of this type of batteries) and specialised repairers<sup>12</sup>.
40. Furthermore, – despite the fact that most of the suppliers of starter batteries offer a range of both starter batteries for cars / LCV and trucks / HCV – the Commission's market investigation provided indications that the supply-side substitutability between starter batteries for cars / LCV and starter batteries for trucks / HCV is limited.
41. As regards the differentiation between the different distribution channels of automotive starter batteries (that is to say, OEM, OES and IAM)<sup>13</sup>, the Commission preliminarily concluded that the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV constitute relevant product markets distinct from the markets for OE starter batteries for cars / LCV and trucks / HCV.

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<sup>11</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 22 et seq.

<sup>12</sup> See Form CO, p. 36.

<sup>13</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 32 et seq.

42. The Commission also found that the results of the first phase market investigation were inconsistent as regards the classification of OES-batteries. The differentiated picture of the results of the first phase market investigation was not least explained by the fact that OEM batteries are purchased in order to be installed into the final product of OE-customers (cars or trucks), while OES and IAM batteries are both “replacement products”, having logistics, purchasing patterns and intended use clearly different from OEM batteries. Accordingly, the Commission at that stage left open the issue whether OES batteries should— together with OEM starter batteries – be considered as being part of the OE-market or whether OES batteries constitute a separate relevant product market distinct from OEM batteries.

(c) *The definitions submitted by the parties in their comments on the Commission’s decision initiating proceedings*

43. The notifying party submitted its comments on the Commission’s decision initiating proceedings on 22 December 2006<sup>14</sup>. In the comments, the notifying party did not explicitly submit new or different market definitions from those proposed in the form CO. However, it offered arguments contradicting the results of the first phase market investigation reported in the Commission’s decision initiating proceedings.

44. Although the notifying party conceded that starter batteries for cars / LCV and starter batteries for trucks / HCV differ as regards capacity, cold cranking capacity, size and weight, it continued to believe that both types of starter batteries belong to one and the same relevant product market and that, in any event, there is no clear distinction between the two types of batteries. According to the notifying party, similar technical differences exist between starter batteries for cars / LCV and starter batteries for trucks / HCV like "for instance between batteries for smaller cars (e.g. a VW Golf) and large cars (e.g. a Mercedes S Class)"<sup>15</sup>. The notifying party however did not contest that – in particular in the IAM – the structure of the distribution for starter batteries for cars / LCV and starter batteries for trucks / HCV differs, with "modern" channels (such as supermarkets, fast-fitters and car centres) mainly being relevant for the distribution of starter batteries for cars / LCV.

45. In addition, the notifying party again stressed the fact that all relevant suppliers of automotive starter batteries have the necessary production equipment for all kinds of batteries and produce a broad variety of batteries, including starter batteries for both cars / LCV and trucks / HCV. Furthermore, in the parties' view the fact that different lead alloys are used for the production of the different types of batteries does not constitute an obstacle for switching production between these types as these alloys are readily available on the market.

46. In its comments on the Commission’s decision initiating proceedings, the notifying party also upheld its position that automotive batteries supplied to OEM and OES businesses constitute one single relevant product market ("OE-market")<sup>16</sup>. In this

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<sup>14</sup> See submission of the notifying party dated 22.12.2006, p. 1 et seq.

<sup>15</sup> Submission of the notifying party dated 22.12.2006, p. 2.

<sup>16</sup> See submission of the notifying party dated 22.12.2006, p. 1 et seq.

regard the notifying party mainly referred to the replies of customers to the Commission's first phase questionnaire which were made available by the Commission when granting access to key documents obtained during the first phase investigation<sup>17</sup>. According to the notifying party, these replies confirm that (i) OEM and OES batteries have similar technical specifications and comply with the same quality standards, (ii) OEM and OES batteries are purchased in identical procedures, and (iii) the majority of OE-customers procure OEM and OES batteries jointly.

## 2) Previous Commission decisions

47. The Commission has found in a number of decisions concerning the automotive industry that it may be appropriate to define the relevant product market by reference to the type of vehicles for which a particular product or component is supplied. A split has usually been made between products supplied for passenger cars, light commercial vehicles and heavy commercial vehicles<sup>18</sup>.
48. In addition, the Commission has already reviewed several transactions in the sector of the supply of automotive starter batteries in the EEA<sup>19</sup>. Whereas in the Varta/Bosch and the JCI/Bosch/VB decisions the issue of a possible distinction of product markets according to the type of vehicles was not assessed in more detail, in the JCI/Bosch/Delphi decision the Commission discussed – but finally could leave open – a distinction between (i) starter batteries for cars/LCV and (ii) starter batteries for trucks/HCV.
49. In previous cases the Commission further found that the markets for automotive starter batteries are to be divided into (i) products supplied to OEM, (ii) products supplied to OES businesses, and (iii) the IAM. In the Varta/Bosch decision starter batteries sold to OES and IAM customers were considered to form part of a single market distinct from the market for starter batteries for OEM customers. In the more recent JCI/Bosch/VB decision (2002) and the JCI/Bosch/Delphi decision (2005) the Commission concluded that sales to OES customers may be attributed to the OEM market for automotive starter batteries. However, in its JCI/Bosch/Delphi decision the Commission clearly indicated that the market investigation conducted in that case showed that only part of the OES market was under the control of the OEMs<sup>20</sup>.

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<sup>17</sup> See DG Competition, Best Practices on the conduct of EC merger control proceeding, paragraph 45.

<sup>18</sup> See e.g. Case No. IV/M. 1491 – Robert Bosch / Magneti Marelli, OJ C 183, 29/06/1999, p. 3p; Case No. Comp/M.2603 – ZF Friedrichshafen / Mannesmann Sachs, OJ C 363, 19/12/2001, p. 32; Case No. Comp/M.2901 – Magna / Donnelly, OJ C 246, 12/10/2002, p. 20; Case No. Comp/M.3351 – Arvin Meritor / Volvo, OJ C 272, 6/11/2004, p. 4.

<sup>19</sup> See Case No. IV/M.12 – Varta / Bosch, OJ L 320, 22/11/2004, p. 26; Case No. Comp/M.2939 – JCI / Bosch / VB/ JV, OJ C 284, 21/11/2002, p. 4; Case No. Comp/M.3789 – JCI / Bosch / Delphi, OJ C 177, 19/07/2005, p. 33.

<sup>20</sup> Case No. Comp/M.3789 - JCI/Bosch/Delphi, paragraph 9.

50. The notifying party in its submissions repeatedly refers to those elements of the previous decisions which are in line with its positions submitted in this case<sup>21</sup>. However, not all of those previous cases included an in-depth investigation of the relevant sector.

### **3) Outcome of the Commission's market investigation as set out in the Statement of Objections**

51. The Commission has investigated the boundaries of the relevant product markets for the various types of automotive starter batteries both during the first phase of the inquiry and after initiating proceedings. The results of these market investigations as set out in the Statement of Objections addressed to the notifying party on 12 February 2007 are reported in this section.

#### *(a) Types of automotive starter batteries*

##### *(1) Demand-side substitutability*

52. The Commission's market investigation confirmed that starter batteries for cars / LCV and starter batteries for trucks / HCV cannot be considered as technically and economically interchangeable from a demand-side point of view.

##### *(i) Technical differences between starter batteries for cars / LCV and starter batteries for trucks / HCV*

53. The parties do not contest that starter batteries for cars / LCV and starter batteries for trucks / HCV have different technical features. According to the notifying party, however, there is no clear technical dividing line which separates starter batteries for cars / LCV from starter batteries for trucks / HCV. The Commission's market investigation contradicted this view.

54. While it is true that due to the variety of vehicles using combustion engines there is also a large number of different technical specifications of automotive starter batteries, there is a consensus that the main technical criteria for differentiating between different types of starter batteries are the following<sup>22</sup>: (i) capacity<sup>23</sup>, (ii) cold cranking capacity<sup>24</sup>, and (iii) dimensions, weight and layout (including

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<sup>21</sup> See e.g. Form CO, p. 31 et seq.; Form CO, p. 37 et seq.; submission of the notifying party dated 22.12.2006, p. 3.

<sup>22</sup> As will be explained in more detail below, also the parties use these criteria to differentiate between starter batteries for cars / LCV and starter batteries for trucks / HCV. In addition, also the market players involved in the Commission's market investigation confirmed that these features mark the main technical differences between starter batteries for cars / LCV and starter batteries for trucks / HCV; see e.g. replies to question 2 of the Commission's questionnaire to OE customers dated 19.12.2006 and question 10 of the Commission's questionnaire to IAM customers dated 20.12.2006; see also replies to question 10 of the Commission's questionnaire to competitors dated 19.12.2006.

<sup>23</sup> The electrical capacity of a battery, which is measured in Ampere hours (Ah), describes the amount of power stored by the battery. An Ah is the amount of energy charge in a battery that will allow one Ampere of current to flow for one hour.

<sup>24</sup> The cold cranking capacity is a performance rating for starter batteries. It describes the ability of a battery to start a combustion engine even under cold weather conditions. It is measured in Ampere (A) and is defined

position of poles). Based on the information submitted by the parties<sup>25</sup>, the most relevant technical differences between starter batteries for cars / LCV and for trucks / HCV are summarized in table 1 below.

**Table 1: technical differences between starter batteries for cars / LCV and starter batteries for trucks / HCV**

	Cars / LCV	Trucks / HCV
		
<b>Capacity</b>	Up to 100/110 Ah bestsellers: 44 to 95 Ah	120 to 225 Ah' bestsellers: more than 140 Ah
<b>Cold cranking</b>	200 to 850 A bestsellers: 360 to 680 A	500 to 1.200 A bestsellers: more than 900 A
<b>Dimensions (height x width x length)</b>	Maximum: 190 mm x 175 mm x 393 mm	Maximum: 240 mm x 273 mm x 518 mm
<b>Weight</b>	10 to 30 kg	35 to 65 kg
<b>Layout</b>	6 cells in line	2 lines of 3 cells
<b>Position poles</b>	long side	short side

55. According to the parties, <sup>26</sup> starter batteries for cars / LCV generally have a **capacity** of *up to* 100 to 110 Ah and a **cold cranking capacity** of 200 to 850 A. The data submitted by the parties show that the best-selling products in the field of starter batteries for cars / LCV provide a capacity of between 44 and 95 Ah and a cold cranking capacity of 360 up to 680 A. More than 80% of the starter batteries for cars / LCV sold by the notifying party in the EEA in 2005 had a capacity of less than 80 Ah and a cold cranking capacity of less than 700 A<sup>27</sup>.

56. Compared with starter batteries for cars / LCV, starter batteries for trucks / HCV have a higher capacity of more than 110 up to about 225 Ah and also a higher cold cranking capacity of 500 to 1.200 A. According to the data submitted by the parties, the best selling products in the field of starter batteries for trucks / HCV have a capacity of 140 up to 220 Ah and a cold cranking capacity of 900 up to 1200 A. More than 70% of the starter batteries for trucks / HCV sold by the notifying party

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as the current that the battery can deliver with a minimum voltage for a certain period of time at a certain low temperature when the battery is new and fully charged.

<sup>25</sup> See e.g. Form CO, p. 29 et seq.; submission of the notifying party dated 17.01.2007, p. 8 et seq. and Annexes 1 to 8; FIAMM's submission dated 08.01.2007, p. 4 et seq. and Annex Q 6.1 to Q 6.2; FIAMM's submission dated 18.01.2007.

<sup>26</sup> Form CO, p. 29; see also the "product matrix" according to the capacity/cold cranking capacity of the different types of starter batteries currently manufactured and sold by the parties: submission of the notifying party dated 08.01.2007, Annex 6; FIAMM's submission dated 08.01.2007, Annex Q.6-1.

<sup>27</sup> Calculated on the basis of the data submitted by the notifying party; see submission of the notifying party dated 08.01.2007, Annex 6.

in the EEA in 2005 had a capacity of more than 140 Ah and a cold cranking capacity of more than 900 A<sup>28</sup>.

57. Since the capacity of a starter battery is closely related to the quantity of lead used for its production, starter batteries for cars / LCV and starter batteries for trucks / HCV also differ significantly as regards their weight. Starter batteries for cars / LCV have a weight of 10 to 30 kg whereas starter batteries for trucks / HCV have a weight of 35 to 65 kg<sup>29</sup>.
58. Both types of batteries also have very different external dimensions<sup>30</sup>, again as a consequence of their different capacity resulting inter alia in different numbers of plates: starter batteries for cars / LCV have a maximum size of 190 mm x 175 mm x 393 mm (height x width x length); the best selling types of starter batteries for cars / LCV have a length of 353 mm or less. Starter batteries for trucks / HCV have a maximum size of 240 mm x 273 mm x 518 mm (height x width x length), with the best selling products having a length of usually more than 500 mm.
59. The external dimension of the battery is also the main feature used in international product standards for the categorization of both types of starter batteries. The relevant product standard for automotive starter batteries in Europe<sup>31</sup> is the European Norm (EN) 50342 ("Lead-Acid Starter Batteries"). The standard EN-50342-2 ("Dimensions and Marking of 12V Batteries") inter alia defines standard dimensions of starter batteries for cars / LCV with none of the standards defining a length of more than 353 mm. In the relevant standard for starter batteries for trucks / HCV (EN-50342-4 "Dimensions of Batteries for Heavy Vehicles"), 3 out of 4 product standards define a length of 513 mm or more.
60. Finally, starter batteries for cars / LCV and starter batteries for trucks / HCV also differ as regards their technical layout. In line with the differences in the dimensions of the respective type of battery, the cells which include the plate sets (electrodes) are usually ordered in one line of 6 cells in starter batteries for cars / LCV whereas starter batteries for trucks / HCV usually use 2 lines of 3 cells each. In addition, due to the different layout of the connection between the starter battery and the combustion engine, the negative and positive poles of starter batteries for cars / LCV are usually placed on the long side of the battery whereas for starter batteries for trucks / HCV they are put on the short side<sup>32</sup>.

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<sup>28</sup> Calculated on the basis of the data submitted by the notifying party; see submission of the notifying party dated 08.01.2007, Annex 6.

<sup>29</sup> See submission of the notifying party dated 17.01.2007, p. 8.

<sup>30</sup> CO, p. 29 et seq.; see also: submission of the notifying party dated 17.01.2007, p. 8.

<sup>31</sup> There are still other product standards for lead-acid starter batteries valid outside the EEA (e.g. the Japanese Industry Standard (JIS 5301) and the Standard SAE J537 relevant for the American market) which provide very different geometrical parameters/dimensions.

<sup>32</sup> See e.g. submission of the notifying party dated 17.01.2007, Annexes 10 to 13; see also technical drawings included in FIAMM's product information/catalogue: submission of the notifying party dated 17.01.2007, Annex 14.

61. For a limited number of technical specifications of starter batteries the allocation to the group of starter batteries for cars / LCV and starter batteries for trucks / HCV is not self-evident. Accordingly, there exists a small grey area of "hybrid" types of batteries which can be used for both types of vehicles. The so called "Group 28" batteries manufactured by FIAMM have a capacity and cold cranking capacity at the upper limit of the range most common for cars/LCV (95 to 105 Ah / 720 – 760 A). The dimensions of this specific type of battery are however – at least as regards length – above the maximum dimensions relevant for starter batteries for cars / LCV (205 to 215 mm compared to 190 mm)<sup>33</sup>. According to the information submitted by FIAMM<sup>34</sup>, these batteries are consistent with international product standards valid outside the EEA (the Japanese JIS 5301 standard and the US norm SAE J537) and they can be used (or are recommended for use) in large Japanese cars (including SUV's) but also in a wide range of agricultural vehicles (such as tractors).
62. The existence of a limited number of "hybrid" batteries, however, does not prove that the distinction between starter batteries for cars / LCV and starter batteries for trucks / HCV is not an appropriate categorization for assessing the technical substitutability between different types of automotive starter batteries. First, the in drawing an exact dividing line between the two types of batteries mainly mirrors the fact that the borderline between LCV and HCV is also more or less fluid.<sup>35</sup> Second, even if one specific specification of starter battery does not fulfil all the criteria of a "typical" starter battery for cars / LCV or starter battery for trucks / HCV, the remaining product features in most cases allow for a clear and consistent allocation of the battery to one of the two types of automotive batteries. Accordingly, the parties provided the view that – due to the fact that the dimensions and the layout of this type of starter battery are closer to the relevant international standards – the "Group 28" of FIAMM, should be considered as starter battery for cars / LCV<sup>36</sup>.
63. Finally it has to be noted that all of the information material / catalogues provided by the parties consistently differentiate between starter batteries for cars / LCV and starter batteries for trucks / HCV<sup>37</sup>. Both companies also provide customers and final users with a detailed list of the different technical specifications of their respective portfolio of starter batteries, clearly indicating those types of vehicles, brands and model series for which the respective specification could be (or is recommended to be) used for.

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<sup>33</sup> See FIAMM's submission dated 18.01.2007, p. 8 et seq. and Annexes A 7.1 to A 9.2; submission of the notifying party dated 17.01.2007, p. 9 et seq. and Annexes 13, 14.

<sup>34</sup> See FIAMM's submission dated 18.01.2007, p. 7 et seq. and Annexes 7.1 to 7.3.

<sup>35</sup> The data submitted by the parties on their sales of starter batteries for cars / LCV and starter batteries for trucks / HCV are based on considering commercial vehicles of up to 6 tons as LCV while most commonly only vehicles of up to 3,5 tons are considered as LCV; see submission of the notifying party dated 17.01.2007, p. 7.

<sup>36</sup> This issue will be discussed in more detail below in the part on the assessment of the IAM for automotive starter batteries in Italy.

<sup>37</sup> See submission of the notifying party dated 17.01.2007, Annexes 3 and 4; FIAMM's submission dated 18.01.2007, Annex 4.2.1 to 4.2.7.

64. Insofar as the notifying party points out that similar technical differences exist between starter batteries for cars / LCV and starter batteries for trucks / HCV like *"for instance between batteries for smaller cars (e.g. a VW Golf) and large cars (e.g. a Mercedes S Class)"*<sup>38</sup>, this assertion is not covered by its own recommendations on the use of its starter batteries. According to the product information submitted<sup>39</sup>, the notifying party recommends for a VW Golf starter batteries with a capacity / cold cranking capacity ranging from 45 Ah / 420 A up to 74 Ah / 680 A and for the Mercedes S class starter batteries with a capacity / cold cranking capacity ranging from 55 Ah / 540 A up to 100 Ah / 800 A, i.e. starter batteries which – as can be seen from the table above – provide the product specifications of starter batteries for cars / LCV. The product information on the other hand does not provide indications that – in particular as regards the dimensions and the layout but also as regards capacity / cold cranking capacity – the VW Golf or the Mercedes S class can also use (or are recommended by the parties to use) starter batteries with the technical specifications of starter batteries for trucks / HCV or that it is technical feasible to start a truck / HCV with starter batteries recommended for use in the VW Golf and / or the Mercedes S class.
65. Taking all the product characteristics and technical differences described above into account, the demand-side substitutability between starter batteries for cars / LCV and trucks / HCV is very limited. As indicated above, also the parties consider – at least as regards the demand-side substitutability between automotive starter batteries for cars / LCV and trucks / HCV on the one hand and starter batteries for motorcycles on the other hand – that the technical differences provided by the different types of starter batteries are a very important criterion for the definition of the relevant product market. Otherwise it could not be explained why the parties submit that starter batteries for motorcycles constitute a separate relevant product market mainly because of their different technical characteristics (capacity, voltage, size and weight).
- (ii) Results of the Commission's investigation on customers' ability to switch between batteries for cars / LCV and for trucks / HCV
66. The very limited technical inter-changeability between starter batteries for cars / LCV and starter batteries for trucks / HCV is confirmed by the results of the Commission's market investigation on the customers' ability to switch between both types of automotive batteries.
67. As indicated in the Commission decision of 4. December 2007 initiating proceedings<sup>40</sup>, all OE-customers<sup>41</sup> and the overwhelming majority of IAM customers (roughly 90%)<sup>42</sup> involved in the Commission's first phase market

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<sup>38</sup> Submission of the notifying party dated 22.12.2006, p. 2.

<sup>39</sup> Submission of the notifying party dated 17.01.2007, Annex 3.

<sup>40</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 27.

<sup>41</sup> The first phase market investigation covered all major car and truck manufacturers currently active in the EEA. The Commission received 14 replies on its questionnaire to OE-customers dated 07.11.2006.

<sup>42</sup> The Commission received 49 replies on its questionnaire to IAM-customers dated 07.11.2006.

investigation clearly indicated that they would not switch between the different types of starter batteries following a small but significant non-transitory price increase of 10% for one of the types with the price for the other type being stable.

68. The results of the first phase market investigation were confirmed by the results of the in-depth market investigation. All OE-customers<sup>43</sup> and the vast majority of IAM-customers (roughly 80%)<sup>44</sup> indicated that starter batteries for cars / LCV and starter batteries for trucks / HCV provide very different technical features which render both types of batteries not being substitutes<sup>45</sup>. Furthermore, all OE-customers and the vast majority of IAM-customers (more than 80%)<sup>46</sup> again confirmed that they would not switch between the different types of starter batteries following a small but significant non-transitory price increase of 10% for one of the types with the price for the other type being stable.
69. Based on this evidence, the Commission preliminarily concluded in the Statement of Objections that there is no technical and economic demand-side substitutability between starter batteries for cars / LCV on the one hand and starter batteries for trucks / HCV on the other hand.

*(2) Supply-side considerations*

70. The Commission's market investigation in addition showed that the supply-side substitutability between starter batteries for cars / LCV and starter batteries for trucks / HCV is limited.

- (i) Commonalities and differences of the production process of starter batteries for cars / LCV and trucks / HCV

71. The production process for starter batteries for cars / LCV as well as for starter batteries for trucks / HCV has essentially three main steps<sup>47</sup>: (i) the production of the plates (electrodes) including the production of the metal grid, the production of the active material, and the pasting of the grid with the active material, (ii) the assembly of the battery, and (iii) the formation and charging of the battery.

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<sup>43</sup> The Commission received 13 replies of major car and truck manufacturers on its second phase questionnaire to OE customers dated 19.12.2006.

<sup>44</sup> The Commission received more than 120 replies of customers on its second phase questionnaire to IAM customers dated 20.12.2006.

<sup>45</sup> See replies to question 2 of the Commission's questionnaire to OE customers dated 19.12.2006 and question 10 of the Commission's questionnaire to IAM customers dated 20.12.2006.

<sup>46</sup> See replies to question 3 of the Commission's questionnaire to OE customers dated 19.12.2006 and question 11 of the Commission's questionnaire to IAM customers dated 20.12.2006.

<sup>47</sup> See Form CO, p. 26 et seq.; submission of the notifying party dated 08.01.2007, p. 3 et seq.; FIAMM's submission dated 08.01.2007, p. 4 et seq.; see also: agreed minutes of a conference call with Exide held on 16.01.2007; agreed minutes of a conference call with MIDAC held on 19.01.2007.

72. Two different technologies are currently used in the production of the grids for the plates:<sup>48</sup> (i) the expanded metal process, and (ii) the gravity casting process. Despite the fact that both technologies in principle can be used for the production of plates used in starter batteries for cars / LCV and in starter batteries for trucks / HCV<sup>49</sup>, the different technologies provide some differences which make them more suitable for the production of one of the two types of automotive batteries.
73. The expanded metal process is a continuous process that consists in producing a metal strip which is trimmed and stretched to form a continuous grid which is subsequently pasted with the active material (lead alloy). According to the parties, this process is highly automated, allows high productivity, and is therefore mainly used for high-volume production. Both parties indicated that this technology is currently mainly used in the production of starter batteries for cars / LCV.
74. The gravity casting process consists in pouring molten lead alloy into a mould that has the shape of the two grids needed for the production of the plates. After solidification, the double grid is ejected and individually stacked. Due to the manual handling needed, this process is relatively labour intensive and its productivity is relatively low. Contrary to the expanded metal process, the gravity casting technology is therefore mainly used for the production of smaller volumes. According to the parties, the gravity casting technology is mainly used in the production of starter batteries for trucks / HCV.
75. The assembly of the battery essentially consists in placing the plate elements into a plastic case, connecting the plates and the plates with the terminals (poles), and covering and sealing the case. Mainly due to the differences in dimensions and layout, the assembly of starter batteries for cars / LCV and starter batteries for trucks / HCV is done on separate assembly lines<sup>50</sup> which inter alia differ as regards the tooling of the assembly equipment. According to the parties, in general the capability of an assembly line to handle batteries of different sizes is mainly conditioned by the first steps of the assembly process, which are limited as to the size (number of plates) of the elements they can handle, and the feed system, which can only manage batteries up to a certain length. This length is very different for starter batteries for cars / LCV (roughly 350 mm) and starter batteries for trucks / HCV (more than 500 mm)
76. FIAMM currently produces starter batteries for trucks / HCV on [...] out of [...] production lines in its plant in [...] ; VB has assembly lines for starter batteries

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<sup>48</sup> See submission of the notifying party dated 08.01.2007, p. 4; FIAMM's submission dated 08.01.2007, p. 5.

<sup>49</sup> The parties indicated, however, that due to the different size of the plates used in starter batteries for cars / LCV and starter batteries for trucks / HCV, the relevant equipment needs different tools and set-ups for the production of plates for the different types of batteries; see e.g. FIAMM's submission dated 08.01.2007, p. 5 and p. 6.

<sup>50</sup> See submission of the notifying party dated 08.01.2007, p. 5; FIAMM's submission dated 08.01.2007, p. 5 et seq.; see also: agreed minutes of a conference call with Exide held on 16.01.2007; agreed minutes of a conference call with MIDAC held on 19.01.2007.

<sup>51</sup> FIAMM in addition produces a limited number of starter batteries for trucks / HCV in its plant in Mlada Boleslav (Czech Republic).

for trucks / HCV in only [...] of its [...] production plants (in [...] and [...]). According to the estimates provided by the parties<sup>52</sup>, the proportion of output (in units) per assembly line for starter batteries for cars / LCV and for starter batteries for trucks / HCV is roughly 2:1 (i.e. output per hour of the assembly line for starter batteries for cars / LCV is double the output of the assembly line for starter batteries for trucks / HCV).

77. The final step in the production of automotive starter batteries encompasses the filling in of the acid ("formation") and the charging of the battery. This production step is different for so called "wet" batteries which already include the acid and "dry" batteries. The latter type allows the battery to be shipped in a pre-charged status but without acid. In this case, the customer has to fill the battery with sulphuric acid and perform a refreshing charge before delivering the battery to the end user<sup>53</sup>.
78. In general, the equipment for formation and charging of the battery is the same for starter batteries for cars / LCV and for starter batteries for trucks / HCV. Due to the different output of the assembly lines for starter batteries for cars / LCV and for starter batteries for trucks / HCV (proportion in units: 2:1), the formation and charge equipment in most cases provides the "bottleneck" of the total capacity of a production plant<sup>54</sup>.

(ii) Results of the Commission's investigation on manufacturers' ability to switch production between batteries for cars / LCV and trucks / HCV

79. The supply-side substitutability between starter batteries for cars / LCV and trucks / HCV seems to be limited. The results of Commission's market investigation regarding the manufacturer's ability to switch production between the two types of batteries confirm this view.
80. The two types of batteries are manufactured on different assembly lines. Even those elements of the production equipment which, in principle, can be used for both types of batteries (like for the production of plates), in practice need technical adaptation (tooling, set-up) in case of switching production. In addition, the two different technologies currently used for the production of plates have significant differences which make them more suitable for the production of one type of automotive batteries or the other.
81. Therefore, according to the notifying party, switching production on a specific production line from one type of starter batteries to the other requires significant

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<sup>52</sup> See submission of the notifying party dated 08.01.2007, p. 4; FIAMM's submission dated 08.01.2007, p. 6.

<sup>53</sup> According to the parties, dry batteries – due to the additional filling and charging process needed – are only used by certain customer groups (e.g. workshops) in the IAM. All OE batteries and the majority of the IAM-batteries are supplied in a fully charged status with acid (wet batteries); see e.g. FIAMM's submission dated 08.01.2007, p. 4.

<sup>54</sup> See agreed minutes of a conference call with Exide held on 16.01.2007; the notifying party submitted that the most important "bottleneck" is the first step of the production process, i.e. the production of the grids for the plates; see Form CO, p. 110.

investment (approximately EUR 5-6 million) and time (1 – 1.5 years)<sup>55</sup>. This estimate is roughly confirmed by the Commission's market investigation<sup>56</sup>.

82. Competitors contacted in the course of the market investigation furthermore indicated that switching production of a pre-existing production line from one type of starter battery to the other would not be a reasonable approach since the re-tooling and adaptation of the production line requires almost the same investment and time as setting up a new production line<sup>57</sup>.
83. Based on this evidence, the Commission reached the preliminary conclusion that the supply-side substitutability between starter batteries for cars / LCV on the one hand and starter batteries for trucks / HCV on the other hand is insufficient to consider that both types of starter batteries belong to the same relevant product market.

*(3) Preliminary conclusion*

84. Based on the results of the first phase market investigation, the Commission reached the preliminary conclusion in the Statement of Objections that starter batteries for cars / LCV and starter batteries for trucks / HCV constitute distinct relevant product markets.

*(b) OEM, OES and IAM*

85. Based on the results of the first phase market investigation, the Commission reached the preliminary conclusion that IAM for batteries for cars / LCV and the IAM for starter batteries for trucks / HCV constitute relevant product markets distinct from the markets for OE starter batteries for cars / LCV and trucks / HCV.
86. However, the Commission also found that the results of the first phase market investigation were inconsistent as regards the classification of OES-batteries. Accordingly, the Commission at that stage left open whether OES-batteries should be considered as being part of the OE-market, together with OEM-starter batteries, or whether OES-batteries constitute a separate relevant product market distinct from the market for OEM-batteries.

*(1) Distinction between IAM and OEM/OES*

87. The in-depth market investigation has confirmed that, as affirmed by the notifying party, the IAM for batteries for cars / LCV and the IAM for starter batteries for trucks / HCV constitute relevant product markets distinct from the markets for OE starter batteries for cars / LCV and trucks / HCV.

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<sup>55</sup> Form CO, p. 35.

<sup>56</sup> See replies to question 11 of the Commission's questionnaire to competitors dated 08.11.2006; 5 out of 8 competitors indicated that switching production would need additional investment (of EUR 2 to 10 million depending on the capacity) and time (of 12 to 18 months).

<sup>57</sup> See agreed minutes of a conference call with Banner held on 11.01.2007;

88. The vast majority of IAM-customers involved in the market investigation (roughly 90%) confirmed that the IAM should be analysed as a separate product market<sup>58</sup>. A consistent majority (roughly 75%) in addition provided the view that, despite the fact that both types of batteries are for replacement, the conditions of sale differ significantly for IAM and OES batteries<sup>59</sup>.
89. This result consistently reflects the results of the Commission's first phase market investigation on the main differences between the two types of replacement batteries:
90. A consistent majority of customers (more than 80%) and competitors (more than 90%) confirmed that, compared to starter batteries sold to car and truck manufacturers, IAM batteries (i) have different technical and quality standards, (ii) are priced differently, (iii) follow different logistical requirements, and (iv) are most often purchased also in different procedures<sup>60</sup>.

*(2) Distinction between OEM and OES*

91. The Commission's in depth market investigation provided indications that OEM and OES starter batteries belong to the same relevant product market: the OE-market. However, the results of the market investigation also clearly show that OEM batteries and OES batteries represent distinct market segments with considerable differences as regards the competitive environment.

- (i) Results of the market investigation in support of a common market for OEM and OES starter batteries ("OE-market")

92. In the course of the first phase market investigation the vast majority of OE-customers (almost 100%) clearly indicated that no distinction should be made between OEM and OES starter batteries since both types of batteries (i) have similar technical specifications, (ii) have almost the same quality standards, (iii) and are purchased in identical procedures<sup>61</sup>.
93. During the in-depth market investigation, OE-customers consistently confirmed that the quality standards for OEM and OES batteries are not very different<sup>62</sup>, and that the technical specifications of OEM and OES batteries have only minor differences<sup>63</sup>, mainly as regards pole protection (additional pole caps), packaging

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<sup>58</sup> See replies to question 12 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>59</sup> See replies to question 13 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>60</sup> See replies to question 15 of the Commission's questionnaire to IAM-customers dated 07.11.2006; replies to question 10 of the Commission's questionnaire to OE-customers dated 07.11.2006; replies to question 15 of the Commission's questionnaire to competitors dated 08.11.2006.

<sup>61</sup> See replies to questions 11 and 12 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>62</sup> See replies to question 3 (a) of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>63</sup> See replies to question 4 (a) of the Commission's questionnaire to OE-customers dated 19.12.2006.

and labelling<sup>64</sup>. All OE customers responding to the Commission's in-depth market investigation furthermore indicated that the requirements for certifying a supplier as an "approved supplier" are quite similar for OEM and OES starter batteries.

94. Furthermore, the customers for OEM and OES starter batteries are the same (that is to say, car / truck manufacturers). Despite the fact that a slight majority of OE customers (8 out of 14) indicated that, for the same technical specification, prices for OES batteries are higher than for OEM batteries, the Commission's market investigation showed that this price difference can be explained by technical differences (that is to say, additional pole caps, packaging, labelling) and the differences in the logistical requirements for the two types of starter batteries<sup>65</sup>. The majority of OE customers (8 out of 14) also indicated that they purchase OEM starter batteries and OES starter batteries on the basis of one single contract<sup>66</sup>.
95. Finally, the majority of OE-customers (8 out of 13) indicated that, in the event of an unexpected disruption of the supply, they would use the existing stock of OES batteries to bridge the disruption of supply of OEM batteries<sup>67</sup>.

(ii) Relevant differences in the competitive environment prevailing for OEM and OES starter batteries

96. The results reported so far are not clear-cut. The Commission's market investigation also provided indications that there are differences in the market environment for OEM and OES batteries which to a certain extent also result in different competitive constraints in respect of the two types of OE starter batteries.
97. First, the notifying party consistently distinguishes between the two segments, OEM and OES, in internal documents. In a presentation assessing the current market position of VB in the supply of the major car and truck manufacturers in the EEA, the analysis provides the relevant data separately for OEM and OES<sup>68</sup>. The same presentation also shows that the number of players considered by the notifying party as competitors is different for the two types of batteries. This internal assessment is consistently reflected in the replies of OE-customers on the suppliers which they consider to be viable suppliers for the respective types of battery<sup>69</sup>.
98. Despite similar technical standards, de facto some quality aspects defined by OE-customers are not the same for OEM batteries as for OES (that is to say, replacement) batteries. This is explained by the fact that OEM batteries go directly

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<sup>64</sup> See also submission of the notifying party dated 17.01.2007, p. 2 et seq.

<sup>65</sup> See replies to question 4 of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>66</sup> See replies to question 3 of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>67</sup> See replies to question 4 (b) of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>68</sup> See presentation for the meeting of the supervisory board on 2.6.2006, point 2 ("Aktuelle Projekte OEM/OES"); submission of the notifying party dated 16.01.2007, Annex 2

<sup>69</sup> See replies to questions 6 and 7 of the Commission's questionnaire to OE-customers dated 19.12.2006.

into the finished product of the car and truck manufacturers and thus have an immediate impact on its quality and the quality perception of the brand by the final customer<sup>70</sup>. OES batteries, on the other hand, are for replacement and therefore their quality (for example, as regards charge) can, at least to a certain extent, also be ensured by the repair-shop which sells the product to the final customer (for example by re-charging the battery).

99. As regards OEM batteries, the OE-customers involved in the market investigation confirmed that starter batteries represent only a minor factor in the total production cost of a new car / truck (less than 1%)<sup>71</sup>. In contrast, the OE-customers indicated that the quality of a starter battery is of huge importance for the quality perception of the final product<sup>72</sup>.

100. Several OE-customers contacted in the course of the market investigation stressed the high standards required for the "freshness" of OEM batteries<sup>73</sup>. As a consequence, OE-customers indicated that the location of the production plant for starter batteries is a major factor in the choice of the supplier. The relevance of the location of the battery plant is further strengthened by the fact that prices for OEM batteries are most commonly negotiated as ex-works prices with the OE-customer taking care of the transport of the starter batteries to its production plants<sup>74</sup>.

101. Accordingly, the majority of OE-customers (12 out of 14) clearly indicated that they prefer suppliers to have production plants close to their own production plants<sup>75</sup>. OE-customers contacted in the course of the market investigation even indicated that they negotiate not only the prices and the quality of the battery but also the concrete source for delivery (that is to say, the plant where the batteries are produced)<sup>76</sup>.

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<sup>70</sup> See e.g. reply of OE-customer 14 to question 13 of the Commission's questionnaire dated 19.12.2006: *"Initial start experience is critical to the end customer perception of the vehicle quality"*; OE-customer 3 indicated in its reply to the same question *"The starter battery is very important for the quality of the final product (car/LCV)"*; OE-customer 6 as regards starter batteries for trucks / HCV in reply to the same question simply stated: *"Without working truck (including battery) no income for end customer"*; OE-customer 10 answered: *"Battery can be an image killer"*.

<sup>71</sup> See replies to question 11 of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>72</sup> See replies to question 12 of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>73</sup> For the different aspects described in the following, see in particular: agreed minutes of a conference call with OE-customer 9 held on 25.01.2007; agreed minutes of a conference call with OE-customer 7 held on 25.01.2007; see also reply of OE-customer 13 to question 22 of the Commission's questionnaire to OE-customers dated 07.11.2006: *"Batteries need to be 'fresh' for use – therefore no long lead times for shipment possible."*

<sup>74</sup> See e.g. agreed minutes of a conference call with OE-customer 9 held on 25.01.2007; agreed minutes of a conference call with OE-customer 1 held on 22.01.2007; agreed minutes of a conference call with OE-customer 11 held on 26.01.2007;

<sup>75</sup> See replies to question 18 of the Commission's questionnaire to OE-customers dated 07.11.2006

<sup>76</sup> See e.g. agreed minutes of a conference call with OE-customer 9 held on 25.01.2007

(c) *Preliminary conclusion on the relevant product markets as set out in the Statement of Objections*

102. Based on the results of the market investigation, the Commission reached the preliminary conclusion in the Statement of Objections that the relevant product markets affected by the transaction are the following:

(i) the OE market for starter batteries for cars / LCV and the OE market for starter batteries for trucks / HCV, both markets characterized by the two distinct segments of OEM batteries and OES batteries, and

(ii) the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV.

**4) The notifying party's reply to the Statement of Objections**

103. The notifying party submitted its reply to the Commission's Statement of Objections on 26 February 2007. As FIAMM's comments on the Statement of Objections did not touch upon issues relating to the product market definitions, only VB's reply will be referred to in this section.

104. As regards the different types of automotive starter batteries, the notifying party in its reply to the Statement of Objections does not contest any of the facts and conclusions on the distinction between the market for starter batteries for cars / LCV and the market for starter batteries for trucks / HCV. It only reiterates that *"VB maintains that given the spectrum of batteries in terms of capacity (and cold cranking capacity), any threshold used to distinguish between these two types of batteries and allocate them to different markets is (to a certain extent) arbitrary"*<sup>77</sup>.

105. In addition, the notifying party agrees with the Commission's finding that there is one single market for starter batteries for OE customers, encompassing the segments of OEM and OES batteries.

**5) Assessment**

106. The notifying party does not explicitly maintain its view that there is one single relevant product market for automotive starter batteries, encompassing batteries for cars / LCV and batteries for trucks / HCV. Furthermore, the fact that, at least for a limited number of "hybrid" automotive batteries, the use of a threshold relating to capacity (or cold cranking capacity) to distinguish between starter batteries for cars / LCV and starter batteries for trucks / HCV may lead to arbitrary results, does not mean that it is not appropriate to distinguish between the two types of starter batteries.

107. The different types of starter batteries are characterized by several other technical differences besides capacity and cold cranking capacity, –for example, their dimension, weight and technical layout. Even if one specific specification of a starter battery does not fulfil the criteria of a "typical" starter battery for cars / LCV or starter battery for trucks / HCV as regards capacity and cold

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<sup>77</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 2

cranking capacity, the remaining product features allow for a clear and consistent allocation of the battery to one of the two types of automotive batteries. The notifying party does not contest any of the factual details reported in the Statement of Objections in this regard.

## **6) Overall conclusion on product market definitions**

108. Based on the results of the market investigation, it is concluded that the relevant product markets affected by the transaction are the following:

(i) the OE market for starter batteries for cars / LCV and the OE market for starter batteries for trucks / HCV, both markets characterized by the two distinct segments of OEM batteries and OES batteries, and

(ii) the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV.

### **B. RELEVANT GEOGRAPHIC MARKETS**

#### **1) OE-markets for starter batteries for cars / LCV and trucks / HCV**

(a) *Definition and arguments submitted by the parties and results of the market investigation as set out in the Statement of Objections*

109. The parties submitted in the notification that, in line with the Commission's past practice, the markets for OEM and OES starter batteries (for cars / LCV as well as for trucks / HCV) are EEA-wide in scope. The market investigation conducted in this case confirmed this view.

110. The overwhelming majority (12 out of 14) of OE-customers contacted in the Commission's market investigation considered that the markets for OE-batteries for cars / LCV and for trucks / HCV are EEA-wide in scope<sup>78</sup>. The Commission's market investigation confirmed that all the OE-customers operate an EEA-wide sourcing strategy with supply contracts being tendered and regularly re-negotiated centrally for all the manufacturing plants for cars / LCV and trucks / HCV located in the EEA<sup>79</sup>.

111. The vast majority (12 out of 14) furthermore clearly confirmed that they do not regularly invite manufacturers located outside the EEA to submit offers for the supply of starter batteries to the manufacturing plants for vehicles located in the EEA and so far have not purchased starter batteries from those suppliers<sup>80</sup>.

112. Even in the event of a lasting price increase of 10%, the vast majority of OE-customers (11 out of 14) would not consider changing their current purchasing

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<sup>78</sup> See replies to question 16 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>79</sup> See replies to questions 27 to 29 of the Commission's questionnaire to OE-customers dated 07.11.2006;

<sup>80</sup> See replies to questions 20 and 21 of the Commission's questionnaire to OE-customers dated 07.11.2006.

pattern and switching to suppliers located outside the EEA for the supply of their car and truck production plants located in the EEA<sup>81</sup>.

113. This result of the market investigation is explained by the fact that transportation cost and plant location are an important factor in the OE-customers' choice of viable suppliers, in particular in the segment of OEM batteries. One customer explicitly indicated in its reply to the Commission's first phase questionnaire that *"logistic cost of batteries makes [it] difficult to source very far from the car manufacturing plant; sourcing in Turkey or Romania for Western Europe plant would result in high logistic costs"*<sup>82</sup>. Another customer pointed out that *"due to the weight of the batteries transportation costs do matter; from the economic point of view it is not profitable to supply batteries for [customer 5]'s European production plants from battery manufacturers outside of Europe"*<sup>83</sup>.

114. The fact that transportation cost matters and that OE-customers in particular in the segment of OEM batteries prefer suppliers to have production facilities close to their own production plants<sup>84</sup> or even negotiate the concrete source for delivery<sup>85</sup> does not justify the conclusion that the geographical scope of the markets for OE starter batteries for cars / LCV and OE starter batteries for trucks / HCV is narrower than EEA-wide. The number of production plants of the different suppliers of starter batteries and their relative location compared to the location of the OE-customers' production plants, however, has to be considered as an important factor in the assessment of their relative competitive strengths and weaknesses and of the competitive constraint they may exert on each other in the markets for OE starter batteries for cars / LCV and for OE starter batteries for trucks / HCV.

115. Based on the results of the market investigation, the Commission in its Statement of Objections reached the preliminary conclusion that the OE-markets for starter batteries for cars / LCV and for starter batteries for trucks / HCV are EEA-wide in scope.

*(b) The notifying party's reply to the Statement of Objections*

116. The notifying party submitted its reply to the Commission's Statement of Objections on 26 February 2007. As FIAMM's comments on the Statement of Objections did not touch upon issues relating to the geographical scope of the markets for OE starter batteries for cars / LCV and for trucks / HCV, only VB's reply will be referred to in this section.

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<sup>81</sup> See replies to question 23 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>82</sup> See reply of OE-customer 9 to question 16 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>83</sup> See reply of OE-customer 5 to question 20 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>84</sup> See replies to question 18 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>85</sup> See e.g. agreed minutes of a conference call with OE-customer 9 held on 25.01.2007.

117. While in principle not contesting the EEA-wide scope of the markets for OE starter batteries for cars / LCV and trucks / HCV, VB *"maintains that the market is probably larger than EEA-wide and includes, at least, also Turkey."*<sup>86</sup> Moreover, VB points to the fact that the EEA now also includes Romania and Bulgaria *"where strong OE starter battery suppliers, such as Rombat and Monbat are active."*<sup>87</sup> The notifying party also asserted that non-EEA suppliers *"exert competition pressure in the OE-market in the EEA and will increasingly do so post-merger."*<sup>88</sup>:

118. According to the notifying party, the competitive constraint exerted by non-EEA suppliers "is already demonstrated by the Commission's finding that OE customer occasionally invite non-EEA manufacturers to submit tenders regarding the supply of starter batteries to plants located in the EEA (para. 84 of the SO)"<sup>89</sup>. In addition, the notifying party claimed that the Commission's file provides evidence that some European OE-customers are purchasing starter batteries from non-EEA suppliers or are, at least, currently considering doing so<sup>90</sup>. Furthermore, according to the notifying party's understanding, the Turkish supplier Mutlu delivers starter batteries to a production plant of Toyota located in the United Kingdom.

119. Based on these elements, the notifying party, without providing any additional supporting evidence, furthermore asserts that transport costs and the requirement for "fresh" batteries do not constitute significant barriers for the import of OE starter batteries from outside the EEA. According to the notifying party, most starter batteries for cars / LCV are maintenance free and not subject to quick discharge and can therefore be kept "fresh" over a long period of time. In this regard, the notifying party also refers to the replies of *"a large number of"* OE customers<sup>91</sup> which reportedly indicated that it is not necessary for a supplier to have production plants or warehouses close to the plant of the OEM. According to the notifying party, this view is also shared by competitors such as Rombat and Steco.

(c) *Assessment*

120. The notifying party does not contest the Commission's finding that the markets for OE starter batteries for cars / LCV and trucks / HCV are EEA-wide in scope

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<sup>86</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 1

<sup>87</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 1

<sup>88</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 1

<sup>89</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 1

<sup>90</sup> The notifying party in this respect refers to the replies of 5 out of 14 OE customers, namely the replies of OE customer number 1, 7, 10, 12 and 16; see VB's reply to the Statement of Objections dated 26 February 2007, p. 2.

<sup>91</sup> The notifying party explicitly refers to the replies of 6 out of 14 OE customers, namely the replies of OE customer number 1, 2, 6, 9, 10 and 17; see VB's reply to the Statement of Objections dated 26 February 2007, p. 2.

but only reiterates that, "probably" by including these countries into the relevant geographic market, the competitive constraints exerted by suppliers located in Romania, Bulgaria and Turkey have to be taken into account in assessing the competitive impact of the proposed transaction. Since the Commission's competitive assessment thoroughly assesses the competitive constraints stemming from players located outside the EEA<sup>92</sup>, the notifying party's submission in this respect does not contradict the Commission's findings as set out in the Statement of Objections.

121. In addition, by taking note of and quoting the relevant evidence in the Commission's file only perfunctorily and selectively in its reply to the Statement of Objections, the notifying party — only provides an incomplete and heavily distorted picture of the results of the Commission's market investigation.

122. First, the notifying party's assertion that the Commission's market investigation provided evidence "that OE customers occasionally invite non-EEA manufacturers to submit tenders regarding the supply of starter batteries to plants located in the EEA (para. 84 of the SO)"<sup>93</sup> must be rejected. The relevant paragraph of the Statement of Objections reads: "The **vast majority** [of OE customers] (12 out of 14) furthermore **clearly confirmed that they do not regularly invite manufacturers located outside** the EEA to submit offers for the supply of starter batteries to the manufacturing plants for vehicles based in the EEA **and so far have not purchased** starter batteries from those suppliers". The wording of the relevant questions in the Commission's questionnaire to OE customers and the corresponding replies of OE customers<sup>94</sup> show that the wording used in the Statement of Objection ("... do not regularly invite ...") provides a very "cautious" interpretation of the OE customers' replies. Since the relevant question ("Do you invite manufacturers [...] located outside the EEA [...]?") does not touch upon the issue of the regularity of invitations, the assertion put forward by the notifying party cannot be derived from the replies of the OE customers to this question.

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<sup>92</sup> As has been set out in all detail in the Statement of Objection, the Commission for example includes the production capacity of all the players explicitly mentioned by the notifying party (i.e. Rombat, Monbat, Mutlu, Inci Akü) in its calculation of the excess capacity currently available in the EEA. In favour of the notifying party this approach was even applied for those suppliers which – like for example Monbat – are currently not even active in the OE market for automotive starter batteries; see Statement of Objections dated 12.02.2007, paragraph 205; all the players mentioned in addition were included in the Commission's market investigation and – except for the Turkish supplier Inci Akü – submitted replies to the Commission's questionnaire to competitors. The Commission's questionnaire to OE customers furthermore carefully assessed whether and to which extent these suppliers are considered to be viable supply alternatives for the manufacturing plants located in the EEA; see e.g. questions 38 and 39 of the Commission's questionnaire to OE customers dated 07.11.2006; questions 6 and 7 of the questionnaire to OE customers dated 20.12.2006.

<sup>93</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 1

<sup>94</sup> Question 20 of the Commission's questionnaire to OE customers dated 7.11.2006 reads: "Do you invite manufacturers of OEM automotive batteries located outside the EEA to participate in the procurement procedures for the supply of your company's production plants located in the EEA?" (Options for reply: "Yes", "No"); this question does not mention the options "occasionally invite" or "regularly invite"; question 21 of the same questionnaire reads: "Have you ever purchased OEM automotive starter batteries from manufacturers located outside the EEA for the supply of your company's plants located in the EEA?" (Options for reply: "Yes, I regularly purchase ", "Yes, I do purchase [...] from time to time"; "No, I have never purchased"; as indicated in the Statement of Objections, 12 out of 14 respondents indicated that they never purchased OE starter batteries from suppliers located outside the EEA.

123. As regards the replies of those OE customers considered by the notifying party to support its assertion (5 OE-customers), the notifying party does not contest that the majority of OE customers (9 OE-customers) clearly indicated that they do not consider suppliers located outside the EEA to be viable alternatives for the supply of OEM starter batteries to their production plants in the EEA.
124. In addition, the notifying party provides an incomplete picture of the replies of the respective OE-customers. By stating that "*OE customer 10 considers the Turkish supplier Inci Akü to be an alternative supplier*"<sup>95</sup>, the notifying party omits to mention that customer 10 refers only to the segment of OES starter batteries, thus ruling out this supplier as a viable alternative for the supply of OEM starter batteries to vehicle production plants located in the EEA<sup>96</sup>. With its assertion that "*OE-customer 1 states that it would switch to suppliers outside the EEA*"<sup>97</sup>, the notifying party quite freely interprets in its favour the following reply of OE-customer 1 to question 23 of the Commission's questionnaire<sup>98</sup>: "*We would switch, but actually not possible*". The notifying party – in the course of discussing the geographical scope of the IAM for automotive starter batteries – also confirms that "*only a relatively small part of European OE manufacturers sources batteries from outside the EEA*"<sup>99</sup>.
125. Similarly, the notifying party's assertion that the Commission's market investigation provides evidence that transport costs and the requirement of "freshness" of starter batteries do not constitute significant barriers for the import of OE batteries from outside the EEA does not reflect a balanced assessment of the factual elements and evidence included in the Commission's file. In this regard, the notifying party does not contest that OE-customers negotiate ex-works prices for OEM starter batteries and take care of the transport of the batteries to their production plants for themselves, thus giving the location of the battery plant relative to their own production plants a decisive influence on the competitiveness of the different suppliers for OE starter batteries.
126. As regards the replies of those OE customers considered by the notifying party to be in support of its assertion (that is to say, a minority of 6 out of 14 OE customers, namely OE customer 1, 2, 6, 9, 10 and 17), the notifying party again provides an incomplete and distorted picture of the views expressed by these market players. It has to be noted first that the notifying party's assertion that "*explicit statements of a large number of OE customers*" would show "*that it is not necessary for a supplier [...] to have production plants and warehouses close to*

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<sup>95</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 2

<sup>96</sup> See reply of customer OE-customer 10 to the Commission's questionnaire dated 7.11.2006 (p. 3381 of the Commission's file).

<sup>97</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 2

<sup>98</sup> Question 23 reads: "*In case of a lasting price increase for OEM automotive starter batteries in the EEA, would your switch your supply of your company's plants located in the EEA to manufacturers located outside the EEA?*"

<sup>99</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 11

*the plant of the OEM*" is based on the replies of OE-customers to questions which are not intended to clarify this issue. The questions the notifying party refers to (questions 7 and 8 of the phase-II questionnaire to OE-customers) are mainly aimed at clarifying how the delivery of OE starter batteries is physically organized and therefore do not touch upon the issue or even mention the location of the production plant of the supplier, the requirement of "freshness" or the relevance of transport cost<sup>100</sup>.

127. As regards the issue whether and to what extent transport cost and the location of a battery plant are important factors in the customer's choice of an OE battery supplier, the results of the market investigation not mentioned at all by the notifying party in its reply to the Statement of Objections provide a very clear picture. In this regard, the Commission considers the replies to questions 18 and 22 of the Commission's first phase questionnaire to be most relevant.

128. Question 18 reads: "Does your company prefer your supplier of automotive batteries to have plants and / or warehouses located close to your car / LCV or truck / HCV production plant?" The reply options were: (i) "Yes, plants and warehouses", (ii) "Yes, warehouses", and (iii) "No". The notifying party does not contest that 12 out of 14 respondents (including the OE-customers number 1, 2, 6, 9 and 10 quoted by the notifying party in support of its assertion<sup>101</sup>) clearly indicate that they prefer their suppliers to have plants and warehouses close to their production plants. Furthermore, the notifying party does not contest the Commission's finding that OE-customers even negotiate the concrete source (production plant) for the delivery of starter batteries.<sup>102</sup>

129. Question 22 reads: "If you do not purchase OEM automotive starter batteries from manufacturers located outside the EEA for the supply of your plants in the EEA, what are the reasons that prevent you from doing so?" The notifying party does not contest that 13 out of 14 respondents (including the OE-customers number 1, 2, 6, 9 and 10 quoted by the notifying party in support of its assertion) clearly indicated that "significantly higher transport cost" are one of the main reasons which prevent them from sourcing OEM batteries from outside the EEA.

130. Furthermore, the notifying party does not contest the Commission's finding that OE-customers even negotiate the concrete source (production plant) for the delivery of OEM starter batteries.<sup>103</sup> The notifying party also does not question the

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<sup>100</sup> Question 7 of the phase-II questionnaire to OE-customers regarding OEM batteries reads: "Please indicate in the table below how your suppliers deliver the OEM batteries you purchase from them." The table mentioned provides the following options (i) "To your vehicle assembly plant on a just-in-time basis; suppliers are required to have warehousing facilities near the plant", (ii) "To your vehicle assembly plant on a just-in-time basis; however, suppliers are not required to have warehousing facilities near the plant", and (iii) "To your vehicle assembly plant but not on a just-in-time basis. You manage the inventory as to ensure continuing availability of batteries". The three options therefore do not refer to the aspect of transport cost and/or the location of the battery plant relative to the vehicle production plant.

<sup>101</sup> OE customer 17 did not respond to the first-phase questionnaire.

<sup>102</sup> See e.g. agreed minutes of a conference call with OE-customer 9 held on 25.01.2007

<sup>103</sup> See e.g. agreed minutes of a conference call with OE-customer 9 held on 25.01.2007

Commission's finding that even in the event of a lasting price increase of 10%, the vast majority of OE-customers (11 out of 14) would not consider changing their current purchasing pattern and switching to suppliers located outside the EEA for the supply of their car and truck production plants located in the EEA<sup>104</sup>.

131. Finally, as regards the relevance of the requirement of the "freshness" of OE starter batteries, in particular of OEM batteries, the Commission notes that its findings reported in the Statement of Objections are also confirmed by FIAMM. By explaining its strategy regarding the level of inventory of starter batteries, FIAMM explicitly states: "*With regard to the OE segment, a distinction should be drawn between OEM and OES batteries. **OEM batteries** are generally characterized by strict ex-works just-in-time deliveries and considering that the batteries **must be delivered within few days of the first charging** (seven to fifteen, depending on customer's approach), FIAMM cannot stock more relevant amounts of product according to the foreseen demand*"<sup>105</sup>.

(d) *Conclusion*

132. Based on the results on the market investigation, – and having taken into account the competitive constraints exerted by suppliers located in neighbouring countries of the EEA in the course of the assessment of the competitive impact of the proposed transaction, it is concluded that the OE-markets for starter batteries for cars / LCV and for starter batteries for trucks / HCV are EEA-wide in scope.

**2) IAM for starter batteries for cars / LCV and IAM for starter batteries for trucks / HCV**

(a) *Definition and arguments submitted by the parties in the form CO and the reply to the decision initiating proceedings*

133. As regards the IAM for batteries, the parties submit that the IAM for batteries for cars / LCV and the IAM for batteries for trucks / HCV also have to be considered EEA-wide in scope. To support their view, in the form CO the parties mainly refer to the following aspects and market characteristics<sup>106</sup>:

134. According to the parties, transport costs for starter batteries are relatively modest. In addition, the parties argue that publicly available data clearly indicate that there is a high level of trade between Contracting Parties to the EEA Agreement. Furthermore, the parties submit that a significant consolidation has occurred among battery production facilities, with a significant decrease in the number of plants and a concentration in only some Contracting Parties to the EEA Agreement (in particular Germany, France, Italy, Spain and the Czech Republic). The parties further point out that all automotive starter batteries are now governed by European technical standards and that the most popular battery types are

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<sup>104</sup> See replies to questions 23 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>105</sup> FIAMM's submission dated 22 February 2007, p. 4 (emphasis added)

<sup>106</sup> Form CO, p. 37 et seq.

converging across countries, with the major suppliers running a European-wide brand strategy.

135. While conceding that significant price differences still exist between the Contracting Parties to the EEA Agreement, the notifying party stated in the form CO that the existing price differences can be explained by (i) different climatic conditions leading to different preferences for specific types of batteries (as regards capacity and cold-cranking capacity) in different countries, (ii) different customer size in different countries, or (iii) differences in the distribution systems and service levels<sup>107</sup>.
136. The notifying party also submits that a significant consolidation of buyers in the IAM has led to an increased importance of large trans-national and pan-European customers. The notifying party estimates that it derives almost [35-45]\*% of its turnover in the IAM from sales to such trans-national customers (including buyer groups) and that in 2005 it achieved approximately [30-40]\*% of its IAM turnover with its 10 largest customers<sup>108</sup>.
137. Finally, the notifying party refers to those elements of previous Commission decisions which support its view that the scope of the IAMs for starter batteries for cars / LCV and starter batteries for trucks / HCV is EEA-wide.
138. The Commission concluded in its *Varta/Bosch* decision<sup>109</sup> that the IAM for automotive starter batteries is national in scope. In 2002, in its decision concerning *JCI/Bosch/VB* the Commission defined the IAM as EEA wide<sup>110</sup> taking into account factors including low transport costs, significant cross border sales, the fact that purchasers are increasingly customers with centralised purchasing such as supermarkets, the fact that popular battery types are converging and the fact that strength of preferences for local brands has weakened in favour of a more “European wide” brand.
139. In its decision *JCI/Bosch/Delphi*, the Commission could leave open the precise definition of the geographical scope of the IAM since no serious competition concerns were to be expected under each definition<sup>111</sup>. In that decision, however, the Commission also explicitly pointed out that several elements (for example, existing price differences, differences in distribution structure, national organization of sales) still suggested a national scope for the IAM.

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<sup>107</sup> Form CO, p. 44 et seq.

<sup>108</sup> Form CO, p. 43.

<sup>109</sup> Case No. IV/M.12 – Varta/Bosch, paragraph 18.

<sup>110</sup> Case No. Comp/M.2939 – JCI/Bosch/VB/JV, paragraph 23 et seq.

<sup>111</sup> Case No. COMP/M.3789 – JCI/Bosch/Delphi, paragraph 11 et seq.

140. In the course of the first phase market investigation in this case, the Commission found, in line with its decision concerning *JCI/Bosch/Delphi*, several strong indications that the IAM cannot be considered EEA-wide in scope<sup>112</sup>.

141. In its comments on the decision to initiate proceedings, the notifying party claimed that the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV is *at least* EEA-wide in scope or even wider<sup>113</sup>. In addition to repeating that there is significant cross-border trade between Member States, the notifying party argued that the tremendous variation of market shares of the different suppliers in different countries is mainly explained by historical reasons. In addition, in the parties' view there are no significant geographical barriers to entry to the IAM and smaller competitors with only a very limited geographical footprint may easily expand their activities to other countries<sup>114</sup>.

142. The notifying party, in its comments, also repeated its assertion that the existing price differences across countries are not evidence of national markets because these differences could be explained by several objective factors. In addition, it indicated that "*the parties will provide further price comparison data together with the reply to the Commission's request for information of 19 December 2006*"<sup>115</sup>. The notifying party has not submitted any additional price comparison or other evidence which would support its assertion.

(b) *Outcome of the Commission's market investigation as set out in the Statement of Objections*

143. The Commission's in-depth market investigation has verified the geographical dimension of the IAM for starter batteries for cars / LCV and starter batteries for trucks / HCV. In doing so, the Commission in particular took into account all those arguments which, in the parties' view, indicate that the scope of those markets is EEA-wide, and which, in at least one of its previous decisions (*JCI/Bosch/VB/JV*), led the Commission to conclude on the basis of a first-phase market investigation that the IAM for automotive starter batteries is EEA-wide in scope. The results of the in-depth market investigation conducted in this case, as set out in the Statement of Objections of 12 February 2007, are reported in this section.

(1) *Preliminary remarks*

144. First, contrary to the parties' view, neither the fact that the production plants for automotive starter batteries are concentrated in only a limited number of countries (in particular Germany, France, Spain, Italy, Czech Republic) nor the fact that the official trade statistics shows significant cross border trade in lead-acid batteries between Contracting Parties to the EEA Agreement is, in itself, sufficient evidence that the IAM has an EEA-wide scope.

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<sup>112</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 52 et seq.

<sup>113</sup> See submission of the notifying party dated 22.12.2006, p. 3 et seq.

<sup>114</sup> See submission of the notifying party dated 22.12.2006, p. 9.

<sup>115</sup> See submission of the notifying party dated 22.12.2006, p. 6.

145. The relevant statistics include all types of lead-acid batteries of a weight of more than 5 kg<sup>116</sup> and do not differentiate between OEM, OES and IAM batteries. Therefore, the relevant data also include non-automotive lead-acid batteries as well as starter batteries for cars / LCV and trucks / HCV sold to OE-customers.
146. In its reply to the Commission's decision initiating proceeding in this case, the notifying party submitted that *"the parties believe that the vast majority of the intra-EU trade in automotive starter batteries concern IAM batteries"*<sup>117</sup>. This belief, however, is only based on estimates of VB's exports of OE-batteries and IAM-batteries in the financial year 2006/2007, thus in particular not taking into account all the other players whose plant location is more concentrated than VB's<sup>118</sup>.
147. But even if the parties' belief were to be true, the assumption that the majority of starter batteries included in the trade statistics have to be allocated to the IAM would not be indicative of an EEA-wide scope of the IAM. Such a conclusion would also require the assumption that the cross-border trade in IAM automotive starter batteries is the result of the EEA-wide or at least trans-national purchasing patterns of the relevant customers (that is to say, wholesalers, retail chains, car centres etc.). This assumption is however not confirmed by the Commission's market investigation.
148. In addition, the official trade statistics (such as the Eurostat data the parties refer to) in general include all cross-border transactions between enterprises, irrespective of whether or not the legal entities involved belong to the same company. Accordingly, the data on cross-border sales within the Community also include all the cross-border transactions between the different national legal entities of one and the same supplier. VB, for example, currently operates most of its production plants and all its national distribution subsidiaries as separate legal entities<sup>119</sup>. By explaining its accounting system, the notifying party submitted that *"due to the company's legal structure, it is common that inter-company transactions are recorded prior to the actual sale of the batteries to the end-customer (for example, when a battery is 'sold' from the production legal entity to the selling legal entity)"*<sup>120</sup>. Due to the methodology of the trade statistics, all these transactions ("sales") between the legal entities within the VB group are also recorded as cross-border trade in lead-acid batteries.

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<sup>116</sup> See submission of the notifying party dated 09.11.2006, p. 4.

<sup>117</sup> See submission of the notifying party dated 22.12.2006, p. 5.

<sup>118</sup> As indicated above, VB currently operates 7 production plants in 4 Member States of the EEA. FIAMM's 3 production plants are located only in 2 countries (Italy, Czech Republic), and several of the parties' competitors only operate one production plant in the EEA (e.g. Banner (Austria), Moll (Germany), MIDAC (Italy), Steco (France)). According to the parties' submission, Exide currently operates production plants in France, Spain and Poland. See submission of the notifying party dated 09.11.2006, Annex 2.

<sup>119</sup> See submission of the notifying party dated 08.01.2007, Annex 2.

<sup>120</sup> Submission of the notifying party dated 17.01.2007, p. 13 et seq.

149. For the reasons set out above, the data contained in the trade statistics does not, in itself, make it possible to draw any conclusion as to the competitive environment in which the notifying party (that is to say, the national distribution subsidiaries of VB) or other suppliers sell and distribute starter batteries to IAM-customers in the Contracting Parties to the EEA Agreement. In particular, the data itself does not allow the conclusion that the market environment and competitive constraints prevailing in the different Member States are homogeneous to an extent that would allow to conclude that the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV are EEA-wide in scope.

150. On the contrary, the Commission's market investigation provided strong evidence that the competitive environment in the IAM for automotive starter batteries is still very different in the different Contracting Parties to the EEA Agreement.

*(2) Geographic focus and brand strategies of suppliers*

151. The presence and market position of the parties and their competitors differ considerably in different Member States. This is in particular true for FIAMM. Whereas FIAMM holds very strong market positions in Italy, Austria, the Czech Republic and Slovakia, outside these countries FIAMM's market share – with the exception of Lithuania ([10-20]\*%), the United Kingdom ([5-10]\*%) and Germany ([5-10]\*%) – does not exceed [0-5]\*% on a national level.

152. The same variation of market shares can also be observed for other suppliers such as Exide. By way of example, according to the market share estimates submitted by the parties<sup>121</sup>, Exide has a market share of almost [25-35]\*% in Italy while being only a minor player, with less than [5-10]\*%, in neighbouring Austria. Similarly, Exide – again according to the parties' own estimates – holds a market share of well above [25-35]\*% in Slovakia and has almost no presence (less than [0-5]\*%) in the neighbouring country the Czech Republic.

153. The variation in the market shares of the different players is linked to very different brand strategies of the suppliers in different countries. In particular FIAMM does not run a consistent brand strategy across the EEA, or even across those countries where it has significant market shares. By way of example and according to the parties' submission<sup>122</sup>, FIAMM sells its high-quality branded starter batteries under the brand “AAA Falcon” in Italy and under the brands “Bären Polar” and “Bären Power” in Germany, Austria and the Czech Republic, whereas those products are marketed in the rest of the EEA under the brand “Titanium Plus” and “Uranio”. . The same differentiated brand strategy of FIAMM can also be observed for IAM for starter batteries for cars / LCV and trucks / HCV with lower quality standards.

154. The same differentiation of the brand strategy can also be observed for larger players such as the notifying party or Exide. The notifying party submits that – while it runs a consistent European-wide brand strategy for its high-quality (“first

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<sup>121</sup> See submission of the notifying party dated 22.12.2006, p. 7.

<sup>122</sup> Form CO, p. 115.

line") branded products ("Varta" and "Bosch") – the lower end of its brand portfolio is represented by different brands, for example, in Germany ("AFA"), Scandinavia ("Berga") or Eastern Europe ("Perion")<sup>123</sup>. According to Exide, in the IAM for automotive starter batteries the value of a brand in general purely depends on national factors and its first line brand is different in different countries (for example, "Tudor" in Spain, "Exide" in Austria)<sup>124</sup>.

*(3) Purchasing patterns of customers and relevance of national presence for market success*

155. The Commission's market investigation also provided evidence that the purchasing patterns in the IAM for automotive starter batteries are still predominantly national.

156. During the first phase market investigation, a consistent majority of IAM-customers indicated that purchases of IAM starter batteries are organized on a national or even a local level. In addition, most of the IAM customers –including members of trans-national buyer-groups – clearly indicated that negotiations with the suppliers are still based on national price lists. The in-depth market investigation confirmed the results of the first phase investigation.

157. The clear majority of IAM-customers involved in the market investigation (more than 75%) indicated that contract conditions are negotiated with the supplier's sales force, sales subsidiary or distributor in the respective country<sup>125</sup>. More than 80% of the customers furthermore indicated that the price negotiations are based on national price-lists of the suppliers<sup>126</sup>.

158. The national focus of the purchasing patterns of most of the IAM-customers<sup>127</sup> is also reflected in the replies of IAM-customers as regards their awareness of existing price differences between the Contracting Parties to the EEA Agreement<sup>128</sup>. More than 85% of the respondents indicated that they do not know whether there are any price differences (more than 50%) or explicitly confirmed the existence of such differences (more than 30%). Only a minority (less than 15%) denied the existence of significant price differences<sup>129</sup>.

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<sup>123</sup> Form CO, p. 116.

<sup>124</sup> See agreed minutes of a conference call with Exide held on 19.01.2007.

<sup>125</sup> See replies to question 16 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>126</sup> See replies to question 17 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>127</sup> The relevance of "trans-national" IAM-customers such as international retail chains (Metro, Carrefour) will be discussed in more detail below.

<sup>128</sup> The extent of and potential reasons for existing price differences for IAM starter batteries will be discussed in more depth below.

<sup>129</sup> See replies to question 20 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

159. More importantly, out of those IAM-customers who are aware of existing price differences, a consistent majority (roughly 70%) indicated that they do not purchase starter batteries from those countries where they are cheapest<sup>130</sup>. As regards the reasons for such a purchasing pattern<sup>131</sup>, the customers *inter alia* referred to the low purchase volume<sup>132</sup>, the importance of local supply<sup>133</sup>, the risk of quality problems<sup>134</sup>, or the importance of logistics and supplier support<sup>135</sup>.

160. The replies of IAM-customers are confirmed by the results of the Commission's market investigation as regards the relevance of the distribution infrastructure (sales offices, warehouses) for the market success of a supplier in a specific country. Almost 90% of the IAM-customers contacted in the Commission's second phase market investigation indicated that a supplier of IAM starter batteries must have a sales force and/or warehouses in the country concerned. A consistent majority of 60% of the IAM-customers indicated that a supplier must have both, a sales force as well as warehouses to guarantee the security of supply<sup>136</sup>.

161. This result of the Commission's second phase market investigation is consistent with the replies of suppliers in the course of the first phase investigation. Several smaller competitors which are currently active only in the markets for IAM batteries in only some Member States, clearly indicated that they could not expand easily into other countries but that this would need additional investments (establishment of warehouses and sales offices) and time (up to 1 year)<sup>137</sup>. The majority of competitors (70%) furthermore indicated that a successful market entry / market success in the IAM for automotive batteries in one specific country requires the establishment / maintenance of distribution facilities in that country<sup>138</sup>.

162. The results of the Commission's market investigation, consistently contradict the notifying parties' assertion that there are no significant geographical barriers to

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<sup>130</sup> See replies to question 21 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>131</sup> In this regard, the replies of those IAM-customers are telling which are e.g. located in Austria where – as will be discussed in more detail below – the price level is significantly higher than in neighbouring countries like Germany or Italy.

<sup>132</sup> See reply of IAM-customer Austria 19 to question 21 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>133</sup> See reply of IAM-customer Austria 21 to question 21 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>134</sup> See e.g. reply of IAM-customer Austria 2 to question 21 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>135</sup> See reply of IAM-customer Austria 27 to question 21 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>136</sup> See replies to question 19 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>137</sup> See replies to question 30 of the Commission's questionnaire to competitors dated 08.11.2006.

<sup>138</sup> See replies to question 31 of the Commission's questionnaire to competitors dated 08.11.2006.

entry to the IAM and smaller competitors with only a very limited geographical footprint may easily expand their activities to other countries<sup>139</sup>.

(4) *Role of "trans-national" buyers not indicative for EEA-wide scope*

163. The notifying party also considers the increased number of pan-European and trans-national customers to be indicative of an EEA-wide scope for the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV. According to the notifying party<sup>140</sup>, the overall volume of smaller customers is relatively small, and the *"overall demand is mainly and increasingly driven by large customers, such as supermarkets, fast-fitters, auto centres, buyer groups and their member companies and large wholesalers, that all operate on a European level"*<sup>141</sup>. The notifying party estimates that it derives almost [35-45]\*% of its turnover in the IAM from sales to trans-national customers and that in 2005 it achieved approximately [30-40]\*% of its IAM turnover with its 10 largest customers<sup>142</sup>.

164. The Commission's market investigation did not support the assertion of the notifying party. It provides evidence that the data and estimates submitted by the notifying party over-estimate the relevance of large customers with EEA-wide purchasing patterns. This is mainly explained by the fact that the notifying party also includes in its calculations / estimates customers which in fact do not source automotive starter batteries on an EEA-wide level.

165. Table 2 below summarizes the notifying party's estimates of the total annual demand of each of the 8 largest trans-national IAM customers in the EEA (including starter batteries for cars / LCV as well as starter batteries for trucks / HCV), and VB's sales to each customer as a percentage of VB's total sales of IAM automotive batteries.

Table 2

Customer	Type of customer	Total purchase volume 2005 (all suppliers; in units)	Share of VB's IAM sales (in volume) in 2005
ADI	Buyer group	~[...]*	[5-10]*%
GAU International	Buyer group	~[...]*	[0-5]*%
Temot International	Buyer group	~[...]*	[0-5]*%
ATR International	Buyer group	~[...]*	[0-5]*%
ATU	Car centre	~[...]*	[0-5]*%
Carrefour	Supermarket	~[...]*	[5-10]*
Norauto	Car centre	~[...]*	[0-5]*%
Feu Vert	Car centre	~[...]*	[0-5]*%
<b>Total</b>		~[...]*	<b>[25-35]*%</b>

<sup>139</sup> See submission of the notifying party dated 22.12.2006, p. 9.

<sup>140</sup> See submission of the notifying party dated 22.12.2006, p. 6; see also: Form CO, p. 42 et seq., p. 79 et seq. and p. 118.

<sup>141</sup> See submission of the notifying party dated 22.12.2006, p. 6.

<sup>142</sup> Form CO, p. 43.

166. According to the notifying party's estimates, the eight largest IAM customers account for a total demand of [9-10]\* million starter batteries for cars / LCV and for trucks / HCV (roughly [20-30]\*% of the total demand for IAM starter batteries in the EEA) and for roughly [25-35]\*% of VB's sales in the IAM for automotive starter batteries in the EEA. The data provided in the table, however, also clearly show that the main proportion of the sales has to be attributed to four trans-national buyer groups (ADI, GAU, Termot, ATR). This customer group overall accounts for more than [65-75]\*% of the total demand volume and more than [55-65]\*% of VB's sales volume to those large customers which – according to the notifying party – have to be considered as "trans-national" or even "pan-European" customers.
167. Contrary to the notifying party's assertion, the Commission's market investigation provided convincing evidence that the international buyer groups do not source automotive starter batteries on a European or even trans-national basis. Quite the opposite, the purchasing pattern of the customers belonging to these groups clearly shows that the IAMs for automotive starter batteries still have national characteristics.
168. According to the notifying party's own submission, the European level of the international buyer groups is not involved in the price negotiations between the suppliers and their member companies and also does not decide on the purchasing volumes and delivery conditions. At the Commission's request, the notifying party described the contents and structure of the negotiation process as follows: *"These negotiations are conducted with the central purchasing organisations of the pan-European buyer groups. These central organisations negotiate pan-European bonuses. These bonuses are paid annually to the central organisations on the basis of the total pan-European purchasing volume of the member companies of the respective buyer group. [...] The bonus is deducted from the net price on top of any rebates, bonuses, special payment conditions etc. that VB has agreed with individual [...] member companies."*<sup>143</sup>
169. In the form CO, the notifying party submitted that the negotiations on the additional bonus take place at European level, but that *"the base price is negotiated by the national member organisations on a national level [and] battery manufacturers, such as VB, therefore use national price lists for the negotiations with the national member organisations"*<sup>144</sup>.
170. The replies of the international buyer groups involved in the Commission's market investigation confirm that – contrary to the notifying party's argument which to a certain extent also contradicts its own submission on the structure and scope of the relevant purchasing process – price negotiations and purchasing decisions take place at national level, with the "pan-European" level only negotiating an "add-on" bonus to the very differentiated national prices and contractual conditions.

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<sup>143</sup> Submission of the notifying party dated 09.11.2006, p. 11 (emphasis added).

<sup>144</sup> Form CO, p. 44 (emphasis added).

171. In its reply to the Commission's questionnaire, one of the largest buyer groups indicated that "as a central organisation we have no direct contact with the suppliers (i.e. JCI/FIAMM). [...] Direct contacts to these companies only have our member companies".<sup>145</sup> Another buyer group explicitly stated that "we do not negotiate prices, only our members do so"<sup>146</sup>.
172. At the Commission's request, the notifying party submitted the sales and distribution agreements concluded by VB with the major international buyer groups (ADI, GAU, ATR and Termot)<sup>147</sup>. Those documents confirm that customers belonging to those groups cannot be considered as customers operating a trans-national or even pan-European sourcing strategy for automotive starter batteries. In particular, the structure and the geographical scope of the negotiation process do not prevent manufacturers of starter batteries from discriminating between the final customers located in different countries.
173. By way of example, the sales and distribution agreement between VB and GAU International, according to the notifying party together with ADI the largest international buyer group for automotive starter batteries in the EEA, explicitly states: *"In accordance with the national contracts or agreements between VB subsidiary companies and GAUI members and dealers, the deliveries shall be made directly from the local VB subsidiary company to the relevant GAUI member or dealer. Prices and conditions of sales shall be negotiated individually between the local VB subsidiary company with the relevant GAUI member or dealer, based on the specific features of the particular market in the respective country"*<sup>148</sup>. Almost identical regulations are included in the sales and distribution agreements concluded by VB with the other international buyer groups<sup>149</sup>.
174. Furthermore, as regards the other "trans-national" customers active in the EEA (for example, car centres and supermarkets) these large trans-national customers are by no means active in all Contracting Parties to the EEA Agreement. By way of example, the retail chain Carrefour which is explicitly mentioned by the parties as one of its largest customers, is currently only active in 7 Contracting Parties to the EEA Agreement. According to the parties' submission, the geographical scope of the other large customers is also limited, with a clear focus in a single Member

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<sup>145</sup> Letter of IAM-customer Germany 15 dated 24.11.2006.

<sup>146</sup> See reply of IAM-customer Germany 10 on question 17 of the Commission's questionnaire to IAM customers dated 20.12.2006.

<sup>147</sup> See submission of the notifying party dated 24.01.2007, Annexes 4 to 7.

<sup>148</sup> Art. 4 of the sales and distribution agreement between VB and GAU International, submission of the notifying party dated 24.01.2007, Annex 6 (emphasis added).

<sup>149</sup> See e.g. Paragraph 5 of the sales and distribution agreement between VB and ADI International, submission of the notifying party dated 24.01.2007, Annex 7; Point 7 of the sales and distribution agreement between VB and Termot International, submission of the notifying party dated 24.01.2007, Annex 4; for the contents and scope of separate agreements concluded between VB and ATR International as well as ATR Germany see submission of the notifying party dated 24.01.2007, Annex 5.

State<sup>150</sup>. Norauto (France) is active in 6 Member States, ATU (Germany) only in 4 and Feu Vert (France) only in 3 Contracting Parties to the EEA Agreement.

(5) *Distinct distribution structure and demand characteristics*

175. The limited geographical scope of the activities of some of the largest IAM-customers for automotive starter batteries is also reflected by the fact that the distribution structure and demand characteristics for automotive starter batteries still vary significantly in different countries. The Commission's in-depth investigation in relation to the IAM for automotive batteries mainly focused on those countries for which competition concerns were identified in the first phase market investigation (namely Italy, Austria, the Czech Republic and Slovakia<sup>151</sup>). In addition, the market investigation also covered neighbouring countries (Germany, France, Hungary and Poland) to ensure representative data for analysing the geographical scope of the market and potential differences in the competitive environment on the national level.

176. According to the parties, "modern" channels such as supermarkets, car centres, and fast-fitters have in recent years gained increased importance in the distribution of automotive starter batteries<sup>152</sup>. Based on the data submitted by the parties on the breakdown of their sales according to different distribution channels<sup>153</sup>, it has to be concluded however that the structure of distribution and the relevance of the different distribution channels still differ significantly across the different Contracting Parties to the EEA Agreement, even for neighbouring countries.

177. By way of example, table 3 below gives a breakdown of the notifying party's total sales of starter batteries for cars / LCV (in units) in the period 2003 to 2005 according to the following distribution channels: (i) "modern" distribution channels (encompassing hyper-/supermarket, fast-fitters and car centres), (ii) buyer groups, and (iii) others (in particular encompassing the "traditional" distribution through wholesalers).

Table 3	% of VB's total sales of IAM batteries for cars / LCV (in units, average 2003 to 2005) sold through distribution channel .....		
Country	"Modern" channels	Buyer groups	Others
France	[40-50]*%	[10-20]*%	[35-45]*%
Hungary	[15-25]*%	[5-10]*%	[70-80]*%
Germany	[10-20]*%	[25-35]*%	[45-55]*%
Italy	[5-15]*%	[15-25]*%	[65-75]*%
Austria	[0-5]*%	[15-25]*%	[70-80]*%
Czech Republic	[0-5]*%	[0-5]*%	[90-100]*%
Poland	[0-5]*%	[10-20]*%	[80-90]*%
Slovakia	[0-5]*%	[0-5]*%	[90-100]*%

<sup>150</sup> Form CO, p. 43.

<sup>151</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 116 et seq.

<sup>152</sup> See e.g. Form CO, p. 42 et seq.; see also: FIAMM's submission dated 08.01.2007, p. 15 et seq.

<sup>153</sup> See submission of the notifying party dated 17.01.2007 Annex 17; FIAMM's submission dated 08.01.2007, Annex Q.19.

178. As regards IAM starter batteries for trucks / HCV, the relevant data submitted by the notifying party provides a similar picture for the variations in the distribution structure in different countries<sup>154</sup>: the share of VB's total sales of IAM starter batteries for trucks / HCV through "modern channels" in the years 2003 to 2005 varies between [0-5]\*% (Slovakia, Poland, Hungary) and [5-15]\*% (Italy). The share of sales to (member companies of) buyer groups between [0-5]\*% (Czech Republic, Poland, Hungary) and [35-45]\*% (France). The share of sales through "traditional" channels between [55-65]\*% (France) and [90-100]\*% (Slovakia, Poland, Hungary).

179. The very significant differences in the distribution structure in different countries are also reflected in large variations in the customer size. By way of example, table 4 below provide an overview of the customer concentration for starter batteries for cars / LCV based on VB's sales of this type of starter battery to its 10 largest customers in the respective countries (in units, 2003 – 2005)<sup>155</sup>.

<b>Country</b>	<b>Concentration of sales (10 largest customer in % of total sales in units; 2003 – 2005)</b>
France	[30-40]*%
Hungary	[25-35]*%
Germany	[55-65]*%
Italy	[10-20]*%
Austria	[40-50]*%
Czech Republic	[25-35]*%
Poland	[10-20]*%
Slovakia	[45-55]*%

180. Like the data on the distribution structure, the available data on customer concentration also shows a significant variation in different countries as regards IAM starter batteries for trucks / HCV. VB's sales of this type of starter battery to its 10 largest customers in the respective countries (in units, 2003 – 2005)<sup>156</sup> vary between well below [15-25]\*% (Italy: [10-20]\*%; Poland: [10-20]\*%) and more than [55-65]\*% (Germany).

181. Furthermore, the Commission's market investigation provides evidence that the relevance of brands also differs significantly across Member States. By way of example, table 5 provides an overview of the share of branded and private label starter batteries for cars / LCV based on VB's sales of the respective type of starter battery (in units, 2003 – 2005)<sup>157</sup>.

<sup>154</sup> See submission of the notifying party dated 17.01.2007 Annex 17; FIAMM's submission dated 08.01.2007, Annex Q.19.

<sup>155</sup> See submission of the notifying party dated 17.01.2007 Annex 17.

<sup>156</sup> See submission of the notifying party dated 17.01.2007 Annex 17.

<sup>157</sup> See submission of the notifying party dated 17.01.2007 Annex 17.

<b>Table 5</b>	<b>Share in % of VB's total sales of starter batteries for cars / LCV (in units, 2003 – 2005)</b>	
<b>Country</b>	<b>Branded products</b>	<b>Private labels</b>
France	[50-60]*%	[40-50]*%
Hungary	[90-100]*%	[0-5]*%
Germany	[45-55]*%	[45-55]*%
Italy	[90-100]*%	[5-10]*%
Austria	[80-90]*%	[10-20]*%
Czech Republic	[90-100]*%	[5-10]*%
Poland	[90-100]*%	[0-5]*%
Slovakia	[90-100]*%	[5-10]*%

182. Again, the data submitted by the notifying party as regards IAM starter batteries for trucks / HCV provide a comparable picture with the share of branded products in countries such as Germany ([55-65]\*%) being significantly lower than in countries such as Italy, the Czech Republic, Slovakia, Hungary or Poland ([90-100]\*%).

183. All the elements presented in this section clearly indicate that the demand-side conditions for IAM starter batteries for cars / LCV and IAM starter batteries for trucks / HCV are still very different across the Member States of the EEA.

*(6) Price differences*

184. An important indicator that competitive conditions differ in different countries is the persistence of significant differences in prices between countries. In this regard, the parties do not contest that significant price differences still exist between the Contracting Parties to the EEA Agreement.

185. Based on the data submitted by the notifying party, table 6 below summarizes the average price in several Contracting Parties to the EEA Agreement for VB's three best selling technical specifications of starter batteries for cars / LCV, separately for branded products and private label products.

**Table 6: VB price level IAM (in EUR) – best-selling branded / non-branded batteries cars/LCV (specification: capacity/cold cranking capacity)**

Country	Specification [...] Ah / [...] A			Specification [...] Ah / [...] A			Specification [...] Ah / [...] A		
	branded	private	average	branded	private	average	Branded	private	average
Italy	[...]*	[...]*	[10-20]	[...]*	[...]*	[20-30]	[...]*	[...]*	[25-35]*
Austria	[...]*	[...]*	[20-30]	[...]*	[...]*	[30-40]	[...]*	[...]*	[35-45]*
Czech	[...]*	[...]*	[15-25]	[...]*	[...]*	[20-30]	[...]*	[...]*	[25-35]*
Slovakia <sup>158</sup>	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Germany	[...]*	[...]*	[10-20]	[...]*	[...]*	[20-30]	[...]*	[...]*	[20-30]*
France	[...]*	[...]*	[15-25]	[...]*	[...]*	[20-30]	[...]*	[...]*	[30-40]*
Poland	[...]*	[...]*	[10-20]	[...]*	[...]*	[20-30]	[...]*	[...]*	[20-30]*
Hungary	[...]*	[...]*	[15-25]	[...]*	n.a.	[25-35]	[...]*	[...]*	[25-35]*

<sup>158</sup> The notifying party was not able to submit respective price data for Slovakia.

186. As set out in the Commission decision initiating proceedings<sup>159</sup>, similar and even more pronounced price differences can also be observed for IAM starter batteries for trucks / HCV. Table 7 below, by way of example, summarizes the price level of VB's three best selling branded IAM starter batteries for trucks / HCV for those countries where the proposed transaction would lead to significant horizontal overlaps. It also indicates the highest and the lowest price in a Contracting Party to the EEA Agreement for the specific product.

**VB price level IAM (in €) – best-selling  
branded batteries trucks/HCV  
(specification: capacity/cold cranking capacity)**

<b>Table 7</b>	[...]/[...]*	[...]/[...]*	[...]/[...]*
<b>Country</b>			
Austria	[...]*	[...]*	[...]*
Czech Republic	[...]*	[...]*	[...]*
Italy	[...]*	[...]*	[...]*
Slovakia	[...]*	[...]*	[...]*
Highest price	[...]*	[...]*	[...]*
Lowest price	[...]*	[...]*	[...]*

187. While the parties have not contested the existence of differences in prices across countries, they have argued that they do not demonstrate the existence of national markets for IAM batteries. It is claimed that they can largely be explained by variations in customer sizes, differences in product mix and other differences in costs (for example, distribution or other transport costs)<sup>160</sup>.

*(7) Econometric analysis*

188. In order to test this argument of the notifying party, the Commission performed an econometric analysis of the prices charged by VB (including Bosch) for all its transactions<sup>161</sup> in 2005 and 2006. However, even if (at least parts of) the existing price differences across countries could be explained by factors like variations in customer size, differences in product-mix, differences in distribution cost and / or variations in the relevance of brands, all these differences together indicate that the conditions of demand across the EEA are still very heterogeneous and thus from a qualitative point of view would indicate that the IAMs for automotive starter batteries show national characteristics.

189. In its econometric analysis, the Commission restricted its attention to the three particularly popular types of batteries for cars / LCV<sup>162</sup>. For each type of battery, the data contained a very large number of observations and thus allowed a

<sup>159</sup> Paragraph 48.

<sup>160</sup> Form CO, p. 44 et seq.

<sup>161</sup> The parties were unable to provide transaction data for Slovakia.

<sup>162</sup> The relevant technical specifications are (capacity / cold cranking capacity): [...]\*, [...]\* and [...]\*.

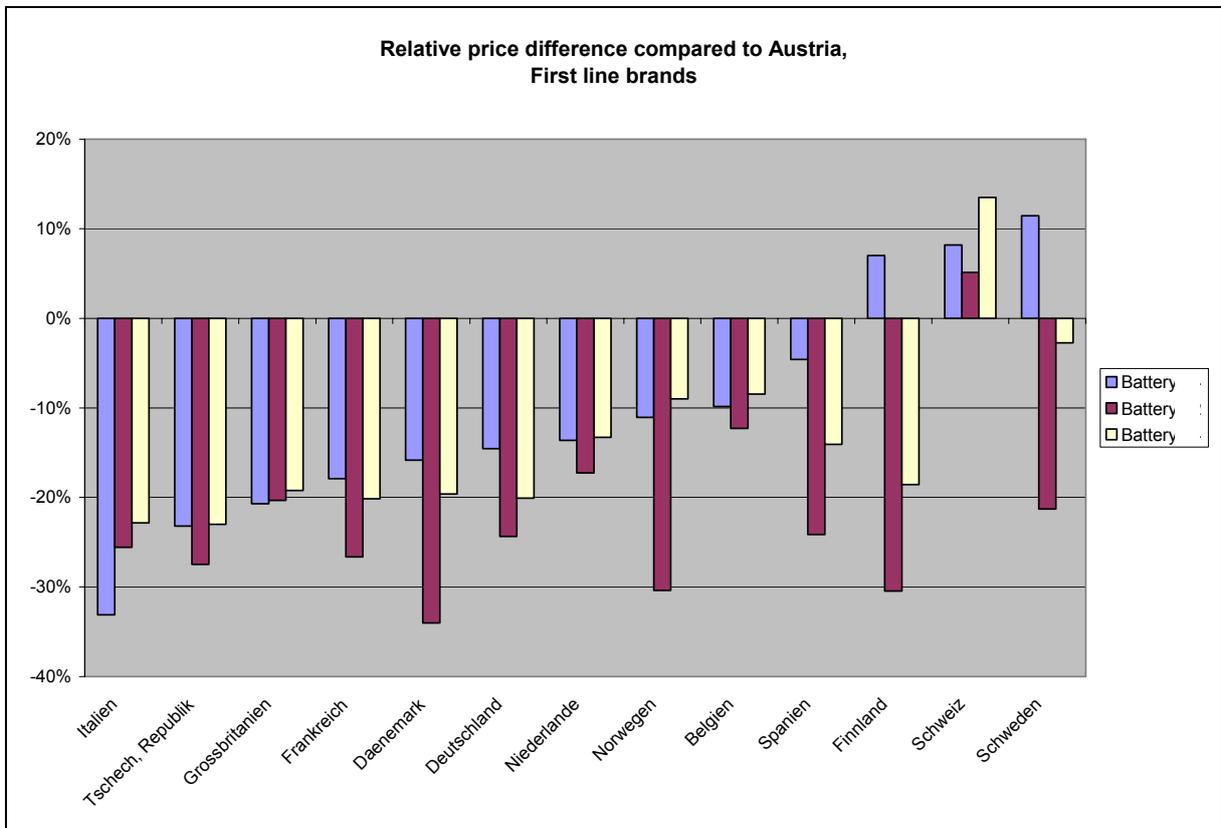
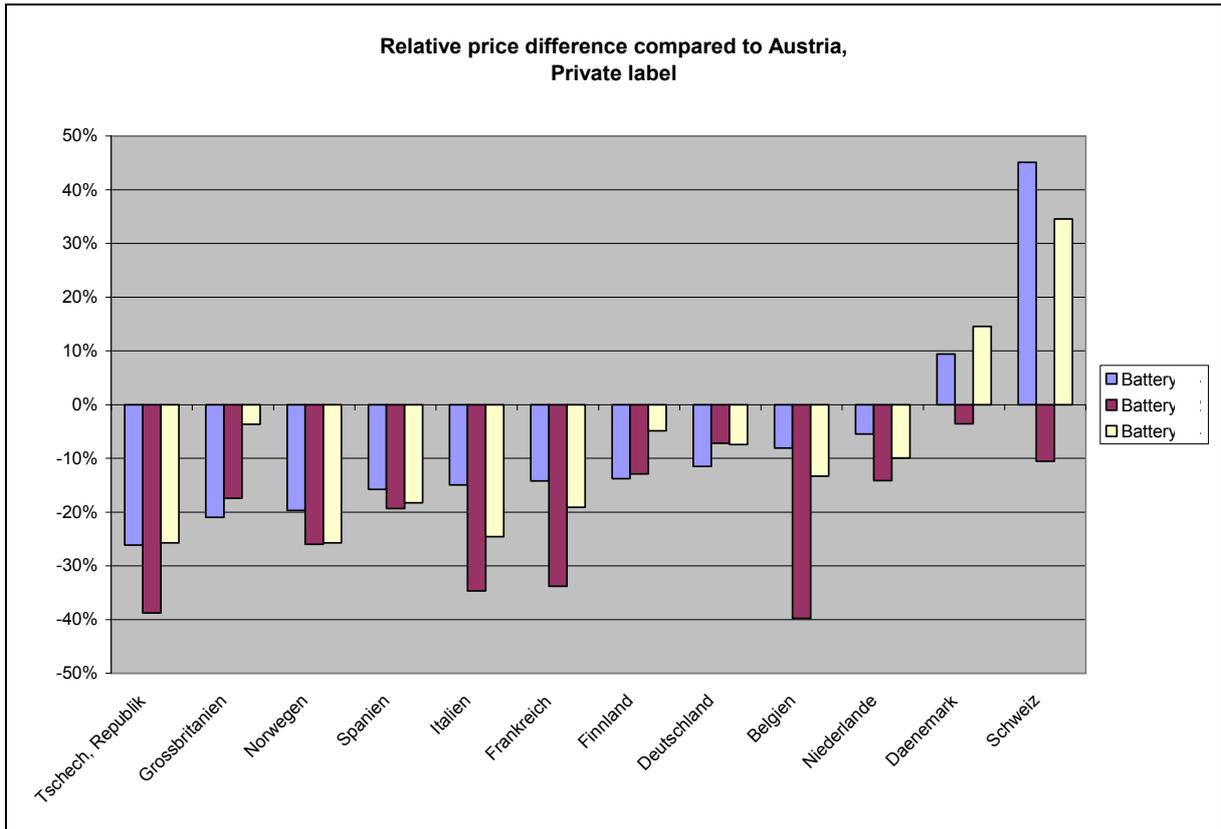
relatively precise assessment of the effect on prices of the different characteristics mentioned by the parties.

190. The data set provided by the notifying party contained all IAM transactions during the years 2005 and 2006 for the three battery types of interest ([...]\*, [...]\*, [...]\*). For each of the transactions, the customer was clearly identified by name and customer number. In addition, for each customer, total sales and total units purchased in the year of the transaction were calculated based on the respective data set submitted by the notifying party. These data on *total units* and *total sales* were then merged with the initial transaction data set. Accordingly, each observation in the final data set used for the regression analysis contained information on the transaction characteristics (price, units, sales, battery type, brand, quarter, country) as well as main customer characteristics (such as total units and total sales of the customer in the year of the transaction, customer type, customer name/number). The final data set used included more than 190.000 observations.

191. Based on this data set, the regression analysis – based on the arguments submitted by the notifying party – took into account the following variables as factors (potentially) explaining the average price level of each of the transactions: (i) customer type, (ii) customer size, (iii) technical specification of the battery (product-mix), (iv) type of branding (3 levels of branded products and non-branded products), (v) size of the transaction, and (vi) location of the customer (country). This analysis thus allowed the Commission to test whether the differences in prices observed in table 7 can be explained by factors such as the size of the transaction, the size of the customer, the type of customer, the type of battery and the branding of the battery. The analysis showed, quite clearly, that there are significant differences in prices across countries that cannot be attributed to the factors brought forward by the parties.

192. The charts below illustrate the estimated relative difference in unit price compared to Austria for each country and for the private labels and the first line brand respectively that cannot be explained by the factors mentioned by the parties. For ease of presentation, prices are compared to average prices in Austria, which is one of the countries where the Commission has identified likely harm to consumers. As is apparent, price differences between countries are quite substantial. Prices deviate from those in Austria by more than 10% for almost any battery type in any country. In some cases the differences can even be as high as 50%. Price differences are furthermore not limited to geographically remote countries, but are also very substantial even in neighbouring countries such as Germany, the Czech Republic or Italy.

193. It must be noted that price differences expressed in percentage are lower when the basis for the comparison is a country where prices are high, such as Austria. Furthermore, it is not possible to conclude that Austria is an exceptional case. There are also very significant price differences among other neighbouring countries.



194. The parties put forward a number of arguments that account for historic price differences. They argue, inter alia, that prices are higher in Austria because of the

lack of wholesalers which forces VB to deliver directly to the secondary level. The notifying party further submits that prices are lower in Italy because VB historically had not introduced the full range of brands and that fluctuations in Poland are special because VB took special pricing action in 2005 in order to increase volume and gain market share<sup>163</sup>.

195. These explanations tend to reinforce a finding of national markets rather than rebutting it. The finding that firms take special pricing actions in selected countries, and that distribution conditions and the landscape of brands differ between countries makes it inappropriate to analyse the competitive conditions in all of Europe as if they were one and the same.

196. In addition, the notifying party has submitted evidence that there is a parallel movement of the prices of its first line products in the European market and argues that this would indicate a European market for IAM starter batteries<sup>164</sup>. The Commission agrees in principle that different price levels in themselves may not always be sufficient to conclude that markets are national. In certain circumstances it may be relevant to assess the extent to which prices move in parallel and a finding of such parallel price movements could indicate a wider market. For instance it would not be appropriate to maintain separate markets if price movements across countries were synchronous and the different price levels simply reflected differences in transportation costs. In this case, however, such reasoning cannot be followed.

197. First, the Commission cannot attribute the identified price differences to transportation costs. As is clear from the estimations presented in this section, the differences in the price levels are too significant and without any pattern that could possibly reflect different costs of transportation.

198. Secondly, the finding of national markets in the context of this case is based on the observation that the same supplier can and does charge different prices for the same product in different countries without such differences being countered by customers in the high price countries switching its demand to low price countries (that is to say, the absence of cross border arbitrage). This conclusion is not affected by the observation that prices in different countries sometimes move in parallel. It should be recalled that a large fraction of production costs are raw material (lead). It is to be expected that an increase in the production costs - such as an increase in the price of lead - would give the seller an incentive to increase prices generally in all countries, just as it would be likely to lead to similar price trends for all other products that use the same raw material.

199. Thirdly, the existence of partly parallel price-movement is thus inadequate to rebut view that VB would be in a position to change its prices locally in a given country in response to a change in the competitive pressure exercised on it in that country. This is illustrated by the fact that, according to its own submission, in

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<sup>163</sup> See submission of the notifying party dated 26.01.2007, p. 3.

<sup>164</sup> See e.g. Form CO, p. 44 and Annex 23; submission of the notifying party dated 26.01.2007, p. 2 and Annex..

2005, contrary to the trend in other countries, –VB decided not to increase its prices in Poland but to lower its prices in order to win a bigger market share<sup>165</sup>.

*(8) Further evidence from internal documents*

200. Finally, the internal documents submitted by the notifying party at the Commission's request show that competitive strategies are developed and implemented on a country-by-country (that is to say, national) basis.

201. By way of example, the minutes of the Board Meeting of VB of 24 January 2005 state:[...]<sup>166</sup>. In the environment of an intended general price increase in the IAM in the second half of the year 2006, the minutes of the Board Meeting of VB on 7 August 2006 state:<sup>167</sup> [...] point spread in pricing. Strategy to be developed country by country"<sup>168</sup>. In the course of the preparation of these price actions, the minutes of the Board Meeting of VB on 20 March 2006 include the following statement: ""[...]"<sup>169</sup>.

202. The documents quoted in the previous paragraph furthermore indicate that the internal organisation of the marketing force of VB includes []country sales managers and national financial budget planning. In addition, internal documents on the assessment of the present transaction on the IAM are also based on the analysis of the different countries separately<sup>170</sup>.

*(9) Preliminary conclusion of the Commission*

203. Based on the results of the market investigation, the Commission reached the preliminary conclusion that the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV are national in scope.

*(c) The notifying party's reply to the Statement of Objections*

204. The notifying party submitted its comments on the Statement of Objections on 26 February 2007. As FIAMM's comments on the Statement of Objections did not touch upon issues relating to the geographic market definitions, only VB's reply will be referred to in this section.

205. The notifying party maintains its view that the IAMs for starter batteries for cars / LCV and for trucks / HCV are *at least* EEA-wide in scope<sup>171</sup>. Without

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<sup>165</sup> See submission of the notifying party dated 26.01.2007, p. 3.

<sup>166</sup> See submission of the notifying party dated 16.01.2007, Annex 2.

<sup>167</sup> LME = London Metal Exchange.

<sup>168</sup> See submission of the notifying party dated 16.01.2007, Annex 2.

<sup>169</sup> See submission of the notifying party dated 16.01.2007, Annex 2.

<sup>170</sup> See e.g. the reports of VB on the present transaction prepared for Bosch; submission of the notifying party dated 16.01.2007, Annex 3.

<sup>171</sup> See VB's reply to the Statement of Objections dated 26 February 2007, p. 9 et seq.

submitting any new supporting factual evidence, the notifying party specifically reiterates its view and refers to the following results of the Commission's market investigation.

206. First, the notifying party – obviously by referring to question 16 of the Commission's first-phase questionnaire to IAM customers<sup>172</sup> – states that *"the overwhelming majority of the responses from IAM customers have confirmed the EEA-wide scope of the IAM (41 out of 45 respondents)"*. Furthermore, it claims that the replies show that some IAM customers *"went even further arguing that the scope of the IAM is even wider than the EEA since they regularly invite starter battery manufacturers located outside the EEA [...] to submit bids in their tenders"*. In this regard, the notifying party refers to the replies of 9 customers<sup>173</sup>. The notifying party furthermore asserted that *"the fact that some smaller IAM customers tend to purchase on a national level does not allow the conclusion that the IAM is national in scope"*<sup>174</sup>.
207. Secondly, the notifying party reiterates its assertion that IAM customers increasingly source at European level. In the notifying party's view this is *"backed up by the information provided by the IAM customers which explicitly confirm that [...] their purchasing decisions are made at a European-wide level (13 responses) and they refer to European-wide price lists (6 responses) when dealing with starter battery manufacturers"*<sup>175</sup>. Without providing concrete figures on the respective share of sales, the notifying party also asserts that even if *"it may be true that smaller customers still source at the national level, [...] the total volume of purchases by these customers is relatively small compared to the overall size of the IAM"*. In the notifying party's opinion these smaller customers also *"have a narrow view of the global market on which they operate and, consequently, can only have a limited appreciation of the competitive environment of the IAM market"*<sup>176</sup>.
208. Thirdly, the notifying party repeats its assertion that *"the overall demand for starter batteries is mainly and increasingly driven by large customers, such as supermarkets, fast-fitters, auto centres, **buyer groups (and their member companies)** and large wholesaler that all operate on a European level"*<sup>177</sup>. It further submits that *"almost all"* of these customers have a presence in a large number of

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<sup>172</sup> Question 16 reads: *"The parties provide the view that the market for IAM automotive starter batteries is EEA-wide in scope. Do you agree?"* Options for reply: *"Yes"* and *"No"*.

<sup>173</sup> These customers were the Italian IAM customers with customer number "IAM Italy" 1, 4, 7, and the IAM customers located outside the four countries Italy, Austria, Czech, Republic and Slovakia with customer number "IAM Others" 1, 10, 14, 15, 16, 17 (as indicated above, only for the four countries mentioned competition concerns were identified; IAM customers outside these countries therefore in the process of allocating random numbers to keep anonymity were summarized under the category "other countries").

<sup>174</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 9

<sup>175</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 9

<sup>176</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 10

<sup>177</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 10 (emphasis added).

countries. In this regard, the notifying party again submits the same data total purchases of its largest "trans-national" customers, but amending it with the number of countries in which the respective players are active. For the international buyer groups ADI, GAU, Termot and ATR which the notifying party still considers to be "pan-European" customers, the number of countries mentioned ranges between 14 (GAU) and 21 (ATR). For the other trans-national customers (ATU, Carrefour, Norauto, Feu Vert) the number of countries ranges between 1 (Feu Vert) and 8 (Norauto).

209. Fourthly, to support its view that the IAM is "at least" EEA-wide in scope, the notifying party claims that "IAM customers wishing to source directly or indirectly (via importers) from suppliers located outside the EEA do not appear to face any obstacles"<sup>178</sup>. It submits that – contrary to the Commission's finding set out in the Statement of Objections – "it is in no way necessary for a manufacturer to have a warehouse, sales force or other distribution facilities in order to generate sales or expand its IAM activities to new markets". According to the notifying party "a supplier can easily use importers that take over such warehousing and distribution functions". To support this view, the notifying party also refers to VB's plans [...]\*. It claims that starter batteries of VB "[...]\*" and furthermore stresses the fact that [...]\*.<sup>179</sup>

210. Fifthly, referring to the replies of IAM customers to the Commission's questionnaire, the notifying party claims that "the IAM customers responding to the Commission's questionnaire in the phase-II investigation (33 out of 43 responses) stated that, in case of a significant and long-lasting increase in the price [...] they would switch suppliers and purchase automotive batteries from established or newly established manufacturers outside the EEA or in other EEA-countries"<sup>180</sup>.

211. Finally, the notifying party stresses the importance of battery imports from outside the EEA (as in its view evidenced by the relevant trade statistics) for the assessment of the "at least" EEA-wide geographical scope of the IAM<sup>181</sup>. While acknowledging that the trade statistics for cross-border trade *within* the EEA "do not allow for a clear-cut segmentation, first, between IAM and OE batteries, and second, between intra-group sales of manufacturers and sales to customers", the notifying party claims that these "difficulties [...] do not exist with regard to the trade statistics on the imports into the EEA from outside the EEA". According to the notifying party, for the statistical data on imports from outside the EEA into the EEA-countries "it can be clearly ruled out that cross-border intra-group sales of battery producers are included". Since the notifying party, contradicting its

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<sup>178</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 12

<sup>179</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 12

<sup>180</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 12; the notifying party however – despite mentioning 33 responses, explicitly refers in the respective footnote only to the replies of 4 IAM customers (one located in Austria and 3 located in other countries than Austria, Italy, Czech Republic and Slovakia).

<sup>181</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 11 et seq.

position on the geographic scope of the OE markets, also claims that *"only a relatively small part of European OE manufacturers sources batteries from outside the EEA"*<sup>182</sup>, the Commission understands that the notifying party also considers the fact that the trade statistics do not differentiate between OE and IAM batteries not to be relevant for the trade statistics on imports *into* the EEA from outside the EEA.

212. Accordingly, the notifying party allocates all the imports of "starter batteries" from outside the EEA included in the trade statistics to the IAM and claims that *"even if one were to consider only imports of IAM batteries from Asia and the rest of Europe (European non-EEA countries) in 2005, it can be seen that approximately 11.5 million IAM batteries were imported into the EEA [which] means that approximately 25% of all IAM batteries sold in the EEA were produced in Asia or in non-EEA European countries"*. Based on the same approach, the notifying party claims, in respect of Italy and the Czech Republic, that roughly 20% of the IAM batteries sold in these countries were imported from outside the EEA.

(d) *Assessment*

213. In its reply to the Statement of Objection, the notifying party does not contest the following findings of the Commission on the different factors which are relevant for assessing the geographical scope of the IAM:

- (i) Suppliers of IAM starter batteries run different brand strategies across the territories of the Contracting Parties to the EEA Agreement.
- (ii) The distribution structure (as regards the relative importance of different distribution channels and the level of customer concentration) as well as other demand-side characteristics (in particular as regards the relevance of branded and non-branded products) differ significantly in different countries.
- (iii) Significant price differences exist between the Contracting Parties to the EEA Agreement for one and the same technical specification of a starter battery. This is true both for branded products as well as for the corresponding non-branded products.
- (iv) The results of an econometric analysis conducted by the Commission show that – contrary to the repeated assertions of the notifying party – these price differences cannot be explained by existing variations in customer size, the size of the transaction, the type of customer, and/or the type of branding.
- (v) Internal documents submitted by the notifying party at the Commission's request show that competitive strategies are developed and implemented on a country-by-country basis.

214. The Commission considers all these uncontested findings of its market investigation to be highly important for assessing the geographical scope of the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV. All these uncontested findings indicate that the IAM for starter

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<sup>182</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 11

batteries for cars / LCV and the IAM for trucks / HCV have to be considered national in scope.

215. In addition, the objections raised by the notifying party in its reply to the Statement of Objections in the respect of the preliminary conclusions set out in the Statement of Objections and the results of the Commission's market investigation are not convincing.
216. First, the Commission acknowledges that, in their reply to question 16 of the questionnaire, the majority of IAM customers contacted in the first-phase market investigation express agreement with the parties' view that the IAM has to be considered EEA-wide in scope. Question 16 of the first-phase questionnaire reads: "*The parties provide the view that the market for IAM automotive starter batteries is EEA-wide in scope. Do you agree?*" The replies to this question are, as will become evident from the factual evidence gathered in the course of the investigation, however not consistent with other answers to the questionnaire and the objective evidence gathered in the course of the market investigation, in particular including the findings which remain uncontested by the notifying party. In the light of such "inconsistencies" as regards the *opinions* expressed by respondents and the *objective facts* derived from the market investigation, the Commission gives more weight to the objective facts.
217. Secondly, as regards the factual issue whether IAM customers increasingly source at European level, the notifying party agrees with the Commission that only a minority of IAM customers contacted in the first-phase market investigation (13 out of 42) indicated that purchasing decisions are taken at European level and that an even smaller number of customers (6 out of 42) indicated that these decisions are taken on the basis of European-wide price lists.
218. In addition, the notifying party does not contest the results of the Commission's in-depth market investigation which generated replies from more than 120 IAM customers on the same factual issue. As set out in the Statement of Objections, the clear majority of IAM-customers involved in the market investigation (more than 75%) indicated that contract conditions are negotiated with the supplier's sales force, sales subsidiary or distributor in the respective country<sup>183</sup>. More than 80% of the customers furthermore confirmed that the price negotiations are based on national price-lists<sup>184</sup>. More than 85% of the respondents indicated that they do not know whether there are any price differences between countries (more than 50%) or explicitly confirmed the existence of such differences (more than 30%). Only a minority (less than 15%) denied the existence of significant price differences between countries<sup>185</sup>. Additionally, out of those IAM-customers who are aware of existing price differences, a consistent majority (roughly 70%) indicated that they do not purchase starter batteries from those countries where they are cheapest<sup>186</sup>.

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<sup>183</sup> See replies to question 16 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>184</sup> See replies to question 17 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>185</sup> See replies to question 20 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>186</sup> See replies to question 21 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

219. Thirdly, as regards the factual issue whether the demand in the IAM is mainly and increasingly driven by large "trans-national" customers which *source* starter batteries at European level, the notifying party, in its reply to the Statement of Objections, simply reiterates, also as regards the relevant data submitted, the view put forward in the form CO and its reply to the Commission decision initiating proceedings. The notifying party neither contests nor comments on the relevant factual details gathered by the Commission in the course of the in-depth market investigation on that issue.
220. Accordingly, it is concluded that the notifying party does not contest the finding that the purchasing pattern of the, in the notifying party's view, most relevant group of "trans-national" customers (namely the international buyer groups for starter batteries such as ADI, GAU, Termot and ATR) shows national characteristics. In this regard, the Commission in particular considers the replies of the central organisation of these buyer groups to the Commission's questionnaires and the structure and contents of the distribution agreements concluded to be the most relevant evidence.
221. As set out in the Statement of Objections, the replies of the international buyer groups involved in the Commission's market investigation show that price negotiations and purchasing decisions take place at national level with the "pan-European" level only negotiating an "add-on" bonus to the very differentiated national prices and contractual conditions. One of the largest buyer groups, in its reply to the Commission's questionnaire, indicated that *"as a central organisation we have no direct contact with the suppliers (i.e. JCI/FIAMM). [...] Direct contacts to these companies only have our member companies"*.<sup>187</sup> Another buyer group explicitly stated that *"we do not negotiate prices, only our members do so"*<sup>188</sup>.
222. The sales and distribution agreements concluded by VB with the international buyer groups (ADI, GAU, ATR and Termot) also reject the notifying party's view that the international buyer groups *source* on a European-wide level<sup>189</sup>. In particular, the structure and the geographical scope of the negotiation process do not prevent suppliers of starter batteries from discriminating between the member companies located in different countries with respect to price and other conditions of supply. The sales and distribution agreement between VB and GAU International explicitly states: *"In accordance with the national contracts or agreements between VB subsidiary companies and GAUI members and dealers, the deliveries shall be made directly from the local VB subsidiary company to the relevant GAUI member or dealer. Prices and conditions of sales shall be negotiated individually between the local VB subsidiary company with the relevant GAUI member or dealer, based on the specific features of the particular market in*

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<sup>187</sup> Letter of IAM-customer Germany 15 dated 24.11.2006.

<sup>188</sup> See reply of IAM-customer Germany 10 on question 17 of the Commission's questionnaire to IAM customers dated 20.12.2006.

<sup>189</sup> See submission of the notifying party dated 24.01.2007, Annexes 4 to 7.

*the respective country*'<sup>190</sup>. Almost identical provisions are included in the sales and distribution agreements concluded by VB with the other international buyer groups<sup>191</sup>.

223. In addition, as is evidenced by the detailed transaction data submitted by the notifying party to enable the Commission to conduct its econometric analysis, the notifying party considers each of the member companies of these buyer groups to be an individual customer. Each member company (and not the international buyer group) is therefore allocated a different customer number<sup>192</sup>.

224. Based on this factual evidence, it is concluded that the price level which provides the basis for the "add-on" bonus negotiated by the buyer group on a trans-national level as well as all the other contractual conditions relevant for the member companies (for example, delivery conditions) are negotiated at national level by the member companies. For this reason, international buyer groups such as ADI, GAU, Temot and ATR cannot be considered to *purchase / source* starter batteries on a European-wide level. On the basis of the data submitted by the notifying party the deduction of the combined demand volume of all the member companies of the most important international buyer groups from the total demand volume of large "trans-national" customer would lead to the conclusion that large trans-national customers represent only [5-10]\*% of the total demand for IAM batteries in the EEA (compared to more than [20-30]\*% should these customers be included). Finally, for all these reasons, it is concluded that the notifying party's assertion that the demand for IAM starter batteries is mainly driven by large trans-national customers is wrong.

225. Fourthly, as regards the notifying party's claim that the scope of the IAM may be even wider than the EEA, all the results of the Commission's market investigation presented so far, in particular all those results which are uncontested by the notifying party, indicate that the IAMs for starter batteries for cars / LCV and for trucks / HCV are national in scope and – contrary to the notifying party's assertion – cannot be considered even to be EEA-wide in scope.

226. As regards the notifying party's assertion that "IAM customers wishing to source [...] from suppliers located outside the EEA do not appear to face any obstacles" and that "it is in no way necessary for a manufacturer to have a warehouse, sales force or other distribution facilities in order to generate sales or expand its IAM activities to new markets"<sup>193</sup>, the notifying party does not contest

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<sup>190</sup> Art. 4 of the sales and distribution agreement between VB and GAU International, submission of the notifying party dated 24.01.2007, Annex 6 (emphasis added).

<sup>191</sup> See e.g. Paragraph 5 of the sales and distribution agreement between VB and ADI International, submission of the notifying party dated 24.01.2007, Annex 7; Point 7 of the sales and distribution agreement between VB and Temot International, submission of the notifying party dated 24.01.2007, Annex 4; for the contents and scope of separate agreements concluded between VB and ATR International as well as ATR Germany see submission of the notifying party dated 24.01.2007, Annex 5.

<sup>192</sup> See submission of the notifying party dated 26.01.2007,

<sup>193</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 12

of the market investigation set out in the Statement of Objections and reported in the following.

227. Almost 90% of the IAM-customers contacted in the Commission's second phase market investigation indicated that a supplier of IAM starter batteries must have a sales force and/or warehouses in the country concerned. A consistent majority of 60% of the IAM-customers indicated that a supplier must have both, a sales force as well as warehouses, to guarantee the security of supply<sup>194</sup>. This result of the Commission's second phase market investigation is consistently reflected in and confirmed by the replies of suppliers in the course of the first phase investigation. Several smaller competitors which are currently active only in the markets for IAM batteries in some of the Contracting Parties to the EEA Agreement, stated that they could not expand easily into other countries but that this would need additional investments (establishment of warehouses and sales offices) and time (up to 1 year)<sup>195</sup>. The majority of competitors furthermore indicated that a successful market entry / market success in the IAM for automotive batteries in one specific country requires the establishment / maintenance of distribution facilities in that country<sup>196</sup>.

228. Therefore, it is concluded that the notifying party's assertion that "it is in no way necessary for a manufacturer to have a warehouse, sales force or other distribution facilities in order to generate sales or expand its IAM activities to new markets" is not confirmed by the (uncontested) results of the market investigation. As regards the notifying party's assertion that "IAM customers wishing to source [...] from suppliers located outside the EEA do not appear to face any obstacles", the notifying party provided no argument or factual evidence that would substantiate its view that the "obstacles" identified for the geographic expansion of suppliers within the EEA (availability of distribution infrastructure such as warehouses, sales force etc.) are not relevant for suppliers outside the EEA.

229. The notifying party's submission that "*a supplier can easily use importers that take over such warehousing and distribution functions*"<sup>197</sup>. In addition, the notifying party submitted that [...]\*.

230. It is concluded that, by these statements, the notifying party confirms the Commission's finding that a supplier located outside one specific country needs to establish a distribution infrastructure – either by establishing "*warehousing and distribution functions*" on its own or by outsourcing these "*warehousing and distribution function*" from importers and / or independent distributors – in order to become (or as regards VB, to remain) active in another country.

231. Insofar as the notifying party claims that "*IAM-customers wishing to source directly [...] from suppliers located outside the EEA do not appear to face any*

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<sup>194</sup> See replies to question 19 of the Commission's questionnaire to IAM-customers dated 20.12.2006.

<sup>195</sup> See replies to question 30 of the Commission's questionnaire to competitors dated 08.11.2006.

<sup>196</sup> See replies to question 31 of the Commission's questionnaire to competitors dated 08.11.2006.

<sup>197</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 12

*obstacles*"<sup>198</sup>, this assertion is not supported by any factual evidence. As set out in the Statement of Objections, the Commission's market investigation provided the result – again uncontested by the notifying party – that more than 95% of the IAM customers contacted in the in-depth market investigation stated that they do not buy starter batteries from manufacturers located outside the EEA<sup>199</sup>. Only 4 out of more than 120 IAM customers explicitly indicated that they purchase starter batteries from manufacturers located outside the EEA, and it is unclear whether such purchases are made directly or indirectly through importers.

232. Fifthly, the Commission strongly rejects the notifying party's assertion that "the IAM customers responding to the Commission's questionnaire in the **phase-II** investigation (33 out of 43 responses) stated that, in case of a significant and long-lasting increase in the price [...] they would switch suppliers and purchase automotive batteries from established or newly established manufacturers outside the EEA or in other EEA-countries".

233. In that respect, the notifying party does not specify the exact question to which it refers. Furthermore, there is no single question in either of the two questionnaires sent to IAM customers from which such a statement could be deduced. It is only on the basis of the total number of respondents quoted by the notifying party that the Commission can assume that it is the replies to the phase I questionnaire to IAM customers that the notifying party is referring to.

234. It is not possible to deduce the notifying party's conclusion from the replies to any of the questions in the phase I questionnaire that aimed to clarify the geographical scope of the relevant market or the IAM customers' ability to switch to manufacturers located in other countries (whether inside or outside the EEA) in the case of price increases. The only question, for which the number of replies corresponds to the 33/43 split mentioned by the notifying party, is question 42 that aims to clarify whether and to which extent IAM customers are ready to place orders with new market entrants in the relevant *product market* of IAM automotive batteries. Question 42 reads: "*Would you place an order with a newly established producer of automotive starter batteries in the EEA offering a competitive price?*" (Reply options: "*Yes, with no reservation*"; "*Yes, but only if (please specify):*"; "*No, my company only deals with established suppliers*", and "*Others*"). The question does not contain a reference to either a long lasting price increase or switching to suppliers located in other countries (inside or outside the EEA). It is therefore impossible to conclude from the replies to this question that "*in the case of a long-lasting and significant price increase they [IAM customers] would not hesitate to switch suppliers and purchase automotive starter batteries from suppliers located outside the EEA*".

235. Based on these elements it has to be concluded that the notifying party's assertion is based on a wrong and distorted interpretation of the results of the market investigation and as such it has to be disregarded.

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<sup>198</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 12 (emphasis added)

<sup>199</sup> See replies to question 22 of the Commission's questionnaire to IAM customers dated 20.12.2006; question 22 reads: "*Do you buy starter batteries from manufacturers located outside the European Economic Area (EEA)?*" Options for reply: "*Yes*" and "*No*".

236. Finally, as regards the notifying party's assertion that the mere fact that the official trade statistics shows that starter batteries with a weight of more than 5 kilogramme are imported into the EEA from non-EEA countries would prove that the geographical scope of the IAM for starter batteries for cars / LCV and the IAM for trucks / HCV is wider than the EEA, the following points should be made. On the basis of the factual evidence, which is mainly uncontested by the notifying party, it cannot be concluded that the markets for IAM starter batteries for cars / LCV and for trucks / HCV are EEA-wide in scope. The notifying party does not contest the Commission's finding set out in the Statement of Objections that the relevant trade statistics also include lead-acid starter batteries which cannot be considered as being starter batteries for cars / LCV or trucks / HCV. The notifying party has not presented any factual evidence which would indicate that the imports from outside the EEA recorded in the trade statistics only include direct sales of manufacturers located outside the EEA to the relevant customers (that is to say, wholesalers, retail chains, car centres etc.) located inside the EEA. The notifying party does not contest the Commission's argument set out in the Statement of Objections that the relevant trade statistics can only be considered to be indicative for the geographical scope of the IAM if it could be assumed that the cross-border trade is the result of an at least EEA-wide or trans-national purchasing pattern of the relevant customers (that is to say, wholesalers, retail chains, car centres etc.). The factual evidence collected in the course of the Commission's market investigation shows that the purchasing patterns of the vast majority of IAM customers cannot be considered to be EEA-wide or even trans-national.

*(e) Conclusion*

237. Based on the results of the market investigation, it is concluded that the IAM for starter batteries for cars / LCV and the IAM for starter batteries for trucks / HCV are national in scope.

## **VII. COMPETITIVE ASSESSMENT**

### **A. INTRODUCTORY REMARKS**

238. The parties claim that – should the proposed transaction between JCI/VB and FIAMM not be cleared by the Commission – the entire FIAMM group will be forced out of the market due to its poor financial condition. This would allegedly entail a worsening of the competitive conditions in the relevant markets similar to, or no worse than the possible adverse effects that the Commission might find as a result of the proposed merger ("failing firm defence").

239. At the same time, the parties contest that – even without considering the fact that FIAMM might be in danger of exiting the market in the absence of the merger – the proposed transaction would lead to a significant impediment of effective competition in the common market within the meaning of Article 2 (3) of the Merger Regulation.

240. As explained in the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between

undertakings<sup>200</sup>, *"in assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger"*. When considering what constitutes the relevant counterfactual to the merger scenario, under specific circumstances, the Commission takes account of the likely exit of firms if the merger did not take place<sup>201</sup>. In this context, *"the Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the **competitive structure** of the market **would deteriorate to at least the same extent** in the absence of the merger."*<sup>202</sup>

241. Without prejudice to the legal framework quoted in the previous paragraph and the position and arguments submitted by the parties, in this section only the effects of the proposed transaction on competition in the common market will be discussed, without taking into account that FIAMM is allegedly a failing firm and without considering the effects of a possible failure and liquidation of FIAMM (the "merger scenario"). Accordingly, this section only discusses the arguments submitted by the parties and the results of the market investigation insofar as they are relevant for the assessment of whether or not the proposed transaction would lead to a significant impediment of effective competition. All the arguments and results of the market investigation which are relevant to assess whether and to which extent FIAMM can be considered to be a failing firm, and the impact of this assessment on the competitive structure of the relevant markets ("failing firm scenario") will be analysed in a second step in a separate section (see section VIII: Failing Firm Scenario). This two-step assessment is for ease of presentation, and final conclusions on the competitive assessment are drawn only after considering the failing firm scenario.

242. The parties submitted their reply to the Statement of Objections on 26 February 2007. As FIAMM's comments on the Statement of Objections mainly focus on issues relevant in the context of the assessment whether or not the failing firm scenario should be considered in this case, only VB's reply to the Statement of Objections will be referred to in this section.

## **B. ORIGINAL EQUIPMENT (OE) MARKETS**

### **1) Preliminary remark**

243. In its Statement of Objections, the Commission expressed serious doubts as to the compatibility of the proposed transaction with the common market and with

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<sup>200</sup> OJ C31 of 5 February 2004. See in particular paragraph 9.

<sup>201</sup> Ibidem, Guidelines, paragraph 9.

<sup>202</sup> See Guidelines, paragraph 89 (emphasis added). Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 110. Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 114. See also Commission Decision 2002/365/EC in Case COMP/M.2314 — BASF/Pantochim/Eurodiol, OJ L 132, 17.5.2002, p. 45, points 157-160.

the EEA agreement with regard to the OE markets for starter batteries for cars / LCV and starter batteries for trucks / HCV. The Commission reached the preliminary conclusion that the proposed transaction would significantly impede effective competition on the markets for OE starter batteries for cars / LCV and OE starter batteries for trucks / HCV by eliminating important competitive constraints on VB as the leading player which would have increased market power post-merger (non-coordinated effects), and by changing the nature of competition in such a way that the merged entity is more likely to coordinate its market behaviour with the remaining strong player (coordinated effects).

244. In its reply to the Statement of Objections the notifying party contests the significant impediment of effective competition both in terms of unilateral and coordinated effects.

245. In this section, the preliminary conclusions of the Commission regarding the significant impediment of competition in the OE markets for starter batteries for cars / LCV and starter batteries for trucks / HCV as set out in the Statement of Objections, the notifying party's respective arguments as submitted in its reply to the Statement of Objections and the Commission's final assessment are set out in detail in a section relating to the impact of the transaction on the market structure, 4 separate sections dealing with the assessment of the risk of non-coordinated effects ("removal of competitive constraint"; "OE customers' ability to switch to actual competitors"; "OE customers' ability to switch to potential competitors (barriers to entry)" and "countervailing buyer power"), and a section relating to the assessment of the risk of coordinated effects.

246. Despite the fact that the markets for OE starter batteries for cars / LCV and for OE starter batteries for trucks / HCV constitute distinct relevant product markets, the two markets have some commonalities, in particular as regards the main suppliers currently active on the market, the relevant factors to be taken into account when assessing the ability of alternative suppliers to expand capacity and supply, and the existing barriers to entry for potential competitors currently active in neighbouring markets (namely the IAM). A distinction will only be drawn between the two types of starter batteries to the extent it is relevant for the specific issue discussed.

## 2) Market structure

### (a) *The preliminary conclusions of the Commission as set out in the Statement of Objections*

247. The notifying party submitted revised market share estimates in the second phase of the investigation<sup>203</sup>, indicating that it had discovered that the data submitted in the notification included batteries not intended to be used either in cars/LCV or trucks/HCV (for example, motorcycle batteries) and starter batteries supplied by FIAMM to its competitor Exide. Since the new market share figures are only slightly lower than those submitted originally, this revision has no impact on the competitive analysis. According to the new market share estimates, the

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<sup>203</sup> See submission of the notifying party dated 22.12.2006, Annex 3.

structure of the EEA-wide markets for OE starter batteries for cars / LCV and OE starter batteries for trucks / HCV in 2005 would be as follows (see table 8 below):

**Table 8: OE market (% , volume, EEA, 2005)**  
(figures in brackets are previous estimates submitted in the notification)

	<b>VB</b>	<b>FIAMM</b>	<b>Combined</b>	<b>Exide</b>	<b>Others</b>
Cars/LCV	[45-55]* ([45-55]*)	[5-10]* ([5-15]*)	<b>[55-65]*</b> ([60-70]*)	[20-30]*([20-30]*)	[10-20]* ([5-15]*)
Trucks/HCV	[50-60]* ([50-60]*)	[0-5]* ([0-5]**)	<b>[50-60]*</b> ([50-60]*)	[35-45]* ([35-45]*)	[0-5]* ([0-5]*)
Cars/LCV + Trucks/HCV	[45-55]* ([45-55]*)	[5-10]* ([5-15]*)	<b>[55-65]*</b> ([55-65]*)	[20-30]* ([20-30]*)	[10-20]* ([5-15]*)

248. In the market for *OE starter batteries for cars / LCV* (market volume 2005: 27.5 million units) the market share of the merged entity would reach [55-65]\*% with the proposed transaction resulting in a horizontal overlap of [5-10]\*%. In the market for *OE starter batteries for trucks / HCV* (market volume 2005: 1.7 million units) the combined market share is [55-65]\*% with the horizontal overlap being rather small ([0-5]\*%).

249. In the market for *OE starter batteries for cars / LCV*, Exide ([20-30]\*%) would be the second largest player with a market share far below that of the merged entity. The group of other competitors comprises several smaller players (such as Moll (Germany), Banner (Austria), Steco (France), FAAM (Italy), Rombat (Romania), Monbat (Bulgaria) and Multlu (Turkey)) which are – like, for example, Monbat – only active in the OES segment or have only minor sales of less than [...] units (market shares of well below [0-5]\*%) in the OEM segment. None of these competitors achieve individual market shares in the market for OE starter batteries for cars / LCV of more than [0-5]\*%.

250. In the market for *OE starter batteries for trucks / HCV* the picture is even more pronounced. The combined market share of the two leading players (the merged entity and Exide) would reach [90-100]\*%. Several smaller players which are active in the OE market for starter batteries for cars / LCV are not active in the market for OE starter batteries for trucks / HCV. Again, none of the smaller competitors achieve individual market shares of more than [0-5]\*%.

251. The market structure presented in table 8 is consistent with the sales data collected by the Commission from the different suppliers in the course of the first phase market investigation. Furthermore, market shares on the basis of sales value provide roughly the same picture.

252. The development of the market structure in the years 2003 to 2005 (see table 9 below) mainly reflects the effects of the successive acquisitions by VB and hence the ongoing concentration process in the industry. After the establishment of VB as the automotive starter battery joint venture of JCI and Bosch in 2002, the acquisition of sole control by VB of its competitor Delphi in 2005 resulted in an increase of VB's market share in the OE market for starter batteries for cars / LCV

of [5-10]\*% in the EEA.<sup>204</sup> FIAMM's market share, on the other hand, remained basically constant.

**Table 9: Market shares VB / FIAMM (% , volume, EEA, 2003 - 2005)**

	2003			2004			2005		
	VB	FIA MM	Comb.	VB	FIA MM	Comb.	VB	FIAMM	Comb.
Cars/LCV	[35-45]*	[5-15]*	[45-55]*	[35-45]*	[5-10]*	[45-55]*	[45-55]*	[5-10]*	[55-65]*
Trucks/HCV	[45-55]*	[0-5]*	[45-55]*	[50-60]*	[0-5]*	[50-60]*	[50-60]*	[0-5]*	[50-60]*
Cars/LCV + Trucks/HCV	[35-45]*	[5-10]*	[45-55]*	[35-45]*	[5-10]*	[45-55]*	[45-55]*	[5-10]*	[55-65]*

253. The parties underline FIAMM's limited presence in the market for OE starter batteries for trucks/HCV, providing however somewhat conflicting information at different stages of the procedure. In the form CO, the parties submitted that FIAMM only had sales in the market for OE starter batteries for trucks / HCV in 2006 of [ $<10,000$ ]\* units. In the reply to a request for information submitted on 10 November 2006 the parties concede that FIAMM was also active in that market with a similar sales volume in 2005. The parties further submit that, during the preparation of their comments on the Commission decision initiating proceedings, they discovered that FIAMM has been marginally active in the segment of OEM starter batteries for trucks / HCV for 10 years supplying batteries to "niche" customers like Tatra and Zetor in the Czech Republic and Poland and Komatsu in Italy as well as a limited number of OEM starter batteries to the Italian truck manufacturer Iveco.

*(b) The parties' reply to the Statement of Objections*

254. The Commission notes that in their reply to the Statement of Objections the parties do not contest the Commission's findings as regards the impact of the proposed transaction on the market structure.

**3) Non-coordinated effects/dominance**

255. Based on the results of the market investigation, and the assessment of the parties' reply to the Statement of Objections, it is concluded– without considering at this stage the effects of a possible failure and liquidation of FIAMM – that the notified concentration would create a dominant position on the EEA-wide market for OE starter batteries for cars / LCV and create or strengthen a dominant position on the market for OE starter batteries for trucks / HCV, thereby impeding effective competition in the common market.

256. This conclusion is based on the following main findings: (i) the notified transaction would remove a strong competitive constraint and significantly

<sup>204</sup> The acquisition of Delphi had no immediate impact on the OE market for starter batteries for trucks / HCV since Delphi was not active in that market.

increase the concentration level of the OE market for starter batteries for cars / LCV and would in addition remove a significant competitive constraint from the OE market for starter batteries for trucks / HCV; (ii) following the merger, the possibility of OE customers to switch to alternative suppliers would be extremely limited, in particular due to the lack of significant overcapacity and the existing barriers to expanding production capacity; (iii) significant barriers to entry render swift market entry of new suppliers unlikely; and (iv) the detrimental effects on competition resulting from the merger are not likely to be counteracted by the alleged countervailing buyer power of OE-customers.

(a) *Concentration levels and removal of significant competitive constraints*

(1) *The preliminary conclusions of the Commission as set out in the Statement of Objections*

257. It is settled case law that a “particularly high market share may in itself be evidence of the existence of a dominant position, in particular where the other operators on the market hold only much smaller shares”<sup>205</sup>. In this case, the merged entity would hold market shares of [55-65]\*% and [55-65]\*% respectively for starter batteries for cars/LCV and for trucks/HCV. The second largest competitor, Exide, would be significantly smaller with the remaining competitors being fringe players.

258. After the transaction, the Herfindahl-Hirschman-Index (HHI)<sup>206</sup> for the OE market for starter batteries for cars / LCV will be [ $>4000$ ]\* with a substantial increment of [ $>900$ ]\*. The HHI for the OE market for starter batteries for trucks / HCV post-merger will be [ $>4500$ ]\*, albeit with a limited increment of [100-120]\*.

259. The market investigation confirmed that FIAMM exerted a significant competitive pressure on VB in the ***OE-market for starter batteries for cars / LCV*** pre-merger which would be removed by the transaction. This is in particular true for the segment of OEM starter batteries for cars / LCV.

260. Based on the sales data submitted by the parties separately for OEM and OES starter batteries for cars / LCV, the horizontal overlap of the notified transaction for OEM starter batteries for cars / LCV would be more significant than for OES starter batteries for cars / LCV (see table 10 below). In the OEM segment, the merged entity would hold a market share of almost [65-75]\*% with FIAMM adding an increment of [5-15]\*%.

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<sup>205</sup> See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 17; see also recently Case T-282/02 *Cementbouw v. Commission*, 23/02/2006, para 201, not yet published; see also: Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, paragraph 39 et seq.

<sup>206</sup> See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 16.

**Table 10: OE market for starter batteries for cars / LCV  
(%, volume, EEA, 2005)**

	<b>VB</b>	<b>FIAMM</b>	<b>Combined</b>
<b>OEM</b>	[55-65]*%	[5-15]*%	<b>[65-75]*%</b>
<b>OES</b>	[30-40]*%	[0-5]*%	<b>[35-45]*%</b>
<b>OEM + OES</b>	[45-55]*%	[5-10]*%	<b>[55-65]*%</b>

261. Despite the fact that FIAMM's market shares in the market for OE starter batteries for cars / LCV was relatively stable between 2003 and 2005, there appears to have been a significant increase in 2006. Based on the data on the purchasing volume from the different suppliers provided by car manufacturers in their reply to the Commission's first phase questionnaire, the Commission was able to reconstruct the bulk of the OE demand for starter batteries for cars / LCV (save for some fringe car manufacturers). It appears from this demand-side data that FIAMM increased its market share from [5-15]\*% to [10-20]\*% during 2006. This increase was clearly at the expense of JCI and Exide, whose market shares (based on the same data) fell from [50-60]\*% to [50-60]\*% and from [25-35]\*% to [20-30]\*% respectively<sup>207</sup>.

262. This development is also reflected in the replies to the Commission's second phase market investigation. OE-customer 9 for example explicitly states: *"FIAMM has been delivering competitive prices which allowed them to strongly increase the market share [in OE customer 9's overall demand for starter batteries] in 2005 and to be awarded with [...] new project in 2006"*<sup>208</sup>.

263. The significant competitive pressure exerted by FIAMM on the market leader VB is further evidenced by several internal documents submitted by VB at the Commission's request. In a presentation for the meeting of the supervisory board of VB in June 2006 assessing the current market position of VB and the most recent competitive developments, under the heading *"main issues in OEM / OES"* the first point states: *"[...]"*<sup>209</sup>.

264. The fact that FIAMM's competitive pressure effectively constrained the leeway of VB unilaterally to increase prices vis-à-vis VW is in addition evidenced by the minutes of the Board Meeting of VB on 12 December 2005, that is to say, several months before the meeting of the supervisory board in June 2006. The notes contained in these minutes on VB's supply relationship with VW clearly show that the strategy of VB at that time was quite different and even did not exclude the intention of price increases:*[...]\**<sup>210</sup>. The very fact that only some weeks later, VB had to concede that *[...]\** seems to confirm that VB's intention did not succeed, either as regards the *[...]\** or as regards the *"[...]"*.

<sup>207</sup> Calculation based on the data provided by OE-customers in reply to question 27 a) of the Commission's questionnaire to OE customers dated 7.11.2006.

<sup>208</sup> Reply of customer 9 to question 21 of the Commission's questionnaire to OE-customers dated 19.12.2007.

<sup>209</sup> See presentation for the meeting of the supervisory board on 2.6.2006, point 2 ("Aktuelle Projekte OEM/OES"; submission of the notifying party dated 16.01.2007, Annex 2

<sup>210</sup> See submission of the notifying party dated 16.1.2007, Annex 2.

265. The fact that FIAMM exerts effective competitive pressure on VB prior to the merger is furthermore reflected in the replies of OE-customers consulted in the Commission's market investigation. In the first phase market investigation, the OE-customers clearly ranked FIAMM as belonging to the three leading suppliers of starter batteries for cars / LCV for all relevant criteria (for example, quality, price, product range etc.), giving FIAMM a lead over its smaller competitors such as Banner and Moll<sup>211</sup>. This result was consistently confirmed in the replies of OE-customers in the course of the in-depth market investigation on the competitive pressure currently exerted by FIAMM in the market for OE starter batteries for cars / LCV<sup>212</sup>.
266. Despite the fact that FIAMM currently holds only a weak market position, the market investigation has shown that FIAMM also exercises a significant competitive constraint in the *market for OE starter batteries for trucks / HCV* on the two leading suppliers (VB and Exide), which together hold [90-100]\*% of the market.
267. VB, with a market share of [50-60]\*%, is the current market leader with Exide being quite a strong second. VB's particularly high market share of more than 50% may in itself be indicative of a dominant position of VB in the EEA-wide market for OE starter batteries for trucks / HCV. However, in contrast to the market for OE starter batteries for cars / LCV, Exide holds a stronger market position in the market for OE starter batteries for trucks / HCV thus rendering VB's lead over its strongest competitor less significant. In any event, the question whether VB already has a dominant position on the market for OE starter batteries for trucks / HCV can be left open since the proposed transaction would in any case lead to a significant impediment of effective competition due to the removal of FIAMM as a significant competitive constraint on VB.
268. FIAMM in particular has existing assets and spare capacity to increase significantly the production of starter batteries for trucks/HCV and its credibility as OE supplier is not reflected in its low market share.
269. The majority of truck manufacturers participating in the Commission's second-phase market investigation (60%) consider FIAMM to be a viable OE supplier that exercises a competitive constraint on the two main suppliers, JCI and Exide<sup>213</sup>. The same manufacturers have further expressed explicit concerns about the reduction of competition/supply alternatives and the threat of ensuing price increases.<sup>214</sup> The Commission's second phase investigation has also confirmed that

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<sup>211</sup> See replies to question 35 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>212</sup> See replies to question 20 (a) of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>213</sup> See the replies to question 5 (b) of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>214</sup> See the replies of OE-customer 2, 6 and 8 to questions 49 and 50 of the Commission's questionnaire to OE-customers dated 7.11.2006; OE-customer 6 for example indicated: *"FIAMM is the only possible alternative to switch to from Exide and VB Autobatterie, short term. If VB Autobatterie would acquire FIAMM the competition on the European market would be not be equally good with risk for increased prices for starter batteries. The operation would further reduce possible alternatives to Exide and VB"*.

FIAMM was about to increase its presence in the OE market for starter batteries for trucks / HCV: one OE-customer has already made concrete steps to certify FIAMM as an alternative supplier for OEM starter batteries<sup>215</sup>.

270. FIAMM has concentrated its production for truck/HCV starter batteries in its plant in [...]\*. In 2006 this plant produced [0-500,000]\* units. However, the [...]\* production lines dedicated to starter batteries for trucks/HCV have the (existing) capacity to produce [500,000-1 million]\* units per year<sup>216</sup>. The current spare capacity of FIAMM therefore represents around [15-25]\*% of the total demand for OE starter batteries for trucks/HCV in the year 2005 (1.7 million as estimated by the parties). It can therefore be concluded that in spite of its currently low market share in the OE market for starter batteries for trucks/HCV, FIAMM's available capacity represents a strong asset, which could easily be used to increase its presence in this market providing a credible alternative for OE-customers and hence a competitive constraint on the two leading suppliers, VB and Exide.

271. Contrary to the parties' submission, the fact that – based on the market share data for the year 2005 – the proposed transaction only results in a relatively small horizontal overlap is not indicative of a limited competitive impact of the proposed transaction on the market for OE starter batteries for trucks / HCV.

272. Based on these elements, the Commission reached the preliminary conclusion in the Statement of Objections that the proposed transaction would remove a significant competitive constraint on VB in the markets for OE-starter batteries for cars / LCV and OE starter batteries for trucks / HCV.

*(2) The notifying party's reply to the Statement of Objections*

273. In its reply to the Statement of Objections, the notifying party submits that VB and FIAMM cannot be considered as close competitors. It refers to the replies of 4 car manufacturers and 3 truck manufacturers to support this claim, out of a total of 17 respondents to the Commission's subsequent inquiries.

274. In its reply to the Statement of Objections, the notifying party further reiterates its argument that the proposed transaction would not have an appreciable impact on the OE market for starter batteries for trucks / HCV because of the low market share FIAMM currently has in this market. To this effect, the notifying party refers to the "*Commission's standard practice that a market share increment of less than 2% as a rule does not create or strengthen a dominant position*".

275. The notifying party further asserts that FIAMM has "never succeeded in supplying any appreciable number of truck batteries to any OEM" and therefore that FIAMM "cannot be considered to be a viable alternative OE truck battery supplier".

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<sup>215</sup> See the reply of OE-customer 8 to question 19 of the Commission's questionnaire to OE-customers dated 19.12.2006

<sup>216</sup> See FIAMM's submission dated 08.01.2007, p. 10 et seq.; FIAMM's submission dated 18.01.2007, p. 11 et seq.

276. The notifying party also states in its reply to the Statement of Objections that there would be no shortage of capacity on the OE market for starter batteries for trucks / HCV, because FIAMM's *"truck production facilities are almost exclusively dedicated to the production of IAM batteries"*.

277. The notifying party also notes that FIAMM cannot be considered as a strong competitor due to its financial situation.

*(3) Assessment*

278. The Commission's findings on the market share gains of FIAMM in 2006 in the OE market for starter batteries for cars / LCV were not contested by the parties in their reply to the Statement of Objections, nor was the confirmation of Customer 9 contested to this effect.

279. The notifying party also does not contest that VB was confronted with a significant loss of VW business in the OE market for starter batteries for cars / LCV because of FIAMM's competitive price quotes.

280. The few opinions of OE customers of starter batteries for cars / LCV which the notifying party refers to in order to make the claim that VB and FIAMM are not close competitors are clearly not representative. Furthermore, the notifying party contests the fact that FIAMM and VB are close competitors on the basis of a minority of replies to a question, which did not ask whether VB and FIAMM could be considered to be "close" competitors, but whether they were considered to be in fact the "closest" competitors. Based on the replies it is clear that the majority of OE customers currently constituting a majority of overall demand for starter batteries for cars / LCV considered the products of FIAMM to represent not only a close substitute, but the "immediate/closest/most evident" substitute to the products of VB<sup>217</sup>.

281. The notifying party does not contest the Commission's findings that OE customers ranked FIAMM as belonging to the three leading suppliers of starter batteries for cars / LCV for all relevant criteria. Nor does the notifying party contest the overall feedback of OE customers on viable suppliers both in the OE market for starter batteries for cars / LCV and starter batteries for trucks / HCV.

282. As regards OE starter batteries for trucks / HCV, the notifying party, in its reply to the Statement of Objections, does not contest the Commission's findings on FIAMM's ability to expand its production for the OE market for starter batteries for trucks / HCV significantly. The notifying party also does not contest the factual findings on the available unused capacity in [...] for the manufacture of starter batteries for trucks / HCV or the conclusion that FIAMM could use this spare capacity to produce for the OE market for starter batteries for trucks / HCV.

283. The fact that truck manufacturers may not overall consider FIAMM's products to be the "immediate/closest/most evident" substitute to VB's products is understandable considering FIAMM's current presence in the OE market for starter batteries for trucks / HCV and considering that Exide and VB together hold

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<sup>217</sup> See replies to question 36 of the Commission's questionnaire to OE customers dated 7.11.2007

[90-100]% of this market. The fact that truck manufacturers do not consider FIAMM's products to be the "immediate/closest/most evident" substitute to VB's products does not mean, however, that FIAMM's products could not be considered by the same manufacturers to be viable alternatives to VB's products.

284. For example, despite not considering FIAMM's products to be the "immediate/closest/most evident" substitute to VB's products, OE customer 8 (also quoted by the notifying party) has already started certifying FIAMM as an alternative supplier. Additionally, the majority of truck manufacturers considered FIAMM to be a viable OE supplier. It can be concluded therefore that the Commission's dynamic approach to the assessment of the competitive pressure stemming from FIAMM in the OE market for starter batteries for trucks / HCV based on the potential of FIAMM to expand significantly its presence in this market is not rebutted by the parties.

285. The other statements of the notifying party in its reply to the Statement of Objections regarding FIAMM's current position of the OE market for starter batteries for trucks / HCV are simply a reiteration of the fact that FIAMM almost exclusively produces IAM batteries and – consequently – has a low market share in the OE market. The Commission does not contest the notifying party's factual submission in this respect. The notifying party's statement does not convey either that FIAMM's truck battery production facilities are fully utilised and/or that FIAMM could not use its facilities to produce for the OE market for starter batteries for trucks / HCV. As such, therefore, the submission does not rebut the Commission's findings on FIAMM's ability to increase significantly its production of OE starter batteries for trucks / HCV and the Commission's conclusions regarding the competitive pressure FIAMM has exercised until now in the OE market for starter batteries for trucks / HCV, which stems from its potential to expand significantly its presence in this market.

286. Finally, FIAMM's financial situation is a factor that will be considered in the assessment of the failing firm scenario and not in the assessment of the competitive pressure FIAMM has exercised on the market to date ("merger scenario").

287. Based on the above, the submissions in the notifying party's reply to the Statement of Objections are clearly not conclusive and/or sufficient to contest the overall feedback of OE customers and all the other objective factual evidence (including the notifying party's own statements and internal documents) that demonstrate the direct competitive constraint FIAMM has exercised on JCI/VB in the OE market for starter batteries for cars / LCV and the indirect competitive constraint FIAMM has exercised over VB in the OE market for starter batteries for trucks / HCV. They do not therefore change the Commission's assessment to this effect.

(b) *OE customer's limited ability to switch suppliers, lack of significant overcapacity and barriers to expansion*

(1) *Arguments submitted by the parties and results of the market investigation as set out in the Statement of Objections*

288. In the form CO, the parties claim that despite the very high market shares and the high concentration level, the proposed transaction does not give rise to serious competition concerns based on the risk of unilateral effects. In the parties' view, the presence of "*strong competitors with excess capacity*" (in the range of 30%) and/or their ability to expand capacities (the parties explicitly mention Exide as well as "*a range of smaller competitors*") will ensure effective competition in the markets for OE batteries post-merger and provide customers with a wide range of alternative suppliers. In their comments on the Commission decision initiating proceedings, the parties reiterate their view that Exide and various smaller competitors would continue to exercise significant competitive pressure on the merged entity.

289. As set out in the Commission decision initiating proceedings<sup>218</sup>, the first phase market investigation has shown that there would be insufficient supply alternatives, after the merger, for OE-customers wishing to switch a significant proportion of the current demand for starter batteries for cars / LCV and for trucks / HCV to alternative suppliers.

290. The results of the in-depth market investigation as set out in the Statement of Objections confirmed the preliminary conclusions of the first phase investigation and clearly rebut the parties' assertion that – without considering whether and to which extent FIAMM can be assumed to be a failing firm – after the merger OE-customers would still have a range of strong alternative suppliers with excess capacity and/or the ability to easily expand their production capacity.

(i) *Results of the market investigation on OE-customers' ability to switch suppliers post-merger*

291. The lack of sufficient alternatives after the merger for OE-customers wishing to switch a significant proportion of the current demand for starter batteries for cars / LCV and trucks / HCV to alternative suppliers was consistently confirmed by the results of the first phase market investigation, which should therefore be reiterated in this context.

292. On the question in the market investigation whether – in the event of a unilateral price increase by the merged entity – they would be able to switch easily to alternative suppliers, 50% of the respondents said they would not. Another 30% only consider Exide to be a viable alternative<sup>219</sup>. As regards the factors that might prevent these customers from switching to alternative suppliers, the vast majority of OE-customers indicated the insufficient production capacity of alternative

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<sup>218</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 69 et seq.

<sup>219</sup> See replies to question 36 of the Commission's questionnaire to OE-customers dated 7.11.2006.

suppliers (10 out of 14) and the insufficient technical capabilities of alternative suppliers (9 out of 14) to be the most important reasons<sup>220</sup>.

293. The questionnaire sent to OE-customers in the course of the first phase market investigation also explicitly asked whether and to which extent the different manufacturers are considered as viable alternative to VB / FIAMM for the supply of automotive batteries in the EEA. For each manufacturer mentioned, the OE-customers were asked for information on (i) the products concerned (OEM, OES or both), (ii) the geographical scope of supply (EEA as a whole, region of EEA, national), and (iii) the volume of supply (in 1.000 units and in percentage of their current purchases from VB / FIAMM) they could switch to the alternative suppliers<sup>221</sup>.

294. The only smaller supplier which is considered by OE-customers as a viable alternative to the merged entity and Exide is the Austrian manufacturer Banner. OE-customers, however, also clearly indicate that Banner has the drawback of a limited production capacity. Smaller competitors (like the Bulgarian and Romanian manufacturers Rombat and Monbat or the Turkish manufacturer Mutlu) are either not considered as a viable alternative at all or only considered as a very limited alternative for the supply of batteries in the respective country where they are currently active (Romania, Bulgaria, Turkey) or neighbouring Contracting Parties to the EEA Agreement.

295. The proportion of the current demand which OE-customers consider could be easily switched to alternative suppliers in the event of unilateral price increases by the merged entity is far below 1 million units, that is to say, less than [0-5]\*% of the total demand for OE starter batteries for cars / LCV and trucks / HCV in the EEA and less than [5-10]\*% of the total sales of the merged entity in the OE-markets for starter batteries for cars / LCV and trucks / HCV.

296. These results of the first phase market investigation on the very limited possibilities of OE-customer to switch the supplier (for starter batteries for cars / LCV as well as for starter batteries for trucks / HCV) were confirmed by the in-depth market investigation.

297. In the second questionnaire to OE customers, the Commission asked respondents to list all suppliers they consider viable for the supply of either OEM or OES batteries or both.<sup>222</sup> Again, JCI and Exide were the only suppliers consistently considered viable for both OEM and OES. Smaller suppliers were listed either by only one manufacturer and/or with some restrictions (viable only for either OEM or OES, or for geographically limited supply). Besides Banner, no smaller supplier was indicated by more than one manufacturer as being a viable supplier for both OEM and OES.

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<sup>220</sup> See replies to question 37 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>221</sup> For results of the first phase market investigation presented in the following see replies to question 38 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>222</sup> See replies to question 5 of the Commission's questionnaire to OE customers dated 19.12.2007

298. Customer 9, for example, confirms explicitly in its reply to the Commission's second phase questionnaire<sup>223</sup> that it would not be possible to transfer all quantities currently purchased from FIAMM to other suppliers without major risks to quality since the only alternative suppliers are smaller producers incapable of producing to the OEM quality standard. Customer 9 has also confirmed during an interview that it would be unable to switch suppliers because of the tight capacity in the market<sup>224</sup>. Customer 11 also expressed its concerns during the second phase investigation that the only alternative suppliers post-merger would be VB and Exide and expressed concerns about the availability of free capacity without FIAMM as an alternative<sup>225</sup>.
299. Even customers which currently do not have any supply relationship with FIAMM consider it as a viable supply alternative. OE-customer 14 for example explicitly stated: *"FIAMM provided a viable alternative source of supply, having under utilised facilities and an established track record of supply to Western European OEMs. The threat of introducing them into our existing supply base may have served to restrain monopolistic pricing"*<sup>226</sup>.
300. The perception of OE-customers of smaller suppliers as not being real competitors is fully reflected in their procurement practices. Only a minority of customers invite small suppliers to tender, the majority only inviting VB, FIAMM and Exide and – to a lesser degree – Banner<sup>227</sup>.
301. These results consistently reflect the Commission's findings on the specific requirements of OE-customers for the supply of starter batteries. These requirements are significantly stronger in the segment of OEM-batteries.
302. OE-customers contacted in the course of the market investigation in particular pointed at the high standards required for the "freshness" of OEM batteries<sup>228</sup>. OE-customers indicated that the location of the production plant for starter batteries is a major factor in the choice of the supplier. The relevance of the location of the battery plant is further strengthened by the fact that prices for OEM batteries are most commonly negotiated as ex-works prices with the OE-customer taking care

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<sup>223</sup> See reply of OE-customer 9 to question 25 of the Commission's questionnaire to OE customers dated 19.12.2007.

<sup>224</sup> See agreed minutes of a conference call held with OE-customer 9 on 25.1.2007.

<sup>225</sup> See reply of OE-customer 11 to questions 21 and 25 of the Commission's questionnaire to OE-customers dated 19.12.2007.

<sup>226</sup> See reply of OE-customer 14 to questions 21 and 25 of the Commission's questionnaire to OE-customers dated 19.12.2007.

<sup>227</sup> See replies to question 29 of the Commission's questionnaire to OE customers dated 7.11.2006.

<sup>228</sup> For the different aspects described in the following, see in particular: agreed minutes of a conference call with OE-customer 9 held on 25.01.2007; agreed minutes of a conference call with OE-customer 7 held on 25.01.2007.

of the transport of the starter batteries to its production plants<sup>229</sup>. Accordingly, the majority of OE-customers clearly indicated that they prefer suppliers to have production plants close to their own production plants<sup>230</sup>. OE-customers contacted in the course of the market investigation even indicated that they negotiate the concrete source for delivery of OEM batteries (that is to say, the plant where the batteries are produced)<sup>231</sup>.

303. Most of the smaller suppliers of OE-starter batteries only operate one production plant in a single location, which is in some cases remote from the location of the production plants of the OE-customers. Whilst Banner and Moll operate one production plant in Austria and Germany respectively, Mutlu only operates a production plant in Turkey, Rombat and Monbat in Romania and Bulgaria respectively. The latter players exert a relatively weak competitive constraint on the leading players as regards the supply of the OE-customers' plants in Western Europe (in particular Germany, Benelux, Spain, France and Italy).

304. Based on these elements, it has to be concluded that the merger would significantly weaken the competitive constraints on VB as leading supplier of OE-batteries, in particular of OEM batteries. Besides Exide, only Banner is consistently considered to be a viable alternative OE supplier but the two companies, individually or together, currently lack the capacity to provide a competitive constraint capable of offsetting the reduction in competition that would result following the transaction, at least in the short term and without significant investment into new production lines.

305. In assessing the impact of the reduction of viable alternatives for the supply of OE-batteries, it has also to be noted that the market investigation strongly confirmed the findings of the first phase investigation – which also corresponds to the parties' submission – that most OE-customers multi-source starter batteries for cars / LCV and trucks / HCV from two or more suppliers.

306. Since the proposed transaction essentially combines two of the three leading suppliers with significant production capacity for starter batteries for cars / LCV and trucks / HCV in the EEA, the choice of OE-customers to multi-source would in practice be limited to the merged entity and Exide. A number of OE customers have confirmed these concerns in the second-phase investigation<sup>232</sup>.

307. Finally, the majority of those OE customers which held in-depth interviews with the Commission during the second phase investigation expressed serious

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<sup>229</sup> See e.g. agreed minutes of a conference call with OE-customer 9 held on 25.01.2007; agreed minutes of a conference call with OE-customer 1 held on 22.01.2007; agreed minutes of a conference call with OE-customer 11 held on 26.01.2007.

<sup>230</sup> See replies to question 18 of the Commission's questionnaire to OE-customers dated 07.11.2006.

<sup>231</sup> See e.g. agreed minutes of a conference call with OE-customer 9 held on 25.01.2007

<sup>232</sup> See reply of OE-customers 8 to question 25 of the Commission's questionnaire to OE-customers dated 19.12.2006.

concerns regarding post-merger price increases, reiterating the expectation expressed by OE-customers in the replies to the first-phase questionnaire<sup>233</sup>.

(ii) Available production capacity

308. The parties' assertion that the OE markets for starter batteries for cars / LCV and trucks / HCV are characterized by significant excess capacity of roughly 30% was not confirmed in the Commission's market investigation.

309. According to the parties' estimates<sup>234</sup>, total production capacity for starter batteries in the EEA (including all types, that is to say, OEM, OES and IAM batteries for cars / LCV and trucks / HCV) amounted to 85 million units in 2005. The same level of capacity was estimated for 2004 and 2003. The estimates are based on the assumption of a 5-day working week and three shifts per day, which according to the parties, is the standard way of measuring capacity in the industry.

310. The parties estimate that VB has the largest share of total production capacity ([30-40]\*%). Exide, according to the notifying party, has a total production capacity of [20-25]\* million units ([25-35]\*%) and Fiamm of [7-10]\* million units ([5-10]\*%). The remaining capacity (around 25%) is, according to the parties, dispersed among 15 small producers the largest of which is Banner with an estimated capacity of [<5]\* million units [0-5]\*%). All other producers have a production capacity of less than 2 million units ([0-5]\*%). In addition to this production capacity located inside the EEA, the parties estimated there to be production capacity of an additional 30 million units in 2005 located in Romania, Bulgaria<sup>235</sup>, Turkey, the Balkan region, Ukraine, Russia and other former Soviet countries.

311. The market investigation roughly confirmed these figures on total capacity provided by the parties, even though capacity figures for specific suppliers did not always correspond. The capacity data gathered by the Commission based on a 5-day working week and three shifts per day sets the total production capacity for

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<sup>233</sup> See replies to questions 49 to 51 of the Commission's questionnaire to OE-customers dated 7.11.2006; OE-customer 13 indicated: "*JCI-FIAMM will assume the dominant position on the EEA market. [...] Currently no other supplier will be able to compete by size and leverage in the near future*"; OE-customer 14 pointed out: "*This merger would further enhance Varta's position [...] and increase the likelihood of monopolistic behaviour. The lack of credible alternative for our product requirement [...] will increase our dependency upon Varta in the future. No entrants are expected. Future competitive tenders will be limited to two suppliers. [...] Increasing the dominance of Varta would increase their ability to set the market price*"; OE-customer 1 noted: "*market dominating position for JCI – strong dependency on JCI for [customer 1] – a fair competition is not given any more for the future European volume distribution and lack of capacity with competitors – price increase request has already been forwarded to [customer 1] by JCI*"; customer 8 as regards starter batteries for trucks / HCV stated: "*Varta/JCI/FIAMM: will most probably raise their prices [...] Risk to see JCI becoming monopolistic supplier in mid-term*".

<sup>234</sup> Form CO, section 8.3 and relative Annexes.

<sup>235</sup> When the case was notified in 2006, these two countries were not yet Member States of the EU. For simplicity reasons, the data will be presented as originally submitted in the Form CO. The competitive pressure – if any - stemming from suppliers located in these countries will of course fully appreciated in the competitive assessment.

starter batteries for cars / LCV and starter batteries for trucks / HCV (OEM, OES and IAM) in the EEA at above 83 million units in 2005<sup>236</sup>.

312. In assessing the notifying party's assertion that the market for OE-starter batteries is characterized by significant overcapacity (roughly 30% both for cars/LCV and for trucks/HCV), it has to be noted that this estimate is based on the following assumptions: (i) inclusion of the *total* capacity of all suppliers, irrespective of whether the supplier is currently active in the OE market for starter batteries for cars / LCV and trucks / HCV or not; (ii) inclusion of the total production capacity of suppliers located in countries outside the EEA and remote from the production facilities of the OE-customers located in the EEA.

313. Neither of these assumptions reflects properly the production capacity readily available for the supply of OE starter batteries for cars / LCV and trucks / HCV in the EEA. This is mainly due to the fact that (i) OE-customers apply a list of "approved" suppliers and the relevant certification process constitutes a significant barrier to entry for those suppliers currently not active in the OE markets, and (ii) the distance between the location of the plant for the production of starter batteries and the production plants for cars / LCV and trucks / HCV is an important factor for OE-customers because of transport costs and 'freshness' requirements for the batteries.

314. Against this background, for the purposes of the analysis of the capacity readily available in the markets for OE starter batteries for cars / LCV and OE starter batteries for trucks / HCV, the Commission considers the production capacity of those suppliers located in the EEA and currently active in the OE markets to be most relevant. In its calculation the Commission therefore included the production capacity of VB, Exide, Fiamm, Banner, Moll, Steco, MIDAC and FAAM. To complete the picture, the Commission furthermore took into account the capacity of Rombat, Monbat and also of Mutlu, although this supplier is not located in the EEA.

315. The parties' estimate of the total production capacity for starter batteries for cars / LCV and starter batteries for trucks / HCV (OEM, OES and IAM) for the players indicated in the previous paragraph is more than 78 million units in 2005. The Commission's investigation has confirmed an annual capacity of more than one million units less. Most importantly, that *not* all this capacity is actually dedicated to OE customers, given that all these suppliers also serve the IAM.

316. The vast proportion of capacity is usually dedicated to the production of starter batteries for cars / LCV, reflecting the significantly larger volume of this market. At the same time, production of starter batteries for trucks / HCV takes longer due to the higher number of plates and larger sizes of these batteries. For the suppliers mentioned above, the capacity dedicated to the production of batteries for

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<sup>236</sup> Figures provided in reply to question 7 of the Commission's questionnaire to competitors dated 8.11.2006 and in conference calls with suppliers; see agreed minutes of a conference call with Exide held on 16.01.2007; agreed minutes of a conference call with MIDAC held on 19.01.2007; agreed minutes of a conference call with Banner held on 11.01.2007; agreed minutes of a conference call with Mutlu held on 17.1.2007. The Commission received, on a confidential basis, capacity figures from suppliers representing 86% of total capacity. For the remaining suppliers, the Commission accepted the notifying party's estimates.

car / LCV amounts to roughly 69 million units, whereas around 7 million units of the production capacity are dedicated to truck / HCV batteries.

317. Based on the replies of competitors and the parties the Commission also verified spare capacity for OE suppliers, including those which only account for very marginal supplies. The Commission found the spare capacity of existing OE suppliers to be considerably less than the parties' estimate of 30% of total capacity. Including the excess capacity of the merging parties, the excess capacity in the EEA market for starter batteries for cars / LCV currently amounts to around 10% of the total capacity and, in the market for starter batteries for trucks / HCV, for roughly 15% of the total capacity. If the excess capacity of the parties to the transaction is deducted, the excess capacity in the EEA market for starter batteries for cars / LCV would be less than 10% of the total capacity and in the EEA market for starter batteries for trucks / HCV roughly 10% of the total capacity.
318. Even these significantly lower total capacity figures may provide an exaggerated picture of the spare capacity readily available in the OE markets for starter batteries for cars / LCV and for starter batteries for trucks / HCV. On the one hand, spare capacity could (and a part of it at least would most likely be) used to supply batteries for the IAM as well<sup>237</sup>. The parties estimated the total demand in the EEA to be 76.5 million units in 2005 (OE 29.3 million, IAM 47.2 million). Even in the purely hypothetical (and not at all realistic) scenario that all spare capacity of all current OE suppliers would be immediately available to produce OE batteries competitively following the exact specifications of the different OE customers, competitors would only be able to expand their current supplies by an additional 17% of the total OE demand for starter batteries for cars / LCV and trucks / HCV.
319. The figures include marginal OE suppliers, which may supply less than 1% of the OE market and may supply only OES or OEM and for only one manufacturer or even one plant. These marginal suppliers are clearly not in the same position as JCI, Exide or FIAMM. In fact the Commission concluded in the second phase market investigation that the only suppliers that were viewed consistently by manufacturers as viable suppliers for both types of OE-batteries in the EEA were JCI, Exide, Banner and FIAMM.
320. Moreover, the proposed transaction has an immediate impact on the production capacity of starter batteries for cars / LCV and trucks / HCV. As explained in detail in section II describing the proposed transaction, the parties explain that the merger would lead to only one of FIAMM's three production plants (in Veronella, Italy, with a capacity of [ $>4$ ]\*million units per year) remaining active in the production of starter batteries. One of the other two plants, the plant in Mlada Boleslav (Czech Republic, capacity of [ $<3.5$ ]\*million units per year) is not included in the transaction and [...]\*. The plant in Avezzano (Italy, capacity of [ $<2.5$ ]\*million units per year) would, [...]\*. This means that a total capacity of [ $>3$ ]\*million units (roughly [ $2-4$ ]\* million units for cars/LCV and [ $0-1$ ]\* million

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<sup>237</sup> According to the parties almost all manufacturers produce both types of batteries. The market investigation has verified that those producers, which currently produce OE-batteries, are also producing IAM batteries (though this is not the case vice versa).

units for trucks/HCV<sup>238</sup>) would exit the market as a result of the proposed transaction.

321. Since the two production plants affected are the only plants of FIAMM with facilities for the production of starter batteries for trucks / HCV, the proposed transaction would have a significant impact in particular on the total capacity available in the EEA market for starter batteries for trucks / HCV. FIAMM has concentrated its production for truck/HCV starter batteries production in its [...] plant. In 2006, this plant produced [0-500,000]\* units. However, the [...] production lines dedicated to starter batteries for trucks / HCV have the (existing) capacity to produce [500,000- 1,000,000]\* units per year<sup>239</sup>. The current spare capacity of FIAMM therefore represents around [20-30]\*% of total current OE demand for starter batteries for trucks/HCV (1.7 million as estimated by the parties).

322. Accordingly, [...] would immediately remove from the market spare capacity representing around [15-25]\*% of the entire OE demand of starter batteries for trucks / HCV. VB itself has no spare capacity for starter batteries for trucks / HCV. All its production facilities for the truck/HCV market are fully utilised.<sup>240</sup> Furthermore, the market investigation has clearly shown that the overall spare capacity among the other OE competitors consistently viewed by truck manufacturers as viable suppliers is significantly less than [5-10]\*% of total capacity. Again, even including smaller suppliers active in the OE market (not necessarily in the OE market for starter batteries for trucks/HCV) the spare capacity would still be less than [5-10]\*% of total capacity.

(iii) Barriers to expansion

323. Moreover, the Commission's market investigation does not confirm that suppliers of OE-batteries can easily expand their capacity. On the contrary, the market investigation provided evidence that the barriers to expansion are significant and the current expansion plan of one smaller supplier (Banner) would not increase the available production capacity to a significant extent in the foreseeable future.

324. In the Form CO<sup>241</sup>, the notifying party states that production capacity can be significantly expanded (by around 20%) through additional weekend shifts. The market investigation has not confirmed that this option is economically viable: European battery manufacturers only have recourse to weekend shifts in

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<sup>238</sup> For details see also the following paragraphs on the specific effects of [...] the available capacity for the production of starter batteries for trucks / HCV.

<sup>239</sup> See FIAMM's submission dated 18.01.2007, p. 12 et seq..

<sup>240</sup> See submission of the notifying party dated 9.11.2006, Annex 11.

<sup>241</sup> Form CO, p. 55.

exceptional circumstances, and only for a short periods of time. Weekend shifts are perceived as being difficult to organise and involving high labour costs<sup>242</sup>.

325. Since Exide and, to a lesser degree, Banner would remain the only competitors of the merged entity currently considered by OE-customers as a viable alternative source of supply, the Commission has conducted a more in-depth investigation into the capacity situation of these suppliers, in particular into their ability and plans, if any, to increase their production capacity in the short and medium term.
326. Exide confirmed the findings of the first phase investigation, that is to say, that their spare capacity for starter batteries for cars / LCV and starter batteries for trucks / HCV was less than 10% of total capacity. Exide also confirmed that it currently has no plans to increase its production capacity by way of investment into new production lines.
327. According to the information gathered during the market investigation, Banner intends to expand its production capacity by opening a new plant in the Eastern part of the Community<sup>243</sup>. The notifying party states in the Form CO<sup>244</sup> that Banner applied for a building permit for a new plant in Slovakia, which is expected to be put in operation in [...] and to have a production capacity of [>5]\* million units.
328. According to the confidential information received by the Commission directly from the supplier in question, Banner's new plant will have a much lower production capacity than estimated by the notifying party. The build-up of the intended capacity will, furthermore, take several years and even at full capacity, the plant will produce significantly less than 4 million units<sup>245</sup>.
329. According to the estimates submitted by the parties, the expansion of the production capacity would also require significant investments and time. FIAMM estimates that the procurement of the equipment needed for setting up a new *assembly line* for starter batteries is [...] to [...] months and the costs associated with a new assembly line amount to between EUR [1-2]\* and EUR [1-2]\* million<sup>246</sup>. In the description of the production process, however, the *assembly line* covers only one of the three different steps in the production process for starter

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<sup>242</sup> See agreed minutes of the conference call with MIDAC held on 19.01.2007: "*There is some degree of manoeuvre for increasing the shifts, but work in the weekends is not really an option due to high labour costs and organisational difficulties.*"; see agreed minutes of a conference call with Exide held on 16.01.2007: "*Exide has no intention to make use of weekend shifts on a lasting basis in the future and does not consider weekend shifts a viable option.*". A partial exception is Banner, which does not exclude in principle to make recourse to weekend shifts but recognises that it entails significantly higher labour costs. See agreed minutes of conference call with Banner held on 11.01.2007: "*Saturday shifts would lead to a labour cost increase by [10-20]% resulting in an overall higher cost of batteries of [5-15]%. "*

<sup>243</sup> Agreed minutes of a conference call with Banner held on 11.01.2007.

<sup>244</sup> Form CO, p. 52.

<sup>245</sup> Agreed minutes of a conference call with Banner held on 11.01.2007.

<sup>246</sup> FIAMM's submission dated 8.1.2007, p. 5 et seq.

batteries. In addition, according to the party's own submission and the information gathered in the course of the market investigation, these other production steps (namely production of the plates and formation / charging of the batteries) provide the decisive "bottleneck" in the production process<sup>247</sup>. Accordingly, the investment needed for capacity expansion is significantly higher than EUR [1-2]\* to EUR [1-2]\* million.

(iv) Preliminary conclusion in the Statement of Objections

330. Based on these elements, the Commission reached the preliminary conclusion in the Statement of Objections that the proposed transaction would significantly reduce the possibility for OE-customers to switch to alternative suppliers. Furthermore, due to the significant barriers to expansion, the current lack of significant overcapacity cannot be expected to be overcome within a time-frame relevant for the assessment of any negative competitive impact that would result from the merger scenario.

*(2) The notifying party's reply to the Statement of Objections*

331. In its reply to the Statement of Objections, the notifying party reiterates its view that the presence of strong competitors with excess capacity and/or the ability to easily expand capacities (the parties explicitly mention Exide as well as a range of smaller competitors) will ensure effective competition in the markets for OE batteries after the merger and provide customers with a wide range of alternative suppliers<sup>248</sup>.

332. To support its view, the notifying party claims, with regard to the results of the Commission's market investigation, that "at least 50% of the OE customers confirmed that they would switch to an alternative supplier in case of a unilateral price increase by VB post merger (para. 183 of the SO)" and stresses the fact that "for instance, OE customer 3 confirmed that it could easily switch to alternative suppliers (p. 3760 of the Commission's file)".<sup>249</sup>

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<sup>247</sup> Exide submitted that the formation / charging of the battery very often is the decisive "bottleneck" and furthermore indicated that the relevant equipment needed is very expensive; see agreed minutes of a conference call with Exide held on 16.01.2007; the notifying party submitted that the most important "bottleneck" is the first step of the production process, i.e. the production of the grids for the plates; see Form CO, p. 110..

<sup>248</sup> See VB's reply to the Statement of Objections dated 26 February 2007, p. 4 et seq.; the notifying party in this section of its reply in general discusses together (i) the possibility of players currently active in the market to expand supply ("ability and incentive to expand"), and (ii) the competitive pressure stemming from potential competitors ("ability and incentive to enter"). For the purpose of clarity, this section only deals with the arguments submitted by the notifying party in its reply to the Statement of Objections on the ability and incentives of actual competitors in the markets for OE starter batteries for cars / LCV and for trucks / HCV to expand the production and supply of such batteries following the proposed transaction. The issue of how the ability and incentives for potential competitors to enter the markets for OE starter batteries for cars / LCV and trucks / HCV is to be assessed will be discussed in a separate section ("barriers to entry") further below.

<sup>249</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 4

333. The notifying party furthermore claims that the results of the market investigation confirm that OE-customers "*promote*" the expansion of suppliers in the OE business. It states that "*for instance OE customer 10 states that it recently 'promoted' Banner and Exide (p. 5944 of the Commission's file), OE customer 2 points out that it recently 'promoted' Banner (p. 5926 of the Commission's file), [and] OE customer 11 stated that it 'promoted' MIDAC, Mutlu, Monbat, Steco, Rombat (p. 9949 of the Commission's file)*"<sup>250</sup>.
334. As regards the issue whether or not there is significant overcapacity available in the markets for OE starter batteries for cars / LCV and trucks / HCV, the notifying party states that "*competitors, such as Exide (p. 4952 of the Commission's file), Rombat (p. 4266 of the Commission's file) and FAMM (p. 4284 of the Commission's file) explicitly state that there is overcapacity in the market*"<sup>251</sup>. It also points out that the available capacity will be increased by the opening of Banner's new production plant in Eastern Europe in 2008.
335. The notifying party further claims that– by assessing the existing spare capacity in the market on the basis of the "*OE customers' lists of approved suppliers*" – the Commission would "*artificially limit the capacity in the OE market*". It furthermore reiterates its view that the available capacity in the OE markets can be easily increased by adding weekend shifts and / or new production lines. The notifying party submits that "*the establishment of a new production line for approx. 1 million car / LCV starter batteries requires a financial investment of approx. € 1-3 million (depending on the degree of automation) and a period of 1 to 1.5 years*"<sup>252</sup>.
336. Finally, as regards the possibility of the merged entity increasing prices unilaterally after the merger, the notifying party claims that due to the ability of alternative suppliers to expand and "*given the high level of fixed costs of starter battery production [...] any such price increase will be unprofitable*". It furthermore considers "*the argument in para. 189 of the SO that the supplier [of vehicles] would not be able to transfer all quantities [to be] misleading*" and states that "*suppliers [of vehicles] need not switch their entire demand [of starter batteries] to defeat unilateral price increase [but that] they only have to switch enough quantities to hurt the supplier*".

### (3) Assessment

- (i) The interpretation of the results of the Commission's market investigation presented by the notifying party is incomplete and distorted

337. In assessing the arguments submitted by the notifying party in its reply to the Statement of Objections which explicitly refer to several elements of the results of the Commission's market investigation, the Commission notes that the notifying party's statement that "*at least 50% of the OE customers confirmed that they would*

<sup>250</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 4

<sup>251</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 5

<sup>252</sup> VB's reply to the Statement of Objections dated 26 February 2007, p. 5

*switch to an alternative supplier in case of a unilateral price increase by VB post merger (para. 183 of the SO)", provides an incomplete and distorted picture of the findings of the Commission as set out in the Statement of Objections.*

338. Paragraph 183 of the Statement of Objections reads as follows (emphasis added): "On the question in the market investigation whether – in case of a unilateral price increase of the merged entity – they would be able **to switch easily** to alternative suppliers, **50% of the respondents denied this possibility. Another 30% only consider Exide to be a viable alternative**<sup>253</sup>. As regards the factors that might prevent these customers from switching to alternative suppliers, **the vast majority of OE-customers indicated the insufficient production capacity of alternative suppliers** (10 out of 14) and the insufficient technical capabilities of alternative suppliers (9 out of 14) **to be the most important reason**<sup>254</sup>".

339. Accordingly, the paragraph of the Statement of Objections to which the notifying party refers in the attempt to support its assertion that OE customers have sufficient alternatives to switch in the event of a unilateral price increase by the merged entity, in fact presents the results of the Commission's market investigation, which clearly contradicts this very assertion. In this regard, the notifying party does not contest the findings of the Commission which underlie the respective paragraph in the Statement of Objections.

340. The same kind of "mis-reading" of arguments included in the Statement of Objections occurred to the notifying party as regards its claim that – based on paragraph 189 of the Statement of Objections – it can be concluded that the Commission bases its assessment of the very limited ability of OE customers to switch to alternative suppliers on the approach that a sufficient ability to switch could only be assumed if OE customers would be able to "*switch their entire demand*" of OE starter batteries to alternative suppliers. Paragraph 189 of the Statement of Objections reads as follows (emphasis added): "**Customer 9, for example, confirms explicitly in its reply to the Commission's second phase questionnaire**<sup>255</sup> **that it would not be possible to transfer all quantities currently purchased from FIAMM to other suppliers without major risks to quality since the only alternative suppliers were smaller producers incapable of producing to the OEM quality standard. Customer 9 has also confirmed during an interview that it would be unable to switch suppliers because of the tight capacity in the market**<sup>256</sup>. *Customer 11 has also expressed its concerns during the second phase investigation that the only alternative suppliers post-merger are VB and Exide and*

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<sup>253</sup> See replies to question 37 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>254</sup> See replies to question 38 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>255</sup> See reply of OE-customer 9 to question 25 of the Commission's questionnaire to OE customers dated 19.12.2007.

<sup>256</sup> See agreed minutes of a conference call held with OE-customer 9 on 25.1.2007.

*expressed concerns about the availability of free capacity without FIAMM as an alternative*<sup>257</sup>"

341. It is apparent from the wording of the paragraph of the Statement of Objections to which the notifying party refers, that that paragraph does not describe the Commission's approach of assessing the sufficient ability of OE customers to switch suppliers, that the customer quoted in that paragraph explicitly refers to the switching of "*quantities currently purchased from FIAMM*" and not its "*entire demand*" of OE starter batteries, and that the two customers mentioned in the paragraph in question clearly confirm that switching to other suppliers is difficult due to the lack of sufficient free capacity. Again, the statement of OE customers which the notifying party refers to explicitly rebuts its assertion instead of proving it.
342. The notifying party does not contest the following findings set out in paragraphs 184 to 186 of the Statement of Objections: "The questionnaire sent to OE-customers in the course of the first phase market investigation explicitly asked whether and to which extent the different manufacturers are considered as viable alternatives to VB / FIAMM for the supply of automotive batteries in the EEA. [...]" (paragraph 184 of the Statement of Objections). "The only smaller supplier which is considered by OE-customers as a viable alternative to the merged entity and Exide is the Austrian manufacturer Banner. OE-customers, however, also clearly indicate that Banner has the weakness of a limited production capacity. [...]" (paragraph 185). "**The proportion of the current demand which is considered by OE-customers to be easily switched to alternative suppliers in case of unilateral price increases of the merged entity ranges far below 1 million units, i.e. less than 3 % of the total demand for OE starter batteries for cars / LCV and trucks / HCV in the EEA and less than 6% of the total sales of the merged entity in the OE-markets for starter batteries for cars / LCV and trucks / HCV**" (paragraph 186, emphasis added).
343. As regards all the other selective quotes provided by the notifying party in its reply to the Statement of Objections on the issue whether there is sufficient free capacity in the market, the Commission, as already explained in the Statement of Objections, –has analysed this issue carefully based on real capacity data submitted by the different suppliers. Therefore, some of these suppliers' opinions on that issue (the notifying party explicitly quotes the opinions expressed by Exide, Rombat and FAAM) cannot be taken face value.
344. In any event, the relevant customers' perception of the available free capacity in the market should be given the greatest weight. The customers' understanding of the free capacity available in the market is crucial for the suppliers' leeway to justify price increases based on the argument that there is not sufficient capacity available. In this regard, the notifying party does not contest the Commission's finding that – in reply to the Commission's phase-I questionnaire – the vast

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<sup>257</sup> See reply of OE-customer 11 to questions 21 and 25 of the Commission's questionnaire to OE-customers dated 19.12.2007.

majority of OE-customers (13 out of 14) considered that the OE market is currently *not* characterized by a significant overcapacity<sup>258</sup>.

345. The Commission furthermore rejects the notifying party's assertion that – by assessing the existing spare capacity in the market on the basis of the "*OE customers' lists of approved suppliers*" – the Commission would "*artificially limit the capacity in the OE market*". In this regard, the following elements should be noted.
346. The production capacity of suppliers which are currently *only* active in the IAM and *not* in the OE market could only be considered to effectively constrain the leeway of the merged entity to unilaterally increase prices if the barriers to entry to the OE market were to be considered to be insignificant. Since the Commission's market investigation confirmed that there are significant barriers to entry to the OE market, it cannot be concluded that the production capacity of suppliers which are only active in the IAM is "readily available" to serve (at least partly) the demand of those OE customers which intend to switch in the event of a unilateral price increase by the merged entity.
347. As set out in detail in the Statement of Objections, the Commission included in its assessment of the spare capacity readily available in the OE market the *total* spare capacity of all suppliers which are active in this market. Based on this approach and using the data submitted by the respective suppliers to the Commission, the Commission concluded, without being contradicted by the notifying party, – that "*if the excess capacity of the parties to the transaction is deducted, the excess capacity in the EEA market for starter batteries for cars / LCV would be less than 10% of the total capacity and in the EEA market for starter batteries for trucks / HCV roughly 10% of the total capacity*" (paragraph 208 of the Statement of Objections).
348. Furthermore, the notifying party does not contest the Commission's findings set out in the Statement of Objections that all those suppliers which are active in the OE market are also active in the IAM, that in particular all small competitors (such as Banner, Moll, MIDAC, Rombat, Monbat) currently produce OE batteries and IAM batteries in (sometimes only one) the same production plant, and that it is to be assumed that at least part of the spare capacity is likely to be used for the production of IAM batteries.
349. Based on these elements, it is concluded that – by taking into account the *total* spare capacity of these suppliers which are, in some cases, not even considered as viable alternatives for the supply of OE batteries – the Commission's approach of analysing the spare capacity readily available in the markets for OE starter batteries is very much in favour of the notifying party and in fact paints an exaggerated picture of the capacity readily available to serve additional demand of

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<sup>258</sup> See replies to question 45 of the Commission's questionnaire to OE-customers dated 7.11.2006; the relevant question reads: "*Do you think that the market for automotive batteries is currently characterized by a significant overcapacity? Please differentiate – if necessary – between automotive batteries for cars / LCV and for trucks / HCV (options: Yes and No). If yes, please provide an estimate (in % of total market volume in the EEA)*".

those OE customers which intend to switch in the event of a unilateral price increase by the merged entity.

350. As regards the notifying party's claim that the available spare capacity in the market for OE starter batteries for cars / LCV and trucks / HCV will increase due to Banner's plan to open a new production plant in Eastern Europe in 2008, the following points should be noted. The notifying party does not contest the Commission's finding set out in the Statement of Objections that the new plant will only be put into operation at best in 2009. The notifying party furthermore does not contest the following conclusions set out in the Statement of Objection which are based on information submitted by the supplier concerned: *"Banner's new plant will have a production capacity much lower than estimated by the notifying party. The build-up of the intended capacity will furthermore take several years and even at full capacity, the plant will produce significantly less than 4 million units."*<sup>259</sup>

351. Furthermore, the notifying party's assumption that all of the production capacity will be dedicated to the OE market is not covered by objective facts and cannot be derived from the information included in the file. In addition, as is also confirmed by the notifying party, OE customers certify plants and not suppliers. Accordingly, after being put into operation, the new plant would first pass through the certification process which – according to the results of the market investigation – would take at least 1 to 1.5 years. Even if Banner were to dedicate the new production plant to the market for OE starter batteries, the supply of those batteries cannot be expected before 2010 or 2011.

352. Based on these elements it is concluded that the arguments submitted by the notifying party in the reply to the Statement of Objection do not rebut the Commission's finding that the market for OE starter batteries currently is not characterized by sufficient spare capacity to make it easy for OE-customers to switch to alternative suppliers.

- (ii) The main argument submitted by the notifying party disregards the incentive of alternative suppliers to expand capacity and supply

353. The notifying party's assertion that, post-merger, there would be no risk of unilateral price increases by the merged entity since OE customers would still have the ability to switch to alternative suppliers is based on the following line of arguments: (i) OE customers can easily switch to alternative suppliers because these suppliers can expand capacity and supply easily *"by switching to a six-day working week"* or even by *"production on Saturdays and Sundays"* (that is to say, seven-day working week), (ii) that the investment cost for a new production line for starter batteries is rather modest (EUR 1 - 3 million for a capacity of 1 million units), and (iii) that against this background and *"given the high level of fixed costs of starter battery production [...] any such [unilateral] price increase will be unprofitable"* for the merged entity.

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<sup>259</sup> See Statement of Objections, paragraph 220; the version of the SO addressed to the parties includes – as is evidenced by the minutes the relevant paragraph refers to – a technical error. Instead of "will *not* produce significantly less than" the correct wording is "will produce significantly less than".

354. The notifying party's assertion that the production of starter batteries involves a particularly "*high level of fixed cost*" is not confirmed either by the results of the market investigation or by the data and arguments submitted by the notifying party itself in the course of the proceedings. In a presentation submitted in the course of the pre-notification phase, the notifying party provided the following breakdown of the production cost for OE starter batteries<sup>260</sup>: [45-55]\*% of the total cost is due to the lead needed for the production of the plates; [15-25]\*% of the cost is caused by "other material" used in the production of the battery (container, separator, lid); [5-10]\*% of the total cost is linked to energy needed for charging / formation of the battery, and [20-30]\*% of the total cost is "rest production cost" not covered by the factors mentioned.
355. Based on these figures submitted by the notifying party, which are roughly confirmed by the detailed cost data of VB submitted in the course of the Commission's market investigation<sup>261</sup>, it has to be concluded that significantly more than [70-80]\*% of the total production cost of an OE battery depends on the quantity of battery produced (cost of lead, cost of other raw material and energy cost, to which labour costs must be added) and thus has to be considered to be variable and not a fixed cost of production.
356. As regards the notifying party's assertion that the investment costs for a new *production line* providing for a capacity of 1 million units are relatively modest and amount to only EUR 1 - 3 million, this argument clearly contradicts the notifying party's assertion that the production of starter batteries involves "*high fixed cost*". Since the capital cost for the production equipment needed accounts for a significant part of the fixed costs involved in the production of a product, the notifying party's assertion that the investment costs for the production equipment needed are "*modest*" also implies that the fixed costs involved in the production are modest.
357. In addition, the notifying party contradicts FIAMM's submission that the setting up of a new *assembly line* for starter batteries which only covers one out of three production steps for a starter battery (the other steps are production of plates and charging / formation) would need an investment of EUR [1-2]\* million. It furthermore does not contest the Commission's finding as set out in the Statement of Objections that, according to the parties' own submission and the information gathered in the course of the market investigation, these other production steps provide the decisive "bottleneck" in the production process and that the relevant equipment needed for these production steps is quite expensive. Finally, the notifying party has not provided any factual evidence to support its estimate of the investment cost for a new production line for 1 million starter batteries.
358. Irrespective of the relevant level and structure of cost involved in the production of OE starter batteries, the notifying party's line of argument disregards several crucial factors which are decisive for the assessment whether a unilateral price increase would be profitable for the merged entity following the merger, the

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<sup>260</sup> See presentation of VB submitted in the meeting with the case-team on 15 September 2006, p. 9.

<sup>261</sup> See e.g. submission of the notifying party dated 8.1.2007, Annex 14.3.

ability and economic incentive of the alternative suppliers to serve those customers which would allegedly switch in the event of a unilateral price increase by the notifying party post-merger. In this regard, the Commission considers the following arguments to be most relevant.

359. Whether a unilateral price increase may be profitable for the merged entity in general depends on how much of the customers' demand served by the merged entity (post-merger) would be switched to other suppliers following the price increase and whether and to which extent the increase in revenue for the merged entity resulting from the higher price (for a lower quantity) is higher than the lost revenues resulting from the loss of quantity (at a lower price) and the (potential) increase in average total cost of production due to a potential reduction of capacity utilization. The proportion of the OE customers' demand the merged entity risks of losing in the event of a unilateral price increase, however, crucially depends on the OE customers' ability to switch and hence the OE customers ability to *find an alternative supplier to serve at least a share of the current supplies* the OE customers want to switch away from the merged entity.
360. Therefore, the profitability of unilateral price increases for the merged entity largely depends on whether or not the *expansion of supply is profitable for alternative suppliers*, that is to say, whether the alternative suppliers not only have the ability but also the economic incentive to serve those OE-customers which would allegedly switch in the event of a unilateral price increase by the merged entity.
361. By only stating that alternative suppliers may easily serve the additional demand of OE-customers *"by switching to a six-day working week"* or introducing *"production on Saturdays and Sundays"* (that is to say, seven-day working week) and / or by adding additional production capacity by setting up a new production line, the notifying party only provides arguments on the technical *ability* of alternative suppliers to expand capacity and supply. It disregards whether or not alternative suppliers have the economic *incentive* to increase total capacity and to use the additional capacity for the supply of OE starter batteries and not for serving the IAM.
362. In this context, the notifying party does not contest the Commission's finding set out in the Statement of Objections that European battery manufacturers only have recourse to weekend shifts in exceptional circumstances, and only for a short period of time, because weekend shifts are perceived to be difficult to organise and also involve high labour costs which can amount to higher total cost per battery.
363. Furthermore, with the exception of Exide, all other alternative suppliers currently active in the market for OE starter batteries operate only one single plant which incorporates the production of OE batteries as well as IAM batteries. While it would, in principle, be possible for these alternative suppliers, whose only production plants are "certified" by OE customers to provide the quality needed, to switch (parts of) the existing production capacity from the production of IAM batteries to the production of OE batteries, this option again would only take into account the *ability* to expand capacity in the OE market and disregard the economic *incentive* of the alternative suppliers to do so.

364. In this respect, there is consensus among market operators that the IAM business is currently more profitable than the OE business. According to the data included in the due diligence report for FIAMM SBB submitted by the notifying party, the profitability of FIAMM's business "*varies among the different segments, with OE reporting an industrial margin of [0-5]\*% in FY (financial year) 05, AM Italy of [25-35]\*% and AM Europe of [20-30]\*%*"<sup>262</sup>. The respective data submitted by the notifying party for JCI/VB show that the gross-margin for the IAM business (almost [25-35]\*%) is significantly higher than for the OEM business (significantly less than [15-25]\*%)<sup>263</sup>. The fact that the IAM business in general is more profitable than the OE business is furthermore consistently confirmed by competitors contacted by the Commission in the course of its market investigation.
365. Accordingly, alternative suppliers which produce IAM batteries and OE batteries in a single production plant would – in the event of the overall capacity being fully utilized – only have an incentive to expand the production of OE batteries should the price offered by the OE-customer be sufficiently high to avoid any loss in profitability, that is to say, at least on the level of the profitability of selling the same quantity of IAM batteries.
366. Based on these elements it is concluded that – in the event of a unilateral price increase by the merged entity – OE customers would only find alternative suppliers with an incentive to meet the additional demand (that is to say, OE customers would only be *able* to switch) if the alternative supplier has sufficient spare capacity and if the price offered by the OE customer is sufficiently high to set an incentive to use the spare capacity for OE production. If no spare capacity were to be available the OE customer would have to pay a sufficiently high price to compensate the supplier for the additional cost of expanding capacity by implementing weekend-shifts or setting up new production lines, and for the profits foregone as a result of not being able to use the additional capacity for the production of IAM batteries.
367. Accordingly, OE customers would – in particular taking into account the current level of spare capacity available in the market – only be able to switch to alternative suppliers should they be ready to pay a higher price to these suppliers which would compensate them for one or more of the additional "cost factors" (namely, higher labour cost due to weekend shifts, investment cost for expanding capacity, profits foregone as result of not serving the IAM). In turn, these cost factors determine the leeway the merged entity would have following the merger to increase prices unilaterally without running the risk that OE customers would not only be willing but would also be able to switch to alternative suppliers.
368. Finally, by only pointing at the alternative suppliers' *ability* to expand, the notifying party also disregards the fact that the proposed *transaction in itself*, by concentrating capacity in the hand of the leading player, has a negative impact on

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<sup>262</sup> See "Project Fire – Due Diligence Report, September 26, 2006", p. 23; submission of the notifying party dated 8.1.2007, Annex 3; further details on the industrial margin by segment are presented on page 58 of the same report.

<sup>263</sup> See submission of the notifying party dated 17.1.2007, Annex 17.

the *incentive* of alternative suppliers to expand in the OE market by competing against the merged entity.

369. As has been set out in the Statement of Objections, without being contested by the notifying party, as a result of the proposed transaction the notifying party would – acquire significant additional capacity which is already certified by OE-customers. FIAMM's production plant in Veronella, which is specialized in the production of starter batteries for cars / LCV for example, has a production capacity of roughly [4-6]\* million batteries, being equivalent to roughly [15-25]\*% of the total demand for OE batteries for cars / LCV in the EEA. Based on the information submitted by the parties, this plant also provides some free capacity of roughly [5-10]\*% of its total capacity. Furthermore, despite being certified by several OE customers, the plant also produces IAM batteries.
370. Following the proposed transaction, alternative suppliers with the ability to expand capacity and supply in the OE market, but only by incurring additional costs, would compete with the notifying party which – due to the merger – would have additional production capacity which is not fully utilized and, in addition, can flexibly be used for the production of OE batteries as well as IAM batteries.
371. The fact that the Veronella-plant would provide the notifying party with additional flexibility to shift production between OE batteries and IAM batteries would not only improve VB's ability to reduce the available capacity and the supply in the OE market to unilaterally increase price, but would also provide VB with an improved ability to sustain a sufficiently high (potential) certified capacity to establish a credible threat to alternative suppliers in the OE market which consider expanding their capacity and supply of OE starter batteries.

(c) *Barriers to entry*

(1) *Arguments submitted by the parties and results of the market investigation as set out in the Statement of Objections*

372. The parties also stated that the barriers to new entry in the market for OE starter batteries are relatively low and OE-customers could easily turn to established high-quality battery suppliers that are active in other areas of the world or other market segments (IAM) to supply their European operations. In their reply to the Commission decision to initiate proceedings of 4 December 2006, the parties reiterate their views on the possibility of OE-customers sponsoring new entry to diversify their supplier base.
373. In its decision to initiate proceedings, the Commission has already highlighted a number of significant barriers to entry<sup>264</sup>. The second phase investigation confirmed the existence of such barriers to entry.
374. The Commission found that almost all OE-customers apply a list of “approved” suppliers. The certification process usually involves extensive auditing and test procedures. The parties themselves consider these certification procedures

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<sup>264</sup> See Commission decision to initiate proceedings of 4 December 2006, paragraph 85 et seq.

to be a *"significant market entry barrier"* in the Form CO.<sup>265</sup> However, in their reply to the Commission decision to initiate proceedings, they submit that *"OE customers could easily approve more suppliers and more production facilities"*<sup>266</sup>. The Commission has therefore explored this issue further in its second phase market investigation.

375. The vast majority of OE-customers (12 out of 14) clearly indicate in their replies to the Commission's first phase market investigation that they would only switch to a newly established supplier of starter batteries for cars / LCV and trucks / HCV after extensive testing and auditing procedures. Other OE-customers (2 out of 14) stated that they in general only deal with well established suppliers of OE starter batteries<sup>267</sup>.

376. Even for suppliers which are currently active in the IAM for starter batteries for cars / LCV and trucks / HCV the barriers to entry in the OE-market are very high. The competitors involved in the Commission's first phase market investigation clearly indicated that the technical capabilities of a supplier are crucial for successful market entry and that the acquisition of these capabilities requires significant investments and time. This result is in line with the the replies to the first phase questionnaire to OE-customers, in the course of which a majority indicated the risk of insufficient technical capabilities and the risk of insufficient product quality to be the most important reason to prevent them from switching to an alternative supplier<sup>268</sup>.

377. All but one OE-customer confirmed that they certify plants, not suppliers. The majority of OE-customers furthermore indicated that the certification would take more than one year. One OE-customer, who has recently started the certification of FIAMM as its potential supplier of OEM starter batteries, stated that the process took more than one year<sup>269</sup>. The Commission's market investigation also provided indications that potential new entrants cannot expect a quick (and in the parties' wording 'easy') certification. MIDAC, a supplier currently only active in the IAM, indicated to the Commission that it took several years to become an "approved" OEM supplier. MIDAC tried for almost 4 years to get an OE contract for starter batteries for cars / LCV <sup>270</sup>.

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<sup>265</sup> Form CO, p. 56

<sup>266</sup> See submission of the notifying party dated 22.12.2006, p. 10.

<sup>267</sup> See replies to question 39 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>268</sup> See replies to question 37 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>269</sup> See reply of OE-customer 8 to question 18 of the Commission's questionnaire to OE customers dated 19.12.2007.

<sup>270</sup> See agreed minutes of a conference call with MIDAC held on 19.01.2007.

378. Even though OE-customers indicated that they certify plants<sup>271</sup>, certification is not merely a technical procedure. OE-customers mentioned a number of criteria that would need to be fulfilled by a supplier to become certified. These include technical specifications, quality testing and auditing of the production processes, but also commercial aspects such as financial stability, demonstration of reliability, experience in producing large volumes and competitive pricing<sup>272</sup>. Furthermore, design development, R&D and know-how<sup>273</sup> were mentioned by OE-customers as relevant criteria for certification.
379. Some of these criteria exclude or at least disadvantage small, aspiring new entrants. The requirement for financial stability, for example, makes it difficult for small entrants to enter into investments to expand their capacities in order to meet the large volume criteria. One smaller supplier indicated to the Commission that despite its certification/approved status it would not be able to provide an offer for supplying batteries for popular car/truck models produced in large volumes<sup>274</sup>.
380. Even small volume contracts may be out of the reach of smaller suppliers even if they manage to receive certification. Even though a small minority of OE-customers invite smaller suppliers (other than JCI/VB, Exide, Fiamm or perhaps Banner) to their tenders, this is ultimately not reflected in the number of their actual suppliers. One supplier also confirmed that each time it has provided a bid for an OEM contract, one of the three big suppliers stepped in and took it, despite the contract being obviously small<sup>275</sup>.
381. The parties also argue that there are potential suppliers located outside the EEA which could enter the EEA markets for OE starter batteries. However, the market investigation clearly confirmed that the location of the production plant is a very important factor in the choice of the supplier and thus has to be considered as a significant additional barrier to entry. Even from countries close to the EEA (like Turkey), transport cost are significant. One OE-customer estimated transport cost from this country to its West European production facilities to add a significant extra cost to the production cost of the battery.<sup>276</sup>
382. Distance is not only a barrier to entry in terms of extra costs, but also in terms of the quality of the products. As explained in the section on relevant markets, starter batteries intended for the OEM market are `fresh products` and must be installed in the new vehicles while they are fully charged. Furthermore, long

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<sup>271</sup> See replies to question 13 of the Commission's questionnaire to OE customers dated 19.12.2007.

<sup>272</sup> See replies to question 27 Commission's questionnaire to OE customers dated 19.12.2007.

<sup>273</sup> See agreed minutes of conference call with OE-customer 7 and OE-customer 9 held on 25 January 2007.

<sup>274</sup> See agreed minutes of a conference call with MIDAC held on 19.01.2007.

<sup>275</sup> See agreed minutes of a conference call with MIDAC held on 19.01.2007. In fact, MIDAC considers the leading suppliers to use their capacity advantage to cross-subsidise contracts thus deterring entry in particular for small competitors.

<sup>276</sup> See agreed minutes of a conference call with OE-customer 9 held on of 25. 1.2007.

transport, especially from countries which are not well-connected to Western European infrastructure, increases the risk of not meeting the requirement of just-in-time delivery.

383. These findings are consistent with the overall negative experience regarding the sponsorship of new entry by OE-customers. In its second phase questionnaire the Commission asked OE-customers whether they have previously sponsored the entry of new suppliers to either the OEM or the OES segment. Despite the fact that several OE-customers indicate that they have tried to sponsor entry, no new market entry in either OEM or OES seems to have occurred as a result of being sponsored by an OE-customer<sup>277</sup>. Accordingly, the vast majority of OE-customers (13 out of 14) indicated in the reply to the first-phase market investigation that no new market entry has occurred in recent years on the EEA markets for OE starter batteries for cars / LCV and OE starter batteries for trucks / HCV<sup>278</sup>.

384. Based on these elements, the Commission reached the preliminary conclusion that the markets for OE starter batteries for cars / LCV and OE starter batteries for trucks / HCV are characterized by significant barriers to entry which render the entry of new suppliers of OE starter batteries unlikely within a time-frame relevant for the assessment of the competitive impact of the proposed transaction.

*(2) The parties' reply to the Statement of Objections*

385. In its reply to the Statement of Objections, the notifying party mainly reiterates its arguments put forward in previous submissions<sup>279</sup>. It states that "*OEMs are able and willing to increase their potential sources of supply by approving more suppliers and more production facilities*". In this context, the notifying party also claims that in the course of the Commission's market investigation "*virtually all OE customers confirmed that they would consider switching to a new market entrant if the batteries met certain minimum quality requirements*".

386. The notifying party furthermore claims that "the Commission disregards the fact that OE customers may and do sponsor the market entry of non-EEA and EEA suppliers" and points out that "due to their extensive battery know-how [...], car manufacturers are able to provide battery manufacturers with know-how and other support where this is necessary to ensure that the batteries meet their quality standards". In this regard, the notifying party provides the example that "VB only recently failed to win the contract to supply batteries for the Fiat Punto" and that "VB believes that MIDAC, whose OEM activities were limited to the supply of batteries for agricultural machinery until now, has won a substantial part of this business".

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<sup>277</sup> See replies to questions 19 and 20 of the Commission's questionnaire to OE-customers dated 19.12.2006.

<sup>278</sup> See replies to question 41 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>279</sup> For the following see VB's reply to the Statement of Objections dated 26 February 2007, p. 4.

### *(3) Assessment*

387. In assessing these arguments, the Commission notes first that the notifying party's assertion that in the course of the Commission's market investigation "*virtually all OE customers confirmed that they would consider switching to a new market entrant if the batteries met **certain minimum quality requirements***" severely downplays the results of the Commission's market investigation on the character of the certification process applied by OE customers as a barrier to entry.
388. As has been set out in detail in the Statement of Objections, the vast majority of OE-customers (12 out of 14) clearly indicate in their replies to the Commission's first phase market investigation that they would only switch to a newly established supplier of starter batteries for cars / LCV and trucks / HCV after extensive testing and auditing procedures. The remaining OE-customers (2 out of 14) even stated that they in general only deal with well established suppliers of OE starter batteries<sup>280</sup>.
389. Furthermore, the notifying party does not contest the finding set out in the Statement of Objections that the majority of OE-customers indicated that the certification process would take more than one year. For one OE-customer, who has recently started the certification of FIAMM as its potential supplier of OEM starter batteries, the process took more than one year<sup>281</sup>. In addition, the notifying party does not contest that suppliers of starter batteries involved in the Commission's first phase market investigation clearly indicated that the technical capabilities of a supplier are crucial for successful market entry and that the acquisition of these capabilities requires significant investments and time.
390. Secondly, as regards the notifying party's assertion that OE-customers may easily sponsor new market entry (for example, by providing battery "know-how") and the example submitted by the notifying party to this effect (the Italian manufacturer MIDAC, a number of considerations are of relevance.
391. The notifying party does not contest the Commission's finding that – despite the fact that several OE-customers indicated that they have in the past tried to "sponsor" new market entry – the vast majority of OE-customers (13 out of 14) indicated in the reply to the first-phase market investigation that no new market entry has occurred in recent years on the EEA markets for OE starter batteries for cars / LCV and OE starter batteries for trucks / HCV<sup>282</sup>.
392. As regards the example of the "recent entrant" MIDAC, the notifying party does not contest the Commission's finding set out in the Statement of Objections as regards the difficulties encountered by MIDAC in trying to enter the market for OE batteries and – according to the notifying party – to conclude one small contract with one OE customer for only one car model. As set out in the Statement

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<sup>280</sup> See replies to question 39 of the Commission's questionnaire to OE-customers dated 7.11.2006.

<sup>281</sup> See reply of OE-customer 8 to question 18 of the Commission's questionnaire to OE customers dated 19.12.2007.

<sup>282</sup> See replies to question 41 of the Commission's questionnaire to OE-customers dated 7.11.2006.

of Objections, the Italian supplier MIDAC indicated to the Commission that it took several years to become an "approved" OEM supplier and that, in fact, MIDAC tried to get an OE contract for almost 4 years.

393. By stressing only the ability or incentive of *OE-customers* to sponsor market entry, the notifying party –as already described in the context of the discussion of barriers to expansion prevailing in the market again disregards the incentive of potential suppliers currently only active in the IAM to enter the OE business.
394. The Commission's market investigation confirmed that the certification process needed to enter the OE business requires significant investment and time. Suppliers currently not active in the OE business would therefore only have an incentive to enter the market if they considered there to be a sufficient likelihood not only of entering but also of staying in the market for a sufficient time and gaining contracts which guarantee a "return" on this investment. The costs involved in the certification process therefore have to be considered as a "sunk cost" of market entry.
395. In addition, the IAM business is currently more profitable than the OE business. Accordingly, potential suppliers which are currently only active in the IAM business only have an incentive to enter the OE business if the price offered by the OE-customer is sufficiently high to compensate for foregone profits of using at least parts of the capacity to expand in the IAM business.
396. Finally, the Commission notes that the notifying party – by only referring to the *OE customers'* incentive to "promote" entry of new suppliers post-merger – disregards the fact that the proposed transaction in itself has a negative impact on the incentive of potential competitors to enter the OE market.
397. As a result of the proposed transaction the notifying party would – as has been set out in the context of the discussion of the barriers to expansion prevailing post-merger acquire a significant additional capacity which is already certified by OE-customers and – only considering one of the production plants of FIAMM (Veronella) – is equivalent to roughly [15-25]\*% of the total demand for OE batteries for cars / LCV in the EEA. Based on the information submitted by the parties, this plant also has free capacity of roughly [5-10]\*% of its total capacity.
398. Based on these facts it has to be concluded that potential suppliers and new entrants in the OE market would compete with the notifying party which – due to the merger – would have additional production capacity which is not fully utilized and can flexibly be used for the production of OE as well as IAM batteries. In assessing the impact on the incentives for market entry, the Commission in particular notes that the notifying party does not contest the Commission's finding that smaller competitors like MIDAC confirmed that each time they had provided a bid for an OEM contract, one of the three big suppliers (namely JCI/VB, FIAMM and Exide) stepped in and took it, despite the contract being obviously small<sup>283</sup>.

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<sup>283</sup> See agreed minutes of a conference call with MIDAC held on 19.01.2007. In fact, MIDAC considers the leading suppliers to use their capacity advantage to cross-subsidise contracts thus deterring entry in particular for small competitors.

*(4) Conclusion*

399. Based on these elements, it is concluded that the markets for OE starter batteries for cars / LCV and for OE starter batteries for trucks / HCV are characterized by significant barriers to entry which render the entry of new suppliers of OE starter batteries unlikely within a time-frame relevant for the assessment of the competitive impact of the proposed transaction.

*(d) Countervailing buyer power*

*(1) The preliminary conclusions of the in-depth market investigation as set out in the Statement of Objections*

*(i) Arguments submitted by the parties*

400. In their response to the Commission decision initiating proceedings of 4 December 2006 the parties also reiterate that OE-customers have significant countervailing buyer power, which would "*severely constrain the merged entity's pricing behaviour*".<sup>284</sup> In particular, the parties maintain that OE-customers could exercise their buyer power by switching to an established supplier of OE starter batteries, by sponsoring new entry to the OE markets, and by leveraging their broader customer relationship with VB or JCI, that is to say, using their strong demand position for other automotive components manufactured and sold by FIAMM and the parent companies of VB (JCI and Bosch) to get better prices and conditions for starter batteries.

401. The parties claim that because of the overwhelming buyer power of OE-customers there has never been any observable reduction in the competitive constraint faced by the leading suppliers despite the ongoing concentration process. To the contrary, this buyer power, according to the parties, ensured decreasing prices and very tight margins for starter battery suppliers. The parties further submit that the existence of tight margins in the OE market and the absence of past price increases despite ongoing concentration in the starter battery market are evidence of the existence of significant buyer power.

*(ii) Preliminary assessment as set out in the Statement of Objections*

402. In assessing the arguments submitted by the parties, it has to be noted first, that – while it is true in general that strong customers can be in a position to counter an increase of market power that a merger would otherwise be likely to create – countervailing buyer power must be assessed in the context of the post-merger market structure. Purchasing power in particular cannot be found to sufficiently off-set the potential adverse effects of a merger if the relevant customers have no sufficient alternatives to switch significant shares of their demand.<sup>285</sup>

403. Following the merger– due to the capacity constraints of the remaining competitors, the existing barriers to entry and expansion in the markets for OE

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<sup>284</sup> See submission of the notifying party dated 22.12.2006, p. 11.

<sup>285</sup> See Case T-282/02 *Cementbouw v. Commission*, 23/02/2006, paragraph 232.

starter batteries for cars / LCV and trucks / HCV as well as the reduction of existing production capacity due to the intended closing and conversion of two of FIAMM production plants – the merged entity will be an indispensable supplier of OE starter batteries for cars / LCV and trucks / HCV for most of the demand of the leading OE-customers in the EEA.

404. Secondly, whether margins in the OE market for starter batteries are tight or whether this is a sign of intense competition and/or the past leveraging of buyer power is irrelevant for the assessment in this case insofar as it does not preclude that this merger would lead to such a deterioration of competition that would make it easy for the merged entity to increase prices and make it difficult, if not impossible, for OE-customers to exercise their bargaining power post-merger either by switching or threatening to switch to other suppliers.
405. In addition, whereas in the foregoing analysis, the likelihood of unilateral price increases following the merger was mainly deduced from the overall competitive situation and the expected changes in the parameters of competition, the Commission has also come into possession of evidence as to the concrete intention of the notifying party to increase prices following the merger. Minutes from the VB management meeting of 13 November 2006 explicitly mention "*price increase actions*" as one of the "*critical path items*" of the integration plan with FIAMM<sup>286</sup>.
406. The parties also submit that there has been no observable increase in prices despite the ongoing concentration in the market. However, certain OE-customers indicated that, since the merger with Delphi, VB has failed to pass on savings resulting from productivity improvements, although this appears to have been the practice previously<sup>287</sup>. The fact that prices have not increased, however, does not preclude the possibility that they did not decrease to the same level which would have been reached in the absence of the consolidation in the market. Furthermore, there are several indications in the minutes of the VB management meetings that FIAMM has been constantly attacking the market shares of VB and has thus had an important role in keeping prices low, in particular in the market for OEM batteries for cars / LCV<sup>288</sup>.
407. In addition to highlighting the significant purchasing volume of leading OE-customers in the EEA, the parties also point out that, after the merger, large OE customers would be able to leverage their purchasing power across different types of automotive components. FIAMM and the parent companies of VB (JCI and Bosch) are also active in the supply of several other automotive components (for example, interior, seats and electronic equipment). According to the data submitted by the parties, JCI generates more than [85-95]\*% of its turnover with large OE-customers with components other than starter batteries.

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<sup>286</sup> See submission of the notifying party dated 16.1.2007, Annex 2.

<sup>287</sup> See agreed minutes of a conference call with OE-customer 9 held on 25.1.2007; reply of OE-customer 2 to question 11 b) of the Commission's questionnaire to OE customers dated 19.12.2006.

<sup>288</sup> See for example minutes of the Management Meeting of 12 December 2005 and of 30 May 2005; submission of the notifying party dated 16.01.2007, Annex 2.

408. In assessing this argument, it is first to be stressed that no OE-customer indicated that it would be able to exercise countervailing power vis-à-vis the merged entity because it procures different types of automotive components from FIAMM, JCI and/or Bosch<sup>289</sup>. The second phase market investigation did not reveal any evidence to suggest that such a strategy could be easily implemented by the OE-customers. On the contrary, the in depth inquiry into the purchasing patterns of OE-customers has identified significant organisational and economic constraints on their ability to leverage their overall relationship with the merged entity and its parent companies JCI and Bosch in the starter battery segment.
409. The replies of OE-customers to the Commission's second phase questionnaire<sup>290</sup> have confirmed that an overwhelming majority of OE-customers have a business relationship with FIAMM, JCI and Bosch (roughly 90% of all respondents) in other automotive component markets. However, the other components supplied by FIAMM, JCI and Bosch are to a great extent more expensive and complex than starter batteries (for example electrical parts, braking systems, interior etc.).
410. The Commission has also found that most OE-customers have separate purchasing units for batteries and other automotive components. Furthermore, none of the OE-customers has ever been offered a "package" deal encompassing starting batteries together with other automotive components from JCI, Bosch or FIAMM. One OE-customer - while considering that hypothetically it would perhaps be possible to leverage the strong demand position for other components – confirmed that in practice it would not be an option. The reasons given by OE-customers for their lack of ability to leverage in particular included the separation of business divisions both within the OE-customers' purchasing organisation as well as within JCI.
411. The Commission further investigated this issue during its in-depth investigation interviews with a number of OE-customers which confirmed the results reported above<sup>291</sup>. One OE-customer considered that the ability to exercise buyer power in this market is limited by virtue of the fact that it is the OE customers who are dependent on the starter battery suppliers and not vice versa. This is because the OEM business only accounts for roughly one third of the starter battery business with IAM accounting for the larger part. VB's threat to stop deliveries to FIAT if it does not accept price increases, as evidenced by the minutes of the VB management meeting of 20 February 2006, seems to support this argument<sup>292</sup>.

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<sup>289</sup> See replies to question 51 of the Commission's questionnaire to OE customers dated 7.11.2006; see also replies to question 18 of the Commission's questionnaire to OE customers dated 19.12.2006.

<sup>290</sup> See replies to questions 14-17 of the Commission's questionnaire to OE customers dated 19.12.2006.

<sup>291</sup> See agreed minutes of conference calls with OE-customers 1, 7, 9 and 11 held on 22., 25. and 26 January 2007.

<sup>292</sup> See submission of the notifying party dated 16.01.2007, Annex 2.

412. Furthermore, several OE-customers stated that the coordination of purchasing of different automotive components would not make business sense and would be very complicated. Purchasing divisions for separate components are fully organised teams researching the market independently on the basis of different lists of criteria specific to the components concerned. Organisationally speaking, each purchasing division has its own bottom-line and is judged by its own financial results. A purchasing manager would therefore be unlikely to forego his own profits in order to increase the profits of another purchasing manager.
413. The individual purchasers' work towards an individual optimisation of supply is based not only on price, but also on quality and reliability. The co-ordination of all these criteria would obviously be very complicated. Package deals for different car components would therefore risk jeopardising the individual efficiency of purchasing divisions and global results could be sub-optimal. One customer considered that in terms of reliability/security of supply, working on the basis of package deals would create a "*critical situation*".
414. In light of the above, the Commission reached the preliminary conclusion that the detrimental effects on competition resulting from the proposed transaction are not likely to be counteracted by the alleged countervailing factors put forward by the notifying party.

*(2) The notifying party's reply to the Statement of Objections*

415. In its reply to the Statement of Objection, the notifying party reiterates its view that OE customers would "*continue to have significant purchasing power also post-transaction*". In particular, the notifying party claims that OE customers would still have the option to switch to certified competitors or to sponsor new entry. In alleged support of its views the notifying party refers to the Commission's decision in the case *Johnson Controls/Bosch/Delphi*
416. The notifying party furthermore reiterates that OE customers "*are likely to use their ability to leverage purchasing power across different products that they purchase from JCI (or Bosch)*" and expresses the belief that despite the (uncontested) difficulties in implementing such a strategy (as set out in the Statement of Objections), OE customers would be able to implement the internal coordination needed to establish joint purchasing of very different car components.
417. The notifying party – albeit without submitting any supporting evidence – further claims that two OE customers have recently threatened to discontinue sourcing other component parts from JCI if the latter did not agree to decrease its battery prices.

*(3) Assessment*

418. The parties do not contest that countervailing buyer power must be assessed in the context of the post-merger market structure in this case. In this respect, it should be recalled that in the *JCI/Bosch/Delphi* case the Commission investigated a different market context. The conclusions drawn by the Commission in that case therefore cannot be applied in this case.

419. Furthermore, the parties do not contest the following points as set out in the Statement of Objections: (i) the merged entity post-merger will be an indispensable supplier of OE starter batteries for cars / LCV and trucks / HCV, (ii) OE-customers explicitly indicated that since the merger with Delphi, VB has failed to pass on savings thanks to productivity improvements, although this appears to have been the practice previously, (iii) the feedback from the OE customers confirms that none of them has ever been offered a package deal in the past, and (iv) the view submitted by OE customers to the Commission that – due to the relative size of the IAM business compared to the OE business - OE-customers are to a certain extent dependent on starter battery suppliers, while this is not the case vice versa.
420. In addition, according to the data submitted by the notifying party<sup>293</sup>, VB's profit margin in the OE business, in particular in the segment of OEM starter batteries, has increased significantly in recent years. While the gross margin for OEM batteries was less than [5-10]\*% in 2003, the gross margin more than tripled from 2003 to 2005 reaching more than [10-20]\*% in 2005. This development clearly contradicts the notifying party's assertion that the strong bargaining position of OE-customers ensured decreasing prices and very tight margins for starter battery suppliers.
421. With regard to the ability of OE customers to exercise their buyer power by switching to existing suppliers and/or by sponsoring new entry, the Commission explicitly reverts to its assessment on the OE customers' limited ability to switch suppliers and the significant barriers to entry of the OE market in the section on barriers to entry.
422. The parties also concede that there are internal organisational factors (for example, separate purchasing departments) that may constrain the ability of OE customers to leverage their purchasing power across different car components. The notifying party does not contest *"the fact that certain OEMs faced some difficulties in the past to achieve such internal coordination"* [of separate purchasing activities]. Furthermore, the parties do not contest the finding of the Commission that JCI's own separation of business activities provides an additional constraint on the ability of OE-customers to leverage their bargaining power.
423. In addition, the notifying party does not contest that overall efficiency/supply optimisation objectives and the financial incentives of different purchasing units of OE customers work against the achievement of internal coordination of purchasing activities for different car components. Nor does the notifying party contest that there are significant quality and safety-related risks involved in the internal coordination of purchasing activities.
424. Based on the elements presented above, it is concluded that the notifying party reiterates its views without backing them up with solid factual evidence that would cast any doubt on the evidence presented by the Commission in the Statement of Objections.

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<sup>293</sup> See submission of the notifying party dated 17.1.2007, Annex 17.

425. The notifying party does not substantiate its statement that 'there can be little doubt that OEMs would make a more serious effort to achieve such coordination [of different purchasing activities] and use their leverage power if they considered battery prices too high post-merger'. Although the notifying party claims that two OE-customers have recently tried to use their ability to leverage their business relationship with JCI in other component markets, the notifying party did not provide any evidence to this effect and the ability to threaten does not equate to the ability to carry out the threat. To this effect the parties would need to provide factual evidence, which they do not.

(4) *Conclusion*

426. In the light of the above, it is concluded that the detrimental effects on competition resulting from the proposed transaction are not likely to be counteracted by the countervailing factors put forward by the notifying party.

(e) *Further arguments submitted by the notifying party in its reply to the Statement of Objections*

427. In its reply to the Statement of Objections the notifying party challenges the Commission's overall preliminary conclusion that the transaction would have a negative impact on competition by quoting from the replies of OE-customers and competitors to the questionnaires sent to them in the course of the market investigation<sup>294</sup>. The statements of OE customers and competitors quoted by the notifying party are mainly taken from the replies to questions in the first-phase questionnaire which were intended, after a number of detailed questions covering the factual issues relevant for the competitive assessment, to ask the respondents' general *opinion* on the impact of the proposed transaction<sup>295</sup>.

428. As a general comment, the Commission notes that whereas subjective opinions of third parties on the general competitive situation are useful in many respects, these opinions in themselves are not sufficient to override the overall factual evidence gathered and systematically investigated in the course of the market

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<sup>294</sup> See VB's reply to the Statement of Objections dated 26 February 2007, p. 2 et seq.

<sup>295</sup> See questions 58 to 61 of the Commission's questionnaire to competitors dated 08.11.2006; questions 49 to 53 of the Commission's questionnaire to OE customers dated 07.11.2006; the respective questions in the questionnaire to OE customers read: question 49: "What impact, if any, would the proposed operation have on your company? Would your own company be affected by the merger? Please explain in detail why you think / do not think that it will affect your company"; question 50: "In general, would the operation, in your opinion, give rise to any negative anti-competitive effect in any of the markets discussed above? In your reply, please take into account the market position of the parties, their potential to influence prices or output or to foreclose markets and possible changes in the competitive dynamics in general"; question 51: "In particular, please indicate the impact of the proposed transaction on your bargaining-position vis-à-vis VB/FIAMM SBB as well as your bargaining position vis-à-vis the two largest automotive starter batteries suppliers in the EEA (i.e. VB and Excide) Please explain and – if appropriate – differentiate between the OEM / OES markets"; question 52: "Do you think that the proposed transaction might result in the two largest suppliers of automotive starter batteries in the EEA (i.e. VB-FIAMM SBB and Excide) having greater incentive and ability to coordinate their competitive behaviour vis-à-vis EEA-based car manufacturers in order to collectively raise their price or lower the quality of their products? Please provide reasons for your answer"; question 53: "Please make any other comment you consider relevant to the Commission's assessment in this case".

investigation, which in turn forms the basis for the Commission's assessment. These opinions must take due account of the appropriate context, including for example the nature of the interest of the third party in question in the outcome of the proceedings, the extent of its knowledge and overview of the market situation and the degree of substantiation underpinning the opinion.

429. Furthermore, the opinions quoted by the notifying party in its reply to the Statement of Objections are abridged, they are neither representative nor conclusive and as such do not provide any additional evidence or argument that would challenge the Commission's conclusions following its in-depth market investigation. In addition, some of these quotes do not faithfully represent the overall opinion of the individual respondent and may even convey the exact opposite meaning of the views they are intended to support.
430. In particular, the statement of its competitor FAAM quoted by the notifying party (*"the merger will bring to dumping policies"*) when read in conjunction with other opinions expressed in FAAM's reply to the Commission's questionnaire to competitors, suggests that, in FAAM's opinion, JCI will, post-merger, be able to use *"dumping policies"* to prevent the expansion / entry of small competitors like FAAM. FAAM in addition – only one sentence after its remark quoted by the notifying party states that *"the operation could have a negative impact because in some markets the new company will have a really dominant position"*.
431. By quoting the statement of its competitor Steco that the merger will have *"no effect (p. 3811 of the Commission's file)"*, the notifying party freely interprets Steco's reply *"it [the transaction] should not affect our company"* to question 58 which is intended to find out whether and to which extent the transaction affects the activity of each company which replies to the questionnaire. Steco does not say anything about whether or not the transaction may have a negative anti-competitive effect (question 59).
432. Despite several statements by OE customer 2, which clearly convey concerns about unilateral effects post-merger, the notifying party also chose to quote one single unsubstantiated reply of customer 2 consisting of a single *'no'* to one question regarding the probability of price increases caused concretely by coordination. OE customer 2, however, for example also stated that *"competition would be limited to Varta, Exide and Banner – Exide being in financial problems and Banner being very small [...]. Bargaining position is weaker – missing competitive suppliers on same technical level"*.
433. As regards the notifying party's quote from the reply of OE customer 10 (*"price increase not really expected"*), the wording used by the notifying party is not a quote but a combination of parts of the customer's reply (*"Not really"*) and the text of the question concerned. Furthermore, the notifying party disregards the following comment of OE customer 10: *"Competition behaviour can change due to the fact that there are not many competitors left in EEA."*
434. Whilst customer 15 is quoted as believing that the transaction would have no negative impact at all, this customer's reply to the Commission's phase-I questionnaire to OE customers reveals that it considers that an anti-competitive effect could result from the merger (*"Yes, we think that it could happen"*).

435. OE customer 16 is quoted as believing the potential impact of the transaction to be limited. Again, this ignores the other statements of this customer, who goes on to explain that the limited impact on their own operations is simply because they are currently not customers of FIAMM. OE customer 16 however further submits that the transaction *'could have some negative impact considering the recent market concentration'*, whereby they concretely mention the acquisition of Delphi by JCI.
436. Furthermore, almost all other OE customers not explicitly quoted by the notifying party in its reply to the Statement of Objections provide statements on the negative competitive impact of the proposed transaction. Taking only the replies of OE customers to those questions considered by the notifying party to be relevant (question 48 et seq.), the following quotes provide some telling examples: *"Lack of competition (reduce possibility to switch to another supplier. [...] Varta/JCI/FIAMM will most probably raise their price"* (OE customer 8); *"The merger would further enhance Varta's position [...] and increase the likelihood of monopolistic behaviour"* (OE customer 14); *"We would be obviously affected by this merger as market distribution will be reduced from three main OEM suppliers to 2. Very significant increase of the price would have to be expected"* (OE customer 9).
437. It is therefore concluded that the *opinions* quoted by the notifying party do not refute the Commission's conclusions regarding the likelihood of unilateral effects post-merger, in particular when balanced against the opinions expressed by other market participants and the strength of the overall evidence supporting these conclusions.

*(f) Conclusions on non-coordinated effects*

438. For the reasons set out above, without considering the effects of a possible failure and liquidation of FIAMM, it is concluded that the notified concentration will create a dominant position on the market for OE starter batteries for cars / LCV and create or strengthen a dominant position on the market for OE starter batteries for trucks / HCV and would allow the merged entity to raise prices and/or deteriorate any other term of supply unilaterally. As a result, it will significantly impede effective competition in the common market within the meaning of Article 2(3) of the Merger Regulation.

**4) Coordinated effects**

439. Due to the very high combined market shares of the two leading players (namely JCI/VB and Exide) remaining post-merger in the markets for OE starter batteries for cars / LCV ([80-90]\*%) and for OE starter batteries for trucks / HCV ([90-100]\*%), the Commission also investigated whether or not the notified concentration – without considering the effects of a possible failure and liquidation of FIAMM – would change the nature of competition in such a way that the merged entity would be more likely to coordinate its market behaviour with the remaining suppliers (coordinated effects).

(a) *The preliminary conclusions of the in-depth market investigation as set out in the Statement of Objections*

(1) *Parties' arguments*

440. In their response to the Commission's decision to initiate proceedings of 4 December 2005, the parties contest the likelihood of coordinated effects following the merger. They argue that the OE markets for starter batteries for cars/LCV and trucks/HCV are not characterised by significant price transparency. According to the parties, this is also due to the fact that OE customers strategically manage their orders and the information they provide about prices in order to force competitors to decrease their prices. In such an environment, according to the parties, it would be impossible to detect deviation and to retaliate. Furthermore, coordination would not be possible because of the reaction of smaller competitors active in the market ("mavericks") and potential new entrants.

(2) *Preliminary assessment as set out in the Statement of Objections*

441. The Commission considered in the Statement of Objections that following the merger the parameters of competition would change significantly, which would in turn create the opportunity for VB and Exide to coordinate their market behaviour. This is mainly due to the fact that with the merger VB would remove a competitor which has been keen to increase its market share and fill its spare capacity and has been used by OE-customers as part of their multi-sourcing strategy to maintain price pressure on VB and Exide. In short, post-merger there would be no major competitor left which could significantly disrupt coordination between the two leading players JCI/VB and Exide, either in the market for OE starter batteries for cars / LCV or in the market for OE starter batteries for trucks / HCV.

442. Although the Commission has not found any evidence of past coordination, based on the results of the in-depth market investigation the Commission considered that the proposed transaction would change the market structure to such an extent as to make coordination possible and economically rational for the remaining two main players.

443. For coordination to be implemented and sustained effectively, general market conditions have to (i) make it easy for the firms to reach a mutually acceptable coordinative outcome, (ii) make it easy for the firms to detect any deviation from the expected behaviour (detection of "cheating"), and (iii) make it easy for the firms to punish any deviation in such a way that for each firm the coordinative outcome is the most favourable (that is to say, profitable) market conduct (effective threat of "retaliation"). In addition, for coordination to be successful, the actions of non-coordinating firms, potential competitors and customers should not jeopardise the outcome expected from coordination.

(i) *Reaching the terms of understanding*

444. The Commission identified in the Statement of Objections a number of characteristics of the markets for OE starter batteries cars/LCV and trucks/HCV that would be likely to facilitate an understanding on the terms of coordination for suppliers. Demand is stable and predictable, the products are rather homogeneous, production technology is mature and no significant innovation is taking place or

expected for the future. The products concerned are based on technology which is more than 100 years old. The parties themselves have also acknowledged that automotive starter batteries are becoming more and more commoditised and that they increasingly represent a homogeneous product.

445. Furthermore, the Commission pointed out in the Statement of Objections that post-merger there would be only two major competitors left, VB and Exide. Banner would not have the capacity to really upset the terms of coordination and other players are in a far weaker position than Banner.

446. Despite the fact that the two remaining significant competitors are not symmetric in size, the Commission considered that an understanding on the terms of understanding would not be difficult even without entering into a formal agreement or resorting to concerted practices within the meaning of Article 81 of the Treaty. For example, the companies could find a focal point of coordination based on existing distribution of contracts and refraining from bidding aggressively (by submitting uncompetitive bids with unrealistically high prices or other unattractive contractual terms) on contracts obtained in the past by the competitor. Furthermore, the Commission considered that the other similarities between the companies would facilitate an understanding on common terms, for example the symmetry in the cost structures of the two companies due to the significant role of lead prices in their overall costs<sup>296</sup>.

(ii) Transparency

447. In their reply to the Commission's decision to initiate proceedings the parties argued that there is no significant price transparency in the OE markets for starter batteries for cars/LCV and for trucks/HCV. This assumes that coordination may take the form of direct price coordination only. However, the OE markets for starter batteries for cars/LCV and trucks/HCV are bidding markets, with negotiations taking place between suppliers and customers after submission of the offers. The Commission therefore considered in the Statement of Objections that firms could coordinate their behaviour by allocating OE supply contracts<sup>297</sup>. Given that there would be only two of them left as serious contenders in the bidding, the (credible) participation or non-participation of one would signal clearly to the other whether the terms of coordination were being respected or not. The main question in this respect is whether there would be enough transparency in the respective markets regarding the allocation of contracts. The Commission's preliminary findings indicated that there would be. In the Statement of Objections the Commission based its conclusions to this effect on points reported in the following.

448. First of all, the parties submit in their notification in significant detail the supplier base of major OE-customers.<sup>298</sup> Although they give only estimates for

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<sup>296</sup> As indicated above, lead cost amount to more than 50% of the total production cost of a starter battery.

<sup>297</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03), paragraph 40

<sup>298</sup> Form CO, p. 65 et seq.

supply share, there does not appear to be any uncertainty when the parties describe which supplier supplies which OE-customer. This description is detailed down to the plant and even to the vehicle model concerned. Since VB and Exide are invited to almost all tenders<sup>299</sup>, it is very easy for them to keep track of market shares both in terms of volume and value.

449. The Commission has found confirmation of transparency of the allocation of contracts in the minutes of VB management meetings. For example, the minutes of 30 May 2005 read: [...]\*

450. The Commission's market investigation also indicated that OE-customers and suppliers were engaged in a constant exchange of information regarding contracts and competitive offers. For example, a meeting was organised between VW and VB on 13 December 2005, where VW was to [...]\*. There also appear to be workshops with OE-customers, where the supply situation is discussed in detail, also relating to plans to change demand or to phase out a competitor. In such a workshop with [...]\* VB was informed of [...]\* plan to stop the contract with [...]\* and source exclusively from [...]\*. VB's minutes of management meetings provide, in relation to this, the volume and expected margin of the contract<sup>300</sup>.

451. The Commission further pointed out that most of the OE-customers tend to multi-source starter batteries for cars / LCV and trucks / HCV from two or more suppliers. Since the proposed transaction essentially combines two of the three leading suppliers with significant production capacity for starter batteries for cars / LCV and trucks / HCV in the EEA, the choice of the multi-sourcing OE-customers is essentially limited to the merged entity and Exide. The Commission pointed out in the Statement of Objections that the proposed transaction would as a consequence significantly increase the transparency of the market and the ability of the leading suppliers to detect any deviations from potential agreements on coordination.

452. The Commission therefore reached the preliminary conclusion in the Statement of Objections that the market is already very transparent regarding the allocation of contracts and terms of supply. With VB and Exide remaining the only two major players in the market, monitoring of the market behaviour of competitors would become even easier.

(iii) Retaliation

453. In the Statement of Objections the Commission considered the threat of retaliation to be credible. In particular, the Commission pointed out that the constant flow of information in the market about the terms of supply would be likely to facilitate the detection of deviation. In addition, the Commission considered that were there to be another (serious) bidder for a new contract, VB or Exide post-merger could already assume with significant certainty that the

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<sup>299</sup> See replies to question 29 of the Commission's questionnaire to OE customers of 4/11/2007

<sup>300</sup> Annex 2 of Minutes of VB Board meeting of May 2 2006, Annex 2 of the response of parties to the Commission's questionnaire of 12 January 2007,

alternative bid came from the other and would therefore immediately be aware if the other deviated from the terms of agreement. Furthermore, the Commission stressed in the Statement of Objections that while OE-customers issue contracts lasting from one to three years, several new contracts become available every year. The parties further submit in the Form CO that OE-customers renegotiate contracts regularly. The Commission therefore reached the preliminary conclusion in the Statement of Objections that there would be ample opportunities to retaliate.

454. The Commission also considered specifically the incentives of Exide to deviate. The Commission recognised in the Statement of Objections that Exide – in principle – could take advantage of the multi-sourcing policy of customers following the merger and try to take at least a part of FIAMM's market share. In this regard the Commission considered the notifying party's expectation that GM, VW and Toyota would increase the share of Exide in their battery supplies following the merger<sup>301</sup>. However, the Commission also pointed out that even the parties do not anticipate any significant gains for Exide with other customers, such as Daimler-Chrysler, BMW or Renault.

455. In any event, the Commission pointed out in the Statement of Objections that Exide's capacity constraints would be likely to constrain prospective market share gains, which in turn would lower the incentive to deviate. Exide's financial situation would make it unlikely that they would risk investments into new capacity, especially in the light of the spare capacity VB acquires with FIAMM, which strengthens the threat of retaliation (and increases the risk of any investment in turn).

(iv) Reaction of outsiders

456. It has already been concluded under the assessment of potential unilateral effects that smaller competitors and potential new entrants would not be able to exercise sufficient competitive pressure in the OE starter batteries market. It was also concluded that OE customers post-merger could not exercise their buyer power either by switching or threatening to switch to another supplier or by leveraging their broader buyer power vis-à-vis the merged entity. It can therefore be concluded that the coordination would not be disrupted by third parties.

(v) Further evidence

457. Finally, the Commission referred to the feedback from a number of OE-customers which also indicated the risk that VB and Exide would form a duopoly in the OE markets after the merger.<sup>302</sup>

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<sup>301</sup> See Form CO, p. 64 et seq.

<sup>302</sup> See replies to question 52 of the Commission's questionnaire to OE-customers dated 7.11.2006.

(b) *The notifying party's reply to the Statement of Objections*

458. In its reply to the Statement of Objections the notifying party contests the Commission's preliminary conclusions and claims that the transaction would not give rise to coordinated effects.
459. In order to support this view the notifying party notes that a number of OE customers and competitors "*explicitly confirmed that there will be no risk of coordinated effects*".
460. The notifying party also re-iterates its view on the lack of *price transparency* as already put forward in its reply to the Commission's decision to initiate proceedings. According to the notifying party, in the lack of price transparency, the reasons for a change in the customers' purchasing behaviour would be unclear. The supplier would not be in a position to know whether the change was triggered by deviation from the (implicit) agreement to coordinate or other factors, for example changes in customer sourcing/production strategy, customer preferences, etc.
461. In its reply to the Statement of Objections the notifying party *in addition* contests the Commission's findings regarding transparency of *supply volumes*, which it attributes to the multi-sourcing strategy of OE customers.
462. The notifying party refers to some customer replies to the Commission's phase I questionnaire to show that these customers do not consider the market to be transparent.
463. In addition to contesting that the market is transparent, the notifying party stresses the potential of OE customers to disrupt co-ordination. It points out that in the absence of communication between the two players, OE customers control the flow of information between the different suppliers with regards to the terms of supply of competitors. Suppliers are therefore not in a position to know either the volumes supplied or the prices charged by other suppliers. According to the notifying party, OE customers can also upset co-ordination by strategically awarding contracts to less competitive suppliers "*in order to signal to competing suppliers that they should lower their prices*".
464. The notifying party also submits that the asymmetry of size between Exide and VB would make the incentive to deviate and the ability to punish different for each player. In addition it refers to VB's lack of excess capacity and the high fixed costs involved in the production of starter batteries as relevant factors that would constrain the merged entities' ability to punish deviation.
465. The notifying party further contests the finding of the Commission that there would be ample opportunities for VB or Exide to retaliate, because OE customers issue contracts of one to three years duration. It also refers to (unspecified) '*statements of OE customers*' to contest the Commission's preliminary conclusion regarding the tendency of OE customers to re-negotiate contracts regularly.
466. As an overall comment on co-ordination, the notifying party points out the lack of evidence provided by the Commission to prove that the transaction would be likely to give rise to co-ordinated effects.

(c) *Assessment*

(1) *Incentives to coordinate under a market structure with a very strong player with significantly higher market shares*

467. The Commission notes that the bulk of the notifying party's statements relate to the *ability* of JCI and Exide to coordinate their behaviour post-merger without resorting to practices falling under the scope of Article 81 of the Treaty. However, the notifying party does stress that differences in these incentives due to the asymmetry between VB and Exide may work against coordination.
468. The notifying party does not specify what it means by "asymmetry between Exide and VB"<sup>303</sup> and it can only be inferred that the notifying party refers to the size and the market shares of these companies. However, there are other symmetries between the two players that may help coordination. For example, JCI and Exide are both global players with each having plants in strategic locations in Europe (Spain, France and (post-merger) Italy). It should also be noted that the asymmetry between JCI and Exide is less pronounced than between Exide and the smaller players, including Banner. Furthermore, both players supply nearly all OE customers in the EEA.
469. Notwithstanding that some symmetry can be found between the two companies, the Commission does recognise that following the merger, the asymmetry between the two players in terms of size and market shares in the EEA would be significant. This difference is one of the main reasons why the Commission concluded that the transaction would be likely to give rise to non-coordinated effects.
470. The Commission recognises that such significant asymmetry, that is to say, a strong dominant position of one player, may limit the additional benefits to be realised from co-ordination as prices are already likely to increase significantly due to non-coordinated effects. Whilst it cannot be excluded that these benefits would provide a sufficient level of incentive for JCI and Exide to resort to co-ordination, these incentives would naturally be more clear-cut in a market situation with more equally matched players.
471. JCI would, irrespective of Exide's reaction, have the ability to raise prices on its own and behave independently of Exide and other competitors. The Commission therefore does not argue that coordination would in any case be *essential* for JCI to increase prices. Rather, coordination may *reinforce* and further *enhance* this ability, which could in turn exacerbate the negative impact on competition and the damage to customers.
472. This is in line with the views of several OE customers and some smaller competitors (potential new entrants mainly<sup>304</sup>), which voiced concerns about the risk of co-ordination post-merger.

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<sup>303</sup> See the notifying party's reply to the Statement of Objections, p. 8.

<sup>304</sup> See replies of TAB, Monbat and FAAM to question 60 of the Commission's questionnaire to competitors dated 8.11.2006, and replies of OE customers 1, 7, 9, 13, 14 to question 52 of the Commission's questionnaire to OE customers dated 7.11.2006

473. In any event, should the incentives to co-operate prove to be sufficient to make co-ordination a preferred outcome for both JCI and Exide, the Commission found indications that they would have the ability to co-ordinate their behaviour without resorting to practices falling under Article 81 of the Treaty.
474. The notifying party does not contest that the parameters of competition would deteriorate with the merger. In particular, the notifying party does not contest the Commission's finding that with the merger VB would remove a competitor which has been keen to increase its market share and fill its spare capacity and has been used by OE-customers as part of their multi-sourcing strategy to maintain price pressure on the leading suppliers VB and Exide.
475. Although the notifying party calls on the Commission to provide "compelling evidence" for the creation of co-ordinated effects through the merger, it does not contest the specific criteria against which the risk of the emergence of coordinated effects is assessed, namely (i) the relevant conditions favourable to reaching the terms of understanding; (ii) sufficient market transparency; (iii) the credibility and effectiveness of retaliation in case of deviations; (iv) the assessment of the likelihood of disruptive reactions of outsiders ("mavericks").

*(2) Reaching the terms of understanding*

476. Regarding the first of these criteria, the notifying party does not contest the finding that certain characteristics of the OE markets for starter batteries for cars / LCV and starter batteries for trucks / HCV facilitate the reaching of the terms of understanding for suppliers. These include stable demand, mature technology and a quasi-homogeneous product.
477. Notwithstanding its comments on the specificities of achieving a coordinative understanding in the OE markets for starter batteries for cars / LCV and starter batteries for trucks / HCV, the notifying party does not contest the Commission's preliminary conclusion that such an understanding may in principle be based on the distribution of OE contracts.
478. The OE markets for starter batteries for cars/LCV and trucks/HCV consist of a small number of individually negotiated transactions, the individual contracts of OE customers. These contracts are all unique with regards to the price and other terms of supply. OE customers issue, on an invitation-only basis, a request for quotes that specifies in detail the terms of supply (volume, technical specification and target price). The feedback from OE customers has shown that the bidding process in most cases consists of several rounds, that is to say, post-offer negotiations frequently precede the final conclusion of the contract.
479. The Commission argued in the Statement of Objections that due to this organisation of the market, the focal point of coordination was not prices, but quantities, that is to say market shares. It appears that the most obvious approach for JCI and Exide to reach a common understanding would be to take existing market shares for each OE customer as a focal point of co-ordination and then refrain from (seriously) bidding on contracts obtained in the past by the other.
480. Allocating quantities is facilitated by the fact that some suppliers appear to have one global contract with one supplier determining the overall volume to be

delivered by that supplier<sup>305</sup>. It also appears from the list of JCI contracts submitted by the parties that JCI has one global contract with at least two of its most important customers<sup>306</sup>. In such cases, should the OE customer approach either supplier with an offer to increase their share of supply within that particular OE customer, the supplier could simply refuse it quoting a plausible reason (like capacity constraints), or attach unrealistic terms as a condition.

481. Allocating quantities would also be possible if suppliers offered different contracts for each project (for example for each model). In the case of a renewal of a contract for the same model, the existing supplier could be mutually understood to "inherit" the renewed contract. This would be the same in the case of a new contract for a new version of an existing car model.

482. The most problematic aspect of distributing market shares would be entirely new contracts for entirely new models. However, these are relatively infrequent and are not therefore likely to disrupt overall co-ordination.

483. Having established a common understanding on the allocation of contracts, JCI and Exide would not necessarily need to reach a common understanding on the exact prices of the individual contracts. If both players can assume that they would be the only (serious) bidders for a given contract they can obviously charge monopoly prices for that contract independent of the other.

### *(3) Transparency*

484. In its reply to the Statement of Objections the notifying party only re-iterates its view regarding the lack of transparency, in particular price transparency, as already submitted in its reply to the Commission's decision to initiate proceedings.

485. In the absence of communication between the parties, OE customers provide the main channel through which JCI and Exide could obtain information about the other player's prices. The notifying party argues that OE customers would upset the coordination by controlling and even manipulating this information. This in turn would make tacit collusion impossible because players would not have a direct (and therefore fully credible) overview of the prices charged by the other. It would not therefore be possible to monitor the terms of co-ordination.

486. Whilst the Commission recognises that the two players would not have a direct overview of each other's prices, this in itself cannot exclude co-ordination because price transparency would in any case not be necessary for co-ordination in the OE markets for starter batteries for cars/LCV and trucks/HCV.

487. Notwithstanding that the Commission does not consider price transparency to be essential for co-ordination and that it did not come across any clearly conclusive evidence on price transparency during its investigation, the Commission did receive some indication of price transparency from VB's internal

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<sup>305</sup> See agreed minutes of a conference call with with OE-customers 1 and 11 of 1.3.2007 and 28.2.2007 respectively.

<sup>306</sup> See submission of the notifying party dated 8.1.2007, Annex 9.1.

documents. For example, the presentation from VB's board meeting of 2 June 2006 starts with the statement [...]\*. There are no indications in that document that would suggest any degree of uncertainty regarding the authenticity of this price quote.

488. Furthermore, the notifying party's own submission regarding the setting of unrealistic target prices by OE customers suggests that this is a common practice by OE-customers. It can therefore be reasonably assumed that the notifying party (and Exide as well), based on their previous experience with OE tenders, can estimate, with a good degree of accuracy, the realistic final price based on the target price quoted. This could in principle also help co-ordination on price directly.
489. Irrespective of whether the prices of competitors are precisely known to other competitors or not, co-ordination would be possible. Since the focal point of co-ordination is output quantity and not price, transparency regarding the former would suffice for monitoring whether the terms of co-ordination are respected or not. With respect to transparency of output and market shares, the Commission reiterates its preliminary findings as set out in the Statement of Objections.
490. In particular, the notifying party does not contest the Commission's finding that the leading players in the market post-merger (the merged entity and Exide) are invited to all tenders of OE customers. The volume of these tenders is always specified, which facilitates the re-construction of the market. In any event, aggregate sales data on the different models of cars and trucks is available, which would give a good indirect overview of the overall demand for starter batteries. The award of a contract by an OE customer could in any case be known to a supplier even if it was not invited to the tender.
491. As with price transparency, the Commission recognises that *in principle* a supplier in a private tender, which submits an unsuccessful bid, may not necessarily have direct knowledge of which other supplier succeeded in winning the contract. However in this specific case, owing to the constraints of other competitors (capacity, absence of "certification", etc) Exide is the only consistently viable source of supply in addition to JCI for most OE customers. This is especially true for strategic contracts of significant volumes. Should one of them lose a significant proportion of its business with an OE-customer, the rational expectation would be that this business was won by the other. With stable demand and barriers to expansion and entry, supplying the OE customers with starter batteries for both cars/LCV and trucks/HCV would be a zero-sum game.
492. Furthermore, the factual evidence found in VB's internal documents and the data submitted in the Form CO as explained in the Statement of Objections indicate that VB does have an overview of the distribution of contracts. The notifying party does not contest the Commission's factual findings to this effect as set out in the Statement of Objections. Furthermore, this evidence shows transparency from VB's own perspective, and thus it is the most direct evidence to be considered in assessing the transparency of the market and contradicts the parties' assertion that the merged entity and Exide would not know the different volumes awarded to other suppliers only because OE-customers pursue a multi-sourcing strategy.

493. In addition to the findings set out in the Statement of Objections, there are some further indications in internal VB documents that the market is transparent as regards the quantities supplied. For example, a presentation to the VB board meeting of 2 June 2006 shows that [...] gets a [5-10]\*% share of the [...] business, making it the [...] supplier of that group. It is also noted in the same presentation that [...] became the [...] strategic source for [...] with [20-30]\*% of the [...] business<sup>307</sup>.
494. The Commission considers that the factual evidence, especially regarding the internal documents of VB, is not affected by the notifying party's reference to a selection of customer replies to show that these customers do not consider the market to be transparent. The notifying party refers to selective replies to questions on the view of customers on the transparency of prices and quantities.<sup>308</sup> The answers to these questions are not conclusive because of the inconclusive distribution of different answers (there are also several customers that consider the market to be transparent both in terms of price and share of supplies) and the subjective approach that is evident from some customer replies (that is to say, some understood the question to concern transparency from their own perspective, whilst the question was intended to concern transparency from the suppliers' perspective).
495. The notifying party claims that due to the strategic behaviour of OE customers (awarding contracts in order to disrupt coordination as opposed to awarding contracts to the best offer) the detection of real deviation would not be possible. However, each supplier has discretion to decide whether they want to supply a given contract/volume to a given OE. In other words, should an OE offer a contract or an increase in the share of supply either to Exide or JCI and should accepting this offer constitute effective deviation, the company concerned could simply refuse to accept the offer, for example by quoting capacity constraints. OE-customer 11 for example described some situations in which some suppliers – for one reason or another – did not show an interest in exploring business opportunities with OE-customer 11<sup>309</sup>.
496. Conversely, due to barriers to expansion and entry OE customers would not be in a position post-merger to withdraw orders of significant volumes from either JCI or Exide *without* a priori obtaining an agreement from the other to make up for the supply gap thus created. This kind of a dependency is confirmed by Customer 9<sup>310</sup>.

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<sup>307</sup> See submission of the notifying party dated 16.1.2007, Annex 7.

<sup>308</sup> See replies to question 46 and 47 of the Commission's questionnaire to OE customers dated 7.11.2006

<sup>309</sup> See agreed minutes of a conference call with OE-customer 11 dated 28.02.2007: *"Furthermore, CUSTOMER 11 tried to contact SUPPLIER I, but SUPPLIER I does not appear to be interested in exploring business opportunities with CUSTOMER 11." Or [Recently] "Both [...] and [...] have indicated that they would not be interested in increasing their share of supply with CUSTOMER 11. This type of reaction is also unprecedented."*

<sup>310</sup> See agreed minutes of a conference call with OE-customer 9 held on 25.1.2007.

497. Besides the fact that OE customers could not "force" a supplier to increase supplies, a strategic allocation of a single contract could be insufficient to disrupt co-ordination and JCI or Exide would be likely to look for more consistent indication of "cheating", which would require strategic allocation of contracts on a wider scale. This would increase the costs of disrupting co-ordination by the strategic allocation of contracts from any OE customer and especially considering the significant positive externalities of such an action, may provide a disincentive.

*(4) Retaliation*

498. As regards the notifying party's view that the lack of excess capacity of VB and the high fixed cost involved in the production of starter batteries are factors that would constrain its ability to "retaliate" in the event of any deviation from the understanding on coordination, it is not the capacity of VB, but the capacity of the merged entity that has to be taken into account. With the acquisition of FIAMM, VB would acquire significant additional capacity, including spare capacity.

499. However, the limits on readily available spare/excess capacity would obviously affect the ability of the two players to retaliate should they detect deviation by the other and in turn the credibility of retaliation. In this case, neither Exide nor JCI would have sufficient spare capacity, to allow them to "flood" the market. The Commission also recognises that the clear dominant position of JCI and the significant asymmetry between the two players may render Exide's threat of retaliation somewhat less credible from JCI's viewpoint.

500. Regarding JCI's incentive to retaliate, the Commission does not share the view of the parties that a "high level of fixed costs" would necessarily weaken this incentive. On the contrary, it may strengthen the incentive – and in turn make the threat of retaliation credible - because any reduction in supplies (and subsequent unused capacity) would increase JCI's average cost of production.

501. In order to assess the notifying party's assertion that there are only very limited opportunities for the merged entity and Exide to retaliate because OE customers issue contracts of one to three years duration, the Commission reconstructed the overall volume of new contracts coming to the market for starter batteries for cars/LCV in 2005. The reconstruction was based on the replies of OE customers to question 31 of the Commission's phase-I questionnaire to OE customers and shows that within the course of a single year more than 15 contracts were offered, amounting to around 40%<sup>311</sup> of the total annual demand. The Commission therefore maintains its argument that there are ample opportunities in the market for retaliation.

502. In conclusion, notwithstanding that the Commission maintains its argument that the parties would have ample opportunities to retaliate, the Commission recognises that the limitations on excess capacity and the significant asymmetry between the parties may weaken the ability and hence the credibility to do so.

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<sup>311</sup> Based on aggregate demand figures of respondents to the Commission's questionnaire to OE customers dated 07.11.2007

*(5) Reaction of outsiders*

503. As regards the potential disruption of the understanding on coordination stemming from smaller competitors and potential new market entrants, the Commission reverts to its conclusions in the context of assessing the ability and incentives of smaller competitors to expand supply and capacity as well as the assessment of the barriers to entry and the incentives of potential competitors to enter the markets for OE starter batteries for cars / LCV and for trucks / HCV.

*(d) Final conclusions of the Commission on coordinated effects*

504. Following the assessment of the results of the Commission's in-depth market investigation and a careful consideration of the arguments provided by the notifying party in their reply to the Statement of Objections, the Commission maintains that there are a number of indications that suggest that co-ordination would be facilitated following the merger. However, the clear dominant position of JCI and the ensuing asymmetry between JCI and Exide together with the limitations on excess capacity do make the incentives to co-ordinate and the ability to punish less than clear-cut, in particular when compared to the strong likelihood of unilateral effects.

505. Based on the results of the market investigation, it is therefore concluded that, while the merger – without considering the effects of a possible failure and liquidation of FIAMM may increase the likelihood of the emergence of coordinated effects on the OE markets for starter batteries for cars/LCV and trucks/HCV by removing an important competitor, the Commission has not found sufficiently convincing evidence to demonstrate that such coordinated effects are more likely than not to emerge.

**C. INDEPENDENT AFTERMARKET**

**1) Summary of the decision to open an in-depth market investigation**

506. In its decision to open an in-depth investigation, the Commission expressed serious doubts as to the compatibility of the proposed transaction with the common market and with the EEA agreement with regard to the markets for IAM starter batteries for cars / LCV and trucks / HCV in Italy, Austria, the Czech Republic and Slovakia.

507. The Commission based its conclusion on the following elements. Firstly, the proposed transaction would lead to very high combined market shares in the countries mentioned in the previous paragraph. Secondly, the brands of FIAMM and VB were considered closer substitutes in these countries than they were in other national markets. Conversely, Exide's brands were considered to be less of a close substitute to VB's than they were in other national markets. Thirdly, in Italy, Austria, the Czech Republic and Slovak Republic, a significantly higher proportion of customers than in other national markets affirmed that in the event of a price increase of 10% for the branded products of the merged entity they would not switch to alternative brands or to private label products. Finally, the

“Integration Plan” assessing the profitability of the transaction explicitly includes the following positive effects of the merger: [...]\*.<sup>312</sup>

## **2) The reply of the notifying party to the decision initiating proceedings**

508. In its reply to the decision initiating proceedings, the notifying party stated that the merged entity will not be able to raise prices in the IAM above a competitive level. The notifying party also noted that FIAMM's current pricing is below cost and therefore cannot be taken as the competitive level at which to judge the effects of the transaction.

509. Although the notifying party submits that the IAM is EEA-wide, it also provided arguments to show that the proposed transaction would not lead to a significant impediment of effective competition at national level either.

510. Firstly, the notifying party noted that market shares used by the Commission are in value and that market shares in volume are much lower. The notifying party submits that market shares in value are "*naturally based on very rough estimates*"<sup>313</sup>.

511. Secondly, the notifying party reports that a mistake in attribution occurred for a specific type of batteries (Group 28, with a capacity of 95 Ah) in Italy, which should be classified as car/LCV sales and not as truck/HCV sales as initially reported. Additionally, VB's car/LCV sales were overstated due to a calculation mistake. Correcting these mistakes, the notifying party estimated lower combined market shares in some markets.

512. Thirdly, the notifying party disputed that FIAMM and VB could be considered as closest competitors in Italy, Austria, the Czech Republic and Slovakia, arguing that VB's closest competitors should actually be considered to be Exide or Banner. In any event, even if it proved true that 60% of IAM customers could/would not switch to other suppliers, the remaining customers alone would be sufficient to make a unilateral price increase by the merged entity unprofitable.

513. Finally, the notifying party stressed that in Italy, Austria, the Czech Republic and Slovakia the merging parties also compete with suppliers located outside the EEA.

## **3) The findings of the Commission's in-depth investigation as set out in the Statement of Objections**

514. In the course of the second phase investigation, the Commission further investigated the competitive conditions in the IAMs, with a special focus on Italy, Austria, the Czech Republic and Slovakia.

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<sup>312</sup> See presentation "Gesellschafterantrag Project Fire" submitted by the notifying party; submission of the notifying party dated 18.10.2006, Annex 1.

<sup>313</sup> See VB's comments to the Commission's decision to initiate Phase II proceedings, dated 22 December 2006.

(a) *Data availability*

515. To the extent possible, the Commission has verified the market estimates of the notifying party. As set out in detail by the notifying party<sup>314</sup>, total IAM volumes were estimated indirectly by taking as a basis independent or in-house estimates of the existing fleet of vehicles (cars/LCV, trucks/HCV and specialty vehicles such as tractors and motorboats), of the IAM batteries replacement rates, average lifespan and, for the specialty vehicles, the split of batteries for car/LCV and trucks/HVC used.

516. A complete market reconstruction by the Commission has not been possible because of the existence of a very large number of small suppliers, whose sales in a specific market can be very small and difficult to trace exactly. The Commission has been able to obtain exact sales figures for the most significant players in the national markets in question and for a representative number of smaller players. Wherever the Commission has not been able to verify the specific sales of a supplier mentioned by the parties, it has accepted the notifying party's estimates. Additionally, the Commission has allowed for the possibility of further sales by small and very small suppliers which were not individually mentioned by the notifying party. This notwithstanding, the analysis shows that some markets are still significantly smaller than what was indirectly estimated by the notifying party.

517. The Commission's figures are presented as a complement to the notifying party's estimates on market shares and whenever possible, on market volumes.

518. The Commission relies in its analysis on both figures in volume and in value. While it agrees with the notifying party that market shares in value are "*naturally based on very rough estimates*", the same appears to be true for market shares in volume. For this reason, it is the combination of the two sets of data that can give the most reliable picture of the competitive structure of the markets in question. In any event, it should be stressed from the outset that competitive concerns arise in this case irrespective of the use of data in value or in volume.

(b) *Common features of the national markets concerned*

519. A first important common feature of the national IAMs in Italy, Austria, the Czech Republic and Slovakia is the relative strength of FIAMM. In 2005 the four countries accounted for almost [60-70]\*% of FIAMM's EEA-wide sales of car/LCV batteries in volume (Italy alone, almost [50-60]\*%). Similarly, for truck/HCV batteries, the four countries accounted for [55-65]\*% of FIAMM's EEA-wide sales in volume (Italy alone, almost [45-55]\*%) in 2005<sup>315</sup>. FIAMM's sales in other large national markets were usually only a fraction of its sales in Italy<sup>316</sup>.

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<sup>314</sup> See Annex 3 to VB's submission of 9 November 2006 in response to the Commission's questionnaire of 31 October 2006.

<sup>315</sup> See Annex 5 to VB's comments to the Commission's decision to initiate Phase II proceedings, dated 22 December 2006.

<sup>316</sup> E.g., FIAMM's sales in Germany for car/LCV were 18% of its Italian sales, in France 10%, and in the UK 19%.

520. VB's market presence is much more homogeneous across Europe: in 2005, Italy, Austria, the Czech Republic and Slovakia account for only [15-25]\*% of its EEA-wide IAM car/LCV battery sales (Italy [10-20]\*%) and [10-20]\*% of its truck/HCV battery sales. Furthermore, VB's sales in other large national markets are comparable to or larger than its Italian sales<sup>317</sup>. Exide's distribution of sales across the EEA is much more similar to VB's than to FIAMM's.
521. This means that, in the IAMs, FIAMM is not, unlike VB and Exide, a large player across Europe. Indeed, according to the figures in volume submitted by the notifying party, FIAMM's EEA-wide market share amounted to [5-10]\*% in car/LCV batteries and to [5-10]\*% in truck/HCV batteries in 2005. On the contrary, FIAMM is a strong regional player with a very important presence only in Italy, Austria, the Czech Republic and Slovakia and a rather marginal position in the other markets: FIAMM's market share is [5-10]\*% or lower for any national market other than Lithuania in car/LCV batteries, and [5-10]\*% or lower for any national market other than Belgium in truck/HCV batteries. This is confirmed by FIAMM itself, which affirms that "[...] *FIAMM has no truly European brand, FIAMM being basically a local player with strong operations in a few European countries only*"<sup>318</sup>.
522. A second characteristic that distinguishes FIAMM's presence in Italy, Austria, the Czech Republic and Slovakia is the fact that in these countries it owns strong brands with an important national footprint (FIAMM, Uranio and AAA in Italy, Bären in Austria and Akuma in the Czech Republic and Slovakia).
523. The role of specific brands in national markets will be discussed in more detail for each national market; however it is important to note at this stage that FIAMM's strength in the four national markets under scrutiny is accompanied by the existence of well known and geographically focused brands. Interestingly, FIAMM does not have nationally recognised brands in the other markets, where its presence is limited. The national role of brands is confirmed by Exide: "*The strength of a brand depends on purely national factors and is anyhow country-driven. Exide has many different brands which have different appeal in different countries: e.g. the brand Tudor is strong in Spain, Exide in the UK, etc.*"<sup>319</sup>.
524. With respect to brands, a third feature of the markets under scrutiny is worth mentioning, the very high percentage of branded batteries compared to private label batteries. Branded batteries for cars/LCV sold in Italy were [90-100]\*% of the total for VB and [70-80]\*% for FIAMM, in Austria [80-90]\*% and [75-85]\*% respectively, in the Czech Republic [90-100]\*% and [60-70]\*%, and in Slovakia [90-100]\*% and [90-100]\*%. By way of comparison, the shares of branded products were in Germany [45-55]\*% for VB and [55-65]\*% for FIAMM, and in

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<sup>317</sup> E.g., VB's sales in Germany for car/LCV were [180-190]\*% of its Italian sales, in France [115-125]\*%, and in the UK [65-75]\*%.

<sup>318</sup> See FIAMM's submission of 9 January 2007, p. 10, in response to the Commission's questionnaire of 20 December 2006,

<sup>319</sup> Agreed minutes of conference call with Exide on 19.01.2007

France [50-60]\*% and [60-70]\*% respectively<sup>320</sup>. The situation for truck/HCV batteries is very similar, with considerably higher shares of branded products for both VB and FIAMM in the four countries under scrutiny than in Germany or France.

525. According to the data provided by FIAMM<sup>321</sup>, its share of branded products has decreased significantly in recent years in favour of private label products, therefore showing that FIAMM's leading brands are far from being 'must have' brands. FIAMM also submitted that, due to financial difficulties, FIAMM has not been able to invest sufficiently in the promotion of its brands, which as a consequence have lost competitiveness with respect to VB's and Exide's products.

526. While the situation of specific brands, and their 'must have' status in the national markets concerned will be analysed for each national market, it is worth noting at this stage that the value of brands, including FIAMM's, is something that is rooted in the consumer's preferences and awareness and that can outlive the company owning them. Witness of this is the fact that many valuable brands today derive their name from the companies that originally manufactured the products, but that ceased operations and were taken over a long time ago (for example, Akuma, Bären, Tudor and, to some extent, Bosch).

527. As for the more specific loss of share of branded products for FIAMM in recent times, it is interesting to note that the loss has been less pronounced exactly in the countries where it owns well-known brands<sup>322</sup>. On the importance and attractiveness of brands in the starter battery business, FIAMM itself affirmed that "*[...] the IAM activity shows a trend of higher sales growth for the weak, low cost brands, with respect to premium brands where margins are more interesting*"<sup>323</sup>.

528. A fourth feature of the Italian, Austrian, Czech and Slovak markets is that IAM distribution and retail in these countries is oriented more towards traditional types of retail channels (independent workshops, repair shops, filling stations, battery specialists, wholesalers) rather than towards 'modern' retail channels (supermarket/building centres, car centres, fast fitters / tyre retailers) or towards buyer groups.

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<sup>320</sup> The figures are calculated on the basis of the parties' data on distribution by branded and not branded products. See Annex 17 of the notifying party's reply of 17 January 2007 to the Commission's questionnaire of 12 January 2007.

<sup>321</sup> See FIAMM's submissions of 8 January 2007 and 9 January 2007 in response to the Commission's questionnaire of 20 December 2006.

<sup>322</sup> From 2005 to the year up to September 2006, the share of FIAMM's branded products for car/LCV decreased by [0-5]\*% in Italy, [0-5]\*% in Austria, [10-20]\*% in the Czech Republic, [5-10]\*% in Slovak Republic and [15-25]\*% in the other EU countries. For truck/HCV, the share of FIAMM's branded products decreased by [0-5]\*% in Italy, [0-5]\*% in Austria, [0-5]\*% in the Czech Republic, [5-10]\*% in Slovak Republic and [10-20]\*% in the other EU countries. See FIAMM's submission of 8 January 2007 in response to the Commission's questionnaire of 20 December 2006, annexes 18.1 and 18.2.

<sup>323</sup> See FIAMM's submission of 29 January 2007.

529. For example, in 2005, [55-65]\*% of VB's car/LCV batteries and [65-75]\*% of its truck/HCV batteries were sold in Italy through traditional retail channels. The shares were even higher in Austria ([65-75]\*% for both types), the Czech Republic ([85-95]\*% for car/LCV and [90-100]\*% for truck/HCV) and Slovakia ([90-100]\*% for both types). By way of comparison, the corresponding shares were [45-55]\*% and [55-65]\*% in Germany and [35-45]\*% and [55-65]\*% in France, the two largest European markets<sup>324</sup>. FIAMM's data show the same trend: traditional retail channels had a much higher weight in the four countries under scrutiny than in other leading European countries. The share of traditional retail channels for car/LCV batteries are, in FIAMM's case, [85-95]\*% in Italy, [70-80]\*% in Austria, [55-65]\*% in the Czech Republic and [85-95]\*% in Slovakia, against [45-55]\*% in Germany and [30-40]\*% in France. For truck/HCV batteries, the figures are [85-95]\*% in Italy, [80-90]\*% in Austria, [65-75]\*% in the Czech Republic, [90-100]\*% in Slovakia, [90-100]\*% in Germany<sup>325</sup> and [40-50]\*% in France<sup>326</sup>.

530. There is clearly a relation between the weight of traditional distribution and retail channels and the share of branded products sold in Italy, Austria, the Czech Republic and Slovakia. The modern distribution channels are more likely to look for own label products as a way to reduce the market and pricing power of their suppliers and to impose their corporate image. In contrast, traditional distribution and retail channels are represented more often by smaller undertakings that tend to handle smaller volumes and rely more on the offer of their suppliers in terms of products sold and of marketing and communication. For these market players, it is more important to offer clients a limited number of well known brands.

(c) *Italy*

531. According to the latest data provided by the parties<sup>327</sup>, the market structure in the Italian IAM would be as indicated in table 11.

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<sup>324</sup> The figures are calculated on the basis of the parties' data on distribution by channel. See Annex 17 of the notifying party reply of 17 January 2007 to the Commission's questionnaire of 12 January 2007.

<sup>325</sup> The particularly high figure in Germany for FIAMM surely overstates the importance of the traditional distribution channels in that country and can be explained by the very limited activities of FIAMM in the market: [...] units sold in 2005 with a [0-5]\*% market share.

<sup>326</sup> During the second phase investigation, the Commission also looked in detail at two further countries: Poland and Hungary. The share of traditional distribution channels in these countries is very high, comparably to the four countries being investigated.

<sup>327</sup> See Annex 5 to VB's comments to the Commission's decision to initiate Phase II proceedings, dated 22 December 2006 and VB's email to the Commission dated 29 January 2007.

**Table 11: IAM Italy**

<b>Number of starter batteries sold</b>						
	<b>Market size (thousands)</b>	<b>VB (share)</b>	<b>FIAMM (share)</b>	<b>Combined (share)</b>	<b>Exide (share)</b>	<b>Others (share)</b>
Cars/LCV	[...]*	[20-30]*%	[25-35]*%	[50-60]*%	[25-35]*%	[15-25]*%
Trucks/HCV	[...]*	[10-20]*%	[20-30]*%	[35-45]*%	[15-25]*%	[35-45]*%
Cars/LCV + Trucks/HCV	[...]*	[20-30]*%	[25-35]*%	[45-55]*%	[20-30]*%	[15-25]*%
<b>Value of starter batteries sold</b>						
	<b>Market size (€ million)</b>	<b>VB (share)</b>	<b>FIAMM (share)</b>	<b>Combined (share)</b>	<b>Exide (share)</b>	<b>Others (share)</b>
Cars/LCV	[...]*	[20-30]*%	[30-40]*%	[55-65]*%	n.a	[35-45]*%
Trucks/HCV	[...]*	[15-25]*%	[30-40]*%	[50-60]*%	n.a	[40-50]*%
Cars/LCV + Trucks/HCV	[...]*	[20-30]*%	[30-40]*%	[50-60]*%	n.a	[40-50]*%

532. Among other suppliers with significant market shares (in volume) the notifying party includes the Italian suppliers FAAM, with [0-5]\*% for car/LCV batteries and [0-5]\*% for truck/HCV batteries, MIDAC [0-5]\*% and [0-5]\*% respectively) and Vipiemme [0-5]\*% and [0-5]\*% respectively). Additionally, the notifying party mentions the Slovenian producer TAB, with a market share of [0-5]\*% for both car/LCV batteries and truck/HCV batteries.

533. After the transaction, the HHI index for car/LCV batteries would be [ $>3500$ ]\* with an increment of [ $>1400$ ]\*.<sup>328</sup> For truck/HCV batteries, it would be [ $>2100$ ]\* with an increment of [ $>800$ ]\*.

534. The parties have not indicated the suppliers for 4 % (or [...]\* units) of the car/LCV market and 27% (or [...]\* units) of the truck/HCV market. While the first figure is consistent with the existence of further, very small suppliers (with market shares around or below 1%), it is more difficult to explain the second figure. In this respect, it should be recalled that total market size was estimated by the notifying party on the basis of a number of assumptions regarding vehicles park, average product lifetimes, replacement rates, etc. The total market size is therefore only indirectly derived from general indicators, and actual market size may differ considerably.

<sup>328</sup> The notifying party did not provide an estimate of the HHI index based on the latest set of figures. The Commission has calculated the index on the basis of the notifying parties estimates, and further assuming that the share of the market which is not attributed to any supplier in particular is made up of market players with a share of 1% each.

535. In the Form CO<sup>329</sup>, the notifying party had provided a very different picture of the Italian IAM for truck / HCV batteries. The estimated market size was larger ([...]\* units in 2005, with FIAMM sales of [...]\* and a market share of [50-60]\*% in volume). The change in sales attributed by the notifying party to truck/HCV batteries was justified by the fact that a specific group of batteries (Group 28 batteries, discussed in the section on market definition) was erroneously classified as truck/HCV batteries.
536. However, while FIAMM's sales in the market were decreased by [>200,000]\* units (from [...]\* to [...]\* units), total market size decreased by only [...]\* units (from [...]\* to [...]\* units). What is important to note at this stage is that, relying on the figures in the Form CO, the 'unexplained' part of the market (where sales would have to be attributed to small or very small suppliers) would be 8% and not 27% as is the case with the latest set of figures. The difference is largely explained by FIAMM's Group 28 batteries that were not classified as truck/HCV battery sales but were, at the same time, left as forming part of the market.
537. If the market size for trucks/HVC batteries is adjusted to fully incorporate FIAMM's reattribution of sales, the resulting total market size is [...]\* units and the combined market share of the parties is [45-55]\*% (VB [15-25]\*% and FIAMM [25-35]\*%) . The resulting figure is much more in line with the market shares by value presented by the notifying party, with estimated combined market shares of [50-60]\*% in the truck/HCV batteries market and [55-65]\*% in the car/LCV batteries market.
538. There are therefore strong indications that the latest figures presented by the notifying party for the truck/HVC battery market are not entirely coherent with its own previous submissions, and underestimate the parties' combined strength.
539. The Commission's own investigation also indicates that the estimates provided by the notifying party overestimate actual market size. This is true both for car/LCV batteries and truck/HCV batteries.
540. For car/LCV batteries, the actual sales of the competitors individually mentioned by the notifying party are lower than what was attributed to them by a total of [...]\* units, or 6% of the market. This means that the aggregated market share that can be attributed to Exide, FAAM, MIDAC, Vipiemme and TAB should be [30-40]\*% and not [35-45]\*%.<sup>330</sup> At the same time, the Commission's market investigation has not given any indication of other suppliers who could be significant players in the Italian market. For example the aggregated market share of the producers Banner, Rombat, Monbat, Steco and Mutlu is well below [0-5]\*% and some of these are not even present on the Italian market.

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<sup>329</sup> See Annex 36 to the Form CO.

<sup>330</sup> Individual market shares are obviously confidential as they would reveal the sales volumes of the suppliers in question. For those supplies for which no actual sales are available, the Commission accepted the notifying party's estimates.

541. The Commission's investigation leads to a total market size of 6,022,000 units. Based on this market size, the parties' combined market share would be [55-65]\*% (VB [25-35]\*%, FIAMM [30-40]\*%) in the car/LCV battery market. While these figures cannot be taken as definitive, they clearly indicate that the combined market share estimated by the notifying party could well underestimate the real position of the merged entity.
542. In the truck/HCV batteries market, the actual sales of the competitors individually mentioned by the notifying party are slightly higher than what was attributed to them by a total of [...] units, or 5% of the market. This means that the aggregated market share that can be attributed to Exide, FAAM, MIDAC, Vipiemme and TAB should be [30-40]\*% and not [35-45]\*%. However, the Commission's market investigation has not given any indication of other suppliers who could be significant players in the Italian market ([15-25]\*% of the estimated market size remains 'unexplained'). For example the aggregated market share of the producers Banner, Rombat, Monbat, Steco and Mutlu is well below [0-5]\*% and some of these are not even present on the Italian market.
543. The Commission's investigation leads to a total market size for truck/HCV batteries of 636,000 units. Based on this market size, the parties combined market share would be [50-60]\*% (VB [15-25]\*%, FIAMM [25-35]\*%) in the truck/HCV battery market. While these figures cannot be taken as definitive, they clearly indicate that the combined market share estimated by the notifying party could well underestimate the real position of the merged entity<sup>331</sup>.
544. Another look at the structure of the market reveals that the Italian market is in fact dominated by three players: FIAMM, Exide and VB. The combined market share of the three players is a commanding [75-85]\*% for car/LCV batteries and [55-65]\*% for truck/HCV batteries (For confidentiality reasons, the notifying party's figures are used here. While in Italy's case, the notifying party's figures are not too far from the Commission's findings, market shares of the top three players would be higher if the Commission's figures were to be used). The next players in the market, very distant in terms of market shares, are the local producers FAAM, MIDAC and Vipiemme.
545. An important factor that sets FIAMM, Exide, and VB aside from smaller suppliers is that they are the only companies with significant activities in Italy who are also OE suppliers. Since technical and quality standards of batteries in the OE markets are higher than in the IAM, and since the status of OE supplier can be achieved only after lengthy and difficult qualification periods, OE suppliers are generally also considered as more reliable and higher quality players in the IAM. This view is shared, for example, by Banner (not an important presence in Italy), which affirms that "*in general, manufacturers capable of serving the OE market can give more assurance on the quality of their products.*"

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<sup>331</sup> In any event it should be emphasised that the Commission's analysis below and the preliminary conclusion on the competitive effects would be the same, irrespective of whether the reference market size is the one proposed by the notifying party or the one stemming from the Commission's investigation.

546. The market investigation has also indicated that the importance of VB and FIAMM in the Italian market goes beyond the simple addition of market shares.
547. Firstly, in Italy the share of branded products sold is very high ([90-100]\*% for VB and [65-75]\*% for FIAMM) and a consistent majority (23 out of 33) of customers consider that private label products are not good substitutes for branded ones<sup>332</sup>. Furthermore, most customers (24 out of 34) affirm that they consider some brands as 'must haves'. Against this background, customers mention virtually only VB's (Varta and Bosch) and FIAMM's (FIAMM, AAA and Uranio) brands as 'must have' products. Although the large majority of the products mentioned are VB brands (20), FIAMM's brands are second (3)<sup>333</sup>.
548. It is interesting to note that Exide's brands are never mentioned as 'must have' brands by customers. This is probably explained at least in part by the fact that Exide does not have a reference brand in Italy as it has in other countries<sup>334</sup>. Additionally, none of the smaller players possesses strong brands in Italy<sup>335</sup>.
549. Therefore, the merger would not only bring together two of the three leading players in the IAM markets, both for car/LCV batteries and for truck/HCV batteries, but would also give VB control of all the best known brands in Italy. Competition would be reduced to one large player without specific brand presence (Exide) and smaller local players with weak brands.
550. Importantly, the overwhelming majority (30 out of 32) of customers who replied to the Commission market investigation affirmed that they do not buy starter batteries from manufacturers located outside the EEA<sup>336</sup>. In any event, the competitive constraint that would possibly come from imported products or from smaller competitors would mostly be felt by the similarly placed small producers rather than by the post merger market and image leader VB.
551. Similarly, private label products do not seem to impose an effective competitive constraint on branded products sold by the parties. Indeed, the latter

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<sup>332</sup> See replies of Italian customers to question 28 of the second phase questionnaire, sent on 20 December 2006. Question 28 reads "*Are private label starter batteries good substitutes to the branded batteries you sell in terms of prices, quality and your customers' perception?*"

<sup>333</sup> See replies of Italian customers to question 25 of the second phase questionnaire, sent on 20 December 2006. Question 25 reads "*Among the brands you sell, are there some that you consider 'must haves' for your business? If yes, which ones?*"

<sup>334</sup> See agreed minutes of conference call with Exide on 19.01.2007 "*In Italy, Exide runs a multi-brand strategy with 12 or 13 different brands. The top-ten brands of Exide in the EU are sold in Italy.*"

<sup>335</sup> See for example agreed minutes of the conference call with MIDAC on 19 January 2007: "*MIDAC does not enjoy strong brand recognition in the countries where it is present. This is because brand recognition in individual countries depends on historical factors/presence (with older brands like FIAMM in Italy and Varta Bosch strong Europe wide but in Germany very very strong). MIDAC brand is relatively young and does not have the same appeal as historical ones.*"

<sup>336</sup> See replies of Italian customers to question 22 of the second phase questionnaire, sent on 20 December 2006. Question 22 reads "*Do you buy starter batteries from manufacturers located outside the European Economic Area?*"

are significantly more expensive than the former. According to the data provided by the notifying party on bestselling products, for batteries of type [...] the average price for branded products is EUR [...], while the average price for non branded is EUR [...], for batteries of type [...] the average price for branded products is EUR [...], while the average price for non branded is EUR [...], and for batteries of type [...] the average price for branded products is EUR [...], while the average price for non branded is EUR [...].

552. The price difference remains positive even after controlling for other factors that may influence pricing (for example, retail channel, size of the contract as well as total sales to that customer)<sup>337</sup>. In Italy, the estimated price difference between 'primary brands' and private label is EUR [...] for [...] batteries, EUR [...] for [...] batteries and EUR [...] for [...] batteries.

553. The fact that the pricing of branded batteries is to a significant extent independent from the pricing of private label batteries is confirmed by the majority (14 out of 24) of customers responding to the market investigation, which indicated that final customers would not switch to the latter if the price of the former were to increase by a further 10%<sup>338</sup>.

554. These elements provide a clear indication of the divide in terms of prices and image between branded products, where VB and FIAMM are currently the closest competitors, and non-branded or weak brand products.

555. Turning to the feedback that came from the market investigation, it should be noted that most replies did not give a clear picture of the competitive pressure imposed by FIAMM on its competitors. The majority (20 out of 38) of respondents either did not answer or did not understand the question<sup>339</sup>. Of those which replied, the majority (8) considered that FIAMM exercised significant competitive pressure<sup>340</sup>, 2 that competitive pressure had been greater in the past, and 5 that no competitive pressure was felt.

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<sup>337</sup> The Commission has estimated the price difference between 'primary brands' and private label versions of the same products on the basis of the data provided by VB.

<sup>338</sup> See replies of Italian customers to question 30 of the second phase questionnaire, sent on 20 December 2006. Question 30 reads "*If the price of branded batteries were to increase by 10% with the price of private label batteries remaining constant, would a significant proportion of your customers switch to private label batteries?*"

<sup>339</sup> See replies of Italian customers to question 31 of the second phase questionnaire, sent on 20 December 2006. Question 31 reads "*Please provide your views about the competitive pressure that FIAMM was delivering vis-à-vis the other major suppliers in the OES and IAM starter batteries markets from 2001 to date separately for Cars/LCV and Trucks/HCV starter batteries. Please respond for the country where you are active and especially for Austria, Czech Republic, Italy, Slovenia, France, Germany, Hungary and Poland. Please also bring about any possible relevant evidence if available (emails, letters etc.) in this respect of the question above.*"

<sup>340</sup> See for example the reply of Italian IAM-customer number 15: "*We are active in Italy and FIAMM has always been very important*", Italian IAM-customer number 38: "*FIAMM has always exercised a very strong competitive pressure*" and Italian IAM-customer number 6: "*[...] for batteries for cars it has been very aggressive with the price*".

556. The market investigation obtained clearer views on the perception of the proposed transaction on the markets involved<sup>341</sup>. Out of 38 replies, 15 indicated that the operation would lead to anticompetitive effects on the Italian starter batteries markets<sup>342</sup>, 11 affirmed that no negative effects would occur<sup>343</sup> and 12 did not reply or did not know. Therefore, the majority of the respondents who expressed an opinion on the merger indicated that it would lead to anti-competitive effects.

557. In interpreting the reactions of customers to the questions on the competitive effects of the merger, it should, however, be borne in mind that a large proportion of customers are distributors for VB and FIAMM starter batteries, sometimes under an exclusivity contract. These customers do not necessarily see price increases or reduction in competition as a negative effect, especially if they are able to pass price increases on to final customers and if they can increase their own margins following the exit of competing brands.

558. The merging parties' competitors also take a mixed view on the effects of the acquisition. On the one hand, fringe player Banner considers that any advantage from the acquisition of FIAMM's brands can only be short term: "*Banner emphasizes that the acquisition and combination of brands can give some strength only in the short term.*"<sup>344</sup>

559. On the other hand, prospective number two Exide sees the acquisition of FIAMM's brands by VB as a central feature of the proposed transaction: "*The most interesting assets from the acquisition of FIAMM probably can be found in customer contacts, contracts, brands and market presence (in particular in the Italian market), rather than in production assets/capacity.*"<sup>345</sup>. The same opinion is expressed even more forcefully by MIDAC, a small player for whom Italy is the main market: "*MIDAC also believes that JCI has a greater interest in acquiring FIAMM's brands than the FIAMM's production plants, because acquiring FIAMM's brands would equal acquiring FIAMM's markets. This is particularly true regarding Italy, where FIAMM is currently market leader.*"<sup>346</sup>

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<sup>341</sup> See replies of Italian customers to question 33 of the second phase questionnaire, sent on 20 December 2006. Question 33 reads "*In general, would the operation, in your opinion, give rise to any negative anti-competitive effect in any of the markets discussed above? In your reply, please take into account the market position of the parties, their potential to influence prices or output or to foreclose markets and possible changes in the competitive dynamics in general.*"

<sup>342</sup> See for example the reply of Italian IAM-customer number 34 "*Commercially yes. After the merger the market will be managed by not too many people.*" and Italian IAM-customer number 32: "*In our opinion the operation brings an anticompetitive effect on the majority of the European markets*". See also Italian IAM-customer number 38 "*The sales at low prices made by FIAMM should stop.*"

<sup>343</sup> See for example the reply of Italian IAM-customer number 25 "*No problem the market in Italy is very competitive.*" and Italian IAM-customer number 1 : "*The operation will not have negative effects on the market*".

<sup>344</sup> See agreed minutes of conference call with Banner on 11.01.2007.

<sup>345</sup> See agreed minutes of conference call with Exide on 16.01.2007.

<sup>346</sup> Agreed minutes of conference call with MIDAC on 19.01.2007

560. MIDAC, in particular, expresses the reaction of a manufacturer that is not competing directly in the branded product segment ("MIDAC does not enjoy strong brand recognition in the countries where it is present. This is because brand recognition in individual countries depends on historical factors/presence (with older brands like FIAMM in Italy and Varta Bosch strong Europe wide but in Germany very very strong). MIDAC brand is relatively young and does not have the same appeal as historical ones."<sup>347</sup>) and that sees the acquisition of key brands as the most important asset to penetrate the Italian IAM.
561. To conclude on the Italian IAMs, the market investigation has led to the finding that the proposed transaction would combine two of the three major players in the Italian IAMs, to create a dominant player in both the IAM for car/LCV batteries (market shares of [50-60]\*% according to the notifying party and of [55-65]\*% according to the Commission's investigation) and the IAM for truck/HCV batteries (combined market share of [35-45]\*% according to the parties and of [50-60]\*% according to the Commission's investigation) markets. Additionally, the proposed transaction would combine the most important brands in the national market in one company.
562. This situation would allow the merged entity to increase unilaterally prices in both the car/LCV batteries and truck/HCV batteries markets. Competition from other suppliers would be limited to the lower segments (private label and weak brands) of the market, which are to a large extent isolated from the branded premium segments where VB and FIAMM are currently strongest.
563. Based on these elements, the Commission reached the preliminary conclusion that the proposed transaction would impede effective competition in the Italian IAMs for car/LCV batteries and for truck/HCV batteries, in particular as a result of the creation of a dominant position.

(d) *Austria*

564. According to the latest data provided by the parties<sup>348</sup>, the market structure in the Austrian IAM would be as indicated in table 12:

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<sup>347</sup> Agreed minutes of conference call with MIDAC on 19.01.2007

<sup>348</sup> See Annex 5 to VB's comments to the Commission's decision to initiate Phase II proceedings, dated 22 December 2006 and VB's email to the Commission dated 29 January 2007.

**Table 12: IAM market Austria**

<b>Number of starter batteries sold</b>						
	<b>Market size (thousands)</b>	<b>VB (share)</b>	<b>FIAMM (share)</b>	<b>Combined (share)</b>	<b>Banner (share)</b>	<b>Others (share)</b>
Cars/LCV	[...]*	[30-40]**%	[20-30]**%	<b>[55-65]**%</b>	[15-25]**%	[20-30]**%
Trucks/HCV	[...]*	[15-25]**%	[10-20]**%	<b>[30-40]**%</b>	[5-10]**%	[50-60]**%
Cars/LCV + Trucks/HCV	[...]*	[25-35]**%	[15-25]**%	<b>[55-65]**%</b>	[15-25]**%	[25-35]**%
<b>Value of starter batteries sold</b>						
	<b>Market size (€ million)</b>	<b>VB (share)</b>	<b>FIAMM (share)</b>	<b>Combined (share)</b>	<b>Banner (share)</b>	<b>Others (share)</b>
Cars/LCV	[...]*	[35-45]**%	[25-35]**%	<b>[60-70]**%</b>	n.a	[30-40]**%
Trucks/HCV	[...]*	[20-30]**%	[15-25]**%	<b>[35-45]**%</b>	n.a	[55-65]**%
Cars/LCV + Trucks/HCV	[...]*	[30-40]**%	[20-30]**%	<b>[55-60]**%</b>	n.a	[35-45]**%

565. Among other suppliers with significant market share (in volume) the notifying party includes the Ukrainian supplier ISTA with [5-10]\*\*% for car/LCV batteries and [0-5]\*\*% for truck/HCV batteries, US supplier East Penn ([5-10]\*\*% and [0-5]\*\*% respectively) as well as Exide ([0-5]\*\*% and [0-5]\*\*% respectively).

566. After the transaction, the HHI index for the car/LCV batteries would be [ $>3500$ ]\* with an increment of [ $>1500$ ]\*. For truck/HCV batteries, it would be [ $>1200$ ]\* with an increment of [ $>600$ ]\*.

567. The parties have not indicated the suppliers for 7% (or [...]\* units) of the car/LCV market and an impressive 49% (or [...]\* units) of the truck/HCV market. While the first figure is consistent with the existence of further, very small suppliers (with market shares around or below 1%), it is very difficult to explain the second figure. In this respect, it should be recalled that as for Italy total market size is only indirectly derived from general indicators, and actual market size may vary considerably.

568. In previous submissions<sup>349</sup>, the notifying party had provided a significantly higher market share for FIAMM in the truck/HCV batteries market: [20-30]\*\*% or [...]\* units. The change in sales attributed by the notifying party to truck/HCV in the latest submission was justified, as for Italy, by the erroneous classification of Group 28 batteries. However, while FIAMM's sales in the market were decreased by [ $>17\ 000$ ]\* units (from [...]\* to [...]\* units), total market size was left untouched (at [...]\* units), which is difficult to reconcile.

569. While the adjustment of the market size for truck/HVC batteries to fully incorporate FIAMM's reattribution of sales would not lead to a large increase in the parties' combined market share ([35-45]\*\*%, of which VB [15-25]\*\*% and FIAMM [15-25]\*\*%), there are strong indications that the latest figures presented

<sup>349</sup> See Annex 17 to the submission of 9 November 2006 in response to the Commission's questionnaire of 31 October 2006.

by the notifying party for the truck/HVC battery market are not entirely coherent with its own previous submissions, and underestimate the parties' combined strength.

570. The Commission's own investigation also indicates that the estimates provided by the notifying party overestimate actual market size for truck/HCV batteries.

571. In the truck/HCV battery market, the Commission's investigation leads to a total market size of 114 000 units, or [...] units less than what was submitted by the notifying party. Although the actual sales for the competitors individually mentioned by the notifying party are higher than what was attributed to them by a total of 15,000 units<sup>350</sup>. The Commission's market investigation has not given any indication of other suppliers who could be significant players in the Austrian market (that is to say, [35-45]\*% of the estimated market size remains 'unexplained'). For example, the aggregated market share of the producers Banner, Rombat, Monbat, Steco, MIDAC and Mutlu is considerably below [5-10]\*% and some of these are not even present on the Austrian market.

572. Based on a total market size of 114 000 units, the parties' combined market share would be [55-65]\*% (VB [25-35]\*%, FIAMM [25-35]\*%) in the truck/HCV battery market. As regards figures in value, the Commission market investigation indicates that the total size of the market is EUR 9,3 million, against EUR [...] estimated by the notifying party. Consequently, the market share attributable to the merged entity would be [55-65]\*% and not [45-55]\*% as indicated in the notifying party's submissions.

573. While these figures cannot be taken as definitive, they clearly indicate that the combined market share estimated by the notifying party could well underestimate the real position of the merged entity by a large margin.

574. For car/LCV batteries, on the other hand, the actual sales of the competitors individually mentioned by the notifying party are higher than what was attributed to them by a total of [...] units, or one quarter of that entire market. This implies that, according to the findings of the market investigation, the Austrian market for car/LCV batteries is larger than what was estimated by the notifying party.

575. The Commission's investigation leads to a total market size of 731 000 units. Based on this market size, the parties' combined market share would be [45-55]\*% (VB [25-35]\*%, FIAMM [15-25]\*%) in the car/LCV battery market. As regards figures in value, the Commission market investigation indicates that the total size of the market is EUR 29,8 million, against EUR [...] estimated by the notifying party. Consequently, the market share attributable to the merged entity would be [40-50]\*% and not [60-70]\*% as indicated in the notifying party's submissions.

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<sup>350</sup> This means that the aggregated market share that can be attributed to Banner, Exide, ISTA and East Penn should be of 24% and not 16%.

576. While these figures cannot be taken as definitive, they indicate that the combined market share estimated by the notifying party could well overestimate the real position of the merged entity<sup>351</sup>.

577. The hypothetical combined market for car/LCV and truck/HCV batteries would have a total volume of [...] units, and the merged entity would have a combined market share of [50-60]\*% (VB [25-35]\*%, FIAMM [15-25]\*%). In value, the market would amount to EUR 39 million, with a combined market share of [45-55]\*% (VB [25-35]\*%, FIAMM [15-25]\*%).

578. Looking at the structure of the market, it appears that the Austrian market is in fact dominated by three players: VB, FIAMM and Banner. According to the figures provided by the parties, the combined market share of the three players is a commanding [70-80]\*% for car/LCV batteries and [40-50]\*% for truck/HCV batteries in volume. However, in the case of Austria case, these figures must be treated with particular caution due to the discrepancies with the Commissions' findings. According to the latter, the combined market share of the top three players would be [80%-90%] for car/LCV batteries and [80%-90%] for truck/HCV batteries (for confidentiality reasons, ranges are provided here). The next players in the market, very distant in terms of market shares are Ista, Exide and others. Importantly, the overwhelming majority (17 out of 18) of customers who replied to the Commission's market investigation affirmed that they do not buy starter batteries from manufacturers located outside the EEA<sup>352</sup>.

579. Besides market shares, there are several factors showing that VB, FIAMM and Banner are by far the dominant forces in the Austrian market. Firstly, Exide's presence is small (although, with market shares of [5%-15%]\* both for car/LCV batteries and truck/HCV batteries, bigger than what was estimated by the notifying party). Exide is the only other producer which is an OE supplier and therefore can claim to achieve higher quality standards in its production.

580. Secondly, and more importantly, while the majority of customers (14 out of 23) stated that they consider some brands as 'must haves'<sup>353</sup>, specific indications were given for Varta and Bosh (belonging to VB, 7 times), Bären (belonging to FIAMM, 9 times) and Banner (3 times). Only one indication was given for Exide, which is the brand name of the company in the country<sup>354</sup>.

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<sup>351</sup> In any event it should be emphasised that the Commission's analysis below and the preliminary conclusion on the competitive effects would be the same, irrespective of whether the reference market size is the one proposed by the notifying party or the one stemming from the Commission's investigation.

<sup>352</sup> See replies of Austrian customers to question 22 of the second phase questionnaire, sent on 20 December 2006.

<sup>353</sup> See replies of Austrian customers to question 25 of the second phase questionnaire, sent on 20 December 2006.

<sup>354</sup> This notwithstanding, Exide agrees on the importance of brands in Austria: "*Austria is essentially a market for branded products*". See agreed minutes of conference call with Exide on 19.01.2007.

581. The importance of brands in the Austrian market becomes clear if one considers that the share of branded products sold is very high ([80-90]\*% for VB and [75-85]\*% for FIAMM) and that the majority (13 out of 24) of customers consider that private-label products are not good substitutes for branded ones<sup>355</sup>. Indeed, the latter are significantly more expensive than the former. According to the data provided by the notifying party on bestselling products, for batteries of type [...] the average price for branded products is EUR [...]\*, while the average price for non branded is EUR [...]\*, for batteries of type [...] the average price for branded products is EUR [...]\*, while the average price for non branded is EUR [...]\*, and for batteries of type [...] the average price for branded products is EUR [...]\*, while the average price for non branded is EUR [...]\*.
582. The price difference remains positive even after controlling for other factors that may influence pricing (for example, retail channel, size of the contract as well as total sales to that customer)<sup>356</sup>. In Austria, the estimated price difference between 'primary brands' and private label is EUR [...]\* for [...] batteries, EUR [...]\* for [...] batteries and EUR [...]\* for [...] batteries.
583. The replies of customers to the question on switching to private label products in the event of a further 10% increase in the price of branded products<sup>357</sup>, where a significant share of respondents (10 out of 22) affirmed they would not switch, should be read in conjunction with the existing, and already very significant price gap between the two types of products.
584. These elements provide a clear indication of the divide in terms of prices and image between branded products, where VB and FIAMM are currently the closest competitors, and non-branded or weak brand products.
585. Therefore, the merger would not only bring together two of the three leading players in the IAM markets, both for car/LCV batteries and for truck/HCV batteries, but would also give VB additional control of Bären, which is one of the best known brands in Austria, as shown by the large number of respondents to the market investigation indicating it as a 'must have' brand<sup>358</sup>.
586. Thirdly, the largest and strongest competitor<sup>359</sup> of the merged entity in Austria, Banner, is currently capacity constrained and would therefore not have the

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<sup>355</sup> See replies of Austrian customers to question 28 of the second phase questionnaire, sent on 20 December 2006.

<sup>356</sup> The Commission has estimated the price difference between primary brands and private label versions of the same batteries on the basis of the data provided by VB.

<sup>357</sup> See replies of Austrian customers to question 30 of the second phase questionnaire, sent on 20 December 2006.

<sup>358</sup> On this point, see also the agreed minutes of conference call with MIDAC on 19.01.2007: "*MIDAC considered Baren to be very strong and famous in Austria (2<sup>nd</sup>-3<sup>rd</sup>)*".

<sup>359</sup> On Banner's strength, Exide affirmed: "*[in Austria] Banner is dominant and runs a very strong distribution network (capable of supplying customers up to 4 times a day)*". See agreed minutes of conference call with Exide on 19.01.2007.

possibility and the incentive to increase its sales in response to a price increase by the merged entity. Given the capacity constraint that limits Banner and the weakness of the presence, also in terms of brands, of the other players in the Austrian market, the merger would therefore remove competition between the close competitors VB and FIAMM.

587. The customers who replied to the Commission's market investigation held mixed views on the competitive impact of the merger. The majority of customers (15 out of 23) indicated that they do not expect negative effects for their company as a result of the transaction<sup>360</sup>. However, a fairly large number of respondents are VB's resellers, sometimes under an exclusive contract. Their answer should therefore be taken with caution. For example, Austrian IAM-customer number 21, an exclusive dealer of VB brands, stated: "*The operation would be positive. One competitor less!!*"<sup>361</sup>.

588. When asked about the more general competitive effects of the proposed transaction, a slight majority (10 out of 19) replied that they expect negative effects on competition<sup>362</sup>: for example, Austrian IAM-customer number 31 stated "*it could be possible that the new company (VB+FIAMM) will control the market and that we become more depending*", Austrian customer number 32 stated that: "*We estimate that the merger of the companies will lead to a situation of market dominance (>60%); influence on future price evolution is to be expected*", and Austrian IAM-customer number 11 stated that: "*Missing competition will lead to unavoidable price increases, so that free retailers as myself will feel clear negative competitive effects due to the dominant situation*"<sup>363</sup>.

589. To conclude, the market investigation has led to the finding that the proposed transaction would combine two of the three major players in the Austrian IAM market, to create a dominant player in both the cars/LCV (market shares of [55-65]\*% according to the notifying party and of [45-55]\*% according to the Commission's investigation) and truck/HCV batteries (combined market share of [30-40]\*% according to the parties, but of [55-65]\*% according to the Commission's investigation) battery markets. Additionally, the proposed transaction would combine some of the most important brands in the national market in one company. The remaining significant brand, Banner, would have no room to increase sales due to capacity constraints in the short and medium term.

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<sup>360</sup> See replies of Austrian customers to question 32 of the second phase questionnaire, sent on 20 December 2006, which asked: "*What impact, if any, would the proposed operation have on your company? Would your own company be affected by the merger?*".

<sup>361</sup> See the reply of Austrian IAM-customer number 21 to question 32 of the second phase questionnaire, sent on 20 December 2006.

<sup>362</sup> See replies of Austrian customers to question 33 of the second phase questionnaire, sent on 20 December 2006.

<sup>363</sup> See the replies of Austrian customer numbers 31, 32 and 11 to question 33 of the second phase questionnaire, sent on 20 December 2006

590. This situation would allow the merged entity to increase unilaterally prices in both the cars/LCV and truck/HCV battery markets. Competition from other suppliers would be limited to the lower segments (private label and weak brands) of the market, which are to a large extent isolated from the branded premium segments where VB and FIAMM are currently strongest.

591. Based on these elements, the Commission reached the preliminary conclusion that the proposed transaction would impede effective competition in the Austrian IAMs for car/LCV batteries and for truck/HCV batteries, in particular as a result of the creation of a dominant position.

(e) *Czech Republic*

592. According to the latest data provided by the parties<sup>364</sup>, the market structure in the Czech Republic IAM would be as indicated in table 13.

**Table 13: IAM market Czech Republic**

<b>Number of starter batteries sold</b>						
	<b>Market size (thousands)</b>	<b>VB (share)</b>	<b>FIAMM (share)</b>	<b>Combined (share)</b>	<b>Banner (share)</b>	<b>Others (share)</b>
Cars/LCV	[...]*	[30-40]*%	[20-30]*%	<b>[55-65]*%</b>	[5-15]*%	[25-35]*%
Trucks/HCV	[...]*	[35-45]*%	[20-30]*%	<b>[60-70]*%</b>	10-20)* %	[15-25]*%
Cars/LCV + Trucks/HCV	[...]*	[30-40]*%	[20-30]*%	<b>[55-65]*%</b>	[5-15]*%	[25-35]*%
<b>Value of starter batteries sold</b>						
	<b>Market size (€ million)</b>	<b>VB (share)</b>	<b>FIAMM (share)</b>	<b>Combined (share)</b>	<b>Banner (share)</b>	<b>Others (share)</b>
Cars/LCV	[...]*	[30-40]*%	[20-30]*%	<b>[55-65]*%</b>	n.a.	[35-45]*%
Trucks/HCV	[...]*	[45-55]*%	[20-30]*%	<b>[70-80]*%</b>	n.a.	[20-30]*%
Cars/LCV + Trucks/HCV	[...]*	[35-45]*%	[20-30]*%	<b>[60-70]*%</b>	n.a.	[30-40]*%

593. Among the other suppliers with significant market share (in volume) the notifying party includes TAP with [5-10]\*% for car/LCV batteries and [5-10]\*% for truck/HCV batteries, as well as Monbat ([0-5]\*% in both markets) and Exide ([0-5]\*% in both markets).

594. After the transaction, the HHI index for car/LCV batteries would be [ $>3500$ ]\* with an increment of [ $>1500$ ]\*. For truck/HCV batteries, it would be [ $>4400$ ]\* with an increment of [ $>1900$ ]\*.

595. The parties have not indicated the suppliers for 19% (or [...]\* units) of the car/LCV battery market and 10% (or [...]\* units) of the truck/HCV battery

<sup>364</sup> See Annex 5 to VB's comments to the Commission's decision to initiate Phase II proceedings, dated 22 December 2006 and VB's email to the Commission dated 29 January 2007.

market. In previous submissions<sup>365</sup>, the notifying party had provided a significantly higher market share for FIAMM in the truck/HCV battery market: [30-40]\*% or [...] units. The change in sales attributed by the notifying party to truck/HCV batteries in the latest submission was justified, as for other countries, by the erroneous classification of Group 28 batteries. However, while FIAMM's sales in the market were decreased by [>6000]\* units (from [...] to [...] units), total market size was left untouched (at [...] units), due to the fact that total market size is calculated based on a number of assumptions regarding vehicles park, average product lifetimes, replacement rates, etc. This is also true for the car/LCV batteries markets, where FIAMM's sales were reduced from [...] to [...] units, with no adjustment to total market size.

596. Since the adjustment of the market size for truck/HVC and car/LCV batteries fully incorporates FIAMM's reattribution of sales would not lead to a large increase in the parties combined market share, there are indications that the latest figures presented by the notifying party may not be entirely coherent with its own previous submissions, and underestimate the parties' combined strength.

597. The Commission's own investigation indicates that the estimates provided by the notifying party overestimate actual market size for car/LCV batteries. In this market, actual sales of the competitors individually mentioned by the notifying party are only marginally lower than what was attributed to them. However, there are no indications of any other suppliers who could be significant players in the Czech market and explain all of the 'unexplained' part of the estimated market size. For example, the aggregated market share of the producers Rombat, Monbat, Steco, MIDAC and Mutlu is considerably below [5-10]\*% and some of these are not even present on the market.

598. The Commission's investigation leads to a total market size of around 666 000 units. Based on this market size, the parties' combined market share would be [65-75]\*% (VB [35-45]\*%, FIAMM [25-35]\*%) in the cars/LCV battery market. As regards figures in value, the Commission's market investigation indicates that the total size of the market is EUR 15.7 million, against EUR [...] million estimated by the notifying party. Consequently, the market share attributable to the merged entity would be [65-75]\*% and not [55-65]\*% as indicated in the notifying party's submissions.

599. While these figures cannot be taken as definitive, they clearly indicate that the combined market share estimated by the notifying party could well underestimate the real position of the merged entity by a significant margin.

600. In contrast, for truck/HCV batteries, the actual sales of the competitors individually mentioned by the notifying party and total market size were in line with the notifying party's estimates<sup>366</sup>.

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<sup>365</sup> See Annex 17 to the submission of 9 November 2006 in response to the Commission's questionnaire of 31 October 2006.

<sup>366</sup> In any event it should be emphasised that the Commission's analysis below and the preliminary conclusion on the competitive effects would be the same, irrespective of whether the reference market size is the one proposed by the notifying party or the one stemming from the Commission's investigation.

601. Looking at the structure of the Czech market, it appears that the merging parties are the clear market leaders (both according to the parties' estimates and even more according to the Commission's figures in the car/LCV battery market). Banner is a rather distant number three at the moment and would have only a fraction of the market share of the merged entity. Exide is hardly present on the Czech market and other players seem rather marginal. Importantly, virtually all customers who replied to the Commission's market investigation affirmed that they do not buy starter batteries from manufacturers located outside the EEA<sup>367</sup>.
602. Additionally, and more importantly, the merger would not only bring together the two leading players in the IAMs leading to a dominant position, both for car/LCV and for truck/HCV batteries, but would also give VB control of Akuma, which is one of the best known brands in the Czech Republic. Indeed, while the majority (16 out of 20) of customers stated that they consider some brands as 'must haves'<sup>368</sup>, specific indications were given for Varta and Perion (belonging to VB, 14 times), Akuma, FIAMM and Bären (belonging to FIAMM, 6 times) and much more seldom for Banner and Exide (3 times between them).
603. The importance of brands in the Czech market becomes clear if one considers that the share of branded products sold is very high ([90-100]\*% for VB and [60-70]\*% for FIAMM) and that the majority of customers (14 out of 24) consider that private label products are not good substitutes for branded ones<sup>369</sup>. Indeed, the latter are significantly more expensive than the former: according to the data provided by the notifying party on bestselling products, for batteries of type [...] the average price for branded products is EUR [...]\*, while the average price for non branded is EUR [...]\*; for batteries of type [...] the average price for branded products is EUR [...]\*, while the average price for non branded is EUR [...]\*; and for batteries of type [...] the average price for branded products is EUR [...]\*, while the average price for non branded is EUR [...]\*.
604. The price difference remains positive even after controlling for other factors that may influence pricing (for example, retail channel, size of the contract as well as total sales to that customer)<sup>370</sup>. In the Czech Republic, the estimated price difference between primary brands and private label is EUR [...]\* for [...] batteries, EUR [...]\* for [...] batteries and EUR [...]\* for [...] batteries.

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<sup>367</sup> See replies of Czech customers to question 22 of the second phase questionnaire, sent on 20 December 2006.

<sup>368</sup> See replies of Czech customers to question 25 of the second phase questionnaire, sent on 20 December 2006.

<sup>369</sup> See replies of Czech customers to question 28 of the second phase questionnaire, sent on 20 December 2006.

<sup>370</sup> The Commission has estimated the price difference between primary brands and private label versions of the same batteries on the basis of the data provided by VB.

605. The replies of customers to the question on switching to private label products even in the event of a 10% increase in the price of branded products<sup>371</sup>, where a significant share of respondents (15 out of 26) affirmed they would not switch, should be read in conjunction with the existing, and already very significant price gap between the two types of products.
606. Furthermore, the strongest, albeit much smaller, competitor of the merged entity in the Czech Republic, Banner, is currently under capacity constraint and would therefore not have the possibility and the incentive to increase its sales in response to a price increase by the merged entity. Given the capacity constraint that limits Banner and the weakness of the presence, also in terms of brands, of the other players in the Czech Republic market, the merger would therefore remove competition between close competitors VB and FIAMM.
607. As in the other national markets under scrutiny, the customers who replied to the Commission's market investigation held mixed views on the competitive impact of the merger. The majority of customers indicated that they do not expect negative effects for their company as a result of the transaction<sup>372</sup>. However, a fairly large number of respondents are VB's or FIAMM's resellers, sometimes under an exclusive contract. Their answer should therefore be taken with caution.
608. When asked about the more general competitive effects of the proposed transaction, the majority (10 out of 19) replied that they expect negative effects on competition<sup>373</sup>, most notably on account of the disappearance of one of the main market players.
609. To conclude, the market investigation has led to the finding that the proposed transaction would combine the two leading players in the Czech IAM, to create a dominant player in both the car/LCV (market shares of [55-65]\*% according to the notifying party and of [65-75]\*% according to the Commission's investigation) and truck/HCV batteries (combined market share of [60-70]\*% according to the parties, confirmed by the Commission's investigation) battery markets. Additionally, the proposed transaction would combine some of the most important brands in the national market in one company. The remaining brand of some significance, Banner, would have no room to increase sales due to capacity constraints in the short and medium term.
610. This situation would allow the merged entity to increase unilaterally prices in both the car/LCV and truck/HCV battery markets. Competition from other suppliers would be limited to the lower segments (private label and weak brands) of the market, which are to a large extent isolated from the branded premium segments where VB and FIAMM are currently strongest.

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<sup>371</sup> See replies of Czech customers to question 30 of the second phase questionnaire, sent on 20 December 2006.

<sup>372</sup> See replies of Czech customers to question 32 of the second phase questionnaire, sent on 20 December 2006.

<sup>373</sup> See replies of Czech customers to question 33 of the second phase questionnaire, sent on 20 December 2006.

611. Based on these elements, the Commission reached the preliminary conclusion that the proposed transaction would impede effective competition in the Czech IAMs for car/LCV batteries and for truck/HCV batteries, in particular as a result of the creation of a dominant position.

*(f) Slovak Republic*

612. According to the latest data provided by the parties<sup>374</sup>, the market structure in Slovakia IAM would be as indicated in table 14:

**Table 14: IAM market Slovak Republic**

Number of starter batteries sold						
	Market size (thousands)	VB (share)	FIAMM (share)	Combined (share)	Exide (share)	Others (share)
Cars/LCV	[...]*	[5-15]*%	[20-30]*%	[35-45]*%	[25-35]*%	[25-35]*%
Trucks/HCV	[...]*	[10-20]*%	35-45]*%	[55-65]*%	[30-40]*%	[0-10]*%
Cars/LCV + Trucks/HCV	[...]*	[10-20]*%	[20-30]*%	[35-45]*%	[25-35]*%	[25-35]*%
Value of starter batteries sold						
	Market size (€ million)	VB (share)	FIAMM (share)	Combined (share)	Banner (share)	Others (share)
Cars/LCV	[...]*	[10-20]*%	[25-35]*%	[40-50]*%	n.a	[50-60]*%
Trucks/HCV	[...]*	[15-25]*%	[35-45]*%	[55-65]*%	n.a	[35-45]*%
Cars/LCV + Trucks/HCV	[...]*	[10-20]*%	[25-35]*%	[45-55]*%	n.a	[45-55]*%

613. Among other suppliers with significant market share (in volume) the notifying party includes Banner with [5-15]\*% for car/LCV and [5-15]\*% for truck/HCV batteries, as well as Monbat ([0-5]\*% in both markets) and Iskra ([0-5]\*% in both markets), Ista ([0-5]\*% in both markets) and TAP [0-5]\*% in both markets).

614. After the transaction, the HHI index for the car/LCV batteries would be [ $>2500$ ]\* with an increment of [ $>650$ ]\*. For truck/HCV batteries, it would be [ $>4700$ ]\* with an increment of [ $>1300$ ]\* (however, see in the following on the unreliability of the notifying party's estimates for this market).

615. The parties have not indicated the suppliers for 10% (or [...]\* units) of the car/LCV market. However, in the truck/HCV market, the market shares indicated total [110-120]\*%, clearly a mistake in the estimation<sup>375</sup>. In this respect, it is

<sup>374</sup> See Annex 5 to VB's comments to the Commission's decision to initiate Phase II proceedings, dated 22 December 2006 and VB's email to the Commission dated 29 January 2007.

<sup>375</sup> In previous submissions (see Annex 17 to the submission of 9 November 2006 in response to the Commission's questionnaire of 31 October 2006), the notifying party had provided a lower market share for FIAMM in the truck/HCV market: [20-30]\*% or [...]\* units. This figure would limit the sum of all indicated competitors' market shares to 98%. However, it would also imply an average price per starter battery of [...]\* Euro, which is clearly too high. For this reason, the Commission will use the latest sales figures ([...]\* units and [...]\* Euro revenue) for FIAMM as the basis of its analysis.

appropriate to disregard the estimates submitted by the notifying party as regards the market size

616. The Commission's own investigation indicates that the estimates provided by the notifying party overestimate the actual size of the market for car/LCV batteries. In this market, while actual sales of some of the competitors individually mentioned by the notifying party are significantly lower than what was attributed to them, the Commission's investigation leads to a total market size of around 215,000 units. Based on this market size, the parties' combined market share would be [50-60]\*% (VB [15-25]\*%, FIAMM [30-40]\*%) in the car/LCV battery market. As regards figures in value, the Commission's market investigation indicates that the total size of the market is EUR 5.1 million, against EUR [...] million estimated by the notifying party. Consequently, the market share attributable to the merged entity would be [50-60]\*% and not [40-50]\*% as indicated in the notifying party's submissions.
617. While these figures cannot be taken as definitive, they clearly indicate that the combined market share estimated by the notifying party could well underestimate the real position of the merged entity by a significant margin.
618. In contrast, for truck/HCV batteries, the market investigation pointed to a slightly larger market than what was estimated by the notifying party. The resulting market size was 43 000 units with the parties' combined market share reaching [45-55]\*% (VB [10-20]\*%, FIAMM [30-40]\*%)<sup>376</sup>.
619. Looking at the structure of the Slovak market, it appears that pre-merger FIAMM is market leader in the car/LCV battery market, with VB, Banner and Exide broadly competing for the second position. The merger would allow VB to consolidate FIAMM's leadership position and become the clear market leader with a market share exceeding [45-55]\*%. In the truck/HCV battery market, FIAMM is currently market leader with a position similar to that of Exide, while VB and Banner are smaller competitors. As for car/LCV batteries, the merger would allow VB to consolidate FIAMM's leadership position and become the clear market leader with a market share exceeding [45-55]\*%.
620. The merger would therefore allow VB to reach a dominant position in the IAM in Slovakia, both for car/LCV and for truck/HCV batteries. Additionally, it would give VB control of the Akuma brand, which is one of the best known brands in Slovakia, as shown by the large number of respondents to the market investigation indicating it as a 'must have' brand.
621. Furthermore, Banner, one of the two strongest competitors of the merged entity in Slovakia, is currently capacity constrained and would therefore not have the possibility and the incentive to increase its sales in response to a price increase by the merged entity.

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<sup>376</sup> In any event it should be emphasised that the Commission's analysis below and the preliminary conclusion on the competitive effects would be the same, irrespective of whether the reference market size is the one proposed by the notifying party or the one stemming from the Commission's investigation.

622. Based on these elements, the Commission reached the preliminary conclusion that the proposed transaction would impede effective competition in the Slovak IAMs for car/LCV batteries and for truck/HCV batteries, in particular as a result of the creation of a dominant position.

#### 4) The notifying party's reply to the Statement of Objections

623. In its reply to the Statement of Objections, the notifying party first repeats that the proposed transaction will not impede effective competition on the EEA-wide IAM. Indeed, on the basis of 2005 sales in volume, the combined market share of the merged entity would be [30-40]\*% (VB [20-30]\*%, FIAMM [5-10]\*%) for car/LCV batteries and [25-35]\*% (VB [15-25]\*%, FIAMM [5-10]\*%) for truck/HCV batteries. Exide would remain a strong second player on both markets with, additionally, a large number of smaller competitors.

624. The notifying party also excludes the risk of a significant impediment to competition if national IAMs were to be defined, in particular for Italy, Austria, the Czech Republic and Slovakia. A summary of the notifying party's comments are reported in the following.

##### (a) Italy

625. Regarding Italy<sup>377</sup>, the notifying party contests the Commission's estimate of the total market size, both for car/LCV and for truck/HCV batteries. The notifying party, while seemingly accepting the Commission's figures regarding the sales of the competitors mentioned in the Statement of Objections, points out that the Commission omitted to take into account imports of batteries from outside the EEA.

626. The notifying party reports that according to Eurostat-based import statistics, imports from outside the EEA into Italy amounted to [...] units in 2005. The notifying party assumes that these imports can be divided between car/LCV batteries and truck/HCV batteries in line with the relative size of these two markets in Italy that is 88.5% for car/LCV and 11.5% for truck/HCV batteries. As a consequence, the notifying party concludes that the Commission's estimate on market sizes should be increased by [...] units for car/LCV batteries (total market size of [...] units) and by [...] units for truck/HCV batteries (total market size of [...] units).

627. The notifying party puts forward two further elements in support of its view that extra-EEA imports play a very important role in the Italian IAMs. First, Samauto, the largest Italian importer, has close links to Chinese producers. According to the information in the possession of the notifying party, "*Samauto imports the vast majority of the approximately 800,000 starter batteries reported by Eurostat that are supplied by Chinese manufacturers to the Italian market each year.*"<sup>378</sup> The parties also mention Gallo and DIBA as other importers which import significant quantities of starter batteries from Asia.

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<sup>377</sup> See VB's reply to the Statement of Objections, pp. 26-29.

<sup>378</sup> VB's reply to the Statement of Objections, page 26.

628. Second, the notifying party refers to statistics produced by COBAT, the Italian consortium of lead recycling companies, which is by law notified of all sales of batteries containing lead in Italy. The notifying party mentions (without quoting the exact source) that, according to COBAT, [2-3]\* million batteries with a capacity exceeding 20 Ah were imported into Italy, both from within and from outside the EEA in 2005. The notifying party also states that some of the batteries with capacity exceeding 20 Ah are for motorcycles and not for car/LCV or truck/HCV.

629. Based on the Commission's estimates of total market sizes increased by the Eurostat import statistics, the notifying party presents new estimates, presented in table 15, of sales and market shares in the Italian aftermarket, also subdividing FIAMM's sales by brand.

Table 15

Number of starter batteries sold ('000) in the Italian IAM market					
Supplier	Brand (for FIAMM)	Cars/LCVs		Truck/HCVs	
		Volume	Market Share	Volume	Market share
FIAMM	<i>FIAMM</i>	[...]*	[5-10]*	[...]*	[5-10]*
	<i>Magnet</i>	[...]*	[15-25]*	[...]*	[0-5]*
	<i>AAA</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<i>Uranio</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<i>Bären</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<i>Private/no label</i>	[...]*	[5-10]*	[...]*	[5-10]*
	<i>Other</i>	[...]*	[0-5]*	[...]*	[0-5]*
	Total	[...]*	[20-30]*	[...]*	[20-30]*
VB		[...]*	[15-25]*	[...]*	[10-20]*
Combined		[...]*	[40-50]*	[...]*	[35-45]*
Exide		[...]*	[25-35]*	[...]*	[30-40]*
FAAM					
TAB					
Vipiemme					
Midac					
Banner, Rombat, Monbat, Steco, Mutlu		[...]*	[0-5]*	[...]*	[0-5]*
Extra-EEA imports		[...]*	[15-25]*	[...]*	[20-30]*
Total		[...]*	100	[...]*	100

630. According to these estimates, the merged entity would become market leader with [40-50]\*% in the car/LCV battery market and [35-45]\*% in the truck/HCV battery market. Exide would be number two (market shares of [25-35]\*% and [15-25]\*% respectively).

631. Regarding the competitive assessment, the notifying party points out the significant role of imports from outside the EEA. This would represent [15-25]\*% of the market for car/LCV and [20-30]\*% of the market for truck/HCV batteries. In addition to these imports, the notifying party states that the Italian market is "*highly permeable to competition originating from neighbouring countries such as Austria, France, and to some extent Slovakia*"<sup>379</sup>.

632. On the importance of branded and private label products, in its reply the notifying party refers to the section on Austria, where it is argued that end consumers have little loyalty to brands, as demonstrated by the success of private label brands within 'modern' distribution channels such as Carrefour, Norauto and Feu Vert.

(b) *Austria*

633. In its reply to the Statement of Objections regarding the Austrian IAMs<sup>380</sup>, the notifying party reaffirms the market estimates of the Austrian market set out in previous submissions. In addition, it provides a breakdown of FIAMM's sales by brand, which shows that Bären is by far the best selling brand of FIAMM with [...] units (and a [15-25]\*% market share according to the notifying party's estimate, [10-20]\*% according to the Commission's estimate) for car/LCV batteries and [...] units (and a [10-20]\*% market share according to the notifying party's estimate, [20-30]\*% according to the Commission's estimate) for truck/HCV batteries.

634. The notifying party also contests the Commission's findings that the importance of VB and FIAMM in the Austrian market goes beyond the mere addition of market shares and that private label products do not impose an effective competitive constraint on branded products. To this end, it mentions that consumers have little loyalty to brands and that the 'modern' distribution channels of supermarkets and fast fitter chains have been successful in seizing market shares from branded products.

(c) *Czech Republic*

635. In its reply to the Statement of Objections regarding the Czech IAMs<sup>381</sup>, the notifying party contests the Commission's estimate of the total size of the market for car/LCV batteries, which was [...] units lower than its own estimate.

636. The notifying party reports that, according to Eurostat-based import statistics, imports from outside the EEA into the Czech Republic amounted to approximately 88 000 units in 2005. The notifying party assumes that these imports can be attributed entirely to car/LCV batteries (without giving an explanation of the reasons for that assumption) and adds that the remaining gap between its market

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<sup>379</sup> VB's reply to the Statement of Objections, page 30. The notifying party may have meant Slovenia instead of Slovakia.

<sup>380</sup> See VB's reply to the Statement of Objections, pp. 14-17.

<sup>381</sup> See VB's reply to the Statement of Objections, pp. 14-17.

size estimate and that of the Commission can be explained by intra-EEA trade not accounted for by the Commission's market investigation.

637. Regarding the competitive assessment, the notifying party points out the competitive constraint imposed by Banner (which will start local production in 2009) and TAB on the market, with market shares of just above and just below [5-10]\*% respectively. In addition, the notifying party states that the Czech market is "*highly permeable to competition originating from neighbouring countries such as Slovakia, Austria, Poland, Germany and to some extent Italy*"<sup>382</sup>. It also mentions the role of importers in facilitating market entry by manufacturers with no local presence.

638. On the importance of branded and private label products, the notifying party refers the reader to the section on Austria.

*(d) Slovakia*

639. In its reply to the Statement of Objections regarding the Slovak IAMs<sup>383</sup>, the notifying party reaffirms the market estimates set out in previous submissions. In addition, it provides a breakdown of FIAMM's sales by brand, which shows that Akuma is by far the best selling brand of FIAMM with [...] units (and a [15-25]\*% market share according to the notifying party's estimate, [20-30]\*% according to the Commission's estimate) for car/LCV batteries and [...] units (and a [35-45]\*% market share according to the notifying party's estimate, [30-40]\*% according to the Commission's estimate) for truck/HCV batteries.

640. The notifying party also submits that post merger Exide will remain a strong number two in the market and that numerous other competitors will exercise significant competitive constraint on the parties. Additionally, the Slovak market is permeable to competition originating from neighbouring countries such as the Czech Republic, Austria, Poland, and Hungary.

641. On the importance of branded and private label products, the notifying party refers the reader to the section on Austria.

**5) Assessment**

*(a) Italy*

642. In its reply, the notifying party does not comment on a number of points contained in the Statement of Objections.

643. Firstly, it does not comment on the Commission's assertion that the Italian markets are dominated by three players: FIAMM, Exide and VB, the only three companies with significant activities in Italy which are also OE suppliers.

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<sup>382</sup> VB's reply to the Statement of Objections, page 21.

<sup>383</sup> See VB's reply to the Statement of Objections, pp. 14-17.

644. Secondly, it does not comment on the particularly high share of branded products sold in Italy, on the fact that a consistent majority of customers considered private label products not to be good substitutes for branded ones, and on the fact that virtually only VB's (Varta and Bosch) and FIAMM's (FIAMM, AAA and Uranio) brands were considered as 'must have' products.
645. Thirdly, it does not comment on the market investigation's result that the overwhelming majority of customers who replied to the Commission's market investigation affirmed that they do not buy starter batteries from manufacturers located outside the EEA and that, in any event, the competitive constraint from imported products would be very limited on market and image leader VB post merger.
646. Fourthly, it does not comment on the finding that branded products are significantly more expensive than private label products with the same specification, indicating a weak competitive constraint of the latter on the former. Similarly, it does not comment on the customers' responses indicating that they would not switch from branded to private label products in the event of a price increase.
647. Fifthly, it comments only very generically on the Commission's finding that VB and FIAMM are currently the closest competitors in terms of prices and image and the overall conclusion of the market investigation that the proposed transaction would combine two of the three major players in the Italian IAM, to create a dominant player in both the car/LCV and truck/HCV battery markets.
648. The notifying party's new estimates on the total size of the Italian IAMs indicate a very large market share for imports from outside the EEA: 19% of the market for car/LCV batteries and 23% of the market for truck/HCV batteries. The Commission has further investigated the size of the Italian market to understand the real role of imports from outside the EEA.
649. As a preliminary point on this aspect, it should be noted that the Commission's assessment and preliminary conclusion on the competitive situation in the Italian aftermarket in the Statement of Objections did not depend on whether the size of the reference market was that proposed by the notifying party or the one stemming from the Commission's investigation<sup>384</sup>.
650. The notifying party's new estimate of imports from outside the EEA is based on the statistics collected by Eurostat<sup>385</sup>. The statistics distinguish between

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<sup>384</sup> See footnote 232 of the Statement of Objections.

<sup>385</sup> Database on EU-25 trade under the CN8 classification, available at: [http://epp.eurostat.ec.europa.eu/portal/page?\\_pageid=1090,1&\\_dad=portal&\\_schema=PORTAL](http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1090,1&_dad=portal&_schema=PORTAL). The Commission notes that the figure quoted by the notifying party is in line to the figure resulting from the sum of two CN8 codes: 85071081, corresponding to "lead-acid accumulators, of a kind used to start piston engines 'starter batteries', of a weight >5 kg, working with liquid electrolyte (excluding those in use in civil aircraft)", and 85071081, corresponding to "lead-acid accumulators, of a kind used to start piston engines 'starter batteries', of a weight >5 kg, working with non-liquid electrolyte (excluding those in use in civil aircraft)". The Commission takes note of the fact that the notifying party, in its submission of 9 November 2006, page 4, indicates two difference codes as the source for the reported figures: 85071092 and 85071098. However, no data corresponding to these codes is available on the Eurostat website. Given that

batteries with a weight of more than 5 kg and batteries with a weight equal to or lower than 5 kg. The notifying party implicitly assumes that all batteries with a weight of more than 5 kg are car/LCV or truck/HCV batteries. This is however incorrect: while car/LCV or truck/HCV batteries have a weight of more than 5 kg, there are numerous motorcycle batteries that also have a weight of more than 5 kg<sup>386</sup>. This means that the total figure for imports of batteries from outside the EEA reported by Eurostat (1,621,000 in 2005) overestimates the number of car/LCV or truck/HCV batteries imported.

651. While it is not possible to know directly what proportion of the 1,621,000 batteries imported into Italy from outside the EEA are car/LCV or truck/HCV batteries, an important indirect indication comes from Samauto, an importer which, according to the notifying party, imports the [...] majority of the 829,000 starter batteries reported by Eurostat that are supplied by Chinese manufacturers. It is correct that Samauto imports a [...] large number of starter batteries from China (approximately [1-2 million]\* each year in 2005 and 2006). However, the large majority of batteries imported (approximately [1-2 million]\*) are motorcycle batteries. Only [< 300 000]\* are car/LCV or truck/HCV batteries. Of these, only [<200 000]\* are destined for the Italian market, the remainder being re-exported by Samauto to supply its European sales network.<sup>387</sup>

652. Similarly, another importer, DIBA Srl, mentioned by the notifying party as another significant importer of starter batteries, did not import any car/LCV or truck/HCV batteries from outside the EEA in 2005. In any event, the company entered into liquidation in 2006.

653. Secondly, the additional evidence put forward by the notifying party relating to COBAT statistics cannot be accepted. COBAT statistics do not report data on sales of starter batteries for cars/LCV and trucks/HCV. The statistics report data on batteries based on capacity, with a cut off point at 20Ah. Batteries with capacity higher than 20Ah include motorcycle batteries, not part of the relevant markets being scrutinised. Capacity for car batteries usually starts at 35Ah. Additionally, the COBAT statistics mentioned do not distinguish between imports into Italy from within and from outside the EEA, nor do they distinguish between OE and IAM batteries. It is therefore not possible to obtain direct indications from these statistics regarding the level of imports from outside the EEA in the Italian IAM for cars/LCV and truck/HCV batteries.<sup>388</sup>

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the only difference between the two sets of codes is whether batteries for civil aircraft are included or excluded and given that the sets of figures correspond to a large extent, the Commission concludes that the two sets of codes give largely equivalent statistics.

<sup>386</sup> See for example the list of motorcycle batteries available at <http://www.unibat.it/pdf/CTGUNIBAT2006.pdf>.

<sup>387</sup> See Samauto email of 5 March 2007 approving the summary of a telephone conversation. The fact that Samauto total imports from China is higher than the Eurostat figure is explained by the fact that Samauto also imports batteries with a weight below 5kg.

<sup>388</sup> However, COBAT data can indirectly give some indication on the level of imports from extra-EEA into Italy. According to COBAT's statistics, around 4,129,000 starter batteries were imported by 'importers' in Italy. This excludes starter batteries already fitted in vehicles, machinery and appliances. Around [40-50]\*%

654. Thirdly, the notifying party's new estimate that imports from outside the EEA account for 19% of the Italian car/LCV battery market is in striking contrast with its previous estimates, which did not indicate such a large market share. For example, in its reply to the Commission decision to open an in depth investigation, the notifying party attributed 96% of the Italian market to EEA manufacturers.
655. Fourthly, the results of the Commission's market investigation strongly rebut the idea that imports from outside the EEA play a very significant role in the Italian market. Indeed, the overwhelming majority of customers who replied to the Commission's market investigation affirmed that they do not buy starter batteries from manufacturers located outside the EEA. The notifying party did not comment on this point in its reply to the Statement of Objections.
656. These elements cast a very serious doubt on the notifying party's estimate that simplistically adds the Eurostat figure to the market size figure estimated by the Commission during its market investigation. The main Italian importer of IAM batteries from outside the EEA, Samauto, confirmed the import of only [ $<200\ 000$ ]\* million batteries, or just above [0-5]\*% of the market. The Commission found no indications of any other significant sources of import.
657. Based on these elements, it is concluded that the new estimate of the Italian IAMs put forward by the notifying party is not realistic. Regarding the figures indicated by the Commission in the Statement of Objections, the Commission accepts that they may have underestimated the real size of the market by omitting to consider imports from outside the EEA<sup>389</sup>. However, it is concluded, on the basis of the results of the market investigation and the further checks carried out by the Commission after issuing the Statement of Objections, that these imports have only a limited relevance.
658. Importantly, there is clearly no indication that the level of imports from outside the EEA is such as to lead the Commission to change its assessment on the likely effects of the proposed transaction in the Italian IAMs for car/LCV and trucks/HVC batteries. Assuming, in favour of the notifying party, that imports from outside the EEA accounted for 10% of the total Italian IAMs for car/LCV and truck/HCV batteries, the resulting combined market shares would still be very high (see table 16).

Table 16

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of these where imported by VB (and Delphi, now part of VB) and a further [15-25]\*% by Samauto. As JCI is not importing starter batteries from extra-EEA countries, and Samauto imported only [ $<200\ 000$ ]\* for the Italian IAM, that means that out of over 2.6 million batteries imported, only [ $<200\ 000$ ]\* are for the Italian market. If the remaining part of the imports (below 1.5 million batteries) had a similar proportion of extra EEA imports, their total would be absolutely negligible on the Italian IAM market. In any event, it is more than clear that the figure claimed by the parties ([...]\* million units imported from outside the EEA) is grossly overestimated.

<sup>389</sup> The Commission did however consider imports from Mutlu, Rombat and Monbat, which are located outside the EEA.

Number of starter batteries sold ('000) in the Italian IAM market					
		Cars/LCVs		Truck/HCVs	
Supplier	Brand (for FIAMM)	Volume	Market Share	Volume	Market share
FIAMM	<i>FIAMM</i>	[...]*	[5-10]*	[...]*	[5-10]*
	<i>Magnet</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<i>AAA</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<i>Uranio</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<i>Bären</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<i>Private/no label</i>	[...]*	[5-10]*	[...]*	[5-10]*
	<i>Other</i>	[...]*	[0-5]*	[...]*	[0-5]*
	<b>Total</b>	[...]*	[25-35]*	[...]*	[25-35]*
VB		[...]*	[20-30]*	[...]*	[15-25]*
Combined		[...]*	[45-55]*	[...]*	[40-50]*
Exide		[...]*	[30-40]*	[...]*	[35-45]*
FAAM					
TAB					
Vipiemme					
Midac					
Banner, Rombat, Monbat, Steco, Mutlu		[...]*	[0-5]*	[...]*	[0-5]*
Extra-EEA imports		[...]*	[5-10]*	[...]*	[5-10]*
<b>Total</b>		[...]*	100	[...]*	100

659. Once again, the Commission underlines that its assessment in the Italian market does not depend on the exact market share the combined entity would achieve and that under all reasonable scenarios (including the one presented in table 16, which must be considered a best case scenario in favour of the notifying party) regarding market size and market shares its conclusion would not change.

660. Regarding the permeability of the Italian IAMs to competition originating in neighbouring countries, the Commission has not found any elements to support this claim. The market investigation has demonstrated that the conditions of competition in different national markets are very heterogeneous even between neighbouring countries, regarding price levels (see the section on market definitions on this point), brand strength and brand awareness (for example, Bären is very strong in Austria and barely exists in Italy and the reverse is true for the FIAMM brand), distribution and retail structure (France has one of the highest shares of 'modern distributors' in Europe, Italy one of the lowest<sup>390</sup>). The notifying party has put forward no additional evidence in its reply to the Statement of Objections to prove the contrary.

<sup>390</sup> Interestingly, the examples of 'modern' distribution channels quoted by the notifying party have a limited presence in Italy.

661. Therefore, it is concluded, in line with the Commission's preliminary analysis, that – without considering whether and to which extent FIAMM can be assumed to be a failing firm - the proposed transaction would make the combined entity dominant in the Italian markets by combining FIAMM's and VB's large market shares. Additionally, the transaction would reduce the number of large players on the Italian markets from three to two (Exide being the other). Finally, by combining FIAMM's and VB's premium brands, the transaction's impact on competition would be over and above what would result from the simple addition of market shares. Indeed the combined entity would control virtually all the 'must have' brands on the Italian IAMs, in a country where the competitive constraint imposed by private label products has proven to be particularly weak.

662. For these reasons, considered individually or together, it is concluded that, in the absence of adequate remedial action, the notified concentration – without considering the effects of a possible failure and liquidation of FIAMM – will create a dominant position on the Italian IAMs for car/LCV starter batteries and for truck/HCV starter batteries and will, as a result, significantly impede effective competition in the common market within the meaning of Article 2(3) of the Merger Regulation.

*(b) Austria*

663. In its reply, the notifying party does not comment on a number of points contained in the Statement of Objections.

664. Firstly, it does not comment on the Commission's finding that VB, FIAMM and Banner are by a large measure the dominant forces in the Austrian market, which concentrate between each other the most important "must have" brands.

665. Secondly, it does not comment on the very high share of branded products sold in Austria in relation to other European countries and the indication from the market investigation that customers do not consider private label products as good substitutes for branded ones.

666. Thirdly, it does not comment on the Commission's findings on the significant price gap between branded and private label products with the same specifications.

667. Fourthly, it only provides very generic remarks contesting the Commission's conclusion that the merger would not only bring together two of the three leading players in the IAMs, both for car/LCV batteries and for trucks/HCV batteries, but would also give VB additional control of the Bären-brand, which is one the best known brands in Austria.

668. Finally, it does not comment on the finding that the largest and strongest competitor of the merged entity in Austria, Banner, is currently capacity constrained and would therefore not have the possibility and the incentive to increase its sales in response to a price increase by the merged entity. Indeed, the notifying party indirectly confirms this conclusion by stating in another part of the reply<sup>391</sup> that Banner will increase its production capacity from 2009 onwards.

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<sup>391</sup> On the Italian IAM market, see VB's reply to the Statement of Objections, page 30.

669. Therefore, it is concluded, in line with the Commission's preliminary analysis, that the proposed transaction would make the combined entity dominant in the Austrian markets by combining FIAMM's and VB's large market shares in both car/LCV batteries (market shares of [55-65]\*% according to the notifying party and of [45-55]\*% according to the Commission's investigation) and truck/HCV batteries (combined market share of [30-40]\*% according to the parties, but of [55-65]\*% according to the Commission's investigation).
670. Additionally, the transaction would reduce the number of large players on the Austrian markets from three to two (Banner being the other). Finally, by combining FIAMM's and VB's premium brands, the transaction's impact on competition would be over and above what would result from the simple addition of market shares. Indeed the merged entity would control most of the 'must have' brands on the Austrian IAMs, in a country where the competitive constraint imposed by private label products has proven to be rather weak.
671. For these reasons, considered individually or together, it is concluded that, in the absence of adequate remedial action, the notified concentration – without considering the effects of a possible failure and liquidation of FIAMM – will create a dominant position on the Austrian IAMs for car/LCV starter batteries and for truck/HCV starter batteries and will, as a result, significantly impede effective competition in the common market within the meaning of Article 2(3) of the Merger Regulation.
- (c) *The Czech Republic*
672. In its reply, the notifying party does not comment on a number of points contained in the Statement of Objections.
673. Firstly, it does not comment on the Commission's finding that VB and FIAMM are the clear market leaders and that the transaction would lead to a dominant position, both for car/LCV and for truck/HCV batteries. By mentioning its market share, it implicitly confirms that Banner is a rather distant number three at the moment and that its market share would be only a fraction of that of the merged entity. The fact that Banner will open a production plant in the Czech Republic in 2009 does not seem relevant in this context, and certainly does not provide a counter argument to the Commission's finding that the company is currently capacity constrained.
674. Secondly, it does not comment on the role of FIAMM's brands in the Czech Republic and on the effects of their addition to VB's brands, taking into account the very high share of branded products sold in the Czech Republic in relation to other Member States and the price gap between branded and private label products with the same specifications.
675. Thirdly, it does not comment on the Commission's finding that virtually all customers who replied to the Commission's market investigation affirmed that they do not buy starter batteries from manufacturers located outside the EEA.
676. On the issue of market estimates, the reasons why it is inappropriate to translate Eurostat statistics directly into market size estimates have already been

discussed in the section on the assessment of the Italian IAMs. The same remarks apply in respect of the data on the Czech Republic.

677. More importantly, and similarly to Italy, the Commission's assessment and preliminary conclusion on the competitive situation in the Czech market in the Statement of Objections did not depend on whether the size of the reference market was that proposed by the notifying party or the one stemming from the Commission's investigation.
678. Regarding the permeability of the Czech IAMs to competition originating in neighbouring countries, the market investigation has demonstrated that the conditions of competition in different national markets are very heterogeneous even between neighbouring countries, regarding price levels (see the section on market definitions on this point), brand strength and brand awareness, distribution and retail structure.
679. The notifying party considers that the market is permeable because there are no barriers to trade and importers are free to source the products in neighbouring countries. However, it does not put forward any new evidence to indicate that prices are similar between countries or that imports significantly changed the competitive conditions within the Czech market, for example by denting the very strong position of VB and FIAMM.
680. Therefore, in line with the Commission's preliminary analysis, it is concluded that the proposed transaction would make the combined entity dominant in the Czech markets by combining FIAMM's and VB's large market shares. Additionally, by combining FIAMM's and VB's premium brands, the transaction's impact on competition would be over and above what would result from the simple addition of market shares. Indeed the combined entity would control virtually all the 'must have' brands on the Czech IAMs, in a country where the competitive constraint imposed by private label products has proven to be rather weak.
681. For these reasons, considered individually or together, it is concluded that, in the absence of adequate remedial action, the notified concentration – without considering the effects of a possible failure and liquidation of FIAMM – will create a dominant position on the Czech IAM markets for car/LCV starter batteries and for truck/HCV starter batteries and will, as a result, significantly impede effective competition in the common market within the meaning of Article 2(3) of the Merger Regulation.

*(d) Slovakia*

682. In its reply, the notifying party does not comment on a number of points contained in the Statement of Objections.
683. Firstly, it does not comment on the Commission's finding that in the car/LCV battery market the proposed transaction would allow VB to consolidate FIAMM's leadership position and become the clear market leader with a market share exceeding [45-55]\*%. In the trucks/HCV battery market, FIAMM is currently market leader with a position similar to that of Exide, while VB and Banner are smaller competitors.

684. Secondly, it does not comment on the finding that Akuma is one of the best known brands in Slovakia, as shown by the large number of respondents to the market investigation indicating it as a 'must have' brand.
685. Thirdly, it does not comment on the Commission's finding that Banner, one of the two strongest competitors of the merged entity in Slovakia, is currently capacity constrained and would therefore not have the possibility and the incentive to increase its sales in response to a price increase by the merged entity.
686. Regarding the permeability of the Slovak IAMs to competition originating in neighbouring countries, the market investigation has demonstrated that the conditions of competition in different national markets are very heterogeneous even between neighbouring countries, regarding price levels (see the section on market definitions on this point), brand strength and brand awareness, distribution and retail structure.
687. Therefore, it is concluded, in line with the Commission's preliminary analysis, that the proposed transaction would make the combined entity dominant in the Slovak markets by combining FIAMM's large market shares with VB's position. Additionally, by combining FIAMM's and VB's premium brands, the transaction's impact on competition would be over and above what would result from the simple addition of market shares. The combined entity would control an important number of 'must have' brands on the Czech IAM markets.
688. For these reasons, considered individually or together, it is concluded that, in the absence of adequate remedial action, the notified concentration – without considering the effects of a possible failure and liquidation of FIAMM – will create a dominant position on the Slovak IAMs for car/LCV starter batteries and for truck/HCV starter batteries and will, as a result, significantly impede effective competition in the common market within the meaning of Article 2(3) of the Merger Regulation.

## VIII. FAILING FIRM DEFENCE

689. As explained in the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings<sup>392</sup>, *"in assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger"*. When considering what constitutes the relevant counterfactual to the merger scenario, under specific circumstances, the Commission takes account of the likely exit of firms if the merger did not take place<sup>393</sup>.
690. In this context, "the Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the

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<sup>392</sup> paragraph 9.

<sup>393</sup> Ibidem, Guidelines, paragraph 9.

merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger."<sup>394</sup>

691. In the course of the procedure and even at the pre-notification stage, the parties have on various occasions raised the issues that the proposed transaction" does not go through, the entire FIAMM group will be forced out of the market due to its poor financial conditions. This would allegedly entail a deterioration of the competitive conditions in the relevant markets similar to or worse than the possible adverse effects that the Commission might find as a result of the proposed transaction.

**A. THE FIAMM GROUP AND ITS OVERALL FINANCIAL SITUATION**

692. The FIAMM Group is engaged in four different business areas, namely: (i) starter batteries ("FIAMM SBB"), (ii) automotive horns, (iii) automotive antennae and cables and (iv) industrial batteries (stand-by batteries).

693. FIAMM SBB division represents approximately [40-50\*]% of the sales of the group. It has been making heavy losses for several years which have affected the results of the group as a whole.

694. As regards the other divisions, FIAMM Automotive Horns Business operates manufacturing plants in Europe (Italy), in both North and South America (US and Brazil) and in Asia (China). Total sales in year 2005 amounted to EUR [...] million, less than [20-30]\*% of FIAMM Group's sales, and the business is profitable (average EBIT<sup>395</sup> over the last 3 years approximately [5-10]\*%), even if in 2005 this business' turnover, as well as EBIT, dropped significantly.

695. The Automotive Antenna & Cable Business is a niche activity (approximately [5-10]\*% of FIAMM's turnover), characterized by quite a high level of technological complexity. With a production plant in the Czech Republic and a research and development centre in France, FIAMM enjoys a significant market share with the French car producers (both Renault and PSA). Total sales in 2005 were approximately EUR [...] million. The business is profitable (average EBIT over the last 3 years approximately [5-10]\*%).

696. FIAMM's Industrial Battery Business has a certain international presence and manufacturing footprint that includes Europe, China and the US. This is the second largest FIAMM's business and is growing. The business is profitable (average EBIT over the last 3 years approximately [5-10]\*%).

697. Although the other FIAMM Group's divisions are profitable, the losses of FIAMM SBB, the main division of the group in terms of turnover, are so significant as to nullify the positive results of the other divisions. This has put in jeopardy the very existence of the FIAMM Group as a whole. According to the

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<sup>394</sup> See Guidelines, paragraph 89. Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 110. Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 114. See also Commission Decision 2002/365/EC in Case COMP/M.2314 — BASF/Pantochim/Eurodiol, OJ L 132, 17.5.2002, p. 45, points 157-160

<sup>395</sup> Earnings Before Interests and Taxes.

parties, the FIAMM Group has been in a difficult financial position for several years now (at least since 2000-2001). FIAMM SBB is the main reason for the FIAMM Group's current financial distress, as FIAMM SBB still represents [40-50]\*% of the FIAMM Group's sales and thus has considerable weight on the financial performance of the group as a whole. Altogether, despite some restructuring measures taken by the management of the company, FIAMM SBB has generated, at operating level, cumulative negative results (for this division) of EUR [...] million as regards EBIT and EUR [...] million as regards EBITDA<sup>396</sup> during the last five years (2001-2005). In 2006 the figures followed a similar negative trend (based on unaudited accounts). This is illustrated in table 17.

Table 17

<b>SBB RESULTS</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<i>SBB Sales</i>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<i>EBIT</i>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<i>EBITDA</i>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

698. Regardless of the possible causes of such a crisis of the SBB (possibly due to overinvestment, unfavourable evolution of lead prices, small revenue margins of the business and a relatively flat market demand), FIAMM SBB's very negative performance resulted in significant losses for FIAMM Group as a whole as shown in table 18.

Table 18

<b>FIAMM GROUP RESULTS</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<i>Overall sales</i>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<i>EBIT</i>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<i>Overall debt</i>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<i>Net result</i>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

699. The delicate financial position of FIAMM as a whole appears to have put in danger the commercial relationships of FIAMM with its most important OE customers (both as regards starter batteries and also as regards the other divisions' businesses) as these OE customers also assess suppliers from a financial stability standpoint<sup>397</sup>.

<sup>396</sup> Earnings Before Interests, Taxes, Depreciation and Amortisation.

<sup>397</sup> FIAMM produced in this respect letters from 2 OE-customers.

## B. THE POSITION OF FIAMM'S CREDITORS (MOSTLY BANKS AND HEDGE FUNDS)

700. During the procedure, FIAMM explained that the banks, which are among the most important creditors, are seriously concerned about its financial situation. The banks have been monitoring the financial situation of the FIAMM group since at least 2001 and FIAMM's credit position is included in the non-performing loans in the banks' ratings. This is because FIAMM has been unable to reimburse the instalments of its debts. To face this situation FIAMM and the banks negotiated and reached a Standstill Agreement in June 2004, which is supposed to last until December 2007. FIAMM shareholders committed to recapitalise the group by approximately EUR [...] million and FIAMM undertook to implement a restructuring plan. However already in mid 2005, FIAMM was in breach of this agreement as it was unable to meet the financial parameters (covenants) established with the banks<sup>398</sup>.

701. Given the critical financial situation, FIAMM had been looking for a financial partner willing to inject the required capital to implement a strategy based on the rightsizing of its starter batteries business. A formal process to this effect was started in June 2005 and a mandate was given to JP Morgan. In September 2005, JP Morgan received one non-binding letter of intent from [...]\*, [...]\*, a financial institution based in Vicenza that provides equity capital and structured finance services. In December 2005, [...] and FIAMM signed a Memorandum of Understanding providing for the injection of EUR [...] million into FIAMM's capital, which would have made [...] the majority shareholder of FIAMM<sup>399</sup>. The banks were ready to accept a EUR [...] million write off in the context of that operation. However, [...] withdrew its offer on 26 May 2006<sup>400</sup>.

702. In view of the failure of the "[...] transaction" the banks required FIAMM to present a new plan. This new plan was to be certified by an independent Expert appointed by the Italian Court of Vicenza in accordance with the Italian

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<sup>398</sup> In particular, the Standstill agreement provided for FIAMM to reach certain levels with regard to the DEBT/EQUITY and DEBT/EBITDA financial ratios and to maintain a minimum level of Equity for FIAMM. The 2005 accounts showed that these covenants were not met as the DEBT/EQUITY ratio was [5-6] while the Standstill Agreement requested the ratio to fall under [3-4]. Minimum equity level should have amounted to approximately of € [...] million, while the level was € [...] million for 2005.

<sup>399</sup> In the context of the [...] transaction, the FIAMM group carried out also a review of its ownership structure. As a result of that, at the top of the FIAMM group pyramid there are actually two companies i) the holding Pardo Spa (which has in its portfolio [90-100]% shares of FIAMM) and the sister company Elettrofin (which has in its portfolio all real estate assets – land and building - of FIAMM). Elettrofin mainly leases this real estate to FIAMM. In addition, between Elettrofin and FIAMM there is a [...] of the respective debts. In particular, Elettrofin's debts towards one creditor bank are guaranteed by mortgages on the Veronella real estate (land and building).

<sup>400</sup> The main reason for the failure of the [...] transaction was apparently the weakness of the FIAMM SBB. [...] came to the conclusion that the SBB would not have prospects to achieve a break even position before some years and would actually risk jeopardizing any development plan of the Group's remaining divisions. In the letter in which [...] explained to FIAMM the reasons for not proceeding with the acquisition plan, it is written: "... [...] [...]"

bankruptcy legislation<sup>401</sup>. The Expert's mandate is to provide the Court with an independent assessment of the viability of the restructuring plan at issue, given the pre-default situation of FIAMM, in order to best preserve the rights of the creditors and avoid the possible triggering of the "claw-back" (revocatory) action in case insolvency were ultimately declared.

703. This plan was first presented in September 2006 and foresaw the maintenance of the SBB division in the perimeter of the FIAMM Group together with a downsizing of the starter batteries operations. This plan was received negatively by the banks and by the Expert, given the impossibility to ensure a turnaround of the company in the light of the high level of debt.

704. A new plan was then proposed by FIAMM to the banks in November 2006, providing for the repayment of the outstanding debts through the sale of the unprofitable SBB division and with a business focus on the remaining cash-generating divisions (horns, antennas and stand-by batteries). The centrepiece of this new plan is the proposed transaction with JCI for the sale of the SBB assets. The Expert's findings indicated that there is no credible chance that SBB will remain in the perimeter of the FIAMM group. In the absence of the proposed merger, the Expert considered that the only possible course of action would be for the FIAMM group to immediately accede to one of the procedures foreseen under the Italian Insolvency/Bankruptcy law. This would imply cessation of the unprofitable SBB activities and possibly the sale as going concerns of the other three divisions on a standalone basis in order to repay creditors.

705. In the course of the phase-II investigation, the banks which, at that time, held the most important part of the debt<sup>402</sup> stated that, given the breach of the covenants, they were already entitled to terminate the Standstill Agreement, which in their view would determine the default of FIAMM Group as a whole. The banks indicated that they had not claimed back the debt because they expected the FIAMM group to return to a more sustainable financial position after the sale of the SBB was completed. The relative proceeds would have been used to reimburse the existing short-term credit lines that they had granted to FIAMM.

706. At least two of these banks have now transferred portions of their credit position vis-à-vis FIAMM to hedge funds (at discount) to disengage from the FIAMM Group as a client at least as regards the "unsecured" credit exposure. After the Commission sent the Statement of Objections to the parties and even after the response of the parties, FIAMM informed the Commission that two banks had sold at discount (portions of) their credit to hedge funds, while another bank was negotiating a similar deal. While the previous banks remain creditors as long as they hold "secured" credits vis-à-vis FIAMM, the unsecured credits are now held by a number of entities among which, the banks, the hedge funds and FIAMM's suppliers. Under this development, it is unclear whether the Standstill Agreement is still valid.

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<sup>401</sup> The submission of the plan to the expert has been requested by the banks as a safeguard from "claw-back action" (revocatory) which could be triggered under possible bankruptcy procedure in case of insolvency of the FIAMM Group.

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707. The position of hedge funds vis-à-vis FIAMM as a debtor may have an impact as regards the potential attitude of the creditors vis-à-vis the FIAMM group. In particular, it is unclear whether and under what conditions the hedge funds would be ready to accept any restructuring plan of FIAMM at all (even including the disposal of the SBB business to JCI).

### C. SPECIFIC CRITERIA FOR THE FAILING FIRM DEFENCE

708. Based on its practice and relevant judgment of the Court of Justice of the European Communities<sup>403</sup>, the Commission considers three main elements especially relevant in order to establish whether a "rescue merger" may be permitted (that is to say, a failing firm defence can be accepted) despite its adverse effects on competition: (i) the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another undertaking; (ii) there is no less anti-competitive alternative purchase than the notified merger; (iii) in the absence of a merger, the assets of the failing firm would inevitably exit the market<sup>404</sup>.

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<sup>403</sup> Under the Council Regulation (EC) No 4064/89 on the control of concentrations between undertakings (the "old" Merger Regulation), the Commission has only twice based a merger decision on the concept of the failing firm or "rescue merger", in case Kali und Salz/MKD/Treuhand (Commission Decision of 14 December 1993, Case No IV/M.308 - Kali- Salz/MdK/Treuhand, Official Journal L 186, 21/07/1994 p. 0038 – 0056, hereinafter "Kali und Salz") and in the BASF/ Eurodiol/ Pantochim decision (Case COMP M. 2314, BASF/Eurodiol/Pantochim decision of 11.07.2001, OJ L132, 17.02.2002, page 45 and also published on the Commission's web-site: <http://europa.eu.int/comm/competition/mergers/cases/>) Hereinafter referred to as "BASF".

<sup>404</sup> See Guidelines, paragraph 90. As regards previous case law on which the Guidelines are inter alia based: in Kali und Salz the criteria set by the Commission for the application of the rescue merger defence were the following: (a) the acquired company would in the near future be forced out of the market, (b) there is no less anti-competitive purchaser, (c) the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market. According to its judgment in Kali und Salz (Joined cases C-68/94 and C-30/95, France vs Commission. 31 March 1998), the Court of Justice found that a merger can be regarded as a rescue merger if the deterioration in the competitive structure resulting from the concentration would occur in a similar fashion even if the concentration did not proceed. According to the Court of Justice (Points 155 and following of the judgment Joined Cases C-68/94 and C-30/95.): "The introduction of this criterion (the acquiring undertaking would gain the market share of the acquired undertaking) if it were forced out of the market is intended to ensure that the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed. The criterion of absorption of market shares, although not considered by the Commission as sufficient in itself to preclude any adverse effect of the concentration on competition, therefore helps to ensure the neutral effects of the concentration as regards the deterioration of the competitive structure of the market. This is consistent with the concept of causal connection set out in Article 2(2) of the Regulation". In its Decision in BASF, the Commission indicated that the approach taken by the Court of Justice is wider than the criteria set out in the Commission's Decision in Kali und Salz. According to the Court of Justice, the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded and so a merger can be regarded as a rescue merger only if the competitive structure resulting from the concentration is expected to deteriorate in similar fashion even if the concentration were prohibited. In general terms, according to the BASF Decision, the concept of the "rescue merger" requires that the undertakings to be acquired can be regarded as "failing firms" and that the merger is not the cause of the deterioration of the competitive structure. Thus, for the application of the rescue merger, two conditions must be satisfied: (a) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking; and (b) there is no less anti-competitive alternative purchase. The application of these two criteria does not rule out the possibility of a take-over by third parties of the assets of the undertakings concerned in the event of their bankruptcy. If such assets were taken over by competitors in the course of bankruptcy proceedings, the economic effects would be similar to a take-

709. Ultimately, it is to be assessed whether the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This would arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.

710. It could be argued that at stake in this case is rather a "failing division" and not a "failing firm", since it is the SBB business which is unprofitable and would risk exiting the market, unlike the remaining divisions of the FIAMM Group. However, in view of the foregoing, it appears that the entire FIAMM Group is in a pre-default status and that the distress of the SBB business would most likely involve the entire company (that is to say, the other divisions) as well. SBB is not a separate legal entity within the FIAMM Group. Any civil law procedure aimed at liquidation or at credit restructuring (depending on the merit of the elected procedure) of the SBB assets would have to involve the FIAMM Group in its entirety.

711. Even if, under any of these civil law procedures, the other divisions of the FIAMM group could continue to operate as a going concern or could be sold to third parties, the SBB business would be likely to stop trading in any event. Therefore, whether a failing firm or, rather, a failing division is at stake<sup>405</sup> in this case, the assessment would not change.

**1) The failing firm (or division) would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking**

*(a) Introduction*

712. In the course of the phase-II investigation, the creditor banks clearly indicated that the proposed transaction is pivotal as regards the survival of the FIAMM group. Already in the context of the "[...]\* transaction" the banks were ready to write-off a significant part of their credits (about EUR [...]\* million) in order to ensure the continuity of the FIAMM Group as a whole, which indicates that there is little hope that FIAMM could succeed in restoring its viability and repaying all its debt purely through the restructuring of its various businesses. This sale to the financial investor did not go through. The creditor banks indicated that any

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over of the failing firms themselves by an alternative purchaser. Thus, the Commission in that case decided that, in addition to the first two criteria, it was necessary to establish that (c) the assets to be purchased would inevitably disappear or exit from the market in the absence of the merger.

<sup>405</sup> See also *Newcorp/Telepiù* Case COMP 2876, paragraph. 211 and seq. "As indicated by the Commission in its Decision in *Rewe/Meinl* [Commission Decision of 3 February 1999 relating to proceedings under Council Regulation (EEC) No 4064/89 (Case No IV/M.1221 - Rewe/Meinl) Official Journal L 274, 23/10/1999 p. 0001 – 0022] in a case of a "failing-division defence" and not of a "failing-company defence", the burden of proving lack of causality between the merger and the creation or strengthening of a dominant position falls on the companies claiming it. Otherwise, every merger involving an allegedly unprofitable division could be justified under merger control law by the declaration that, without the merger, the division would cease to operate. The case *Rewe/Meinl* involved a division of the *Meinl* group that was acquired by *Rewe*. The importance of proving lack of causality is even greater in the case of a claimed "failing division" [...]. Finally, it could reasonably be argued that it is possible that the buying group might have strategic reasons to keep its failing division alive even if the merger were to be prohibited.

possible further restructuring plan of FIAMM as a whole would have to involve the sale or (voluntary) liquidation of the loss-making SBB division, which is the cause of the financial distress of the group.

713. The Expert appointed by the Court of Vicenza concluded with regard to the plan of September 2006 in which the JCI transaction was not contemplated (that is to say, a situation tantamount to the JCI transaction not going through) that the most likely scenario for FIAMM was to file for one of the liquidating procedures available under the Italian legislation. While it was not excluded that the other divisions could continue as "going concerns" even in a non-merger scenario, the Expert indicated that it is very likely that the SBB division would have to be disposed of. The maintenance of this business in the perimeter of the FIAMM Group would involve a high risk for the group, bearing in mind the previous failed attempts to restore its viability, the weak prospects of the starter batteries business and the high level of exogenous elements of cost (lead), as well as the cost of financing involved.

*(b) The Statement of Objections*

714. In the Statement of Objections, the Commission expressed doubts whether the creditor banks had the incentive to force the liquidation of the company without further jeopardising their chances of recovering part of their credits in a liquidation scenario. In addition, it was still to be clarified whether, but for FIAMM SBB being taken over by another company, the SBB division within the FIAMM group would completely stop business (and be forced out of the market) even in the context of one of the possible alternative procedures to the outright bankruptcy liquidation (that is to say, under the "Concordato Preventivo" (a form of composition with creditors) or the "Amministrazione Straordinaria" (extraordinary administration, see below). This was inter alia borne out by the fact that, under "Amministrazione Straordinaria", the tangible and intangible assets of the company would be ring-fenced from possible claims of "old" creditors and the company would need to finance the ongoing activities only.

715. In particular, the Commission reached the preliminary conclusion that the notifying parties had not provided all the relevant information necessary to demonstrate that the deterioration of the competitive structure that will follow the merger is not caused by the merger, in accordance with paragraph 91 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. Therefore, at the time of the Statement of Objections, the Commission could not yet reach the conclusion that FIAMM would in the near future be forced out of the market because of its financial difficulties if its SBB division was not taken over by another undertaking.

*(c) The response of the parties*

716. In their response to the Statement of Objections the parties, in particular FIAMM in the comments annexed to the reply, contend that the Commission misunderstood the seriousness of the liquidity crisis of FIAMM. FIAMM stated that it has de facto extinguished its credit lines and has generated cash in the most recent times only through temporary measures such as the optimisation of the working capital (paying suppliers as late as possible and getting payments as soon

as possible). Therefore, in such a situation, it would not be the creditor banks asking for the termination of the Standstill Agreement (thus triggering FIAMM's liquidation), but rather FIAMM itself would have to require the application of one of the available bankruptcy procedures, if the merger would not proceed. In this context, the parties recalled the firm position of the banks, the position of the independent Expert appointed by the Court of Vicenza and the precise responsibility of the Board of Directors of FIAMM to act in the interest of creditors if the liquidity crisis becomes permanent and does not show any positive prospect of turnaround. Therefore, FIAMM contends that it is demonstrated beyond doubt that, if it were not to be taken over by another company, the entire FIAMM group would exit the market in its current form<sup>406</sup>, in that it would have to require the application of one of the available bankruptcy procedures.

(d) *Assessment*

717. Based on the information gathered by the Commission, both before and after sending the Statement of Objections, and taking into account the response of the parties, as well as other new elements, the Commission considers it likely that FIAMM (including the SBB division) will enter into one of the insolvency procedures available under Italian law, unless FIAMM SBB is taken over by another company. The banks' position is that they will not inject any new capital into the group, if FIAMM does not show perspectives of being redressed. According to the creditor banks, the Expert and FIAMM, this prospect depends entirely on the proposed transaction.
718. It does not appear likely that other banks or financial investors will be willing to provide new finance to a company with such financial difficulties as FIAMM. Given the liquidity crisis, it is plausible that the survival-time-horizon for the FIAMM group as a whole is shorter than the date of termination of the Standstill Agreement with the banks (end of 2007). FIAMM informed the Commission that by adopting some extraordinary cash-related measures, they would be able to cope with the tight financial distress until around the end of April.
719. FIAMM has reiterated that the decision to file for one of the bankruptcy procedures will have to be taken by the Board of FIAMM before being prompted by the creditors, as the CEO of FIAMM, and the members of the Board and of the Auditors risk criminal prosecution under Italian law if they allow a distressed situation to continue to the detriment of the creditors. Therefore, the crucial issue is whether there is any other available choice for the Board of FIAMM, more than whether the banks have the incentive to force FIAMM into liquidation or not.
720. Based on all the information at the disposal of the Commission it appears likely that the Board of FIAMM would file for one of the bankruptcy procedures if the merger did not go through. This is all the more likely taking into account the fact that two banks have already sold (at discount) the unsecured portion of their credits to hedge funds and a third bank is in the process of doing so. Depending on the position that the hedge funds will take as creditors, it is unclear whether the

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<sup>406</sup> See response by FIAMM to Statement of Objections, page 9-11. (Annex 1 to response by VB to Statement of Objections)

FIAMM group could nevertheless face liquidation regardless of the merger going through. Alternatively, FIAMM could be put under Amministrazione Straordinaria.

721. In any event, even if the decision to file for one of the bankruptcy procedures is ultimately not taken by FIAMM it is nevertheless likely that the SBB division will not remain in the perimeter of the FIAMM group and in the market in its current form, that is to say as a going concern, in the context of any such procedure. It is therefore concluded that FIAMM SBB – if not taken over by another company – would be forced out of the relevant markets in the absence of the proposed transaction.

## **2) There is no less anti-competitive purchase than the notified merger**

### *(a) Introduction*

722. In the course of the investigation, FIAMM submitted that it had been carrying out discussions with third parties from 2001. FIAMM has been trying to find industrial and financial partners investors/purchasers for the whole group or for parts of its business including the SBB. However, prior to the proposed transaction these attempts failed. The parties state that, despite trying hard to sell the business (to financial investors, as well as to industrial players), the only serious potential purchaser is JCI.

723. FIAMM retained JP Morgan as advisor with the objective to find a strategic partner for the group as well as to solve the problems of the SBB division in the last couple of years. In particular in 2005, while looking for a Private Equity partner, FIAMM also instructed JP Morgan to search for an industrial purchaser or a financial investor willing to purchase or to invest into, FIAMM's starter battery business<sup>407</sup>.

724. It was submitted that FIAMM and JP Morgan had contacts with competitors as well as with other companies active in the automotive business. In addition, talks were held with [...] (a leading lead producer). According to FIAMM, the only companies that showed a preliminary interest in an acquisition were [Competitor 2]\*, [Competitor 1]\* and [...]\*. As regards contacts with [Competitor 2]\* and [Competitor 1]\*, FIAMM claims that, although various alternatives were considered, covering a variety of potential strategic agreements, ultimately the end result was only a supply contract. With [Competitor 1]\*, this supply contract was also cancelled in 2005. [...] looked at the business in 2005 and eventually communicated in September 2005 that they were not interested in pursuing the opportunity. Conversations with [Competitor 3]\* apparently took place in 2005 and 2006, envisaging a possible joint venture between FIAMM and [Competitor 3]\* for the European market. [Competitor 3]\* declared that they did not want to have control of the joint venture and subsequently communicated that they were not interested in pursuing the opportunity at all.

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<sup>407</sup> Contacts took place over the years with [Competitor 2]\*, [Competitor 1]\*, [...]\*, [...]\*, [Competitor 3]\*, [...]\*, [...]\* [...]\*.

725. FIAMM submitted that the main reason for the negative outcome of those negotiations is that FIAMM SBB is not seen as an attractive business overall. It claims that FIAMM SBB is a significant business to purchase (hundreds of employees, large plants to operate, complex OE operations) mostly located in a high labour cost country (Italy), and therefore not of interest to smaller players. This is the main reason why FIAMM never seriously considered other smaller players such as Moll, Banner, MIDAC as potential purchasers for SBB<sup>408</sup>.
726. With regard to the possible acquisition of the whole FIAMM group, only the [...] seriously discussed the possibility of an acquisition. With regard to the possible sale of the starter batteries division, FIAMM stated that all the most important battery producers have been contacted. Allegedly, the business offered to all recent potential acquirers contacted was identical to the business offered to JCI/VB, namely the Veronella plant and the Avezzano plant. The Mlada plant was never on offer<sup>409</sup>.
727. In the course of the procedure in this case, FIAMM acknowledged that smaller players such as Moll, Banner, MIDAC etc. were not contacted during the previous search. The reason for not contacting them was that these players lack the financial resources to acquire a business which is three to four times larger than their own. It was submitted that this is borne out by the difficulties encountered by the parties in the negotiation (in advance of a submission of a remedy proposal to the Commission) with Banner as regards a possible acquisition of production lines representing a production capacity of [1-2] million batteries per year. This also allegedly confirms that such players were not likely acquirers of the Veronella production plant as such<sup>410</sup>.

*(b) The position of the Commission in the Statement of Objections*

728. In the Statement of Objections, the Commission reached the preliminary conclusion that, despite the parties' contention, there was no clear evidence that any previous deal considered by FIAMM concerned an operation equivalent to JCI's acquisition of only the most efficient production plant (Veronella) for starter batteries. Therefore it could not be excluded that another buyer could be found. Potential acquirers could have included those smaller starter batteries manufacturers which FIAMM neglected in its search prior to the proposed merger, such as Banner (Austria), MIDAC (Italy), Mutlu (Turkey), etc. From a competition

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<sup>408</sup> See response sent by FIAMM by email on 10 January 2007, page 7 to the Commission's request for information.

<sup>409</sup> FIAMM contends that it even proposed better deals to some interested parties than the deal offered to JCI/VB. FIAMM offered to [...]\*, [...] and [...] to purchase the starter batteries business together with the profitable horns and antennas businesses. FIAMM also offered [Competitor 3]\* to acquire the Veronella plant only (excluding Avezzano). As regards discussion between FIAMM and [Competitor 3]\*, FIAMM contends that [Competitor 3]\* was offered possibility to acquire the Veronella plant and, thereafter, of creating a JV which included the Veronella plant in its perimeter. Apparently, [Competitor 3]\* refused both alternatives as such plant was much less cost efficient than its Asian production plants.

<sup>410</sup> See response sent by FIAMM by email on 10 January 2007, page 7 to the Commission's request for information.

law standpoint, any such acquirers would represent a "less anticompetitive purchaser" than JCI<sup>411</sup>.

729. Nevertheless, the Commission also acknowledged that for these smaller players, the acquisition of the Veronella plant would represent an important addition of production capacity ([5-6]\* million units/year, almost [10-20]\*% of the OE market for starter batteries for cars / LCV and trucks / HCV and [15-25]\*% of the OE market for starter batteries for cars / LCV) and customer base (important OE clients such as Fiat, PSA, Renault, etc.)<sup>412</sup>. In this context, for an acquisition by a smaller producer to be possible and viable, the support of OE customers would be crucial. At the time of the Statement of Objections the Commission could not exclude that OE customers, particularly those sourcing from the Veronella plant, would have not been prepared to offer this support.<sup>413</sup>

(c) *The response of the parties*

730. In their response to the Statement of Objections the parties, in particular FIAMM, reiterated that the only companies that could be interested in the acquisition of FIAMM SBB were those already contacted by JP Morgan. Given the very short survival-time horizon of FIAMM and the strict line of the creditor banks as regards possible further funding of FIAMM in the interim period these companies already contacted were the only ones which could meet the standards required by, for example, one creditor bank, that is to say, that they be of equal standard to JCI, and that they offer conditions similar to those offered by JCI.

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<sup>411</sup> For example, as regards the OE market, see minute of the interview with the OE customer 9 considers selling FIAMM's battery business a good step to save other divisions. However, they would prefer to have an extra-EEA buyer for these assets. They would also prefer an existing smaller OEM supplier, like Banner. As for smaller European non-OEM suppliers, MIDAC's technical abilities for example to supply OEMs are unknown for OE-customer 9. They would therefore normally need a certification lead time of 12-18 months to introduce MIDAC into their supplier base. However, should MIDAC (or another smaller supplier) take over FIAMM's production in Veronella [...] without changing the production process, they would not need this certification and could continue with their existing orders of [0-1 million]\* batteries. [...] An existing non-OEM European battery manufacturer would therefore be their second-preferred option.

<sup>412</sup> See minute of the interview with the manufacturer MIDAC. MIDAC considers that the Veronella plant is a valuable asset with its [5-6]\* Million unit production capacity and a location close to OEMs. The cost of acquiring the plant is an important factor in determining whether there would be potential buyers. MIDAC could in principle have the financial capability to acquire the Veronella plant, but this would depend not only on the price but also on market conditions/demand.

<sup>413</sup> See minute of the interview with OE-customer 7. In the hypothetical scenario that Banner or MIDAC or another third player took over FIAMM, customer 7 would evaluate their options regarding their existing contracts but would in principle be willing to keep their FIAMM contracts without the need for new validation on the condition that the buyer acquires FIAMM's R&D department and does not make changes to the production process.

See also the minute of the interview with OE-customer 11: This OE customer states that the best solution would be to have an alternative buyer for the FIAMM starter battery division. Such buyer would guarantee the presence of a third OE supplier in Western Europe. OE-customer 11 does not at the moment have precise knowledge of an alternative possible buyer or on likely timing for an expression of interest. However, customer 11 knows that there are currently discussions in the industry and that potential buyers could express an interest.

731. FIAMM claims that the fact that it did not contact companies like Moll, Banner, MIDAC etc. is irrelevant because such players do not offer the same financial standing to the bank as JCI. In any event, there is no indication in the Commission's file that Moll would be interested. As regards Banner, the Commission's file and the informal contacts that FIAMM has had in the past, confirm that Banner is not interested in FIAMM SBB. As regards MIDAC, the only small player theoretically interested in FIAMM, the parties contended that MIDAC appears to be very prudent, since its interest in the plant of Veronella may depend on the "price" and the "market conditions" and due diligence would need to be carried out by MIDAC. In such a situation, the banks would not grant new financing to FIAMM if confronted with an offer from such player. The negative attitude of the banks is further confirmed by rumours in the market that other banks are actively trying to sell their credits to hedge funds.

732. FIAMM also reiterated that JCI, under the proposed transaction, is not only acquiring the most efficient production plant (Veronella) for starter batteries, but also all of the activities of the Avezzano plant except for the land. Since the Mlada plant has always been reserved by FIAMM to the development of its profitable stand-by batteries, the plants which may have been offered to all players contacted by JP Morgan are the Veronella and the Avezzano plants, that is to say, the same plants offered to JCI. Therefore, the parties conclude that there is no alternative buyer for FIAMM SBB outside the bankruptcy procedure<sup>414</sup>.

*(d) Assessment*

733. Based on the information in the Commission's file, especially that gathered by the Commission after sending the Statement of Objections, and the response by the parties, as well as new elements, it is not likely that a less anticompetitive purchaser for the SBB division can be found. Apart from the unsuccessful search carried out by FIAMM in the past years, an alternative buyer could not be found also more recently, that is to say, the time available to avoid entering into an insolvency procedure under Italian law. Possible discussions of an acquisition by any small competitor (Moll, Mutlu, Banner, MIDAC) would have to start before the start of any liquidation process under bankruptcy or other procedures for FIAMM, as the SBB would be likely to cease operating. As mentioned, the support of OE customers (even from a financial viewpoint) was considered to be necessary to sustain the efforts of the potential buyer.

734. No alternative buyer has manifested any concrete interest, and no potential support from OE customers has materialised. The Commission itself sought to further verify whether in the market there would be alternative players interested in taking over the SBB business or at the least the Veronella plant. In this context, one small competitor MIDAC manifested an interest in acquiring some of the assets of the Veronella plant in the course of a liquidation procedure, but not the SBB division as a going concern or the Veronella plant as a going concern.

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<sup>414</sup> See Response by FIAMM to Statement of objections, page 11-13. (Annex 1 to Response by VB to Statement of objections.

735. Considering the financial situation of FIAMM, neither FIAMM nor the banks or other creditors are likely to finance the company during the uncertain time necessary for a potential third party buyer to materialise and any alternative "new" sale price would not necessarily resolve the group's liquidity crisis. In addition, given the lack of liquidity at FIAMM group level and the significant operating losses of the SBB division, it is most unlikely that new creditors will accept to fund a long-standing unprofitable business such as the SBB division, should FIAMM enter into one of the available procedures under Italian bankruptcy law.

736. The Commission therefore concludes that it appears more likely than not that there is no less anti-competitive purchase for the SBB business than the notified merger

**3) In the absence of a merger, the assets of the failing firm would inevitably exit the market**

*(a) Introduction*

737. In the first phase investigation it was submitted that the CEO of FIAMM had declared to the Board that with the best possible management of the financial resources and a tight control on outlays, the company could reasonably meet its commitments only up to the end of February/March 2007. In addition, it was stressed that based on the Italian legislation (Article 217 (1) (4) of the Italian Bankruptcy Law), it is a criminal offence to maintain the activity of a company which is evolving towards a situation of insolvency<sup>415</sup>. FIAMM's management would have no alternative but to file for a bankruptcy procedure if it appeared that the notified transaction was unlikely to be completed. FIAMM therefore stressed that the critical situation had become much more pressing compared to the situation described by the parties during the phase-I investigation.<sup>416</sup>

738. According to information submitted later on in the procedure, FIAMM would be able to stretch the survival timeline until end of April/beginning of May, due to the adoption of extra-ordinary measures. In addition, a possible agreement was under discussion between FIAMM and some hedge funds as regards the healthy businesses of FIAMM (stand-by, horns and antennas). According to the most recent information from FIAMM, prior to the petition of Concordato Preventivo

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<sup>415</sup> See response sent by FIAMM by email on 10 January 2007 to a Commission's request for information. The situation has been illustrated to the board of directors of FIAMM by its President, at the meeting of December, 22nd 2006). The minutes of the Board's meeting read as follows: [...]\*.

<sup>416</sup> See response sent by FIAMM by email on 5 October 2006 to a Commission's request for information, page 9. The parties stated that "In case the VB transaction does not take pace, FIAMM will have to obtain new financing from the banks in order to proceed with its operations. [...] In such a context, it is unlikely that the banks will agree to finance the liquidation of FIAMM SBB's operations, since this would lead to a further increase of FIAMM's debt and a reduction of assets and turnover. In addition the liquidation of the SBB division would most likely bring in proceeds significantly lower than the book value of such division's assets, thus causing an erosion of the Group's equity that would by itself compel the Directors to call for a further substantial increase of capital (at least € [...]\*) or to file for bankruptcy." [...] Thus, it is to be feared that, absent the contemplated VB transaction, it is the whole FIAMM Group which could face liquidation due to the situation of FIAMM SBB. A scenario providing for the "managed" liquidation of FIAMM SBB by the FIAMM Group appears now quite remote. [...].

(composition with creditors), FIAMM would rent out ("affitto del ramo d'azienda") all of the businesses other than the SBB division to a Newco to be created between the main shareholder of FIAMM (Dolcetta family) and two hedge funds. The monthly rent fees paid by this Newco for the "affitto del ramo d'azienda" would be used by FIAMM to pay the creditors under the Concordato Preventivo. As regards of SBB, in the event of a negative decision by the Commission on the proposed transaction, it would have to be liquidated in order to facilitate the agreement of creditors to the Concordato Preventivo.

739. Regardless of these latest developments, there would be two alternative possibilities in this respect: (i) the outright declaration of bankruptcy from the Court of Vicenza; (ii) the accession of FIAMM to one of the "softer" procedures, namely the "Concordato Preventivo" (composition with creditors) or the "Amministrazione Straordinaria" (under Legge Marzano or Prodi-bis). These two "softer" procedures would, under certain circumstances, offer (although in different ways) the possibility to avoid the liquidation of the most profitable businesses of the group (the other three FIAMM divisions) and to maintain a FIAMM Group alive with the disposal of the SBB assets<sup>417</sup>. As it will be explained in further detail below, it is unlikely that the SBB division could continue as a going concern under any of the two applicable "softer" procedures.

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<sup>417</sup> As regards Concordato Preventivo: FIAMM has to request the Court of Vicenza to enter into Concordato Preventivo. This procedure avoids the declaration of insolvency and the present Board remains in place under the control of the Court (through the appointment of a judicial commissioner who shadows the Board of directors of the company). The unsecured creditors are paid in proportion of their credit according to a plan which is to be proposed by FIAMM (and certified by an expert). The unsecured creditors have to vote in favour of the plan as proposed by FIAMM. Privileged creditors have to be paid in full. Theoretically the prosecution of the activity of the company is possible for all of its divisions (including SBB), but given the severe liquidity crisis, FIAMM has all interest in disposing at the earliest the SBB division, otherwise its repayment plan risks being vetoed by the unsecured creditors. The repayment plan (voted in favour by the creditors) has to be homologated by the Court of Vicenza within 6 months from the petition of Concordato Preventivo by FIAMM. A postponement is possible for other 2 months. Liquidating activities would have to start after that and will have to ensure the obtaining of the best price for the assets sold (through kind of tenders), unless the Concordato Preventivo is done through sale of assets under Article 160, lett a) of the Italian bankruptcy law. Liquidating activities can anyhow start sooner if the company admitted to the procedure is authorized by the judge to dispose some assets (in the interest of the procedure and of creditors).

As regards Extraordinary Administration under Marzano Law: FIAMM has to request admission to "amministrazione straordinaria" under Marzano Law to the Minister of Productive Activities and in parallel request the Court of Vicenza to declare the insolvency of the FIAMM group. If the subjective requirements provided by the Marzano Law are fulfilled, the Minister of Productive Activities will admit FIAMM to the procedure and will appoint the extraordinary commissioner which will replace immediately the Board of FIAMM. This can be done in a rather quick period of time. The extraordinary commissioner has to present a restructuring plan to the Minister within 6 months of its appointment. A postponement is possible for further 3 months. Before this plan is presented, upon request by the extraordinary commissioner, the Minister can authorize disposals of assets in the interest of the restructuring of the company. The restructuring plan can also foresee the repayment of creditors in proportion of their credits. The restructuring plan must be achieved within 2 years of authorization. If the restructuring plan is refused by the Minister, then the extraordinary commissioner can propose a disposal plan to be achieved within two years. If this also is not feasible, the procedure converts into bankruptcy. Possible liquidating activities would have to follow stricter public sale rules ("procedura di evidenza pubblica"). Similar rules apply to the traditional Extraordinary Administration under the Prodi-bis law, which is however open to a wider class of undertakings, can also be initiated by other subjects and may take longer to put in place.

740. In this context, it is noteworthy that the estimated value of the liquidation proceeds of the SBB assets is in the region of EUR [40-50]\* million (including working capital, tangible and intangible assets, minus debts). As this appears to be a rather high liquidation value (not very far from the price that JCI is prepared to pay for the acquisition) the Expert suggested that the Court would not be likely to authorize the official in charge of the procedure (whatever it were to be) to continue the SBB business. This conclusion would a fortiori be valid if the full bankruptcy procedure was to be applicable to the entire FIAMM Group (involving also the three remaining profitable divisions).

*(b) The position of the Commission in the Statement of Objections*

741. In the Statement of Objections the Commission could not reach the conclusion that, but for the merger, the SBB division within the FIAMM group would completely stop business and exit the market even in the context of one of the possible alternative procedures to the outright bankruptcy liquidation (that is to say, under the "Concordato Preventivo" or the "Amministrazione Straordinaria". This was because these procedures might allow the entire undertaking, including its SBB division, to continue its activity, since during the procedure, the company's capital and assets are somewhat ring-fenced and "old" creditors are prevented by law from triggering lawsuits vis-à-vis the company in order to recoup their past credits. Under these circumstances the SBB assets would not be forced out of the market and would continue as a going concern.

*(c) The response of the parties*

742. In their response to the Statement of Objections the parties, in particular in the comments submitted by FIAMM, stressed that it cannot be taken for granted that any FIAMM business (even the viable ones) will be kept operating by FIAMM or by a third party further to the acceptance of a Concordato Preventivo by FIAMM's creditors or FIAMM's admission to Extraordinary Administration under Legge Marzano by the Minister. All the banks confirmed that a continuation of activities of a FIAMM division would require the management (or the Commissario appointed by the Minister) to find the financial resources (cash) to pay the suppliers, workers, etc. of such division.

743. The banks have confirmed that the granting of "Esercizio provvisorio" (allowing the prosecution of the activity as going concern) is not current practice under bankruptcy procedure in Italy either for single divisions or for the entire group. In any event, the company would have to search for a bank willing to finance the business during the transitional period.

744. It was underlined that any continuation of one or more divisions of FIAMM would require new financing from the banks; under the Marzano law procedure the Commissario appointed by the Minister would have to convince the banks that they may have an interest in increasing their financial exposure vis-à-vis FIAMM in order to maximize the future amount of payment that they will receive. The parties stated that the more activities the FIAMM management (or the Commissario) proposes to keep ongoing, the more finances will be required and the more difficult it may be to convince the banks to accept to finance the maintenance of the activities.

745. Therefore, FIAMM claimed that it was demonstrated beyond reasonable doubt that the fact that FIAMM SBB will stop operating if the notified transaction is vetoed by the Commission does not depend as such on the type of procedure which will be applicable to the FIAMM Group as a whole. In addition, according to FIAMM, in the absence of the merger, creditors are unlikely to draw any benefit from pursuing FIAMM SBB (in the face of the cash-burning nature and high liquidation value of SBB) and the FIAMM management has every interest in proposing to the Court of Vicenza a Concordato Preventivo which excludes the continuation of SBB (to have a higher chance of getting approval from the creditors).

*(d) Assessment*

746. Based on the information gathered by the Commission, both before and sending the Statement of Objections, and the response by the parties, as well as on new elements, it is to be concluded that FIAMM would probably file for, or be admitted to, one the procedures available under the Italian bankruptcy legislation if the proposed transaction were not to proceed. In addition, under any of the procedures available under Italian bankruptcy law, it seems plausible that, in the absence of the merger, the SBB division will stop trading and will not continue as a going concern.

747. This is because, while it is true that under the relevant bankruptcy procedure the "old" creditors cannot claim the repayment of their credits, nevertheless the continuation of the activities of the SBB division (as well as of the other divisions of FIAMM) would require the FIAMM management or the official in charge of the relevant procedure to find financing for the operations. Based on the information available it is unlikely that a bank would provide new liquidity for the SBB division under either Concordato Preventivo or Extraordinary Administration (under Legge Marzano or Prodi-bis), given its existing heavy losses at operating level. The granting of new liquidity in order to allow the prosecution of the activity of the SBB division would be contrary to the interests of creditors (the banks and any other new creditors, such as the hedge funds, or the suppliers of FIAMM) given the current and foreseeable perspective of FIAMM group (and in particular the perspective of the SBB division on a standalone basis).

748. Given the high level of working capital, and tangible and intangible assets of the SBB division, new liquidity for the group could be found by disposing as soon as possible of the liquid assets of SBB in order to fund the other divisions of the group and allow the prosecution at least of their activities<sup>418</sup>. Therefore, given the severe liquidity crisis of FIAMM, it is likely that under both Concordato

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<sup>418</sup> The timing of the liquidation can vary depending on the procedure elected: normally it could be no short than 8-12 months, not necessarily including liquidating activities, which are more flexible under the Concordato Preventivo, compared to Extraordinary Administration. In any event, it should be borne in mind that under both Concordato Preventivo and Extraordinary Administration (under Marzano Law or Prodi-bis law) the disposal of the SBB assets can even occur quite quickly: in both procedures the law allows, under Concordato Preventivo, the CEO of the company with the supervision of the Commissario Giudiziale or, under Extraordinary administration, the Commissario Straordinario to request authorization to sell assets of the company. This authorization must be given by, respectively, the Court (under Concordato Preventivo), by the Ministry of Economic Development (under Extraordinary Administration).

Preventivo and Extraordinary Administration (whether under Legge Marzano or under Prodi-bis Law) the SBB would stop business and be liquidated unless new financing is found (which is very unlikely). This is a fortiori the case under outright bankruptcy<sup>419</sup>.

749. While the SBB division will probably stop business and/or, in any event, will not be sold as a going concern in all available procedures (including bankruptcy), individual assets of SBB will not necessarily exit the market in both the softer procedures and in bankruptcy. These assets (machinery, production lines, brands) could be purchased by smaller producers (such as MIDAC) in the course of the liquidation process and could be brought back to the market with some delay (which may result from the liquidation process plus time needed for the buyer to adjust these assets to its own plant and make them productive again). JCI could also theoretically purchase some of these unproductive assets in the course of this liquidation process.

750. Therefore, the information provided by the parties *does not allow the Commission to conclude* that – in the absence of the merger – *all of the assets* of FIAMM SBB would *inevitably* exit the market.

751. The overall criterion for assessing whether "an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm" is whether the proposed transaction has to be considered to be the cause of the significant impediment of effective competition. This requires a comparison to be made between the "merger scenario" and the "liquidation or failed-firm scenario", that is to say, even if not all of the three criteria regarded as especially relevant for the assessment of the 'failing firm defence' are satisfied, the Commission has to take due account of the concrete likelihood that FIAMM would enter into one of the liquidation procedures if the merger does not go through, and therefore has to assess the effects of such liquidation in the context of the appropriate merger counterfactual. In order to conclude that the merger is compatible with the common market, it is necessary to establish – separately for each of the relevant markets for which a significant impediment of effective competition would occur due to the "merger scenario" – whether the likely outcome(s) of the "liquidation- or failed-firm-scenario" would produce a deterioration of the competitive structure in the market to a similar degree compared to the merger.

752. Since the proposed transaction essentially has a competitive impact on two different relevant product markets (OE market, IAM), in the following section this assessment will be done separately for these two relevant products markets.

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<sup>419</sup> FIAMM is in fact considering to file for Concordato Preventivo even before any decision by the Commission concerning the merger. This information has been provided in the course of a meeting with the Commission on Friday 2 March, 2007.

#### 4) Likely effects of the "failed-firm scenario" (SBB liquidation) on the competitive structure of the relevant markets concerned

##### (a) Preliminary remarks

753. The parties (FIAMM in particular) have described the possible effects of the liquidation procedure in various ways<sup>420</sup> during the procedure. The parties affirmed that the most striking effect would be a disruption of supply for both OE and IAM customers, which would be even worse than the possible adverse effects arising from the JCI transaction. OE clients in particular would have to find alternative suppliers and it would be difficult for a new owner of the assets to re-develop a viable business out of them.

754. According to FIAMM, the individual SBB assets (sold in pieces and without goodwill) are unlikely to be of interest for potential acquirers, since two of the three FIAMM SBB plants are obsolete (Mlada and Avezzano). Only the Veronella plant could be purchased, but not as a going concern. In this respect, FIAMM stated that the land and buildings of Veronella are burdened with mortgages in order to guarantee the debts that Elettrofin (the FIAMM group company which formally owns Veronella) has vis-à-vis one principal creditor bank<sup>421</sup> with a FIAMM guarantee. In addition, the production plant in question is based in a high cost country (both for labour and energy costs). Thus, FIAMM affirms that it may be difficult to sell even this asset (located in Italy) in the OE market and that it

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<sup>420</sup> See Memorandum from FIAMM sent by email on 21 September 2006, page 9. This is a first pre-notification memorandum, in which the parties described such possible effects of FIAMM SBB exiting the market in the following fashion: "The effects of the FIAMM SBB assets exiting the market will be a sharing of FIAMM's market shares between the acquirer VB and its leading competitor Exide, due to the multi (at least dual) sourcing policy of the OE buyers in Europe and a similar tendency witnessed in the IAM market. Banner (and other smaller competitors) are also likely to benefit from some FIAMM volumes especially from OE with more than two suppliers. The notifying parties expect that VB will lose a significant part of FIAMM's starter battery business to its competitors. It is their expectation that the market shares that VB will gain through the proposed concentration will, at least in the medium term, be very similar to the market shares that VB would gain if FIAMM SBB were to exit the starter batteries market. If not taken over by VB, FIAMM SBB (and the whole FIAMM Group) is very likely to be subject to a bankruptcy procedure. The effects of the latter on the market will be similar to the effects of the transaction as described above". This memorandum continues in the following way: "[...] Thus if FIAMM SBB's assets are liquidated, the OE business will not survive such a procedure. OE manufacturers will immediately switch to alternative suppliers. Clearly, the SBB constructors which will benefit from that switching will mainly be JCI/Bosh/VB and Exide, as well as some of the smaller competitors, according to a scenario which will be more or less identical to the one deriving from an acquisition of FIAMM by VB. As regard to the IAM business a similar scenario is likely. The large retail chains and the wholesalers which supply smaller outlets will cease to procure batteries from FIAMM. This will be rendered particularly easy due to the lack of customer brand loyalty in this market (as recognised by the Commission in its past decisions). Again, the leading players active on the market (and the far east producers which exports to the EU) will benefit from such switch. Thus the effects will be the same as in the case the transaction takes place. However, from the perspective of FIAMM SBB's customers, a liquidation of FIAMM SBB would have serious disadvantages that can be avoided in case of an acquisition by VB. In particular, the discontinuation of FIAMM SBB's activities could lead to costly disruptions of supplies and quality problems. In summary, the market conditions for consumers therefore would be more favourable or at least no worse after the proposed concentration than following the FIAMM SBB's exit from the market".

<sup>421</sup> Land and building in Veronella have a book value of approximately € [30-40]\* million, while the mortgage is of approximately € [20-30]\* million.

would, in any event, be too big for any smaller new entrant. However, in its responses to the Commission's request for information, FIAMM recognised that these SBB assets would not necessarily exit the market taken individually<sup>422</sup>.

**(b) OE market**

755. For the OE market the competition concerns raised by the proposed transaction are structural in nature. The Commission concluded in the Statement of Objections that (i) the notified transaction would remove a strong competitive constraint and significantly increase the concentration level of the OE market for starter batteries for cars / LCV and would in addition remove a significant competitive constraint from the OE market for starter batteries for trucks / HCV; (ii) following the merger, the ability of OE customers to switch to alternative suppliers would be limited, in particular due to the lack of significant overcapacity and the existing barriers to expanding capacity and supply; (iii) significant barriers to entry in addition render swift market entry of new suppliers (potential competitors) unlikely; and (iv) the detrimental effects on competition resulting from the merger are – mainly due to the lack of sufficient supply alternatives for OE-customers – not likely to be counteracted by the alleged countervailing buyer power of OE-customers.

756. The Commission considers that the "*failed firm scenario*" can only be assumed to result in at least the same "*deterioration of the market structure*" in the OE market if the liquidation of FIAMM SBB would have similar or the same structural effects, in particular (but not exclusively) as regards (i) the ability of OE customers to switch to alternative suppliers (mirrored by the ability and incentive of alternative suppliers to expand capacity and supply in the OE market), and (ii) the ability and incentive of potential competitors to enter the OE market (taking into account the existing barriers to entry).

*(1) Assessment as set out in the Statement of Objections*

757. At the time of the Statement of Objections, the Commission questioned whether or not the liquidation of FIAMM SBB business would give the possibility

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<sup>422</sup> See response by FIAMM sent by email on 5 October 2006 to a Commission's request for information page 11 *passim*. In essence, FIAMM state the following: the remaining assets of the SBB Division mainly consist of: i) working capital (Accounts Receivable and Inventories) ii) fixed assets (Land and Buildings and Plant and Machinery); iii) intangible assets (Brands). The book value of accounts receivables is in the region of € [84-85]\* million and represents the most valuable asset of the division. According to FIAMM it should not be a difficulty to sell that asset to financial institutions for recovery in due time even though in a bankruptcy situation those credits would clearly have to be transferred at a significant discount on face value. As regards plants and machines, according to FIAMM the most likely interested party would potentially be an East Asian producer, as European ones would allegedly prefer brand-new machinery to used ones. Some of the brands of FIAMM SBB could also find an acquirer. As a matter of fact, these FIAMM brands will not be associated with any kind of goodwill. See FIAMM submission page 11.

In its response submitted on 8 January 2007, page 12 in response to a Commission's request for information, JCI takes the same stance, pointing out that European manufacturers are generally not interested in acquiring used machinery. Used equipment from another manufacturer would often be incompatible with existing own equipment and, in any event, would require additional know-how as regards its use and maintenance. The integration of used equipment would cause additional maintenance costs, increase the complexity of the plant, in particular as regards spare parts, and would reduce the efficiency of the plant.

to new entrants or existing competitors to increase their competitive position in the OE market through the acquisition of some of the FIAMM SBB assets made available under the liquidation process. Tangible assets (production lines, machinery) could probably be taken over in the medium term as part of the liquidation procedure. Customers would be dispersed to other players. In such circumstances, the Commission concluded that there might be a kind of trade-off between likely short-term adverse effects of the FIAMM liquidation versus a possible medium or longer-term restoration of better conditions of competition through the stimulating effect of the availability of assets in the liquidation process and the corresponding impact on the ability and incentive of alternative suppliers to enter / expand in the OE market.

758. In particular, the Commission considered that: (i) the ex-FIAMM customer base would be dispersed to other manufacturers, most likely the leading ones (JCI and Exide) which would acquire the relative market share; (ii) tools and machinery could be acquired by other competitors which could profit from the discounted liquidation prices in order to boost their capacity (to the extent that this is in line with their business plans).

759. In this respect FIAMM stated regarding plant and machinery that "[t]he most likely interested party would potentially be East Asian [producers], as European producers are generally not interested in used machinery"<sup>423</sup>. However, the Commission had been in contact with some of the smaller European suppliers, and some of those had manifested an interest in buying tools and machineries from FIAMM, even in a liquidation process<sup>424</sup>. As regards brands, the market investigation indicated that in the OE market brands are of much less value (compared to the IAM for instance), since the starter batteries are to some extent "anonymous" components in the final product sold to the end consumer (the car/truck).

760. Nevertheless, the Commission noted in its Statement of Objections that even if the production lines and machinery could conceivably return to the market in the medium term (after being acquired in a liquidation procedure), this did not exclude the possibility that harm to customers would be caused in the short term.

761. In this context, account was taken of the fact that several OE customers mentioned as negative effects in a failed-firm situation the disruption of supply.

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<sup>423</sup> See response by FIAMM sent by email on 5 October 2006 to a Commission's request for information page 11. JCI had taken a similar stance as regards European manufacturers and has put forward that dismantling, transportation and re-installation of the equipment would in any event be difficult and expensive and would be such that third parties would not find it attractive to purchase SBB production equipment or machinery even in a liquidation process. See JCI's response submitted on 8 January 2007 in response to a Commission's request for information, page 12. JCI also provides a description of FIAMM's machinery and equipment in the Veronella and Avezzano plants, and the supposed difficulties that potential purchasers of this equipment would face (Annex 15 to the mentioned response). This is an assessment done by JCI of the feasibility of a transfer of machinery and equipment from Veronella and Avezzano presumably to its own plants.

<sup>424</sup> See minute of the interview with MIDAC. In particular, MIDAC appears to be interested in acquiring both brands and machinery should FIAMM go into liquidation. Although ideally, OEM customer orders would be part of the deal, they would be interested in acquiring assets and brands even without guaranteed OEM orders.

Most of FIAMM's OE customers which were contacted in the phase-II investigation indicated that in the short term they would fear a potential disruption of supply as much as or even more than a potential price increase post-merger<sup>425</sup>. This is because demand for OE batteries is rather inelastic, and car makers cannot afford to run the risk that their car production is jeopardised because of the lack of an essential component such as the starter battery. Even in a failed-firm situation, a price increase could have occurred in any event, in addition to the disruption of supply, if a capacity shortfall took place due to the withdrawal from the market of the [5-6]\* million units/year that used to be shipped from the Veronella plant. At the same time, the Commission concluded that OE customers would – at least to a certain extent and limited by the ability and incentive of alternative suppliers to expand in / enter the OE market – probably have assumed appropriate initiatives in order to stimulate new suppliers and reduce the importance of adverse scenarios.

*(2) The response of the parties*

762. In its response to the Statement of Objections, FIAMM contested that a possible negative decision could open the door to a scenario of entry of new players. In this regard, it was submitted that the high level of integration and automation of the equipment at Veronella would impede the use of any piece of equipment in another plant by any other player, even if acquired in liquidation. Therefore, only the acquisition of the entire Veronella plant from the liquidation would be envisaged as a tool to new market entry<sup>426</sup>. In any event, as the Veronella plant is capital intensive, an acquisition of the entire plant would require the buyer to make significant investment. In particular, on top of the pledge over the land and buildings, to be repaid, the buyer would also need to invest in re-building the working capital of the business previously generated by Veronella plant. In addition the buyer would have to assume the costs involved in restarting the plant after the period of inactivity.

763. FIAMM in addition provided the view that even "if a battery producer succeeds in using some equipment (e.g. an assembly line) at its plant, this would not lead to a rapid increase of supply for OE customers since this producer would have to obtain a new certification for the new production lines using these equipments"<sup>427</sup>. FIAMM furthermore claims that – if not carefully maintained – at least some parts of the production plants will become difficult to use or require heavy maintenance operations before being used again. In this regard, FIAMM specifically for example refers to (i) the risk of the creation of "crusts" due to chemical reactions in the equipment used for the production of the paste which is

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<sup>425</sup> See responses to phase I and phase II questionnaires (in particular response to question 25 of the questionnaire to OE-customers dated 19.12.2007) and agreed minutes of the conference call with OE-customers 1, 7, 9 and 11.

<sup>426</sup> According to FIAMM even that should not be exaggerated since any third player wishing to enter the OE market would be better off by building/acquiring a "greenfield" plant for example in Eastern Europe, than acquiring Veronella, which is located in a high labour-cost country etc. See Response by FIAMM to the Statement of Objections, page 21-22. (Annex 1 to Response by VB to the Statement of Objections)

<sup>427</sup> Response by FIAMM to the Statement of Objections, p. 4 (Annex 1 to Response by VB to the Statement of Objections).

put on the plates of a battery, (ii) the risk of "corrosion" for machinery which contains acids, and (iii) the risk of damage due to the melted metal remaining in some parts of the machinery<sup>428</sup>.

(3) *Assessment*

764. Based on the information gathered by the Commission both before and after sending the Statement of Objections, and the response by the parties, as well as new elements, the Commission has sought to estimate the likely effects of the liquidation of FIAMM's SBB division on competition in the marketplace. In this regard, it is important to clearly differentiate between (i) the short-term effects of the stoppage of production and supply of OE starter batteries by FIAMM SBB in the event of it entering into liquidation on the available capacity in the market and the quality of the production assets of FIAMM, and (ii) the effects of the liquidation on the structure of the markets for OE starter batteries, in particular on those structural factors which are relevant for the assessment of the ability and incentive of alternative suppliers to expand in / enter the OE market, and thus on the likelihood that any short-term negative effects ("scarcity of supply") will be reduced or removed.

(i) **Short term effects of the liquidation of FIAMM SBB on available capacity and the quality of FIAMM's production assets**

765. The liquidation of FIAMM SBB would give rise to the exit of SBB as a going concern and a short-term reduction of capacity in the market. Around [50-60]\*% of the Veronella plant's capacity (production in 2005: around [2-3]\* million OE starter batteries for cars / LCV or [10-20]\*% of the market) is currently used for OEM supplies for starter batteries for cars / LCV. The current spare capacity readily available in the market is around [10-20]\*%, which is rather limited compared to the total OEM supplies of FIAMM. The production capacity of the Mlada plant and the Avezzano plant also has to be considered. According to the data submitted by FIAMM, the Avezzano plant and the Mlada plant, which are both certified by at least one OE customer, provide a total capacity of [3-4]\* million starter batteries (Avezzano: [1-2]\* million; Mlada: [2-3]\* million). FIAMM furthermore concentrated its production of starter batteries for trucks / HCV in the Avezzano plant (production of truck / HCV batteries in 2005: [0-1 million]\* units; production of car / LCV batteries in 2005: [1-2]\* million units) whereas the Mlada plant is more focused on starter batteries for cars / LCV (production in 2005: [2-3]\* million units). The Mlada plant however in the past also produced starter batteries for trucks / HCV (for example, in 2004, roughly [...] units) and – according to the information submitted by FIAMM – *"in Mlada, the assembly lines could handle a much higher number of truck / HCV batteries (appr. [0-1 million]\*)"*<sup>429</sup>.

766. In the course of the Commission's market investigation, OE customers expressed serious concerns about the effects of the "capacity reduction" that a

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<sup>428</sup> See Response by FIAMM to the Statement of Objections, p. 21 (Annex 1 to Response by VB to the Statement of Objections).

<sup>429</sup> FIAMM's submission dated 8.1.2007, p. 10.

liquidation of FIAMM could entail. Some even fear a serious disruption of supply. Other suppliers consider the effect very similar to a price increase likely to follow post-merger<sup>430</sup>.

767. Some OE customers stated that they will have to adopt some supplementary "contingency plans" and find possible temporary solutions to mitigate the effects of this "capacity gap" and avoid stopping their own production of cars should this be at risk (through, for example, imports from battery suppliers of other companies within their own group in other locations in the EEA/world). Switching their supplies to non-certified IAM manufacturers is considered much less likely, due to quality reasons as well as other technical issues, such as the need to perform a durability testing (endurance) of automotive batteries, which is quite important and time consuming<sup>431</sup>.

768. Given the inelastic demand of the OE customers, it is likely that the "capacity gap" in question would mainly be filled in the short term by existing (and already certified) market suppliers who are likely to ask for price increases. The players with most current capacity are Exide and JCI. Nevertheless, the "capacity gap" could also be filled partially by smaller competitors to the extent that they are certified by OE customers. One OE customer contacted recently has roughly estimated that it expects a price increase of around [15-25]\*%.

769. It is possible that some of the production assets of FIAMM SBB could be bought by some smaller producers in the liquidation process and would be brought back to the market in a productive fashion again. Depending on the liquidation procedure in place (Concordato Preventivo, Amministrazione straordinaria under Legge Marzano, or Prodi-bis, outright Bankruptcy this "re-entry" would occur after some period of time. This period highly depends on whether sales of assets take place in the short term (which is possible in the context of Concordato Preventivo or under Extraordinary Administration) or after the considerable period involved in a bankruptcy procedure.

770. FIAMM in general contests that production assets currently included in its production plants would be available for other suppliers, in the event of a liquidation of FIAMM SBB, to be used in the OE markets mainly due to the fact that (i) the high level of integration and automation of the equipment in the Veronella plant would impede the use of any piece of equipment in another plant by any other player, and (ii) at least some parts of the equipment will become difficult to use or require heavy maintenance operations before being used again. The Commission considers that neither argument is convincing.

771. First, FIAMM only claims that the high level of integration and automation of the equipment in one of its three production plants for OE starter batteries (the Veronella plant) impedes the use of any piece of equipment in another plant by any other player. Accordingly, FIAMM does not exclude that production assets

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<sup>430</sup> See agreed minutes of conference calls with OE-customer 7 held on 25.1.2007 and 8.3.2007 and with OE-customer 11 held on 28.2.2007 and OE-customer 1 held on 1.3.2007.

<sup>431</sup> See agreed minutes of a conference call with OE-customer 9 held on 28.2.2007.

currently included in its two other production plants (located in Avezzano and Mlada Boleslav can be used by other players in their production plants. These two plants currently include production equipment for the production of roughly [3-4]\* million starter batteries, encompassing starter batteries for cars / LCV as well as starter batteries for trucks / HCV.

772. Secondly, it cannot be concluded that – based on the information gathered in the course of a plant visit in Veronella<sup>432</sup> and the information submitted by FIAMM on the production process and the layout of this plant<sup>433</sup> – due to the level of integration and automation, the different parts of the equipment currently included in the plant cannot be transferred to and effectively used in a production plant of another supplier.

773. The main steps in the production of starter batteries in the Veronella plant are not physically integrated. On the contrary, the whole production process is "interrupted" several times by manual handling and interim stocks / warehousing and each production step encompasses a different number of parts of equipment (see also the layout-structure of the plant presented below).

774. As regards the production of the inputs needed for the production of plates (metal coils to produce the grids, lead alloy paste to cover the grid), the Veronella plant includes **two coil production lines and 4 mills for the production of the paste** which are located in an adjoining room to the grid production line. There is no automated link between coil and grid production, the two lines are entirely separate. The same is true for the paste production. These two inputs therefore have to be manually handled and fed into the grid production process. As regards grid production, there are **six expanded metal lines** which are all separate from each other. Following grid production and the pasting of the grid, the plates have to go through curing in ovens, which is again a separate operation and requires manual handling between the lines on both ends of the line. Following curing, the plates are again manually fed into the assembly lines in an adjoining room of the building which also houses the equipment for formation / charging. There are **five assembly lines** which are again entirely separate from each other. The last production step (before packaging and labelling), that is to say, the formation / charging process, has no automated link to the previous production steps. The equipment for charging / formation encompasses **80 cooling tanks grouped into five charging modules**.

775. Furthermore, according to the information submitted by FIAMM<sup>434</sup>, the layout and capacity of the Veronella plant have changed several times in recent years due

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<sup>432</sup> The site visit took place on 15 February 2007. It included a detailed presentation of the layout of the production plant by representatives of FIAMM as well as a guided inspection of the plant facilities. Following the visit, FIAMM submitted the information material presented during the visit to the Commission (see presentation "Veronella plant" handed over during the site visit on 15.2.2007; document "layout of Veronella plant" submitted electronically on 16.2.2007).

<sup>433</sup> See FIAMM's submission dated 18.1.2007, p. 13 et seq.; FIAMM's submission dated 8.1.2007, p. 8 et seq.

<sup>434</sup> FIAMM's submission dated 8.1.2007, p. 9.

to the addition / removal of production equipment. In this regard FIAMM states: *"During the period 2001 – 2006 there have been some changes in the installed capacity of equipment relating to the different phases of the production cycle and, as a consequence, to the overall capacity of the plant. More specifically: 2002 – Introduction of a third mill; installation of the sixth line for Expanded Metal and of the third high flow assembly line resulting in a substantial overall plant capacity increase. 2005 – a high flow assembly line specialized in car batteries was transferred from Avezzano while a more flexible standard line was transferred from Veronella to Avezzano. Moreover, during the above years, FIAMM has done some capital investments to increase the charging capacity in order to be better able to cope with the seasonality of the demand"*<sup>435</sup>. FIAMM furthermore explicitly confirmed that the *"installed capacity within a plant may be different for the different phases of the production process"*.

776. All these factual details submitted by FIAMM strongly contradict its own assertion that other suppliers would not be able to increase their overall production capacity for starter batteries by integrating additional production equipment currently used by FIAMM in their own production plants, for example by acquiring and transferring FIAMM's charging equipment and/or single assembly lines and/or a paste mills and/or expanded metal lines.

777. As regards FIAMM's assertion that the equipment cannot be used for the production of OE starter batteries *"since this producer would have to obtain a new certification for the new production lines using these equipments"*<sup>436</sup>, OE customers certify plants and not each production line inside a specific plant. In any event, the risk – if any – of the OE starter batteries being of a different quality due to the new production assets can be avoided by using more of or even exclusively the "old" production equipment for the production of OE starter batteries while the "new" equipment is mainly or exclusively dedicated to the production of IAM batteries.

778. Finally, FIAMM's assertion that – if not carefully maintained – at least some parts of the production plants may become difficult to use or require maintenance operations before being used again does not lead to the conclusion that alternative suppliers would not acquire these assets in the course of a liquidation of FIAMM SBB. In this regard it has first to be noted that not all of the equipment needs continued maintenance. Also, from the point of view of the potential purchasers potential maintenance needs mainly influence the price they are prepared to pay for the assets concerned but do mean that the assets in general are not of interest for them. In turn, since the maintenance of the production equipment has an immediate impact on the price which creditors can charge for these assets in the event of liquidation, it is in the interest of FIAMM or of a bankruptcy administrator to maintain the economic value of the production equipment by implementing the maintenance measures required.

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<sup>435</sup> FIAMM's submission dated 8.1.2007, p. 9.

<sup>436</sup> Response by FIAMM to the Statement of Objections, p. 4 (Annex 1 to Response by VB to the Statement of Objections).

(ii) **Impact of the liquidation of FIAMM SBB on the competitive structure of the market for OE starter batteries for cars / LCV**

779. The potential anti-competitive effects of the "merger scenario" in the market for OE starter batteries for cars / LCV mainly stem from the fact that the transaction would lead to (i) a significant horizontal overlap and the removal of an effective competitive constraint on the leading player JCI/VB, and (ii) a significant reduction of OE customers' ability to switch to alternative suppliers, in particular due to the reinforcement of the already existing barriers to expansion and entry for alternative or potential suppliers.

780. As regards ex-FIAMM market shares, in the "liquidation scenario" a reallocation would probably be to the advantage of those "approved" suppliers of OE starter batteries for cars / LCV which would fill the "capacity gap". It is likely that the largest part would go to JCI and Exide but— to a lesser extent — smaller competitors such as Banner could also increase market share. In any event, in the short term, the current market shares of FIAMM would not automatically go to JCI, which is the most likely outcome of the "merger scenario".

781. In addition most of the alternative suppliers currently active in the OE market also produce starter batteries dedicated to the IAM in their production plant which has been certified by OE customers. Furthermore, the total production capacity of most suppliers is currently almost fully utilized.

782. The current alternative suppliers would be *able* to expand in the OE market (and thus satisfy a necessary pre-condition to the OE customers' ability to switch in the event of a price increase imposed by JCI/VB) if they increased their production capacity by switching to very costly weekend shifts, invested in additional production lines and/or switched production capacity from IAM to OEM.

783. Furthermore in assessing the competitive impact of the "merger scenario", the alternative suppliers would only have a sufficient *incentive* to expand capacity / supply in the OE market (and thus *in fact* provide OE customers with the ability to switch away from JCI / VB in the event of a price increase) if there were sufficient prospects that the costs associated with the capacity expansion (weekend shifts, investments costs) would be covered, and there would be no reduction of overall profits due to the shift of output from the (more profitable) IAM business to the OE business.

784. The parties in their reply to the Statement of Objection disregard these aspects which are crucial for the assessment of the competitive impact of both the "merger scenario" as well as the "liquidation scenario" on the OE customers' ability to switch to alternative suppliers.

785. Based on these general considerations, the Commission considers that the structural conditions which determine the *ability and incentive* for alternative suppliers to *expand* in the OE market for starter batteries for cars / LCV in the "liquidation scenario" are less bad than in the "merger scenario" and thus that the impact on the ability of OE customers to switch to alternative suppliers in the event of a price increase imposed by JCI/VB is less significant in the "liquidation

*scenario*" than in the *"merger scenario"*. The main reasons are discussed in the following paragraphs.

786. First, in the event of a liquidation of FIAMM SBB, valuable production assets which were included in plants already certified by OE customers would be released to the market and could be acquired by alternative suppliers – presumably for a significantly lower investment cost compared to new production equipment. This not only improves the *ability* of suppliers to expand their overall production capacity but also – because of the lower investment cost to be covered by revenues from contracts with OE customers – also the economic *incentive* to expand the overall production capacity of those alternative suppliers.
787. Secondly, if integrated into the production plants already certified by OE customers, this expansion of the overall capacity would enable these suppliers to expand the supply of OE batteries without losing profits due to the reduction of the output of (more profitable) IAM batteries. This effect increases the economic *incentive* to use the additional capacity mainly to expand in the OE market.
788. In this regard, the notifying party does not contest that OE customers certify plants and not suppliers, and that the alternative suppliers produce both OE and IAM batteries in their production plants. Therefore, it appears that, in the event of the integration of the production assets of FIAMM in an already certified production plant that plant would not need to be re-certified by the OE customers. The risk – if any – of the starter batteries being of a different quality due to the new production assets can be avoided by using more of or even exclusively the "old" production equipment for the production of OE starter batteries while the "new" equipment is mainly or exclusively dedicated to the production of IAM batteries.
789. Thirdly the "merger scenario" is likely to have a negative impact on the alternative suppliers' *incentive* to expand in the OE market, since – by acquiring the production assets of FIAMM already certified by OE customers but also used for the production of IAM batteries –the notifying party would not only acquire additional capacity (which is not fully utilized) but also additional flexibility to shift production between OE batteries and IAM batteries. This would not only improve VB's ability to reduce the available capacity and the supply in the OE market to unilaterally increase price, but would also provide VB with an improved ability to sustain a sufficiently high (potential) certified capacity to establish an (additional) credible threat to alternative suppliers in the OE market who consider expanding their capacity and supply of OE starter batteries. This effect would obviously not result in the "liquidation scenario".
790. Finally, it is concluded that the same considerations in general also apply to the assessment whether and to which extent the conditions for potential market *entry* differ in the "merger scenario" and the "liquidation scenario". The main difference between the existing barriers to expansion for established OE suppliers and the barriers to entry for potential market entrants is the following: potential entrants in addition also consider the cost of market entry, which mainly stems from the "sunk cost" of the certification process required by OE customers, to be relevant for the assessment whether or not entry to the OE market may be profitable. The

conclusion that the impact on the incentives to enter would be worse in the merger scenario than in the liquidation scenario is the same.

(iii) **Impact of the liquidation of FIAMM SBB on the competitive structure of the market for OE starter batteries for trucks / HCV**

791. The anti-competitive effect of the "merger scenario" in the market for OE starter batteries for trucks / HCV mainly stems from the fact that, although the transaction would lead to only a small horizontal overlap (1%), it would remove the competitive pressure FIAMM exercised until now in the OE market starter batteries for trucks / HCV which stems from its potential to expand significantly its presence in this market. Additionally, the transaction would lead to a significant reduction of OE customers' ability to switch to alternative suppliers, in particular due to the reinforcement of the already existing barriers to expansion and entry for alternative or potential suppliers.
792. As regards FIAMM's relatively low current market share in the market for OE starter batteries for trucks / HCV, in the "liquidation scenario" a reallocation would probably be to the advantage of those "approved" suppliers of OE starter batteries. It is likely that the largest part would go to JCI and Exide but – to a lesser extent – smaller competitors such as Banner could also increase market share. In any event, in the short term, the current market shares of FIAMM would not automatically go to JCI, which is the most likely outcome of the "merger scenario".
793. Since the competitive constraint exerted in the past by FIAMM on VB/JCI in the market for OE starter batteries for trucks / HCV mainly stems from its potential to significantly expand its supply of these batteries, the competitive effect of the "liquidation scenario" largely depends on whether and to which extent alternative suppliers would acquire the relevant production assets of FIAMM to use them to increase their market position on the market for OE starter batteries for trucks / HCV. In this regard, even if it is not possible to assess in detail the likelihood of whether and to which extent alternative suppliers would acquire these assets, it has to be concluded that VB/JCI is not likely to be able to acquire these assets to the same extent in the event of the liquidation of FIAMM as in the event of the merger.
794. Based on these considerations, the Commission considers that – like for OE starter batteries for cars / LCV – the structural conditions which determine the *ability and incentive* for alternative suppliers to *expand* in the OE market for starter batteries for trucks / HCV in the "*liquidation scenario*" are less bad than in the "*merger scenario*" and thus that the impact on the ability of OE customers to switch to alternative suppliers in the event of a price increase imposed by JCI/VB are less bad in the "*liquidation scenario*" compared to the "*merger scenario*".

(iv) **Conclusion**

795. In the light of the above, the comparison of the likely scenarios shows that the adverse effects caused by the merger are structural in nature, imposing strong barriers to entry and to expansion which could deter expansion and entry of alternative suppliers and thus would significantly damage the OE customers' ability to switch to alternative suppliers, while the negative effects of the non-

merger scenario are mostly of a short-term nature and will possibly be re-balanced in the medium term, since the "capacity gap" created by the potential liquidation of FIAMM would offer a wider possibility of new undeterred expansion and entry in the markets for OE starter batteries for cars / LCV and for trucks / HCV.

796. Therefore, it is concluded that, in the absence of appropriate remedial action by JCI and FIAMM, the likely adverse effects of the merger would be significantly greater in the OE market than the adverse effects likely to result in the "liquidation scenario".

**(c) IAM market**

797. For the IAM market the competition concerns raised by the proposed transaction are structural in nature and encompass unilateral effects due to the creation of a dominant position of the merged entity in the IAM for starter batteries for cars / LCV and trucks / HCV in Italy, Austria, the Czech Republic and Slovakia.

798. The Commission's conclusion that the proposed transaction will lead to the creation of a dominant position is mainly based on the findings that (i) the notified transaction would remove a strong competitive constraint and significantly increase the concentration level of the IAM markets for starter batteries for cars / LCV and for trucks / HCV, and (ii) that by combining FIAMM's and VB's premium brands in the respective countries, the transaction's impact on competition would be over and above what would result from the simple addition of market shares.

*(1) Assessment as set out in the Statement of Objections*

799. At the time of the Statement of Objections the Commission had reached the conclusion that the assets which are most relevant to the IAM market are the FIAMM brands. In the course of the procedure FIAMM stated that "some of the brands of FIAMM SBB could find an acquirer. However, many brands have little market share except locally. FIAMM affirmed that its portfolio of brands would not be attractive for new entrants as the brands in question have a significant presence only in a few European countries. In addition, in absence of brand loyalty in the IAM starter batteries sector, the brands would appear to be less relevant in the IAM market. Ultimately, several of the FIAMM brands would be low/medium-price brands which are not associated with any kind of goodwill"<sup>437</sup>.

800. Nevertheless, FIAMM acknowledged that these brands could be theoretically put on sale although they would be weakened by the absence of advertising, the fact that IAM customers would have had to find alternative suppliers and brands following the liquidation and the fact that the failed-firm scenario would probably have had a negative impact on the FIAMM's brand portfolio.

801. Ultimately, FIAMM concluded that FIAMM's only valuable brands would be in all likelihood acquired by JCI, the other suppliers lacking the adequate financial

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<sup>437</sup> See response by FIAMM sent by email on 5 October 2006 to a Commission's request for information page 11

means to acquire and successfully re-launch such brands after the liquidation of FIAMM<sup>438</sup>.

802. At the time of the Statement of Objections the Commission reached the preliminary conclusion that in a liquidation (failed-firm) scenario the following appears to be likely: (i) IAM customer base would be dispersed to several other manufacturers, not necessarily the leading ones (JCI and Exide); (ii) FIAMM's brand portfolio could be acquired by one or more competitors; (iii) for IAM customers a possible short term disruption of supply would probably not have entailed such negative effects as for OE customers, as it is easier to find substitutes for specific battery models in the IAM sector; (iv) contrary to the statement of FIAMM, the value of brands on the national markets could be significant and the acquisition of brands by third parties in a liquidation scenario may prove better than their acquisition by JCI/VB from a competitive point of view<sup>439</sup>; (v) in particular, given the existence of "premium" brands in the IAM market, whose margins are higher, it could not be excluded that in a liquidation process, these brands will be appealing to third party IAM suppliers willing to build on those brands (which have anyhow a significant "brand awareness" in their respective countries) in order to better compete in the foreseeable future in the national IAM markets concerned.

*(2) The response of the parties*

803. In their response to the Statement of Objections the parties, FIAMM in particular, submitted that the Commission had not asked IAM customers about the consequences of a bankruptcy on their business. In any event, the Commission had not rebutted the possibility that the FIAMM brands which could be sold under a bankruptcy procedure would be severely weakened by the absence of advertising, the fact that IAM customers would also have had to find alternative suppliers and brands and the fact that the failed-firm situation would probably have had a negative impact on the FIAMM brand portfolio. In addition, FIAMM observed that, following bankruptcy, the complex distribution arrangements currently supporting the main FIAMM brands will be dismantled. This would make it less likely that the acquisition of FIAMM's brands following liquidation would have a significant impact on competition in the medium-term.

804. Allegedly, since the Commission had found that some IAM national markets would face a quasi duopoly after the merger, the Commission should have come to the conclusion that if one of the national leading brands disappears, this will also have a negative effect on IAM customers. A decision finding the merger to be incompatible with the common market and the functioning of the EEA Agreement

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<sup>438</sup> See response sent by FIAMM by email on 10/1/2007 to a Commission's request for information, page 21

<sup>439</sup> FIAMM underlined in a submission that "*sia l'attività OE che l'attività IAM non mostrano possibilità concrete di miglioramento; i contratti OE sono quasi tutti in perdita e l'attività IAM mostra una tendenza di un incremento delle vendite dei marchi deboli, a basso prezzo, rispetto ai marchi premium ove il margine è più interessante*". (unofficial translation: "both the OE and the IAM activities do not show any possibility of better performance; the OE contracts are almost all at loss and the IAM activity shows a tendency of sales increase for the weak brands, compared to premium brands where the margin is more interesting"). See email sent to the case team by legal counsels of FIAMM on 29/01/2007 at 11:42.

would therefore bring about a disruption of supplies and price increases in the IAM<sup>440</sup>. Therefore, the merger could not have a more negative impact on competition than an incompatibility decision.

*(3) Assessment*

805. Based on the information gathered by the Commission both before and after sending the Statement of Objections, and the response by the parties, the Commission has sought to determine the likely effects of the liquidation of FIAMM SBB on competition in the marketplace.

**(i) Short term effects of the liquidation of FIAMM SBB on available capacity and the value of FIAMM's brands**

806. Similar to the OE market, FIAMM SBB's liquidation would probably give rise to a reduction of production capacity that currently is used for supplying the IAM. The overall reduction of capacity would be of a similar magnitude as in the OE market ([45-55]\*% of the Veronella plant is for the IAM market). In addition, the IAM-related production of the Mlada plant and of the Avezzano plant will also have to be withdrawn from the market.

807. As regards the impact of the reduction of capacity on IAM customers (that is to say, a possible disruption of supply, plus the price increase to be generated by the prohibition of the merger), this effect can be considered significantly smaller than in the OE market, since IAM customers in the four relevant countries have the possibility to switch to other smaller suppliers which are currently only active in the IAM. The demand of IAM customers furthermore is much more elastic than the demand of OE customers and, unlike OE customers, IAM customers are not affected by the requirement to only procure "fresh batteries".

808. Besides the production assets which – at least if the plant is certified by OE-customers – can be used for the production of OE as well as IAM batteries, the main assets which are particularly relevant to the IAM market are FIAMM's brands. As it is illustrated at length in the competitive assessment section regarding the IAM markets, one of the main reasons why the merger would entail serious adverse effects in the four national markets is the fact that, (in addition to the market share of FIAMM, the notifying party would also acquire the relevant FIAMM brands, which are particularly strong in the countries in question and can be considered as "must have" brands in these markets.

809. The liquidation of FIAMM SBB would make it less likely that the FIAMM brands be directly acquired by the notifying party. At the same time, those brands would be involved in the liquidation process. In the failed-firm scenario, the value of these brands would probably be diminished because, in the liquidation process, they would lose part/all of their goodwill (that is to say, customer base). In addition, the distribution network and sales personnel associated with these brands would be affected, or even disappear. Nevertheless, it is still likely that these

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<sup>440</sup> See Response by FIAMM to Statement of objections, page 22-24 (Annex 1 to Response by VB to Statement of objections)

brands could outlive the previous owner and be usefully purchased by smaller competitors. MIDAC has confirmed its interest in some of the FIAMM's brands.

(ii) **Impact of the liquidation of FIAMM SBB on the competitive structure of IAMs for starter batteries for cars /LCV and for trucks / HCV**

810. In the event of a liquidation of FIAMM SBB, the market shares of FIAMM will be reallocated to other IAM suppliers, not necessarily only to JCI and Exide, but also to other suppliers in the respective national markets. Prima facie, this re-allocation of market shares may not necessarily be consistent with the way in which the "capacity gap" will be filled (in the IAM in the country concerned). In particular, FIAMM's market shares could also accrue to new/smaller producers or possibly to private label manufacturers. For the sake of the analysis in this case, it can reasonably be assumed that the distribution of FIAMM's (IAM) market shares could take place post-liquidation in proportion to the pre-merger (IAM) market shares of the various market players in the respective country (also depending on the goodwill of individual brands).

811. The main difference between the liquidation scenario and the merger scenario as regards the impact on the competitive structure of the IAMs for starter batteries for cars /LCV and for trucks /HCV stems from the fact that, in the merger scenario, JCI/VB would acquire FIAMM's brand portfolio, whilst under the liquidation scenario the brands of FIAMM and their (probably slightly diminished) competitive value could be acquired by alternative suppliers to increase their presence in the IAMs for starter batteries for cars / LCV and for trucks / HCV.

812. Alternative suppliers would be able to bring those brands back to the market within the liquidation process. Similar to what would happen in the OE market, that period could be rather short if the Concordato Preventivo is obtained by FIAMM through, inter alia, the quick disposal of the SBB assets or, in the case of Amministrazione Straordinaria, if the official in charge requests and quickly obtains authorisation from the Minister of Economic Activities to sell the SBB assets. Otherwise, the period could be longer and would have to include, the time necessary for the acquirer of these assets to re-launch the brands in the national market in question (through new advertising and support, etc) in addition to the time necessary for the liquidation proceedings.<sup>441</sup>.

813. In any event, it cannot be concluded that the brand portfolio of FIAMM SBB would inevitably exit the market in the absence of the merger. Therefore, it is likely that the brand portfolio would serve alternative suppliers as a valuable asset to – at least partly – replace FIAMM as a competitive constraint in the markets for IAM starter batteries for cars / LCV and trucks / HCV in Italy, Austria, the Czech Republic and Slovakia.

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<sup>441</sup> According to FIAMM, organising the sale of the brands could take up to two/three months only for the tender (under Concordato Preventivo, longer under Legge Marzano or Legge Prodi-bis) to obtain a sufficient level of participation while, on top of that, FIAMM will also need to negotiate a license agreements to be enabled to continue using these brands for businesses other than the starter batteries. See response to the Statement of objection by FIAMM.

(iii) **Conclusion**

814. In the light of the above, the comparison shows that the negative effects likely to be caused by the merger are structural in nature while the negative effects of the failed-firm scenario are mostly of a short-term nature and consist essentially in the reduction of the value of FIAMM brands. Those brands would not automatically be acquired by the dominant player JCI in the liquidation process.

815. Therefore, it is concluded that, in the absence of appropriate remedial action, the effects of the merger are likely to be significantly worse than the effects of the non-merger scenario (that is to say, liquidation).

**D. CONCLUSION**

816. Based on the results of market investigation, it is concluded that there is a causal link between the proposed concentration and the adverse effect on competition, because the conditions of competition can not be expected to deteriorate to the same extent in the absence of the merger, even if this would lead to the liquidation of FIAMM SBB.

**IX. ASSESSMENT OF THE PROPOSED REMEDIES**

817. Where a concentration raises concerns that it is likely to lead to a significant impediment to effective competition, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of the concentration. In this case, the assessment of remedies takes into account that the relevant counterfactual includes the likely liquidation of FIAMM SBB.

**A. DESCRIPTION OF THE REMEDIES**

**1) The remedies submitted on 9 March 2007**

818. On 9 March 2007, the notifying party submitted a proposal for Commitments in order to resolve the negative effects of the proposed transaction and to enable the Commission to declare the transaction compatible with the common market and the EEA Agreement pursuant to Article 8(2) of the Merger Regulation.

*(a) OE market*

819. To resolve the competition concerns for the market for OE starter batteries for cars / LCV and for trucks / HCV, [one of the parties]\* committed to divest the entirety of the personnel (including key personnel) and equipment currently located in the plant in [Plant]\* which is capable of the production of [1-2]\* million OE starter batteries for cars/LCV and trucks/HCV. The offer extended to all tangible and intangible assets and all licences, permits and authorisations relating to the [Plant]\* business.

820. [One of the parties]\* offered to sell or lease the [Plant]\* real estate (land and buildings). In addition it offered to transfer certain equipment from its plant in [Plant]\* and move it to the [Plant]\* plant. The equipment would include one expanded metal plate production line with a capacity to produce plates for [1-2]\*

million batteries/year assuming 7 days per week utilisation. This would be made available as of [...]\*. Also offered was equipment for additional charging capacity of around [0-1]\* million starter batteries per year available as of [...]\* and two assembly lines with a capacity of [0-1]\* million batteries per year available as of [...]\*. This additional equipment would increase the capacity of [Plant]\* to [2-3]\* million starter batteries/year.

(b) *Independent Aftermarket*

821. As regards the IAM, VB committed to divest a number of trademarks and businesses currently belonging to FIAMM that are used in the IAMs for starter batteries for cars/LCVs and for trucks/HCVs. The businesses to be divested would consist of the following: (i) the [A]\* trademark and business in the EEA; (ii) the [B]\* trademark and business in the EEA; (iii) the [C]\* trademark and business in the EEA; and (iv) the [D]\* trademark and business in the EEA; (v) the [E]\* trademark and business in the EEA.

822. Each divestiture trademark and business would consist in all tangible and intangible assets, which are necessary to ensure the viability and competitiveness of the divestiture businesses, all licences, permits and authorisations issued by any governmental organisation for the benefit of the divestiture businesses, all contracts, leases commitments and customer orders of the divestiture businesses, all customers, credits and other records of the divestiture businesses and, if applicable, the personnel that is necessary to run the divestiture businesses.

823. Additionally, VB and FIAMM committed, at the option of the purchasers, to enter into temporary supply or toll manufacturing agreements with the purchasers for the non-exclusive supply of or toll manufacturing of starter batteries for a total of maximum [0-1]\* million batteries over a period of [...]\*.

**2) The remedies submitted on 29 March 2007**

824. After the expiration of the deadline for the submission of remedies<sup>442</sup>, on 29 March 2007, the parties submitted modified remedies with a view to addressing the concerns raised by the Commission on the OE markets. The new remedy-package no longer includes the divestiture of [one of the parties]\*'s production plant in [Plant]\* but concerns one of [one of the parties]\*'s production plant located in [Plant]\* and the production assets currently included in [one of the parties]\*'s production plant in [Plant]\*.

(a) *The [Plant]\**

825. [One of the parties]\* commits to divest the "[Plant]\* OE only Business", which includes its plant located in [Plant]\* and dedicated to the production of starter batteries for cars/LCV for a total capacity indicated as [...]\* million OE and IAM batteries/year on a five day per week utilisation. The [Plant]\* OE only Business will include all tangible and intangible assets necessary to ensure the viability of the OE business, all relevant licences, permits and authorisations, all

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<sup>442</sup> The deadline for the submission of remedies was 14 March 2007.

contracts, leases, commitments and customer orders relating to the OE business, all customers, credit and other records of the OE business as well as the real estate property and the personnel. Current OE starter battery production at [Plant]\* is of around [1-2]\* million batteries per year.

826. Additionally, all existing machinery and equipment of the [Plant]\* plant will be divested, with the exception of the equipment used to [...] (hereafter the "equipment"). The [...] equipment is a patented technology used by [one of the parties]\* to produce IAM batteries and is not used for OE production.
827. In the event that [one of the parties]\* does not enter into a final binding agreement for the sale and purchase of the [Plant]\* OE only Business within following the date of this decision, [one of the parties]\* commits to further divest, in addition to the [Plant]\* OE only Business: a royalty free licence for a period of three years for the use of the equipment, the existing contracts for private label or own label IAM batteries currently produced in [Plant]\* by [one of the parties]\* and, at the option of the purchaser, a toll manufacturing agreement at reasonable terms and in line with the industry practice for the volume of branded batteries currently produced in [Plant]\*.
828. This extended remedy package is referred to in the following as the "[Plant]\* OE and IAM Business".

*(b) The [Plant]\* equipment*

829. [One of the parties]\* commits to sell certain separate pieces of equipment for the production of starter batteries for both cars/LCV and trucks/HCV currently in use at its [Plant]\* plant. Although the equipment offered would not constitute a complete production line, it would be consistent with a yearly production capacity of approximately [1-2]\* million batteries.

**B. ASSESSMENT OF THE PROPOSED COMMITMENTS**

**1) OE markets**

*(a) The remedies submitted on 9 March 2007*

*(1) The notifying party's view on the proposed remedies*

830. The notifying party maintains that there is no need propose a remedy in the OE market, because the criteria for the failing firm defence are met. Nevertheless, the notifying party submits that the divestiture of the [Plant]\* plant will lead to more pro-competitive results on the OE market than the otherwise inevitable bankruptcy of FIAMM and will "*comprise all the elements necessary for a suitable purchaser to compete effectively with the merged entity.*"
831. The notifying party submits that the [Plant]\* plant, with the additional equipment, would have the capacity to produce [2-3]\* million starter batteries per year.
832. The notifying party submits that a prospective buyer would be able to serve OE customers across Europe from the [Plant]\* plant and that OE customers could

assist the prospective buyer in becoming a viable supplier in the OE market for starter batteries for cars / LCV and starter batteries for trucks / HCV.

(2) *Results of the market test*

833. The Commission's market test has given a negative result as regards the remedies proposed in the OE markets.

834. Only one respondent had a relatively positive reaction to the remedy<sup>443</sup>. The customer considered [Plant]\* as a plant capable of supplying OE customers, which could raise the interest of starter battery producers and whose divestiture could remove or alleviate the competitive concerns identified by the Commission in the OE markets<sup>444</sup>. At the same time, the customer indicated that the main weaknesses of the plant are to be found in an "*old production process, machinery, equipment*" while its reported strengths are limited to the proximity to the customer's own production premises<sup>445</sup>.

835. For all other customers who replied to the market test, the [Plant]\* plant would have very little impact on the competitive situation post merger. None of them are currently supplied from [Plant]\*, none of them have ever considered certifying [Plant]\* in the past and most consider it not to be suitable for OE supplies<sup>446</sup>, for example due to its disadvantaged geographical location and small size<sup>447</sup>. Most OE customers considered that, for a starter battery producer, increasing capacity at its existing OE-certified plants would be more useful than acquiring [Plant]\* as a whole to increase its presence in the OE markets<sup>448</sup>.

836. A similar picture emerged from the competitors' replies to the market test<sup>449</sup>. None of the respondents expressed interest in the [Plant]\* plant as a going concern, while some interest was expressed in production equipment (either from [Plant]\* or from [Plant]\*)<sup>450</sup>.

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<sup>443</sup> See reply of OE customer 7 to the market test dated 16 March 2007.

<sup>444</sup> See reply of customer 7 to questions 8, 9 and 16 of the market test.

<sup>445</sup> See reply of customer 7 to question 5 of the market test.

<sup>446</sup> See replies of customers 1, 3, 9, 10, 14 and 15 to the market test and in particular replies to questions 2, 6 and 8.

<sup>447</sup> See reply of customer 1 to question 9 of the market test and of customer 9 to question 11.

<sup>448</sup> See reply of customer 1, 3, 9 and 15 to question 11.

<sup>449</sup> The market test to competitors was sent on 13 March 2007.

<sup>450</sup> See replies to question 13 of the market test to competitors.

(3) *The Commission's assessment*

(i) General Remarks

837. The [Plant]\* plant was to be closed down following the completion of the proposed transaction. The parties' own previous statements regarding [Plant]\*'s value seem to be at odds with the faith they put in [Plant]\* as an appropriate remedy. For example in their submissions in November 2006 the parties submitted that, apart from the [Plant]\* plant, all of [one of the parties]\*'s plants are 'inefficient'.<sup>451</sup>[...]\*.
838. Not only has [one of the parties]\* stated that it intended to shut down the [Plant]\* plant, it also expressed explicit doubts concerning the utility of the existing equipment in [Plant]\*. This explains why the lease agreement with [one of the parties]\* for the [Plant]\* real estate gives the option to [one of the parties]\* to 'abandon any and all equipment' located in [Plant]\*. [...]\*'.<sup>452</sup>
839. In its response to the Commission's questionnaire of 19 December 2006 the notifying party reiterates that "*the [Plant]\* plant is unlikely to be attractive for a third party due to its small size, [and] its outdated machinery*".
840. Furthermore, the plant is currently selling predominantly in the IAM: out of a total capacity of [1.2]\* million batteries in 2006, less than [0-1]\* million were sold on the OE market.
841. [Plant]\* is in fact only certified by one car producer, [...]\*, which in turn is one of the smaller customers of [one of the parties]\*. [Plant ]\* supplies with a car/LCV battery for a light commercial vehicle, the [...]\* which is produced at a plant nearby. The total annual volume supplied is, according to the notifying party, [0-1]\* million batteries, or less than [0-5]\*% of the total market volume. None of [one of the parties]\*'s bigger customers, [...]\*[...]\*[...]\*, have certified the [Plant]\* plant. The parties themselves submit that it is likely that the prospective buyer would initially have to produce for the IAM for a period of up to [...]\* years due to the need for certification of the [Plant]\* plant by OE customers.
842. In addition to supplying [...]\*, the parties submitted that a very small amount ([...]\*) of truck/HCV batteries was also supplied to [...]\* plant in [...]\*. These were most likely supplied from [Plant]\*. As an indication of the very marginal nature of these supplies, [...]\* itself does not mention [one of the parties]\* among its recent/current suppliers in its reply to the Commission's phase-I questionnaire.
843. The Commission further notes [one of the parties]\* submission that the [Plant]\* and [Plant]\* plants are both loss-making and the fact that [one of the

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<sup>451</sup> VB's response to the Commission's questionnaire of 31 October 2006 submitted on 9 November 2006

<sup>452</sup> VB's response to the Commission's questionnaire of 31 October 2006 submitted on 9 November 2006

parties]\* attributes this explicitly to their "structural weaknesses"<sup>453</sup>. It also appears from the data submitted by [one of the parties]\* on production costs and revenues that compared to truck production (including both OE and IAM) car production in general seems to be less efficient. Since the OE market for starter batteries for cars / LCV is much larger than the OE market for starter batteries for trucks / HCV (close to [90-100]\*% of the total OE volumes according to the figures provided in the Form CO) this again casts some further doubts on the already questionable value of [Plant] in terms of helping a potential purchaser to get a solid foothold in the OE business.

(ii) Capacity, efficiency, bottlenecks

844. According to the parties [Plant]\* produced [1-2]\* million starter batteries in 2006, a majority of which (roughly [1-2]\* million) are starter batteries for cars / LCV. The parties also submitted that the current annual production capacity of [Plant]\* is [1-2]\* million batteries<sup>454</sup>. Capacity utilisation is currently [80-90]\*%, which is poor compared, for example, to [one of the parties]\*'s predominantly OE ([Plant]\*: [90-100]\*%, [Plant]\*: [90-100]\*%) or mixed OE-IAM ([Plant ]\*, [90-100]\*% plants. [Plant]\*'s capacity utilisation is, however, better than [Plant]\*'s [40-80]\*%.

845. The [Plant]\* capacity currently dedicated to the production of starter batteries for trucks / HCV is disproportionately high compared to the share of the OE demand for starter batteries for trucks / HCV of the total OE demand (around [5-10]\*% according to the figures submitted in the Form CO). In its submission of 18 January 2007 [one of the parties]\* submits that the [Plant]\* plant has [0-5]\* assembly lines. Assuming 5 days/week utilisation, [0-5]\* of these (with an annual capacity of [0-1]\* million batteries each) are only able to handle starter batteries for cars / LCV. The other [0-5]\* lines (annual capacity of [0-1]\* each) are currently dedicated to the production of starter batteries for trucks / HCV, although the parties maintain that they are flexible and could be used for the production of 'large'<sup>455</sup> starter batteries for cars / LCV.

846. In their Commitments submitted on 9 March 2007, [one of the parties]\* however, stated that [one of the parties]\* would keep one of the assembly lines, which is presently used for the production of car batteries in [Plant]\*. [One of the parties]\* offered for divestment in addition two assembly lines from the [Plant]\* plant with a capacity of [0-1]\* million batteries (based on 5days/week utilisation).

847. In its submission of 8 January 2007, [one of the parties]\* also explained that the total assembly capacity of [Plant]\* is significantly higher than the total plant capacity, which is limited by bottlenecks in oxide production and, to a lesser extent, charging processes. Even assuming non-stop (seven days/week) utilisation,

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<sup>453</sup> FIAMM's reply to the Commission's questionnaire of 20 December 2006 submitted on 8 January 2007

<sup>454</sup> FIAMM's response to the Commission's questionnaire of 20 December 2006 submitted on 8 January 2007

<sup>455</sup> Schedule 6 of VB's and FIAMM's Commitments as submitted on 9 March 2007

the current oxide production facilities would still only have the capacity for [1-2]\* million `equivalent` batteries.

848. The parties did not offer supplementary equipment to increase oxide production, although they previously indicated this to be the most significant bottleneck<sup>456</sup>. The parties only mention that it is `their understanding that additional volumes of oxide are available on the market` without providing any evidence to this effect<sup>457</sup>. [One of the parties]\* offered supplementary equipment only to other production processes they consider to be `bottlenecks`, plates production and charging.

849. However, there is a discrepancy in the manner in which capacity is calculated for the production equipment of the different segments of the production process, which casts some doubt on whether the capacities of the different production processes are actually balanced. Whereas for assembly lines, capacity is calculated on a 5 days/week basis, for oxide and plates production the capacity is calculated on the basis of 7 days/week utilisation and, for charging, on a 6 days/week utilisation. [one of the parties]\* submits that present agreements with trade unions allow for higher levels of utilisation and that cleaning and maintenance of the expanded metal plates line, for example, only takes 2 or 3 hours a week.

*(4) Conclusion on the remedies submitted on 9 March 2007*

850. Based on the elements summarised in this section, and in particular the limited relevance of the [Plant]\* plant in the OE markets and its unfavourable economic and productive situation, which makes it unlikely that the plant could be acquired by a suitable buyer, it is concluded that the remedies submitted on 9 March 2007 are unsuitable and insufficient to eliminate the competition concerns identified in the OE markets for car/LCV and truck/HCV starter batteries.

*(b) The remedies submitted on 29 March 2007*

851. The parties submitted modified remedies on 29 March 2007. In determining whether the remedies proposed by the parties on 29 March 2007 can be validly taken into consideration by the Commission, account must be taken of the requirements set out in Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings<sup>458</sup> (the "Implementing Regulation") and in the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98<sup>459</sup> (the "Commission Notice"), which apply to undertakings submitted after the deadline for doing so.

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<sup>456</sup> FIAMM's response to the Commission's questionnaire of 20 December 2006 submitted on 8 January 2007 p.11

<sup>457</sup> Schedule 6 of VB's and FIAMM's Commitments as submitted on 9 March 2007

<sup>458</sup> OJ L 133, 30.4.2004, p. 1.

<sup>459</sup> OJ C 68, 2.3.2001, p. 3.

852. Article 19(2) of the Implementing Regulation provides that commitments intended by the parties to form the basis of a decision of compatibility pursuant to Article 8(2) of the Merger Regulation are to be submitted to the Commission within not more than 65 working days from the date on which proceedings were initiated, although the Commission may, in exceptional circumstances, extend that period.
853. In this case, the last day for submitting commitments was 14 March 2007. Paragraph 43 of the Commission Notice indicates that where the parties subsequently modify the proposed commitments, the Commission may only accept them where (i) it can clearly determine, on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing, and without the need for any other market test, that such commitments, once implemented, resolve the competition problems identified and (ii) there is sufficient time for proper consultation of Member States.
854. Accordingly, the Commission has examined whether, without the need for a further market test, it can be concluded that the late remedies submitted by the parties address fully and unambiguously - that is, in a straightforward manner - the competition concerns identified during the investigation.
855. To this end, the Commission notes that the [Plant]\* plant is a significant supplier of starter batteries to the OE car/LCV market. The plant is currently supplying around [1-2]\* million batteries/year to OE customers ([...]\* and [...]\*), or [5-10]\*% of the overall market. [...]\*, [...]\*. Thanks to its geographical location and its large overall capacity, the plant is well placed to increase its presence in the OE market.
856. Capacity utilisation at the [Plant]\* plant has been consistently high in recent years, at around [90-100]\*% if both OE and IAM production is taken into consideration. Furthermore, the plant's equipment and machinery is in line with the standards in [one of the parties]\*'s other plants around Europe, which are homologated by all European OE customers. In all these aspects, the [Plant]\* plant is clearly superior to the [Plant]\* plant: its share of the OE market is significantly higher (6% against 1%), its geographical location makes it a potential supply base to a wider pool of OE customers and for higher order volumes than [Plant]\*. Additionally, the capacity utilisation at [Plant]\* is close to [90-100]\*% (while [Plant]\* is underutilised).
857. Notwithstanding these positive elements of the [Plant]\* plant, the commitments proposed by VB regarding the [Plant]\* OE only Business as such may not necessarily guarantee the viability of the plant. This is because, in the context of the [Plant]\* OE only Business remedy, [one of the parties]\* does not commit to divest the [...]\* equipment, nor the IAM business at the [Plant]\* plant. The relevance of the [...]\* equipment is not its effects on total production capacity, which would be unchanged at [Plant]\*, but the fact that is used to a very large extent to produce batteries that are subsequently marketed under [one of the parties]\*'s top brands, namely [...]\* and [...]\*. Similarly, the IAM business includes contracts, commitments and customer orders as well as customers, credit and other records of the sale of IAM batteries produced at [Plant]\*.

858. Without these assets, a potential purchaser of the [Plant]\* plant would be able to use all the production capacity at the plant efficiently only if it had the possibility of serving the IAM market with its own brands, contracts, and customer contacts. However, not all potential purchasers which could successfully compete in the OE market by acquiring the [Plant]\* plant have sufficient assets and resources to effectively develop their IAM business in a very short time after the acquisition of the plant. As a consequence, some potential purchasers without such assets and resources might not be in a position to maintain the capacity utilisation levels and the revenue streams that the plant currently enjoys, simply because they would not take advantage of the more profitable IAM business and, in addition, might not find customers for the IAM batteries it produces. At the same time, such potential purchasers might not be in a position to increase OE output to make up for the lost IAM production without significantly deteriorating prices and margins. If this were to be the case, the potential purchaser would not be able to guarantee the viability and competitiveness of the [Plant]\* plant.
859. The Commission does not want at this stage to prejudge the possibility that a potential purchaser exists, which can maintain and develop the [Plant]\* plant with own assets and resources for IAM production. However, such a purchaser should have a very well defined strategy to utilise the [Plant]\* plant, possibly together with other plants belonging to the same entity, with the view of being present both in the OE and in the IAM markets in a commercially balanced way.
860. It is been argued in the part of this decision dealing with the assessment of the IAM markets that strong brands constitute a very important asset to ensure viability and competitiveness in such markets. Therefore, in order to ensure the viability and competitiveness of the [Plant]\* plant, a potential purchaser would have to demonstrate that it would be able to develop a successful and coherent brand strategy for the IAM batteries produced in [Plant]\*.
861. As explained in the section above on the description of the remedies submitted on 29 March 2007, [one of the parties]\* commits to enter into a final binding agreement for the sale of the [Plant]\* OE only Business within [...] months from the date of this decision. If this is not the case, [one of the parties]\* commits to divest the [Plant]\* OE and IAM Business, within the usual limits for a divestiture.
862. Regarding the [Plant]\* OE and IAM Business, the Commission notes that it will guarantee the current high levels of capacity utilisation of the [Plant]\* plant, the transfer of contracts for private label and own label IAM batteries and a tolling agreement with [one of the parties]\* for the production of branded batteries. Indeed, the Commission considers that the option of the tolling agreement may be valuable to a potential purchaser which does not yet have a sufficient presence in the IAM markets to enable it to sell independently the volume of branded batteries that [one of the parties]\* is currently producing at the [Plant]\* plant. In this way, the purchaser would have the guarantee of high capacity utilisation at the plant and the possibility to develop its own IAM market presence without compromising the plant's viability.
863. Taking into account these elements, the Commission considers that the [Plant]\*OE and IAM Business have all the characteristic to allow a suitable buyer

to guarantee the viability of the plant and to develop its activities in an efficient and competitive fashion.

864. Regarding the commitment to divest the [Plant]\* equipment, the new commitments are in line with the indications from the market test, that battery manufacturers, especially if small and capacity constrained, while not interested in taking over the [Plant]\* plant, are potentially interested in machinery increasing their capacity at their own plants. The [Plant]\* equipment is capable of producing both car/LCV and truck/HCV batteries and could increase the OE capacity and market presence of the purchaser.
865. As for the competitive impact of the divestitures envisaged in the new package, the [1-2]\* million OE batteries produced at [Plant]\* account for just over [5-10]\*% of the EEA OE market for car/LCV batteries. The [Plant]\* machinery would provide further potential capacity of [1-2]\* million batteries for cars/LCV and trucks/HCV, with however no market shares associated to it. The impact of this extra capacity on the OE markets, although certainly positive, is very difficult to predict, and would depend on the identity of the purchaser. Indeed, the purchaser would need to integrate the equipment in its own production facilities and have the capacity to use it in a timely manner for OE production.
866. In order to assess the competitive impact of the proposed remedies, it should be first recalled that, by adding FIAMM's [5-10]\*% market share to JCI's, the merged entity would reach a combined market share of [55-65]\*% in the OE market for car/LCV batteries. The impact of the remedy would fall short of eliminating the [5-10]\*% overlap between VB and FIAMM. However, the remedy would make sure that the situation is not worse with respect to the counterfactual of FIAMM exiting the starter batteries markets.
867. Firstly, the divestiture of the [Plant]\* OE only Business or the [Plant]\* OE and IAM Business, would allow the purchaser to either enter or expand into the OE car/LCV battery market starting with an existing plant and a significant client base. Such purchaser, which would become the number three in the market behind JCI and Exide, could be either an existing smaller OE supplier, or a European non-OE supplier wishing to expand in the OE market, or a non-European producer willing to enter the European market with.
868. Secondly, the [Plant]\* equipment could help release bottlenecks and capacity constraints of smaller European OE-suppliers, allowing them to increase their presence both in the car/LCV and in the truck/HCV battery markets, either building on existing relations with OE customers or undertaking the homologation process for new customers.
869. Thirdly, the proposed remedies would limit the overlap to [0-5]\*% ([10-20]\*% from FIAMM minus [5-10]\*% divested through the [Plant]\* plant) and possibly less if the [Plant]\* equipment is efficiently used for increased OE production. The associated deterioration of the competitive structure would be lower than in the liquidation scenario. Indeed, assuming that in the counterfactual of FIAMM exiting the starter batteries markets its [10-20]\*% market share were to be split between existing suppliers on the basis of their relative market strength, VB would acquire about [5-10]\*%, given that it accounts for about half of the OE car/LCV

batteries market if FIAMM sales are excluded. Therefore, VB's market share increase would be lower with the proposed remedies than in the liquidation scenario.

870. Fourthly, in the counterfactual of FIAMM exiting the starter batteries markets, VB and to a lesser extent Exide would be in the position to acquire a large portion of FIAMM's assets put on sale in the context of a liquidation procedure. While it is impossible to predict exactly which proportion they would acquire, it is very possible that VB would purchase equipment, either to use it for its own production or strategically to avoid that smaller competitors acquire it with the aim of increasing their own OE presence. With the proposed remedy, it is ensured that at least the [Plant]\* equipment will be available to other potential acquirers. Additionally, both the [Plant]\* plant and the [Plant]\* equipment will have the effect of strengthening competitors other than VB and Exide, thereby having the secondary effect of introducing an important element of asymmetry into the market which would also reduce the risk of coordination between the two largest market players.

871. Based on these elements, it is concluded that the remedies submitted on 29 March 2007 are sufficiently clear cut to guarantee that, once implemented, they will reduce the deterioration of the competitive structure to a level which is at least comparable to that of the liquidation scenario. This conclusion has been reached by the Commission on the basis of the information received throughout the investigation and in particular on the basis of the market test of the remedies submitted on 9 March 2007, which clearly detailed what factors made the [Plant]\* divestiture unsuitable and therefore indicated which factors would make an alternative divestiture, such as [Plant]\*, acceptable. The Commission therefore considered that a further market test was not needed to assess the remedy package submitted on 29 March 2007.

872. It is therefore concluded that the commitments submitted on 29 March 2007 are suitable for remedying the significant impediments to effective competition in the EEA-wide OE markets that would result from the proposed transaction.

## **2) Independent Aftermarket**

### *(a) The notifying party's view on the proposed remedies*

873. According to the notifying party, the proposed commitments would resolve the concerns raised by the Commission regarding the IAMs for car/LCV batteries and for truck/HCV batteries in Italy, Austria, the Czech Republic and Slovakia.

874. The notifying party indicates that the proposed commitments would allow the purchaser(s) of the divested businesses to compete effectively with the merged entity through established brands and businesses. The lack of production assets within the divested business is not considered an impediment to effective competition, given the result of the Commission's market investigation which indicates that there is spare production capacity in the IAMs in question. In any event, VB and FIAMM commit to supply the purchaser(s) with a sufficient number of batteries to serve demand for a certain period of time.

875. The notifying party submits that in the absence of the transaction, FIAMM will go into bankruptcy. In that scenario, the acquisition of FIAMM's brands may not be attractive for third parties. In any event, FIAMM's brand portfolio would be damaged and its value depleted due to the bankruptcy procedure and potential acquirers would probably not be able to take over the market shares attached to these assets.

(b) *Assessment*

(1) *Italy*

(i) Preliminary remarks

876. The notifying party submits that the divestiture of the [A]\*, [B]\*, [D]\*, [E]\* businesses would eliminate to an appreciable extent the overlap resulting from the proposed transaction. According to the notifying party's estimates in their reply to the Statement of Objections, the market share covered by the four brands in 2005 was [5-10]\*% for car/LCV batteries and [5-10]\*% for truck/HCV batteries, lowering the market share of the merged entity to [35-45]\*% for car/LCV batteries and [30-40]\*% for truck/HCV batteries.

877. As explained in the section on the competitive assessment, these market shares are based on unrealistic assumptions regarding the share of imports of batteries from outside the EEA. By taking the market estimates that the Commission considers most favourable for the notifying party, the market share covered by the four brands was, in 2005, [5-10]\*% for car/LCV batteries ([0-5]\*%, [0-5]\*%, [0-5]\*% and [0-5]\*%) and [5-10]\*% for car/LCV batteries ([0-5]\*%, [0-5]\*%, [0-5]\*% and [0-5]\*%), lowering the market share of the merged entity to [40-50]\*% for car/LCV batteries (FIAMM [15-25]\*% and VB [20-30]\*%) and [35-45]\*% for truck/HCV batteries (FIAMM [15-25]\*% and VB [20-30]\*%). The merged entity would still remain the largest player in the Italian markets, and maintain FIAMM, the most valuable and recognised brand of FIAMM.

(ii) Results of the market test

878. The Commission's market test has globally been positive on the remedies offered.

879. An overwhelming majority of customers<sup>460</sup> consider that globally the brands to be divested have an important commercial value, which would not be lost if the brands were to be separated from FIAMM<sup>461</sup>.

880. Looking at the single brands, the market test has indicated stark differences in their perceived commercial value. While FIAMM is clearly seen as the most

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<sup>460</sup> The market test to Italian customers was sent on 12 March 2007. The Commission received over 40 complete replies, which are summarised below.

<sup>461</sup> See reply to question 8 of the questionnaire sent on 12 March 2007, where 37 customers affirmed that the commercial value of the brands would not be lost if they were to be separated from the FIAMM starter battery business, while only 1 took the opposite view.

valuable brand, [A]\* and to a somewhat lesser extent [B]\* are also considered as good brands in the Italian aftermarket. [D]\* image is considerably lower and [E]\* has very little commercial value<sup>462</sup>.

881. Consistently, customers believe that there are starter battery producers which could be interested and willing to purchase the brands and businesses to be divested<sup>463</sup>. [A]\* and [B]\* are considered the most interesting brands for a potential buyer<sup>464</sup> and the majority of customers would consider buying the divested brands after they were acquired by another manufacturer<sup>465</sup>.

882. Importantly, the large majority of customers believe that the brands would enable the acquirer to compete with VB post-merger<sup>466</sup> and that the remedy would resolve the competition concerns in the Italian IAM<sup>467</sup>.

883. The reaction of competitors<sup>468</sup> is consistent with the customer's views regarding the proposed remedies: competitors believe that the brands and businesses to be divested, and in particular [A]\* and [B]\* for Italy, will retain a significant part of their value if separated from FIAMM and could compete successfully in the IAMs<sup>469</sup>.

884. Competitors also consider that the assets to be divested, the description of the businesses, the toll manufacturing agreement and VB's best efforts to transfer

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<sup>462</sup> On this point, see replies to questions 5, 6 and 7 of the questionnaire sent on 12 March 2007. In particular, question 7 asked which brands were the closest to VB's (Varta and Bosch in particular) in terms of price, product quality, brand image and final customers' brand awareness: 32 replies indicated FIAMM, 23 [A]\*, 15 [B]\*, 4 [D]\*, and only 1 [E].

<sup>463</sup> See replies to question 14 of the questionnaire sent on 12 March 2007: 20 customers consider the brands interesting for potential buyers, 15 are uncertain and only 3 reply negatively.

<sup>464</sup> See replies to question 15 of the questionnaire sent on 12 March 2007: 33 replies point at [A]\* and 26 at [B]\* as interesting brands for a buyer.

<sup>465</sup> On this point, see replies to questions 10 to 13 of the questionnaire sent on 12 March 2007: among the current customers of the brands, 12 would continue purchasing, 7 are uncertain and none is definitely negative on the possibility; among potential (not current) customers, 11 would consider purchasing, 9 are uncertain and 5 are definitely negative on the possibility.

<sup>466</sup> See replies to questions 16, 17 and 18 of the questionnaire sent on 12 March 2007: 24 positive, 6 negative and 6 uncertain regarding the capacity of the acquirer to compete with VB. Of the customers answering positively, many stress that the acquirer would need to provide a good quality product through an efficient distribution network. Others mention the need to invest in the product image and product range, to have an own production plant and to offer a competitive price. Of the customers answering negatively, the majority believes that VB would be in any event dominant in the Italian aftermarket.

<sup>467</sup> See replies to question 19 of the questionnaire sent on 12 March 2007: 26 respondents judge the remedies positively, and 8 negatively.

<sup>468</sup> The market test to competitors was sent on 13 March 2007.

<sup>469</sup> See replies to questions 23, 24 and 31 of the questionnaire sent on 13 March 2007 to competitors.

existing sales contracts are useful elements that could help potential acquirers of the divested businesses<sup>470</sup>.

885. Finally, a number of competitors express a (clearly very preliminary) interest in some of the brands and businesses to be divested and consider that the proposed remedies can remove the competition concerns identified by the Commission in the Italian IAM markets<sup>471</sup>.

(iii) The Commission's assessment

886. Taking into account the commitments proposed by the notifying party and using the Commission's market estimates reported in the section on the assessment of the Italian IAM, VB's market share post merger would be [40-50]\*% for car/LCV batteries and [35-45]\*% for truck/HCV batteries.

887. While still high (the commitments proposed clearly do not eliminate the overlap between the merging parties), these market shares are significantly lower than without the proposed remedies. Additionally, VB will keep the most important and commercially valuable of FIAMM's brands (that is, the FIAMM brand).

888. It is difficult to predict with certainty what would happen in the absence of the transaction on the Italian IAMs, in particular for the branded products. If FIAMM were to exit the market and its brands were to (at least temporarily) disappear, its current [25-35]\*% market share for cars/LCV's and [25-35]\*% market share for truck/HCV batteries would be dispersed among its competitors.

889. If FIAMM's market share were to be distributed among its competitors proportionally to their relative market strength, VB would acquire less than [10-20]\*% of the market in car/LCV batteries<sup>472</sup> and less than [5-10]\*% in truck/HCV batteries. This is less than the [15-25]\*% market share addition for both for car/LCV batteries and for truck/HCV batteries resulting from the transaction after the effect of the remedies has been factored in.

890. However, it should be borne in mind that VB, as owner of the Varta and Bosch brand, would be in a very favourable position to acquire a large share of those FIAMM customers who favour branded products. It is therefore likely that VB would significantly increase its market presence in the high end of the market, attracting former FIAMM, [A]\* and, to a lesser extent, [B]\* customers. Therefore, VB's market share increase could be higher than its numeric strength on the Italian market indicates.

891. As a further element, it must be borne in mind that FIAMM's brands are valuable assets that would in all likelihood find an acquirer in any liquidation procedure and would therefore re-enter the Italian IAMs after a certain period of

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<sup>470</sup> See replies to questions 23 to 30 of the questionnaire sent on 13 March 2007 to competitors.

<sup>471</sup> See replies to questions 32 to 37 of the questionnaire sent on 13 March 2007 to competitors.

<sup>472</sup> VB accounts for approximately one third of the Italian market, if FIAMM sales are excluded.

time. It is likely that the businesses attached to the brands (contracts, distribution networks, etc.) would have to be rebuilt by the acquirer, requiring significant investment in logistics, marketing and sales.

892. Following FIAMM's liquidation, the acquirer of its brands could be VB or a competitor. In the former case, VB would extend its stronghold on the Italian market with the FIAMM brand and possibly with [A]\* and [B]\* as well. In the latter case, the competitor acquiring the brands would be in better position to compete with VB's top brands.

893. The assessment of the likely outcome is difficult, as there are numerous currently unknown events that could shift the balance in one direction or the other. Such assessment, however, must be carried out in the light of the results of the market test, which has given a clear indication that the proposed commitments are sufficient to resolve the competition concerns identified by the Commission in the Italian IAM and has consistently provided reasons to support this view.

894. In the light of the market test, and coherently with the Commission's own analysis of the competitive situation it is therefore concluded that the commitments submitted on 9 March 2007] are suitable to remedy the significant impediments to effective competition in the Italian IAMs that would result from the proposed transaction.

## *(2) Austria*

895. The notifying party submits that the divestiture of the [D]\* and [E]\* businesses would eliminate to a very large extent the overlap resulting from the proposed transaction. According to the notifying party's estimates in their reply to the Statement of Objections, the market share covered by the two businesses in 2005 was [10-20]\*% for car/LCV batteries ([10-20]\*% [D]\* and [0-5]]\*% [E]\*) and [5-15]\*% for truck/HCV batteries (all [D]\*). After the divestiture, the merged entity's market share would be [35-45]\*% for car/LCV batteries (an overlap of [5-10]\*%) and [20-30]\*% for truck/HCV batteries (an overlap of [0-5]\*%).

896. The Commission's market test<sup>473</sup> has indicated that [D]\* is indeed considered by customers as the most valuable brand in Austria. The majority of the respondents indicate that they believe that [D]\* commercial value would not be lost if the brands were to be separated from FIAMM<sup>474</sup> and that there are companies who would be interested in acquiring the brand.

897. The Commission's own analysis is in line with the feedback from the market test. Indeed, it is clear that the [D]\* brand accounts for the lion's share of FIAMM's sales in Austria and that [D]\* is by far FIAMM's most valuable brand in this country.

898. Taking the Commission's estimates as a benchmark, the market share accounted for by [D]\* was, in 2005, [5-15]\*% for car/LCV batteries and [15-

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<sup>473</sup> The market test to Austrian customers was sent on 13 March 2007.

<sup>474</sup> See reply to questions 5, 6 and 8 of the questionnaire sent on 13 March 2007 to Austrian customers.

25]\*% for truck/HCV batteries. As a result of the divestiture of the brand, there would be only a much reduced overlap between the parties in the Austrian market, with a combined market share of [30-40]\*% for car/LCV batteries (FIAMM [5-10]\*% and VB [25-35]\*%) and [40-50]\*% for truck/HCV batteries (FIAMM [5-10]\*% and VB [30-40]\*%). Additionally, FIAMM's sales would, for a large part, be made up of private label or unbranded products, which have a very limited impact on competition in the high end of the market. As a consequence, post merger VB would not be in the position to become dominant in the Austrian IAMs.

899. Additionally, it is likely that VB could acquire the entire market share that it would acquire with the transaction after factoring in the [D]\* divestment, even in the event of FIAMM exiting the market. Taking as a benchmark the Commission's market estimates, in the absence of the transaction, FIAMM's [20-30]\*% market share for cars/LCV batteries and [25-35]\*% market share for truck/HCV batteries would be dispersed among its competitors.

900. If FIAMM's market share were to be distributed among its competitors proportionally to their relative market strength, VB would acquire [5-10]\*% of the market in car/LCV batteries and more than [5-15]\*% in truck/HCV batteries.

901. Therefore, in the light of the market test, and coherently with its own analysis of the competitive situation, it is concluded that the commitments are suitable to remedy the significant impediments to effective competition in the Austrian IAMs that would result from the proposed transaction.

### *(3) The Czech Republic*

902. The notifying party submits that the divestiture of the [C]\*, [D]\* and [E]\* businesses would reduce the overlap resulting from the proposed transaction. The brands account for the largest share of FIAMM's sales in the Czech Republic (more than half for car/LCV batteries and two thirds for truck/HCV batteries). Additionally, [C]\* and [D]\* are the main brands sold by FIAMM in the Czech Republic.

903. The Commission's market test<sup>475</sup> has indicated that [C]\* is indeed considered by customers as FIAMM's most valuable brand in the Czech Republic. The majority of the respondents indicate that they believe that [C]\* commercial value would not be lost if the brands were to be separated from FIAMM<sup>476</sup> and that there are companies who would be interested in acquiring the brand.

904. The Commission's own analysis is in line with the feedback from the market test. Indeed, it is clear that the [C]\* brand accounts for the lion's share of FIAMM's sales in the Czech Republic (according to the Commission estimates, a market share of [10-20]\*% for car/LCV batteries and [15-25]\*% for truck/HCV batteries) and that [C]\* is by far FIAMM's most valuable brand in this country.

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<sup>475</sup> The market test to Czech customers was sent on 13 March 2007.

<sup>476</sup> See reply to questions 5, 6 and 8 of the questionnaire sent on 13 March 2007 to Austrian customers.

905. After the divestiture of [C]\* and [D]\*, FIAMM would have an extremely small presence in the branded segment of the Czech IAMs (the FIAMM brand would have a [0-5]\*% market share for car/LCV batteries and [0-5]\*% for truck/HCV batteries). The combined entity would nevertheless have very significant, combined market shares of [50-60]\*% (FIAMM [5-15]\*% and VB [35-45]\*%; combined [40-50]\*% according to the parties) for car/LCV batteries and [45-55]\*% for truck/HCV batteries (FIAMM [5-10]\*% and VB [35-45]\*%). The high combined market shares are to a large extent the result of VB's existing high market shares. Given its very strong existing position, VB could, in the event of FIAMM exiting the market, acquire the entire market share that it would acquire with the transaction after factoring in the brand divestments.
906. Taking as a benchmark the Commission's market estimates, in the absence of the transaction, FIAMM's [25-35]\*% market share for cars/LCV batteries and [20-30]\*% market share for truck/HCV batteries would be dispersed among its competitors. If FIAMM's market share were to be distributed among its competitors proportionally to their relative market strength, VB would acquire [10-20]\*% of the market in car/LCV batteries and more than [5-15]\*% in truck/HCV batteries, that is to say, more than it would obtain post-merger.
907. Therefore, in the light of the market test, and coherently with its own analysis of the competitive situation, it is concluded that the commitments are suitable to remedy the significant impediments to effective competition in the Czech IAMs that would result from the proposed transaction.

*(4) Slovakia*

908. The notifying party submits that the divestiture of the [C]\* and [E]\* businesses would significantly reduce the overlap resulting from the proposed transaction. The two brands accounts for the lion's share of FIAMM's sales in the Slovakia (almost [90-100]\*% for car/LCV batteries and almost [90-100]\*% for truck/HCV batteries). Additionally, [C]\* and [E]\* are the main brands sold by FIAMM in Slovakia.
909. The market share covered by the two brands was, in 2005, [15-25]\*% for car/LCV batteries ([10-20]\*% according to the notifying party's estimate) and [30-40]\*% ([30-40]\*% according to the notifying party's estimate) for truck/HCV batteries. By divesting the brand, the overlap between the merging parties would virtually disappear, with a combined market share of [20-30]\*% (FIAMM [0-5]\*% and VB [10-20]\*%; combined [15-25]\*% according to the parties) for car/LCV batteries and [10-20]\*% for truck/HCV batteries (FIAMM [0-5]\*% and VB [10-20]\*%; combined [15-25]\*% according to the parties). Given the low combined market shares, the remedy would ensure that the modified transaction would not lead to a significant impediment of effective competition.
910. The Commission's market test<sup>477</sup> has confirmed the importance of the brand in Slovakia and the fact that it represents by far the most significant asset FIAMM holds in the IAMs.

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<sup>477</sup> The market test to Slovak customers was sent on 13 March 2007.

911. Therefore, in the light of the market test, and coherently with its own analysis of the competitive situation, it is concluded that the commitments submitted on 9 March 2007 are suitable to remedy the significant impediments to effective competition in the Slovak IAMs that would result from the proposed transaction.

## **X. CONCLUSION**

912. Based on these elements, it is concluded that the proposed concentration, as modified by the Commitments submitted on 29 March 2007, does not impede effective competition, in particular as the result of creation or strengthening of a dominant position, in the common market or in a substantial part of it. The concentration should therefore be declared compatible with the common market pursuant to Article 8(2) of the Merger Regulation and with the EEA Agreement pursuant to Article 57 thereof,

HAS ADOPTED THIS DECISION:

*Article 1*

The notified operation whereby VB Autobatterie GmbH, an undertaking jointly controlled by Johnson Controls Inc. and Robert Bosch GmbH, acquires sole control of the automotive starter battery business of FIAMM S.p.A. within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is hereby declared compatible with the common market and the functioning of the EEA Agreement.

*Article 2*

Article 1 is subject to compliance with the conditions set out in section B of Annex I and point 3 of Annex II.

*Article 3*

Article 1 is subject to compliance with the obligations set out section C to section G of Annex I and points 1 2 of Annex II.

*Article 4*

This decision is addressed to:

**VB Autobatterie GmbH & Co KGaA**  
Am Leineufer 51  
30419 Hannover  
Germany

Done at Brussels, 10/05/2007

For the Commission,  
(signed)  
Neelie KROES  
Member of the Commission

**VB Autobatterie GmbH & Co KGaA / Automotive starter battery business of  
FIAMM S.p.A.  
Case No. COMP/M.4381**

**Amended Commitments to the European Commission  
(VB Commitments)**

Pursuant to Article 8(2) of Council Regulation (EC) No. 139/2004 (the “**Merger Regulation**”), VB Autobatterie GmbH & Co KGaA. (“**VB**”) hereby provides the following commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare the acquisition by VB of the automotive starter battery business of FIAMM S.p.A. (“**FIAMM SBB**”) compatible with the Common Market and the EEA Agreement by its decision pursuant to Article 8(2) of the Merger Regulation (the “**Decision**”).

FIAMM S.p.A. will provide separate commitments with regard to specific obligations regarding the supply of batteries, the sale of certain production equipment from FIAMM SBB’s [Plant]\* and with regard to the preservation and the viability, marketability and competitiveness of the Divestiture Businesses held by FIAMM S.p.A. prior to the closing of the acquisition of FIAMM SBB by VB as well as with regard to the transitional provision of real estate contracts and technical support services.

FIAMM S.p.A. has signed a different undertaking to this effect. All other commitments are given by VB.

The Commitments shall take effect upon the date of adoption of the Commission Decision.

This text shall be assessed in conjunction with the FIAMM S.p.A. Commitments of this date, and interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, within the general framework of Community law, in particular the Merger Regulation and by reference to the Commission Notice on remedies acceptable under the Merger Regulation.

If the acquisition of FIAMM SBB by VB (the “**Proposed Transaction**”) is abandoned or not implemented for any reasons, the Commitments will be void and will not need to be implemented.

The Commitments are given by VB without prejudice to VB’s position that the Proposed Transaction does not significantly impede effective competition in any of the relevant markets.

## Section A. Definitions

For the purpose of the VB Commitments and the FIAMM S.p.A. Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings:** undertakings controlled by either VB or FIAMM S.p.A., whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Commission Notice on the concept of concentration under the Merger Regulation.

**Completion of the Proposed Transaction:** completion of the acquisition of FIAMM SBB by VB.

**Closing:** the transfer of the legal title of each Divestiture Business to the Purchaser.

**Cost Plus Basis:** the price will be determined by taking into account [...]\*

**Divestiture Businesses:** the assets comprising the IAM Divestiture Businesses and the [Plant]\* Divestiture Business that VB commits to divest, as further defined in Section B and the attached Schedules (each respective business defined in the Schedules herein referred to as a “**Divestiture Business**”).

**Divestiture Trustee:** one or more natural or legal person(s), independent from VB or FIAMM S.p.A., who is approved by the Commission and appointed by VB and who has received from VB the exclusive mandate to sell one or more of the Divestiture Businesses to a Purchaser at no minimum price.

**Effective Date:** the date of the Decision.

**Extended Divestiture Period:** the period of [...]\* from the date of expiry of the First Divestiture Period within which the Divestiture Trustee shall have the irrevocable and exclusive mandate from VB to sell those Divestiture Businesses for which a binding agreement is not yet concluded at the end of the First Divestiture Period.

**FIAMM S.p.A.:** incorporated under the laws of Italy, with its registered office at 63 Viale Europa, 36075 Montecchio Maggiore, Vicenza.

**FIAMM SBB:** the automotive starter battery business of FIAMM S.p.A., incorporated under the laws of Italy, with its registered office at 63 Viale Europa, 36075 Montecchio Maggiore, Vicenza.

**First Divestiture Period:** the period of [...]\* from the Effective Date within which VB may conclude one or more binding agreements to sell the Divestiture Businesses before providing a mandate to the Divestiture Trustee.

**IAM:** the Independent Aftermarket.

**IAM Divestiture Businesses:** the [A]\*, [B]\*, [C]\*, [D]\* and [E]\* trademarks and businesses in the EEA that VB commits to divest, as further defined in Section B and the attached Schedules.

**Hold Separate Manager:** the person appointed by VB to manage the day-to-day business of a Divestiture Business that is held separate pursuant to paragraph 19, under the supervision of the Monitoring Trustee.

**Key Personnel:** all personnel currently employed by the Divestiture Businesses, if applicable, which are necessary to maintain the viability and competitiveness of the Divestiture Businesses, as listed in the applicable Schedule.

**[Plant]\* Equipment:** the automotive starter battery production equipment (including equipment for plate production, assembly lines and charging equipment) currently located in FIAMM SBB's [Plant]\* that FIAMM S.p.A. commits to divest, as further defined in the FIAMM S.p.A. Commitments.

**Monitoring Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by VB, and who has the duty to monitor VB's compliance with the conditions and obligations attached to the Decision.

**Personnel:** the personnel currently employed by the Divestiture Businesses, if applicable, as listed in the applicable Schedule.

**Proposed Transaction:** VB's planned acquisition of FIAMM SBB.

**Purchaser:** with regard to each Divestiture Business, the undertaking approved by the Commission as acquirer of the Divestiture Business in accordance with the criteria set out in Section D.

**[Plant]\* Divestiture Business:** the assets (including personnel and equipment) comprising the [Plant]\* and the OE business of the [Plant]\* that VB commits to divest, as further defined in Section B and the attached Schedules.

**[...]\* Equipment:** The [...]\* equipment located in [Plant]\* currently used to [...]\*.

**Trustee(s):** the Monitoring Trustee and/or the Divestiture Trustee.

**VB:** VB Autobatterie GmbH & Co KGaA, incorporated under the laws of Germany, with its registered office at Am Leineufer, 51, 30419 Hannover.

## Section B. The divestiture commitments

### Commitment to divest

1. In order to maintain or restore effective competition, VB commits to divest, or procure the divestiture of, the IAM Divestiture Businesses and the [Plant]\* Divestiture Business as going concerns to one or more Purchasers on terms of sale approved by the Commission in accordance with the procedure described in paragraphs 27 and 28 (the “**Divestiture Commitment**”). VB commits to do so by the end of the Extended Divestiture Period.
2. To carry out each divestiture, VB shall seek to find, for each of the Divestiture Businesses, a Purchaser and to enter into a final binding agreement for the sale of such Divestiture Businesses within the First Divestiture Period.
3. If VB has not entered into such an agreement at the end of the First Divestiture Period, VB shall grant the Divestiture Trustee an exclusive mandate to sell the Divestiture Businesses within the Extended Divestiture Period in accordance with the procedure described in paragraph 38.
4. In order to maintain the structural effect of the Divestiture Commitment, VB shall, for a period of [...] after the Effective Date, not acquire direct or indirect influence over the whole or part of any of the Divestiture Businesses, unless the Commission has previously found that the market structure has changed to such an extent that the absence of influence over the Divestiture Businesses in question is no longer necessary to render the proposed concentration compatible with the Merger Regulation.
5. VB shall be deemed to have complied with the Divestiture Commitment if:
  - (i) by the end of the Extended Divestiture Period, VB or an Affiliated Undertaking has entered into a final binding sale and purchase agreement for each of the Divestiture Businesses; and
  - (ii) the Commission approves the Purchasers and the terms in accordance with the procedure described in paragraphs 26 through 28; and
  - (iii) closings take place in each case within a period not exceeding three (3) months after the approval of the respective Purchaser and the terms of sale by the Commission.

### The IAM Divestiture Businesses

6. The IAM Divestiture Businesses consist of the following going concerns:
  - (i) the [A]\* trademark and business in the EEA (the “[A]\* Divestiture”);
  - (ii) the [B]\* trademark and business in the EEA (the “[B]\* Divestiture”);
  - (iii) the [C]\* trademark and business in the EEA (the “[C]\* Divestiture”);
  - (iv) the [D]\* trademark and business in the EEA (the “[D]\* Divestiture”); and
  - (v) the [E]\* trademark and business in the EEA (the “[E]\* Divestiture”).

each time as further defined in the relevant Schedule.

The present legal and functional structure of the IAM Divestiture Businesses as operated to date is described in Schedules 1 to 5.

These businesses will be divested to one or more Purchaser(s).

7. The divestiture of the IAM Divestiture Businesses will proceed by way of asset transactions (including transfer, sale, assignment, as the case may be and insofar as legally permissible) or share deal transactions. As a general rule, each divestiture transaction shall include the following elements, as more specifically defined in the relevant Schedule:
- (i) all tangible and intangible assets (including the relevant intellectual property rights), by way of transfer, sale, or assignment, which are necessary to ensure the viability and competitiveness of the Divestiture Businesses;
  - (ii) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestiture Businesses;
  - (iii) all contracts, leases, commitments and customer orders of the Divestiture Businesses;
  - (iv) all customer, credit and other records of the Divestiture Businesses;
- hereinafter collectively referred to as “**Assets**”)
- (v) to the extent required by the Purchaser, the Personnel (if applicable), as further specified in the applicable Schedule.

### **The [Plant]\* Divestiture Business**

8. VB commits to provide the entirety of the personnel, of the equipment and of the real estate property dedicated to the production of automotive starter batteries currently located in [Plant]\* which is capable of the production of [...] OE and IAM starter batteries for cars/LCV as well as the current OE automotive starter battery business of the [Plant]\* (the “**[Plant]\* Divestiture Business**”).
9. The [Plant]\* Divestiture Business will, at the request of the Purchaser, include the [...] Equipment currently located in the [Plant]\* which is used to produce both OE and IAM automotive starter batteries. The [...] Equipment is used to [...]\*. This is a patented technology [...]\*.
10. In respect of the [...] Equipment, at the request of the Purchaser, it will be made available to the Purchaser for a period of [...] years and VB will grant the Purchaser of the [Plant]\* Divestiture Business a license for [...] years allowing the Purchaser to manufacture and sell OE batteries made in the [Plant]\* that are [...] using the [...] Equipment (such a license does not allow the Purchaser to duplicate the [...] equipment). After the period of [...] years, VB will be able to retrieve the [...] Equipment from the [Plant]\*.
11. The divestiture of the [Plant]\* Divestiture Business will proceed by way of an asset transaction (including transfer, sale, assignment, as the case may be and insofar as legally permissible). As a general rule, such transaction shall include the following elements, as more specifically defined in the relevant Schedule:
- (i) all tangible and intangible assets, by way of transfer, sale, or assignment, which are necessary to ensure the viability and competitiveness of the [Plant]\* Divestiture Business;
  - (ii) all licences, permits and authorisations issued by any governmental organisation for the benefit of the [Plant]\* Divestiture Business;

(iii) all contracts, leases, commitments and customer orders of the [Plant]\* Divestiture Business;

(iv) all customer, credit and other records of the [Plant]\* Divestiture Business;

hereinafter collectively referred to as “**Assets**”)

(v) the Personnel, as further specified in the applicable Schedule.

The present legal and functional structure of the [Plant]\* Divestiture Business as operated to date is described in Schedule 6.

12. The current OE automotive starter battery business of the [Plant]\* plant includes the following OE supply agreements.

(i) [...]\*

(ii) [...]\*

(iii) [...]\*

At the request of the Purchaser of the [Plant]\*, VB will make its best efforts to transfer the above listed contracts to the Purchaser.

13. To carry out the divestiture of the [Plant]\* Divestiture Business as described above, VB shall seek to find a Purchaser and enter into a final binding agreement for the sale of the [Plant]\* Divestiture Business within the first [...]\* months (i.e., [...]\*) of the First Divestiture Period.

14. If VB has not entered into such an agreement at the end of the first [...]\* months of the First Divestiture Period, VB will

(i) grant the Purchaser of the [Plant]\* Divestiture Business a [...]\* technology royalty-free license for [...]\* years allowing the Purchaser to manufacture and sell IAM batteries made in the [Plant]\* plant that are [...]\* using the [...]\* Equipment (such a license does not allow the Purchaser to duplicate the [...]\* equipment); and

(ii) make its best efforts to transfer, at the request of the Purchaser, the current IAM automotive starter battery business of the [Plant]\*. VB will make its best efforts to transfer all contracts for the supply of private label or own label IAM batteries currently manufactured in the [Plant]\*. Such contracts include the following IAM supply agreements:

(iii) [...]\*

(iv) commit, at the request of the Purchaser of the [Plant]\* Divestiture Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the supply or toll manufacturing for an annual total maximum amount equal to the volume of branded batteries manufactured in the [Plant]\* in 2006. Such commitment will apply for an appropriate period of time, not to exceed [...]\*, based on a calculation formula to be approved by the Commission based on the advice of the Monitoring Trustee.

VB commits to make, within 15 days from the appointment of the Monitoring Trustee, a proposal to the Commission regarding a reasonable calculation formula, which is based on industry practice and which is consistent with VB's commitment to guarantee the economic viability, marketability and competitiveness of the [Plant]\* Divestiture Business. The calculation formula shall take into account the following factors: [...]\*. The Commission will decide, based on the advice of the Monitoring Trustee, on the appropriateness of the calculation formula with no undue delay.

## **Supply agreement in relation to the IAM Divestiture Businesses**

15. VB commits, at the request of the Purchaser(s), to enter into a temporary supply or toll-manufacturing agreement with the Purchaser(s) of some of all of the IAM Divestiture Businesses for the non-exclusive supply or toll manufacturing of automotive starter batteries for IAM applications necessary to fulfil the demand for the brands traded in relation to the IAM Divestiture Businesses. Such commitment will cover a total maximum amount of [...] batteries manufactured by VB, for an appropriate period of time, not to exceed [...]\*, on a reasonable Cost Plus Basis to be agreed with the Purchaser(s).

## **Section C. Related commitments**

### **Preservation of viability, marketability and competitiveness**

16. From the Effective Date until Completion of the Proposed Transaction, FIAMM S.p.A., and from Completion of the Proposed Transaction until Closing, VB shall preserve the economic viability, marketability and competitiveness of each of the Divestiture Businesses, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestiture Businesses.
17. In particular, from the Effective Date until Completion of the Proposed Transaction, FIAMM S.p.A. undertakes, and from Completion of the Proposed Transaction until Closing, VB undertakes:
- (i) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestiture Businesses or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestiture Businesses;
  - (ii) to make available sufficient resources for the development of the Divestiture Businesses, on the basis and continuation of the existing business plans;
  - (iii) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage Key Personnel to remain with the Divestiture Businesses, if applicable.

### **Hold separate obligations**

18. VB commits, from Completion of the Effective Date and subject to paragraph 17, to (i) keep the Divestiture Businesses separate from the businesses it is retaining; (ii) ensure that Key Personnel (if applicable) of the Divestiture Businesses - including the Hold Separate Manager - have no involvement in any retained business and vice versa; and (iii) ensure that the Personnel do not report to any individual outside the Divestiture Businesses.
19. Prior to Closing, VB shall assist the Monitoring Trustee in ensuring that the Divestiture Businesses are managed as distinct and saleable entities or group of assets separate from the businesses it is retaining. VB shall also appoint as soon as feasible and in any event no longer than 7 days after the Effective Date a Hold Separate Manager(s) who shall be responsible for the management of the Divestiture Businesses, under the supervision of the Monitoring Trustee.

20. The Hold Separate Manager shall manage the Divestiture Businesses in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by VB.

### **Ring-fencing**

21. VB shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestiture Businesses. However, VB may obtain information relating to such Divestiture Businesses which is reasonably necessary for the divestiture of the Divestiture Businesses or whose disclosure to VB is required by law.

### **Non-solicitation clause**

22. VB undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with any of the Divestiture Businesses for a period of [...] years after Closing.

### **Due diligence**

23. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestiture Businesses, VB shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
- (i) provide to potential purchasers sufficient information as regards the relevant Divestiture Business; and
  - (ii) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel, if applicable.

### **Reporting**

24. VB shall submit written reports in English to the Commission and the Monitoring Trustee on potential purchasers of the Divestiture Businesses and developments in the negotiations with such potential purchasers. It shall do so no later than ten (10) days after the end of every month following the Effective Date (or otherwise at the Commission's request).
25. Insofar as any due diligence of the Divestment Businesses takes place after the Effective Date, VB shall inform the Commission and the Monitoring Trustee on the preparation of data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

## **Section D. The Purchaser**

26. In order to ensure the maintenance or immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:
- (i) be independent of and unconnected to VB ;

- (ii) have the financial resources, proven expertise and incentive to maintain and develop the Divestiture Businesses as a viable and active competitive force in competition with VB and other competitors;
- (iii) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Divestiture Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestiture Businesses

(the before-mentioned criteria for the purchaser are hereafter referred to as the “**Purchaser Requirements**”).

- 27. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When VB has reached an agreement with a Purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. VB must be able to demonstrate to the Commission that the Purchaser meets the Purchaser Requirements and that the Divestiture Businesses are being sold in a manner consistent with the Divestiture Commitment.
- 28. For the approval, the Commission shall verify that the Purchaser fulfils the Purchaser Requirements and that the Divestiture Businesses are being sold in a manner consistent with the Divestiture Commitment. The Commission may approve the sale of the Divestiture Businesses without one or more assets or members of Personnel, if this does not affect the viability and competitiveness of the Divestiture Businesses after the sale, taking account of the proposed Purchaser.

## **Section E. Trustee**

### **I. Appointment procedure**

- 29. VB shall appoint a Monitoring Trustee to carry out the functions specified below with regard to the Monitoring Trustee.
- 30. If VB has not entered into a binding sale and purchase agreement one (1) month before the end of the First Divestiture Period or if the Commission has rejected a Purchaser proposed by VB at that time or thereafter, VB shall appoint a Divestiture Trustee to carry out the functions specified below with regard to the Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Extended Divestiture Period.
- 31. The Trustee(s) shall be independent of VB or FIAMM S.p.A., possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee(s) shall be remunerated by VB in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestiture Businesses, the fee shall also be linked to a divestiture within the Extended Divestiture Period.

### **Proposal by VB**

- 32. No later than one (1) week after the Effective Date, VB shall submit to the Commission for approval a list of one or more persons whom VB proposes to appoint as the Monitoring

Trustee. No later than one (1) month before the end of the First Divestiture Period, VB shall submit to the Commission for approval a list of one or more persons whom VB proposes to appoint as Divestiture Trustee. Each proposal shall contain sufficient information for the Commission to verify that the proposed entities fulfil the requirements set out in paragraph 31 and shall include:

- (i) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
- (ii) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
- (iii) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different Trustees are proposed for the two functions.

### **Approval or rejection by the Commission**

33. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, VB shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, VB shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

### **New proposal by VB**

34. If all the proposed Trustees are rejected, VB shall submit the names of at least two (2) more individuals or institutions within one (1) week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 29 to 32.

### **Trustee nominated by the Commission**

35. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom VB shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

## **II. Functions of the Trustee**

36. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or VB, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

### **Duties and obligations of the Monitoring Trustee**

37. The Monitoring Trustee shall:
- (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;

- (ii) oversee the ongoing management of each Divestiture Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
  - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestiture Businesses in accordance with paragraphs 16 and 17;
  - (b) ensure that the Divestiture Businesses are kept separate from the businesses retained by VB, in accordance with paragraph 18;
  - (c) supervise the management of the Divestiture Businesses as a distinct and saleable entity, in accordance with paragraph 19;
  - (d) (i) in consultation with VB, determine all necessary measures to ensure that the competitive businesses retained by VB does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to these Divestiture Businesses, and (ii) decide whether such information may be disclosed to VB as its disclosure is reasonably necessary to allow VB to carry out the divestiture or as the disclosure is required by law;
  - (e) monitor the splitting of assets and the allocation of Personnel (if applicable) between the Divestiture Businesses and VB or Affiliated Undertakings.
- (iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to VB such measures as the Monitoring Trustee considers necessary to ensure VB's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestiture Businesses, the holding separate of Divestiture Commitments and the non-disclosure of competitively sensitive information.
- (v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (i) potential purchasers receive sufficient information relating to the Divestiture Businesses and Personnel (if applicable), in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (ii) potential purchasers are granted reasonable access to the Personnel.
- (vi) provide to the Commission a written report within fifteen (15) days after the end of every month, and send VB a non-confidential copy at the same time. The report shall cover the operation and management of the Divestiture Businesses so that the Commission can assess whether the businesses are held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending VB a non-confidential copy at the same time, if it concludes on reasonable grounds that VB is failing to comply with these Commitments.
- (vii) within one week after receipt of the documented proposal referred to in paragraphs 27 and 28, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestiture

Businesses after the sale and as to whether the Divestiture Businesses are sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestiture Businesses without one or more assets or not all of the Personnel affects the viability of the Divestiture Businesses after the sale, taking account of the proposed purchaser.

### **Duties and obligations of the Divestiture Trustee**

38. Within the Extended Divestiture Period, the Divestiture Trustee shall sell at no minimum price any Divestiture Business that remains unsold to a Purchaser, provided that the Commission has approved both the Purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraphs 27 and 28. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Extended Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to affect the sale. The Divestiture Trustee shall protect the legitimate financial interests of VB, subject to VB's unconditional obligation to divest at no minimum price in the Extended Divestiture Period.
39. In the Extended Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within fifteen (15) days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to VB.

### **III. Duties and obligations of VB**

40. VB shall provide, and shall cause its advisors to provide, the Trustee(s) with all such co-operation, assistance and information as the Trustee(s) may reasonably require to perform its tasks. The Trustee(s) shall have full and complete access to any of VB's, its Affiliated Undertakings', or the Divestiture Businesses' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and VB and the Divestiture Businesses shall provide the Trustee(s) upon request with copies of any document. The Trustee(s) shall agree in writing to keep any confidential information and business secrets disclosed to it in confidence, except to the extent necessary to perform its duties hereunder. VB, its Affiliated Undertakings, or the Divestiture Businesses shall make available to the Trustee(s) one or more offices on its premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
41. VB shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestiture Businesses. This shall include all administrative support functions relating to the Divestiture Businesses which are currently carried out at headquarters level. VB shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. VB shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.

42. VB shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale during the Extended Divestiture Period, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, VB shall cause the documents required for effecting the sale and the Closing to be duly executed.
43. VB shall indemnify the Trustee and its employees and agents (each an “**Indemnified Party**”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to VB for, any liabilities arising out of the performance of the Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
44. At the expense of VB, (each of) the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to VB’s approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the trustee mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should VB refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard VB. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 43 shall apply *mutatis mutandis*. In the Extended Divestiture Period, the Divestiture Trustee may use advisors who served VB during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

#### **IV. Replacement, discharge and reappointment of the Trustee**

45. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
  - (i) The Commission may, after hearing the Trustee, require VB to replace the Trustee; or
  - (ii) VB, with the prior approval of the Commission, may replace the Trustee.
46. If the Trustee is removed according to paragraph 45, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full handover of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 29 through 35.
47. Beside the removal according to paragraph 45, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

#### **Section F. Dispute resolution**

48. Should a dispute arise post Closing about the implementation of the Commitments by VB (the “**Other Party**”), the Purchaser (the “**Initiating Party**”) can refer the matter to a fast track resolution procedure (the “**Fast Track Resolution Procedure**”).
49. The Fast Track Resolution Procedure will operate as follows:

- (i) The Initiating Party shall notify the Other Party of its request and specify the reasons why it believes that a failure by the Other Party to meet such request would be inconsistent with these Commitments.
- (ii) The Purchaser and VB (including the relevant Affiliated Undertaking) shall use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not to exceed fifteen (15) calendar days.
- (iii) Should the Purchaser and VB fail to resolve their differences of opinion through co-operation and consultation, the Initiating Party shall within seven (7) days initiate an arbitration process.
- (iv) To initiate the arbitration process, the Initiating Party shall give written notice to the Other Party nominating an arbitrator and stating the specific nature of the claim, the factual basis of its position and the relief requested. In such case, the Other Party shall appoint another arbitrator within fourteen (14) calendar days after receipt of the written notice. The arbitrators so appointed shall appoint a third arbitrator to be president of the arbitration tribunal within seven (7) calendar days after both arbitrators have been nominated. If the arbitrators nominated by the Purchaser and VB cannot agree on the nomination of a third arbitrator, they shall request that the London Court of International Arbitration appoint the third arbitrator.
- (v) Any of the arbitrators will be entitled to request any relevant information from the Purchaser, VB or the relevant Affiliated Undertaking. The arbitrators shall agree in writing to keep any confidential information and business secrets disclosed to them in confidence. Throughout these Commitments the standards attributed to confidential information and business secrets are those as set out in accordance with European Community law.
- (vi) The burden of proof in any dispute governed by this Section shall be as follows: (i) the Initiating Party must produce evidence of a prima facie case, and (ii) if the Initiating Party produces evidence of a prima facie case, the arbitrators must find in favour of the Initiating Party unless the Other Party can produce evidence to the contrary.
- (vii) The arbitration procedure shall follow the Rules of the London Court of International Arbitration. The language of the arbitration shall be English, unless otherwise agreed by the Initiating Party and the Other Party. In the event of disagreement between the parties to the arbitration regarding the interpretation of the Commitments, the arbitrators shall inform the Commission and may seek the Commission's interpretation of the Commitments before finding in favour of any party to the arbitration. The Commission may, at any time, issue a submission during the arbitration procedure
- (viii) The arbitration award shall, in addition to dealing with the merits of the claim, impose the fees and costs of the prevailing party upon the party that is unsuccessful.
- (ix) Decisions of the arbitrators shall be final and binding on all persons submitting to arbitration.
- (x) Nothing in the above-described arbitration procedure shall affect the powers of the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation and the EC Treaty.

**50.** The parties shall report to the Commission any matters which the Commission reasonably requests in order to determine whether the parties have complied with the present

commitments with regard to dispute resolution. Any such report shall be sent to the Commission within fifteen (15) working days from the date the Commission makes a request.

### **Section G. The review clause**

51. The Commission may, where appropriate, in response to a request from VB showing good cause and accompanied by a report from the Monitoring Trustee:
- (i) grant an extension of the time periods foreseen in the Commitments; or
  - (ii) waive, modify or substitute, in exceptional circumstances, one or more of the conditions or obligations in these Commitments.
52. Where VB seeks an extension of a time period, it shall submit a request to the Commission no later than one (1) month before the expiry of that period, showing good cause. Only in exceptional circumstances shall VB be entitled to request an extension within the last month of any period.

Signed by \_\_\_\_\_  
Walther Wever

Duly authorised for and on behalf of VB Autobatterie GmbH & Co KGaA  
Date: 29 March 2007

## Schedule 1: Description of the [D]\* Business

As indicated in paragraph 6 of the VB Commitments, VB commits to divest the [D]\* trademark and the commercial business conducted under this trademark in the EEA (the “[D]\* Business”). By way of clarification, VB wishes to point out that the divestment will comprise the assets related to the [D]\* starter battery business in [...] and not the [Company D]\* entity.

As described in more detail below, the [D]\* Business includes the following assets:

### 2 Legal form and structural organisation of the [D]\* Business

#### Social information

[...]\*

#### Shareholding structure

[...]\*

[...]\*

### 3 Detailed description of the [D]\* Business

#### 3.1 Sales and operational organisation

In [...] [Company D]\* is mainly engaged in the sale of starter batteries under the [D]\* trademark. As shown below, in 2006, sales of [D]\* batteries amounted to [...]\*, representing [...] cars/LCV batteries and [...] trucks/HCV batteries.

Country of sales	Volume of sales (1000 units)			Value of sales (€ million)		
	Cars/LCV	Trucks/HCV	Total	Cars/LCV	Trucks/HCV	Total
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]	[...]*	[...]*

The [D]\* branded cars/LCV batteries are currently produced in [...]The [D]\*branded trucks/HCV batteries are produced in [...].

The [D]\* products are marketed in [...] through [...].

The commercial organisation in [...] of the [D]\* Business is managed by [...].

The divested [D]\* Business will include all books and records of the sales and operational organisation, including all customer records, but excluding corporate records and statutory accounts as [Company D]\* is not part of the divestment.

Moreover, VB will make its best efforts to transfer the existing sales contracts entered into by the existing [D]\* business with third parties.

## **3.2 Tangible assets**

### **3.2.1 Stock of batteries**

The 2006 year-end stock includes approximately [...] [D]\* batteries, [...] of which were located in the [...] deposits of the [D]\* Business in [...]. The remaining batteries were located in the following locations: [...].

There is no certainty that the stock level will be exactly the same at the time of the transfer of the [D]\* Business. Nevertheless, FIAMM S.p.A. undertakes to ensure that the stock level at that time will correspond to a normal stock level in view of the activities of the [D]\* Business. Detailed information regarding the stock level for [D]\* batteries during the past three years is enclosed as **Schedule 1.A**.

### **3.2.2 Leases**

To the extent required by the Purchaser, VB will make its best efforts to transfer the real estate contract leases for the offices and warehouses in [...] to the Purchaser.

[...]

### **3.2.3 Other fixed assets**

The [D]\* Business also includes the following fixed assets dedicated to the starter battery commercial activity in Austria, which will be divested: [...]

A detailed list of such fixed assets and their value is included in **Schedule 1.B**.

## **3.3 Intangible asset: [D]\* trademark**

As FIAMM S.p.A. uses the [D]\* trademark [...], VB will not acquire the existing [D]\* trademark, which is owned by [Company D]\*. However, within the context of the proposed transaction FIAMM S.p.A. will register and assign to VB a new ad-hoc trademark that VB will be able to use freely and on an exclusive basis in the EEA, in the starter batteries market. Such ad-hoc trademark includes the well established [D]\* logo and [...] as shown below.

[...]

The divestment [D]\* Business includes the assignment of the perpetual rights on the above ad-hoc trademark in the EEA. The purchaser will be free to [...] and to register the ad-hoc trademark.



As indicated above, VB will make its best effort to transfer the existing sales contracts entered into by [D]\* Batterie GmbH with customers relating to the [D]\* Business.

### 3.5 Personnel

The existing [D]\* business has [...] employees. A complete list of such personnel is enclosed as **Schedule 1.D**.

To the extent required by the Purchaser of the [D]\* Business, VB will transfer the Personnel identified by the Purchaser of the [D]\* Business to the Purchaser itself.

### 3.6 Key personnel

List of Key Personnel of the existing [D]\* business

The VB Commitments define the Key Personnel as the employees “*which are necessary to maintain the viability and competitiveness*” of the [D]\* Business. The list of employees which fulfil the above definition is set out below:

Location	Name	Job title	Date of hiring
[...]*	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*

A Hold Separate Manager will be appointed by VB among the Key Personnel at the Effective Date.

To the extent required by the Purchaser of the [D]\* Business, VB will transfer the Key Personnel identified by the Purchaser of the [D]\* Business to the Purchaser itself.

Criteria chosen for the identification of Key Personnel

VB considers that the members of management of the [D]\* Business do not fulfil the criteria regarding the definition of Key Personnel, as their absence would not jeopardize the “*viability and competitiveness*” of the [D]\* Business.

Only the employees who possess the relevant know how and knowledge of the activity of the [D]\* Business and of the relevant markets it operates on have been identified as Key Personnel as they are necessary to maintain the viability and competitiveness of the business.

### 3.7 Transitional supply agreement between FIAMM and the Purchaser of the [D]\* Business

FIAMM S.p.A. commits, at the option of the Purchaser of the [D]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of [...] automotive starter batteries per quarter for IAM applications manufactured by FIAMM at its plant in [...]\*, for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

Please note that FIAMM S.p.A.'s Commitment concerns a total maximum volume of [...] IAM starter batteries which will be made available to be Purchaser of the [D]\*, [C]\*, [A]\* or/and [B]\* businesses. It is neither the purpose nor the object of FIAMM S.p.A.'s Commitment to offer a temporary supply agreement for [...] IAM batteries to each of the purchasers of the IAM Divestiture Businesses (as this could require FIAMM S.p.A. to supply in total [...] IAM batteries).

### **3.8 Transitional supply agreement between VB and the Purchaser of the [D]\* Business**

VB commits, at the option of the Purchaser of the [D]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of automotive starter batteries for IAM applications necessary to fulfil the demand of brands traded in relation to the Divestiture Businesses. Such commitment will cover a total maximum amount of [...] batteries manufactured by VB, for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

### **3.9 Support services**

To the extent required by the Purchaser of the [D]\* Business, FIAMM S.p.A. or VB will provide to the purchaser of the [D]\* Business certain support services, namely IT services (including IT software), logistics (warehousing) and customer services (back office) for a period of up to [...] on a reasonable cost plus basis.

**Schedule 1A - 1D: [...]\***

## Schedule 2: Description of the [C]\* Business

As indicated in paragraph 6 of the VB Commitments, VB commits to divest the [C]\* trademark and business in the EEA (the “[C]\* Business”). By way of clarification, VB wishes to point out that the divestment will comprise the assets related to the [C]\* starter battery business in [...] and not [Company C]\*.

As described in more detail below, the [C]\* Business includes the following assets:

### 1 Legal form and structural organisation of the [C]\* Business

#### Social information

[...]\*

#### Shareholding structure

[...]\*

### 2 Detailed description of the [C]\* Business

#### 2.1 Sales and operational organisation

As shown below, in 2006, sales of [C]\* branded batteries amounted to [...]\*, representing [...]\* cars/LCV batteries and [...]\* trucks/HCV batteries.

In [...]\*, sales amounted to [...]\*, representing [...]\* cars/LCV batteries and [...]\* trucks/HCV batteries.

In [...]\*, sales amounted to [...]\*, representing [...]\* cars/LCV batteries and [...]\* trucks/HCV batteries.

Country of sales		Volume of sales (1000 units)			Value of sales (€ million)		
		Cars/LCV	Trucks/HCV	Total	Cars/LCV	Trucks/HCV	Total
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*		12.4	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*		5.1	[...]*	[...]*	[...]*	[...]*	[...]*
<b>Total</b>		[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

The [C]\* products are marketed mainly in [...] through a structured organization including [...]\*.

2.1.1 [...]\*

The most significant market (representing approximately [...] of sales) of the [C]\* Business is [...] where the local commercial network is structured as follows:

[...]\*

#### 2.1.2 [...]\*

Sales in [...] are made through a network of [...]\*. In addition there is [...]\*.

It should be noted that [...] also buy unbranded batteries or batteries with different brands that are not included in the [C]\* Business.

It should also be noted that, in addition to the [...] sales people directly employed in [...]\*, the Head Office Sales in [...] also has [...] employees which manage sales, customer service and logistic activities, including the central warehouse [...]\*. Such employees also manage the export activity.

As such the [C]\* Business will include all books and records for the sales and operational organisation, including all customer records, but excluded corporate records and statutory accounts as [Company C]\* is not part of the [C]\* Business.

Moreover, VB will make its best efforts to transfer the existing sales contracts entered into by the [C]\* Business with third parties.

## 2.2 Tangible assets

### 2.2.1 Stock of batteries

The 2006 year-end stock includes approximately [...] [C]\* batteries which were located in the [...] warehouses of the [C]\* Business as follows:

[...]\*

There is no certainty that the stock level will be exactly the same at the time of the transfer of the [C]\* Business. Nevertheless, FIAMM S.p.A. undertakes to ensure that the stock level at that time will correspond to a normal stock level in view of the activities of the [C]\* Business. Detailed information regarding the stock level for [C]\* batteries during the past three years is enclosed as **Schedule 2.A**.

### 2.2.2 Leases

To the extent required by the Purchaser of the [C]\* Business, VB will make its best efforts to transfer the real estate contract leases for the offices and warehouses in [...] to the Purchaser.

At the premises in [...] and [...]\*, FIAMM S.p.A. also carries out businesses other than the starter battery business and wishes to retain these premises. However, to the extent required by the Purchaser of the [C]\* Business, FIAMM S.p.A. undertakes to make available to the Purchaser for a limited transitional period and on a reasonable cost plus basis some space in the premises in [...]\*.

Finally, as regards the premises of [...] which are the property of FIAMM S.p.A. and which will not be transferred as part of the [C]\* Business, FIAMM S.p.A. undertakes, to the extent required by the Purchaser of the [C]\* Business, to make available to the Purchaser for an extended period and on a reasonable cost plus basis the premises in [...]\*.

### 2.2.3 Other fixed assets

The [C]\* Business also includes the fixed assets dedicated to the starter battery commercial activity in [...]\*, which will be divested:

[...]\*

A detailed list of such fixed assets and their value is included in **Schedule 2.B**.

### 2.3 **Intangible asset: [C]\* trademark**

As FIAMM S.p.A. uses the [C]\* trademark not only for its starter battery business but also for other businesses, VB will not acquire the existing [C]\* trademark which is owned by [Company C]\*. However, within the context of the proposed transaction FIAMM S.p.A. will register and assign to VB a new ad-hoc trademark that VB will be able to use freely and on an exclusive basis in the EEA, in the starter batteries market. Such ad-hoc trademark includes the well established [C]\* logo and [...]\* as shown below.

[...]\*

The divestment [C]\* Business includes the assignment of the perpetual rights on the above ad-hoc trademark in the EEA. The Purchaser will be free to [...]\* and to register the ad-hoc trademark.

FIAMM S.p.A. will retain the existing [C]\* trademark [...]\*.

### 2.4 **Customers**

The table below lists the twenty most important customers of the [C]\* Business in the period from 1<sup>st</sup> October 2005 to 30 September 2006 for [...]\*. The table sets out the volume of IAM automotive starter batteries purchased as well as the share that these sales represent in the total sales of the [C]\* Business in [...]\*.

#### 2.4.1 [...]\*

Client	Type of sales	[C]* brand sales	
		Volume	Share of sales
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*



Client	Type of sales	[C]* brand sales	
		Volume	Share of sales
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
<b>Total</b>		[...]*	[...]*

The [...]\* office, headed by a Sales Manager manages directly about [...]\* of the total [C]\* batteries sales in [...]\*.

The customer base of [...]\* is mainly composed of [...]\*.

A significant share of the [C]\* Business' sales in [...]\* is supported by [...]\*. The parties also enclose as **Schedule 2.D** a more detailed overview of the major clients, together with their addresses, of the [C]\* Business in [...]\* as of September 2006.

## 2.5 Personnel

As of 28 February 2007, the [C]\* Business has [...]\* employees. A complete list of such personnel is enclosed as **Schedule 2.E**.

To the extent required by the Purchaser of the [C]\* Business, VB will transfer the Personnel identified by the Purchaser of the [C]\* Business to the Purchaser itself.

## 2.6 Key personnel

List of Key Personnel of the existing [C]\* business

The VB Commitments define the Key Personnel as the employees “*which are necessary to maintain the viability and competitiveness*” of the [C]\* Business. The list of employees which fulfil the above definition is set out below:

Location	Name	Job title	Date of hiring
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*

Location	Name	Job title	Date of hiring
[...]*			
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*			
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*

A Hold Separate Manager will be appointed by VB among the Key Personnel at the Effective Date.

To the extent required by the Purchaser of the [C]\* Business, VB will transfer the Key Personnel identified by the Purchaser of the [C]\* Business to the Purchaser itself.

Criteria chosen for the identification of Key Personnel

VB considers that the members of management of the existing [C]\* business do not fulfil the criteria regarding the definition of Key Personnel, as their absence would not jeopardize the “*viability and competitiveness*” of the [C]\* Business.

Only the employees who possess the relevant know how and knowledge of the activity of the [C]\* Business and of the relevant markets it operates on have been identified as Key Personnel as they are necessary to maintain the viability and competitiveness of the business.

**2.7 Transitional supply agreement between FIAMM and the Purchaser of the [C]\* Business**

FIAMM S.p.A. commits, at the option of the Purchaser of the [C]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of [...] automotive starter batteries per quarter for IAM applications manufactured by FIAMM at its [Plant], for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

Please note that FIAMM S.p.A.’s Commitment concerns a total maximum volume of [...] IAM starter batteries which will be made available to be Purchaser(s) of the [C]\*, [D]\*, [A]\* and [B]\* businesses. It is neither the purpose nor the object of FIAMM S.p.A.’s Commitment to offer a temporary supply agreement for [...] IAM batteries to each of the

Purchasers of the IAM Divestment Businesses (as this could require FIAMM S.p.A. to supply in total [...] IAM batteries).

**2.8 Transitional supply agreement between VB and the Purchaser of the [C]\* Business**

VB commits, at the option of the Purchaser of the [C]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of automotive starter batteries for IAM applications necessary to fulfil the demand of brands traded in relation to the Divestiture Businesses. Such commitment will cover a total maximum amount of [...] batteries manufactured by VB, for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

**2.9 Support services**

To the extent required by the Purchaser of the [C]\* Business, FIAMM S.p.A. or VB will provide to the purchaser of the [C]\* Business certain support services, namely IT services (including IT software), logistics (warehousing) and customer services (back office) for a period of up to [...]\*, on a reasonable cost plus basis.

**Schedule 2A – 2E: [...]\***

## Schedule 3: Description of the [A]\* Business

As indicated in paragraph 6 of the VB Commitments, VB commits to divest the [A]\* trademark and business in the EEA (the “[A]\* Business”). By way of clarification, VB wishes to point out that the divestment will comprise the assets related to the [A]\* starter battery business in [...]\*, currently run by [Company A]<sup>478</sup>, and not any commercial entity as such.

As described in more detail below, the [A]\* Business includes the following assets:

### 1 Legal form and structural organisation of the [A]\* Business

#### Social information

[...]\*

#### Shareholding structure

### 2 [...]\* Detailed description of the [A]\* Business

#### 2.1 Sales and operational organisation

As shown below, in 2006, sales of [A]\* branded batteries amounted to [...]\*, representing [...]\* cars/LCV batteries and [...]\* trucks/HCV batteries. The [A]\* trademark is marketed only in [...]\*.

Country of sales		Volume of sales (1000 units)			Value of sales (€ million)		
		Cars/LCV	Trucks/HCV	Total	Cars/LCV	Trucks/HCV	Total
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<b>Total</b>		[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

As indicated above, the [A]\* trademark is marketed in [...]\* through [...]\*.

Some of the independent agents used for the [A]\* trademark are also [...]\*.

As shown in more detail in **Schedule 3.A**, more than [...]\* of sales of cars/LCV and trucks/HCV batteries are related to the [A]\* and [...]\*brands; the remaining part is related to [...]\*.

Customer service and logistic activities, including the central warehouse [...]\* are managed by [...]\*. Please see Section 2.8 in this respect.

[...]\*.

<sup>478</sup> At the closing of the Proposed Transaction, the entire SBB business will be transferred to a Newco to be sold to VB; the company name of such Newco is FIAMM Autobatteries S.r.l., Viale del Lavoro, 20 – 37040 Veronella.

As such, the [A]\* Business will include all books and records of the sales and operational organisation, including all customer records but excluded corporate records and statutory accounts as [...] and [...] are not part of the [A]\* Business.

Moreover, VB will make its best efforts to transfer the existing sales contracts entered into by the [A]\* Business with third parties. Also VB will make its best efforts to transfer (i) the existing distribution contracts entered into by the [A]\* Business with its independent agents, a list of which is enclosed as **Schedule 3.B.**, and (ii) the contracts entered into by the [A]\* Business with the local deposits, a list of which is enclosed as **Schedule 3.C.**

## **2.2 Tangible assets**

### **2.2.1 Stock of batteries**

The 2006 year-end stock includes approximately [...] [A]\* batteries which were located in [...] warehouses as follows:

[...].

There is no certainty that the stock level will be exactly the same at the time of the transfer of the [A]\* Business. Nevertheless, it is expected that the stock level at that time will correspond to a normal stock level in view of the activities of the [A]\* Business. Detailed information regarding the stock level for [A]\* batteries during the past three years is enclosed as **Schedule 3.D.**

### **2.2.2 Leases**

As regards the [...] premises, VB wishes to retain their usage in order to carry out its IAM starter batteries activity in [...] following the completion of the proposed transaction. However, to the extent required by the Purchaser of the [A]\* Business, VB undertakes to make available to the Purchaser for a limited transitional period and on a reasonable cost plus basis some space in the [...] premises.

### **2.2.3 Other fixed assets**

The [A]\* Business could also include the fixed assets dedicated to the starter battery commercial activity in [...]. Such assets have a book value estimated at approximately [...] as at 31 December 2005.

A detailed list of such fixed assets and their value is included in **Schedule 3.E.**

## **2.3 Intangible asset: the [A]\* trademark**

The [A]\* trademark is owned by [Company A]\*. In view of the Proposed Transaction, the [A]\* trademark will be sold to VB by [Company A]. Such brand is registered in [...]. Such registrations make reference to the [...] shown below which are used to market the [A]\* batteries together with the [...], which is going to be registered:

[...].

The [A]\* Business includes the assignment of the perpetual rights on the above trademarks in the EEA.

Further to the Proposed Transaction FIAMM S.p.A. will [...].



It has also to be noted that the [A]\* commercial organization also markets batteries using the [...] brand, which [...]. In year 2006 a total of [...] cars/LCV batteries and [...] trucks/HCV batteries have been sold [...].

## 2.5 Personnel

FIAMM SBB does not have personnel which is specifically dedicated to the promotion of [A]\* branded products. For the commercialization of all FIAMM brands, the logistics management and the other back office activities, it employs personnel which is identified in **Schedule 3.G**.

It is however planned that before closing, a specific structure will be identified to serve the [A]\* Business from a commercial standpoint. The head of the organization is likely to be [...]. In this respect it should be noted that [...].

In any event, the organization will employ a group of people which at the level of the [A]\* Business mirror the organization of [Company A]\* in the IAM.

To the extent required by the Purchaser of the [A]\* Business, VB will transfer the Personnel identified by the Purchaser of the [A]\* Business to the Purchaser itself.

## 2.6 Key personnel

### List of Key Personnel of the existing [A]\* business

The VB Commitments define the Key Personnel as the employees “*which are necessary to maintain the viability and competitiveness*” of the [A]\* Business. As indicated above, it is thought that [...] will fulfil such criteria.

Location	Name	Job title	Date of hiring
[...]	[...]	[...]	[...]

If retained as Sales Manager, [...] may also be appointed by VB at the Effective Date as the Hold Separate Manager.

To the extent required by the Purchaser of the [A]\* Business, VB will transfer the Key Personnel identified by the Purchaser of the [A]\* Business to the Purchaser itself.

### Criteria chosen for the identification of Key Personnel

VB considers that the members of management of the existing [A]\* business do not fulfil the criteria regarding the definition of Key Personnel, as their absence would not jeopardize the “*viability and competitiveness*” of the [A]\* Business.

Only the employees who possess the relevant know how and knowledge of the activity of the [A]\* Business and of the relevant markets it operates on have been identified as Key Personnel as they are necessary to maintain the viability and competitiveness of the business.

## 2.7 Transitional supply agreement between FIAMM and the Purchaser of the [A]\* Business

FIAMM S.p.A. commits, at the option of the Purchaser of the [A]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of [...] automotive starter batteries per quarter for

IAM applications manufactured by FIAMM at [plant], for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

Please note that FIAMM S.p.A.'s Commitment concerns a total maximum volume of [...]\* IAM starter batteries which will be made available to be Purchaser(s) of the [A]\*, [D]\*, [C]\* and [B]\* business. It is neither the purpose nor the object of FIAMM S.p.A.'s Commitment to offer a temporary supply agreement for [...]\* IAM batteries to each of the Purchasers of the IAM Divestment Businesses (as this could require FIAMM S.p.A. to supply in total [...]\* IAM batteries).

## **2.8 Transitional supply agreement between VB and the Purchaser of the [A]\* Business**

VB commits, at the option of the Purchaser of the [A]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of automotive starter batteries for IAM applications necessary to fulfil the demand of brands traded in relation to the Divestiture Businesses. Such commitment will cover a total maximum amount of [...]\* batteries manufactured by VB, for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

## **2.9 Support services**

To the extent required by the Purchaser of the [A]\* Business, FIAMM S.p.A. or VB will provide to Purchaser of the [A]\* Business certain support services, namely IT services (including IT software), logistics (warehousing) and customer services (back office) for a period of up to [...]\*, on a reasonable cost plus basis.

**Schedule 3A – 3G: [...]\***

## Schedule 4: Description of the [B]\* Business

As indicated in paragraph 6 of the VB Commitments, VB commits to divest the [B]\* trademark and business in the EEA (the “[B]\* Business”). By way of clarification, VB wishes to point out that the divestment will comprise the assets related to the [B]\* starter battery business in [...]\*, currently run by [Company B]\*<sup>479</sup>, and not any commercial entity as such.

As described in more detail below, the [B]\* Business includes the following assets:

### 1 Legal form and structural organisation of the [B]\* Business

#### Social information

[...]\*

#### Shareholding structure

[...]\*

### 2 Detailed description of the [B]\* Business

#### 2.1 Sales and operational organisation

As shown below, in 2006, sales of [B]\* branded batteries amounted to [...]\*, representing [...]\* cars/LCV batteries and [...]\* trucks/HCV batteries. The [B]\* trademark is marketed mainly in [...]\*.

Country of sales		Volume of sales (1000 units)			Value of sales (€ million)		
		Cars/LCV	Trucks/HCV	Total	Cars/LCV	Trucks/HCV	Total
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*		[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*		[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<b>Total</b>		[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

As indicated above, the [B]\* trademark is marketed in [...]\* through [...]\*.

Some of the independent agents used for the [B]\* trademark are also [...]\*.

As shown in more detail in **Schedule 4.A**, more than [...]\* of sales of cars/LCV and trucks/HCV batteries are related to the [B]\* brand; the remaining part is related to [...]\*.

Customer service and logistic activities, including the central warehouse [...]\* are managed by [...]\*. Please see Section 2.8 in this respect.

<sup>479</sup> At the closing of the Proposed Transaction, the entire SBB business will be transferred to a Newco to be sold to VB; the company name of such Newco is FIAMM Autobatteries S.r.l., Viale del Lavoro, 20 – 37040 Veronella.

[...]\*.

The [B]\* Business will include all books and records of the sales and operational organisation, including all customer records but excluded corporate records and statutory accounts as [B Company]\* are not part of the [B]\* Business.

Moreover, VB will make its best efforts to transfer the existing sales contracts entered into by the [B]\* Business with third parties. Also VB will make its best efforts to transfer (i) the existing distribution contracts entered into by the [B]\* Business with its independent agents, a list of which is enclosed as **Schedule 4.B.**, and (ii) the contracts entered into by the [B]\* Business with the local deposits, a list of which is enclosed as **Schedule 4.C.**

## **2.2 Tangible assets**

### **2.2.1 Stock of batteries**

The 2006 year-end stock includes approximately [...]\* [B]\* batteries which were located in [...]\* as follows:

[...]\*.

There is no certainty that the stock level will be exactly the same at the time of the transfer of the [B]\* Business. Nevertheless, it is expected that the stock level at that time will correspond to a normal stock level in view of the activities of the [B]\* Business. Detailed information regarding the stock level for [B]\* batteries during the past three years is enclosed as **Schedule 4.D.**

### **2.2.2 Leases**

As regards the [...]\* premises, VB wishes to retain their usage in order to carry out its IAM starter batteries activity in [...]\* following the completion of the proposed transaction. However, to the extent required by the Purchaser of the [B]\* Business, VB undertakes to make available to the Purchaser for a limited transitional period and on a reasonable cost plus basis some space in the [...]\* premises.

### **2.2.3 Other fixed assets**

The [B]\* Business could also include the fixed assets dedicated to the starter battery commercial activity in [...]\*. Such assets have a book value estimated at approximately [...]\* as at 31 December 2005.

A detailed list of such fixed assets and their value is included in **Schedule 4.E.**

## **2.3 Intangible asset: the [B]\* trademark**

The [B]\* trademark is owned by FIAMM S.p.A. In view of the Proposed Transaction, the [B]\* trademark will be sold to VB by FIAMM S.p.A. Such brand is registered in [...]\*. Such registrations make reference to the logo shown below which is used to market the [B]\* batteries:

[...]

The [B]\* Business includes the assignment of the perpetual rights on the above trademarks in the EEA.

Further to the Proposed Transaction FIAMM S.p.A. will [...]\*.



**2.5 Personnel**

FIAMM SBB does not have personnel which is specifically dedicated to the promotion of [B]\* branded products. For the commercialization of all FIAMM brands, the logistics management and the other back office activities, it employs personnel which is identified in **Schedule 4.G**.

It is however planned that before closing, a specific structure will be identified to serve [B]\* Business from a commercial standpoint. The head of the organization is likely to be [...]\*. In this respect it should be noted that [...]\*.

[...]\*

To the extent required by the Purchaser of the [B]\* Business, VB will transfer the Personnel identified by the Purchaser of the [B]\* Business to the Purchaser itself.

**2.6 Key personnel**

List of Key Personnel of the existing [B]\* business

The VB Commitments define the Key Personnel as the employees “*which are necessary to maintain the viability and competitiveness*” of the [B]\* Business. As indicated above, it is thought that [...]\* will fulfil such criteria.

Location	Name	Job title	Date of hiring
[...]*	[...]*	[...]*	[...]*

If retained as Sales Manager, [...]\* may also be appointed by VB at the Effective Date as the Hold Separate Manager.

To the extent required by the Purchaser of the [B]\* Business, VB will transfer the Key Personnel identified by the Purchaser of the [B]\* Business to the Purchaser itself.

Criteria chosen for the identification of Key Personnel

VB considers that the members of management of the existing [B]\* business do not fulfil the criteria regarding the definition of Key Personnel, as their absence would not jeopardize the “*viability and competitiveness*” of the [B]\* Business.

Only the employees who possess the relevant know how and knowledge of the activity of the [B]\* Business and of the relevant markets it operates on have been identified as Key Personnel as they are necessary to maintain the viability and competitiveness of the business.

**2.7 Transitional supply agreement between FIAMM and the Purchaser of the [B]\* Business**

FIAMM S.p.A. commits, at the option of the Purchaser of the [B]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of [...]\* automotive starter batteries per quarter for IAM applications manufactured by FIAMM at its [Plant]\*, for an appropriate period of time, not to exceed [...]\*, at on a reasonable cost plus basis to be agreed with the Purchaser.

Please note that FIAMM S.p.A.'s Commitment concerns a total maximum volume of [...] IAM starter batteries which will be made available to be Purchaser(s) of the [B]\*, [D]\*, [C]\* and [A]\* businesses. It is neither the purpose nor the object of FIAMM S.p.A.'s Commitment to offer a temporary supply agreement for [...] IAM batteries to each of the Purchasers of the IAM Divestment Businesses (as this could require FIAMM S.p.A. to supply in total [...] IAM batteries).

## **2.8 Transitional supply agreement between VB and the Purchaser of the [B]\* Business**

VB commits, at the option of the Purchaser of the [B]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of automotive starter batteries for IAM applications necessary to fulfil the demand of brands traded in relation to the Business Businesses. Such commitment will cover a total maximum amount of [...] batteries manufactured by VB, for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

## **2.9 Support services**

To the extent required by the Purchaser of the [B]\* Business, FIAMM S.p.A. or VB will provide to the Purchaser of [B]\* Business certain support services, namely IT services (including IT software), logistics (warehousing) and customer services (back office) for a period of up to [...]\*, on a reasonable cost plus basis.

**Schedule 4A – 4G: [...]\***

## Schedule 5: Description of the [E]\* Business

As indicated in paragraph 6 of the VB Commitments, VB commits to divest the [E]\* trademark and business in the EEA (the “[E]\* Business”). By way of introduction, VB wishes to point out that the [E]\* trademark is [...]\*. The divestment should be [...]\*.

The divestment of the [E]\* Business will comprise the assets related to the [E]\* starter battery business in [...]\*, currently run by FIAMM S.p.A.<sup>480</sup>, and not any commercial entity as such.

As described in more detail below, the [E]\* Business includes the following assets:

### 1 Legal form and structural organisation of the [E]\* Business

#### Social information

[...]\*

#### Shareholding structure

[...]\*

### 2 Detailed description of the [E]\* Business

#### 2.1 Sales and operational organisation

As shown below, in 2006, sales of [E]\* branded batteries amounted to [...]\*, representing [...]\* cars/LCV batteries and [...]\* trucks/HCV batteries. The main market for the [E]\* trademark is [...]\*.

Country of sales	Volume of sales (1000 units)			Value of sales (€ million)		
	Cars/LCV	Trucks/HCV	Total	Cars/LCV	Trucks/HCV	Total
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

In general the [E]\* branded batteries are marketed as [...]\*.

<sup>480</sup> At the closing of the Proposed Transaction, the entire SBB business will be transferred to a Newco to be sold to VB; the company name of such Newco is FIAMM Autobatteries S.r.l., Viale del Lavoro, 20 – 37040 Veronella.

### 2.1.1 [...]\*

In [...]\*, the [E]\* trademark is marketed through [...]\*.

As shown in more detail in **Schedule 5.A**, more than [...]\* of sales of car/LCV and truck/HCV batteries are related to the [...]\* brand; most of the remaining sales are related to [E]\* batteries, while minor sales are related to private label / unbranded batteries and other FIAMM brands (without exclusivity).

### 2.1.2 [...]\*

In [...]\*, the [E]\* trademark is marketed through [...]\*.

### 2.1.3 [...]\*

Sales in [...]\* are made through [...]\*.

### 2.1.4 [...]\*

The [E]\* products are marketed in [...]\* through [...]\*.

### 2.1.5 General comments

As mentioned above, the [E]\* branded batteries are marketed as [...]\*.

Currently the majority of sales of the [E]\* branded batteries take place [...]\*.

[...]\*

The divested [E]\* Business will include all books and records of the sales, including all customer records but excluded corporate records and statutory accounts as [...]\* are not part of the [E]\* Business.

Moreover, VB will make its best efforts to transfer the existing sales contracts entered into by the [E]\* Business with third parties. Also VB will make its best efforts to transfer (i) the existing distribution contracts entered into by the [E]\* Business with its independent agents, a list of which is enclosed as **Schedule 5.B.**, and (ii) the contracts entered into by the [E]\* Business with the local deposits, a list of which is enclosed as **Schedule 5.C.**

## 2.2 Tangible assets

### 2.2.1 Stock of batteries

The 2006 year-end stock includes approximately [...]\* [E]\* batteries which were located in [...]\* as follows: [...]\*.

There is no certainty that the stock levels will be exactly the same at the time of the transfer of the [E]\* Business. Nevertheless, it is expected that the stock level at that time will correspond to a normal stock level in view of the activities of the [E]\* Business. Detailed information regarding the stock level for [E]\* batteries during the past three years is enclosed as **Schedule 5.D.**

### 2.2.2 Leases

As regards the [...]\* premises, VB wishes to retain their usage in order to carry out its IAM starter batteries activity in [...]\* following the completion of the proposed transaction. However, to the extent required by the Purchaser of the [E]\* Business, VB

undertakes to make available to the Purchaser for a limited transitional period and on a reasonable cost plus basis some space in the [...] premises.

### 2.2.3 Other fixed assets

The [E]\* Business could also include the fixed assets dedicated to the commercial starter battery activity in [...]\*. Such assets have a book value estimated at approximately [...] as at 31 December 2005.

A detailed list of such fixed assets and their value is included in **Schedule 5.E**.

## 2.3 Intangible asset: the [E]\* trademark

The [E]\* trademark shown below is owned by FIAMM S.p.A. In view of the Proposed Transaction, the [E]\* trademark will be sold to VB by FIAMM S.p.A. [...]\*.

[...]\*

Further to the Proposed Transaction FIAMM S.p.A. will [...]\*.

## 2.4 Customers

The table below lists the ten most important customers of the [E]\* Business in the period from 1<sup>st</sup> October 2005 to 30 September 2006 in [...]\*. The tables set out the volume of IAM automotive starter batteries purchased as well as the share that these sales represent in the total sales of the [E]\* Business.

### 2.4.1 [...]\*

Client	Type of sales	[E]* brand sales	
		Volume	Share of sales
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
<b>Total</b>		[...]*	[...]*



2.4.4 [...]\*

Client	Type of sales	[E]* brand sales	
		Volume	Share of sales
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
<b>Total</b>		[...]*	[...]*

Apart from their relationships with the independent agents, relationships with customers are mainly regulated by contracts or sales agreements that identify the pricing conditions.

The parties also enclose as **Schedule 5.F** a more detailed overview of the major clients, together with their addresses, of the [E]\* Business in [...] as of September 2006.

**2.5 Personnel**

FIAMM SBB [...] employs personnel which is identified in **Schedule 5.G**.

Since it is likely that, after the Proposed Transaction, the [E]\* brand will continue to be marketed as [...]\*.

**2.6 Transitional supply agreement between FIAMM and the Purchaser of the [E]\* Business**

FIAMM S.p.A. commits, at the option of the Purchaser of the [E]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of [...] automotive starter batteries per quarter for IAM applications manufactured by FIAMM at its [Plant]\*, for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

Please note that FIAMM S.p.A.'s Commitment concerns a total maximum volume of [...] IAM starter batteries which will be made available to be Purchaser(s) of the [E]\*, [D]\*, [C]\*, [E]\* and [A]\* businesses. It is neither the purpose nor the object of FIAMM S.p.A.'s Commitment to offer a temporary supply agreement for [...] IAM batteries to

each of the Purchasers of the IAM Divestiture Businesses (as this could require FIAMM S.p.A. to supply in total [...] IAM batteries).

## **2.7 Transitional supply agreement between VB and the Purchaser of the [E]\* Business**

VB commits, at the option of the Purchaser of the [E]\* Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of automotive starter batteries for IAM applications necessary to fulfil the demand of brands traded in relation to the Business Businesses. Such commitment will cover a total maximum amount of [...] batteries manufactured by VB, for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

## **2.8 Support services**

To the extent required by the Purchaser of the [E]\* Business, FIAMM S.p.A. or VB will provide to the Purchaser certain support services, namely IT services (including IT software), logistics (warehousing) and customer services (back office) for a period of up to [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser.

**Schedule 5A – 5G: [...]\***

## Schedule 6: Description of the [Plant]\* Divestiture Business

As indicated in paragraph 8 of the Amended VB Commitments, VB commits to divest:

- the personnel dedicated to the production of automotive starter batteries in the [Plant]\*;
- the equipment dedicated to the production of automotive starter batteries in the [Plant]\*;
- the real estate property dedicated to the production of automotive starter batteries in the [Plant]\*;
- the current OE automotive starter battery business of the [Plant]\*.

hereinafter collectively referred to as the “[Plant]\* Divestiture Business”.

To carry out the divestiture of the [Plant]\* Divestiture Business as described above, VB shall seek to find a Purchaser and enter into a final binding agreement for the sale of the [Plant]\* Divestiture Business within [...]\*.

If VB has not entered into such an agreement at the end of [...]\*, VB will commit to divest, in addition, the current IAM automotive starter battery business of the [Plant]\*.

As described in more detail below, the [Plant]\* Divestiture Business, which is capable of producing [...]\* OE and IAM starter batteries for cars/LCV, includes the following assets:

### 1 Legal form and structural organisation of the [Plant]\* Divestiture Business

#### Social information

[...]\*

#### Shareholding structure

A simplified organization chart of the operational structure of the [Plant]\* Divestiture Business is set out below:

[...]\*

### 2 Detailed description of the [Plant]\* Divestiture Business

#### 2.1 Production site

The area of the lot on which the plant has been built is located at [...]\*. Please see **Schedule 6.A** for a visual of the plant. **Schedule 6.B** provides an overview of the layout of the plant.

The site includes production facilities, buildings dedicated to offices and services (canteen, locker rooms), parking lots and appropriate support technical services (water treatment equipment, water tanks, compressed air equipment, etc.).

As previously indicated, VB commits to enter into an agreement for the sale of the real estate property pertaining to the [Plant]\*.

#### 2.2 Plant configuration and capacity

The [Plant]\* Divestiture Business includes all the equipment presently utilized to produce approximately [...]\* car/LCV batteries per year.

The Rouen Divestiture Business will, at the request of the Purchaser, include [...] currently located in the [Plant]\* which is used to [...]. The [...] is used to [...]. This is a patented technology used by VB to [...].

In respect of the [...], at the request of the Purchaser, it will be made available to the Purchaser for a period of [...] and VB will grant the Purchaser of the [Plant]\* Divestiture Business a license for [...] allowing the Purchaser to manufacture and sell OE batteries made in the [Plant]\* that are [...] using [...] (such a license does not allow the Purchaser to [...]). After the period of [...], VB will be able to retrieve [...] from the [Plant]\*.

The main equipment used in the [Plant]\*, which is described in detail in **Schedule 6.C**, includes the following:

[...]

### **2.3 Description of the OE automotive starter battery business of the [Plant]\***

The current OE automotive starter battery business of the [Plant]\* includes the following OE supply agreements:

[...]

At the request of the Purchaser of the [Plant]\*, VB will make its best efforts to transfer the above listed contracts to the Purchaser.

### **2.4 Personnel**

The [Plant]\* Divestiture Business has [...] employees. A complete list of such personnel is enclosed as **Schedule 6.D**.

### **2.5 Key Personnel**

#### List of Key Personnel of the [Plant]\* Divestiture Business

The VB Commitments define the Key Personnel as the employees “*which are necessary to maintain the viability and competitiveness*” of the [Plant]\* Divestiture Business. The list of employees which fulfil the above definition is set out in the chart enclosed in **Schedule 6.E**.

A Hold Separate Manager will be appointed by VB among the Key Personnel at the Effective Date.

#### Criteria chosen for the identification of Key Personnel

VB considers that the members of management of the [Plant]\* Divestiture Business do not fulfil the criteria regarding the definition of Key Personnel, as their absence would not jeopardize the “*viability and competitiveness*” of the [Plant]\* Divestiture Business.

Only the employees who possess the relevant know how and knowledge of the activity of the [Plant]\* Divestiture Business and of the relevant markets it operates on have been identified as Key Personnel as they are necessary to maintain the viability and competitiveness of the business.

### **3 Description of the IAM automotive starter battery business of the [Plant]\* plant**

The current IAM automotive starter battery business of the [Plant]\* includes [...]\*.

VB will grant the Purchaser of the [Plant]\* Divestiture Business a license for [...]\* allowing the Purchaser to manufacture and sell IAM batteries made in the [Plant]\* that are [...]\* (such a license does not allow the Purchaser to [...]\*).

#### **3.1 Supply agreements with IAM customers**

The IAM automotive starter battery business of the [Plant]\* plant includes the following IAM supply agreements:

[...]\*.

At the request of the Purchaser of the [Plant]\*, VB will make its best efforts to transfer the above listed contracts to the Purchaser.

#### **3.2 Transitional supply agreement between VB and the Purchaser of the [Plant]\* Divestiture Business**

VB commits, at the request of the Purchaser of the [Plant]\* Divestiture Business, to enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the supply or toll manufacturing for an annual total maximum amount equal to [...]\*. Such commitment will apply for an appropriate period of time, not to exceed [...]\*, based on a calculation formula to be approved by the Commission based on the advice of the Monitoring Trustee.

**Schedule 6A – 6E: [...]\***

**VB Autobatterie GmbH & Co KGaA / Automotive starter battery business of  
FIAMM S.p.A.  
Case No. COMP/M.4381**

**Commitments to the European Commission  
(FIAMM S.p.A. Commitments)**

Pursuant to Article 8(2) of Council Regulation (EC) No. 139/2004 (the “**Merger Regulation**”), FIAMM S.p.A. hereby provides the following commitments in order to enable the European Commission (the “**Commission**”) to declare the acquisition by VB of the automotive starter battery business of FIAMM S.p.A. (“**FIAMM SBB**”) compatible with the Common Market and the EEA Agreement by its decision pursuant to Article 8(2) of the Merger Regulation (the “**Decision**”). For the purpose of these FIAMM S.p.A. Commitments, please refer to the definitions set out in the VB Commitments

These commitments shall take effect upon the date of adoption of the Commission Decision.

This text shall be assessed in conjunction with the VB Commitments of this date which conditions and obligations apply to the FIAMM S.p.A. Commitments in their entirety, and interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, within the general framework of Community law, in particular the Merger Regulation and by reference to the Commission Notice on remedies acceptable under the Merger Regulation.

If the acquisition of FIAMM SBB by VB (the “**Proposed Transaction**”) is abandoned or not implemented for any reasons, the Commitments will be void and will not need to be implemented.

The FIAMM S.p.A. Commitments are given without prejudice to FIAMM S.p.A.’s position that the Proposed Transaction does not significantly impede effective competition in any of the relevant markets.

1. From the date of the Decision until closing of the Proposed Transaction, FIAMM S.p.A. shall preserve the economic viability, marketability and competitiveness of the Divestiture Businesses (as defined in VB’s commitments of this date) held by FIAMM S.p.A. prior to the closing of the Proposed Transaction.
2. In particular, FIAMM S.p.A. commits:
  - (i) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestiture Businesses or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestiture Businesses;
  - (ii) to make available sufficient resources for the development of the Divestiture Businesses, on the basis and continuation of the existing business plans.
3. In relation to the Divestiture Businesses, FIAMM S.p.A. commits, at the option of the Purchaser, to:
  - (iii) enter into a temporary supply or toll-manufacturing agreement with the Purchaser for the non-exclusive supply or toll manufacturing of [...] automotive starter batteries per quarter for IAM applications manufactured by FIAMM S.p.A. at the date of Closing at its [Plant]\* for an appropriate period of time, not to exceed [...]\*, on a reasonable cost plus basis to be agreed with the Purchaser;

- (iv) provide reasonable technical assistance to the Purchaser to assume responsibility for the sale and marketing of IAM batteries in the EEA for such period as is reasonably required by the Purchaser to establish the Divestiture Businesses as a viable and independent business, as certified by the Monitoring Trustee, and on a reasonable cost plus basis to be agreed with the Purchaser;
- (v) provide transitional real estate contract leases on a reasonable cost plus basis for the offices and warehouses in [...]\*;
- (vi) enter into an agreement for the sale of certain separate pieces of equipment, as detailed in Schedule 1, consistent with a yearly production capacity of approximately [...]\* batteries (“[...]” **Equipment**”), namely: [...]\*.
- (vii) for the avoidance of any doubts, as regards the interpretation of the “reasonable cost plus” pricing principle, reference is made in Section A of the VB Commitments.

Signed by \_\_\_\_\_  
Giulio Dolcetta

Duly authorised for and on behalf of FIAMM S.p.A.  
Date: 29 March 2007

**Schedule 1: [...]\***