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***Case No COMP/M.6471***  
***– Outokumpu/***  
***INOXUM***

Only the English text is authentic.

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

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Article 8 (2)  
Date: 07/11/2012



EUROPEAN COMMISSION

Brussels, 7.11.2012  
C(2012) 7969 final

PUBLIC VERSION

**COMMISSION DECISION**

**of 07.11.2012**

**addressed to:**

**Outokumpu OYJ**

**declaring a concentration to be compatible with the internal market and the EEA  
agreement (Case COMP/M.6471 – Outokumpu/INOXUM)**

(Only the English text is authentic)

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## COMMISSION DECISION

of 07.11.2012

addressed to:  
**Outokumpu OYJ**  
declaring a concentration to be compatible with the internal market and the EEA  
agreement (Case COMP/M.6471 – Outokumpu/ INOXUM)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 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 21 May 2012 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:

- (1) On 10 April 2012, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") by which the undertaking Outokumpu Oyj ("Outokumpu", Finland) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertakings Inoxum GmbH and Nirosta GmbH (together, "Inoxum", Germany), the stainless steel division of ThyssenKrupp AG ("TK", Germany) by way of purchase of shares (the "proposed transaction")<sup>4</sup>.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ C .....200. , p....

<sup>3</sup> OJ C .....200. , p....

<sup>4</sup> Publication in the Official Journal of the European Union No C 116, 20.04.2012, p.4.

Outokumpu is designated hereinafter as the "Notifying Party", while Outokumpu and Inoxum are designated hereinafter as the "Parties".

## 1. THE PARTIES

### 1.1. Outokumpu

- (2) Outokumpu is a Finnish public company listed on the Helsinki Stock Exchange<sup>5</sup>. Outokumpu is active in the production, sale and distribution of stainless steel products and the production of ferrochrome. It has stainless steel production facilities located in Tornio (Finland), Avesta, Nyby, Degerfors and Kloster (Sweden), Sheffield (United Kingdom), and New Castle and Richburg in the United States of America, as well as a ferrochrome mine in Kemi, Finland.
- (3) The largest shareholder of Outokumpu is Solidium Oy ("Solidium", Finland), a limited company fully owned by the State of Finland. Its mission is to strengthen and stabilise Finnish ownership in nationally important companies and increase the value of its holdings in the long run. Investment activities are based on financial analysis. Solidium owns stakes in 12 listed Finnish companies. Solidium currently holds 30.84% of the shares of Outokumpu. The Notifying Party submits that neither Solidium nor any other person or company is currently controlling Outokumpu.
- (4) In its decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation ("Article 6(1)(c) decision") on 21 May 2012<sup>6</sup>, as a preliminary assessment, the Commission did not agree with the Notifying Party that neither Solidium nor any other person or company is currently controlling Outokumpu. The Commission ultimately left this issue open to be further assessed during the phase II investigation.
- (5) After further assessment carried out in the phase II investigation, the Commission notes the following.
- (6) In accordance with Paragraph 54 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings<sup>7</sup> ("Jurisdictional Notice"), "*[s]ole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control). In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly controls a company, i.e.*

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<sup>5</sup> "OUT1V", <http://www.nasdaqomxnordic.com/aktier/shareinformation?Instrument=HEX24321>

<sup>6</sup> OJ C 154, 31.05.2012, p.2.

<sup>7</sup> OJ C 95, 16.04.2008, p.1.

*the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3(2) and therefore control within the meaning of the Merger Regulation."*

- (7) Currently, Solidium is by far the biggest shareholder in Outokumpu, holding 30.84% of the shares. The next largest shareholders have 8.01%, 3.94%, 2.07%, 1.2% or less<sup>8</sup>.
- (8) Outokumpu's decision making bodies are the General Shareholders' Meeting ("GSM") and the Board of Directors ("BOD"). The GSM elects the chairman, vice chairman and the other members of the BOD, while the BOD is responsible for adopting the company's strategic and commercial decisions. At GSMs, the decisions related to the appointment of the chairman, vice-chairman and other members of the BOD are taken by a simple majority. During the last ten years Solidium represented more than 50% of the shareholders of the voters present and voting at GSMs.
- (9) Therefore, Solidium has decisive influence over Outokumpu by its influence over the appointment of the members of the BOD, which in turn adopts the strategic decisions in Outokumpu.
- (10) The Notifying Party takes the view that the proposals for BOD members is made by the Shareholders' Nomination Board, not by Solidium. Furthermore, Solidium does not have any member on the BOD since the board members are "*independent*" within the meaning of the Finnish legislation.
- (11) The Commission notes, however, that the Shareholders' Nomination Board's proposals are non-binding and individual shareholders can also propose candidate directors. Therefore, Solidium has decisive influence over the composition of the BOD.
- (12) Concerning the question of the "*independent*" nature of the members of the BOD, the Jurisdictional Notice, in Paragraph 22, emphasises the importance of the right to appoint the members of the BOD in the following terms: "*Restrictions in the articles of association or in general law concerning the persons eligible to sit on the board, such as a provisions requiring the appointment of independent members or excluding persons holding office or employment in the parent companies, do not exclude the existence of control as long as the shareholders decide the composition of the decision making bodies.*"
- (13) Therefore, Solidium has decisive influence over the composition of the BOD. The latter takes the strategic decisions in Outokumpu on a simple majority basis.

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<sup>8</sup> The source of the information related to Outokumpu's shareholding structure and decision making bodies is the From CO, ID 953.

Consequently, Solidium currently controls Outokumpu within the meaning of the Merger Regulation and the Jurisdictional Notice.

## 1.2. Inoxum

- (14) Inoxum is the stainless steel division of TK. Inoxum is active in the production, sale and distribution of stainless steel products, high performance alloys ("HPA") and forging. Inoxum's main stainless steel production facilities are in Krefeld, Bochum, Dillenburg and Dahlerbrück in Germany, Terni in Italy, and outside Europe, in Mexico (San Luis Potosi, "Mexinox"), USA (Calvert) and China (Shanghai Krupp Stainless, "SKS"). The HPA business is conducted through the division VDM, based in Germany. VDM operates independently of Inoxum's stainless steel business. With the exception of titanium hot and cold rolling which is performed in Terni, according to the Notifying Party [...]\*. Inoxum is currently solely controlled by TK.

## 2. THE OPERATION AND THE CONCENTRATION

- (15) Under the terms of the Business Combination Agreement executed on 31 January 2012, Outokumpu will acquire 100% of Inoxum from TK. Outokumpu will make a cash payment and issue additional shares to TK, so that TK will have a 29.9% interest in the post-merger entity, i.e. Outokumpu including Inoxum. TK will have the right to nominate one member of the Board of Directors of the merged entity.
- (16) Post-merger, TK will become the largest shareholder in Outokumpu with 29.9%, followed by Solidium with 21.7% (currently 30.84%) of Outokumpu's share capital. The Notifying Party submits that post-merger neither TK nor Solidium or any other company will be able to exercise *de jure* or *de facto* (sole or joint) control over Outokumpu. This is because (i) there is no legally binding agreement between TK and Solidium to act in concert in relation to the management of Outokumpu; and (ii) there is no commonality of interests between Solidium and TK in the management of Outokumpu, inter alia because TK considers its 29.9% share acquisition as a short term investment.
- (17) In its Article 6(1)(c) decision, as a preliminary assessment, the Commission did not agree with the Notifying Party that post-merger Solidium and TK will not be able to exercise either *de jure* or *de facto* sole or joint control over the merged entity. However, the Commission ultimately left the issue open to be further assessed during the phase II investigation.
- (18) After further assessment carried out in the phase II investigation, the Commission notes the following.
- (19) In order to have *de facto* sole control of Outokumpu, TK would need to obtain a majority of the votes cast at GSMs and consequently hold decisive influence over

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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.

Outokumpu. Solidium and other shareholders representing about 25% of the issued shares have voted at Outokumpu's GSMs in the last 10 years. This will be diluted post-merger to about 17%. Therefore, it can be reasonably assumed that 68% of the issued capital will be voted at future GSMs. Most likely therefore neither TK's 29.9%, nor Solidium's 21.7% would represent a majority of the votes cast in the future GSMs. As a consequence, on the basis of the observed pattern over a number of years of constant participation of minority shareholders in Outokumpu, there would be no sole control by either company.

- (20) With regard to the *de jure* joint control, since there is no pooling agreement or any other agreement between Solidium and TK giving them veto rights over strategic decisions, no *de jure* joint control of Outokumpu exists.
- (21) As for *de facto* joint control, paragraph 76 of the Jurisdictional Notice provides that, "*very exceptionally, collective action can occur on a de facto basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring*".
- (22) Consequently, *de facto* joint control is likely to occur very rarely and only when the Parties have strong common interests and/or mutual dependencies. A common interest in the financial results is generally not sufficient to constitute *de facto* joint control<sup>9</sup>. In the case at stake, neither TK nor Solidium provide any input or make vital contributions to Outokumpu<sup>10</sup>.
- (23) *De facto* joint control can also occur in case of a high degree of dependency of a majority shareholder on a minority shareholder<sup>11</sup>. In this case, however, both TK and Solidium are minority shareholders. Furthermore, neither Solidium nor TK is dependent on each other.
- (24) The Jurisdictional Notice also sets out with regard to the possibility of *de facto* joint control via the acquisitions of minority shareholdings that "*there is a higher probability of commonality of interests if the shareholdings are acquired by means of a concerted action*"<sup>12</sup>. The control of Solidium over Outokumpu, however, was pre-existing to the proposed transaction. Even if the agreement of Solidium to Outokumpu's acquisition of Inoxum could be regarded as a concerted action, this is only one of the elements of a commonality of interests and it is not, in itself, probative.
- (25) There do not seem to be any other strong elements pointing towards a commonality of interests between Solidium and TK. Firstly, the Notifying Party submits that the shareholding structure of Outokumpu post-transaction was solely dictated by financial and stock market considerations. As Outokumpu was unable to finance the purchase in cash, part of the price was paid by issuing new Outokumpu shares. The

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<sup>9</sup> Paragraph 79 of the Jurisdictional Notice.

<sup>10</sup> Paragraph 77 of the Jurisdictional Notice.

<sup>11</sup> Paragraph 78 of the Jurisdictional Notice.

<sup>12</sup> Paragraph 79 of the Jurisdictional Notice.

proportion of shares was limited by stock exchange rules, which require companies acquiring more than 30% of the shares of a target to make a bid for the remainder. Therefore, it appears most likely that the shareholding structure has been established in the light of the financial and stock exchange constraints and not for having joint-control over Outokumpu.

- (26) Secondly, Solidium was established in 2009 in order to manage non-strategic minority holdings of the Finnish State in companies listed on the Helsinki Stock Exchange, while TK is a private company.
- (27) Thirdly, the role of the two companies is different in the sense that Solidium is not involved in the day-to-day management of the companies in which it holds minority interests and no Solidium nominees are directors of Outokumpu.<sup>13</sup> Although TK will have one director out of at least seven on the Outokumpu board, TK's director will have no special rights and TK will not be able to direct Outokumpu's strategies or commercial policy. Also, TK considers its participation in Outokumpu as a short-term investment, while the Finnish State interests constitute long term investment. The TK Shareholding Agreement clearly states that "*TK does not plan to be a long-term investor in Outokumpu*"<sup>14</sup>. It should also be noted that TK had previously tried to sell Inoxum to Aperam SA, Luxembourg ("Aperam"). Whilst that did not materialise, it clearly shows TK's intention to dispose of its stainless steel production business.
- (28) Finally, although both Solidium (through its 39.9% holding in Rautaruukki<sup>15</sup>) and TK (through its subsidiary ThyssenKrupp Materials, "TKM"<sup>16</sup>) have interests in the distribution of stainless steel, there is no incentive for them to concert in the management of Outokumpu following the proposed transaction. In fact, Rautaruukki's sales of stainless steel are relatively minor and TKM's sales represent less than 2% of TK's turnover.
- (29) Therefore, it is concluded that following the proposed transaction no party or parties will exercise sole or joint (*de jure* or *de facto*) control over Outokumpu.
- (30) In view of the above, the proposed transaction, i.e. the acquisition of Inoxum by Outokumpu, constitutes a concentration within the meaning of Article 3(1) of the Merger Regulation.

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<sup>13</sup> However, see paragraphs 8-11 above.

<sup>14</sup> Source: Form CO, ID 953.

<sup>15</sup> Rautaruukki supplies metal-based components, systems and integrated systems to the construction and mechanical engineering industries; as well as a wide selection of metal products and related services. Rautaruukki is active mainly in carbon steel and does not produce stainless steel. However, as part of its steel distribution activities, it offers stainless steel products, in competition with Outokumpu and Inoxum's stainless steel distribution activities.

<sup>16</sup> ThyssenKrupp Materials runs 500 branches in 40 countries. The product range encompasses numerous stainless steel products, but also nonferrous metals and plastics. Services include processing, logistics, warehousing, inventory management and supply chain management. ThyssenKrupp Materials is not part of the Inoxum group.

### **3. UNION DIMENSION**

- (31) The undertakings concerned had in 2010 a combined aggregate world-wide turnover of more than EUR 5 000 million (Outokumpu: EUR 4 229 million; Inoxum: EUR 6 739 million). The aggregate Union-wide turnover of each of the undertakings concerned is more than EUR 250 million (Outokumpu: EUR [...] million; Inoxum: EUR [...] million). Finally, none of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State<sup>17</sup>. The proposed transaction therefore has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

### **4. THE PROCEDURE**

- (32) The Notifying Party notified the proposed transaction on 10 April 2012.
- (33) Based on a market investigation, the Commission raised serious doubts as to the compatibility of the proposed transaction with the internal market and adopted an Article 6(1)(c) decision on 21 May 2012.<sup>18</sup>
- (34) The Notifying Party submitted its written comments to the Article 6(1)(c) decision on 4 June 2012 ("Reply to the Article 6(1)(c) decision").
- (35) During the phase II investigation, there have been informal information exchanges on a regular basis between the Commission and the Notifying Party, as well as regular status update telephone calls.
- (36) The Commission also sent several formal requests for information pursuant to Article 11 of the Merger Regulation to the Parties.<sup>19</sup>
- (37) On 21 June 2012, the Commission sent to the Notifying Party a non-paper on economic issues ("Issues Paper") that included a response to the main economic submissions presented by the Notifying Party until then, as well as the Commission's preliminary view on the economic framework for the assessment ("comprehensive economic framework"). A conference call with the Notifying Party's economists to discuss the content of the Issues Paper was held on 28 June 2012. The Notifying Party also replied to the Commission's Issues Paper with further economic and econometric submissions on 5, 6 and 11 July 2012.
- (38) Formal State of Play meetings between the Commission and the Parties took place on 8 June 2012, 6 August 2012 and 12 September 2012.

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<sup>17</sup> EEA Contracting Parties are referred to in this Decision as "Member States".

<sup>18</sup> See paragraph (4) and footnote 6.

<sup>19</sup> In particular requests to the Notifying Party of 30 May 2012, 14 June 2012, 26 June 2012, 29 June 2012, 6 July 2012, 30 July 2012, 10 August 2012, 11 September 2012, 14 September 2012, 21 September 2012 and 1 October 2012. The Notifying Party responded to those requests on 22 June 2012, 29 June 2012, 3 July 2012, 11 July 2012, 31 July 2012, 16 August 2012, 21 September 2012, 25 September 2012, 1 October 2012, 3 October 2012, 4 October 2012, 11 October 2012, 12 October 2012, 16 October 2012, and 17 October 2012. The Commission also sent a request for information to Inoxum on 14 June 2012. Inoxum replied by submission of 20 June 2012.

- (39) On 9 August 2012, the Commission adopted a Statement of Objections ("SO") pursuant to Article 18 of the Merger Regulation. The Notifying Party replied to the SO on 24 August 2012 ("Reply to the SO").
- (40) A Letter of Facts was sent to the Notifying Party on 23 August 2012. The Notifying Party replied to the Letter of Facts on 28 August 2012.
- (41) On 30 August 2012, an Oral Hearing took place.
- (42) On 19 September 2012, the Notifying Party submitted commitments pursuant to Pursuant to Article 8(2) of the Merger Regulation ("the Proposed Commitments"). Following the submission of the commitments, the Commission launched a market test in order to gather competitors', customers' and other market participants' views on these commitments.
- (43) On 1 October 2012, the Notifying Party submitted a revised set of commitments. The Commission launched a market test on the revised commitments on the same day.
- (44) On 9 October 2012, the Notifying Party submitted a slightly modified version of the 1 October commitments.
- (45) On 19 October 2012, the Notifying Party submitted a final set of commitments.
- (46) The Advisory Committee discussed the draft of this Decision on 25 October 2012 and issued a favourable opinion.

## **5. ASSESSMENT**

### **5.1. Introduction to the stainless steel industry**

#### *5.1.1. Properties of stainless steel*

- (47) Stainless steel is defined as a steel alloy with a minimum content of 10.5% chromium and a maximum of 1.2% carbon.
- (48) Stainless steel is an intermediate product between carbon steel (carbon-based steel not containing nickel or other alloys) and high performance alloys (HPA). On the one hand, the low content of carbon distinguishes stainless steel from carbon steel. On the other hand, HPA normally contain a higher degree of alloys and their production is more complex, requiring different equipment and technical know-how.
- (49) For certain limited applications, stainless steel competes against a variety of materials such as aluminium, copper, plastics, ceramics, composites or carbon steel. However, stainless steel can be distinguished from other materials by its properties, which make it uniquely suitable for certain applications in process engineering, automobile, white goods, etc. One of the main properties of stainless steel is its resistance to corrosion.
- (50) It is the addition of chromium that provides stainless steel with its stainless properties. When exposed to oxygen, the chromium forms a passivation layer of

chromium oxide. The layer is too thin to be visible, but protects the metal beneath by making it impermeable to water and air. The passivation layer quickly reforms when the surface is scratched.

- (51) Other alloying elements such as nickel and molybdenum can be added in order to enhance the properties of the steel. The main stainless alloying elements are mentioned in Table 1 below.

**Table 1: The main stainless alloying elements**

<b>Element</b>	<b>Limits of available main commercial grades, weight %</b>	<b>Main element function</b>
Chromium (Cr)	10.5- 38.0	Gives stainless nature
Nickel (Ni)	0.0 – 35.0	Stabilises austenitic structure, non-magnetism
Molybdenum (Mo)	0.0 – 8.0	Adds corrosion resistance and high temperature strength
Nitrogen (N)	0.0-0.6	Stabilizes austenitic structure, adds strength
Copper (Cu)	0.0 – 0.6	Stabilizes austenitic structure, adds strength
Titanium (Ti)	0 – 2.0	Improves corrosion resistance, improves welding, adds (temperature) strength
Vanadium (V)	0 – 0.2	Improves corrosion resistance, improves welding, adds (temperature) strength
Niobium (Nb)	0.0-0.2	Improves corrosion resistance, improves welding, adds (temperature) strength
Manganese (Mn)	0.0-15	Stabilizes austenite, increases nitrogen solubility
Cobalt (Co)	0-2.0	Improves many properties
Aluminium (Al)	0-5.0	Reduces impurities and strengthens corrosion resistance
Sulphur (S)	0.0 -0.4	Improves machinability
Boron (B)	0-2.0	Improves hot ductility
Tungsten (W)	0.0 – 3.0	Adds corrosion resistance and high temperature strength

**Source: Form CO, ID 953**

- (52) Nickel, in particular, is an important element that, when added to stainless steel, stabilizes the austenite structure of the material. As a result, the steel becomes non-magnetic and more flexible. Nickel is costly and subject to significant fluctuations in price, which in turn influences the cost and final price of stainless steel grades containing nickel. For instance, at the beginning of 2005, the London Metal Exchange ("LME") (cash) nickel price was at around 15 000 USD/t. By 2007, the price tripled, reaching almost 55 000 USD/t and then dipping at 10 000 USD/t at the beginning of 2009.<sup>20</sup>

<sup>20</sup> Source Form CO Annex 33, ID 1077.

### 5.1.2. Differences between the stainless steel and the wider steel industry

- (53) In 2011, the total global steel production<sup>21</sup> was estimated at approximately 1.3 billion metric tonnes ("t"), consisting - in volume terms - of 91%<sup>22</sup> carbon steel and 9% alloy steel (including stainless steel). With a production volume of approximately 30 million t, stainless steel made up 2.3% of the total global steel production volume.<sup>23</sup> In terms of value, however, stainless steel accounts for approximately 10% of the total worldwide steel market.<sup>24</sup>
- (54) As mentioned above in paragraph (48), the production of stainless steel differs from production of carbon steels through the addition of the alloying elements to the steel melting process. The alloying elements are added to achieve metallurgical differences in the end product as compared to normal steel.
- (55) There are also significant price differences between these groups of materials, notably stainless steel being considerably more expensive than carbon steel. Moreover, for stainless steel logistics costs represent a much smaller proportion of overall costs compared to carbon steel and it is suitable for transport over longer distances. As a result, prices for stainless steel products evolve more similarly across regions than for carbon steel.
- (56) As regards production, in the year 2000 European mills accounted for [40-50]\*% of worldwide stainless steel output. Currently European mills supply [20-30]\*% of worldwide demand.<sup>25</sup> This shift mirrors to a large extent the significant increase in demand in the Asian region which took place in the past ten years.
- (57) Since 2000 and up until the financial crisis, stainless steel had been one of the strongest growing metal sectors.<sup>26</sup> According to some estimates, global demand has been growing since 1997 and will continue to grow on average by [5-10]\*% annually.<sup>27</sup> After the crisis years of 2009-2010, the expected annual growth of worldwide demand for stainless steel in 2011 was [5-10]\*%<sup>28</sup>, which is almost twice the expected growth for carbon steel. China and India have been the fastest growing markets for stainless steel, while relatively slow growth is forecast<sup>29</sup> for Europe in 2012.<sup>30</sup>

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<sup>21</sup> On a finished product basis.

<sup>22</sup> In value terms, carbon steel amounted for 80% of total steel production.

<sup>23</sup> Source: Form CO, Annex 30, ID 1074.

<sup>24</sup> Notifying Party, ID 13095.

<sup>25</sup> Source: Form CO, ID 953.

<sup>26</sup> Source: Form CO, ID 953.

<sup>27</sup> Source: Form CO, Annex 22 ID 1048.

<sup>28</sup> According to latest figures, the annual global growth in stainless steel for 2011 amounted to [5-10]\*%, with a European growth rate of [5-10]\*%, a growth in China of [5-10]\*% and a growth rate in the USA of [20-30]\*%.

<sup>29</sup> Between 1980 and 2011 the annual demand growth rate in Europe amounted to [5-10]\*%. For 2012 the global growth forecast is [5-10]\*%. Source: Notifying Party, ID 10218.

<sup>30</sup> Source: Form CO, Annex 30, ID 1074. According to recent estimates from one source submitted by the Notifying Party, however, growth is expected to decrease by [5-10]\*% in Europe in 2012 (Source: Notifying Party, ID 10222). However, the significant growth of [5-10]\*% which according to the same document took place in 2011 more than compensates for the expected decrease in demand in 2012. The result is still a net increase in demand of [5-10]\*% compared to 2010.

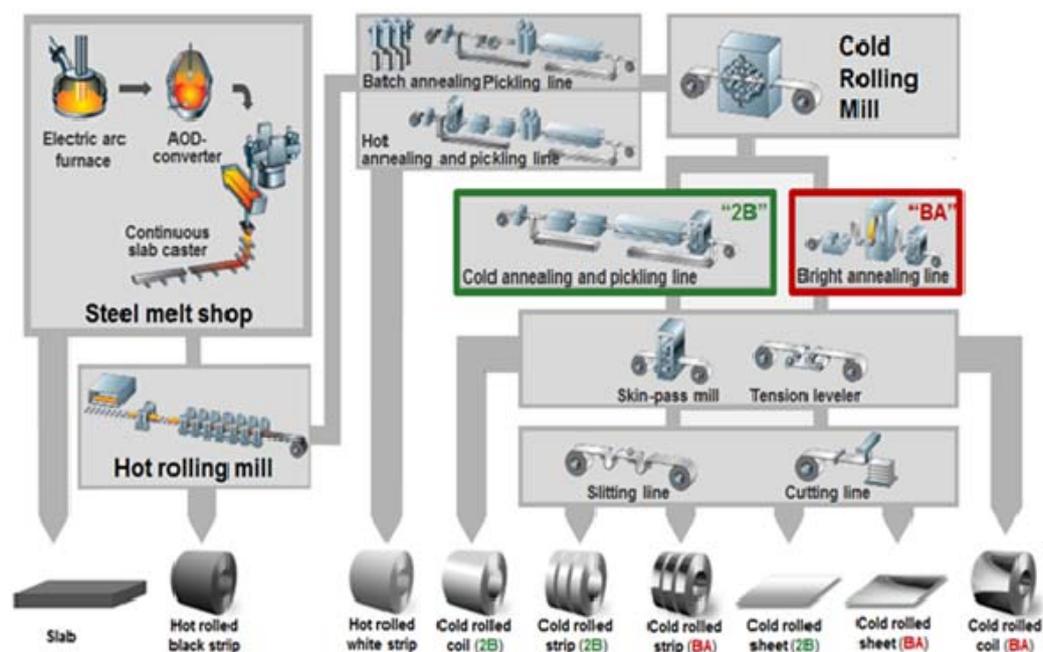
(58) The total global end user market for stainless steel in 2010 amounted to [...] million t.<sup>31</sup> At present China is by far the largest stainless steel market in the world, followed by the European Economic Area (EEA) and India. In fact, according to estimates, by 2015 the total worldwide stainless steel market will be over [...] million t, and over [40-50] % of this demand will come from China and approximately [10-20] % from Europe.<sup>32</sup>

### 5.1.3. Production process

(59) Stainless steel products can be manufactured in different shapes. The main distinction is between *long* products and *flat* products. These two categories of stainless steel products have different end applications and are produced by different processes. The proposed transaction gives rise to an overlap with regard to *flat* products only. As such, only the production process for flat products will be discussed.

(60) There are three main steps for the production of stainless steel flat products: steel melt shop (melting stage), hot rolling mill (hot shaping), and cold rolling mill (cold shaping). The different stages of the steel production process are illustrated in Figure 1 below.

Figure 1: Overview of the stainless steel production process



Source: Form CO, ID 953

(61) The steel melt shop represents the first step in stainless steel production, after which semi-finished stainless steel products are produced. At the melting stage, raw materials, scrap (stainless steel and alloys) and ferro-alloys are melted together in an electric arc furnace. The molten material is further processed in an argon oxygen

<sup>31</sup> Source: Form CO, Annex 32, ID 1076.

<sup>32</sup> Source: Form CO, Annex 30, ID 1074.

decarburization ("AOD") converter and, if required, secondary treatments are carried out. The liquid steel is then processed through a continuous casting process in which the molten metal is poured directly into a mold to produce the required shapes. After leaving the mold, the strand's shell is further cooled until it has completely solidified. The strand is cut into lengths to obtain compact rectangular blocks of crude steel, called **slabs**.

- (62) Slabs are subsequently rolled to obtain hot rolled flat products ("HR"). In particular, slabs are preheated (or not cooled) prior to rolling and then reduced to a predetermined thickness in the roller gap of a hot rolling mill by pressure applied between two rollers. The resulting product is known as hot rolled black band ("HBB"), a product mainly used as feedstock for further processing that is covered by a layer of scale, which gives it its black colour.<sup>33</sup>
- (63) HBB must be processed before it is ready to be cold rolled. It is thus annealed and pickled to obtain hot rolled white band ("HWB"). Annealing is the process of heating cold steel to make it more suitable for bending and shaping as well as to prevent breaking and cracking. Pickling is a process by which stainless steel is cleaned using chemical baths of dilute acid to remove impurities such as rust, dirt, scale and oil from the surface without changing the underlying properties of the metal. The initial annealing and pickling ("hot" annealing and pickling) remove the scale and cause the typical white colour of HWB.
- (64) HWB is suitable for end use in specific applications where outward aesthetic appearance is not important. HWB is however normally further processed to obtain cold rolled products ("CR").
- (65) In the cold rolling process, HWB is processed at room temperature to reduce the thickness and achieve the desired properties. There are three main steps to achieve the right thickness and properties: (i) cold rolling, (ii) "cold" annealing and pickling and (iii) finishing. In particular, HWB is rolled, often on a cluster rolling mill, to the desired thickness at room temperature. The rolled band is then annealed and pickled before undergoing a skin pass to improve its surface finish.
- (66) Following the skin pass process (which improves the shiny surface appearance further), surface treatments, such as brushing, painting or treating with fingerprint-resistant coatings can be applied. Tension in the band is removed in a tension-levelling mill and the band is then cut to required dimensions to form sheet or plate or, depending on the thickness, rolled onto a coil.
- (67) CR is used in a wide variety of end uses, ranging from providing corrosion-resistant solutions for the process industry, consumer durables made from polished strip, to prestigious buildings or other architectural applications that use patterned sheet. Due to their high dimensional tolerances and high surface quality, CR is the predominant category of stainless steels products on the market.
- (68) CR is produced in the form of coils, but can also be cut and supplied in different shapes such as strips and sheets. Furthermore, for a number of applications where

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<sup>33</sup> Slabs are also used to produce a different type of hot rolled product, namely quarto plate (QP).

product appearance is important, further processing to achieve a certain finish can be required. While there are a variety of surface finishes, the most common ones are 2D, 2B and BA finishes.

- (a) 2D: A dull, cold rolled finish produced by cold rolling to the specified thickness, followed by annealing and descaling. This may also be achieved by a final light pass on dull rolls.
- (b) 2B: A bright, cold rolled finish commonly produced in the same way as 2D finish, except that the annealed and descaled sheet receives a final cold roll pass on polished rolls.
- (c) BA: Bright annealed finish is produced by performing bright annealing in an inert atmosphere after cold rolling. Mirror-like, smoother and brighter than 2B.

#### 5.1.4. Families and possible classifications of stainless steel

(69) According to their chemical composition and crystalline structure, four main families of stainless steel can be distinguished:

- (a) **Austenitic** stainless steel contains chromium and nickel, and is the most common type of stainless steel, accounting for approximately [60-70]\*% of the EU consumption of stainless steel and for [60-70]\*% of the EU production<sup>34</sup>. The most commonly used austenitic grades contain 18% chromium and 8% nickel. Austenitic grades have an excellent corrosion resistance, weldability, formability, ductility, and are hygienic and easy to clean. Austenitic stainless steel grades are used in large number of industrial applications (vessels, tanks, pumps, piping, heat exchangers, etc.) and to make a variety of products including housewares, containers, architectural facades and constructional structures.
- (b) **Ferritic** stainless steel contains virtually no nickel, has chromium content between 11% and 18% and has low carbon content. Ferritic steels represent about [20-30]\*% of EU stainless steel consumption and [20-30]\*% of the EU production. Ferritic grades are magnetic and have moderate to good corrosion resistance but cannot be hardened by heating. They can be further divided into stabilised and non-stabilised ferritics. Non-stabilised ferritics require special "self-annealing"/"batch-annealing" in bell furnaces in a special non-oxygen gas atmosphere whereas austenitics and most other stabilised ferritics can be annealed in continuous pickling and annealing lines. Ferritic grades are used mostly in structural applications, housewares, boilers, consumer appliances and indoor architecture.
- (c) **Martensitic** stainless steel has a relatively high carbon content (0.1 to 1.2%) compared to other stainless steel grades, usually contains 11 to 13% chromium

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<sup>34</sup> All data on "European production" in paragraphs 14 and 15 should in principle be referred to as "EuroAfrican" production, as the Notifying Party provided production data at this level (see Form CO, Annex 35, IDs 1081 and 1082).

and contains no nickel. Martensitic steel accounts for approximately [0-5]\*% of European stainless steel consumption. Martensitic grades have moderate corrosion resistance, are magnetic and have poor weldability. Martensitic grades are commonly used for the manufacture of knife blades, surgical instruments, turbine blades, shafts, spindles and pins.

(d) **Duplex** stainless steel has a relatively high chromium content (18 to 28%) and moderate nickel content (between 4.5 and 8%). The nickel content in duplex steel is insufficient to generate a fully austenitic structure and the resulting combination of ferritic and austenitic structures is called duplex. Duplex steels account for approximately [0-5]\*% of European stainless steel consumption. Duplex grades have a high resistance to stress corrosion, cracking and chloride ion attacks. Duplex grades are commonly used in tanks, the pulp and paper industry, marine applications, desalination plants, heat exchangers and petrochemical plants.

(70) In terms of EEA demand, the most important family is austenitic, followed by ferritic. Martensitic and duplex combined represent [5-10]\*% of the EEA consumption.

**Figure 2 [...]\*.**

(71) On a worldwide level, the importance of each family does not vary to a great extent. Austenitic and ferritic grades represent [60-70]\*% and [20-30]\*% of the worldwide production respectively, while duplex and martensitic represent around [0-5]\*% each.

(72) Within each family or series (see paragraph (75) and following), there are over 100 individual grades with different compositions and properties. Each grade has a different composition which determines the corrosion resistance and other properties of the steel. The so-called "commodity grades" (as opposed to "specialty grades") account for a large share<sup>35</sup> of the EU production.

(73) Commodity grades usually cover a very wide range of applications. For example, EN1.4301 (ASTM 304)<sup>36</sup> covers over 70% of all standard applications and can be used for most outside and inside applications in "normal" environments (no acids, high temperature, *etc.*). As a result of its nickel content, it has a high degree of formability. It can therefore be used for deep drawing, tube welding, cutting, *etc.* and it is regarded as a universal grade. In general, where possible, customers prefer commodities over specialties given their universal applicability and ready availability.

(74) There is no clear-cut and industry-wide definition of which grades can be qualified as specialty grades. The Notifying Party generally considers four categories of products to be so-called specialty grades: (i) special or high-performance ferritics; (ii) heat resistant grades; (iii) high alloy grades; and (iv) duplex.

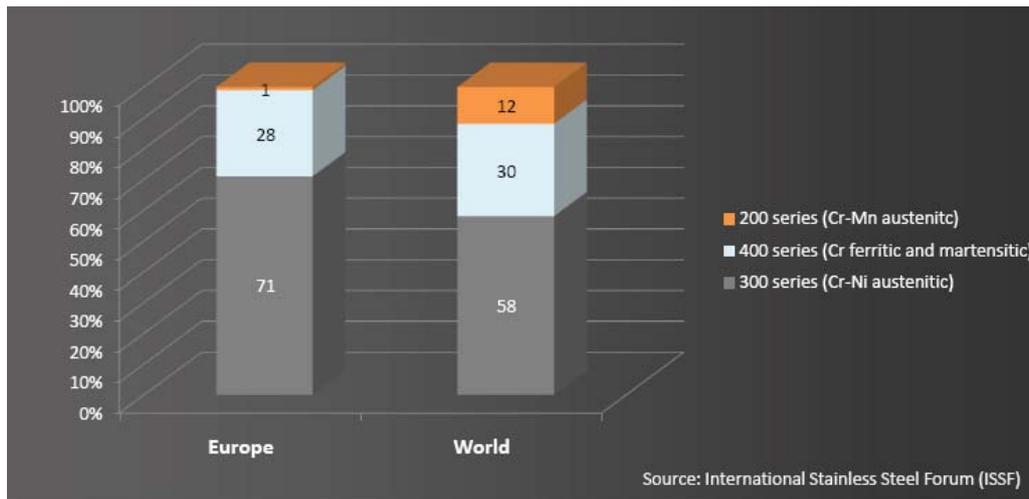
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<sup>35</sup> [90-100]\*% of all stainless steel applications according to the Notifying Party's estimate.

<sup>36</sup> See paragraph **Error! Reference source not found.**

- (75) The family grades can also be split into the so-called stainless steel 'series', with the exception of duplex grades, which are a mixture of austenitic and ferritic grades. The austenitic family of stainless steels is made up of two groups of materials: chromium-manganese-nickel types, or 200 series, and the chromium-nickel types, or 300 series. Ferritic and martensitic grades belong to the 400 series, which includes chromium as the major alloy addition.
- (76) As shown in Figure 4 below, the use of 200 series in the EEA is negligible (approximately 1%), these grades are mainly used in Asia. They are used for example to produce conveyor belts and spacers in double glazed windows panes.

**Figure 3: Breakdown of stainless steel production by type**



Source: Euroinox presentation, ID 418

#### 5.1.5. Grades of stainless steel

- (77) The various steel grades have been standardised according to their composition and physical properties. Each steel grade exhibits certain designated characteristics, including specific alloy element composition, corrosion and/or or heat resistance and mechanical properties.
- (78) There is an increasing trend toward global harmonisation of stainless steel standards, and the global stainless steel industry generally follows either the European standards ("EN") or the US ("ASTM") series.
- (79) The four most common grades in the EEA are:
- Grade 1.4301 (304 under the US standards), an austenitic grade, which accounts for approximately [60-70]\*% of the European austenitic production ([40-50]\*% of total European stainless steel production);
  - Grade 1.4401 (316 under the US standards), an austenitic grade, which accounts for approximately [10-20]\*% of the European austenitic production ([10-20]\*% of total European stainless steel production).

- (c) Grade 1.4016 (430 under the US standards), a ferritic grade, which accounts for about [40-50]\*% of total European ferritic production ([10-20]\*% of total European stainless steel production).
- (d) Grade 1.4512 (409 under the US standards), a ferritic grade, which accounts for approximately [10-20]\*% of the European ferritic production ([0-10]\*% of total European stainless steel production).

#### 5.1.6. *Supply side of the market: the main global players*

- (80) In 2010 South-Korean POSCO Group was the world's largest producer of stainless steel flat products by overall production volume<sup>37</sup>. In terms of available CR capacity however, the world's largest stainless steel producer is Inoxum.<sup>38</sup> The top 10 worldwide producers of all flat products by production volume include all the 4 major European players, namely Inoxum, Outokumpu, Acerinox SA, Spain ("Acerinox") and Aperam. 13 out of the top 20 producers are Asian companies.<sup>39</sup>
- (81) Despite the steadily growing demand (see paragraph (57) above), the stainless steel industry has experienced an outgrow of supply, with a structural shift in the supply-demand balance taking place as of the 2000s, as Asian producers, especially China, increased capacity.<sup>40</sup> Consequently, the stainless steel industry is currently characterised by a global overcapacity estimated at [...] million t in 2010. According to the Notifying Party's submission, many growth projects initiated in 2007 (the "bubble" year) will impact production from 2010-15 onwards. The Notifying Party also submits that according to industry analysts, even with a macroeconomic recovery in the Western world and structural growth in emerging markets (e.g. China, Brazil), the world capacity utilisation is forecasted to be below acceptable levels over the next 5 years.<sup>41</sup> These aspects will be discussed below in Section 5.5.4.7.
- (82) According to estimates, the average capacity utilisation rate in Europe (CR) amounted to [70-80]\*% in 2010.<sup>42</sup> On a worldwide scale, it is expected that Chinese mills will continue to invest aggressively adding another 6 million t (slab) capacity by 2015. But also outside China (e.g. India, USA) flat stainless steel capacity expansion is on-going.<sup>43</sup> In spite of this, the main analysts estimate that in the next years capacity utilisation will improve substantially in all the main regions of the world (see Sections Section 5.5.4.6 and 5.5.4.7).
- (83) In the EEA, there are no legal or regulatory entry barriers for the flat stainless steel industry, although it is highly capital intensive and substantial investments are required for building new capacity. According to the Notifying Party, investment needed for a viable size of production of HR stainless steel in a modern plant is in the region of EUR [...] million if the process is started from slabs, and an

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<sup>37</sup> Source: Form CO, Annex 32, ID 1076.

<sup>38</sup> Both for 2010 and 2011 (Source: Form CO, Annex 59, ID 1191).

<sup>39</sup> Source: Form CO, Annex 32, ID 1076.

<sup>40</sup> Source: Form CO, Annex 21, ID 1047.

<sup>41</sup> Source: Form CO, Annex 21, ID 1047.

<sup>42</sup> Source: Form CO, Annex 32, ID 1076.

<sup>43</sup> Source: Form CO, Annex 32, ID 1076.

additional EUR [...] million is required if also slabs have to be made (i.e. building of melt shop capacity). Entry into the production of CR requires an estimated EUR [...] million of investment, in which case the HR material to be fed to the cold plant will have to be acquired captively or from third parties. The optimal capacity of a modern steel making unit is [...] million t and the minimum capacity of a cold rolling unit is [...] kt.<sup>44</sup>

- (84) Although some Asian mills appear to have according to some estimates a cost advantage (for instance, Chinese TISCO is considered by SMR as the global cost leader),<sup>45</sup> competitiveness is not necessarily only a result of the production costs. Overall, European mills are well positioned. In particular, 7 out of the top 10 most efficient mills worldwide are located in Europe and/or are owned by one of the European players.<sup>46</sup>
- (85) The main players on the EEA flat stainless steel market are the Parties, Aperam and Acerinox<sup>47</sup>. These are the only players which have fully integrated local presence, i.e. with their own melting capacity, hot rolling facilities and cold rolling facilities located within the EEA.
- (86) A small part of the CR market is supplied by non-integrated producers<sup>48</sup> and in addition, both for HWB and CR, there are appreciable imports from third countries into the EEA<sup>49</sup>. There are currently no quotas, taxes, tariffs or non-tariff barriers affecting imports of HWB and CR stainless steel into the EEA.

#### 5.1.7. Demand side of the market

- (87) In Europe, stainless steel products are sold through two main channels: (i) directly to end user customers, and (ii) through (mill-owned or independent) distributors and processors (who import/purchase the products directly from the mills in Europe or from third countries).
- (88) In Europe, mills sell [60-70]\*% of the total market deliveries (CR) to distributors. In particular, [10-20]\*% of deliveries are sold to own integrated distributors, while [40-50]\*% of deliveries are sold to independent stainless steel service centres ("SSCs") and stockholders. The remaining [30-40]\*% of deliveries are split between processors ([10-20]\*%) and end-users ([20-30]\*%).<sup>50</sup>
- (89) Of the "indirect deliveries" (i.e. CR sold to end users through a distributor), independent distributors account for approximately [70-80]\*% of the deliveries whereas mill-owned distributors account for approximately the remaining [20-30]\*%.

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<sup>44</sup> Source: Form CO, ID 953.

<sup>45</sup> Source: Form CO, Annex 32, ID 1076

<sup>46</sup> Source: Form CO, Annex 32, ID 1076.

<sup>47</sup> These four players' combined market shares for CR amount for [70-80]\*%, whereas it amounts to [80-90]\*% for HWB. Source: Notifying Party, ID 3354.

<sup>48</sup> Approximately [0-10]\*%. Source: Notifying Party, ID 3354.

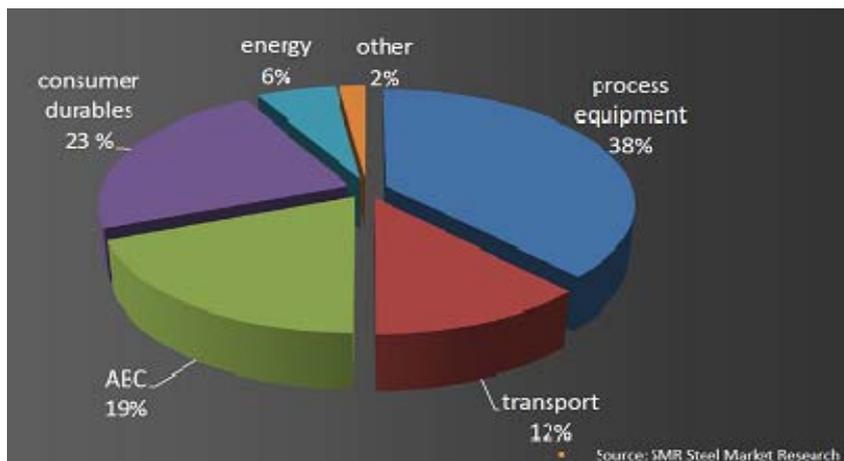
<sup>49</sup> Approximately [20-30]\*% for CR and approximately [10-20]\*% for HR. Source: Notifying Party, ID 3354.

<sup>50</sup> Source: Notifying Party's internal estimates. Form CO, ID 953.

Figure 4 [...]\*.

- (90) The demand side of the CR market is characterised by an extremely fragmented customer base. According to the Notifying Party,<sup>51</sup> in 2011 Outokumpu had over [...]\* EEA CR customers and Inoxum over [...]\*. In the same year, Outokumpu's biggest customer purchased from the company [...]\* kt of CR products whereas Inoxum's biggest customer purchased [...]\* kt, both volumes representing less than [0-5]\*% of EEA-demand.
- (91) CR products are used by a variety of consumer industries and in a wide range of final applications where resistance to both atmospheric and chemical corrosion is necessary and where hygiene may also be essential. The main end applications of CR products are, as also illustrated by Figure 5 below<sup>52</sup>, consumer durables, such as white goods, cutlery, pots pans, etc., process equipment for handling the wide range of chemicals used by processing industries, i.e. pulp and paper, textile, food and beverages, pharmaceutical, medical, etc., transport, such as exhaust systems, energy, such as offshore plants and nuclear equipment, architecture, building and construction -'ABC'- bridge structures, desalination plants, spacers in double glazed window panes, etc.

Figure 5: Breakdown of stainless steel products by end application



Source: Euroinox presentation, ID 418

#### 5.1.8. Price formation

- (92) Prices for stainless steel products sold in Europe and North America generally include two components: (i) the "base price" and (ii) the "alloy surcharge". Customers can clearly distinguish the base price from the alloy surcharge. By contrast, the pricing in Asia is based on a single, fixed price.

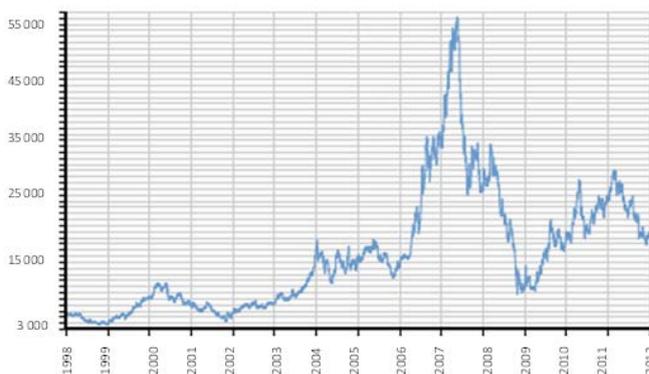
<sup>51</sup> Annex 68 and 39 of the Form CO.

<sup>52</sup> Source: Euro Inox ID 418.

- (93) Base prices for stainless steel are negotiated individually between suppliers and customers. The alloy surcharge is added by producers in order to allow the costs of alloys, such as nickel, chromium, iron and molybdenum, to be directly passed on to customers. The alloy surcharge for a given month is published at the end of the previous month by the main suppliers in Europe and is typically based on alloy prices recorded during the month prior to the publication of the alloy surcharge (the "Reference Period"). [...] <sup>53</sup>
- (94) Due to the highly volatile nickel price (see also paragraph (51) and footnote 20 above), the share of the base price and the alloy surcharge within the total price of stainless steel also varies, as shown in the figures below. In addition, the figures below also illustrate the strong correlation between the CR price and the nickel price due to the alloy surcharge. Nickel indeed generally constitutes the main component of the alloy surcharge.

Figure 6 [...]\*

Figure 7: Development of the nickel price at the LME



Source: LME

Note: The first graph refers to the time period 1994-2011, whereas the second graph refers to the time period 1998-2012.

- (95) The substitution of stainless steel by other materials is mainly considered to be linked to the nickel price development. In addition, nickel price has an essential influence on the competition between different stainless grade families. In general, the higher the nickel price, the lower the expected demand for stainless steel. However, in the short run an expected increase in the nickel price leads to an increase in demand due to the stocking / destocking activity of independent distributors (see paragraphs (562)-(563) below).
- (96) In addition to the absolute nickel price level, the volatility of the nickel prices is a major concern to the stainless industry and its customers and it is likely to decrease the attractiveness of stainless steel as a material and drive the demand to non-nickel

<sup>53</sup> Source: Parties' reply to Article 11 request of 14 June 2012.

grades (mainly ferritic) within the stainless steel industry. The austenitic (300 series) ratio has indeed decreased from around [70-80]\*% five years ago to around [60-70]\*% and is still expected to decrease further, although not to a significant extent.<sup>54</sup>

- (97) Other trends might have a possible impact on substitution to/from stainless steel, for example: the need for using lighter materials e.g. in cars (negative impact on stainless; move from steel to composites), shorter product life-cycles in consumer goods (negative impact on stainless; cheaper materials are used), increased need for water treatment and green energy production (positive impact on stainless; hard to replace in many applications) and the development of the prices of possibly competing materials (iron ore, aluminium, copper).
- (98) However, as already confirmed by the Commission on the basis of phase I market investigation, the demand for stainless steel is fairly inelastic. 70 out of 87 (80%) of direct customers and 156 out of 204 (76%) of indirect customers stated that they would switch away from CR as a result of a price increase.<sup>55</sup> This is also further confirmed by the fact that in recent years the European consumption of stainless steel products has remained relatively constant, even in periods of significant price increase.

#### 5.1.9. *The Parties' activities in stainless steel*

- (99) Outokumpu's main products are stainless steel HR and CR coils and sheet and quarto plate ("QP"). In addition, Outokumpu produces stainless steel tubes and long products as well as ferrochrome.
- (100) Inoxum is also active in the production of HR and CR coils and sheet. By contrast, Inoxum does not produce long products and QP.<sup>56</sup>
- (101) Consequently, the Parties' activities overlap in the supply of stainless steel flat products (see also paragraph (59) above).
- (102) The large majority of products sold by Outokumpu and Inoxum belong to the austenitic family. Within flat products, almost [90-100]\*% of Outokumpu's EEA sales are of austenitic stainless steel, while the corresponding figure for Inoxum exceeds [70-80]\*%.
- (103) As regards the "rare" specialty stainless steel families, the Parties' activities overlap to a limited extent, given that Inoxum has limited sales of duplex and Outokumpu has minimal sales of martensitic grades.
- (104) Table 2 shows the breakdown of the Parties' sales in **CR** flat products per family.

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<sup>54</sup> Source: Notifying Party, ID 6242.

<sup>55</sup> Q3 – Questionnaire to Customers: questions 20, 22. Q4 – Questionnaire to Distributors: questions 26, 28. Q5 – Questionnaire to Distribution Customers: questions 14, 15.

<sup>56</sup> The QP business was sold to Outokumpu in 2003. In 2010 and 2011 there was a minimal QP production in Terni.

**Table 2: [...]\***

	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*
[...]* <sup>57</sup>	[...]*	[...]*	[...]*	[...]*
<b>Total</b>	[...]*	[...]*	<b>100.0%</b>	<b>100.0%</b>

Source: Form CO, ID 953

- (105) Outokumpu has two fully integrated (i.e. melt shop, hot rolling mill, cold rolling mill) plants: Tornio (Finland) and Avesta (Sweden), and two further stand-alone CR facilities Nyby and Kloster (Sweden).
- (106) Tornio is one of the largest and most efficient integrated stainless steel mills in the world. The mill is backwards-integrated into ferrochrome, a raw material for stainless steel production, by means of Outokumpu's mine in Kemi (Finland). Tornio's main products are cold and hot rolled stainless steel coils and sheets mainly in austenitic grades and to a lesser extent ferritic grades. The second integrated plant, Avesta is part of Outokumpu's Specialty Business Area and focuses on thick, wide and special grades products.
- (107) Innoxum has one fully integrated plant in Terni (Italy). Innoxum further has cold rolling mills<sup>58</sup> in Krefeld<sup>59</sup>, Benrath, Dillenburg, (Germany), Shanghai (China), San Luis Potosi (Mexico) and Calvert (United States).<sup>60</sup> These cold rolling mills are supplied either by the [...]\* plant with upstream products (i.e. HBB).
- (108) [...]\* is specialised in thick gauge austenitic and martensitic cold rolled products. [...]\*<sup>61</sup> is specialised in ferritic and BA products. [...]\* is specialised in thin gauge and BA products. [...]\* in [...]\* is focused on ferritic and BA but also produces austenitics for the home market.

## 5.2. Sources of evidence relied on by the Commission in its investigation

- (109) This Decision is based on a wide range of different types of evidence. When assessing the effects of the proposed transaction on competition, all relevant evidence was taken into account.
- (110) Firstly, the Decision takes into account the official form for standard merger notification submitted on the case by the Notifying Party on 10 April 2012 ("Form CO") and all other submissions of the Notifying Party.

<sup>57</sup> [...]\*

<sup>58</sup> Innoxum also has a precision strip mill in Dahlerbrück, Germany.

<sup>59</sup> Krefeld also disposes of melt shop but no hot rolling mill.

<sup>60</sup> The Calvert plant is still under construction. Upon completion it will also have [...]\* and supply [...]\*.

<sup>61</sup> This CR facility is in the process of being transferred to [...]\*.

- (111) Secondly, the Commission asked the Parties to submit a large number of internal documents.
- (112) Thirdly, the Commission carried out an extensive market investigation both in phase I and II of the procedure. In particular, it sent out several sets (13) of questionnaires to customers<sup>62</sup> (including distributors) and competitors<sup>63</sup> of the Parties and conducted a significant number of interviews with a number of third parties. The Commission also addressed several requests for information to the Parties' main European competitors Aperam and Acerinox.
- (113) Following the submission of the Proposed Commitments and their revised versions, the Commission market tested the commitments submitted by the Notifying Party by means of eight sets of questionnaires as well as a number of telephone calls. The Commission also carried out its own calculations on the cost structure of the divested businesses.
- (114) Fourthly, for a better understanding of the industry, the Commission organised a site visit at Outokumpu's premises in Tornio, Finland, and at one of the Parties' major customers, a stainless steel service centre in the Netherlands<sup>64</sup>.
- (115) Finally, the Commission also analysed the economic and econometric evidence submitted by the economic consultants of the Notifying Party. All economic and econometric evidence are described in detail in Annexes I-IV below.

### **5.3. Relevant product market**

#### *5.3.1. Production and supply of stainless steel products*

- (116) In previous decisions<sup>65</sup>, the Commission distinguished four broad categories of steel products: (i) carbon steel, (ii) stainless steel, (iii) highly alloyed steel, and (iv) electrical steel. Steel products in these four categories differ in term of chemical composition, price and end applications. Both Outokumpu and Inoxum produce stainless steel products.
- (117) According to the Notifying Party, stainless steel can be distinguished from other steel products by its physical and chemical characteristics, particularly by its resistance to corrosion and high temperatures. This makes it uniquely suitable for certain applications in process engineering, automobile engineering, hygiene products and cutlery, among others<sup>66</sup>. Within stainless steel, a further distinction can be made between semi-finished and finished products. Semi-finished products

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<sup>62</sup> To 1 164 addressees in phase I and 1 087 addressees in phase II, a total number of 2 251 questionnaires sent. This number might entail duplications of particular companies as certain questionnaires were sent by countries.

<sup>63</sup> To 24 addressees in phase I and 26 addressees in phase II, a total number of 50 questionnaires sent. This number might entail duplications of particular companies as the questionnaires were sent by countries. Phase I questionnaires were also sent to some distributors.

<sup>64</sup> [...]\*

<sup>65</sup> Usinor / Cockerill Sambre, Case No IV/ECSC.1268 and Usinor / Arbed / Aeralia, Case No COMP/ECSC.1351, and Case COMP/M.4137, Mittal/Arcelor, 2 June 2006.

<sup>66</sup> Case No COMP/ECSC.1351 - USINOR/ARBED/ACERALIA, Commission decision of 21 November 2011, Case COMP/M.4137, Mittal/Arcelor, 2 June 2006.

include blooms, billets and slabs, whereas finished products comprise flat and long products.

#### 5.3.1.1. *Semi-finished stainless steel products*

##### **Slabs**

- (118) In accordance with previous Commission decisions<sup>67</sup>, the following basic shapes of semi-finished steel products can be distinguished: (i) blooms (used to produce heavy sections), (ii) billets (used to produce bars, wire rod and light sections), and (iii) slabs (an intermediate product used as internal feedstock in the production of stainless steel plates, strips and sheets). The Notifying Party believes that this distinction is also applicable to the stainless steel industry.
- (119) Both Parties' activities overlap in the production of slabs.
- (120) In previous decisions, the Commission has stated<sup>68</sup> that the markets for stainless steel, including slabs, should not be further divided according to the different grades or grade families (austenitic, ferritic, duplex, and martensitic). The Commission has also stated that all grades of stainless steel can be produced by the same plant, which can switch easily and quickly from one type of grade to the other and that there is sufficient supply-side substitutability between the different grades for them to be included in the same relevant product market.
- (121) In its Article 6(1)(c) decision, the Commission concluded that a separate market for stainless steel slabs existed, but also considered potential sub-segmentations by grades and family of grades. This potential delineation was retained for all stainless steel products concerned by the proposed transaction, i.e. slabs, HR and CR products. During the phase II market investigation an in-depth analysis about the appropriateness of such market delimitation was carried out. The phase II market investigation confirmed that it is possible to switch from the production of one family of grades to another in a relatively short time and using the same equipment with limited additional costs<sup>69</sup>. There exists, therefore, a high degree of supply side substitutability between the different grades and grade families. In this sense, the time and cost required to switch production at the upstream level (slabs) is lower than the cost associated with switching at the hot or cold end of the production process.
- (122) Despite the above, the Notifying Party believes that all dedicated stainless steel operations are integrated upstream. As a result, there are virtually no external customers for slabs. The Notifying Party is not aware of any third-party sources that provide data on merchant market sales for stainless steel slabs. The Notifying Party estimates that the European merchant demand for slabs is between [...] t and [...] t annually, which represents less than [0-5] % of production. In Europe applications

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<sup>67</sup> Usinor / Arbed / Aceralia ,Case No COMP/ECSC.1351, Case COMP/M.4137, Mittal/Arcelor, 2 June 2006.

<sup>68</sup> Case IV/M.484, Krupp/Thyssen/Riva/Falck/Tadfin/AST, 21 December 1994.

<sup>69</sup> See Q1 – Questionnaire to EEA Competitors and Q2 – Questionnaire to Non-EEA Competitors: questions 5, 6, 7.

are more or less limited to clad plate manufacturers and predominately non stainless plate mills that make small quantities of stainless steel. Large scale forgers have the ability to buy slabs in place of ingots, but there is not much evidence of this in Europe.

- (123) Additionally, the results of the phase II market investigation suggest that market participants do not consider the existence of a merchant market for slabs, as the integrated European mills only sell minor quantities of slabs. Moreover, some respondents raised doubts about the incentives for integrated producers to sell slabs to their competitors downstream. Few respondents, however, indicate that in principle Asian players might be interested in selling slabs to the EEA, if a market existed. This possibility would very much depend *inter alia* on the availability of slabs and transport costs from Asia to the EEA.
- (124) In the context of the Commission's assessment of the first remedy package submitted by the Parties, the Commission also found that there is no company in the world that purchases slabs for the purposes of CR production. Furthermore, logistics issues and costs appear to be significant and therefore it would not be convenient for a CR producer to purchase slabs on the market.<sup>70</sup>
- (125) In light of the above, an overall market for slabs will be considered for the purpose of this Decision. The Commission nevertheless points out that there are doubts regarding the very existence of a merchant market for slabs in the EEA.

#### 5.3.1.2. Finished stainless steel products

##### **Flat vs. long products**

- (126) The Commission has consistently found in past cases that flat steel products form a separate product market from long steel products<sup>71</sup>. These two types of steel products are manufactured in different rolling mills and are used in different end applications. Moreover, flat products are generally manufactured from slabs, while long products are manufactured from billets and blooms.
- (127) The Notifying Party shares the Commission's views. According to them, long and flat products are sold for distinct end user applications. While the production processes are similar, flat and long products cannot be produced in the same production facilities due to their shape. Following actual melt, the products are cast in different machines and subsequently produced in different factories.
- (128) For the purpose of this Decision, given that flat and long products form separate product markets and that the Parties only overlap in the production of stainless steel flat products, the markets for stainless steel long products will not be further discussed.

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<sup>70</sup> See Minutes of the calls with Arinox (ID 13118) and Marcegaglia (ID 13001).

<sup>71</sup> Sollac / Aceralia / Solmed, Case No IV/ECSC.1269 -. Krupp Hoesch / Thyssen Case No IV/ECSC.1243 -. Usinor / Cockerill Sambre. Case No IV/ECSC.1268 - Arbed / Aceralia, Case No IV/ECSC.1237 -. Aceralia / Aristrain , Case No IV/ECSC.1264, Case COMP/M.4137, Mittal/Arcelor, 2 June 2006.

## Hot rolled and cold rolled flat products

- (129) As regards flat products, and in accordance with the Commission's previous decisions<sup>72</sup>, two separate markets for steel products can be identified: (i) hot rolled carbon steel products, and (ii) cold rolled carbon steel products. The Notifying Party considers that the same delineation could be considered in the case of stainless steel products.

### Hot rolled flat products (HR)

- (130) According to previous Commission practice<sup>73</sup>, there are two separate product markets within hot-rolled carbon steel flat products: (i) HR and (ii) QP. HR are finished products manufactured in the form of coil or plate for sale to third parties or further processing. QP are non-coiled products with very different dimensions, in particular in terms of thickness, from other HR. QP are made in special QP mills, have specific physical properties and are used in applications that differ from those for thin flat steel products.
- (131) Outokumpu and Inoxum are both active in the production of HR, as well as, to a very limited extent, in QP. The Notifying Party agrees with the market definition adopted by the Commission in previous decisions<sup>74</sup> and submits that HR constitutes a separate market. Additionally, the Notifying Party submits that there is a degree of supply side substitutability with carbon hot rolling mills. According to the Notifying Party, there are two types of hot rolling mills currently used in the stainless steel industry for the production of hot rolled stainless steel products: (a) Continuous Hot Rolling Mills (HRM), which are generally high-capacity mills and can in principle roll both carbon and stainless steel<sup>75</sup>, and (b) Reversing Steckel Mills, which are mostly used only for stainless steel production.
- (132) The Notifying Party also notes that there are two main types of HR products: hot black bands ('HBB') and hot white bands ('HWB'). HBB represents the first step in the production of HR. In particular, it is a hot rolled product which is not subject to pickling and annealing and as a result is covered with a black scale that has to be removed when the HBB is processed further. HWB is hot rolled steel that has been pickled and annealed and is suitable for end use – usually in the construction of tanks whose outward aesthetic appearance is not important and thus does not require a cold roll finish.<sup>76</sup>

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<sup>72</sup> Case No COMP/M.4137 - Mittal /Arcelor; IV/M.906 Mannesmann/Vallourec; IV/M.315 Mannesmann/Vallourec/Ilva.

<sup>73</sup> Usinor / Arbed / Aceralia, Case No COMP/ECSC.1351, Case COMP/M.4137, Mittal/Arcelor, 2 June 2006.

<sup>74</sup> Cases No IV/M.239 - Avesta I; IV/M.484 - Krupp / Thyssen / Riva / Falck / Tadfin / AST; COMP/ECSC.1342 - Outokumpu / Avesta Sheffield; COMP/ECSC.1351 – USINOR / ARBED / ACERALIA, Case COMP/M.4137, Mittal/Arcelor, 2 June 2006.

<sup>75</sup> Carbon hot rolling mills will however operate at 20% lower output rate when rolling stainless steel.

<sup>76</sup> In addition, *Semi-freddo* is a semi cold rolled product made by Inoxum at its Terni mill, as well as by other manufacturers under different denominations. For instance, Aperam makes a similar product known as *faux chaud* and OTK a product known as VKS or 2E. This is a hot-rolled product which is subjected to one light CR pass to improve its finish. As such it falls somewhere between HR and CR.

- (133) Although the production of HWB involves additional equipment (i.e. a pickling and annealing line is required), the Notifying Party considers that HBB and HWB should not be regarded as separate markets. This is because HBB is an intermediate step in the production of HWB. Accordingly, there should be no further type of segmentation between different types of HR.
- (134) Moreover, the Notifying Party considers that there is no merchant market for the HBB market. HBB is a feedstock for the production of HWB and CR products. The Notifying Party knows of only two companies in Europe (Marcegaglia SpA, Italy, "Marcegaglia" and S.C. Otelinox S.A., Romania, "Otelinox") who purchase HBB, and only one or two more in Asia. Therefore, the Notifying Party does not believe it would be appropriate to define a relevant product market for HBB.
- (135) Respondents to the requests for information sent by the Commission have not confirmed the Notifying Party's views. According to customers, there is a clear distinction between HBB and HWB as far as production and end use are concerned<sup>77</sup>. Moreover, HBB and HWB have different mechanical characteristics and surface finishes and they have significant differences in prices. Furthermore, end customers differ, as while HBB is only purchased by re-rollers, HWB is mainly sold to distributors, tube makers and other end users in the industry. Most of the competitors also confirmed that to produce HWB additional equipment is required, i.e. an annealing and pickling line.
- (136) The Commission acknowledges the fact that HBB is mainly used as a feedstock to produce HWB and, thus, the HBB merchant market is very limited. Nonetheless, given the mechanical and price differences between both products, as well as the different equipment required to produce HWB, the Commission considers that separate markets for HBB and HWB, along with a wider market for HR products, should be considered for the present decision. In any case, the precise product market definition could be left open, since the proposed transaction does not raise competition concerns as to its compatibility with the internal market with respect to the markets for HR products.
- (137) In its Article 6(1)(c) decision, the Commission also considered a potential sub-segmentations by grades and family of grades but left this issue open. As explained in paragraphs (118) to (121), the phase II market investigation clarified the pertinence of such market delineation. The respondents to the phase II market investigation confirmed that it is possible to switch from the production of one family of grades to another (or from one grade to an alternative grade) in a relatively short time and using the same equipment with minimal additional costs<sup>78</sup> throughout the overall production process of CR products, including the hot rolling mills. Consequently, there is a high degree of supply side substitutability between the different grades and grade families of HR products. As a result, for the purpose of this decision, no further segmentations by families and grades will be considered for the market of HR products.

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<sup>77</sup> See Q3 – Questionnaire to Customers: questions 6, 7.

<sup>78</sup> See Q1 – Questionnaire to EEA Competitors and Q2 – Questionnaire to Non-EEA Competitors: questions 5, 6, 7.

## Cold rolled flat products (CR)

- (138) In previous decisions, the Commission has considered that only one overall market for CR exists<sup>79</sup>, that includes both sheets and coils. The Commission has not considered further market delineations by type of surface finish, grades, widths or end application.
- (139) According to the Notifying Party, all CR products (sheet and coil) belong to the same product market because of the high degree of supply-side substitution.<sup>80</sup> Mills can roll widths of below 500 mm and above 500 mm and material of less than 500 mm can be slit from wider coils. An older distinction between flat rolled products of less than 500 mm width vs. products with width of 500 mm or more was based on production technology in existence at the time of the Treaty of Paris (1951). Since this technology has largely been replaced by wide rolling and slitting to narrower widths or by the practice of slitting wide coil to produce narrow coil at service centres as well as at the producing mill, this distinction is no longer meaningful.
- (140) During phase I and II, the Commission investigated whether the market for CR could be further segmented. In particular, the market investigation was focused on whether market delineations by grade, grade family, commodities vs. specialties, surface finish and end application could be taken into consideration. In addition, the Commission has also investigated about the existence of a possible market for precision strip.
- a) *Distinction by grades or grade families*
- (141) In previous phase I decisions the Commission stated<sup>81</sup> that the markets for CR should not be further divided according to the different grades or grade families (austenitic, ferritic, duplex, and martensitic). The Commission also stated that all types of stainless steel can be produced by the same plant, which can switch easily and quickly from one type of grade to the other and that there is sufficient supply-side substitutability between the different grades for them to be included in the same relevant product market.
- (142) The Notifying Party relies on these Commission precedents and submits that only an overall market for stainless steel CR exists, with no further segmentation by grade.
- (143) However, it is recalled that the combination of different alloying elements determines the properties of the CR, such as its corrosion resistance, mechanical strength and formability, energy absorption, temperature resistance, aesthetic, cost, etc. These properties make the material suitable for different applications and, consequently, make the CR products more or less suitable for specific end uses and customers' requirements.

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<sup>79</sup> Case IV/M.239, Avesta/British Steel/NCC/AGA/Axel Johnson, 4 September 1992; Case IV/M.484, Krupp/Thyssen/Riva/Falck/Tadfin/AST, 21 December 1994.

<sup>80</sup> Case IV/M.239, Avesta/British Steel/NCC/AGA/Axel Johnson, 4 September 1992, at paragraph 21; Case IV/M.484, Krupp/Thyssen/Riva/Falck/Tadfin/AST, 21 December 1994, at paragraph 28.

<sup>81</sup> Case IV/M.484, Krupp/Thyssen/Riva/Falck/Tadfin/AST, 21 December 1994.

- (144) Thus, from a demand side perspective, customers may require different grades or grade families depending on the mechanical properties suitable for their end application, which in turn is linked with the chemical composition of the stainless steel grade. Although the Notifying Party does not contest that from a demand perspective not all CR products are substitutable, it underlines that a limited number of grades account for a significant share of production in the Union and can be used by a wide range of customers.
- (145) A clear majority of direct customers that responded to phase I questionnaires, did not regard the different grade families of products as substitutes. In particular, 63 direct customers out of 72<sup>82</sup> considered the grade families not to be interchangeable. Among the most common reasons for such differentiation, customers pointed towards the difference in mechanical properties and chemical composition: *'different steel grade families imply different general mechanical chemical and physical properties'*<sup>83</sup>, *'the different compositions leads to different qualities of the product in terms of corrosion resistance , strength, etc.'*<sup>84</sup>. Nevertheless, one customer also indicated that *'grades can be interchangeable provided (they have) the correct corrosion resistance and tensile strength.'*<sup>85</sup>
- (146) Further, some direct customers consider that different chemical compositions lead to sometimes significant price differentials between the grade families because of the alloy costs and the grade's added value. In this sense, customers pointed out that *'prices vary according to alloy content'*<sup>86</sup>, *'due to chemical composition and value added, the prices are different'*<sup>87</sup>.
- (147) Regarding distributors, the responses from the phase I questionnaires were more balanced. 24 out of 47 respondents considered grade families as not interchangeable. Customers pointed towards differences between families in terms of mechanical and chemical properties<sup>88</sup>, as well as corrosion resistance.<sup>89</sup>
- (148) Concerning the individual grades, most customers pointed out that grades within the same family are not interchangeable. More precisely, 56 out of 68 direct customers that responded considered that the different grades are not substitutes from a demand point of view. According to the responses, customers have different and specific applications that demand different qualities in the final product: *'the grade is very depending on the end use of the product'*<sup>90</sup>; *'all the grades have different characteristics they mainly revolve around corrosion resistance'*<sup>91</sup>, *'corrosion*

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82 Q3 – Questionnaire to Customers.  
 83 ID 2039.  
 84 ID 9593.  
 85 ID 1780.  
 86 ID 9588.  
 87 ID 2652.  
 88 ID 1863, ID 2619, ID 2272.  
 89 ID 3337.  
 90 ID 3474.  
 91 ID 2304.

*resistance and physical properties*<sup>92</sup>, and *'different tolerances, different deep-drawing-ability, different temperature requirements*<sup>93</sup>.

- (149) Distributors' responses, as in the case of grade families, were more balanced. 23 distributors considered grades within families as substitutes, whereas 21 indicated that grades within families are not substitutes. However, many distributors also stated that differences in terms of mechanical characteristics, chemical composition, as well as prices and intended use, exist between grades.<sup>94</sup> One respondent observed that *'grades have different chemical compositions and therefore they have very different characteristics in terms of corrosion resistance, strength, heat resistance, etc. Each application has optimal steel grade(s) which can be substituted by other grade only rarely and with compromises.*<sup>95</sup> Consequently, the Commission concludes that there exists certain, but limited, demand side substitutability between the different grades and grade families.
- (150) From a supply side perspective, the Notifying Party submits that stainless production units can produce all types of stainless grades using the same basic equipment. According to the Notifying Party, stainless steel producers tend to constantly switch between the production of different grades, subject only to efficiency considerations (i.e., which grade to produce when and in which volumes). The exceptions to the basic principle that all stainless steel grades can be and are produced on the same equipment are limited. These exceptions are the following:
- (a) Non-stabilised ferritics, which require additional controlled cooling, often done through batch annealing. The Notifying Party estimates that global and European total ferritic production is split [50-60]\*% for non-stabilized ferritic grades and [40-50]\*% for stabilised ferritic grades.
  - (b) Duplex grades for which stronger finishing equipment may be required in order to level and shear the high strength sheets and plates. Duplex also tends to require some additional annealing and pickling – often mechanical - or additional soaking.
  - (c) Martensitic steels need more elaborated finishing, heating, quenching and tempering equipment. Also, martensitic grades require batch annealing. Some martensitic grades also require ingot rather than slab casting.
- (151) The Notifying Party claims that all major producers of stainless steel possess the required know-how and equipment to supply all grades, including non-stabilised ferritic, duplex and martensitic grades. To the Notifying Party's knowledge, all major producers worldwide, not just in Europe, possess equivalent know-how and equipment to supply all grades.
- (152) According to the Notifying Party, once a production facility has been generally equipped to manufacture both austenitic and ferritic grades, switching between

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<sup>92</sup> ID 9599.

<sup>93</sup> ID 2900.

<sup>94</sup> ID 2272, ID 3399, inter alia.

<sup>95</sup> ID 2272.

austenitic and ferritic grades, but also within austenitic grades (e.g. 304 to 316) or within a single grade family (such as 304) usually occurs several times per day. The principal cost in switching between grades usually involves the operational downtime, if any, during which the production process may have to be halted to carry out the shift to another type of product. Where adjustments are made to the alloy content in a specific grade or grade family in the melt shop, there will be little or no downtime and thus no switching cost at all. Where acids are changed for annealing processes when shifting from austenitic to ferritic grades, downtimes may be limited (about [...]\*) and such changes are normally programmed to occur when the change in acid would have been made in any case because of the need to refresh the existing acid bath. Adjustments of roller pressure and speed to accommodate different steel grades, or the temperature of annealing furnaces, are either handled gradually so there is no stoppage of the production process or involve only a few minutes of downtime.

- (153) As a result, the Notifying Party submits that given the principle that all steel grades are produced in the same production process (subject to the limited exceptions listed above), the production of different grades is not a technical question, but one of focus.
- (154) The Notifying Party however states that the size and efficiency of production units dictate the type of products and grades that are best suited to each mill.
- (155) A large integrated mill relies upon high throughput. While such a mill is technically capable of producing most grades, it is not efficient for it to do so because the lower volumes and, thus, more frequent switching that is required to produce special or lower-volume grades would interfere with its efficient operation, which is greatest at high throughputs of large volume products.
- (156) In this sense, larger mills tend to produce larger quantities (in both melt and cold rolling) and prefer grades that support large orders in order to operate at maximum efficiency.
- (157) According to the Notifying Party's data, there can be hundreds of annual changes of grade in a melt shop, with such changes being introduced gradually during the continuous operation of the melt shop. For example, in calendar year 2011, Innoxum melted more than [...]\* different grades (if variations within a grade family are included) in each of its German melt shops and had at least [...]\* grade changes. Outokumpu's Tornio mill is focused on the production of four major grade families: Austenitic 304 and 316 and Ferritic 430 and 409. Within those four grade families, Outokumpu produces a full range of intermediate grades whose alloy and chemical compositions vary. Outokumpu estimates that it melts some [...]\* different grades per year at Tornio (including variations within a grade family) and has more than [...]\* separate melting operations per annum, the frequency being dictated by the size of the melt and the capacity of the melt shop.
- (158) Respondents to the Commission's requests for information confirmed the Notifying Party's submission that there is a degree of supply substitution between the different grades within the same family. Two out of five EEA manufacturers that responded to the Commission's phase I questionnaire indicated that they often switch production between the different grades, on average between 51 and 100 times per

year, and switching production can be done in hours, generally between 0 and 6 hours<sup>96</sup>. Moreover, three out of five European suppliers replied that they are able to produce all possible cold rolled grades.<sup>97</sup>

- (159) As regards the equipment required to produce all CR grades, three out of four EEA suppliers<sup>98</sup> stated that identical equipment is required to produce all grades, although one producer pointed out that *'for some ferritic and martensitic grades additional equipment is required, in particular, batch annealing'*.<sup>99</sup> Whilst a limited number of respondents have pointed out that not all producers do not possess the facilities and know-how to satisfactorily and economically produce all grades of stainless steel within a same family,<sup>100</sup> most of the suppliers produce a vast number of different grades. Furthermore, it seems that knowledge to produce new grades is relatively easy to acquire. In this sense, one of the respondents stated that: *'Each grade chemistry produces unique product characteristics that require changes in operating practice for melting, cold rolling, pickling, and finishing of the steel to produce a satisfactory end product. The more grades produced in each family and the more versions of each grade produced would tend to expand the expertise required. Each producer would have their own body of knowledge based upon past success, experience, and practices that will determine the approach that will be taken for similar business in the future.'*
- (160) Two European suppliers underlined that specific knowledge required to produce certain grades is available for all suppliers.<sup>101</sup>
- (161) The Commission finds therefore that there appear to be no major obstacles to switch production from one grade to another. Additionally, only a minimum order volume to start producing a grade which is not currently produced by a manufacturer is required.<sup>102</sup>
- (162) Therefore, the Commission considers that the respondents have generally confirmed that it is possible to switch from the production of one family of grades to another in a relatively short time and using the same equipment with limited additional costs<sup>103</sup>. Given the high degree of supply side substitutability between the different grades and grade families, an overall market for all CR products will be considered for the purpose of this Decision.

b) *Commodities vs. specialties*

- (163) As explained in paragraph (90), within each family, there are a number of individual grades with different composition and properties. The so-called "commodity grades"

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<sup>96</sup> ID 3054, ID 3365.

<sup>97</sup> ID 3054, ID 3365, ID 1449, 17/04, ID 2191.

<sup>98</sup> ID 3054, ID 3365 and ID 2704.

<sup>99</sup> ID 3054.

<sup>100</sup> ID 9708 and ID 3530.

<sup>101</sup> ID 3054 and ID 2704.

<sup>102</sup> ID 3365.

<sup>103</sup> See Q1 – Questionnaire to EEA Competitors and Q2 – Questionnaire to Non-EEA Competitors: questions 5, 6, 7.

account for a large share of the production in the Union. The four most common grades in the EEA are:

- (a) Two austenitic grades: grade 1.4301 (304), which represents [60-70]\*% of the European austenitic production; and grade 1.4401 (316), which accounts for approximately [10-20]\*%.
  - (b) Two ferritic grades: grade 1.4016 (430), which accounts for [40-50]\*% of total European ferritic production, and grade 1.4512 (409), which represents [10-20]\*% of the European ferritic production.
- (164) The Notifying Party estimates that commodity grades in total cover over [90-100]\*% of all stainless steel applications. Commodity grades usually cover a very wide range of applications. In general, where possible, customers prefer commodities over specialties given their universality and availability.
- (165) Concerning the specialty grades, there is no clear-cut and industry-wide definition of which grades can be qualified as "Specialty"<sup>104</sup> (see also paragraphs (72)-(74)).
- (166) The Notifying Party generally considers four categories of products to be the so-called specialty grades: (i) special or high-performance ferritics; (ii) heat resistant grades; (iii) high alloy grades; and (iv) duplex. These are grades which are generally produced in low volumes, are more costly to produce, and sometimes require in-line corrections, grinding or edge slitting.
- (167) Specialty grades are usually requested when the material properties of commodity grades do not meet the performance requirements of a specific application, *i.e.* in very specific applications with very demanding requirements in respect of properties such as corrosion, acid or heat resistance or a particular combination of the three.
- (168) From a demand point of view, 56 out of 68 direct customers regarded the individual grades as not interchangeable, including both commodity and specialty grades. According to the responses, each grade, regardless of being a commodity or a specialty grade, has different characteristics<sup>105</sup>, corrosion resistance, physical properties<sup>106</sup>, tolerances<sup>107</sup>, etc.
- (169) From a supply side, however, these specialty grades are produced on the same production lines, consisting of the same basic production steps, as the more 'standard' higher volume grades. The main difference between the so-called specialty grades and the standard grades is volume, *i.e.* specialty grades are low volume, whilst standard grades are higher volume products. As a result, the principle

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<sup>104</sup> Outokumpu's Speciality Stainless Division refers to Outokumpu's Swedish production units which focus their production on low volume products including, *inter alia*, precision strip, QP, and long products. For the most part these products do not consist of specialty grades. Rather, a large part of these products are of austenitic grades. These products however present additional peculiarities, such as specific characteristics in terms of width, thickness, etc. As such, the volumes produced are relatively small.

<sup>105</sup> ID 2304.

<sup>106</sup> ID 9599.

<sup>107</sup> ID 2900.

of the high degree of supply-side substitutability between the different steel grades is also true for specialty grades. In practice, however, some differences may exist as producers may prefer to focus production of standard high-volume products on larger mills and specialties on smaller mills (see paragraphs (154)-(156) above).

- (170) On the basis of information from the market investigation, the Commission also corroborated that there is a high degree of supply side substitution between the different grades, regardless of being commodities or specialty grades.
- (171) Three out of four EEA suppliers<sup>108</sup> stated that identical equipment is required to produce all grades. Therefore, there is no need to incur in any investment or additional equipment to produce all type of grades. Further, the time required to switch production is limited (i.e. between 0 and 6 hours).
- (172) A number of respondents also pointed out that most of the producers possess the facilities and know-how to produce the different grades:<sup>109</sup> *'for some grades, specific metallurgical knowledge might be required for quality products, but available through public bibliography, assets suppliers and technical assistance'*.<sup>110</sup> The knowledge to produce any type of grade, including specialty grades, is thus available in the market. As a result, any producer can start producing any commodity or specialty grade if it becomes economically attractive to them.
- (173) Consequently, the Commission considers, in line with the submissions of the Notifying Party, that no separate market by type of grades should be considered in this case.

*c) Distinction by surface finish*

- (174) Stainless steels can be produced with a variety of surface finishes. For certain applications, where product appearance is important, finish is a design element and must be specified. In non-decorative applications, the surface finish may have implications for friction, wear, maintenance or corrosion resistance.
- (175) While there are a variety of surface finishes, the most common ones are 2D, 2B and bright annealed ("BA") finishes (see description in paragraph (181) below), although there also exist other surface finish frequently used in the industry. Table 3 below includes a description of the most requested surface finishes:

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<sup>108</sup> ID 3054, ID 3365 and ID 2704.

<sup>109</sup> ID 9708 and ID 3530.

<sup>110</sup> ID 3054 and ID 2704.

**Table 3: Description of the most requested surface finishes**

Description	ASTM	EN 10088-2	Notes
Hot rolled	1	1E/1D	A comparatively rough, dull surface produced by hot rolling to the specified thickness, followed by annealing and descaling.
Cold rolled	2D	2D	A dull, cold rolled finish produced by cold rolling to the specified thickness, followed by annealing and descaling. May also be achieved by a final light pass on dull rolls.
Cold rolled	2B	2B	A bright, cold rolled finish commonly produced in the same way as No. 2D finish, except that the annealed and descaled sheet receives a final cold roll pass on polished rolls. This is a general-purpose cold rolled finish and is more readily polished than No. 1 or No. 2D.
Bright Annealed	BA	2R	BA finish produced by performing bright annealing in an inert atmosphere after cold rolling. Smoother and brighter than No. 2B.
Brushed or dull polished	No. 4	1J/2J	A general-purpose bright polished finish obtained by finishing with a 120-150 mesh abrasive, following initial grinding with coarser abrasives.
Satin polished (matt)	No. 6	1K/2K	A soft satin finish having lower reflectivity than brushed (or dull polished) finish. It is produced by a Tampico brush.
Bright polished (mirror)	No. 8	1P/2P	The most reflective finish commonly produced. It is obtained by polishing with successively finer abrasives then buffing with a very fine buffing compound. The surface is essentially free of grit lines caused by preliminary grinding operations.
Electropolished surfaces	-	-	This surface is produced by electrolytic attack. This electrochemical process improves the surface finish by removing peaks of surface irregularity.

Source: Form CO, ID 953

- (176) The 1 series is simply HWB *i.e.* not cold rolled. 2D and 2B are variants of the standard cold-rolled production process through normal final annealing and pickling. BA requires a dedicated bright annealing line (annealing in the absence of oxygen).
- (177) In order to produce finishes numbers 4, 6 and 8, it is normally required to take the CR feedstock and finish it with different/additional brushing/polishing. Numbers 4 and 6 would typically be produced from a 2B feed, whilst number 8 is normally fed with BA. Depending on the brushing and/or polishing equipment required, finishes 4, 6 and 8 can be produced at either service centres or the mill. Any polishing/brushing/coating can be produced by a distributor with the required equipment.
- (178) The Notifying Party indicates that [90-100]\*% of the products sold by Inoxum's Nirosta in the EEA have the 2B, 2D or BA surfaces. With the possible exception of BA finishes, all major producers of stainless steel possess the required know-how and equipment to supply products with all these standard finishes. In addition, many service centres can produce a number of surface finishes. Therefore, the Notifying Party submits that a product market distinction of stainless steel products by surface finish is not appropriate.
- (179) The Notifying Party however submits that the production of BA material requires additional equipment that allows an annealing process in an oxygen-free environment maintained in a vertical annealing tower filled with hydrogen. Typical applications for BA surface finishes are appliances and kitchenware. The Notifying Party estimates the costs of a BA line to be of approximately EUR [...] million. In addition to the capital investment, know-how and expertise are necessary to consistently produce a high quality BA product. [...]\*.

- (180) Approximately 40% of the respondents to the Commission's requests for information noted that the surface finish is linked to the characteristics required by the end application of the product and, thus, the different surface finishes are not substitutes from a demand point of view.<sup>111</sup>
- (181) Four suppliers confirmed the Notifying Party's submission that some surface finishes require dedicated equipment, in particular for bright annealed ('BA')<sup>112</sup>. Specifically, *'for a BA finish, the final anneal is done in a furnace with no oxygen, typically a hydrogen atmosphere is used. Since there is no oxygen in the furnace, no surface scale develops and the coils do not need to be pickled. So for a BA finish, a cold-rolled full-hard coil is put on one end and a Bright Annealed finished coil is taken off at the end of the line.'*<sup>113</sup> Two respondents also indicated that for numbers 4, 6 and 8 dedicated equipment is necessary, such as grinding and polishing facilities.<sup>114</sup>
- (182) During the phase II market investigation, a potential sub-segmentation by surface finishes was further examined. Respondents to the phase II questionnaire clarify that some of the surface finishes are also performed by distributors, as well as by producers. Concretely, finishes numbers 4, 6 and 8 can and are also done by distributors.
- (183) It appears, however, that a number of surface finishes are only done at the producers' facilities, namely: 1E/D (which relates to hot roll), 2B, 2D and BA. In 2B and 2D finishes, the coils are annealed and pickled in an oxygen bearing atmosphere. As a result, the surface will oxidize or turn black and develop a scale on the surface. To clean the surface the coil can be pickled again. Though not mandatory, the annealing and pickling are done on the same line. The only difference between 2D and 2B finishes is a temper rolling that is added to the 2D finish, otherwise the same production process and equipment is used. For BA, however, the final cold annealing is done in a furnace with no oxygen, so no surface scale develop and the coils do not need to be pickled. Virtually all suppliers produce the most common surface finishes (with the possible exception of BA). Moreover, as underlined before, also distributors can achieve a series of surface finishes, although not the whole range.<sup>115</sup>
- (184) As a result, on the basis of information from the phase I and phase II market investigations, the Commission has generally confirmed that most producers have the equipment needed to produce the different surface finishes. Additionally, in case a supplier cannot produce a specific surface finish, it could use outside processors/distributors to achieve the desired finishes.
- (185) Regarding BA, information from the market investigation has clarified that this surface finish is performed by most of the producers ([...]\*). BA finish, however, requires special and dedicated equipment, as well as an investment of EUR [...]\* M

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<sup>111</sup> See reply to question 24, questionnaire Q4 (Phase I).

<sup>112</sup> ID 9708 ID 3054, ID 2704, ID 3530.

<sup>113</sup> ID 3530.

<sup>114</sup> ID 9708 ID 3530.

<sup>115</sup> ID 8275, ID8330, ID 5970.

to acquire a BA line. Consequently, there is no supply side substitutability with other surface finishes, as different equipment is required to perform BA finish.

(186) The Commission considers that, while there might be a separate market for BA surface finish, which requires particular and expensive equipment which is not operated by all the players in the market, it must be borne in mind that BA is just one of several possible finishes (BA represents approximately [20-30]\*% of the market). Moreover, surface finishes are normally performed at the end of the production process and, in many instances, not at the producers' facilities. In fact, CR products that have been pickled and annealed are sold to customers and distributors without any surface finished performed. Therefore, the surface treatment could also be regarded as a downstream market in relation to the production of CR. In addition, all European integrated producers are active in BA, although Outokumpu's activities in this segment are limited.

(187) For the purposes of this decision, the overall upstream market for the production and supply of CR products, independently of their surface finish, will be considered. In addition, the effects of the proposed transaction on possible BA and non-BA segments will be considered.

*d) Distinction by end application*

(188) As explained above in paragraph (91), CR products are used by a variety of consumer industries and in a wide range of final applications.

(189) Depending on the end use or application, a grade with certain mechanical characteristics is required. In general terms, grade selection for a specific end-use application depends on requirements relating to, *inter alia*, corrosion resistance, heat resistance, strength, aesthetics and workability.

(190) The Notifying Party submits that it is impossible to define separate sub-markets by end application essentially because, while many end use applications have a distinct grade solution, a number of solutions or grades may be available for multiple applications. Customers tend to learn more about alternative grades and use multiple grades to save costs. For example customers increasingly challenge the grade EN 1.4301 (304), known for its universal applicability, in favour of cheaper solutions for some applications.

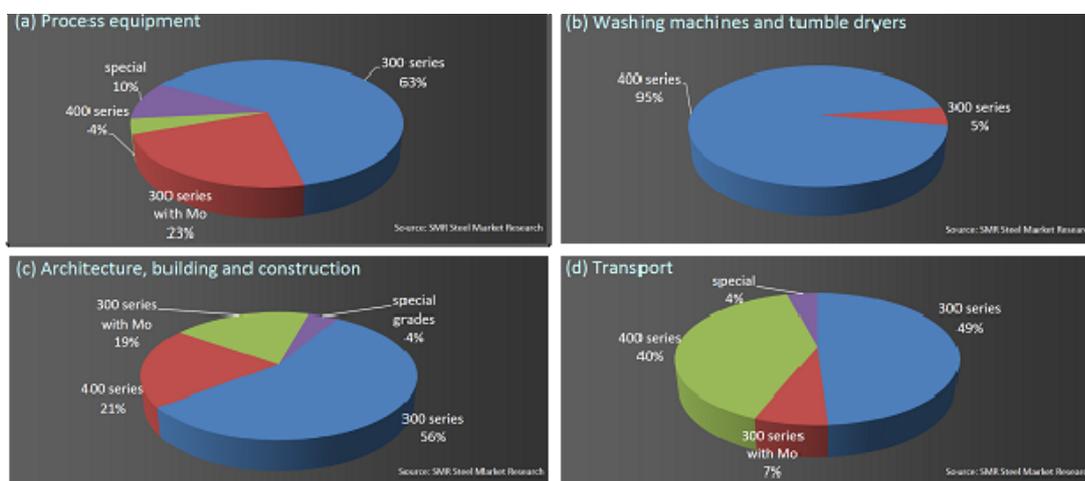
(191) Moreover, the Notifying Party claims that a number of commodity grades, such as 304, 316 NS 430, are widely used in different applications, such as 304, 316 and 430, among others:

(a) Austenitic grade EN 1.4301 (304), which accounts for about [60-70]\*% of European austenitic stainless steel production, is the largest selling grade of stainless in the EEA. It is used in the production of kitchen sinks, counter tops, food processing equipment and other equipment regularly exposed to a corrosive environment. EN 1.4301 (304) is easier to form and weld than other grades due to its content of nickel as additional alloying agent. Many customers prefer to use 1.4301 (304) as the most common grade with universal applicability, which explains why this grade is considered as the "commodity grade" and all mills supply it.

- (b) EN 1.4016 (430), which accounts for about [40-50]\*% of European ferritic stainless steel production, is the most commonly used ferritic grade.<sup>116</sup> This ferritic grade is well suited to the production of the insides of clothes dryers and dishwashers, as well as to end applications where corrosion resistance and ease of welding are not important. As ferritic grades have no nickel content, many customers with lower deformation and anti-corrosion requirements have been steadily increasing the usage of this grade to avoid the price volatility associated with nickel.
- (c) Grade 316 can be made in variants that provide greater heat resistance (by adding titanium), greater corrosion resistance by adding nickel or more molybdenum and greater strength by adding nitrogen. That is why 316 grades, i.e. EN 14404, EN 14429, EN 1436, are used in applications for handling the wide range of chemicals used by process industries, e.g. pulp and paper, textile, food and beverages, pharmaceutical, medical and in the construction industry.

(192) The Commission's investigation has confirmed the Notifying Party's views, in the sense that a variety of grades and grade families are used in the same end application<sup>117</sup>. Such grades are not entirely dedicated to a given application, but can be used in multiple end applications. Figure 8 below show the main grade series (austenitic and ferritic grades) used in the most common end applications. Each grade series include a number of different grades. As an example, transport and ABC end applications used, among many others, the following grades: EN1.4301/1.4307/1.4310, 1.4016, 1.4512, 1.4541 and 1.4404 (316) 1.4301/1.4307 (304) 1.4016 (430), respectively.

**Figure 8: Breakdown of stainless steel production by type and industry**



Source: Euroinox presentation, ID 418

<sup>116</sup> Together, 1.4301 (304) and 1.4016 (430) account for approximately [60-70]\*% of European stainless steel production.

<sup>117</sup> ID 418.

- (193) Given the alternative uses in practically all applications, a customer may want to switch from a more expensive grade to a less expensive grade in a given application (e.g., ferritic instead of austenitic). In such a case, the customer would only choose to incur the costs, if any, of testing and certifying a new grade, if the benefits outweigh the costs. Therefore, switching does not appear to be very costly.
- (194) It should be noted that for some end applications special or particular grades may be required. Ferritic grades, for instance, are not suitable for certain industrial applications where corrosion resistance is a critical parameter. In such applications the choice may be between austenitic grades and duplex.
- (195) In almost all cases, however, a number of alternatives are available. Moreover, many grades are used in a variety of end applications, so it is not possible to identify a number of grades or grade families that are mainly or mostly used in particular applications. As shown in Figure 8, 300 and 400 series are used in almost all end applications. In turn, within each end application and the grade families used in such application, there are many different grades that could be used.
- (196) Consequently, the Commission considers, in line with the submissions of the Notifying Party, that no market delineation by end application should be considered in this case.

e) *Precision strip*

- (197) In previous Commission decisions<sup>118</sup>, cold rolled flat products (sheet and coil) have been regarded as belonging to the same relevant product markets. However, a separate market for precision strip has been also considered in the past<sup>119</sup>. Precision strip is used in a number of end applications, including heat exchangers and heating elements, razor blades, cutlery and knives, electronic parts, process, mechanical engineering and applications in the automotive sector.<sup>120</sup>
- (198) The Notifying Party notes that there is no clear definition concerning the dimensions of precision strip, as the distinguishing feature is the preciseness of its dimensions (gauge and width). However, the vast majority of all precision strip products are thinner than 0.5mm and narrower than 1m in terms of width (precision strip can have different widths, from several millimetres to up 1m width). There are also standard coil products, which are below 0.5mm, though rarely below 0.3mm but they will lack the uniformity and preciseness of precision strip.
- (199) The Notifying Party considers that due to the high degree of supply-side substitution all cold rolled flats products, including precision strip, should belong to the same relevant market. At present, mills can roll widths of below 500 mm and above 500 mm and material of less than 500 mm can be slit from wider coils.

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<sup>118</sup> *Usinor / Arbed / Aceralia*, Case No COMP/ECSC.1351, Case COMP/M.4137, *Mittal/Arcelor*, 2 June 2006.

<sup>119</sup> Case No COMP/M.3778 - *Böhler-Uddeholm/Buderus*.

<sup>120</sup> The total market for precision strip was estimated at [...]kt in 2012. Source: Form CO, Annex 32, ID 1076.

- (200) Still according to the Notifying Party, there is some degree of demand-side substitution given that precision strip is substituted in classical applications. For example, thin broadband is used for plate heat exchangers, and other nickel-based materials can be used for heat-sealing instead of precision strip.
- (201) The Commission's phase I market investigation in the present case was inconclusive as to whether a market for precision strip should be considered as a separate market.
- (202) From a supply-side perspective, market participants believe that similar equipment is needed to produce cold rolled coils, sheets and precision strips. However, a limited number of respondents also pointed out that for the production of precision strip a purpose-built rolling facility is required.
- (203) From a demand side point of view, there was a broad consensus as regards the product market delineations as most of the customers and producers considered that sheet, coil and precision strip are not substitutes from a demand perspective.<sup>121</sup>
- (204) During the phase II market investigation, the Commission further investigated the potential market for precision strips. Respondents to the questionnaire pointed out that in order to produce precision strip a special cold rolling mill for thin gauge products, as well as tension-leveller, are needed. The cold rollings must be able to process coils to lighter the gauges which require different rolls, motors and set-ups. The remaining production process is identical, the only difference being that precision strips are cast in smaller quantities and narrower widths in a special cold rolling mill.
- (205) The main differences between the production of precision strip and narrow strip are strict tolerance of the thickness and the flatness,<sup>122</sup> as well as the customers' requirements on width and product characteristics. In general cold rolled products below 0.38mm of thickness are considered as precision strips. However, if tolerances are very tight, even products with thickness up to 1 mm can be considered as precision strip. In turn, very thin strip (i.e. below 0.38mm of thickness) could not be considered as precision strip unless tolerances are very strict. In consequence, although the terms "narrow strip" and "precision strip" might be used interchangeably to indicate cold rolled stainless steel produced at higher level of precision with regard to the tolerance limits compared to wider strip, precision strip generally has stricter tolerance requirements than narrow strip. To achieve the customers' requirements on tolerance, thickness and width, a special cold rolling is needed. Producers which have this special cold rolling mill can produce precision strip.
- (206) As noted by the Notifying Party, whilst the functions of the equipment to produce precision strip are identical to other cold rolling mills, the size of the precision strip cold rolling mill is smaller. In the Parties' case, for instance, [...]\*. Equally as a result of the smaller scale, the mills can roll to thinner dimensions and with greater

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<sup>121</sup> See replies to questions 14 to 17 from Q1-Questionnaires to EEA competitors and replies to questions and Q2-Questionnaires to non-EEA competitors. Also see replies to questions 19 to 22 from Q3-Questionnaires to customers.

<sup>122</sup> ID 8330, ID 5970.

precision. However, these mills are not only used to produce precision strip, but can also accommodate other CR products, including all types of CR narrow strips. The supply side substitutability is, nevertheless, limited, as narrow strip can be also produced in other (ordinary) cold rolling mills, while precision strip specifically requires a special rolling mill.

- (207) It is noted further that the main producers for precision strip differ substantially from the main players on the overall market for CR.<sup>123</sup>
- (208) It is therefore considered that there are strong indications pointing towards a separate market for precision strips. For the purpose of this Decision and for the assessment of the effects of the proposed transaction, a separate market for precision strip will be considered.

#### 5.3.1.3. Conclusion on the relevant product market for CR

- (209) In the light of the foregoing and in line with the submissions of the Notifying Party, the Commission considers that the relevant product market for the assessment of the effects of the proposed transaction is the overall market for the production and supply of CR flat products, excluding precision strip. In addition, the effects of the proposed transaction on possible BA and non-BA segments will be considered.

#### 5.3.2. *Ferrochrome*

- (210) The production of stainless steel requires chromium as a raw material. This element is available either from stainless steel scrap or in the form of ferrochrome. In previous decisions, the Commission has considered that given that stainless steel products have long lives and that the market for stainless steel is expanding, the requirements for chromium in the production process cannot be met entirely from scrap. The Commission did however not conclude whether stainless steel scrap and ferrochrome are part of the same product market<sup>124</sup>.
- (211) The Commission has also previously distinguished ferrochrome from the broader ferroalloy product family which, for example, could also include ferrovanadium or ferrotitanium. In particular, while leaving the exact market definition open, the Commission has taken the view that ferrochrome's size and content may contribute to it being considered as a separate market (a piece of ferrochrome is between 10–80 mm containing 50% to 63% of chromium)<sup>125</sup>.
- (212) While the Notifying Party broadly agrees with that approach, they estimate that today ferrochrome is [...] in size and contains [50-60]\*% to [70-80]\*% of chromium.
- (213) For the purpose of this decision, the product market definition for ferrochrome can however be left open as no competition concerns would arise under any possible market definition.

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<sup>123</sup> Form CO, Annex 32, ID 1076.

<sup>124</sup> Case COMP/M.2180 – Outokumpu/Avesta Sheffield of 4 December 2000, at paragraph 20.

<sup>125</sup> COMP/3134 – Arcelor/Umicore/Duology JV of 4 June 2003, at paragraph 10-14.

### 5.3.3. *Distribution of stainless steel flat products*

- (214) In previous cases, the Commission has concluded that the distribution of stainless steel should be considered a separate market from the production and direct (ex-mill) sales of stainless steel products<sup>126</sup>.
- (215) Within distribution, the Commission has identified various channels, each of which could be considered as a separate relevant product market: (i) stainless steel service centres (SSCs), which distribute flat and long products, (ii) stockholding centres/stockists, which distribute flat products, long products and QP, and (iii) oxy-cutting centres, which only distribute QP<sup>127</sup>:
- (a) SSCs purchase coils from steel manufacturers, which they then slit and cut to customers' requirements.
  - (b) Stockholding centres are active as wholesalers, purchasing steel products in bulk and re-selling in smaller quantities.
  - (c) Oxy-cutting centres purchase mainly QP from steel manufacturers and then cut it into particular sizes and shapes as required by customers using ox-hydrogen blowtorches.
- (216) Distributors can be either independent companies or entities owned by stainless and carbon steel producers.
- (217) The Notifying Party submits that there is a single distribution market for all stainless steel products, other than for the distribution of QP products.
- (218) The Notifying Party claims that with the possible exception of QP, there is no basis for distinguishing between the distribution of flat vs. long stainless steel products. Whilst there may be a degree of specialisation, more than [90-100]\*% of stainless SSCs and stockholders carry most stainless steel product groups (and sometimes even other metals such as carbon steel, aluminium, copper and brass) because they aim to reach the widest possible range of customers in the geographic areas in which they are active.
- (219) The Notifying Party further claims that there is no basis for distinguishing between sales by SSCs and sales by stockists, as from the viewpoint of the stainless steel customer, this differentiation is becoming irrelevant as stockists have in-house processing facilities which enable them to compete with SSCs. Similarly, SSCs often have sales of unprocessed stainless steel products, which is the typical activity of stockists.
- (220) As regards QP, the Notifying Party submits that QP belongs to a distinct product market and is distributed through distinct channels (i.e. oxy-cutting centres and

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<sup>126</sup> See for example Case COMP/M.5808, JSA/JACQUET METALS/ IMS, 14 July 2010, at paragraph 11; and Case COMP/M.5211, Outokumpu/Sogepar, 25 July 2008, at paragraph 14.

<sup>127</sup> Ibidem, and also Case COMP/ECSC.1351, Usinor/Arbed/Aceralia, 21 November 2001, at paragraph 76; Case COMP IV/M.4137, Mittal/Arcelor, 2 June 2006, at paragraph 80; Case COMP/M.5072, AMSSC/BE GROUP/JV, 10 April 2008, at paragraph 12.

stockists), as the machinery to cut QP differs from that used for other stainless steel products, and QP customers may differ from customers of other stainless steel products. In any event, the distinction is irrelevant for the purposes of assessing the proposed transaction, as Inoxum does not operate any stockists or QP service centres, nor does it distribute any long products in the EEA.

- (221) A large majority of the distribution competitor and customer respondents to the Commission questionnaires<sup>128</sup> confirmed that the distribution of stainless steel should be considered separately from the production and direct ex-mill sales of stainless steel products.<sup>129</sup> Respondents explained that:

*"Customers and competitors are distinct. Mills serve mainly big customers and full coil customers (SSC, tube makers, re-rollers...). Distributors are oriented to small customers, with shorter lead time and smaller batches."*<sup>130</sup>

*"Whereas producers probably will serve large-volume buyers directly, they generally do not accept orders for smaller quantities. Distribution is therefore a separate, and necessary, link between production and medium-sized and small consumers."*<sup>131</sup>

- (222) While a very clear majority of respondents agreed to<sup>132</sup> the distinction between the three channels within distribution: (i) SSCs which distribute flat and long products, (ii) stockholding centres/stockists which distribute flat products, long products and QP, and (iii) oxy-cutting centres which distribute only QP, there were also explanations which pointed to the contrary.<sup>133</sup>
- (223) 63% of the distributors who replied to the Commission's questionnaires<sup>134</sup> indicated that they sell both flat and long products, 55% of total respondents indicated<sup>135</sup> that besides flat and/or long products they also sell QP. Only a limited number of the respondents sell exclusively flat (25%)<sup>136</sup>, long (1.5%)<sup>137</sup>, or QP (1.5%)<sup>138</sup> products.
- (224) As to the question whether SSCs and stockists form part of the same distribution market<sup>139</sup>, out of the distributors which replied to the Commission questionnaire, 33% regarded themselves as stockists, 38% as SSCs and 28% declared to be a "mixed" distributor (i.e. both stockist and SSC), some of them (21% of the total respondents) also offering oxy-cutting services.

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<sup>128</sup> Question 6 of Q5 and Question 9 of Q4

<sup>129</sup> 57 out of 64 who gave a reply to this question in Q4 89%; and 158 out of 213 who gave a reply to this question in Q5 74%

<sup>130</sup> Q4, ID 2619.

<sup>131</sup> Q4, ID 2591.

<sup>132</sup> Question 10 of q4, q7 of q5: Q 10 (q4) 52 out of 64 who replied 81%; Q7 (q5) 180 out of 211, 85%

<sup>133</sup> "I found it unlogic to try to fix stockholder/steelmaker/cutting centres into 3 different categories. Most companies does a mix." ID 1918

<sup>134</sup> 41 out of 65, Q5 of Q4.

<sup>135</sup> 36 out of 65, , Q5 of Q4.

<sup>136</sup> 16 out of 65, Q5 of Q4.

<sup>137</sup> 1 out of 65, Q5 of Q4.

<sup>138</sup> 1 out of 65, Q5 of Q4.

<sup>139</sup> Question 2 of Q4 and Q5.

- (225) Moreover, an overwhelming majority (95%) of the distributors consider that SSCs and stockists are in competition with each other.<sup>140</sup>

*"SSCs and stockholding centres compete for the same customers, in particular for standard products"*<sup>141</sup>

*"SAME PRODUCTS, SAME CUSTOMERS"*<sup>142</sup>

*"Stockholder often has the same material and service as the SSCs"*<sup>143</sup>

*"They offer the same products."*<sup>144</sup>

*"They sell to the same customers."*<sup>145</sup>

*"Most of the stockholding centers have also a conversion capability or they carry in stock converted material."*<sup>146</sup>

- (226) More than half (52%) of the distributors which regarded themselves as "only" stockists considered that at least one of the Parties is among their 3 closest competitors on distribution level<sup>147</sup>.

- (227) Furthermore, a clear majority (75%)<sup>148</sup> of distribution customers claim to be purchasing the same products and services from both SSCs and stockists and in addition consider that SSCs compete with stockists (though some respondents indicated that SSCs have a wider range of products and higher stock).<sup>149</sup>

*"Both sell also standard sheet sizes from stock"*<sup>150</sup>

*"because they partly sell the same products to the same markets."*<sup>151</sup>

*"Both are in the same market and have similar customer base"*<sup>152</sup>

- (228) With regard to the services offered by distributors (i.e. slitting, cut-to-length, grinding, polishing, other special finish, stocking/warehousing), whereas it is true that distributors which consider themselves as "pure" stockists seem on average to have more limited equipment for certain services, the market investigation demonstrated that there is no service which could be exclusively offered by SSCs. Some of the stockists even dispose of more specialised machines. Furthermore not

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<sup>140</sup> Q4 question 11: 61 out of 64.

<sup>141</sup> Q4, ID 3396.

<sup>142</sup> ID 9547.

<sup>143</sup> ID 2450.

<sup>144</sup> ID 2504.

<sup>145</sup> ID 2591.

<sup>146</sup> ID 9496.

<sup>147</sup> Q86 of q4, 11 out of 21.

<sup>148</sup> Q8 of q5, 160 out of 212, 75%.

<sup>149</sup> Q 10 of q5, , 165 out of 209, 79%.

<sup>150</sup> ID 9709.

<sup>151</sup> ID 9502.

<sup>152</sup> ID 2627.

all distributors which regard themselves as SSCs offer the entire range of services (though all of them declared to have at least cut-to length) and there seems to be a great variety of machinery used by the distributors.

**Table 4: Summary of the market investigation on distributors' equipment**

	SSC		SSC + stockist		stockist	
	No. of responses	% of responses	No. of responses	% of responses	No. of responses	% of responses
<b>Total number of respondents to the relevant question<sup>153</sup></b>	10		15		21	
<b>slitting</b>	8	80%	4	27%	3	14%
<b>cut-to-length</b>	10	100%	6	40%	4	19%
<b>grinding</b>	5	50%	3	20%	4	19%
<b>polishing</b>	6	60%	4	27%	3	14%
<b>other special finish</b>	2	20%	2	13%	2	10%
<b>stocking/ warehousing</b>	7	70%	15	100%	19	90%

(229) Oral statements from distributors (during the site visit at one of the distributors' premises and phone interviews conducted with other distributors) also indicate that the distinction between pure stockists and full SSCs is not clearly defined.

*"there is no clear distinction between SSCs and stockists, as they (along with the steel mills) deliver to the same customers"<sup>154</sup>*

*"Regarding the question whether there is a clear distinction between stockists and SSCs, [...] there is a huge grey zone with all kinds of variations of services offered by the different distributors."<sup>155</sup>*

*"The main competitors [of the SSC interviewed] are other SSC and stockists. [...]The customers of service centres and stockists are the same, so there is no real clear distinction between the two groups."<sup>156</sup>*

(230) The market investigation thus demonstrated that both distributors and customers consider SSCs and stockists to be in competition with each other. In addition there is no clear-cut distinction between fully-fetched SSCs and pure stockists, and almost one third of the respondents did not identify themselves as falling within either of the two categories of distributors. Moreover, the market investigation demonstrated that there is a wide range of combination of services offered from distributors as they tend to use a mixture of equipment.

<sup>153</sup> See Q4 – questionnaire to distributors, question 6: "please indicate which of the following stainless steel transformation services your company offers and indicate your annual capacity for each".

<sup>154</sup> [...] \* non-confidential minutes, ID 9237.

<sup>155</sup> [...] \* non-confidential minutes, ID 9120.

<sup>156</sup> ID 9132.

- (231) For the purpose of this decision, however, the product market definition for the distribution of stainless steel products can be left open as no competition concerns would arise under any possible market definition.

#### **5.4. Relevant geographic market**

##### *5.4.1. Production and wholesale of stainless steel products*

- (232) According to the Notifying Party, the geographic market for all stainless steel products (including slabs, HR and CR) is at least EEA-wide for the following reasons:

- (a) Transport costs within the EEA are not significant;
- (b) There is a high level of intra-EEA trade; and
- (c) The Notifying Party submits that there are no material trade or price differences for the sales of stainless steel products in the other Member States in Central and Eastern Europe that are part of the EEA.

- (233) The Notifying Party does not claim that the geographic market for stainless steel products is worldwide. It does, however, submit that imports, in particular from Asia, exercise a significant competitive constraint within the EEA and that this factor has to be taken into account irrespective of the approach to geographic market definition.

- (234) The Commission assesses the definition of the geographic scope of the market with respect to slabs, HBB, HWB and CR.

##### *5.4.1.1. Slabs*

- (235) In previous decisions dealing with carbon steel, the Commission left the geographic market definition for slabs open<sup>157</sup>, although it previously considered that the geographic scope of the market for slabs could be considered as at least Union-wide. As pointed out above, the Notifying Party states that the geographic market for all stainless steel products is at least EEA-wide.

- (236) As a preliminary remark, the EEA merchant market for slabs is very small, if it exists at all,<sup>158</sup> as stainless steel producers are integrated and generally do not sell and purchase slabs. The responses to the Commission's requests for information confirmed that transport costs are not sufficient to hinder intra-EEA trade, and might not even be sufficient to significantly impede worldwide trade<sup>159</sup>.

- (237) For the purposes of the competitive assessment in the current decision, the geographic market definition can be left open as no competition concerns arise with respect to the merchant market for slabs.

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<sup>157</sup> Case COMP/ECSC.1360-DUFERCO/SOGEPA/CARSID of 28 November 2011.

<sup>158</sup> According to the Parties, the yearly volume of slabs sold on the merchant market amounts to [...] kt against total production at the melting level of approximately [...] kt (source: Form CO, Annex 35).

<sup>159</sup> See Q1 – Questionnaire to EEA Competitors: question 42, 43.

#### 5.4.1.2. Hot rolled (HR)

(238) In previous decisions the Commission has considered the markets for production of HR likely to be at least Union-wide<sup>160</sup>. The Commission however left the exact geographic scope of this market open. In a previous decision, the Commission also considered that the market for hot rolled stainless steel strip and sheet encompassed at least Western Europe<sup>161</sup>, based on low transport costs and a high level of intra-Union trade. These Commission precedents have however not distinguished between HBB and HWB of stainless steel. As pointed out above, the Notifying Party considers the geographic market for all stainless steel products to be at least EEA-wide.

#### – Hot Black Band (HBB)

(239) As regards HBB, the EEA merchant market is very small as stainless steel producers are integrated and do not generally sell and purchase HBB. The Notifying Party submits that the only companies purchasing HBB in the EEA are re-rollers, notably Marcegaglia (Italy) and Otelinox (Romania). The responses to the Commission's requests for information confirmed this. In view of the limited size of this market, it is as in the case of slabs particularly difficult to draw meaningful conclusions with respect to the geographic market definition. The responses to the Commission's requests for information with regard to transport costs have been inconclusive as respondents stated that transport costs range from below [5-10]\*% to [10-20]\*% of final price. In any event, re-rollers appear to source to an appreciable extent also from non-European suppliers.<sup>162</sup>

(240) For the purposes of the competitive assessment in the current decision, the geographic market definition can be left open as no competition concerns arise with respect to the merchant market for HBB.

#### – Hot White Band (HWB)

(241) With regard to HWB, the four integrated European suppliers have customers throughout the EEA who buy cross borders. Price differences within the EEA are minimal. Furthermore, the pricing mechanism and the suppliers of HWB are the same across all the EEA. Lastly, transport costs for shipments within the EEA are relatively low (in general, below [5-10]\*% of final price).<sup>163</sup>

(242) Imports represent an appreciable part of EEA consumption<sup>164</sup>. However, many customers have never purchased from outside the EEA, and in particular from Asian suppliers because of differences compared to European producers in term of lead time, quality, reputation and reliability. Moreover, the final customers that purchase

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<sup>160</sup> Cases COMP/M.5211 – Outokumpu/SoGePar of 25 June 2008; COMP/ECSC.1351 – Usinor/Arbed/Aceralia of 21 November 2011 and COMP/ECSC.1243 – Krupp Hoesch/Thyssen of 28 July 1997 (concerning carbon steel products).

<sup>161</sup> COMP/ECSC.1342 – Outokumpu/Avesta Sheffield of 4 December 2000.

<sup>162</sup> See Q1 – Questionnaire to EEA Competitors: question 46.

<sup>163</sup> See Q1 – Questionnaire to EEA Competitors: question 48, 49.

<sup>164</sup> In the EEA market for HWB, imports account for approximately [10-20]\*% of sales. Source: Form CO.

imported materials generally buy from distributors based in the EEA. As a result, distributors appear to be the only category of customers that purchase from outside the EEA to a significant extent.

- (243) For the purposes of the competitive assessment in the current decision, and also in light of the findings that will be discussed in the section below with regard to CR, the Commission concludes that the geographic scope of the market for HWB is not wider than the EEA.

#### 5.4.1.3. Cold rolled (CR)

- (244) In previous decisions, the Commission has considered the possible scope of the market for CR as either not wider than Western Europe or at least Union-wide<sup>165</sup>. However, the definition of the relevant geographic market was ultimately left open.
- (245) As mentioned above, the Notifying Party considers the geographic market for all stainless steel products, including CR, to be at least EEA-wide.
- (246) In its phase I investigation, the Commission found ample evidence that confirmed the Notifying Party's position with respect to the homogeneity of the competitive conditions in the market for CR within the EEA.<sup>166</sup>
- (247) Firstly, there is a very strong correlation among the prices for CR in Western Europe, as shown in Figure 9.

**Figure 9:** [...]\*

**Source:** Form CO, ID 953

- (248) Secondly, customers regularly buy cross-border and the level of intra-EEA trade is very high. This appears to be partly because lead time for shipments within the EEA is short and transport costs appear to be relatively low.
- (249) Thirdly, the pricing mechanism for CR is the same across all the EEA. In particular, the EEA pricing mechanism is based on two components: a base price plus an alloy surcharge. The alloy surcharge represents the part of the final price that is accounted for by the price of the alloys, such as nickel, chromium and molybdenum.
- (250) The Commission's investigation, by contrast, did not show that the geographic market for CR is wider than the EEA. Figure 10 and Figure 11 show the price for CR in different areas of the world with respect to the two most common commodity products, Grade 1.4301 (304, 2B finish and 2mm thickness) and Grade 1.4016 (430, 2B finish and 2mm thickness).

**Figure 10:** [...]\*

**Source:** Form CO, ID 953

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<sup>165</sup> Cases COMP/M.5211 – Outokumpu/SoGePar of 25 June 2008; COMP/ECSC.1351 – Usinor/Arbed/Aceralia of 21 November 2011 (concerning carbon steel products).

<sup>166</sup> See responses to questions 41, 46 to 48 from Q4- questionnaire to customers, and responses to questions 37 to 41 from Q1- questionnaire to competitors.

Figure 11: [...]\*

Source: Form CO, ID 953

- (251) It is noted firstly that there remain significant differences in the price for CR in different areas of the world even for CR of the most common commodity grades. On the basis of data submitted by the Notifying Party, the average difference since January 2000 between the price for CR Grade 1.4301 (304) in Germany and the price for CR Grade 1.4301 (304) in Hong Kong is [...] USD/t<sup>167</sup>. The corresponding difference for CR Grade 1.4016 (430) over the same period is [...] USD/t<sup>168</sup>.
- (252) Secondly, these significant and persistent price differences between different geographic areas cannot be justified by transport costs only. Transport costs for shipments from Asia to the EEA amount approximately to EUR [...] per t<sup>169</sup>, whilst the price difference between the EEA and the Asian price is not constant and has often been higher than EUR [...]. Furthermore, the fact that price differences have not been narrowing over time suggests that the market is not evolving towards a worldwide dimension.
- (253) Thirdly, more than half of the customers responding to the Commission's requests for information during the phase I investigation indicated that they have never purchased CR from a non-European producer, regardless of the grade family or different grades. Some of them indicated that they have done so only for testing purposes. Many customers also indicated that although they purchase CR from non-European producers, they do not do so frequently. In any event, even customers that buy frequently non-EEA products generally do not purchase directly from non-EEA producers. Rather, customers normally buy CR from EEA distributors, the latter being the only category of customers purchasing CR from outside the EEA with continuity.<sup>170</sup>
- (254) Fourthly, the results of the market investigation confirmed that different pricing systems exist in different geographic areas of the world. This is notably the case for the EEA, which adopts a pricing mechanism based on base price plus alloy surcharge calculated at the time of delivery, and Asia, where there is only one transaction price for CR fixed at the time of the order that also incorporates the cost of alloys.
- (255) Finally, the Notifying Party provided econometric evidence and critical elasticity analysis which also supports a geographic scope limited to the EEA.

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<sup>167</sup> The difference in EUR is EUR [...] ([10-20]\*% of the average EEA price for CR Grade 1.4301 (304) used by the Notifying Party for the calculation on transport cost on page 126 of the Form CO). The exchange rate applied is the average exchange rate USD/EUR for 2011 of 1.3920 (source: European Central Bank).

<sup>168</sup> The difference in EUR is EUR [...] ([10-20]\*% of the average EEA price for CR Grade 1.4016 (430) used by the Notifying Party for the calculation on transport cost on page 126 of the Form CO). The exchange rate applied is the average exchange rate USD/EUR for 2011 of 1.3920 (source: European Central Bank).

<sup>169</sup> Source: Form CO, ID 953.

<sup>170</sup> See Q3 – Questionnaire to Customers: questions 40, 47.

- (256) As discussed below in paragraphs (604)-(625), the Commission assessed the Notifying Party's critical elasticity analysis and concluded that it appears to contain a number of flaws. That being said, the standard hypothetical monopolist calculations on the basis of the Notifying Party's econometric results confirm that arbitrage between the different regions of the world is imperfect and that import reactions would not be sufficient to make a price increase unprofitable for a hypothetical monopolist in the EEA. The Notifying Party's econometric evidence therefore also supports the view that the market is limited to the EEA.
- (257) During the phase II market investigation, the Commission further analysed the substitutability of EEA CR products with CR produced outside the EEA. One of the main conclusions from the phase II responses to the Commission's questionnaires is that customers do not regard imports from Asia as a perfect substitute for EEA CR.
- (258) Approximately 61% of the customers replying to the relevant question<sup>171</sup> stated that in general non-European suppliers do not constitute a satisfactory alternative to European suppliers. Even more customers (79%) stated that they do not consider non-European suppliers as a satisfactory alternative to European suppliers for all grade families and grades of stainless steel products.
- (259) There are a number of reasons why a majority of customers do not consider imports a satisfactory alternative to European products: (i) lead time, (ii) quality, (iii) payment conditions and (iv) product range (see paragraphs (534)-(554) for a detailed assessment of each of these factors).
- (260) For the purposes of this decision, the Commission thus concludes that the geographic scope of the market for the production and supply of CR is not wider than the EEA.

#### 5.4.2. *Ferrochrome*

- (261) The Commission has previously considered that ferrochrome is an internationally traded product. While it has considered an EEA-wide market for ferrochrome in previous decisions, the Commission has ultimately left the market definition open<sup>172</sup>.
- (262) The Notifying Party considers that the geographic market is worldwide because prices are determined on the open market, the main producers sell and trade ferrochrome throughout the world, and there are no transport costs, customs barriers or anti-dumping measures that would restrict global trade in ferrochrome.
- (263) In any event, for the purposes of this decision the geographic scope of the market for ferrochrome can be left open as no concerns would arise under any alternative market definition.

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<sup>171</sup> See Question 71 of Q3.

<sup>172</sup> Cases COMP/M.2180 – Outokumpu/Avesta Sheffield of 4 December 2000 and COMP/3134 – Arcelor/Umicore/Duology JV of 4 June 2003.

### 5.4.3. *Distribution of stainless steel flat products*

- (264) The Commission has previously considered that the geographic scope of the market for the distribution of steel products is national or at most regional (wider than national)<sup>173</sup>.
- (265) In particular, the Commission considered as relevant geographic markets for the distribution of stainless steel the Benelux and the neighbouring north western part of Germany (North Rhineland-Westphalia), France<sup>174</sup>, Spain and Portugal and the United Kingdom and Ireland (or, alternatively, for both regions, each country as a separate relevant market)<sup>175</sup>.
- (266) In other decisions the Commission considered the market for SSC activities to be national<sup>176</sup>. In particular, it considered that Sweden was a relevant geographic market, but ultimately left the market definition open. The Commission also previously considered that the market for stockholding centres was national or at most regional<sup>177</sup>.
- (267) The Notifying Party's arguments are focused on (i) the distribution market for all stainless steel products other than for the distribution of QP products as a whole, and (ii) on the distribution of flat products by SSCs only, which according to them is the narrowest possible product market definition. Further, the Notifying Party submits that the distribution market may have a regional dimension to the extent that sale conditions are homogeneous in neighbouring areas within the EEA and there is significant cross-border selling, especially in densely populated middle European regions.
- (268) According to the Notifying Party, (i) Irish customers purchase significant quantities from distributors in the UK; (ii) Belgian and Dutch customers purchase from distributors located in the other country, as well as in Germany; (iii) Danish and Norwegian customers purchase significant parts of their requirements from distributors in Germany and Sweden; and (iv) Portuguese customers purchase from suppliers in Spain. The Notifying Party therefore concludes that at least Ireland, Belgium, The Netherlands, Denmark, Norway and Portugal should not be considered as distinct national geographic markets.
- (269) In the Form CO the Notifying Party also submitted that the following regions should be considered as relevant geographic markets: the Nordic Region (i.e. Norway, Finland, Sweden and Denmark), the Benelux countries, UK and Ireland. The Notifying Party alternatively submitted as relevant geographic markets the Benelux and Germany on the one hand and Germany, Italy and Hungary on the other. In the

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<sup>173</sup> Case COMP/M.5808 – JSA/Jacquet Metals/IMS, paragraph 16. See also case ; COMP/ECSC.1351 – Usinor/Arbed/Aceralia of 21 November 2011, paragraph 102; case COMP/M.4137 – Mittal/Arcelor of 2 June 2006, paragraph 80; case M.5211 – Outokumpu/SoGePar of 25 June 2008, paragraph 20; case COMP/M.5072 - AMSSC / BE GROUP / JV of 10 April 2008, paragraph 14.

<sup>174</sup> See also case COMP/ECSC.1268 – Usinor/Cockerill Sambre of 4 February 1999, paragraph 33.

<sup>175</sup> Case COMP/ECSC.1351 – Usinor/Arbed/Aceralia of 21 November 2011, paragraph 107.

<sup>176</sup> Case COMP/M.5072 - AMSSC / BE GROUP / JV of 10 April 2008, paragraphs 14-15.

<sup>177</sup> Case COMP/M.4137 – Mittal/Arcelor of 2 June 2006, paragraph 80. See also COMP/ECSC.1351 – Usinor/Arbed/Aceralia of 21 November 2011, paragraphs 99-107.

Reply to the Article 6(1)(c) decision, the Notifying Party further argued that apart for the Nordic countries, and UK and Ireland, the Benelux countries together with Northern Germany on the one hand and Slovakia, Hungary and Romania on the other hand should be considered as country clusters.

- (270) The responses to the Commission's requests for information confirmed that a large majority of distributors (84%)<sup>178</sup> consider that they are in competition with distributors based in other EEA Member States. A large majority of distribution customers also consider the market for distribution of stainless steel flat products either as national or regional (broader than national) in scope.<sup>179</sup>

*"Distributors are often multinational, or sell in several countries."<sup>180</sup>*

*"Based on the small geographic size of Hungary; and on the high export and import rate; and on the rel.]lately high value of the product there is definitely competition between local and foreign distributo[r]s."<sup>181</sup>*

- (271) By contrast, more than half of the distributors who have responded to the Commission's requests for information (57%)<sup>182</sup> indicated that they sell locally. On the other hand 43%<sup>183</sup> do export, mostly to neighbouring countries but some of them even outside the EEA.

*"The company generally has access to customers in neighbo[u]ring countries"*

*"[...] \* has customers worldwide."*

*"We sell mainly Fenno-Scandinavia (Finland, Sweden and Norway), Russia, Central Europe, Baltic States, Turkey."*

- (272) The vast majority of distributors and their customers indicated that it is necessary to have local knowledge (including language) in order to carry out stainless steel product distribution in a given country.

- (273) Further, the responses to the Commission's requests for information showed that the average transport distance for most of the stainless steel products distribution is situated in a radius of up to 300km from the distributor's headquarters. The large majority of the respondents (distributors and their customers) also indicated that the percentages of transport costs in the price of the delivered product are limited (from 0 to 5%).<sup>184</sup>

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<sup>178</sup> 51 out of 61 who responded to the relevant question.

<sup>179</sup> See Q4 – Questionnaire to Distributors: questions 26, 47, 48, 49, 50. See also Q5 – Questionnaire to Distribution Customers: question 23.

<sup>180</sup> [...]\*, ID 2670.

<sup>181</sup> [...]\*, ID 2272.

<sup>182</sup> See replies to Q5, question 48: "does your company sell its products to customers based outside the EEA Member State your company us established in?".

<sup>183</sup> See replies to Q5, question 48.

<sup>184</sup> See Q4 – Questionnaire to Distributors: questions 72, 73. See also Q5 – Questionnaire to Distribution Customers: questions 24, 25.

- (274) During the market investigation the Commission also found evidence that there is cross border trade within the distribution market to some extent, as not all distributors have a physical presence in every Member State.<sup>185</sup>
- (275) Moreover, there is a clear indication that at least certain regions form clusters, in particular in the case of SSCs (i.e. the Nordic countries, i.e. Denmark+Norway+Sweden+Finland, the Benelux countries, UK plus Ireland). The Commission therefore considers that these countries form separate regional markets.
- (276) For other countries (in particular for Slovakia, Czech Republic, Hungary, Germany, Italy, Slovenia, Austria), although there are significant cross border sales, it is more difficult to establish a clear pattern of trade flows.
- (277) The Commission considers that the geographic scope of the distribution market for stainless steel flat products is thus national or regional, in particular considering the clusters as listed in paragraph (275)-(278) above. However, for the purpose of the current decision, the exact geographic market definition can be left open as no competition concerns would arise under any possible market definition.

## 5.5. Competitive assessment

- (278) The proposed transaction gives rise to horizontal overlaps at all production and wholesale levels (slabs, HBB, HWB, CR) and for distribution via SSCs and stockholders<sup>186</sup>.
- (279) The proposed transaction also gives rise to vertical relationships with regard to (i) the supply of ferrochrome on the one hand and the production and wholesale of stainless steel products on the other, (ii) all levels in the production of stainless steel flat products (slabs, HBB, HWB and CR), and (iii) the CR stainless steel production on the one hand and its distribution on the other.

### (A) Horizontal overlaps

- (280) The Commission's phase I investigation showed that the proposed transaction raised serious doubts as to its compatibility with the internal market (and on potential submarkets) for (i) the production and wholesale of HWB and CR, and (ii) the distribution of stainless steel flat products.

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<sup>185</sup> E.g. [80-90]\*% of Outokumpu's distribution sales to Spain via its own distributors come from its Italian SSC, [10-20]\*% from Germany. Outokumpu has significant sales to the Netherlands via its Belgian ([10-20]\*%) stockist, French SSC ([5-10]\*%), German SSC ([50-60]\*%) and Italian SSC ([5-10]\*%). Outokumpu's Belgian stockist's sells [10-20]\*% of its total sales to the Netherlands, the Eskilstuna CSC sells, [5-10]\*% to Finland, [20-30]\*% to Norway, and [60-70]\*% to Sweden. TK's Hungarian SSC sells among others to Slovakia ([0-5]\*%), Poland ([5-10]\*%), Slovenia ([5-10]\*%), the Netherlands ([0-5]\*%). TK's Spanish distributor sells to the Netherlands ([0-5]\*%), and to Portugal ([30-40]\*%).

<sup>186</sup> The Parties' activities also overlap with respect to welded tubes. Welded tubes are stainless steel tubes made from coils. The Parties' combined market shares amount to [10-20]\*% at EEA level. The Commission notes that the overlap in welded tubes does not give rise to an affected market. In addition, no competition concerns are likely to arise, in view of the low market share and the presence of competitors which will remain active on the market.

(281) The competitive assessment will therefore focus on these markets. The other horizontal overlaps will also be discussed.

#### 5.5.1. *Production and wholesale of stainless steel flat products - Slabs*

(282) Slabs are mainly used as feedstock for the production of finished flat products such as CR. Post-merger, the combined entity will become the largest producer of slabs in the EEA, with a share of capacity of [60-70]\*%<sup>187</sup>. The remaining competitors in the EEA will be Aperam, with a share of capacity of [20-30]\*%, and Acerinox, with a share of capacity of [10-20]\*%. As regards data on production in the EEA, the Parties' share amounts to [60-70]\*%, the rest of the production being accounted for by Aperam and Acerinox<sup>188</sup>.

(283) The merchant market for slabs, if at all existing, accounts for less than [0-5]\*% of the overall production of slabs (between [...] t and [...] t annually). Most of the slabs are used captively, i.e. [90-100]\*% of the slabs' production. The combined market share of the Parties in the EEA for third-party sales of slabs was approximately [50-60]\*- [60-70]\*% in 2010<sup>189</sup>.

(284) The proposed transaction is unlikely to have a detrimental impact on competition in the merchant market for slabs, given the very limited size of this market compared to the overall capacity and the presence of competitors that would have to increase only marginally their output to defeat any attempt to increase price. Moreover, both Aperam and Acerinox have substantial available capacity at the melting shop level.

(285) It is concluded that the proposed transaction does not raise competition concerns with respect to its compatibility with the internal market with regard to the merchant market for slabs.

(286) Despite the conclusion in paragraph (285), it is noted that the concentration of very high shares of capacity and production at melt shop level is likely to strengthen market power at CR level. This is because all major producers of CR are vertically integrated in the production of slabs and virtually all production of slabs is used for the purposes of producing CR. Moreover, and according to the phase II market investigation results, a new entrant to the EEA market for CR would have a competitive advantage if it is vertically integrated upstream, both at melting shop and HR levels. A sufficiently large melt shop balanced and integrated with the hot rolling mill reduces production costs in an industry where economies of scale are of great importance. Furthermore, a non-integrated player would need to rely on the European integrated mills' supplies of inputs. In the case of slabs, as mentioned above, there is a very limited merchant market and, thus, to obtain slabs for the production of CR products is likely to be difficult.

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<sup>187</sup> Notifying Party's estimates.

<sup>188</sup> The Notifying Party has not provided estimates of the share of production for each competitor.

<sup>189</sup> Form CO, Notifying Party's estimates.

### 5.5.2. *Production and wholesale of stainless steel flat products - HBB*

- (287) HBB is mainly used as feedstock for the production of HWB. As such, all CR stainless steel companies produce HBB for internal use. Post-merger, the combined entity will become the largest producer of HBB in the EEA<sup>190</sup>. Whilst the Notifying Party did not provide shares of capacity for HBB products, third parties estimate the Parties' combined share of capacity in HR is approximately [60-70]\*%<sup>191</sup>. The Parties' combined share of production in the EEA amounts to [60-70]\*%, the rest of the production being accounted for by Aperam and Acerinox<sup>192</sup>.
- (288) The combined share of the Parties in this market is approximately [70-80]\*%<sup>193</sup>. Following the proposed transaction, three HBB producers will remain in the EEA, with the merged entity being the only producer currently supplying the merchant market for HBB. The remaining [20-30]\*% merchant market is covered by producers outside the EEA. However, similarly to slabs, the merchant market for HBB is small in size ([...]\* t). If only the EEA Parties' production capacity of HR products were taken into consideration, the overall merchant market for HBB would represent less than [5-10]\*% of the Parties' capacities.<sup>194</sup> Furthermore, only Marcegaglia and Otelinor purchase significant quantities of HBB in the EEA.
- (289) The Notifying Party also stresses that Inoxum has chosen to sell HBB to [...] to cover some of Inoxum's fixed costs in the hot rolling mill of its plant in Terni (Italy), but Inoxum does not consider this a particularly profitable business. Contribution margins from the sales of HBB are much lower than those of Inoxum's other products and Inoxum would not make such sales if its capacity were more fully utilized for more profitable products.
- (290) It is considered that the proposed transaction is unlikely to have a negative impact on competition in the merchant market for HBB, given the very limited size of this market compared to the overall production of HBB and the presence of competitors that would have to increase their output only marginally to defeat any attempt to increase price. In this sense, both Aperam and Acerinox have significant excess capacity of HBB production in comparison to the merchant market, thus they could start supplying HBB to Marcegaglia and Otelinor if the merged entity decides to stop its supplies. Alternatively, Marcegaglia and Otelinor could increase their purchases from producers outside the EEA. Furthermore, customers did not express any concern, and the market investigation confirmed that at least one of the HBB customers purchases HBB from non-EEA producers and would be able to increase its purchases.
- (291) The Commission therefore concludes that the proposed transaction does not raise competition concerns with respect to its compatibility with the internal market with regard to the merchant market for HBB.

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<sup>190</sup> Market shares would be lower on any wider geographic market.

<sup>191</sup> See Form CO, Annex 32, page 37.

<sup>192</sup> The Notifying Party has not provided estimates of the share of production for each competitor.

<sup>193</sup> Notifying Party's estimates.

<sup>194</sup> Form CO Annex 45.

(292) Nonetheless, as stated in paragraph (286), the Commission underlines that the concentration of high shares, both on capacity and production, on the upstream markets is likely to strengthen market power at CR level. Firstly, all major producers of CR are vertically integrated upstream. Secondly, a non-integrated player would need to rely on the European integrated mills' supplies of HBB. As noted above, there is a limited merchant market for HBB with only two companies purchasing HBB in the EEA. Additionally, CR products have higher margins than HBB and, thus, European mills would have fewer incentives to supply HBB to non-integrated companies which will compete with them in the downstream market for CR.

### 5.5.3. *Production and wholesale of stainless steel flat products - HWB*

(293) According to the Notifying Party's estimates, the EEA combined share for merchant sales of HWB in 2011 was [40-50]\*%. Aperam and Acerinox are also present in this market with shares of [20-30]\*% (Aperam) and [5-10]\*% (Acerinox). In addition, third party imports play also play a role in the market for HWB supplying approximately [10-20]\*% of the merchant market.

(294) The Parties' share of production of HWB in the EEA amounts to [60-70]\*%, the rest of the production being accounted for by Aperam and Acerinox<sup>195</sup>.

(295) In contrast to the upstream markets, i.e. slabs and HBB, the structure of the HWB market is different. Firstly, the merged entity will have substantially lower market shares than in the markets for slabs and HBB. Secondly, two re-rollers, Otelinox and Marcegaglia, are also active in this market and compete with the main European mills.

(296) The merged entity will also have lower market shares in HWB than in the CR market.

(297) In addition, the merchant market for HWB is also limited in size. It only represents approximately [20-30]\*% of the European production of HWB<sup>196</sup>, and less in terms of capacity ([5-10]\*% of the available HWB capacity in the EEA).

(298) During the market investigation, a number of respondents to the Commission's requests for information submitted that the proposed transaction could have a negative impact on the market for HWB. These respondents consider that the proposed transaction will lead to a further consolidation in the market, as a result of which only three EEA suppliers will remain. According to some respondents, a further consolidation in the market could lead to price increases after the proposed transaction as the merged entity will be a dominant player in the stainless steel market.<sup>197</sup>

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<sup>195</sup> The Notifying Party has not provided estimates of the share of production for each competitor.

<sup>196</sup> Source: Form CO paragraph 301.

<sup>197</sup> See Q1 – Questionnaire to EEA Competitors: question 106, 107, 109. Q2 – Questionnaire to Non-EEA Competitors: questions 93, 94, 96. See Q3 – Questionnaire to Customers: questions 97, 99, 101. See Q4 – Questionnaire to Distributors: questions 139.1, 139.2, 140, 142. See also Q5 – Questionnaire to Distribution Customers: questions 52, 54, 56.

- (299) In addition, certain respondents to the Commission's requests for information also cast doubts on the ability of Asian producers to compete effectively with European suppliers, for instance because of the longer lead time required to ship products from Asia.
- (300) The Notifying Party notes that no competition concerns could arise from the proposed transaction in the HWB market. According to them, every EEA and non-EEA stainless steel producer suffers from long-lasting excess capacity at melting and HR levels. Therefore, and given the excess capacities in the market and the small size of the merchant market for HWB, any stainless steel competitor could start supplying HWB if the merged entity decides to stop its supplies.
- (301) It is noted that, firstly, the merchant market represents around [20-30]\*% of the EEA sales of HWB and only a small percentage of the available capacity of HWB in the EEA (around [5-10]\*%)<sup>198</sup>.
- (302) Secondly, according to the market investigation results, there is large over capacity at the HR end. All European mills are currently producing under [60-70]\*% capacity rates.
- (303) The Commission also notes that the Proposed Commitments of 19 October 2012 (see section 6.4 below), i.e. the planned divestiture of the Terni site, imply that the merged entity's HWB capacity will be reduced by more than [...]\* kt/y.
- (304) The Commission therefore considers there is no serious risk that the merged entity will gain a substantial amount of market power in the market for HWB that would enable it to influence the level of prices in the EEA, in particular after the divestiture of Terni. This is mainly due to the moderate size of the merchant market and, in particular, the existence of significant overcapacity at the HR level.
- (305) In view of the above, the Commission considers that the proposed transaction does not raise competition concerns with respect to its compatibility with the internal market insofar as it concerns the merchant market for HWB.
- (306) However, the Commission also notes that the concentration of high shares of capacity and production at the level of HWB is likely to have an impact with regard to market power at downstream level. This is because all major producers of CR are vertically integrated in the production of HWB and a very large proportion of the production of HWB is used for the purposes of producing CR.

#### 5.5.4. *Assessment of non-coordinated effects on the EEA market for CR*

- (307) According to the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings<sup>199</sup> ("Horizontal Merger Guidelines"), a merger may significantly impede effective competition in the form of non-coordinated effects by removing

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<sup>198</sup> Based on figures from Form CO and Annex 59

<sup>199</sup> OJ C 31, 5.2.2004, p 5-18.

important competitive constraints on one or more firms, which as a result of the merger would have increased market power.<sup>200</sup>

- (308) The most direct effect of such a merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had tried to raise its price, it would have lost some sales to the other firm. A merger between those two firms removes that particular constraint.<sup>201</sup>
- (309) Non-merging firms in the same market can also benefit from the reduction of competitive pressure which results from the merger, since the merging firms' price increases may switch some demand to the rival firms, which in turn may find it profitable to increase their prices, too. Such expected reactions by competitors may be a relevant factor influencing the merged entity's incentives to raise prices.<sup>202</sup>
- (310) A merger giving rise to such non-coordinated effects would significantly impede effective competition, in particular where it results in the creation of a dominant position of a single firm, one which typically would have an appreciably larger market share than the next competitor post-merger.<sup>203</sup>
- (311) According to the Horizontal Merger Guidelines, a number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. Not all these factors need to be present for such effects to be likely.<sup>204</sup>
- (312) In line with the Horizontal Merger Guidelines and its case practice, the Commission has conducted its investigation and assessment of the likely effects of the merger with regard to the following aspects:
- (1) Assessment of the effects of the proposed transaction on market shares and concentration levels;
  - (2) Assessment of the likelihood of entry in the EEA CR market;
  - (3) Theory of harm and main criticisms of the Notifying Party;
  - (4) Assessment of the outcome of the market investigation, and in particular of the replies provided by customers;
  - (5) Assessment of the loss of competition between the Parties caused by the proposed transaction;
  - (6) Assessment as to whether the reaction of imports would be likely to prevent a price increase from the merged entity;

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<sup>200</sup> See Horizontal Merger Guidelines, paragraphs 22 and 24.

<sup>201</sup> See Horizontal Merger Guidelines, paragraph 24.

<sup>202</sup> See Horizontal Merger Guidelines paragraph 24 and footnote 28.

<sup>203</sup> See paragraph 25 of the Horizontal Merger Guidelines.

<sup>204</sup> See paragraph 26 of the Horizontal Merger Guidelines.

- (7) Assessment as to whether the reaction of European suppliers (Aperam and Acerinox) would be likely to prevent a price increase from the merged entity;
- (8) Assessment as to whether the reaction of independent distributors would be likely to prevent a price increase from the merged entity;
- (9) Assessment as to whether the potential synergies would be likely to offset the possible price increase caused by the proposed transaction; and
- (10) Assessment as to whether the defensive arguments submitted by the Notifying Party, jointly taken, would be likely to prevent a price increase from the merged entity.

(313) All the elements above will be discussed in detail below.

#### 5.5.4.1. Effects of the proposed transaction on market shares and concentration levels

(314) Although market shares, increments and concentration levels only provide 'first indications' of market power and increases in market power, they are normally important factors in the assessment.<sup>205</sup>

(315) The stainless steel industry is a mature, basic industry in which firms produce relatively homogeneous products. In this type of industry, firms' current market shares typically provide a reliable indication of their competitive positions in the future. Market shares and concentration levels therefore provide an important and strong first indication of market power in this case.

(316) The impact of the proposed transaction on market shares and concentration levels is assessed as follows.

*1) Inoxum is currently by far the largest producer and supplier of CR in the EEA*

(317) Inoxum has a market share in the EEA of [30-40]\*% in 2011.

(318) Inoxum currently sells nearly double the volume of CR products in the EEA ([...]\* kilotons, "kt") compared to the second biggest player, Outokumpu ([...]\* kt). Moreover, Inoxum's current volume sales are almost as high as that of the second (Outokumpu) and third (Aperam) largest players combined.

(319) According to data provided by the Notifying Party, Inoxum is also the largest CR producer in terms of capacity in the EEA, operating production capacity for a total of [...]\* kt per year ("kt/y"). This accounts for [30-40]\*% of EEA capacity. In addition, Inoxum is the largest producer of CR products by capacity worldwide. Its worldwide CR capacity amounts to [...]\* kt/y, i.e. [5-10]\*% of worldwide capacity.

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<sup>205</sup> See Horizontal Merger Guidelines, paragraph 27.

- 2) *Outokumpu is the second largest producer and supplier of CR in the EEA*
- (320) Outokumpu is the second largest player with a CR production of [...] kt and a market share of [10-20]\*% in 2011.
- (321) Outokumpu is third largest CR producer by capacity, with total capacity of [...] kt/y, representing [20-30]\*% of the EEA capacity.
- 3) *The merged entity will have a share of sales above 50%*
- (322) The proposed transaction will bring together Inoxum and Outokumpu, thus the first and the second supplier of CR in the EEA.
- (323) The proposed transaction will - even based on the conservative assumption that imports can be regarded as one full player in Europe as the Notifying Party argues – lead to a combined "very large"<sup>206</sup> market share of [50-60]\*% in the overall EEA market for the production and supply of CR, as also illustrated in Table 5 below.<sup>207</sup>

**Table 5: Notifying Party's estimates of the EEA market shares for CR - 2011**

Company	CR market share in the EEA (kt)	Share of EEA CR market share (%)
Outokumpu	[...]*	[10-20]*%
Inoxum	[...]*	[30-40]*%
<b>Combined</b>	[...]*	[50-60]*%
Aperam	[...]*	[10-20]*%
Acerinox	[...]*	[10-20]*%
Otelinox	[...]*	[0-5]*%
Re-rollers (incl. Marcegaglia)	[...]*	[0-5]*%
Imports	[...]*	[20-30]*%
Total	[...]*	100%

**Source: ID 3354**

- (324) The Parties would have an even larger combined market share in relation to important segments. If segments by grade families are considered, the Parties' activities essentially overlap with regard to the two major families of stainless steel, austenitic and ferritic.

<sup>206</sup> See paragraph 17 of the Horizontal Merger Guidelines.

<sup>207</sup> The Commission has cross-checked the market shares data provided by the Notifying Party with data provided by Eurofer for the same year and has found no appreciable inconsistency.

- (325) In austenitic CR, which represents approximately [70-80]\*% of the overall EEA CR market, the merged entity will have a market share of [60-70]\*% (including the increment of [20-30]\*% due to Outokumpu). Post-merger, the remaining competitors would be Aperam ([10-20]\*%), Acerinox ([10-20]\*%), Otelineox ([0-5]\*%), other re-rollers ([0-5]\*%) and imports ([10-20]\*%).<sup>208</sup>
- (326) In ferritic CR, accounting for approximately [20-30]\*% of the overall EEA CR market, the merged entity's shares will amount to [40-50]\*% (including the increment of [0-5]\*% due to Outokumpu). The other players in the segment would be Aperam ([20-30]\*%), Acerinox ([10-20]\*%), Otelineox ([0-5]\*%), other re-rollers ([0-5]\*%) and imports ([20-30]\*%).<sup>209</sup>
- (327) As regards the remaining two families, which account for less than [0-5]\*% of the EEA market, there are almost no overlaps between the Parties, as Outokumpu is not active in martensitic and Inoxum is only marginally active in duplex (market share of [0-5]\*%). The post-merger share of production/supply of the combined entity would amount to [40-50]\*% for martensitic CR and [50-60]\*% for duplex CR.<sup>210</sup>
- (328) Under a further segmentation by grade, the Notifying Party did provide market shares for groups of grades with similar properties under the US standards.
- (329) With regard to austenitic CR, the share of production/supply of the combined entity would be above 50% in the most important two grades, namely 304 ([50-60]\*%, including the increment of [20-30]\*% due to Outokumpu)<sup>211</sup> and 316 ([60-70]\*%, including the increment of [30-40]\*% due to Outokumpu).<sup>212</sup> These groups of grades represent together approximately [90-100]\*% of sales of austenitic CR in the Union and approximately [60-70]\*% of the overall EEA sales of CR (including all grades and families).
- (330) As for ferritic CR, the shares of production/supply of the combined entity will be significant with regard to the two main ferritic grades, 430 ([30-40]\*%, including the increment of [0-5]\*% due to Outokumpu)<sup>213</sup> and 409 ([40-50]\*%, including the increment of [10-20]\*% due to Outokumpu).<sup>214</sup> These two groups of grades represent together approximately [60-70]\*% of sales of ferritic CR in the Union and approximately [10-20]\*% of the overall EEA sales of CR (including all grades and families).

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<sup>208</sup> Market shares for 2010 at EU level. Source: Form CO, Annex 39 a, ID 1088.

<sup>209</sup> Market shares for 2010 at EU level. Source: Form CO, Annex 39 a, ID 1088.

<sup>210</sup> Market shares for 2010 at EU level. Source: Form CO, Annex 39 a, ID 1088.

<sup>211</sup> The 304 group of grades includes the following grades according to the European standard: 1.4301 (304), 1.4303 (305), 1.4306 (304L), 1.4307 (304L), 1.4310 (301), 1.4318 (301LN) and 1.4948 (304H). Market shares for 2010 at EU level. Source: Form CO, Annex 39 a, ID 1088.

<sup>212</sup> The 316 group of grades includes the following individual grades: 1.4404 (316L), 1.4401 (316), 1.4571 (316Ti). Market shares for 2010 at EU level. Source: Form CO, Annex 39 a, ID 1088.

<sup>213</sup> The 430 group of grades refers only to grade 1.4016. Form CO, Annex 39 a, ID 1088.

<sup>214</sup> The 409 group of grades includes the following individual grades: 1.4003 (S40977) and 1.4512 (409). Form CO, Annex 39 a, ID 1088.

- 4) *The merged entity will also have a share of capacity above 50%*
- (331) There is no standard means to measure capacity in the stainless steel industry. Effective capacity of CR mills depends on a number of factors, including the family or grade of the material that is processed, the thickness and width of the coil, and the presence of potential bottlenecks at levels other than cold rolling (e.g. at annealing and pickling level). “Nameplate capacity” does not, therefore, necessarily constitute a reliable benchmark to assess the capacity that can be actually utilised by each player.
- (332) According to data provided by the Notifying Party, Inoxum is the largest CR producer by capacity in the EEA, operating production capacity for a total of [...] kt per year (kt/y).<sup>215</sup>
- (333) In the EEA, Inoxum operates CR mills in Germany (Benrath: [...] kt/y; Dillenburg: [...] kt/y; Krefeld: [...] kt/y) and Italy (Terni: [...] kt/y).
- (334) Inoxum also operates CR mills in the USA (Calvert: [...] kt/y, to be expanded to [...] kt/y), Mexico (San Luis Potosi: [...] kt/y) and China (Shanghai: [...] kt/y).<sup>216</sup>
- (335) Data submitted by the Notifying Party also shows Outokumpu as the third largest CR producer by capacity, with total capacity of [...] kt/y.<sup>217</sup> Outokumpu operates CR mills exclusively in the EEA in Finland (Tornio: [...] kt/y) and Sweden (Avesta: [...] kt/y; Kloster: [...] kt/y and Nyby [...] kt/y).<sup>218</sup>
- (336) Post-merger, the only two remaining European vertically integrated producers of CR other than the merged entity will be Aperam and Acerinox.
- (337) In the EEA, Aperam operates three CR mills in Belgium (Genk: 740 kt/y) and France (Gueugnon: 400 kt/y and Isbergues 350 kt/y).<sup>219</sup>
- (338) In the EEA, Acerinox operates only one integrated mill in Spain (Campo de Gibraltar: [...] kt/y). Small cold rolling mills are also operated by non-integrated re-rollers, namely Marcegaglia in Italy (Mantova: [...] kt/y) and Otelinnox in Romania (Targoviste: [...] kt/y).<sup>220</sup>
- (339) The Notifying Party submits that the merged entity will have a share of [50-60]\*% of the EEA CR capacity. Table 6 below shows the shares of capacity of the merged entity and its main competitors according to the data submitted by the Notifying Party.

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<sup>215</sup> Source: Form CO, ID 953.

<sup>216</sup> Source: Form CO, Annex 45, ID 1102.

<sup>217</sup> Source: Form CO, ID 953.

<sup>218</sup> Source: Form CO, Annex 45, ID 1102.

<sup>219</sup> Source: [http://www.aperam.com/uploads/pdf/investors/Aperam\\_March%202012.pdf](http://www.aperam.com/uploads/pdf/investors/Aperam_March%202012.pdf). The capacity of the three plants together matches the total estimates provided by the Notifying Party (1 490 kt/y).

<sup>220</sup> Capacity by plant for Marcegaglia and Otelinnox has been calculated by applying the ratio between the different plants in Form CO, Annex 32, page 37, ID 1076 to the estimate of total re-rollers' capacity provided by the Notifying Party in the Form CO, ID 953.

**Table 6: The Notifying Party's estimates of the EEA shares of capacity for CR - 2011**

Company	CR capacity in the EEA (kt)	Share of EEA CR capacity
Outokumpu	[...]*	[20-30]*%
Inoxum	[...]*	[30-40]*%
<b>Combined</b>	<b>[...]*</b>	<b>[50-60]*%</b>
Aperam	[...]*	[30-40]*%
Acerinox	[...]*	[10-20]*%
Re-rollers	[...]*	[0-5]*%
Total	[...]*	100%

Source: Form CO, Annex 59 part 1 ID 1189

(340) According to a second source, CRU (an independent market research company<sup>221</sup>), Outokumpu's capacity is higher than the Notifying Party's own estimates, while Inoxum's capacity is lower.<sup>222</sup> The shares of capacity reported by CRU are included in the table below.

**Table 7: EEA shares of capacity for CR (CRU) - 2011**

Company	CR capacity in the EEA (kt)	Share of EEA CR capacity
Outokumpu	[...]*	[20-30]*%
Inoxum	[...]*	[20-30]*%
<b>Combined</b>	<b>[...]*</b>	<b>[50-60]*%</b>
Aperam (including Imphy Usine Precision)	[...]*	[20-30]*%
Acerinox	[...]*	[10-20]*%
Marcegaglia	[...]*	[0-5]*%
Total	[...]*	100%

Source: CRU, Stainless steel flat products quarterly (February 2012), ID 860

(341) In addition, also the EEA capacity estimates from another independent third party, SMR (an independent market research company<sup>223</sup>), differ from those estimated by

<sup>221</sup> <http://www.crugroup.com/> .

<sup>222</sup> Form CO, Annex 32, page 37, ID 1076.

<sup>223</sup> <http://www.smr.at/> .

the Notifying Party. In this set of shares, both the Parties would have higher capacity shares, whilst the shares of Aperam and Acerinox would be lower.<sup>224</sup> The shares of capacity reported by SMR are included in Table 8.

**Table 8: EEA shares of capacity for CR (SMR) - 2011**

Company	CR capacity in the EEA (kt)	Share of EEA CR capacity
Outokumpu	[...]*	[20-30]*%
Inoxum	[...]*	[30-40]*%
<b>Combined</b>	[...]*	[50-60]*%
Aperam	[...]*	[20-30]*%
Acerinox	[...]*	[10-20]*%
Marcegaglia	[...]*	[0-5]*%
Otelinox	[...]*	[0-5]*%
Total	[...]*	100%

**Source: SMR, ID 1076**

(342) Table 9 below also summarises in detail the CR capacities in Europe by plant as estimated by SMR.

**Table 9: [...]\*. <sup>225</sup>**

(343) It seems possible that the Notifying Party's estimates of the CR EEA capacity underestimate the position of the merged entity. It is however not possible to reach a clear conclusion on the matter, given that a precise calculation of the effective capacity depends on a number of assumptions, none of which are necessarily more realistic than others.

(344) For the purposes of its assessment, therefore, the Commission has taken a conservative approach and used as a basis for its assessment the capacity figures provided by the Notifying Party. Even under these conservative assumptions, it is clear that the combined Outokumpu / Inoxum will become by far the largest CR producer active in the EEA and will control a share of capacity above 50%, which is much larger than the capacity shares of the remaining major EEA competitors, Aperam and Acerinox.

<sup>224</sup> Form CO, Annex 32, page 37, ID 1076.

<sup>225</sup> [...].

- 5) *The proposed transaction gives rise to a significant increment of market shares in the relevant market*
- (345) The increment in market shares brought about by the proposed transaction is very significant. The proposed transaction would bring together the first and the second producers of CR in the EEA, with an increment in market shares of [10-20]\*% on the overall CR market and up to [20-30]\*% in austenitic and [30-40]\*% in grade 316.
- (346) In terms of capacity, the increment will amount to between [20-30]\*% and [20-30]\*%, depending on the estimates. As explained below in Section 5.5.3.2 the increment in capacity shares is the key driver for the increase in market power in an industry of this type. A capacity increment of the merging parties of [20-30]\* to [20-30]\*% implies that the merger reduces the capacity of the merging parties' rivals by [20-30]\* to [20-30]\*% compared to the capacity of the rivals of the larger merging party (Inoxum) in the pre-merger situation. This reduction in rival capacity reduces the competitive pressure on the merged entity.
- 6) *The combined entity will have three times higher market shares than the next competitors post-merger*<sup>226</sup>
- (347) Post-merger, the combined entity will have a significantly higher market share (more than three times higher) than the next competitor. In fact, Aperam will hold [10-20]\*% and Acerinox [10-20]\*%. All other competitors (including imports) are small with shares well below [5-10]\*%.<sup>227</sup>
- (348) The combined entity will also have a capacity share approximately two-thirds larger than Aperam's share. It will further have a share of capacity more than three times larger than Acerinox.
- 7) *The proposed transaction increases substantially the already significant concentration in the relevant market*
- (349) The Commission is unlikely to identify horizontal competition concerns in a market with a post-merger Herfindahl-Hirschman Index (HHI) below 1000<sup>228</sup>. Such markets normally do not require extensive analysis.
- (350) The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a

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<sup>226</sup> See paragraph 25 of the Horizontal Merger Guidelines.

<sup>227</sup> According to the Notifying Party, there are no official third-party sources providing market shares for non-EEA suppliers in the EEA CR market (the industry statistics provide data by country of imports, not by company). Based on the Notifying Party's best estimates, the company YUSCO (Taiwan) has a  $\pm[5-10]$ \*% market share in 2011 ( $[0-5]$ \*% in 2010 and  $[0-5]$ \*% in 2009), the companies TISCO (China) and POSCO (South Korea) have a  $\pm[0-5]$ \*% share respectively in 2011 (POSCO:  $\pm[0-5]$ \*% also in 2010 and 2009; TISCO:  $[0-5]$ \*% in 2010 and 2009); the companies AK Steel and Allegheney (US) have a  $\pm[0-5]$ \*% share in 2011 ( $\pm[0-5]$ \*% in 2010 and  $[0-5]$ \*% in 2009 for both); and all other companies have a share of  $[0-5]$ \*% or less in 2011 (and in prior years).

<sup>228</sup> See paragraph 19 of the Horizontal Merger Guidelines.

merger with a post-merger HHI above 2000 and a delta below 150, except where special circumstances are present.<sup>229</sup>

- (351) The EEA market for CR is already a concentrated one. Only four major players are active on the market, followed by a fringe of small European and non-European players. The HHI in the market pre-merger is [...]\*.<sup>230</sup> Post-transaction, the level of concentration in the EEA market for CR will increase to a very significant extent, as the first two players in the market will merge. The HHI in the market will increase to [...]\*, with a delta of [...]\*.<sup>231</sup> Thus, the proposed transaction will bring very substantial further consolidation in an industry that is already concentrated to a significant extent.
- 8) *The proposed transaction reduces the number of European integrated players from 4 to 3*
- (352) Vertical integration in the upstream production of slabs and HR provides CR producers with significant advantages.
- (353) Firstly, integrated producers do not have to rely on third parties for the sourcing of raw materials. Thus, they are not exposed to disruption in supply or price increases by HR suppliers. All large suppliers of CR are vertically integrated upstream.
- (354) Secondly, integrated producers operating fully integrated plants (which is the case for Acerinox – Campo de Gibraltar, Inoxum – Terni and Outokumpu – Avesta and Tornio) can produce CR more efficiently than others.<sup>232</sup> Fully integrated plants are considered among the most efficient in the world.<sup>233</sup> The transaction will reduce the number of alternative producers with fully integrated plants from three to two.
- (355) At present, there are only four integrated producers of CR active in the EEA: Acerinox, Aperam, Inoxum and Outokumpu.
- (356) The remaining players are (a) small re-rollers such as Marcegaglia and Otelinox (amounting to a total of [0-5]\*% of the market), which are active only on the last steps of the production chain and depend to a very large extent on the Parties to secure their input needs (the Parties estimate having a share in supply to Marcegaglia and Otelinox at approximately [70-80]\*%),<sup>234</sup> and (b) importers of CR from non-EEA countries such as China, Japan, South Korea and Taiwan, which are however active to a very major extent only via distributors (approximately [90-100]\*% of sales).<sup>235</sup>
- (357) Post-transaction, only three integrated producers will be active on the market for CR. Furthermore, only two of them, the merged entity and Acerinox, will have fully integrated plants. The merged entity, in particular, will be the only producer in

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<sup>229</sup> See paragraph 20 of the Horizontal Merger Guidelines.

<sup>230</sup> Source: Notifying Party, ID 3354.

<sup>231</sup> Source: Notifying Party, ID 3354.

<sup>232</sup> See section 5.5.4.9 below.

<sup>233</sup> See Form CO, Annex 32, ID 1046.

<sup>234</sup> Source: Form CO, ID 953.

<sup>235</sup> Source: Form CO, ID 953.

Europe operating with two major fully integrated plants (Tornio and Terni) and one smaller fully-integrated plant (Avesta).

(358) As a result, the proposed transaction will reduce the number of main alternative suppliers in the EEA from four to three.

9) *Market shares are particularly important in mature, basic industries with homogeneous goods*

(359) The stainless steel industry is a mature, basic industry. CR products can generally be considered as homogeneous, given that approximately [90-100]\*% of the market is accounted for by four standard grades that can be produced by all players without any meaningful difference in quality or service from an end-user perspective.

(360) In this type of industry, where differentiation does not play a significant role and all suppliers are generally considered as perfect substitutes (with the exception of certain specialty products), the market share of a player is a valid and strong indication of its degree of market power. Both shares of sales and capacity are important in this respect.

10) *The Notifying Party's analysis of the 2003 consolidation in Quarto Plate (QP) is not relevant*

(361) In its Reply to the Article 6(1)(c) decision, the Notifying Party argued that the Commission should not base its assessment on structural presumptions because such presumptions are not supported by prior history in the stainless steel sector. In support of this claim the Notifying Party submitted an empirical paper on QP. According to the Notifying Party, the empirical analysis in this paper shows that the consolidation in QP in 2003 which led to a reduction in EEA suppliers from four to three had no impact on margins. Such a consolidation took place in 2003, when Outokumpu acquired a service centre and customer book from TK and the latter ceased its activities in QP.

(362) The heart of the study submitted by the Notifying Party is a comparison of average percentage margins on QP during the period 2001-2002 with average margins during the period 2004-2011.

(363) As a preliminary remark, it is considered that the Notifying Party relies on the assumption of a market definition for “true QP” in order to assess the effects of consolidation in the QP industry. Only under such a market definition the effects of the QP transaction on the structure of the market appear to be comparable with the effects of the proposed transaction on the CR market.

(364) It is noted that the Notifying Party has not relied on a market definition for “true QP” in the Form CO. Furthermore, this market definition is different from that adopted by the Commission in previous cases,<sup>236</sup> from the market definition suggested by Outokumpu in the context of the notification of its acquisition of

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<sup>236</sup> Case COMP/M.5211.

Sogepar S.p.A.,<sup>237</sup> as well as by EEA National Competition Authorities for the purposes of assessing consolidation on the QP market.<sup>238</sup> In all these cases, no distinction between "true QP" and QP has ever been made.<sup>239</sup>

- (365) In addition, the consolidation in QP has not led to any change of ownership in productive assets, but only in the transfer of a service centre and a customer book, in addition to TK's exit from the QP business.
- (366) It is therefore noted that the effects of the two transactions on the respective markets may not be comparable, given that in order for the two transactions to appear comparable it is necessary to rely on a market definition proposed by the Notifying Party, which is not in line with the Notifying Party's previous position and with EEA enforcement agencies' precedents. Furthermore, the structure of the 2003 transaction appears to be very different from that of the proposed transaction.
- (367) Moreover, at the State of Play meeting on 8 June 2012 following the Notifying Party's Reply to the Article 6(1)(c) decision the Commission indicated to the Notifying Party that it did not consider the study to provide reliable evidence because the comparison of margins before and after concentration failed to control for variation in external factors unrelated to the consolidation that were likely to have affected margins. The Commission explained that the fact that margins show substantial fluctuations over time suggested that such factors exist and need to be controlled for.
- (368) These concerns by the Commission were explained in further detail in the Issue Paper sent to the Notifying Party on 21 June 2012 and in Annex VI to the SO. The SO also presented evidence that the relative prices of QP in the EEA (relative to CR in the EEA and relative to QP in Asia) increased following the consolidation in QP in 2003. This evidence on relative prices does not appear to be incompatible with the view that the consolidation in QP led to higher prices for QP in the EEA.
- (369) In the Reply to the SO the Notifying Party raises a number of points regarding the Commission's assessment of their QP study in the SO. The Commission's detailed assessment of the Notifying Party's QP study and the relevant points in the Notifying Party's Reply to the SO are discussed in Annex III. Most importantly, the Commission notes that the response by the Notifying Party does not include any improved empirical analysis that would control for external factors (such as changes in cost or demand conditions) that are likely to have affected the evolution of margins independently of the consolidation in 2003.

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<sup>237</sup> Case COMP/M.5211 – Outokumpu/Sogepar.

<sup>238</sup> See for instance Decision of the Spanish Competition Authority in case N-030008 *Avesta Polarit / Thyssenkrupp Nirosta* of 5 March 2003.

<sup>239</sup> The Commission has not investigated in depth into the market definition for QP, given the very minor overlaps raised by the proposed transaction in QP. The Notifying Party has not provided convincing explanations as to the reason for the asymmetries between its current view and its previous position, which was based on the Commission's and NCAs precedents. Furthermore, the Notifying Party has only substantiated its argument that "true QP" constitutes the appropriate market definition at a late stage of the procedure and upon request of the Commission (see the Notifying Party's reply to the Commission request for information of 10 September 2012, ID 10278). Accordingly, the Commission in this case is not in the position to depart from its precedents in relation to QP.

(370) Based on its assessment of the Notifying Party's arguments on QP, the Commission concludes that the Notifying Party's submissions on the QP consolidation in 2003 allow no inference of the effect of that consolidation on the market for QP. Moreover, the evolution of relative QP prices does not appear to be incompatible with an increase in QP prices as a result of that transaction.

(371) As a result, the Commission concludes that the Notifying Party's analysis of the 2003 consolidation in QP is irrelevant for the assessment of the proposed transaction.

#### 11) Conclusion

(372) On the basis of the above evidence, the Commission considers that the important change of the structure of the market brought about by the proposed transaction is a strong and valid first indication that the proposed transaction is likely to lead to a significant impediment of competition in the form of non-coordinated effects by means of the creation of a dominant position in the EEA market for CR.

#### 5.5.4.2. Entry in the EEA market for CR is unlikely

(373) The Commission Horizontal Merger Guidelines state that "[w]hen entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk. Therefore, entry analysis constitutes an important element of the overall competitive assessment. For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger".<sup>240</sup>

(374) As already mentioned in paragraph ((83)) above, there are no legal or regulatory entry barriers for the flat stainless steel industry in the EEA. However, the stainless steel industry in general is highly capital-intensive and substantial investments are required for building new capacity.

(375) According to the Notifying Party, the optimal capacity of a modern steel making unit is [...] and the minimum capacity of a cold rolling unit is [...].<sup>241</sup> The Notifying Party also submits that economies of scale are important for the production of commodity CR, where margins are low.<sup>242</sup>

(376) As indicated in the Commission's Horizontal Merger Guidelines, scale economies may make entry unprofitable unless the entrant can obtain a sufficiently large market share.<sup>243</sup> In the present case, entry (at least in the commodity segment) would imply the construction of large stainless steel production plants. As a result, substantial entry in the market would risk resulting in significantly depressed price levels. This is an element suggesting that entry in the EEA CR market would be unlikely.<sup>244</sup>

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<sup>240</sup> Paragraph 68.

<sup>241</sup> Form CO, ID 953.

<sup>242</sup> See Form CO, ID 953.

<sup>243</sup> Horizontal Merger Guidelines, paragraph 72.

<sup>244</sup> Horizontal Merger Guidelines, paragraph 69.

- (377) In addition, according to the Notifying Party, investment needed for a viable size of production of HR stainless steel in a modern plant is in the region of EUR [...] if the process is started from slabs,<sup>245</sup> and an additional EUR [...] is required if slabs also have to be made (i.e. building of melt shop capacity). Entry into the production of CR requires an estimated EUR [...] of investment, in which case the HR material to be fed to the cold plant will have to be supplied internally or acquired from third parties.
- (378) As regards the investments required for the construction of facilities of the optimal size of [...] t described above, these would amount to approximately EUR [...] for the melt shop.
- (379) It follows that a minimum investment of EUR [...] would be required for a new entrant to build a complete production line from melt shop to cold rolling lines, and a minimum investment of EUR [...] would be required for a plant of the minimum efficient scale.<sup>246</sup>
- (380) The phase I market investigation however suggested that costs to enter the market could be even higher. In particular, one competitor estimated that the investment required to enter the market and gain a meaningful market presence amounts to at least EUR [...].<sup>247</sup>
- (381) In addition, approximately 93% of direct customers (53 / 57) that replied to the relevant question stated that they do not expect any new entry in the EEA market for CR.<sup>248</sup> The respondents to the Commission's requests for information also confirmed the importance that customers attach to reliability and reputation, alongside product quality and delivery time.<sup>249</sup> These customer preferences increase the level of the entry barriers in the market, as they render it unlikely that a new entrant would be able to quickly gain market shares and recover the significant investments required to build and operate a stainless steel mill with cold rolling lines.
- (382) Lastly, the evidence available suggests that in a market with a certain degree of overcapacity and moderate but not excessively large growth, entry is not likely in the short run. The most recent example of entry in a market geographically close to the EEA is that of POSCO's new plant in Turkey. As discussed below (paragraphs (592)-(595)), POSCO is currently building a CR production facility in Turkey, due to start operations in 2013.<sup>250</sup> The Turkish market is expected to grow between 5 and 7 % in the next 3 years. On the contrary, the Notifying Party submitted that the last capacity expansion in the EEA CR market dates back to 2006/7. The Commission

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<sup>245</sup> The Parties have been unable to identify any company in the world which systematically purchases slabs on the market for the purpose of CR production (Reply to Article 11 request of 4 October 2012, ID 12804).

<sup>246</sup> These figures underestimate the costs for a plant of minimum efficient scale given that they do not include the investment required to build sufficient CR capacity to absorb the high volumes produced at melting level.

<sup>247</sup> [...] reply to question 102 of Q1 – Questionnaire to EU competitors, ID 2704.

<sup>248</sup> Q3 – Questionnaire to Customers, question 96.2.

<sup>249</sup> Q3 – Questionnaire to Customers, questions from 74 to 81.

<sup>250</sup> See for instance [http://www.koreatimes.co.kr/www/news/biz/2011/09/123\\_95763.html](http://www.koreatimes.co.kr/www/news/biz/2011/09/123_95763.html)

notes that in that time period demand for CR in the EEA was at its historic peak and expected to grow further.<sup>251</sup>

(383) In view of the above, the Commission concludes that entry in the EEA market for CR is unlikely.

#### 5.5.4.3. Theory of harm and criticisms of the Notifying Party

1) *A detailed assessment of the evidence confirms the finding of a significant impediment to effective competition by means of the creation of a dominant position*

(384) The proposed transaction reduces the number of integrated CR suppliers in the EEA from four to three in an already concentrated industry. The proposed transaction reduces customers' choice of supply options and creates a combined entity with EEA market shares and EEA capacity shares in excess of 50%. As discussed in Section 5.5.4.1 above, the Commission considers that the high market shares of the merged entity in this case constitute a strong and valid first indication of anticompetitive non-coordinated effects by means of the creation of a dominant position in the EEA market for CR. Furthermore, entry in the EEA market for CR is unlikely.

(385) Nevertheless, the Horizontal Merger Guidelines also recognise that there may be circumstances under which the competitive constraints on the merging parties are sufficient to conclude that a concentration is unlikely to lead to a significant impediment of effective competition. In line with the Horizontal Merger Guidelines, the Commission has therefore performed a detailed assessment as to whether a significant impediment to effective competition by means of the creation of a dominant position would arise as a result of the proposed transaction.

(386) According to paragraph 24 of the Horizontal Merger Guidelines:

*"A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market."*

(387) This provision is in line with standard economic theories of harm arising from horizontal mergers as a result of non-coordinated effects, which predict that the elimination of competition between the merging parties will provide the merged entity with an incentive to increase prices. Moreover, standard economic models

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<sup>251</sup> See Reply to Article 11 request of 11 October 2012, ID 13062 and Annex 3 to the Reply to the SO, ID 10006.

generally predict that rivals' reactions will not be sufficient to make a post-merger price increase unprofitable, particularly in a situation where the increment resulting from the transaction is large.

(388) The Commission assessed all the factors set out in paragraph 24 of the Horizontal Merger Guidelines that are relevant to assess the impact of the proposed transaction on the EEA market for CR. This assessment includes an assessment of relevant factors noted in paragraphs 27 to 38 of the Horizontal Merger Guidelines as well as an assessment of arguments against non-coordinated effects submitted by the Notifying Party.

(389) This detailed analysis of non-coordinated effects in the EEA market for CR is discussed further in sections 5.5.4.4 to 5.5.4.11 below. On the basis of this analysis, the Commission concludes that the elimination of competition between the merging parties will increase the market power of the merged entity. Countervailing factors (i.e. entry, constraint from imports, rival's reactions to a potential price increase post-merger, reactions from independent distributors and marginal cost synergies potentially arising from the proposed transaction) are not sufficient to off-set the ability and incentives of the merged entity to raise price, even if taken jointly.

(390) The Commission therefore concludes that, an assessment under the standard theory of harm for non-coordinated effects of horizontal mergers confirms the finding of a significant impediment to effective competition resulting from the creation of a dominant position.

2) *The Notifying Party's criticisms of the Theory of Harm are unfounded*

(391) In response to the SO, the Notifying Party criticises the Commission's assessment of market shares and concentration levels. According to the Notifying Party, the assessment "*ignores the structural changes resulting from the transformative nature of the Transaction as concerns both market structure and synergies.*" The Notifying Party further argues that the SO ignores "*the existence of substantial excess capacity, competition from imports and distributors, a very high degree of customer switching [...] [which] taken individually and collectively undercut [the conclusion from the Commission's assessment of market shares and concentration levels]*".<sup>252</sup>

(392) With respect to the Commission's detailed assessment of in the SO, the Notifying Party notes:

*Most importantly, even though the SO now acknowledges that APM and ACX [i.e. Aperam and Acerinox] have very substantial excess capacity of ~[30-40]\*% [...], it still questions the ability and incentive of these two competitors to defeat a unilateral post-merger price increases. The SO proffers no evidence that APM and ACX lack the ability to do so [...]. As evidence for their lack of incentives, the SO appears to rely on purported pre-merger coordinated interaction. But such conduct, even if it accurately characterized pre-merger interaction, is wholly irrelevant to the SO's unilateral effects*

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<sup>252</sup> Reply to the SO, paragraph 10.

*theory of harm and the Bertrand/Edgeworth model [in Section 5.5.3. of the SO]*".<sup>253</sup>

(393) The two main criticisms raised by the Notifying Party are: (i) the non-coordinated theory of harm as articulated in paragraph 24 of the Horizontal Merger Guidelines does not apply because the Parties' main EEA rivals have substantial levels of spare capacity; and (ii) the Commission partially bases its argument on the pre-merger existence of coordinated effects.

(394) These criticisms are discussed below. The various points raised by the Notifying Party are also discussed in more detail in the rest of Section 5.5.4 below which follows the Horizontal Merger Guidelines.

**i) A merger leading to a substantial consolidation of capacities can be expected to lead to significant non-coordinated effects even in presence of excess capacity at the industry level**

(395) Even in markets which are characterised by levels of spare capacity at the industry level such as in the present case a merger which leads to a substantial consolidation of production capacities can be expected to lead to significant non-coordinated effects, as described in paragraph 24 of the Horizontal Merger Guidelines. Indeed, in a market with relatively homogeneous goods, the competitive pressure on any given firm, and hence a firm's market power, depends inter alia on the level of production capacity of competitors and on whether competitors can enter or expand production within a short period of time to meet demand. The change in market structure resulting from the merger is greater the larger the transaction increment of capacity shares. This change may lead to an increase in market power for the merged entity and provide it with the ability and incentive to restrict competition, in particular through the creation of dominance. For these reasons, the Commission considers that the combined capacity share and the capacity increment resulting from the proposed merger, together with the other factors that will be explained below, provide good indicators for the increase in market power of the merged entity.

(396) In its Reply to the SO, the Notifying Party argued that "*A theory of harm which is based on the existence of capacity constraints cannot reasonably be applied to a transaction where competitors' excess capacity exceeds [20-30]\*% of total EEA deliveries and exceeds total EEA sales of one of the merging parties*".<sup>254</sup> This statement appears to suggest that a horizontal merger leading to very large market shares above 50% such as the present one would result in anticompetitive non-coordinated effects only if competitors were to produce close to their full capacity.

(397) The Commission disagrees with this view.

(398) Firstly, the extent to which competitors to the merged entity constrain the merged entity from raising prices not only depends on the level of their spare capacity but also on whether these firms have the incentive to react aggressively to a post-merger price increase. As is explained in Section 5.5.4.7 below, the Commission finds that

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<sup>253</sup> Reply to the SO, paragraph 12.

<sup>254</sup> Reply to the SO, paragraph 37. ID 10012.

in the circumstances of the present case aggressive reactions from competitors are unlikely. Moreover, as the Commission explained in Section 5.5.4.2, barriers to entry or expansion in this market are significantly high.

(399) Secondly, the economic intuition that, in general, a consolidation of capacities through a merger increases market power applies also in the presence of levels of spare capacity by the merging firms' competitors as encountered in the present case. Even if firms in the industry have a degree of spare capacity as in the present case, the merged entity will still face significantly less rival capacity and less rival spare capacity post-merger than each of the merging firms is facing pre-merger (because the merger combines the capacities of the merging parties). This reduction in countervailing capacity reduces the competitive pressure on the merged entity relative to the competitive pressure on each of the merging firms pre-merger. As a result, the consolidation of levels of capacities as encountered in the present case through a merger will, in general, increase the market power of the merged entity. The ensuing price increase in turn also reduces the competitive pressure on rivals.

(400) Thirdly, the Commission notes that an expert report, which was commissioned by the Notifying Party, states:

*"Under normal precedent in European competition law, a merger creating such a position for the merged firm would be presumed to pose a risk of significant competitive harm. If the parties have argued that, in a market characterized by price competition and product homogeneity, competitive harm can no longer be presumed because two firms are enough under Bertrand competition to ensure competitive pricing, then it is a convincing reply to point out that this conclusion is invalid under capacity constraints, as the BE model<sup>255</sup> demonstrates."<sup>256</sup>*

(401) When the experts refer to "capacity constraints", they refer to the economic notion of capacity constraints, i.e. that firms cannot increase output beyond their physical capacity limits. In the present case, despite the current levels of spare capacity, firms face capacity constraints within this meaning. Therefore, the experts' report also suggests that the mere presence of some degree of spare capacity is not in itself sufficient to assume that the proposed transaction is unproblematic.

(402) As a result, in view of the significant consolidation of capacities resulting from the merger and also taking into account the other characteristics of this market, the Commission concludes that the proposed transaction provides the Parties with substantial market power and so with the ability and incentive to increase prices. This is likely to lead to a significant impediment to effective competition through the creation of dominance, taking also into account the other factors and the analysis of the Commission, as it will be explained below.

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<sup>255</sup> The experts use the term "BE model" to refer to the general characteristics of any Bertrand-Edgeworth model of price competition under capacity constraints.

<sup>256</sup> Independent Expert Opinion by Professors Lyons, Rey and Seabright on Economic Modeling in Case M 6471 (as of 23rd August 2012)", ID 10109, paragraph 2.

**ii) The Commission's theory of harm does not argue for or rely on the existence of coordinated effects pre-or post-merger**

- (403) The Notifying Party also claims that the Commission's theory of harm is based on the underlying assumption that the market presents pre-merger elements of coordination. According to the Notifying Party, in particular, the Commission's conclusion that the competitive constraints from rivals would not be sufficient to defeat a post-merger price increase relies on the existence of coordinated effects.
- (404) The Commission notes that its theory of harm is entirely based on non-coordinated effects both pre- and post-merger, including its assessment of the competitive constraint on the merged entity from its EEA rivals.
- (405) The Notifying Party argues that CR products are completely homogeneous, that there is near perfect supply side substitutability and that neither customers nor intermediaries face any barriers to opportunistically switch suppliers as illustrated by a high degree of switching. When taken literally, these arguments imply price competition in perfectly homogeneous products in which customers instantly switch all their demand to the firm with the lowest price. In other words, a literal interpretation of the Notifying Party's arguments implies a very intense form of competition between firms.
- (406) The Commission, however, found that competition in the EEA market for CR is not as intense as the Notifying Party's arguments suggest (see Section 5.5.4.7 below). The Commission notes that there may be many reasons why actual competition pre-merger is less intense than suggested by a literal interpretation of the Notifying Party's arguments. These factors lead to less intense competition and do not imply the presence of co-ordination in the industry.
- (407) On the customer side, for example, there may be small search or switching costs to find the best supplier; customers may have multi-sourcing strategies preventing them from moving all their demand to a single supplier; or customers may have other preferences for a specific supplier (e.g. geographic proximity, preferences for a specific suppliers products based on quality concerns or experiences; or on-going business relationships or contracts etc.).
- (408) Frictions of this type will imply that customers will not immediately switch all their demand to the firm offering the lowest price. This will reduce the intensity of competition, because undercutting rivals on price becomes less profitable than with perfect customer switching. The Notifying Party's analysis of customer switching which looks at variations in purchase volume from one year to the next are consistent with less than perfect customer switching.
- (409) On the supply side, it is also likely that although suppliers can produce the entire range of products (supply side substitutability) changing product mix at short notice entails small costs (see above, paragraph (151)). Such costs will reduce suppliers' incentives to compete aggressively on price if winning additional business means that the supplier has to incur additional costs. The Notifying Party appears to share the view that these costs, although not sufficient to put into question the supply side

substitutability in the CR market, are nonetheless present and not entirely negligible.<sup>257</sup> In addition, there are a certain number of CR products that require additional equipment and therefore supply side substitutability, although very significant, is not perfect (see above, paragraph (150)).

(410) The observed pre-merger situation is therefore consistent with non-coordinated competition between EEA producers, given that there might be a number of factors softening competition are different from co-ordination. The Commission's theory of harm does not argue for or rely on the existence of coordinated effects pre-or post-merger.

5.5.4.4. A significant number of respondents to the market investigation showed concerns with regard to reduction of competition and likely price increases in the EEA market for CR further to the proposed transaction

(411) In order to closely assess the likely effects of the proposed transaction on prices, the Commission carried out an extensive market investigation by sending questionnaires to many competitors and customers of the Parties as well as a large number of follow up interviews.

(412) The questionnaires contained, firstly, a large number of specific questions to assess the competitive dynamics in the market in order to verify the validity of the Notifying Party's arguments regarding the alleged complementarity of their profiles, the alleged important constraints exercised by Asian imports, the alleged strong countervailing constraints from distributors and the alleged capabilities and incentives of European competitors to significantly expand output post-merger. The objective of those questions was to assess the competitive dynamics in the CR market and to what extent the Notifying Party's allegations with regard to the complementarity of Outokumpu and Inoxum, the competitive constraints from imports and distributors and the capacity and incentives of European competitors to constrain the merged entity post-merger are considered valid and probable by the market.

(413) Secondly, in line with the Commission's case practice, the questionnaires contained at the end broad questions asking market participants for their overall opinion on whether or not the proposed transaction would negatively affect competition or prices in Europe.

(414) The Commission counted the replies to both the specific and general questions and followed up with market participants for a better understanding of the replies through interviews. The findings of that exercise are outlined below.

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<sup>257</sup> For instance, the Notifying Party states: "[...]" (Response to 21 June CET issues paper – Complementarity, 6 July 2012, ID 9084).

- 1) *A mere counting of market participants' opinions on the likely impact of the merger expressed in replies to questions at the end of the questionnaires does not provide a clear indication as to whether significant negative effects are more likely than not*
- (415) In phase I, the Commission sent a large number of questionnaires to competitors, customers and distributors. In phase II, the Commission sent out more targeted questionnaires to the same groups of addressees. In particular, the Commission sent relatively short electronic questionnaires ('e-questionnaires') to a large number of indirect customers. In addition, the Commission sent out more detailed e-questionnaire to competitors, direct customers and independent distributors, both in word and e-questionnaire format.<sup>258</sup>
- (416) The overall response rate for the phase II questionnaires is in the region of 40-45%, with direct and indirect customers on average showing more interest to reply than independent distributors and non-EEA competitors.
- (417) All phase II questionnaires required the respondents to answer at the end of the questionnaire the following broad qualitative questions:
- (1) Whether, in their opinion, as a result of the proposed transaction the intensity of competition will increase, decrease or remain the same;
  - (2) Whether, in their opinion, as a result of the proposed transaction the price level in Europe for CR will increase, decrease or remain the same.
- (418) As regards the direct end customers:<sup>259</sup>
- (1) 57 out of 123 (46%<sup>260</sup>) said that that the intensity of competition will decrease and 57 (46%) out of 124 said that prices will increase.
  - (2) 40 (32%) said that the intensity of competition will remain the same and 52 (42%) said that prices will remain the same.
  - (3) 26 (21%) said that competition will increase and 14 (11%) that prices will decrease.<sup>261</sup>

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<sup>258</sup> The Commission sent a number of word questionnaires to a smaller group of top customers and top independent distributors, targeted in terms of a number of criteria such as interest shown in responding to phase I questionnaire, size and geographic location. The Notifying Party argues that these criteria selections are not sufficiently clear and that the selection gave rise to biased results. In order to address the Notifying Party's criticisms, the Commission has considered all questionnaires (electronic and word versions) as part of the same group and has not attributed more importance to the respondents of one of the two groups of questionnaires.

<sup>259</sup> A number of questionnaires sent to direct customers ("Q9") were addressed to independent distributors. This is because the contact details provided by the Parties for customers included independent distributors as well. We refer in particular to the following 10 companies: [...]\*. The results above are therefore adjusted by attributing these replies to the group of distributors described at paragraph (419).

<sup>260</sup> All percentages in this section are rounded figures.

<sup>261</sup> The Notifying Party claims that the Commission mistakenly assessed the replies of certain direct customers, given that these companies in their replies stated that they purchase from service centres or stockists. The Notifying Party therefore submits that these customers should be considered as indirect

- (419) As regards independent distributors:<sup>262</sup>
- (1) 10 out of 33 (30%) said that competition will decrease and 6 out of 29 (21%) said that prices will increase. Although 2 respondents said that they expect less competition, they did not express themselves on whether price levels would increase because they state that they cannot isolate the effect of the merger from other factors affecting prices.
  - (2) 14 (42%) said that competition will remain the same and 20 (69%) said that prices will remain the same.
  - (3) 9 (27%) said that competition will increase, while 3 (10%) predicted that prices will decrease.
- (420) As regards indirect customers:
- (1) 129 out of 290 respondents (44%) said that the intensity of competition will decrease and 127 out of 299 (42%) said that prices will increase.
  - (2) 117 (40%) said that the intensity of competition will remain the same and 151 (52%) said that prices will remain the same.
  - (3) 44 (15 %) said that competition will increase and 21 (7%) said that prices will decrease.
- (421) The above counting of general opinions expressed by market participants shows, first, that only a small minority of respondents considers that the proposed transaction will lead to more intense competition. Only a marginal number of respondents believe that the merger will result in decreased prices. This does not appear to be compatible with the Notifying Party's claim that marginal cost savings brought about by the synergies will induce the Parties to compete more forcefully than before the merger (see below Section 5.5.4.9).
- (422) Secondly, whilst a large number of customers consider the effects of the merger to be neutral, a similarly large number of respondents have expressed the opinion that the effects of the proposed transaction will be negative. Accordingly a mere counting of the opinions expressed by market participants shows that a significant number of customers have expressed concerns in relation to the impact that the merger will have on the EEA CR market.
- (423) In view of the above, however, the Commission conservatively concludes that a mere counting of market participants' opinions on the likely impact of the merger

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customers for the purposes of counting. The Commission notes that the distinction between direct and indirect customers is often blurred, given that many customers purchase both ex-mill and from distributors. In any event, given the very limited number of companies involved, the outcome of the questionnaires in terms of mere counting would not be significantly affected.

<sup>262</sup> One distributor, [...]\*, replied to both the questionnaire to distributors (Q6) and the questionnaire to customers (Q9) with the same responses in relation to the questions under exam. As a result, [...]\*'s replies to one of the questionnaires have not been taken into account to avoid double counting.

expressed in replies to questions at the end of the questionnaires does not provide a clear indication as to whether significant negative effects are more likely than not.

2) *If the responses of those customers which are more directly affected by the proposed transaction are counted, a clear majority of respondents express concerns*

(424) In order to extract more meaningful results from the replies to its questionnaires, the Commission looked at the customers' replies more closely and assessed the responses carefully in their context. It has conducted in particular a more in depth assessment of (i) whether respondents with a certain profile were more likely to be concerned, and (ii) whether some of the respondents replying that the effects of the proposed transaction were neutral or even positive could have been motivated by extraneous factors (see section below).

(425) The Commission considers that the responses of those customers which currently purchase CR products from both Parties are particularly meaningful, given that these customers are those who are more likely to be affected by the elimination of competition between the Parties brought about by the merger.

(426) The Commission has identified at least [...] \* direct customers who have stated that in 2011 they have sourced CR products from both Outokumpu and Inoxum.<sup>263</sup> The Commission has crosschecked the information on sourcing with the invoice data of the Parties and was able to confirm that these customers were indeed mutual customers in the very large majority of cases.<sup>264</sup> Among the mutual customers who replied to the phase II questionnaires, a clear majority of 64% (30 out of 47) replied that in their view prices will increase as a result of the merger. A minority of 32% (15 out of 47) replied that prices will remain the same or that the effect of the merger on prices cannot be isolated from other variables that steer prices. A marginal number of replies (2 out of 47) replied that prices will decrease. Furthermore, a very large majority of 89% of the mutual customers who only replied to the phase I market investigation (8 out of 9) stated that the proposed transaction will affect prices in the EEA.

(427) Secondly, the Commission looked at the responses of 15 customers who according to them purchase 90% or more of their needs from the Parties. Of those who replied to a phase II questionnaire (13), a large majority of 77% (10) replied that the merger

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<sup>263</sup> The Commission has focussed its analysis on direct customers only, who are normally purchasing large volumes of CR ex-mill and have no difficulty in identifying the source of the purchased material. The Commission has not included in this group independent distributors, given that the market investigation suggested that distributors mainly represent a sales channel rather than a category of customers. Furthermore, the Commission has not included in the same group indirect customers, given that the latter can also purchase from independent distributors, who in turn are likely to purchase from one or more of the Parties. The assessment of the overlapping indirect customers would have been therefore likely to largely underestimate the number of effective mutual customers.

<sup>264</sup> Although the Commission was not able to confirm through the invoice data that all of these customers were mutual customers, the Commission has provided the Parties with a list of customers that it believes to be purchasing from both Outokumpu and Inoxum, on the basis of the information provided in the questionnaires. The Parties have not contended that these customers purchase from both Parties and therefore the Commission assumes that its counting is correct.

will lead to higher prices. 23% replied that prices will remain the same or that the effect of the merger could not be isolated. None said that prices would decrease.<sup>265</sup>

(428) The Commission acknowledges that the sample of 15 respondents is fairly limited and may not therefore be considered as reliable for statistical purposes. The Commission however notes that the results of this exercise are compatible with the finding that customers sourcing (high percentage of their requirements) from both Parties are more likely to be concerned discussed above in paragraph (426).

(429) Accordingly, the Commission concludes that the majority of respondents among customers which are more directly affected by the proposed transaction expressed concerns.

3) *The market investigation points to a number of extraneous factors which may explain why a significant number of respondents consider the effect of the proposed transaction to be neutral*

(430) Given the relatively large number of respondents that have not considered the merger to lead to either negative or positive effects, the Commission has conducted follow up interviews and more in-depth assessments of the replies to better understand the reasons for these neutral expectations. This further analysis suggests that many of the respondents may have had extraneous reasons to understate the potential anticompetitive effects of the proposed transaction. This is essentially for the following reasons:

(1) Almost half (47%) of the customers stated that they would be able to entirely pass on a potential price increase to their customers, while a further 39% stated that they would pass on part of the increase while bearing the other part. Only 13% of customers stated that they would have to bear the totality of the price increase. It therefore appears likely that possible concerns of the customers of the Parties have been mitigated by the knowledge that they can pass on any of such potential price increase to final customers. The relevance of such price increase pass-through is well reflected by the following statement:

*"Regarding the possible effects of the merger on the Group, these would be neutral. [...] From a customer perspective, the effects would also be neutral as any general price increase potentially resulting from the merger would be in any event likely to be passed on to final customer."*<sup>266</sup>

Direct customers' ability to pass through price increases fully or in part is also confirmed by a presentation from SMR that suggests as a possible way to

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<sup>265</sup> The Commission was not able to confirm beyond any reasonable doubt whether two of these customers purchase more than 90% of their requirements from the Parties because of conflicting replies to Q9 and Q3 in one instance and data submitted only on in percentage and on the basis of subsidiaries (i.e. no overall purchase data) in the other. In any event, even if the purchases were to be below 90%, these companies are still likely to source a significant part of their requirements from the Parties. If these two companies were to be taken out from the group, the proportion of respondents predicting a price increase would amount to 73%.

<sup>266</sup> Minutes of call with [...]\*, ID 3220.

counter low profitability in the industry to "sell direct to Endusers who are not price buyers".<sup>267</sup> In other words, end-customer demand for CR is relatively price-inelastic.

- (2) There appears to be a view in the industry that some consolidation is inevitable and potentially positive in the long run, given that in recent years the two merging companies have reportedly been incurring financial losses and the remaining players have not made substantial profits either. As a result, many of those customers that have taken a neutral stance on the merger tend to see the proposed transaction as "the least bad of two bad scenarios" and are convinced that some form of consolidation or industry rationalisation would take place in any event, including in the absence of the merger.<sup>268</sup> This view is accentuated by the frequent rumours of industry consolidation and capacity reduction. For instance, one customer that wrote to the Commission further to a request from the Parties stated:

*"The company is of the opinion that the merger would be the less bad alternative between two bad scenarios. As both of the merging parties have financial problems, it is better for customers that they merge rather than having one of them going bankrupt, as this would reduce the European capacity even further and lead to higher prices. [...]The company would have preferred to maintain two independent sources of supply."*<sup>269</sup>

- (3) From interviews with these customers, it appears that a number of them are concerned about possible retaliation from the merged entity once the proposed transaction is implemented and that this may have driven them to reply that they are not concerned by the proposed transaction. Some customers therefore also requested to be allowed to express their full and untainted view on the proposed transaction only on an anonymous basis.

The statements below, which have been collected by the Commission in the course of correspondence with customers for the approval of non-confidential versions of minutes, provide good examples:

*"the point is that we do not want that our main supplier, which is involved in the transaction, by reading our comments receive the impression that we do not support the merger; this could create us problems in the future for the supply of raw material which is critical for our production."*<sup>270</sup>

*"those info have to be considered Business secrets. I have to protect my Company and its own business. I want to avoid that this memo can further deteriorate the already stressed relationship."*<sup>271</sup>

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<sup>267</sup> Form CO, Annex 30, ID 1074.

<sup>268</sup> The Commission notes however that the Notifying Party has not raised any "failing firm defence".

<sup>269</sup> Minutes of call with [...]\*, ID 9258.

<sup>270</sup> Email of [Anonymous], ID 8417.

<sup>271</sup> Email of [Anonymous], ID 9092.

*"Unfortunately we must insist to use the MOM as confidential only. A supply stop from Outokumpu would put us out of business immediately."*<sup>272</sup>

*"Unfortunately [the proposed non-confidential] version does not match with the interests of our company. We will have a lot of problems with Outokumpu and Inoxum in the future in our negotiations. We cann[ot] accept this non confidential version."*<sup>273</sup>

It follows also from those comments that the fact that the investigation has not led to a submission of a formal complaint should not disguise the strong concerns expressed, often under condition of confidentiality for fear of retaliation, that customers have expressed.<sup>274</sup> These aspects will be discussed in detail below at paragraph (434).

- (431) The Commission therefore concludes that the market investigation points to a number of extraneous factors which may explain why a significant number of respondents consider the potential effect on prices of the proposed transaction to be neutral.
- 4) *It cannot be assumed that customers not responding to the Commission's questionnaires are not concerned about the proposed transaction or that the lack of formal complainant constitutes evidence to be taken into account in the substantive assessment of the proposed transaction*
- (432) The Notifying Party argues that the response rate to the market investigation has been relatively low. The Notifying Party further states that the customers not responding to the Commission's questionnaires should be considered when drawing conclusions on the overall results of the market investigation. In particular, assuming that customers who did not respond at all to the Commission's questionnaires reflect a neutral or at least unconcerned attitude towards the proposed transaction, the percentage of third parties consulted by the Commission who are not troubled is 80% or more. In addition, the Notifying Party claims that the fact that no formal complainant was active in the case is an element supporting the absence of competition concerns stemming from the proposed transaction.
- (433) The Commission notes that there may be several possible reasons why companies have not responded to the questionnaires. A number of companies who have replied

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<sup>272</sup> Email of [Anonymous], ID 9224.

<sup>273</sup> Email of [Anonymous], ID 9282.

<sup>274</sup> The Commission has collected also some evidence that the Parties may have been actively attempting to influence the results of the market investigation, by promoting customers to reply to the investigation in a supportive or neutral way or by requesting from customers information on the status of their replies. In the context described above, it is plausible that this may have further contributed to some market players not having been able or willing to express their views freely. One customer, for instance, stated: *"As regards the email sent to the Commission on 11 May, the company confirms that it has sent the email upon request from Outokumpu. Outokumpu repeatedly approached the company by phone and asked to provide a written statement to the European Commission to express its opinion about the merger with Inoxum."* (Minutes of call with [...]\*, ID 9258). Another customer also stated: *"During meetings with the merging parties some time ago, both Outokumpu and Inoxum asked [...]\* if the European Commission has contacted them with regard to the merger. The company confirmed that this was the case but did not provide any further detail."* (Minutes of call with [...]\*, ID 8941).

to the Commission's questionnaires or sent emails to the Commission highlighted several reasons why a company would not or could not reply to the Commission's questionnaires. These include lack of expertise on the stainless steel market,<sup>275</sup> lack of commercial relationships with one or both Parties,<sup>276</sup> absence<sup>277</sup> or minimal size<sup>278</sup> of purchases for stainless steel products, linguistic reasons,<sup>279</sup> or inaccurate contact details provided by the Notifying Party.<sup>280</sup> As a result, the Commission concludes that it is not possible to draw any conclusion from the fact that certain customers have not replied to the Commission's questionnaires, and it certainly cannot be assumed that these customers would be neutral with regard to the potential impact on the market of the proposed transaction.

- (434) As regards the absence of a formal complainant in the proceedings, the Commission notes that such factor does not prove that competition concerns are not well-founded. The Commission is entrusted by the Merger Regulation with the role of ensuring that concentrations do not significantly impede effective competition in the internal market or in a significant part thereof, regardless of the presence of any company that may file a complaint against or act in support of a merger. Furthermore, there may be several reasons why customers do not decide to formally oppose a merger between two large suppliers. The elements discussed at paragraph (430) point (430)(3) with regard to possible retaliation of the merged entity against companies expressing negative views on the merger are even more important in relation to active complainants. Lastly, the Commission notes that one company ([...]\*<sup>281</sup>) has contacted the Commission on its own initiative with a letter of complaint about the proposed transaction, given that it had not received any questionnaire.<sup>281</sup> Overall, a significant number of companies who expressed a negative view on the proposed transaction have shown an interest in the proceedings.
- (435) As a result, the Commission concludes that it cannot be assumed that customers not responding to the Commission's questionnaires are not concerned about the

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<sup>275</sup> [...] reply to Q5, ID 4651 "This is to inform that the main activity of [...]\*. Taking into consideration the specifics of our business we are not competent to reply to the questionnaire concerning the stainless steel flat products distribution business.". For further examples, see IDs 11069 and ID 11563.

<sup>276</sup> [...] reply to Q3, ID 2904 "Our Company is an industry leading company focused on the production of [...]\*. (...) So as you can see, we operate in a different market and it is really hard for our Company to appreciate the impact of the merger of Inoxum and Outokumpu. We do not buy anything from these companies and they are not our customers".

<sup>277</sup> [...] reply to Q5, ID 3665 "[...]\* doesn't use the stainless steel in the production process. I had to mention this in every answer. For the future, please put an APPLICABLE / NOT APPLICABLE option within the questionnaire in order to avoid all the troubles". See also for instance ID 2904.

<sup>278</sup> [...] reply to Q3, ID 9213: "[...]\* and Outokumpu are not in a business relationship and in that sense we are not in the questionnaire target group. The business relationship between our companies is based on unforeseen project-natured enquiries for rarely used specialized materials. Our last order was made in [...]\* and at the moment and in the foreseeable future we do not have projects that would require us to send enquiries to Outokumpu".

<sup>279</sup> Many companies refused to reply in absence of a translation of the questionnaires in their own mother language. For instance, the [...] replied: "I wrote in an e-mail all I know about the subject. I can add no more. I'll be happy to reply to the questionnaire if I get it in [...] language". ("[...]") (ID 8924). For further examples, see also IDs 9212 and 8927.

<sup>280</sup> After having sent out its Phase II questionnaire to indirect customers, for instance, the Commission received 65 "delivery failed" notices.

<sup>281</sup> ID 5916.

proposed transaction or that the lack of formal complainants constitutes evidence to be taken into account in the substantive assessment of the proposed transaction.

5) *The survey provided by the Notifying Party does not constitute a reliable basis for the assessment of the likely effects of the proposed transaction on competition and prices*

(436) On 6 August 2012, the Notifying Party submitted a survey commissioned by them and carried out by a professional survey company, Callson.<sup>282</sup> The survey has been compiled on the basis of telephone interviews with 180 customers of Inoxum and Outokumpu in six EEA Member States. Customers were not informed that the survey was commissioned by the Notifying Party.

(437) The survey contains a number of questions on the type of products purchased by the Parties' customers and the identity of their suppliers. Question 7 of the survey, in particular, is formulated as follows:

*"If in a hypothetical situation, both OUTOKUMPU and INOXUM were to increase the prices they charge you by 5-10% could you avoid the price increase by obtaining the same products from another supplier?"*

(438) Approximately 89% of the respondents to the above questions replied "certainly" or "probably". The remaining 11% of the respondents replied "probably not" or "certainly not".<sup>283</sup> In view of these results, the Notifying Party argues that the proposed transaction would not give rise to competition concerns.

(439) Firstly, the Commission notes that customers responding to the Callson survey could have easily inferred that the survey was commissioned by the Notifying Party, given the timing of the survey and the type of questions asked. As a result, it is possible that many replies to questions, especially the most sensitive ones, are biased and do not reflect reality but rather give the impression that a respondent wished to give about its position to its main suppliers. It is in fact unlikely that a customer, when questioned about its ability to react to a price increase by one of its main suppliers, would respond in a way that shows vulnerability.

(440) Secondly, the Notifying Party has not provided the Commission with the raw data underlying the survey, apart from a worksheet incorporating the results of the interviews as inputted directly by the interviewers. According to the Notifying Party, no agreed minutes or recordings of the interviews were taken. The validity of such an approach is problematic. The Commission, indeed, could not verify and crosscheck the responses taken into account for the purposes of the survey with the original replies provided by customers. As a result, and in the absence of further evidence to show that the process followed by Callson in collecting the evidence was sufficiently robust, the probative value of the Callson survey is doubtful.

(441) Thirdly, the Callson survey was addressed to 180 customers, accounting for a total volume of approximately [...] kt of CR purchased in 2011. By contrast, the

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<sup>282</sup> ID 9644.

<sup>283</sup> See replies to Q7 of the Callson survey, ID 9644.

Commission's questionnaires were replied to by 479 respondents for a total of at least [...] kt of CR purchased in 2011.<sup>284</sup> It is therefore unclear why the Callson survey should be considered more reliable or representative of the market than the Commission's market investigation.

- (442) Fourthly, as regards the specific question asked above, the replies indicate that 89% of customers believe that they would be able to avoid a price increase by switching to a different supplier. The Commission notes that this outcome would appear to confirm that customers would try to switch to a significant extent in response to a price increase. However the responses do not imply that these customers could successfully avoid a price increase that applies to all of the customers of the merging parties (i.e. a price increase that would affect 51% of volumes in the EEA). In fact, the EEA rivals of the merged entity would not have enough spare capacity to supply 89% of the merging parties' customers if these customers wanted to switch to them. In the extreme assumption of such a large scale switch, the Parties' rivals would have more demand than they can satisfy. This would lead rivals to increase their prices in turn (as indicated in paragraph 24 of the Horizontal Merger Guidelines and described in Section 5.5.4.7). Therefore, while 89% of customers may believe that they can individually avoid a price increase that applies only to them by switching to another supplier, it is doubtful whether respondents have taken into account the full implications of a likely post-merger price increase by the merged entity.
- (443) The Notifying Party's interpretation that the responses to the Callson survey imply that customers would be able to defeat a post-merger price increase is therefore highly problematic. The Commission considers that customers' opinions on the possibility of avoiding a general price increase by the merged entity post-merger are more likely to be reflected in responses to general questions on the consequences of the proposed transaction on competition and prices which were asked by the Commission in its questionnaires.

6) *Conclusion*

- (444) Given the relatively large number of neutral responses, the Commission has conducted its further assessment of the likely effects of the proposed transaction on the basis of a thorough scrutiny of the responses of the same market participants to the more factual questions in questionnaires, interviews, internal documents and industry reports, and concluded that the concerns that have been raised by approximately half of the customers who responded to the questionnaires are well-grounded.

5.5.4.5. Loss of competition between the Parties caused by the proposed transaction

- (445) The most direct effect of a merger is the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had tried to raise

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<sup>284</sup> For each respondent, the Commission has cross-checked the volumes of purchases with the invoice data of the Parties to come to this result. It was not possible to identify clearly the volumes purchased by each company and therefore these figures are likely to underestimate the representativeness in terms of volumes of the Commission's market investigation.

its prices, it would have lost some sales to the other firm. A merger between those two firms removes that particular constraint.<sup>285</sup>

(446) The Commission has assessed, first, the magnitude and importance of the overlap existing pre-merger between the Parties and, second, the loss of competition between the Parties that will be brought about by the proposed transaction.

1) *The overlap between the Parties is substantial*

(447) The Notifying Party contends that the Parties' activities are largely complementary.

(448) In this respect, the Notifying Party puts forward that: (i) almost [90-100]\*% of Outokumpu's EEA sales are of austenitic stainless steel, while the corresponding figure for Inoxum is approximately [70-80]\*%; (ii) ferritic and BA products account for nearly [40-50]\*% of Inoxum's CR sales in the EEA and these are not produced or produced only to a limited extent by Outokumpu; (iii) there is almost no overlap with regard to martensitic and duplex CR; (iv) these differences are reflected by the fact that Inoxum sells mainly to automotive and white goods industries, while Outokumpu sells to heavy transport, chemical, petrochemical, energy and food and drinks segments.<sup>286</sup>

(449) In order to assess whether the Notifying Party's position regarding complementarity is well-grounded, the Commission has assessed the magnitude of the overlap between the Parties' activities in terms of customers, grades, finishes and applications.

**i) There is a significant overlap of actual mutual customers of the Parties**

(450) A significant number of customers purchased in 2011 from both Outokumpu and Inoxum.

(451) Internal documents from the Parties show that in 2011 there were approximately [...] customers purchasing stainless steel products from both Parties.

(452) As regards CR, the Parties' have estimated that in 2011 sales to overlapping customers amount to approximately [...] kt, i.e. [50-60]\*% of the Parties' combined sales.<sup>287</sup> These figures include both customers and independent distributors.

(453) With specific regard to customers, out of the 132 direct customers who replied to the Commission's questionnaires, at least [...] sourced in 2011 from both Parties. On the contrary, [...] customers who source from more than one supplier stated that they only buy from one of the Parties. This means that most of the customers that purchase from more than one supplier purchased in 2011 from both Parties.<sup>288</sup>

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<sup>285</sup> See Horizontal Merger Guidelines, paragraph 24.

<sup>286</sup> Source: Form CO, ID 953.

<sup>287</sup> Source: ID 8963.

<sup>288</sup> See replies to question 15.1 of Q8 and Q9 and question 62 of Q3.

- (454) Of the [...] customers that source from both Parties, at least [...] in 2011 sourced more than [50-60]% of their requirements from Parties ([40-50]% of the relevant customers), among which [...] sourced more than 90%.<sup>289</sup>
- (455) The Callson survey submitted by the Notifying Party also confirms that the customer overlap between the Parties is substantial.<sup>290</sup> According to the survey's results, [60-70]% of Inoxum's CR customers also purchase CR from Outokumpu, whereas [50-60]% of Outokumpu's CR customers also purchase CR from Inoxum.<sup>291</sup> The large majority of customers purchase the same products from the Parties, with austenitic grades [...] and [...] almost always<sup>292</sup> accounting for the majority of purchases from both suppliers.<sup>293</sup>
- (456) As a result of the above, the Commission concludes that there is a significant overlap of mutual customers of the Parties.

**ii) Customer switching behaviour means that there is an even larger overlap of potential customers**

- (457) The Notifying Party claims that the market for CR is volatile and has provided an analysis of sales during the last three years showing that after controlling for general market growth between 2009 and 2011, on average [40-50]% of Outokumpu customers and [50-60]% of Inoxum customers varied their purchases by [50-60]% or more each year. If the range is expanded by reducing the threshold to include changes of over [20-30]% of initial sales, then [70-80]% of Outokumpu customers and [70-80]% of Inoxum customers exceeded the [20-30]% threshold. This high degree of customer volatility indicates in the Notifying Party's view that customers can and easily do switch suppliers.<sup>294</sup>
- (458) On the basis of information from the market investigation, the Commission agrees with the Notifying Party's claim that in general customers frequently switch between different European suppliers.<sup>295</sup>
- (459) These findings imply that the proposed transaction will also lead to the elimination of one major potential source of supply for customers who are not overlapping (also overlapping customers lose the choice between the merging parties) at present, and who use competition between the European suppliers to attain a better bargaining position, to the extent that the products purchased are supplied by both Parties.

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<sup>289</sup> See replies to question 15.1 of Q8 and Q9 and question 62 of Q3. This analysis is focused on end customers and therefore excludes distributors. The number of overlapping customers would increase dramatically if distributors were to be added, as suggested by the figures presented in paragraph (452).

<sup>290</sup> Given that the relevant replies are based on facts as opposed to abstract considerations, the Commission considers this information as relatively reliable, although it still expresses its concerns on the reliability of the Callson survey overall as outlined in section 5.5.4.4 above.

<sup>291</sup> See replies to Q3a and Q3b of the Callson survey, ID 9644.

<sup>292</sup> The only exception is for Outokumpu's customers also purchasing grade 316 from Inoxum, who represent [40-50]% of the total.

<sup>293</sup> See replies to Q3aBis and Q3bBis of the Callson survey, ID 9644.

<sup>294</sup> Form CO, Annex 107, ID 3623.

<sup>295</sup> See replies to Q3, Questionnaire to direct customers, question 67. 69% of respondents replied that in the past 3 years they have switched between different European suppliers.

(460) Given the foregoing, the Commission concludes that customer switching behaviour means that there is an even larger overlap of potential customers.

**iii) A 'complementarity' or 'closeness of competition' analysis by grades or end user segments is not warranted**

(461) In line with the section on market definition above, the Commission does not believe that a further segmentation of the CR market by families of grades or applications would be appropriate in order to assess the magnitude of the overlap between the Parties.

(462) This is because, as rightly pointed out by the Notifying Party in the context of market definition, there is a high degree of supply-side substitutability between the different families and grades of CR, with only limited exceptions. According to the Notifying Party, the frequency with which switching between different grades occurs makes it clear that there is a high degree of supply side substitutability and that switching costs do not inhibit frequent switching from one grade to another. Furthermore, as far as finishes are concerned, all major producers of stainless steel possess the required know-how and equipment to supply products with all the standard finishes (with the possible exception of BA finishes).<sup>296</sup>

(463) Thus, the mere fact that a producer is not currently focusing its activities on a certain type of CR does not imply that it will not be able to increase its output of that particular product in the close future, should an increase in price take place (with the possible exception of BA, see below paragraphs (470)-(478)). As a result, all CR producers currently appear to constitute a competitive constraint on the others, regardless of their mix of output.

(464) Furthermore, there appears to be a certain degree of demand-side substitutability over time between the main families of stainless steel, as stated above (see paragraphs (144)-(149) above).

(465) Accordingly, the Commission concludes that a 'complementarity' or 'closeness of competition' analysis by grades or end user segments is not warranted.

**iv) Overlaps in terms of grade families, finishes and large customer segments are very significant**

(466) The Commission in any event considers that its conclusions as regards the importance of the overlap between the Parties would not be significantly affected even under a narrower segmentation by grades, grade families, finishes and customers.

(467) As regards a possible segmentation by families, the overlap between the Parties would be very significant in austenitic CR. Austenitic stainless steel represents the large majority of both Parties' sales ([80-90]\*% of Outokumpu's sales and [70-80]\*% of Inoxum's sales) and approximately [70-80]\*% of the overall EEA CR

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<sup>296</sup> Source: Form CO, ID 953.

market.<sup>297</sup> Such a large overlap should be considered in itself sufficient to raise *prima facie* concerns, even in the absence of further overlaps.

- (468) The Parties' activities however also overlap in relation to the second most popular family, ferritic CR, albeit to a lesser extent. Ferritic CR accounts for approximately [20-30]\*% of Inoxum's sales and [5-10]\*% of Outokumpu's sales.<sup>298</sup>
- (469) There is almost no overlap between the Parties' sales of martensitic and duplex CR as Outokumpu produces limited volumes of martensitic and Inoxum does not produce duplex. However, these families of stainless steel represent less than [0-5]\*% of the overall EEA market and also account for only limited sales by each Party (duplex represents approximately [5-10]\*% of Outokumpu's sales and martensitic represents approximately [0-5]\*% of Inoxum's sales).<sup>299</sup>
- (470) The only element of differentiation between the Parties that appears to be justified to a certain extent concerns their activities in relation to BA. That being said, the relatively small overlap in BA does not remove other possible concerns, especially in relation to austenitic CR and non-BA products.
- (471) According to the Notifying Party, Inoxum is the largest producer of BA in the EEA, with total production of approximately [...] t in 2010. By contrast, Outokumpu has limited production of BA narrow CR at its plant in [...]\*. Furthermore, it produces 2BB, a CR with a different finishing surface that Outokumpu tries to promote as an alternative to BA. Outokumpu's production of BA and 2BB however remains limited and in 2010 amounted to approximately [...] t.<sup>300</sup>
- (472) The Commission considers that the small overlap between the Parties' sales in BA is an element to be taken into account for the assessment. It is true that Outokumpu has only limited activities with regard to BA and therefore it appears likely that the proposed transaction will not have a very significant direct impact on BA's sales.
- (473) The figures on the split between BA and non-BA products of CR sales submitted by the Notifying Party in the Form CO implied that BA represents approximately [30-40]\*% of Inoxum's CR sales. Following the Commission's analysis of the Parties' invoice data, however, the Notifying Party revised its position and confirmed that BA only accounts for [20-30]\*% of Inoxum's 2011 sales in the EEA by volume.<sup>301</sup> As a result, Inoxum's sales of BA appear to account for a smaller share of total sales of the company as suggested in the Form CO.
- (474) Furthermore, the Notifying Party acknowledges that it is possible to produce non-BA (e.g. 2B) CR on BA lines, although with a non-quantified cost disadvantage.<sup>302</sup> Thus, it appears that BA still plays a role in constraining sales of non-BA CR.

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<sup>297</sup> Source: Form CO, ID 953.

<sup>298</sup> Source: Form CO, ID 953.

<sup>299</sup> Source: Form CO, ID 953.

<sup>300</sup> Source: Form CO, ID 953.

<sup>301</sup> See email of 26 July 2012, ID 9374.

<sup>302</sup> Source: Reply to Article 11 request of 6 July 2012, ID 8902.

- (475) Lastly, at least one customer mentions that the proposed transaction will have an impact on BA, as it will eliminate a potential entrant in the segment.<sup>303</sup>
- (476) Even assuming that the proposed transaction will not have any impact on the segment of BA, there is a very substantial overlap as regards non-BA CR, to the extent that the merged entities' market shares of non-BA CR are even higher than those in the overall market of CR.
- (477) If only non-BA market shares were to be considered, the merged entity appears to be in a similar position as on the overall market, with a market share of [50-60]\*%. The only credible competitors (Aperam and Acerinox) would have a market share of only [10-20]\*% each.

**Table 10: The Notifying Party's estimates of the EU market shares for non-BA CR - 2010**

Company	Non-BA CR market shares in the EU (kt)	Share of EU CR market shares
Outokumpu	[...]*	[20-30]*%
Inoxum	[...]*	[30-40]*%
<b>Combined</b>	[...]*	[50-60]*%
Aperam	[...]*	[10-20]*%
Acerinox	[...]*	[10-20]*%
Otelinox	[...]*	[0-5]*%
Re-rollers (incl. Marcegaglia)	[...]*	[0-5]*%
Imports	[...]*	[20-30]*%
Total	[...]*	100%

**Source: Form CO, Annex 39 part 1, ID 1088**

- (478) As regards the overlaps by grade families, BA is more frequently applied on ferritic CR, the latter accounting for approximately [40-50]\*% of total BA sales (as opposed to [20-30]\*% of the overall CR market). In contrast, BA only accounts for approximately [10-20]\*% of the Parties' combined sales of austenitic CR. As a result, the very significant overlap in austenitic stainless steel, which accounts for the wide majority of the CR market, is only marginally affected by BA. This is confirmed by the fact that the Parties' combined market shares for non-BA austenitic CR would amount to [50-60]\*%.<sup>304</sup>

<sup>303</sup> Minutes of the call with [Anonymous], ID 9075.

<sup>304</sup> Source: Form CO, Annex 39, ID 1088.

- (479) The Notifying Party also argued that the Commission should perform an analysis of the overlap by customer segment and have provided estimates of the Parties' direct sales and share by end-customer segment.
- (480) The Commission considers that differences in end-customer segments are already reflected in differences in the products/grades which were discussed above. For instance, the fact that Inoxum has more sales in the household goods segment is explained by Inoxum's strong position in BA, which is an important input for the production of white goods.<sup>305</sup> Inoxum is also stronger than Outokumpu in automotive, which is in line with its larger production of ferritic CR, largely used for exhaust systems.<sup>306</sup>
- (481) In any event, even under a possible segmentation by end application, the Parties' sales overlap in almost all segments.
- (482) The only segments where the Parties' sales do not overlap are the Armaments & Military, Mining Industry & High Temperature Applications, Retail, Tankers and Water Applications segments. These segments are negligible as they account together for approximately [0-5]\*% of the combined sales of the Parties.
- (483) Table 11 shows the direct sales of each of the Parties for the overlapping applications by segment. It also includes the percentage increment in the sales of the larger Party in each segment brought about by the addition of the smaller Party.

**Table 11: Parties' direct CR sales on overlapping applications - 2011**

Customer segment	Outokumpu Sales (t)	Inoxum Sales (t)	Combined Sales (t)	Increment on largest merging party's sales
Architecture, Building & Construction	[...]*	[...]*	[...]*	[40-50]*%
Automotive	[...]*	[...]*	[...]*	[20-30]*%
Chemical, Petrochemical & Energy	[...]*	[...]*	[...]*	[40-50]*%
Commercial Catering	[...]*	[...]*	[...]*	[70-80]*%
Distributors	[...]*	[...]*	[...]*	[50-60]*%
Food and Drink	[...]*	[...]*	[...]*	[40-50]*%
General Industrial	[...]*	[...]*	[...]*	[50-60]*%
Heating, Cooling and Ventilation	[...]*	[...]*	[...]*	[40-50]*%
Heavy Transport	[...]*	[...]*	[...]*	[30-40]*%

<sup>305</sup> Source: Form CO, Annex 46, ID 1104.

<sup>306</sup> Source: Form CO, ID 953.

Household Goods	[...]*	[...]*	[...]*	[10-20]*%
Processors	[...]*	[...]*	[...]*	[40-50]*%
Total	[...]*	[...]*	[...]*	[50-60]*%

Source: Form CO, ID 953.

(484) As shown by the figures in Table 11, the proposed transaction will cause a significant increment in the direct sales of the Party that is already relatively more active in each application. In addition to the non-overlapping segments mentioned above, the only application where the increment of sales will be below [20-30]\*% is in the household goods sector, which in any event accounts for only [5-10]\*% of the sales of the merged entity. As indicated above, the main explanation for the small overlap with regard to the household segment is Outokumpu's limited activities in BA.

(485) There is therefore no reason to believe that the elimination of competition between the Parties would produce appreciably less harmful effects if assessed under a customer segment perspective.<sup>307</sup>

(486) The Commission concludes that in any event, overlaps by grade families, finishes as well as in important customer segments are very significant.

v) Conclusion

(487) The Commission concludes that the overlap between the Parties is substantial both in terms of customers and products and the Notifying Party's claim that the Parties' activities are complementary is not well-grounded.

2) *The proposed transaction leads to an important loss of competitive constraint*

(488) A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger is the loss of competition between the merging firms.<sup>308</sup>

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<sup>307</sup> In the Form CO ID 953, the Notifying Party provided market shares data segmented by application. Since these market shares are based on estimates of consumption and therefore take into account sales by distributors and processors, the Commission cannot make use of these figures to assess the impact of the transaction of the market for the production and wholesale of CR. Moreover, the Parties' shares by customer segment are based only on the Parties' direct sales to end customers (ex-mill or via integrated distributors) and exclude indirect sales by the Parties in these customer segments via independent distributors. Therefore, the total (direct and indirect) sales by the Parties and, as a consequence, the overlaps for each end-customer segment (i.e. including sales via independent distributors), are very likely to be larger. In other words, a focus on the Parties' share by end customer segment based on the Parties' direct sales to end customers only understates the Parties' position by end-customer segment. As explained in more detail below, the Commission does not consider that independent distributors are an independent competitive force in these customer segments, because independent distributors also rely to a large extent on the Parties as suppliers.

<sup>308</sup> Horizontal Merger Guidelines, paragraph 24.

- (489) The Notifying Party submits that the concern about a loss of competition would be largely based on the elimination of potential competition between the Parties.
- (490) The Commission notes that potential competition refers to a situation where a firm outside the market could enter the market in the future, following the transaction. In the present case, as discussed in the section above, both Parties are large and active suppliers in the market from which customers source their CR requirements. Moreover, even if narrower market segments were considered, the analysis above showed very large overlaps between the Parties. The proposed transaction therefore mainly removes an active supplier, rather than a potential supplier, from the market. This is true even for customers who buy from, or negotiate with, only one of the Parties at present.

**i) The merged entity will obtain increased power in negotiations**

- (491) The Commission's market investigation has shown that most of the customers in the EEA negotiate their order with more than one supplier.<sup>309</sup> Since Inoxum and Outokumpu are respectively the first and second players in the EEA market for CR, a large number of customers currently purchase from both companies.
- (492) In combining Outokumpu and Inoxum, the proposed transaction will change significantly the market structure by creating a dominant position which is more likely to eliminate competition between the two main competitive forces in the market. As a result, post-merger, the customers will lose one important source of supply. This is likely to have a significant negative impact on the customers' bargaining position.
- (493) This risk is acknowledged by the Parties, as noted in an internal document:

*"[...]".*<sup>310</sup>

- (494) A number of respondents to the market investigation have clearly pointed out that the elimination of competition between the Parties will significantly reduce their possibility to switch to alternative suppliers. As a result, the proposed transaction will significantly reduce their negotiation power:

*"[...] [...] has the opinion that price negotiations might become much harder once there is one less competitor"*<sup>311</sup>

*"Even now the power of Outokumpu and Inoxum towards their customers is very high. The negotiations are very hard and sometimes they do not move, because they know their strength. If the transaction happens the situation will become worst for the customers."*<sup>312</sup>

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<sup>309</sup> See replies to Q3, Questionnaire to direct customers, question 65. 85% of respondents replied that they normally negotiate their orders with more than one supplier at the same time.

<sup>310</sup> See ID 8963, slide 15.

<sup>311</sup> Minutes of call with [...]\*, ID 8525.

<sup>312</sup> [...]\* reply to Q9, ID 8511.

*"[Anonymous] believes that the merger will further deteriorate the level of competition in the EEA. As a result, prices will increase as the bargaining power of customers will be reduced because of the disappearance of one supplier."<sup>313</sup>*

*"[Anonymous] has a negative view of the transaction. The EEA stainless steel market is already highly concentrated and the European producers already have significant power in the negotiations because of their size and strategic importance in the EEA market. After the transaction, only 3 suppliers will remain and [Anonymous] believes that this would drastically reduce its bargaining power."<sup>314</sup>*

*"Competition should decrease considering [...] increased size of producer compared to customer."<sup>315</sup>*

*"The more mergers you have in the market, the less communication and negotiation partners you have which affects our business considerably. This is positive for the mill but not for us."<sup>316</sup>*

*"As a result of less competitive environmental as well as large players, it is more likely that suppliers will have a more dominant position in the market compared to current scenario and hence with more power to control the conditions."<sup>317</sup>*

*"[At present, i]n term of price you can get some reductions (some cents per kg) but the biggest benefit is the service level and as well the willingness to have agile and fast market reaction. With this merge I'm tremendously scared that will disappear completely due to the power. Outokumpu will have in EU"<sup>318</sup>*

(495) The Commission therefore concludes that the merged entity will obtain increased power in negotiations.

**ii) The presence of multi-sourcing strategies in the market for CR is likely to reinforce the anticompetitive effects of the proposed transaction**

(496) According to the Horizontal Merger Guidelines, "[c]ustomers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers or because they face substantial switching costs. Such customers are particularly vulnerable to price increases."<sup>319</sup>

(497) One of the reasons why customers may have few alternatives is the presence of multi-sourcing strategies in the market. This is because if customers need to

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<sup>313</sup> Minutes of call with [Anonymous], ID 9075.

<sup>314</sup> Minutes of call with [Anonymous], ID 8418.

<sup>315</sup> [...] \* reply to Q9, ID 4280.

<sup>316</sup> Email by [...] \*, ID 8929.

<sup>317</sup> [...] \* reply to Q8, ID 9200.

<sup>318</sup> [...] \* reply to Q9, ID9369.

<sup>319</sup> Horizontal Merger Guidelines, paragraph 31.

purchase from more than one supplier, they inevitably have less alternatives sources. For instance, in a market with four players where customers need to multi-source from at least two players, customers only have two further alternatives to their current suppliers, should one of the current suppliers increase prices. As a result, firms bargaining power increases further in comparison to a scenario where customers do not multi-source.

(498) Most of the customers who replied to the relevant question in the Commission's request for information<sup>320</sup> stated that they purchase their requirements from more than one supplier.

(499) As regards the EEA market for CR, customers generally multi-source in order to increase their bargaining power, but also to obtain advantages in the quality of the products and ensuring security of supply.<sup>321</sup> For instance, customers stated:

*"We need multisourcing to have the maximum independence possible. This is the only possibility to negotiate prices with the mills effectively. The other reason is that historically there were always problems with the one or the other suppliers regarding lead times and/or quality. So we need more suppliers to get the right performance."*<sup>322</sup>

*"Stainless Steel is very strategic for [...]"; therefore the multi sourcing to avoid supply chain risks. If[ ] [...] is out of Stainless Steel, [...] is out of business!"*<sup>323</sup>

(500) The proposed transaction will reduce the number of integrated players from four to three. The majority of direct customers responding to the Commission's questionnaires source the bulk of their requirements from the European integrated producers.<sup>324</sup> For these customers, the proposed transaction will therefore reduce the alternative sourcing options which compete with their current supplier(s) to two or one, depending on how many suppliers customers source from.

(501) A number of customers also multi-source from all or some of the four integrated producers as well as from re-rollers. For these customers, it is doubtful whether Otelinox and Marcegaglia can be considered as a meaningful competitive force, given that they purchase most of their raw materials requirements from Outokumpu and Inoxum, as acknowledged by the Notifying Party<sup>325</sup> and clearly indicated in the reply from one customer with regard to Otelinox:

*"Outokumpu and Inoxum are our main source of coils. Our third supplier Otelinox in Romania is purchasing most of its hot rolls from the same source."*

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<sup>320</sup> See aggregated anonymised replies to question 62 of Q3 and question 12 and 15 of Q8/Q9. IDs 9826, 9827, 9828.

<sup>321</sup> See replies to question 15.b of question 15 of Q8 and Q9 – Questionnaires to direct customers.

<sup>322</sup> [...] reply to Q8, ID 5952.

<sup>323</sup> [...] reply to Q8, ID 8367.

<sup>324</sup> See aggregated anonymised replies to question 62 of Q3 and question 12 and 15 of Q8/Q9. IDs 9826, 9827, 9828.

<sup>325</sup> Source: Form CO, ID 953.

*We will end up in a single source and Stainless Steel is a strategic product for us. We are worried.*<sup>326</sup>

- (502) Lastly, certain customers multi-source from all or some of the four integrated producers and from independent distributors. Given that independent distributors purchase a large proportion of their requirements from the integrated European producers and are likely to pass on a price increase (see Section 5.5.4.8 below), they do not appear to represent a viable alternative for multi-sourcing that would allow customers to offset a price increase from the merged entity.
- (503) As a result, the Commission concludes that the presence of multi-sourcing strategies in the market for CR is likely to reinforce the anticompetitive effects of the proposed transaction.

**iii) Multi-sourcing is not inconsistent with a finding of significant negative effects on competition and prices post-merger**

- (504) The Notifying Party argues that given multi-sourcing strategies, a number of customers that currently purchase from both Parties are likely to switch post-merger to their competitors. In the case of CR, the Notifying Party estimates switching behaviour of customers post-transaction ("merger dip") to result in losses for [...] worldwide. The Notifying Party submits that this would provide incentives to the merged entity to reduce prices in order to limit the loss of customers and to competitors to fight in order to increase their market share.
- (505) The Commission notes that given the apparent importance of multi-sourcing for customers, it is likely that customers would divert part of their purchases to the competitors of the merged entity, regardless of a possible favourable pricing policy from the merged entity (which in any event is only partially substantiated).<sup>327</sup> As a result, the merged entity would not have incentives to compete more intensely to retain these customers. Moreover, multi-sourcing also implies that the competitors of the merged entity will have less incentive to compete aggressively to gain customers, because customers are likely to switch part of their requirements anyway. Instead, as a result of this shift in demand due to multi-sourcing strategies, competitors are likely to have an incentive to increase their prices, i.e. to become less aggressive compared to the pre-merger situation.
- (506) Accordingly, the Commission concludes that multi-sourcing is not inconsistent with a finding of significant negative effects on competition and prices post-merger.

**iv) Some customers would be particularly vulnerable to a price increase from the merged entity**

- (507) According to the Horizontal Merger Guidelines, "*[c]ustomers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers or because they face substantial switching costs. Such customers are*

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<sup>326</sup> [...] reply to Q3, ID 1606.

<sup>327</sup> Internal documents of the Parties show that the only measures considered in terms of pricing are [...] (see Appendix II to submission on complementarity, ID 9083).

*particularly vulnerable to price increases. The merger may affect these customers' ability to protect themselves against price increases. In particular, this may be the case for customers that have used dual sourcing from the two merging firms as a means of obtaining competitive prices. Evidence of past customer switching patterns and reactions to price changes may provide important information in this respect."*<sup>328</sup>

(508) Fifteen customers<sup>329</sup> replying to the Commission's request for information sourced more than 90% of their requirements from the two Parties.

(509) While for some customers it would be possible in principle to switch part of their supplies to other producers (which may in turn increase prices, see 5.5.4.7 below), certain customers would not be able to purchase from all or some of the other European producers because of product or geographic differentiation, quality issues or commercial strategy of the buyer or the supplier. As a result, their alternatives post-merger would be even more limited than other customers and these customers would be particularly vulnerable to a price increase. Customers for instance stated:

*"[Anonymous] also explained that Aperam refuses to supply the company. Not even quotations are made [...] to the company. Acerinox used to supply [Anonymous] over 10 years ago. Due to problems in the quality of the delivered goods (complaints over 50% of the goods), the business relationship was ended after about one year."*<sup>330</sup>

*"Acerinox does not seem to be interested in the Benelux market and does not apply an aggressive pricing policy. Acerinox seems to rather focus on the USA and its home market the Iberian Peninsula."*<sup>331</sup>

*"The company decided some time ago to concentrate on long-term agreements with only a few strategic suppliers. These suppliers are Outokumpu, Inoxum and Otelinox."*<sup>332</sup>

*"A certain tonnage of steel with the exact width, needed for the [...], is purchased. In Europe, only the merging parties and Aperam are able to produce special widths of coils. Acerinox and Asian companies are mainly active in the field of standard widths."*<sup>333</sup>

(510) In light of the above, the Commission considers that some customers would be particularly vulnerable to a price increase from the merged entity.

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<sup>328</sup> Horizontal Merger Guidelines, paragraph 31.

<sup>329</sup> Out of 112 replies, customers who replied to the relevant question in the Commission's request for information.

<sup>330</sup> Minutes of the call with [Anonymous], ID 9284.

<sup>331</sup> Minutes of the call with [...]\*, ID 9120.

<sup>332</sup> Minutes of call with [...]\*, ID 8941.

<sup>333</sup> Minutes of call with [Anonymous], ID 8521. Note that this customer purchases HR. However, the statement is also applicable to CR as it refers to the width of the coil.

v) Conclusion

(511) In view of the above, the Commission concludes that the proposed transaction will lead to an important loss of competition between the Parties.

5.5.4.6. Imports are an imperfect and insufficient constraint

(512) The Notifying Party argues that the proposed transaction would not lead to non-coordinated effects because of the competitive constraint coming from imports, in particular from Asia. In 2011, imports accounted for [20-30]\*% of the market. The Notifying Party submits that imports represent a significant constraint on European producers and would increase as a reaction to an attempt to increase price in the EEA, thereby making unprofitable any such attempt.<sup>334</sup>

(513) The Commission has assessed the competitive constraint from imports on European producers of CR. The Commission notes that it does not dispute that imports exert some constraint on EEA producers of CR. However, the relevant question that needs to be addressed is whether the constraint from imports is sufficiently strong to prevent post-merger price increases by the merged entity.

(514) The Notifying Party claims that the Commission has focused its analysis on imports from Asia. According to the Notifying Party, the Commission has committed an error of assessment, given that imports from Asia are not the only imports in the EEA, and in particular imports from China represent only [0-5]\*% of EEA deliveries and are equivalent to US imports which the Commission has not mentioned at all.

(515) The large majority of imports of CR imported into the EU come from Asia.<sup>335</sup> Furthermore, the Notifying Party submitted all through the proceedings that Asian imports have a strong constraining effect on European players. Imports from Asia are in fact so important that the Parties often use "Asian imports" and "imports" as interchangeable terms.<sup>336</sup> For instance, the Notifying Party's econometric analysis is based on an assessment of the reactions of imports to changes in the gap between CR prices in the EEA and those in Asia.<sup>337</sup> For this reason, the largest part of the

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<sup>334</sup> The Notifying Party argues that the Commission should also take into account the construction of a [...] kt/y plant by POSCO in Turkey. Any possible constraint coming from POSCO is dealt with in paragraphs (588)-(592) below.

<sup>335</sup> According to data submitted by the Notifying Party, relative imports from Asia as a percentage of all 3<sup>rd</sup> country imports varies over time. However, in all of the past 5 years more than half of 3<sup>rd</sup> country imports to the EU stemmed from the four major Asian exporters ([...]\*). In 2011, for instance, imports from these four countries accounted for [50-60]\*% of total imports into the EEA. If imports from other Asian countries are added, such as [...]\*, the percentage would increase even further. Sources: Form CO, Annex 26, ID 1055 and Annex 41, ID 1093.

<sup>336</sup> For instance, the Notifying Party claims: "*There is ample evidence that imports would undermine any attempt at raising prices post-merger. There are already substantial imports into the EU and low-cost Asian imports now account for about [20-30]\*% of EU consumption even during a period when both stainless steel and nickel prices are low, and represent an exogenous factor beyond the control of EU suppliers. (emphasis added)*" (Source: Form CO, ID 953). The Commission notes in 2011 imports overall, and not Asian imports exclusively, accounted for [20-30]\*% of the European market.

<sup>337</sup> More precisely, the Notifying Party's studies examine the reaction of total imports into the EEA from all origins to changes in the gap between the price for CR in Germany and the CR price in Hong Kong.

Commission's market investigation and assessment has been focused on the competitive constraint imposed by imports from Asian producers on the European producers.

(516) As regards imports from China, the Notifying Party submitted ample evidence to support its argument that China has significant overcapacity and that it constitutes an important potential threat for European producers, regardless of its current low level of imports in the EEA.<sup>338</sup> The Commission agrees with the Notifying Party's position that imports from China represent a very small percentage of the EEA's consumption. However, in line with the Notifying Party's submissions, the Commission has focused part of its investigation on assessing whether it is realistic to expect that the constraint from Chinese CR on European producers will increase.

1) *Trade between different geographic areas is an important feature of the CR market*

**i) Although imports account for approx. [20-30]\*% of the EEA market, the EEA is still a net exporter of CR products**

(517) In 2011, total imports of CR from non-EEA countries accounted for approximately [20-30]\*% of the EEA market.<sup>339</sup> Although imports have increased overall in the past 10 years, the trend of imports has been discontinuous and affected by significant fluctuations, as shown by Figure 12 below.

**Figure 12: [...]\***

**Source: Form CO, Annex 41, ID 1093**

(518) As can be seen from the Figure 12 above, the level of imports in the EEA rapidly peaked in 2006 and decreased with a similar speed in the course of 2007. The reasons for the peak appear to be linked to a significant increase in the price of nickel, which led customers to "edge" on the alloy surcharge by purchasing CR from Asia (see below, paragraphs (561)-(572)). These aspects will be discussed in detail below.

(519) Another important reason for the peak is a sudden reduction in the EEA capacity caused by a fire at ThyssenKrupp's production site in Krefeld. As a reaction to the fire, ThyssenKrupp exported HR and subsequently re-imported processed CR to replace the volumes lost due to the fire. These volumes amount to approximately [...]\* kt and account for approximately [10-20]\*% of total imports of CR in the EEA in 2007.<sup>340</sup>

(520) A further possible reason for the peak might be the widening of the price gap between the EEA and Asia. This element is discussed extensively below, at paragraphs (559)-(585) .

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<sup>338</sup> See for instance Annexes 23, 25 and 31 to the Form CO (IDs 1050, 1054 and 1075).

<sup>339</sup> Source: Notifying Party, ID 3354.

<sup>340</sup> Source: Form CO, ID 953 and Form CO, Annex 41, ID 1093.

(521) Despite an appreciable level of imports, the EEA is a net exporter of CR. In 2011, the EU exported approximately [...] kt of CR and imported [...] kt.<sup>341</sup> While fluctuating month to month, the level of exports has shown no clear trend over time, as illustrated in Figure 13 below. On average, exports account for approximately [20-30]\*% of EEA production.

**Figure 13:** [...]\*

**Source:** Form CO, Annex 41, ID 1093

(522) Conference calls held by the Commission with non-EEA customers confirmed that European producers are seen as competing with Asian and other producers for sales in third countries (e.g. North America or South Africa)<sup>342</sup> Furthermore, the Parties export large quantities of CR to Asia. For China alone, in 2010 Inoxum exported [...] kt and Outokumpu [...] kt of stainless steel products.<sup>343</sup>

(523) As a result, it appears that European producers are seen as important and competitive suppliers of CR in different geographic areas than the EEA. This implies that, *prima facie*, European players do not appear to have any appreciable competitive disadvantage when compared to non-EEA and in particular Asian rivals, given that European players are able to compete face-to-face with these producers in many areas of the world, some of which represent home markets of important non-EEA steelmakers.

(524) As a result of the above, the Commission concludes that although imports account for approx. [20-30]\*% of the EEA market, the EEA is still a net exporter of CR products.

**ii) Imports are not a single competitor but rather a fringe of players each with relatively small sales in the EEA**

(525) The Commission notes that imports are not a single competitor of CR but rather are constituted by several players each with relatively small activities in the EEA. Importers are stainless steel companies mainly based in Asia and North America, such as Baosteel,<sup>344</sup> TISCO, POSCO, LISCO, JISCO, Nippon Steel, Jindal, AK Steel, ATI, Industeel, JFE and Nisshin. The Notifying Party estimates that none of these companies individually accounts for more than [5-10]\*% market share in the EEA.<sup>345</sup>

(526) The Commission therefore concludes that imports are not a single competitor but rather a fringe of players each with relatively small sales and limited local presence in the EEA.

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<sup>341</sup> Source: Form CO, Annex 41, ID 1093.

<sup>342</sup> See minutes of calls with [...] (ID 9289), [...] (ID 9137).

<sup>343</sup> Source: Form CO, Annex 110.

<sup>344</sup> Inoxum has a [...] joint venture with Baosteel in Shanghai, Shanghai Krupp Stainless (SKS). SKS operates a stainless steel production facility in China with an annual production of [...] kt of CR, Source: Form CO, ID 953.

<sup>345</sup> See footnote 227 above.

**iii) Non-European competitors mainly import in the EEA via independent distributors and are not generally directly active in the market**

- (527) Non-EEA importers normally operate without having a physical presence on the EEA territory. The Notifying Party states that only Jindal, Baosteel, POSCO, Hyundai, Samsung and Minmetals have distribution centres or sales offices in the EEA.<sup>346</sup>
- (528) Approximately [90-100]\*% of imports in the EEA are sold to independent distributors,<sup>347</sup> who in turn sell to other distributors or final customers. On the basis of information from the market investigation, the Commission confirmed that distributors generally import CR independent from orders from their own customers, and therefore mainly for stocking purposes.<sup>348</sup>
- (529) Information from the market investigation also suggested that producers outside the EEA mostly do not behave as active sellers in the EEA, but rather as passive order-takers and that they do not consider the EEA as their main market. Non-EEA competitors for instance stated:

*"We produce all cold rolled products after receiving orders."*<sup>349</sup>

*"[...] \* does not have concerns about the proposed transaction as its main market is Asia, and not the EU and the US."*<sup>350</sup>

*"[...] most producers concentrate on their home markets, then select other markets outside of the producing locations based upon the attractiveness of the opportunities available to them or the tie-ins to their home market customers. Certainly not all producers pursue all markets. [...]"*<sup>351</sup>

- (530) The Notifying Party acknowledges that end customers rarely purchase imports directly. As a result, according to the Notifying Party, any explanations as to why they do not purchase imports are largely irrelevant. On the contrary, independent distributors purchase between [30-40]\*% and [40-50]\*% of their CR requirements from importers which implies that imports are an important substitute for European products.
- (531) The Commission notes that its assessment is focused on the market for the production and wholesale of CR. The Commission does not share the Notifying Party's position that the assessment from an end customer perspective is irrelevant. The market investigation confirmed that imports do not represent a reliable alternative for those customers that purchase their requirements of CR from producers, for instance because of their need to have a direct relationship with the supplier in terms of delivery agreements, special product features or quality, or additional services. For this reason, the Commission has carried out an assessment

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<sup>346</sup> Source: Form CO, ID 953.

<sup>347</sup> Ibid.

<sup>348</sup> See replies to Question 13 of Q6 and Q7.

<sup>349</sup> [...] \* reply to Q12, ID 8330.

<sup>350</sup> Minutes of call with **POSCO**, ID 2076.

<sup>351</sup> [...] \* reply to Q12, ID 5970.

of substitutability of European CR with imported CR, as discussed below in section 5.5.4.6 point 2).

- (532) As regards independent distributors which account for the majority of imports, the Commission notes that its analysis also refers to statements from and positions taken by independent distributors. Second, while imports may be a substitute for EEA produced CR for certain end users that purchase their product requirements via distributors, the key question is whether enough customers would switch to imports, directly or via distributors, to make a post-merger increase in price unprofitable for the merged entity. As will be discussed below, the Notifying Party's own econometric estimates of import reactions to changes in the relative price in the EEA imply that this is not the case. Past import reactions (which reflect import activities by distributors) are therefore consistent with the finding that imports are not a perfect substitute for the bulk of CR customers.
- (533) In view of the above, the Commission concludes that non-European competitors mainly import in the EEA via independent distributors and are not generally directly active in the market.

2) *Customers do not regard imports from Asia as a perfect substitute for EEA CR*

- (534) On the basis of information from the market investigation, the Commission considers that imports are not perceived by end customers as perfectly substitutable with European products.
- (535) Approximately [60-70]\*% of the direct customers replying to the relevant question<sup>352</sup> stated that in general non-European suppliers do not constitute a satisfactory alternative to European suppliers. Even more customers (79%) stated that they do not consider non-European suppliers as a satisfactory alternative to European suppliers for all families and grades of stainless steel products.<sup>353</sup>
- (536) There are a number of reasons why a majority of customers do not consider imports a satisfactory alternative to European products. These are listed and discussed below.

**i) Lead time for non-European CR is significantly longer than for European CR**

- (537) Having a fast and reliable lead time for shipments is a very important condition for the large majority of European customers. This is confirmed by the very large proportion of customers (98% of the respondents) who stated that delivery time is important for them.<sup>354</sup>
- (538) According to the Notifying Party, the estimated average transport time for shipments from Asia to Europe is about [...] days and the time for shipments from the U.S. to Europe is about [...] days.<sup>355</sup> This time needs to be added to the time required by

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<sup>352</sup> See Question 71 of Q3.

<sup>353</sup> See Question 72 of Q3.

<sup>354</sup> See Question 78 of Q3.

<sup>355</sup> Source: Form CO, ID 953.

the mill to produce the final CR ([...]\* weeks<sup>356</sup>), which can be estimated to be approximately the same in all geographic regions.

- (539) The Notifying Party's position is generally in line with the findings of the market investigation, although customers tend to disagree on the precise duration of the additional lead time needed to import CR from Asia. Customers for instance stated:

*"[...] \* has Asian suppliers. The shipping time is of at least 6 weeks. In total, it takes at least 9 weeks for European customers to get the stainless steel that they ordered in Asia compared to 3 weeks for stainless steel ordered in Europe."<sup>357</sup>*

*"At the moment, the company sources stainless steel only from Europe but not from Asia. One of the reasons for this is that European suppliers can guarantee a timely delivery, whereas lead time for imports from Asia may take up to three months."<sup>358</sup>*

*"In the last 5 years the company increased its imports from Asian suppliers, though it generally prefers to buy steel from European producers. Buying from Asian mills implies higher transaction costs and a lead time of 4 months due to shipping."<sup>359</sup>*

*"[...] \* also imports some stainless steel from the Far East (from China, South-Korea and Taiwan). The lead time for deliveries from those countries is longer than from Europe, up to 6-8 week."<sup>360</sup>*

- (540) The additional time required for shipments from Asia can create significant obstacles to many customers. [40-50]\*% of direct customers replying to the relevant question stated that they have refused to purchase CR from Asia because of the excessive time required to ship products from their location to the EEA.<sup>361</sup>

- (541) Many customers stated in their replies to the Commission's questionnaires that lead time can constitute an obstacle to buy CR from importers. This is because of the significant fluctuations in the price of the products, which create the need to keep stocks at the minimum level possible, and the need to avoid potential disruptions in the production process. Customers for instance stated:

*"short delivery time is mandatory also because of changing prices"<sup>362</sup>*

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<sup>356</sup> According to the Notifying Party, the average production time from order intake depends upon a number of factors, such as for example whether a product or an intermediary product, e.g. black hot band, is held in stock, or what the loading level of a mill is (i.e., whether there is sufficient space in the program to fit in another order); but in an unconstrained situation the time required to complete the production process is generally around [...] \* weeks. In the case of Inoxum, this time is estimated to be around [...] \* weeks. There are no significant differences with respect to grades or finishes.

<sup>357</sup> Minutes of call with [...] \*, ID 1113.

<sup>358</sup> Minutes of call with [Anonymous], ID 9284.

<sup>359</sup> Minutes of call with [...] \*, ID 8360.

<sup>360</sup> Minutes of call with [...] \*, ID 9120.

<sup>361</sup> See Question 79 of Q3.

<sup>362</sup> [...] \* Q3, ID 3474.

*"For our business we need high sourcing flexibility to respond to the daily market needs and to avoid high stock"*<sup>363</sup>

- (542) The Commission has also received similar feedback in a number of calls with customers:

*"[...] The objective is to keep enough stainless steel on site so as to respond to customer demand and avoid bearing the value of the stock. The necessary reactivity makes a potential procurement from Asia difficult, in particular because of lead time. Indeed, [...]\* has no insight to its clients' needs."*<sup>364</sup>

*"[...] \* does not have a constant production process and therefore requires flexibility with its purchases. Buying from Asia would imply potential delays due to the high lead time and quality risks that the company cannot accept."*<sup>365</sup>

*"Firstly, lead times for shipments from Asia are much longer than those required for production in the EEA. Delays in the shipment of goods are also frequent. A company like [Anonymous] cannot afford delays in the delivery as this would compromise its production cycle."*<sup>366</sup>

- (543) The findings above imply that when lead time is important (which is normally the case for [90-100]\*% of direct customers, see above paragraph (537)), imports are simply not an alternative for direct customers that purchase CR *ex-mill*.

- (544) The longer lead time required to ship imported products into the EEA may constitute an obstacle also for independent distributors. Distributors for instance stated:

*"If material is needed quickly, Asia is seldom an option"*<sup>367</sup>

*"In addition, delivery time for purchases in the Far East is generally longer than in the EEA. That is due to the long time required for the product to be shipped from Asia to Europe."*<sup>368</sup>

*"When we buy materials for stock the time isn't that im[p]ortant. However, if we purchase products for contracts delivery time from Asia is too long and uncer[t]ain."*<sup>369</sup>

- (545) In light of the foregoing, the Commission concludes that the lead time for non-European CR is significantly longer than for European CR.

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<sup>363</sup> [...]\* Q3, ID 2346.

<sup>364</sup> [...]\*Minutes of call with [...]\*, ID 9650.

<sup>365</sup> Minutes of call with [...]\*, ID 8345.

<sup>366</sup> Minutes of call with [Anonymous], ID 8418.

<sup>367</sup> [...]\* Q3, ID 2652.

<sup>368</sup> Minutes of call with [...]\*, ID 8349.

<sup>369</sup> [...]\*, reply to Q4, ID 2504.

**ii) The quality of Asian products is not constant and many customers expressed concern on quality related matters**

- (546) On average, the Commission's investigation revealed that the quality of CR produced by non-European importers can be considered comparable with that of European producers. A limited number of customers have also stated that the quality of Asian commodity products in certain instances can be even higher than that of European products, because of the relatively newer equipment used by Asian producers. One distributor for instance stated:

*"According with the Group's experience there is no average difference between European and Asian stainless steel quality. In certain instances, the quality of Asian products may even be higher because of the last generation mills active in the Far East"*<sup>370</sup>

- (547) However, a significant number of customers (46% of respondents) also stated that they have refused to purchase from Asian suppliers because of difference in quality in comparison with European producers.<sup>371</sup>

- (548) Firstly, a number of customers are hesitant about buying imported materials. This may be because of previous negative experience with Asian producers. Customers for instance stated:

*"[...] believes that in order to be able to purchase stainless steel products from Asia, a company requires local presence in that area. This is because a company would need to verify the quality of the material before shipment to Europe, in order to avoid disruption in the production cycle. For instance, it happened once to [...] that the company ordered stainless steel of a commodity grade from China through an Outokumpu service centre, and that the quality was not sufficient for use in its production."*<sup>372</sup>

*"We had serious doubts about the content of the available material-certificate (Did the actual material meet the requested mechanical and chemical composition)."*<sup>373</sup>

*"The products from Asia can be considered as an alternative to European products, some of them are even better quality than the quality of some European ones. However, some customers do not want to buy products from Asia and are willing to pay a higher price for European products."*<sup>374</sup>

- (549) Secondly, customers may have to carry out a qualification process before starting to source from Asian suppliers and may not be willing to start a such process, if they are uncertain of the outcome. Certain customers reported:

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<sup>370</sup> Minutes of call with [...]\*, ID 3220.

<sup>371</sup> See Question 77 of Q3.

<sup>372</sup> Minutes of call with [...]\*, ID 8345.  
<sup>373</sup> ID 2198.

<sup>374</sup> Minutes of call with [...]\*, ID 9132.

*"The company has agreements with service centres to buy exclusively coils produced in the European Economic Area (EEA). This is because the company has tested the quality and the specification of the EEA materials and it can be sure that these will comply with its requirements."*<sup>375</sup>

*"we do need to perform qualification programs before having [Asian producers] in our supplier's list"*<sup>376</sup>

- (550) Thirdly, a number of customers with specific requirements in terms of quality or origin cannot purchase CR in Asia. Customers for instance stated:

*"[...] also explained that certain special products cannot be purchased from Asia and certain high surface quality requirements crucial to [...] business can be only met by European mills. [...] indeed applies its own finishing and requires an underlying material of impeccable quality. These very high standards of quality can only be achieved by European mills and not by Asian mills or distributors."*<sup>377</sup>

*"[...] believes that the quality of commodity stainless steel products manufactured in the Far East is improving. As regards specialty grades and finishes, however, the quality of Far East producers is not comparable to that of the Europeans. [...] therefore believes that currently it would be difficult for customers purchasing specialty products to switch to Far East suppliers."*<sup>378</sup>

*"For its European plants it buys only in Europe. [...] makes wide use of the "Made in Europe" brand when dealing with its own customers and [...] incorporates coils with EU preferential origin in the manufacture of BPHEs in Europe, in order to be able to apply EU's preferential rules of origin on its final products."*<sup>379</sup>

- (551) It is therefore concluded that the quality of Asian products is not constant and many customers expressed concern on quality related matters.

**iii) Payment conditions for purchasing from Asia are generally less favourable**

- (552) The Commission has also found that the payment conditions for purchases in the EEA or from Asian suppliers are generally different. On the basis of information from the market investigation, the Commission considers that Asian competitors generally request payment upfront, while the European suppliers ask for payment at delivery or within a few months from delivery. Certain customers for instance stated:

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<sup>375</sup> Minutes of call with [...]\*, ID 9258.

<sup>376</sup> [...]\*, Q3, ID 2538.

<sup>377</sup> Minutes of call with [...]\*, ID 8404.

<sup>378</sup> Minutes of call with [...]\*, ID 8349.

<sup>379</sup> Minutes of call with [...]\*, ID 8941.

*"[...] , payment for orders in Asia is done upfront or in any case with guaranteed payment, i.e. letter of credit. As a result, customers are exposed to defects in the quality or delays in the shipment, as the handling of complaints and claims from Asian suppliers is generally poor. Moreover, purchasing from Asia requires having funds or credit available at the time of order, whereas European producers are normally granting delayed payment up to 30 or 60 days after delivery."*<sup>380</sup>

*"Payment conditions for orders in the European Economic Area (EEA) and Asia are also different and shorter. EEA shipments are guaranteed, and European producers normally sell on credit to their customers. On the contrary, payment for orders from Asia is usually upfront."*<sup>381</sup>

*"Moreover, considering that Asian producers require paying in advance, the buyer bears the risk of receiving stainless steel when market conditions have changed."*<sup>382</sup>

- (553) The differences in the payment systems may imply that certain customers, and especially companies with limited working capital, may find difficult to buy from Asia.
- (554) As a result, the Commission concludes that payment conditions for purchasing from Asia are generally less favourable.

**iv) The range of products available in Asia is limited and not capable of satisfying the needs of all European customers**

- (555) As discussed in particular in paragraph (68)-(69), there exist a multitude of different grades, shapes and finishes of CR. While European players normally produce the whole range (although with notable exceptions, for instance Outokumpu with martensitic CR), Asian suppliers mainly focus their product range on commodity products.
- (556) Customers with special requirements in terms of grades, shapes or finishes do not see Asian producers as a credible alternative to the European ones. Only as far as grades and finishes are concerned, a very large majority of [70-80]\*% of customers responding to the relevant question stated that they do not consider non-European suppliers as a satisfactory alternative to European suppliers for all families and grades of stainless steel products.<sup>383</sup>
- (557) Certain customers for instance stated:

*"Fourthly, Far East producers do not manufacture the whole range of products that are produced by European mills. This is the case for instance of [...] 2 mm 316 [...] 2E finish [...] or hot rolled 2 mm 304, [...]. If a customer requires a particular grade or product that is not available in the Far East,*

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<sup>380</sup> Minutes of call with [Anonymous], ID 8418.

<sup>381</sup> Minutes of call with [...]\*, ID 8349.

<sup>382</sup> Minutes of call with [...]\*, ID 3220.

<sup>383</sup> See Question 72 of Q3.

*that it is generally easier for that customer to buy all or a large part of his or her requirements in the EEA.*<sup>384</sup>

*"In addition, Far East producers supply basic materials, to the extent that it is required to arrange further processing (e.g. cut to length or certain finishers) with service centres. These additional services normally increase the overall cost of the final product to the detriment of the customer."*<sup>385</sup>

*"In Europe, only the merging parties and Aperam are able to produce special widths of coils. Acerinox and Asian companies are mainly active in the field of standard widths. [...] the material flow from the steel mill with the exact width must be very precise to match the production for each item."*<sup>386</sup>

**v) Conclusion**

(558) As a result of the above, the Commission considers that imports are not a perfect substitute for European CR.

3) *The price competitiveness of CR from the Far East depends on market circumstances*

(559) In addition to having concluded that imports are not perfect substitutes, the Commission has also found sufficient evidence that imports cannot be considered to constitute a constant constraint under all market circumstances and at all times.

(560) On the contrary, the Commission has found that the price competitiveness of CR from the Far East depends on market circumstances.

**i) The fluctuations in the nickel price have an influence on independent distributors' purchase patterns**

(561) Nickel is the most important component for the calculation of the alloy surcharge. As such, the evolution in the price of nickel can have serious repercussions on the final price of CR paid by customers.

(562) The trend in the price of nickel has important consequences on the behaviour of independent distributors. When the nickel price is expected to increase, distributors tend to increase their purchases with the goal of reselling such products at a later date and a higher price. This is known as "stocking". On the other hand, distributors reduce their inventories in anticipation of lower nickel price ("de-stocking").<sup>387</sup>

(563) Given that independent distributors account for [90-100]\*% of the imports of CR from non-EEA countries, the fluctuations in the nickel price heavily influence the level of imports due to the cyclical stocking and de-stocking dynamics caused by oscillations on the nickel price. These strategies however apply equally to Asian and

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<sup>384</sup> Minutes of call with [Anonymous], ID 8418.

<sup>385</sup> Minutes of call with [Anonymous], ID 9075.

<sup>386</sup> Minutes of call with [Anonymous], ID 8521. Note that this customer purchases HR. However, the statement is also applicable to CR as it refers to the width of the coil.

<sup>387</sup> Source: Form CO, ID 953.

European competitors and in principle affect both producers to the same extent, although stocking and de-stocking are likely to have more impact on Asian producers, given that, unlike European producers, they rely almost entirely on independent distributors. The difference in the pricing system between the EEA and Asia, however, implies that trends in the nickel price have also a significant influence on the distributors' decision to purchase Asian or European products.

- (564) When purchasing from Asian suppliers, the price of the alloys (including nickel) is fixed on the day of the order as part of the full price. On the contrary, European producers charge the alloy surcharge (which includes nickel and other alloys) on the day of delivery, on the basis of the average of alloys prices of the month before delivery. As a result, the difference in the time when the price for the alloys is fixed between the two systems can amount to up to 4 months.<sup>388</sup>
- (565) Firstly, at any given time there can be an even greater difference between the total price of CR in Asia and Europe, because of the different speed at which the two pricing systems reflect the price of alloys. The fluctuations in the nickel price may therefore increase substantially the price gap between the two geographic areas and make it economically profitable to purchase in Asia or in Europe. It follows that in certain situations purchasing from Asia can be too expensive.
- (566) Secondly, independent distributors have an incentive to buy in Asia, rather than in the EEA, when nickel price is expected to increase. On the contrary, when the nickel price is expected to decrease, distributors find it more profitable to purchase from the EEA to postpone in time the payment of the alloys. It follows that in a market with declining nickel, independent distributors are unlikely to purchase from Asia and therefore the potential competitive constraint posed by Asian players is significantly weaker.
- (567) Independent distributors replying to the Commission's questionnaire have confirmed that expectations on nickel price are a key element for their decision to purchase from Asian suppliers.<sup>389</sup> 74% of distributors responding to the relevant question stated that their decision to buy from a European or a non-European (especially Asian) supplier is influenced by their expectations on the future price level of nickel.<sup>390</sup> On average, expectations on the price of nickel were given [...] out of 10 points for how much they influence the decision to purchase from Asia ([...] was the most important factor and scored [...] on average).<sup>391</sup>
- (568) These findings have been confirmed by distributors and customers in the context of phone calls and replies to questionnaires:

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<sup>388</sup> See above, paragraphs (92)-(94).

<sup>389</sup> See question 11 of Q6/Q7.

<sup>390</sup> See question 109 of Q4.

<sup>391</sup> There are doubts that [...] and [...] intended to assign [...] out of 10 as ranking to expectations on nickel price, given that in both cases the factor marked with [...] would be price and this is not coherent with the replies provided by remaining distributors. Rather, it appears that these two distributors consider expectations on the nickel price as the most important factor influencing their decisions to import after price. Accordingly, it is likely that both the average ranking of price and nickel price should be revised upwards.

*"Imports of stainless steel went up in 2005-2006 and collapsed in 2009. Price of nickel is a constraint on imports. The collapse of nickel price could limit imports (in addition to the exchange rate)."*<sup>392</sup>

*"[Anonymous] considers buying from Far East producers as a hedging strategy with regard to the part of price constituted by alloys. This is because the price for purchases in the Far East is fixed at the time of purchase. This is not the case for purchases from European producers, who split the price between base price and alloy surcharge (calculated at the time of delivery). For this reason, a comparison between prices in the EEA and prices in the Far East is normally very difficult."*<sup>393</sup>

- (569) The Commission also notes that the peak of imports in 2006 anticipated the peak in the nickel price by a few months. This appears to confirm that distributors adjust their level of purchases in Asia on the basis of expectations on the nickel price. The trends in nickel price and imports also appear to be relatively correlated, not only in the period 2006-2007 as shown in Figure 14.

**Figure 14: [...]\***

**Source: Source: Form CO, ID 953 and Form CO, Annex 41, ID 1093**

- (570) The Notifying Party submitted a study on the alleged lack of correlation between the price of nickel and the level of imports<sup>394</sup>. In that regard, the Commission notes, firstly, that on the basis of information from the market investigation, expectations on the nickel price evolution (and not only the price itself) appear to have an influence on imports. Secondly, the trend in the nickel price and the price gap appear to be relatively highly correlated. It may therefore be difficult to empirically distinguish between the effect of the price gap on imports and the effect of the nickel price. The apparent lack of correlation between nickel and imports, once the price gap is taken into account in the Notifying Party's study is therefore not inconsistent with the view that expectations about nickel prices are important drivers of purchasing decisions.
- (571) In view of the above, the Commission considers that imports may be considered competitive vis-à-vis European CR production only in cases where the difference in the alloys price between Asia and Europe allows independent distributors to purchase at acceptable conditions. Furthermore, the Commission concludes that imports are not likely to constitute a sourcing alternative when customers, and in particular distributors, expect the price of nickel to decrease.
- (572) As a result, the fluctuations in the nickel price have an influence on independent distributors' purchase patterns.

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<sup>392</sup> Minutes of call with [...]\*, ID 2004.

<sup>393</sup> Minutes of call with [Anonymous], ID 9075.

<sup>394</sup> "The Effect of Nickel Prices of CR Imports, Jerry Hausman, MIT, April 27, 2012" ID 3384.

**ii) The currency exchange rate is also important in influencing the decisions to purchase CR from Asia**

(573) Customers who wish to purchase CR in Asia are normally asked to pay in USD. As a result, the currency exchange rate between EUR and USD is also an important variable in determining independent distributors' decisions of purchasing from Asian suppliers. This finding has been confirmed by calls that the Commission had with customers, who stated:

*"Currency fluctuations are also an issue that limit the possibility of purchasing from the Far East. All products purchased in the Far East from distributors or final customers are paid in USD. Thus, depending on the exchange rate, it may or may not be feasible to purchase outside the EEA."*<sup>395</sup>

*"As regards the role of currency exchange, as the EUR strengthen against the USD the imports' prices from the Far East tends to be more competitive. However, in order to minimize risks [Anonymous] asks, when possible, quotations in EUR. This is because the company's objective is not to speculate either on nickel or currency but to receive a correct market price."*<sup>396</sup>

(574) Independent distributors replying to the Commission's questionnaires have confirmed the statements above, given that the role of currency scored [...] out of 10 among the factors influencing imports.

(575) In view of the above, the Commission concludes that imports may be considered competitive vis-à-vis European CR production only in cases where the exchange rate between EUR and USD allows independent distributors to purchase from Asia at acceptable conditions. As a result, the currency exchange rate is also important in influencing the decisions to purchase CR from Asia.

**iii) Asian producers' competitiveness depends to a large extent on Nickel Pig Iron (NPI)**

(576) Asian producers, and in particular those active in China, use nickel pig iron (NPI), which is an alternative and less expensive source of nickel for stainless steel production. NPI trades at significantly lower prices than nickel (LME nickel price of 18-20 000 USD/t). European producers do not use NPI. This is because the use of NPI in the steel manufacturing process is highly energy intensive and not environmentally acceptable and the purchase of NPI from China is not feasible because of export duties of about 20%. As a result, NPI is effectively only available in China.<sup>397</sup>

(577) NPI is mainly used for the production of austenitic steel, and in particular 200 and 300 series. In 2010, NPI accounted for [30-40]\*% of the production of stainless steel in China. This level represents a significant increase from 2008, when NPI was used in only [20-30]\*% of the production. The Notifying Party submits that the

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<sup>395</sup> Minutes of call with [...]\*, ID 8404.

<sup>396</sup> Minutes of call with [Anonymous], ID 8418.

<sup>397</sup> Source: Form CO, ID 953.

production of NPI in China is expected to increase by [50-60]\*% in the period 2011-2016.<sup>398</sup>

- (578) The Notifying Party acknowledges that "*the use of NPI leads to significant cost advantages in case of a LME nickel price of [...]\** or more."<sup>399</sup> The Commission however notes that the effects of the nickel price on the efficiency of using NPI in the production of stainless steel appear to be more far-reaching. Internal documents of the Parties show that when the nickel price is lower than a certain threshold, any possible appreciable advantage in production costs enjoyed by Asian suppliers disappears. As a result, Chinese producers lose their competitiveness vis-à-vis European players.
- (579) On slide 28 of a presentation dated 30-31 May 2010, shown in Figure 15,<sup>400</sup> Outokumpu states that "*[a]t current cost levels, many Chinese players are cost competitive in Europe*". The underlying assumption is that the nickel price is [...] USD/t (average price for the first quarter of 2010). On slide 29, Outokumpu presents an analysis of production costs for the main CR producers. As can be seen, with a nickel price of approximately [...] USD/t (average price for the first quarter of 2009), Outokumpu is one of the most competitive players in the world, with production costs by far inferior to those of the majority of Asian producers (e.g. Yusco, Jindal, Baosteel, Jisco, etc.).

**Figure 15:** [...]\*

**Source:** ID 6432.

- (580) The trend in the nickel price has therefore a very significant influence on the relative competitiveness of European and Asian suppliers. According to Outokumpu's slide 30 below, the cost of production for NPI is approximately [...] USD/t. As a result, Chinese producers have no advantage when the nickel price is below approximately that threshold and Outokumpu becomes more competitive than all other Chinese players.

**Figure 16:** [...]\*

**Source:** ID 6432.

- (581) In view of the above, the Commission concludes that imports from Asia, and in particular China, may be considered competitive vis-à-vis European CR production only in cases where the nickel price is sufficiently high to increase Asian producers' competitiveness vis-à-vis European players. As a result, Asian producers' competitiveness depends to a large extent on Nickel Pig Iron (NPI).

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<sup>398</sup> Form CO, ID 953.

<sup>399</sup> Ibid.

<sup>400</sup> ID 6432.

**iv) Fluctuations in nickel prices, currency exchange rate and relative cost competitiveness of NPI create "windows of time" in which imports cannot exercise a competitive constraint on European producers**

- (582) The Notifying Party argues that the Commission's conclusions on the influence that nickel price and currency exchange rate have on imports are irrelevant to the question whether imports increase when EEA relative prices increase. According to the Notifying Party, all else being equal (included the observed nickel price and exchange rate fluctuations), if a price increase imposed by the merged firm further increases the Asia/Europe price gap, it can be expected that distributors and processors would quickly and opportunistically increase imports in response.
- (583) The Commission notes that the Notifying Party confirms that its position that imports increase as a reaction to an increase in price in the EEA holds only "all else being equal". As a result, the Notifying Party appears to confirm that fluctuations in the nickel price or currency exchange rate may have an impact on the level of imports, opening and closing "windows of time" when importing may be economically profitable and others where it may be not.
- (584) In these latter situations, an attempt from a hypothetical monopolist to increase prices would not be constraint by imports, even if one accepted the Notifying Party's view that imports exercise an almost perfect competitive constraint on European producers. Furthermore, with specific regard to nickel, the results from the Commission's market investigation show expectations on future nickel price to have an important influence on distributors' and customers' decisions to purchase from Asia. The Notifying Party does not comment on this finding, given that its position is based on the "observed nickel price".
- (585) In view of the above, the Commission considers that fluctuations in nickel price, currency exchange rate and relative cost competitiveness of NPI create "windows of time" in which imports cannot exercise a competitive constraint on European producers.

**v) Conclusion**

- (586) It is therefore considered that the price competitiveness of CR from the Far East is inconstant and depends on market circumstances.
- 4) *It is unlikely that in the future imports will exercise an increasing competitive pressure on European producers because of new entry or expansion*
- (587) Even if the constraint posed by imports may not be strong at present, it would be possible that it will increase in the future. The Commission has therefore assessed whether there are sufficient elements to reasonably assume that competition from imports will increase within a timeframe relevant for the merger assessment.

**i) POSCO's new plant in Turkey is unlikely to affect the EEA market to a significant extent**

- (588) The Korean producer POSCO is constructing a cold rolling facility in Turkey. The project is due to be completed by April 2013 according to public sources.<sup>401</sup> Turkish consumption of CR flat products is estimated at about [...] kt/y and the capacity for the POSCO mill is believed to be about [...] kt/y. The Notifying Party submits that the planned capacity suggests that POSCO intends to capitalize on Turkey's geographic position to supply CR products to neighbouring areas including Eastern and Southern Europe.
- (589) The Commission's investigation suggests that POSCO's project in Turkey will not influence the EEA market to a significant extent in terms of new entry. POSCO is already active in the EEA as one of the major importers. Customers and competitors have confirmed that POSCO is unlikely to supply the EEA from Turkey. On the contrary, POSCO has confirmed that the plant is intended to supply the Turkish market.<sup>402</sup> Other participants in the market investigation stated that it is more likely that POSCO will focus on high growth markets like Turkey, the Middle East and Russia.<sup>403</sup>
- (590) As regards the Parties' and their competitors' sales in Turkey, it is likely that POSCO's entry in Turkey will cause some losses in terms of orders. This may therefore lead to freeing some capacity that could be potentially used for the EEA market. In 2011, the Parties' combined sales in Turkey amounted to approximately [...] kt.
- (591) It is unlikely however that the Parties will lose a very significant share of their sales to POSCO. This is because as discussed above EEA CR customers tend to multisource. On the assumption that the behaviour of Turkish customers is the same as that of EEA customers, Turkish customers are unlikely to switch all of their orders to a single supplier. In addition, it is estimated that the Turkish market will grow at approximately [5-10]\*% per year in the next three years and it is therefore likely that the increasing demand will contribute to keep the losses in terms of orders at relatively low levels.
- (592) As a result, the Commission concludes that POSCO's new plant in Turkey is unlikely to affect the EEA market to a significant extent.

**ii) There are elements suggesting that the cost competitiveness of Asian players in the future is likely to decrease**

- (593) One of the Parties' competitors, Aperam, appears to take the position that Asia suppliers will become less competitive in the future. In a presentation to investors,<sup>404</sup> Aperam expresses the view that the cost of production for Chinese players is expected to rise. This is because of (i) inflation expected to remain high; (ii) slow

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<sup>401</sup> See for instance [http://www.koreatimes.co.kr/www/news/biz/2011/09/123\\_95763.html](http://www.koreatimes.co.kr/www/news/biz/2011/09/123_95763.html)

<sup>402</sup> Minutes of call with POSCO, ID 2076.

<sup>403</sup> Minutes of call with [...] ID 9097 and POSCO ID 2076.

<sup>404</sup> Form CO, Annex 22, ID 1048.

but progressive revaluation of local currency; (iii) reduction of productivity as capacity expansion stabilises and (iv) low levels of nickel price reducing or removing the advantage of NPI.

(594) In its market investigation, the Commission has found elements suggesting that the cost competitiveness of Asian players in the future is likely to decrease, in particular as far as Chinese producers are concerned. These are discussed below.

**iii) The spare capacity of Asian players is likely to decrease and the incentive of these firms to enter and expand in the EEA market will be lower than at present**

(595) In a recent interview, Aperam's CEO has been reported as stating "that overcapacity in Asia is progressively being reduced by the growth in local demand. This trend should prevent Asian imports from becoming a larger feature of the European market, although the industry has to be vigilant to ensure European imports are not subsidised."<sup>405</sup>

(596) In its Reply to the SO, the Notifying Party however argues that available evidence does not support the finding that capacity utilisation in Asia, and in particular in China, is expected to increase in the future.

(597) The Commission notes that the most recent data on capacity utilisation submitted by the Notifying Party would appear to confirm that capacity utilisation in China as well as in the rest of the Asia and the world is expected to increase, as can be seen from Table 12 below (source: CRU, May 2012).

**Table 12: [...]\***

**Source: Reply to the 6(1)(c) decision, Annex IX, ID 4753**

(598) As a result, the Commission concludes that spare capacity of Asian players is likely to decrease and the incentive of these firms to enter and expand in the EEA market will be even lower than at present.

**iv) Changes in the regulatory environment as regards the exports of nickel ore from Indonesia are likely to negatively impact Chinese players' competitiveness**

(599) Chinese producers import nickel ore mainly from the Philippines and Indonesia, each representing about [50-60]\*% of total nickel ore imports into China.<sup>406</sup> As [50-60]\*% of imports from the Philippines are used for the production of pig iron, Indonesia is the main source of nickel ore for Chinese stainless steel producers.

(600) As of May 2012, Indonesia has imposed a 20% tax on all exports of nickel ore. The tax is expected to turn into a complete stop of exports by 2014.<sup>407</sup> In principle, such a measure is capable of increasing significantly the cost of production for Chinese

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<sup>405</sup> ID 8904.

<sup>406</sup> Form CO, Annex 22, ID 1048.

<sup>407</sup> Source Form CO. ID 953.

producers. The Notifying Party however submits that as a reaction to the measure, Chinese producers would build their own smelters in Indonesia to process the ores there.

- (601) The Commission notes that the Notifying Party's position does not appear to be supported as the Commission is not aware of any Chinese producer that moved its production facilities to Indonesia since the enactment of the tax. In addition, the Parties' view does not appear to be shared by industry analysts. An article reporting Citigroup's view for instance states:

*"In the short term, the bank does not expect the legislation to have a significant impact on China's NPI production. Citigroup states that China's NPI producers are holding two- to three-months worth of ore inventory, and some reports suggest there is up to 12 million mt of nickel laterite ores at ports in China. But in the second half of the year, Citigroup believes there will start to be a noticeable production impact."*<sup>408</sup>

**(v) Conclusion**

- (602) It is therefore concluded that the competitive pressure coming from imports in the future is not likely to increase and may even decrease.

- 5) *Quantitative evidence submitted by the Notifying Party confirms that import reactions would not be sufficient to prevent a price increase*

**i) The Notifying Party's arguments based on its quantitative evidence on imports are flawed**

- (603) The Notifying Party argued that the competitive constraint from imports would be strong enough to defeat any price increase resulting from the proposed transaction. In support of its arguments relating to imports the Notifying Party submitted a series of econometric studies.<sup>409</sup>

- (604) These submissions by the Notifying Party present econometric estimates of (i) reactions by imports to changes in the price difference between the EEA and Asia as well as (ii) the effect of the share of imports on the price of CR in the EEA. The Notifying Party's studies further contain critical elasticity analyses on the basis of the econometric results, i.e. they contain calculations for the critical value of the market elasticity of demand for CR stainless steel above which a hypothetical monopolist in the EEA would not find it profitable to increase price given the estimated import response. If the actual demand for CR stainless steel in the EEA is more elastic than this critical value then, according to these studies, even a perfect cartel of European producers would not find it profitable to increase prices.

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<sup>408</sup> See <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/Metals/8347036> .

<sup>409</sup> For example, "Report on Cold and Hot Rolled Austenitic and Cold Rolled Ferritic Imports, Jerry Hausman, MIT, December 8, 2011" at Annex 55 of the Form CO (ID1138); "Critical Elasticity Calculation, Jerry Hausman, December 19, 2011" at Annex 54 of the Form CO (ID1135); "Response to Commission Remarks, Jerry Hausman, March 19, 2012" at Annex 54 of the Form CO (ID1136). A more complete list of the Notifying Party's submissions on imports is given at Annex I.

- (605) Based on an estimated range from the US International Trade Commission for the elasticity of stainless steel sheet and strip demand in the US, the Notifying Party considers the elasticity of the market demand for CR stainless steel in the EEA to be in the range -1 to -0.5.<sup>410</sup> According to the Notifying Party's study, the critical elasticity calculated on the basis of the econometric estimates is lower (in absolute value) than the market elasticity in the EEA which the Notifying Party's considers to be in the same range as the US ITC estimate for demand in the US. The Notifying Party's conclusion from this is that even a hypothetical monopolist (or, alternatively, a perfect cartel) in the EEA would not find it profitable to increase prices in the EEA because of the constraint from imports. This would imply that the import response by itself is strong enough to defeat any price increase by the combined entity post-merger.
- (606) The Notifying Party further claimed that the calculations based on the estimated system of two equations in these studies can approximate the equilibrium effect arising from the proposed transaction (including reactions from EEA rivals) and that the results show that there could not be a price effect arising from the proposed transaction.<sup>411</sup>
- (607) The Commission does not exclude that there may be a certain competitive interaction between European producers and imports. This is demonstrated, *inter alia*, by the relatively high level of imports into the EEA in recent years (between [10-20]\*% and [20-30]\*% of the European consumption of CR).
- (608) However, the evidence provided in the Notifying Party's economic studies on imports does not support the view that imports would be sufficient to prevent a potential price increase from the merged entity. The approach is not consistent with a standard critical elasticity analysis for a hypothetical monopolist, nor can it be interpreted as an analysis or approximation of post-merger equilibrium effects as was also argued by the Notifying Party. A detailed critique of the Notifying Party's analysis of imports is contained in Annex I.
- (609) The main problem with the Notifying Party's approach is that it applies a two-step procedure to compute the constraining effect of imports.
- (610) In the first step, which the Commission considers to constitute a reasonable approach, the Notifying Party's studies calculate the increase in the share of imports that would result from a hypothetical increase in the EEA price. The increase in the share of imports is based on a coefficient estimate from the first (or "import share") equation in the studies. This implies that in order for imports to increase, prices have to rise.
- (611) In a second step, however, the Notifying Party claims that the increase in import share will in turn depress EEA prices which would partially defeat the initial

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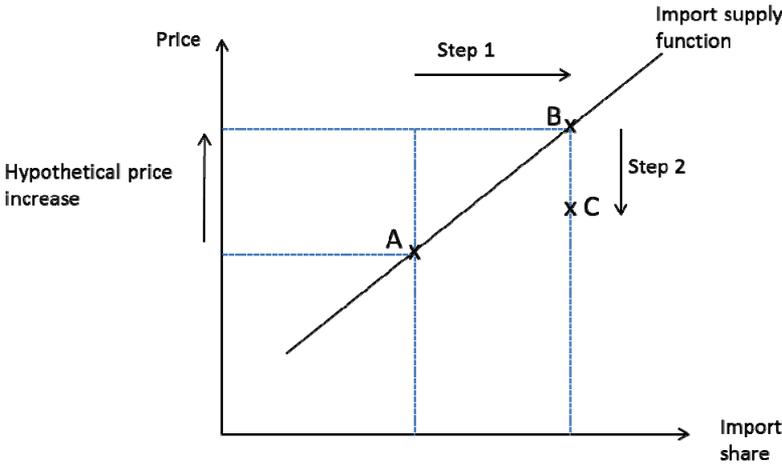
<sup>410</sup> US International Trade Commission, "Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the United Kingdom", publication 3788, July 2005. ID 491.

<sup>411</sup> See, for example, the Notifying Party's submission "Explanation of 'Critical Elasticity' Analysis, Jerry Hausman, MIT, June 2, 2012", ID4754.

hypothetical price increase. The partial defeat is based on a second econometric equation in these studies.

- (612) This approach, and particularly the second step, is inconsistent with a standard critical elasticity analysis or a standard hypothetical monopolist test which are the relevant methods to assess whether imports (by themselves) are a sufficient competitive constraint to prevent price increases post-merger. The question a standard critical elasticity calculation would ask in the present case is: at what level for the elasticity of market demand, and given the estimated increase in the share of imports, would the volume loss to a hypothetical monopolist become so large that maintaining the price increase would be unprofitable for the hypothetical monopolist.
- (613) A "partial defeat" of a price increase as used in the Notifying Party's approach is not interpretable in this standard framework. The hypothetical monopolist would choose a price increase and then suffer a reduction in demand *at the chosen price increase*. This demand reduction would have two components. Firstly, total EEA market demand would be lower at the increased price. The degree of this reduction depends on the elasticity of market demand. Secondly, the share of demand supplied by imports would increase. Because of the increase in the share of imports, the hypothetical monopolist would face a greater reduction in demand than if there was no change in the share of imports. Nevertheless, the hypothetical monopolist would accept the volume reduction that is necessary *to maintain the chosen price increase*. The question is then whether this chosen and maintained price increase is profitable for the hypothetical monopolist.
- (614) The import reaction necessary for this calculation is estimated by the Notifying Party's first econometric equation. Estimates from the Notifying Party's second equation (which are used by the Notifying Party to derive claims about a partial defeat of the price increase) are entirely irrelevant for this standard framework. As the Commission's analysis on the basis of the standard framework for a hypothetical monopolist in paragraphs (620) to (625) below shows, given the estimated range for the market demand elasticity and the Notifying Party's estimates on margins and import reactions, a hypothetical monopolist would find a price increase profitable. This implies that imports by themselves are not a sufficient constraint to prevent price increases in the EEA.
- (615) The Notifying Party's two-step procedure to calculate the "partial defeat" of a price increase is also flawed because it substantially overstates the constraint from imports by combining the import share that would result from the initial price increase with a much lower net price increase. This is illustrated in the figure below which illustrates the effect of Notifying Party's two step procedure along the import supply function as estimated by the Notifying Party's first econometric equation (i.e. the "import supply function").

**Figure 17: Illustration of the import supply function and the Notifying Party's two-step approach to calculate the price constraint from imports**



- (616) The initial combination of price and import share of EEA demand supplied by imports corresponds to point A in the figure. The Notifying Party's approach then assumes a hypothetical price increase in the EEA and calculates, in a first step (and based on the estimates from his first equation) the increase in import share in reaction to the hypothetical price increase. The combination of increased price and increased share corresponds to point B in the figure which is consistent with the Notifying Party's estimated import supply function. The Notifying Party then claims that increased imports will in turn depress price in the EEA in a second step. The combination of import share and "net" price increase corresponds to point C in the figure. The crucial mistake in this argument is that point C lies below the estimated import supply function and is hence inconsistent with the Notifying Party's own estimates of how imports would react to a change in the EEA market price.
  
- (617) While Point B corresponds to the import share that would be observed if the market price in the EEA rose by the hypothetical amount, the import share that would be consistent with the "net" price increase after the Notifying Party's second step (which corresponds to the vertical difference between points C and A in the graph) would be much lower. Combining the import response for the initial hypothetical price increase with a lower net price increase (as illustrated in point C) in the calculations, therefore substantially overstates the import response and hence the extent to which imports constrain prices in Europe (even on the basis of the Notifying Party's own econometric results).<sup>412</sup> This further illustrates why the Notifying Party's approach is flawed.

<sup>412</sup> The fact that the Notifying Party's critical elasticity calculations combine the increase in import share that would result from an initial price increase of 5% with a much lower net price increase after a "partial defeat" of the initial price increase (i.e. that the critical elasticity calculations can evaluate the import response at a point corresponding to point C in the figure above rather than along the import supply function) is apparent from the discussion at the bottom of page 2 of the Notifying Party's submission "Explanation of Professor Hausman's critical elasticity calculation" dated 27 February 2012 (ID457). This submission explicitly states that the import share increase of [0-5]\* percentage points which results from a 5% increase in the (base) price is combined with a net (base) price increase of [0-5]\*% in the critical elasticity calculation. See also the Notifying Party's submission "Critical Elasticity

(618) The Notifying Party's analysis also cannot approximate the equilibrium resulting from a merger as the Notifying Party claimed. The Notifying Party's second econometric estimation equation attempts to estimate the effect of imports and other variables on the market price. The estimation results from this equation may at best provide a reduced form description of market behaviour pre-merger.

(619) However, the assessment of any merger focuses on the question of how the change brought about by the merger will affect post-merger outcomes. There is nothing in the Notifying Party's estimation equations that would allow approximating the effect of the change in market structure resulting from the proposed transaction. The Notifying Party's analysis therefore cannot be interpreted as an analysis of equilibrium effects of the proposed transaction (or an approximation thereof).

**ii) The Notifying Party's quantitative evidence implies that imports are not a sufficient constraint**

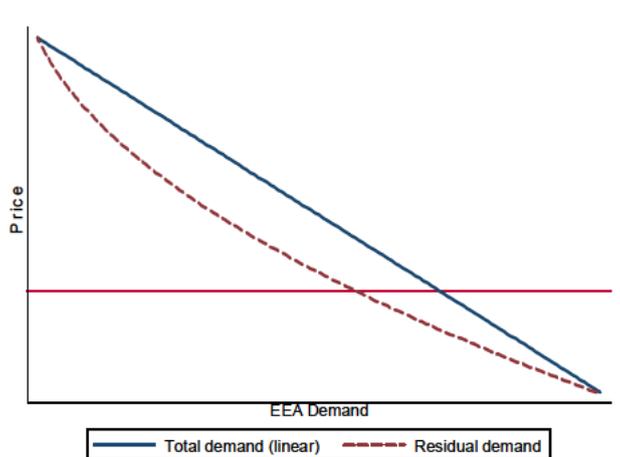
(620) In the Commission's view, any evaluation of the extent to which imports react to changes in EEA price, and hence of the extent to which imports constraint EEA prices, would have to be performed along the import supply function. In fact, the competitive constraint from imports on EEA producers arising from the fact that imports will increase if prices in the EEA rise can be evaluated by examining competition between EEA suppliers against the *residual* demand function after imports. The residual market demand for CR in the EEA which is supplied by EEA producers is obtained by subtracting the supply of imports from the total market demand in the EEA.

(621) EEA market demand and residual demand for EEA producers after imports is illustrated in Figure 18. For the purpose of this illustration, the figure assumes that market demand is linear and that, in line with the Notifying Party's first estimation equation, the share of imports increases with the EEA price (relative to the Asian price). Market demand is represented by the solid line. The residual demand, which is the demand faced by EEA producers after imports have been subtracted from market demand, is represented by the dashed line. At the current market price (indicated by the horizontal line), around [20-30]\*% of EEA demand is supplied by imports. The residual demand faced by EEA producers is therefore around [80-90]\*% of market demand at the current market price.

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Calculation, Jerry Hausman, December 19, 2012" (ID1135) in which it is also specifically claimed that this approach is a "Hypothetical Monopolist Scenario".

**Figure 18: Illustration of market demand and residual demand after imports (for a liner market demand and based on the Notifying Party's import share equation)**



- (622) Because the import share increases as prices increase, the residual demand faced by EEA producers will be considerably more elastic than market demand (in the relevant range). For example, if the aggregate demand elasticity is -1 (which is at the elastic end of the range which the Notifying Party considers a reasonable estimate for the EEA market elasticity<sup>413</sup>), and at the price gap coefficient used by Notifying Party in its critical elasticity calculations, the elasticity of residual demand is -1.64 at the pre-merger price.<sup>414</sup> The fact that the residual demand is considerably more elastic than the market demand reflects the constraint imposed on EEA prices by imports. A hypothetical monopolist in the EEA considering a price increase would assess the profitability of this price increase against this residual demand function. The residual demand function captures the full constraining effect of imports on EEA prices. As the Notifying Party's estimates of import reactions to price changes capture imports via all channels (i.e. via distributors as otherwise), any constraint on the merging Parties which arises because distributors can import more if prices rose is also fully accounted for by the elasticity of the residual demand function.
- (623) Evaluating the profitability of a price increase in the EEA for a hypothetical monopolist against the residual demand function – which is fully in line with the correctly formulated standard hypothetical monopolist test (or alternatively a critical elasticity analysis) shows that the import reaction (as estimated by the Notifying

<sup>413</sup> Notifying Party's submission, "Critical Elasticity Calculation, Jerry Hausman, December 19, 2011", page 3, ID 1135.

<sup>414</sup> As the residual demand is the product of market demand times the share of demand not supplied by imports, the elasticity of residual demand is the sum of the elasticity of market demand and the elasticity of the share of demand not supplied by imports. The elasticity of the share not supplied by imports is given by the negative of the percentage point increase in the import share per percentage point increase in price divided by the share not supplied by imports. The approximate price coefficient used by the Notifying Party's critical elasticity calculations is [...] (which gives the percentage point increase in the import share per 1 USD price increase multiplied by 100). Given observed market prices (including the allow surcharge and the base price), this coefficient translates into a [...] percentage point increase in the import share in response to a 1% increase in the market price. At an initial import share of around [20-30]%, the elasticity of the share not supplied by imports is hence [...] / (1 - [...]) = -0.64. The elasticity of the residual demand is then -0.64 - 0.75 = -1.39 at a market demand elasticity of -0.75 and -0.64 - 1 = -1.64 at a market demand elasticity of -1.

Party's first equation) is insufficient to make a price increase unprofitable. In particular, the hypothetical monopolist will find it profitable to increase prices if the percentage margin on sales is below the inverse elasticity of residual demand (in absolute value). If so, the loss of profit margin on sales that are lost as a result of the price increase (as a result of increased imports and the aggregate reduction in demand) is outweighed by the increase in profits on the volumes that the hypothetical monopolist retains. With a residual demand elasticity of -1.64, a price increase will be profitable if the monopolist's profit margin is less than 61% of sales (including the alloy surcharge). The evidence is that profit margins, in terms of sales price are around [20-30]\*% of the total price<sup>415</sup> i.e. much lower than the 61% required to make a price increase unprofitable.<sup>416</sup>

- (624) When correctly interpreted, the Notifying Party's econometric estimates from their import share equation therefore imply that a hypothetical monopolist would find it profitable to increase prices, even if the elasticity for the market demand is at the upper end of the range estimated by the US ITC which the Notifying Party considers reasonable for the EEA. Even at the elastic end of the range for the elasticity of demand the hypothetical monopolist's margin would have to exceed three times the incremental margin estimated by the Notifying Party for a hypothetical monopolist not to find it profitable to increase prices.
- (625) The Notifying Party's econometric submissions therefore do not support the conclusion that imports are sufficient to constrain a likely price increase post-merger. A correct application of the hypothetical monopolist test shows that the competitive constraint from imports falls substantially short of what would be required for imports to prevent price increases in the EEA.

**iii) The Notifying Party's arguments after the Statement of Objections do not change the Commission's assessment**

- (626) Under the heading "Quantitative evidence on the competitive pressure from imports", the Notifying Party's Reply to the SO notes that the Commission accepts the estimates from the Notifying Party's first equation measuring import reactions to changes in the difference between prices in Europe and Asia.<sup>417</sup> The Notifying Party then criticises a statement in Annex I to the SO which noted that the fact that the existence of substantial lags between the time of order and the time of delivery indicates that the use of a lagged price gap variable (which was used in earlier versions of the Notifying Party's estimates of the import response) is more appropriate than the higher estimates from the Notifying Party's more recent econometric submissions which used the contemporaneous price gap. The Notifying Party argues that this argument is incorrect because the current price gap is a better

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<sup>415</sup> The Notifying Party's submission "Response to CET Comments on Marginal Cost Efficiencies, Compass Lexecon, July 6, 2012" (ID8730) estimates that marginal costs are (on average across products categories) around [80-90]\*% of the price which implies a profit margin of [20-30]\*%. Moreover, contribution margins reported in the Form CO (Annex 105 and 106 IDs 1306 and 1307) are below [10-20]\*% for 304 and below [30-40]\*% for 430.

<sup>416</sup> If the elasticity of market demand was at the -0.5, i.e. at the less elastic end of the range estimated by the US ITC, the residual demand elasticity would be -1.14 and the profit margin would need to exceed 88% to make a price increase unprofitable for a hypothetical monopolist.

<sup>417</sup> ID 10012.

predictor than the lagged price gap and that therefore the coefficient estimate for the contemporaneous price gap should be used. The Notifying Party further argues that the use of the coefficient estimate from lagged price gap model is inconsistent with the logic of the Commission's Bertrand-Edgeworth model, which is discussed in Annex IV.

- (627) Firstly, the Commission notes that the statement in Annex I to the SO simply pointed to the fact that an argument by the Notifying Party that both imports and domestic orders are subject to similar delivery lags (of typically at least one month) does not imply that the contemporaneous price gap should be used. Rather since prices (apart from the alloy surcharge) are fixed at the time of order which is typically several months before delivery, the price gap at the time of order may be more appropriate. An empirical study that finds that the price gap at the time of delivery is a better predictor does not resolve this problem.
- (628) More fundamentally, however, the critique by the Notifying Party is irrelevant for the Commission's findings, because the Commission's entire analysis of the competitive constraint from imports (in the SO and above) is based on the Notifying Party's estimate of import reactions to the contemporaneous price gap. In other words, the Commission uses the estimate which the Notifying Party claims should be used.<sup>418</sup>
- (629) Annex 4 of the Notifying Party's Reply to the SO also relates to the Notifying Party's quantitative estimates of the constraint from imports.<sup>419</sup> The first part of this Annex reiterates the Notifying Party's two step approach to calculate the claimed net effect of increased imports using the estimates from the two estimation equations. The Annex claims that the second equation measures the pressure of imports on prices which is partly due to increased competition between domestic producers after imports have increased. It claims that the Notifying Party's approach using both estimation equations evaluates the import response along the estimated supply function and not below (as illustrated by point C in Figure 17 above).
- (630) The second part of the Notifying Party's Annex then presents new calculations for a hypothetical monopolist and concludes that "*the hypothetical monopolist test demonstrates that imports do not constrain a perfect cartel's ability to increase prices for a linear demand curve, but price will not increase for a log linear demand curve*". It also claims that Aperam and Acerinox would not follow a price as these firms have excess capacity.

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<sup>418</sup> Moreover, the analysis by the Commission of the Bertrand-Edgeworth model at Annex IV is either based on the Notifying Party's point estimate for the contemporaneous price gap coefficient, or on reasonable variations around this estimate which are consistent with the statistical uncertainty in the Notifying Party's measurement of this coefficient.

<sup>419</sup> "Note on Analysis of Price Determination, Jerry Hausman, MIT, 22 August 2012" at Annex 4 of the Reply to the SO (ID 10007). The Notifying Party summarises and refers to this Annex in paragraphs 54 to 57 of the Reply to the SO (ID10012) which relate to the incentive of the Parties' main European rivals to respond to a price increase. However, since the main part of this Annex relates to the quantitative evidence on the competitive constraint from imports it is discussed at this part of the Decision.

- (631) The Commission does not accept the arguments by the Notifying Party in Annex 4 of the Reply to the SO (which were also summarised at paragraphs 54 to 57 of the Reply to the SO). As a preliminary remark, the Commission notes that the submission contains a number of unsubstantiated statements and results for which the Notifying Party has not provided supporting information or the details of the underlying calculations. On 10 September 2012, the Commission requested the Notifying Party to submit all underlying analysis files for its Annexes to the Reply to the SO as well as full details of the calculations or reasoning in these submissions. The Notifying Party has not provided any additional explanations or material for Annex 4.<sup>420</sup>
- (632) On the basis of the argumentation in Annex 4, the Commission is not able to fully replicate the Notifying Party's reasoning to verify the Notifying Party's claims. In these circumstances, the Commission normally attaches less probative value than otherwise to such information and may not be take into consideration this information at all.<sup>421</sup>
- (633) In any event, as regards substance, the first part of Annex 4 reiterates the Notifying Party's approach without responding to the Commission's critique in the SO that the approach: (i) does not fit the standard framework of a standard hypothetical monopolist test; and (ii) cannot approximate post-merger equilibrium reactions as there it cannot capture the change in market structure resulting from the proposed transaction. In fact, the Notifying Party's submission acknowledges the second point of the critique as it states "*... I do not claim that the exact same oligopoly behaviour would continue after the merger*" (page 4). The Commission's rejection of this approach therefore remains unchanged.
- (634) The new claim that the Notifying Party's approach evaluates the import response along the import supply function and not below is unsubstantiated and contradicted by the Notifying Party's critical elasticity calculations mentioned above.<sup>422</sup> The Notifying Party's response to the Commission's critique that its analysis substantially overstates the import response is therefore an unsubstantiated and unverifiable claim.
- (635) Regarding the second part of Annex 4 to the Notifying Party's Reply to the SO which contains the Notifying Party's version of the hypothetical monopolist test, the Commission first notes that the Notifying Party does not dispute the calculations for the hypothetical monopolist test performed by the Commission in the SO (and repeated above). Nor does the Notifying Party argue that these calculations would be incorrect.

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<sup>420</sup> In Annex 1, the Notifying Party has submitted a hard-coded spreadsheet which does not contain the formulae for how the figures in the spreadsheet were calculated.

<sup>421</sup> See DG Competition, Best Practices for the submission of economic evidence, 17.10.2011 ([http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_submission\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf)), and in particular paragraph 15 thereof: "Economic or econometric analysis that does not strictly meet the standards set out in these Best Practices will normally be attached less probative value than otherwise and may not be taken into consideration."

<sup>422</sup> See the footnote 413 above.

- (636) Instead, the Notifying Party presents alternative calculations for a hypothetical monopolist test which according to the Notifying Party lead to different conclusions. However, these alternative calculations (which the Commission is unable to fully replicate with certainty because the calculations have not been provided) appear to suffer from a series of problems and calculation errors. Firstly, they rely on a new margin estimate which the Notifying Party has not been able to fully reconcile with its own earlier margin estimate. Secondly, the argument that when demand is log linear the elasticity of demand would be the same whether one looks at a percentage increase in the total price or in the base price is incorrect. This is because a given percentage increase in the base price will lead to smaller reduction in demand than when the same price increase is applied to the total price – a property which holds independently of the assumed form of the demand function. Thirdly, the implied figure used in the calculations for the elasticity of the share supplied by domestic producers is incorrect. These problems with the calculations are discussed in more detail in Annex I.
- (637) Even if one accepted the new margin figures proposed, correcting the two apparent errors in the Notifying Party's calculation would bring the conclusions from the Notifying Party's hypothetical monopolist test fully in line with the conclusion from the Commission's hypothetical monopolist test, namely that the observed margins are very substantially below the level that would be required to make a price increase unprofitable for a hypothetical monopolist.<sup>423</sup>
- (638) As discussed in Annex II, the Commission also cannot accept the Notifying Party's arguments in Annex 4 to the Reply to the SO that the reaction from the Parties' EEA competitors would defeat a price increase by the merged entity.
- (639) At the Oral Hearing, the Notifying Party also submitted that if imports had remained at their level of approximately [5-10]\*% as in 2001 rather than increasing to approximately [20-30]\*% as in 2011, then, all else equal, prices in the EEA would have been substantially lower. According to the Notifying Party, this illustrates the constraining effects of imports on EEA prices.
- (640) As explained by the Commission at the Oral Hearing, such a statement does not address the relevant question. The Commission does not dispute that a reduction in imports holding all else equal would lead to an increase in price. It is clear that a reduction of supply by [10-20]\*% (the approximate difference between today's import share and the approximate share in 2001) would result in an increase in the market price.<sup>424</sup> However, this is irrelevant for the question whether, in reaction to a price increase by the merged entity, imports would increase sufficiently to make such a price increase unprofitable. The results from the hypothetical monopolist test clearly show that import reactions fall far short of what would be required for imports by themselves to be a sufficient constraint to prevent EEA price increases.

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<sup>423</sup> As explained in Annex I, margins over the base price would need to exceed 165% before a base price increase becomes unprofitable for a hypothetical monopolist. The new proposed margin estimates in Annex 4 to the Reply to the SO is around [70-80]\*% of the base price.

<sup>424</sup> This graph appears to be calculated on the basis of estimates of the Notifying Party's second econometric equation.

## 6) Conclusion

(641) Accordingly, the Commission concludes that imports constitute an imperfect competitive constraint which is insufficient to prevent the significant negative effects on competition caused by the proposed transaction.

5.5.4.7. Competition from the merged entity's EEA competitors is insufficient to prevent price increases post-merger

(642) Having established that the competitive constraint from imports is insufficient to prevent post-merger price increases in the EEA, the Commission has also assessed whether competition from the merging parties' existing EEA rivals would prevent the merged entity from raising prices.

(643) Paragraph 24 of the Horizontal Merger Guidelines describes the standard reaction by competitors of the merging parties. According to well-established case law, very large market shares - 50 % or more - may in themselves be evidence of the existence of a dominant market position. However, smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies.<sup>425</sup>

(644) Furthermore, paragraph 33 of the Horizontal Merger Guidelines states:

*"Conversely, when market conditions are such that rival firms have enough capacity and find it profitable to expand output sufficiently, the Commission is unlikely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition."*

(645) The Commission has therefore assessed in the present case whether the remaining European competitors of the merged entity, and in particular the only two integrated producers Aperam and Acerinox, will have the ability to expand output.<sup>426</sup> The Commission has then further assessed whether it is likely that the merging parties' main competitors have an incentive to increase output sufficiently to make a price increase by the merged entity unprofitable.

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<sup>425</sup> Horizontal Merger Guidelines, paragraph 17.

<sup>426</sup> The Notifying Party argues that the Commission should also take into account [...] *"increasing presence as a coil supplier"* (Reply to the Article 6(1)(c) decision, ID 4766). The Notifying Party estimates the company's deliveries in 2011 (together with other re-rollers) at 53 kt (approximately [0-5] % of the market). Data provided by [...] shows that its sales in 2011 were below [...] kt and its market share below [0-5] % (Excel sheet attached to [...] reply to Q1, ID 3195). [...] however stated that it is currently planning to expand its output up to a maximum of [...] kt/y (see [...] reply to Q1, ID 2704). The Commission notes that [...] is not an integrated producer and buys most of its requirements of [...] from the Parties (see paragraph (287)-(291) above). Furthermore, Marcegaglia mainly uses captively the coils it produces for the manufacture of tubes (see Marcegaglia's reply to Q11, ID 8275). Even in the event that [...] production increased dramatically in the next years according to its forecasts, its presence would be still limited and account for less than 5 % of the market. Furthermore, [...] would still have to rely on the Parties for a large part of its requirements. As a result, any possible competitive constraint from [...] is unlikely to be significant for the foreseeable future.

(646) In this respect, the Commission has first assessed the degree of competition from rivals in the pre-merger situation and public statements by Aperam and Inoxum. The Commission has then assessed whether the circumstances of the present case justify the conclusion that the incentives for rivals to react post-merger are likely to be sufficient to depart from the reaction described in paragraph 24 of the Horizontal Merger Guidelines. The Commission has further assessed whether post-merger the competitors of the merged entity would have different incentives to react than in the pre-merger situation.

(647) The Commission concludes that reactions from EEA competitors of the merging parties will not be sufficient to prevent a price increase by the combined entity, insofar as Aperam and Acerinox will lack the incentives to expand their output sufficiently so as to eliminate the significant impediment to effective competition caused by the proposed transaction.

1) *The Parties' competitors are likely to have the ability to expand output sufficiently to make a post-merger price increase unprofitable for the merged entity*

**i) The Parties' main EEA competitors have moderate levels of nameplate capacity utilisation**

(648) Third party reports show that in recent years the stainless steel industry has been characterised by overcapacity. This overcapacity is mainly concentrated at the level of melting and hot rolling, rather than cold rolling. The estimates on utilisation of the European capacity from a third party, SMR, are presented in Table 13 below.

**Table 13: Estimates on capacity utilisation in Europe**

Level	Capacity utilisation in 2011	Capacity utilisation in 2015 (forecasts)
Melting	[60-70]*%	[90-100]*%
Hot rolling	[60-70]*%	[60-70]*%
Cold rolling	[70-80]*%	[70-80]*%

**Source: SMR (ID 1076)**

(649) The Notifying Party contends that the estimates used by SMR are not reliable and that a different source, CRU, provides capacity utilisation figures that are lower than those estimated by SMR. In particular, CRU estimates capacity utilisation for cold rolling at [60-70]\*% in 2012 and [70-80]\*% in 2015.

(650) By using the production and nameplate capacity figures estimated by the Notifying Party, the Commission has calculated on a conservative basis a level of capacity utilisation of approximately [60-70]\*% in 2011.

(651) Taking this level as a proxy for the average utilisation of nameplate capacity, the Commission agrees with the Notifying Party that the Parties' capacity utilisation is

relatively higher than that of the market.<sup>427</sup> This implies that Aperam's and Acerinox' utilisation of their nameplate capacity is lower than that of the Parties and likely to be in the region of [60-70]\*%.

(652) The Commission therefore concludes that the Parties' main EEA competitors have moderate levels of capacity utilisation.

**ii) Effective spare capacity is lower than suggested by nameplate utilisation figures**

(653) Although Aperam and Acerinox appear to have a significant amount of spare capacity, a number of caveats are necessary.

(1) 100% nameplate capacity utilisation is not achievable and sustainable in the long run

(654) In the Commission's view, a 100% nameplate capacity utilisation by the Parties' rivals is not achievable and sustainable over a long period.

(655) Firstly, the stainless steel industry is a cyclical business and orders are not constant. The important role played by distributors implies that in periods of stocking activity orders may exceed (even substantially) the underlying real demand. In addition, sales of European producers are normally concentrated to a larger extent in the first half of the year. This is confirmed by an internal document of the Parties:

"[...]”<sup>428</sup>

(656) As part of their assessment of synergies, the Parties have engaged in discussion as to whether it would have been preferable to transfer to [...]” part or all of the production currently located in [...]”:

"[...]”<sup>429</sup>

(657) The industrial team charged with the assessment of the two options recommended the “[...]” option, as:

"[...]”<sup>430</sup>

(658) This statement shows that growth of the market, coupled with the elements of business seasonality, can have very important consequences on the assessment of spare capacity. The phase II market investigation also confirmed that 100% capacity utilisation does not appear to be a realistic benchmark. Aperam, for instance, indicated that "Capacity utilization figures in the 90% range over the course of the year is a reasonable figure for annual full capacity".<sup>431</sup>

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<sup>427</sup> Capacity utilisation for the Parties' main plants is as follows: Tornio: [70-80]\*%; Krefeld [80-90]\*% and Terni [80-90]\*% (Source: Form CO, Annex 45, ID 1102).

<sup>428</sup> Source: Form CO, Annex 104 A, ID 1291.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> See minutes of call with [...]”, ID 9378.

- (659) Secondly, maintenance services and the risk of serious disruptions of productive activities implies that a full utilisation rate cannot be maintained. The loss of production facilities due to accidents such as a massive fire or breakage of critical devices is considered as one of the main risks for Outokumpu's activity.<sup>432</sup>
- (660) In their reply to the request for information of 30 May 2012, the Parties stated that two out of the three reasons to move the production of approximately [...] kt/y from [...]\*,[...]\* and [...]\* to [...]\* post-merger is to avoid overloading and overloading risks.<sup>433</sup> In the Parties' reply to the request for information of 14 June 2012, it is also stated that [...]\*. In addition, the Parties also state that [...]\*<sup>434</sup> (see also paragraph (519) above).
- (661) In view of the above, the Commission considers that overloading increases the possibility of technical failure, which can constitute an important risk for a stainless steel producer. In any event, it is clear that increasing the load up to very high levels can be potentially risky for a mill operator, as the consequences of a failure would be harder to be managed and likely to result in more severe damage. As a result, it is confirmed that a capacity utilisation of 100% cannot be considered as a realistic benchmark to measure the expansion capabilities of the European stainless steel producers.
- (662) In view of the reasons presented above, the Commission concludes that 100% nameplate capacity utilisation is not achievable and sustainable in the long run.
- (2) A nameplate capacity utilisation of [90-100]\*% presents a reasonable upper bound for a sustainable long run level of production
- (663) Given that it does not appear to be possible and in any event advisable to increase the capacity utilisation of a CR mill to 100%, the Commission has assessed whether a different level of capacity utilisation can be considered as a more realistic proxy for the effective expansion capabilities of European producers.
- (664) The Commission has examined the level of production achieved by the European players over the past years, and in particular in 2006, the year with the largest production in recent history. Table 14 below shows the level of capacity utilisation reached by each of the European players in the years 2005, 2006 and 2007.

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<sup>432</sup> See TW Strategy (Outokumpu\_000324), ID 6425.

<sup>433</sup> ID 4470.

<sup>434</sup> ID 5978.

**Table 14: Estimates on capacity utilisation in Europe in the years 2005-2006<sup>435</sup>**

Company	2005	2006	2007
Aperam	[80-90]*%	[80-90]*%	[60-70]*%
Outokumpu	[80-90]*%	[90-100]*%	[70-80]*%
Inoxum	[80-90]*%	[90-100]*%	[80-90]*%
Acerinox	[90-100]*%	[100-110]*%	[90-100]*%

**Source: Form CO, ID 953**

- (665) The Commission considers that the figures above constitute a reasonable proxy of the peak of production that can be achieved in one year.<sup>436</sup> The figures above do not prove that production at very high levels of capacity utilisation is sustainable in the long run, as the peak in production reached in 2006 lasted only for one year.
- (666) Moreover the Commission has also assessed capacity utilisation rates in 2006 for the four integrated EEA producers based on actual (i.e. third party confidential) production data from each producer.<sup>437</sup> These figures suggest that the utilisation figures in the table above are in some cases higher than actual utilisation rates.
- (667) It is therefore considered that a capacity utilisation of [90-100]\*% presents a reasonable upper bound for a sustainable long run level of production.
- (3) Actual expansion possibilities by rivals are further reduced by mothballing and capacity suspensions
- (668) In the course of its investigation, the Commission has found that not all the capacity available in the EEA at present is ready for operation. A number of CR lines located at different mills are currently mothballed or in long-term suspension.
- (669) Inoxum has suspended part of its capacity at three different sites: [...]\* ([...]\* kt/y), [...]\* ([...]\* kt/y) and [...]\* ([...]\* kt/y). These lines are permanently suspended since [...]\*. Inoxum has also [...]\*.<sup>438</sup>
- (670) As regards the Parties' competitors, part of Aperam's capacity is at the moment either mothballed or suspended.
- (671) According to the Notifying Party, Aperam has suspended a cold rolling line at Isbergues with a total capacity of approximately [...]\* kt/y.<sup>439</sup> Furthermore, it

<sup>435</sup> Capacity utilisation for the years following 2007 is not included in the table, given that it is by far lower than the levels achieved in 2006.

<sup>436</sup> See also minutes of call with [...]\* (ID 9378), where it is confirmed that 90% appears a reasonable estimate of the maximum capacity utilisation of the company.

<sup>437</sup> The Commission offered the Parties' advisors the opportunity to have access to confidential third party data under a "data room" procedure to protect the confidential nature of this information. The Parties have not made use of their right to access this confidential information under the data room procedure.

<sup>438</sup> See email of 12 July 2012, ID 9203.

<sup>439</sup> See email of 12 July 2012, ID 9203.

appears from Aperam's presentation to investors of 16 November 2011 that Aperam has mothballed one cold rolling line and one finishing line in Gueugnon, as well as one annealing & pickling line and one finishing line in Genk. At the time, it appears that Aperam was planning to terminate operations on these lines and to apply swing of production (i.e. flexible reduction) to one additional cold rolling line in Genk and one additional BA annealing line in Gueugnon.<sup>440</sup>

- (672) Returning a production line that is currently mothballed to activity would imply additional fixed costs for the company concerned, at least to employ a minimum of [...] full time workers.<sup>441</sup> Furthermore, long shutdowns like that of Aperam may imply the risk of a lack of skilled people to hire.<sup>442</sup> While mothballing capacity instead of closing it down permanently preserves the option of reactivating it at a later stage and hence carries a certain option value, such reactivation of capacities will likely only be profitable when demand conditions improve substantially and persistently.
- (673) In a context where substantial spare capacity remains in the industry, it is unlikely that de-mothballing will be profitable, even in response to a price increase by the combined entity. This is because increasing the level of industry excess capacity would be likely to reduce the market price, which could potentially offset the benefits from being able to produce more. This is particularly the case if de-mothballing would bring prices close to the level before the increase by the combined entity. In this sense, even modest costs of reactivating mothballed capacity will therefore be sufficient to prevent firms from de-mothballing unless demand increases substantially.
- (674) The Commission has thus not found any evidence in its market investigation that Aperam would reactivate the plants that are currently mothballed or suspended in the short run and in particular as a reaction to the proposed transaction. On the contrary, recent statements from Aperam's CEO show that the company considers that only further reductions in the capacity would bring an advantage to the industry as a whole.<sup>443</sup> Furthermore, the most recent presentations to investors available on Aperam's website do not contain any statement or suggestion that Aperam is considering reactivating plants that are currently mothballed or suspended.<sup>444</sup>
- (675) It is therefore concluded that actual expansion possibilities by rivals are further reduced by mothballing and capacity suspensions.
- (4) Spare capacity is likely to decrease naturally during the next years as a result of growing demand

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<sup>440</sup> Form CO, Annex 22, ID 1048.

<sup>441</sup> The Parties estimates these costs at approximately EUR [...]\*. The Parties however note that, as a general rule, costs will be higher the longer the line has been out of service, although there is no formula that would equate a specific cost for every year that the line has been suspended. See Outokumpu's emails of 15 and 16 October 2012, IDs 13095 and 13115.

<sup>442</sup> ID 6011.

<sup>443</sup> See Annex I of the response to the Article 11 request of 6 July 2012, ID 8904.

<sup>444</sup> <http://www.aperam.com/who-are-we/investors-shareholders/conference-presentations>.

- (676) The European stainless steel market grew in the period 1980-2011 at an average of [0-5]\*% per year.<sup>445</sup> The Commission's investigation has confirmed that demand in the stainless steel industry is still expanding. The Parties' competitors estimate the EEA market to grow in the next 3 years at a rate between [0-5]\*% and [0-5]\*% per year.<sup>446</sup> The same respondents consider that other geographic markets will grow at a faster pace in the next 3 years (North America: [0-5]\*-[0-5]\*%; Asia: [0-5]\*-[5-10]\*%; South America: [0-5]\*-[5-10]\*%). Given that the EEA is still a net exporter of stainless steel and in 2011 exported more than [20-30]\*% of its stainless steel production,<sup>447</sup> the high levels of growth forecast outside the EEA are also relevant to the assessment.
- (677) The increase in the consumption in the EEA and worldwide might be also the reason why all the sources consulted by the Commission predict an increase in capacity utilisation in the next years. As reported above, SMR predicts an increase in the European capacity utilisation of [5-10]\*% by 2015, while CRU foresees an increase of [10-20]\*%.<sup>448</sup>
- (678) In its Reply to the Article 6(1)(c) decision, the Notifying Party argues that the Commission's estimated growth rate for the stainless steel market is overly optimistic given the continuing European recession and declining growth rates. Further, in its Reply to the SO, the Notifying Party argues that the Commission's expected growth rate relies on only two sources of doubtful reliability: (i) few replies to the phase I market investigation, and (ii) third parties' estimates, such as SMR and CRU.
- (679) More importantly, the Commission refers to increased capacity utilization rates estimated by third-party market reports, i.e. SMR and CRU, to quantify the impact of such growth rates for the capacity utilisation rates of Aperam and Acerinox. The Notifying Party in turn indicates that [...]\*
- (680) The Notifying Party argues that even the most optimistic [0-5]\*%-[0-5]\*% growth rate projected by one third party for EEA demand for stainless steel has little to no effect on Aperam and Acerinox's capacity utilization rates. Assuming that Aperam and Acerinox's EEA sales were to grow [0-5]\*%-[0-5]\*% between 2013 and 2015, their sales would increase by a total of [...]\* kt for Aperam and [...]\* kt for Acerinox over this period, increasing their capacity utilization rates by [0-5]\*% and [0-5]\*%, respectively. The remaining excess capacity for the two competitors would still be higher than Outokumpu's EEA sales and would still represent more than [10-20]\*% of total EEA deliveries (assuming the same growth levels).
- (681) Lastly, at the Oral Hearing, the Notifying Party argued that according to SMR's most recent estimates (July 2012), demand in the EEA stainless steel market is expected to drop by [5-10]\*% in 2012.

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<sup>445</sup> Form CO, Annex 30, ID 1074.

<sup>446</sup> See replies to Q1, question 68.

<sup>447</sup> Form CO, ID 953.

<sup>448</sup> Note that SMR estimates date to before the announcement of the deal. By contrast, CRU estimates may be influenced by the capacity reductions in CR planned by the Parties post-transaction.

- (682) Contrary to the Notifying Party's views, the Commission notes that the market investigation results are consistent. According to market participants, the EEA market is expected to grow at a rate between [0-5]\*% and [0-5]\*% annually during the next three years. Similarly, third parties' forecasts provided by the Notifying Party estimated a growth rate of [0-5]\*% per year from 2009 to 2015. More recent growth forecasts from the Notifying Party point towards a market growth, in terms of end-use consumption in the European market, of approximately [0-5]\*% per year during the next 3 years.
- (683) All sources consulted by the Commission forecast an increase in utilisation rate worldwide in the next years. In particular, the most recent report available to the Commission (CRU, May 2012) shows that such an increase can be very significant as set out in Table 15.

**Figure 19: [...]\***

**Source: Reply to the 6(1)(c) decision, Annex IX**

- (684) In addition, the chart below, included in a presentation by Outokumpu on the company's interim report on the second quarter of 2012, includes the overall expected growth in the stainless steel industry in Europe (approximately [0-5]\*%/year), as well as growth forecasts by end application. As a result, a growth rate of the stainless steel market around [0-5]\*%-[0-5]\*% per year is not overoptimistic as claimed by the Notifying Party. On the contrary, this growth rate appears to be a conservative proxy.
- (685) It should be also underlined that the capacity utilization rates of the European players will be also affected by the growth rates in other world regions. As stated in paragraph (57), the average non-European growth rate is significantly higher than that of the European market. This view is also confirmed by Outokumpu's presentation, which predicts higher growth rates on a worldwide level.

**Figure 20: [...]\***

**Source: Outokumpu's Interim Report Q2/2012- Appendix**

- (686) Lastly, as regards the Notifying Party's position that SMR foresees a decrease in demand for CR in 2012 of [5-10]\*%, the Commission notes that according to the same estimates demand for CR in 2011 has grown by [5-10]\*%.<sup>449</sup> This would therefore mean that the net effect of the decrease after growth of such an entity would still consist of a growth of approximately [0-5]\*% over two years. Given that these estimates provided by the Notifying Party do not contain any forecast beyond 2012, and that the Notifying Party has not provided any more recent figures for growth in capacity utilisation that those contained in paragraph (683) above, the Commission is not in a position to draw any additional conclusions from these figures. As a result, the Commission concludes that spare capacity is likely to decrease naturally during the next years as a result of growing demand.

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<sup>449</sup> See Annex 1 to Reply to the Article 11 request of 10 September, ID 10222.

(5) Conclusion

(687) It is therefore concluded that the Parties' main rivals have a certain degree of effective spare capacity, which is lower than what nameplate capacity utilisation figures would suggest.

**iii) The Parties' EEA competitors are likely to have the ability to expand output sufficiently to make a post-merger price increase unprofitable for the merged entity**

(688) In the Reply to the SO, the Notifying Party argues that the conclusion that their two main EEA competitors have substantial spare capacity is unchallengeable. Moreover, according to the Notifying Party, "*A theory of harm which is based on the existence of capacity constraints cannot reasonably be applied to a transaction where competitors' excess capacity exceeds [20-30]\*% of total EEA deliveries and exceeds total EEA sales of one of the merging parties*"<sup>450</sup>.

(689) As noted above, the Commission does not challenge that the Parties' main competitors have at present a certain level of effective spare capacity.

(690) The Commission further considers that the level of spare capacity held by the Parties' main competitors is sufficient to have a certain impact on the market. In particular, if the Parties' main rivals were to use all of their spare capacity in response to a post-merger price increase by the merged entity, then this output expansion would be likely to be sufficient to make such a price increase unprofitable for the merged entity.

(691) However, the Notifying Party's argument that the Commission's theory of harm cannot apply to the proposed transaction because the Parties' competitors combined spare capacity exceeds [20-30]\*% of the market incorrectly characterises the Commission's theory of harm as relying on the Parties' competitors having limited spare capacity. This is incorrect. The Commission's theory of harm is instead that even if firms have substantial levels of spare capacity at present, the merging firm's rivals may not have the incentive to react in a way that would make a post-merger price increase unprofitable for the merged entity.

(692) Having established the existence of overcapacity, the Commission has performed a detailed assessment, the results of which are described in the next subsection, on whether the Parties' competitors will find it profitable to expand output sufficiently to make a post-merger price increase unprofitable for the merged entity.

**iv) Conclusion**

(693) The Parties' EEA competitors are likely to have the ability to expand output sufficiently to make a post-merger price increase unprofitable for the merged entity.

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<sup>450</sup> Reply to the SO, paragraph 37.

2) *The Parties EEA rivals are unlikely to have an incentive to expand output sufficiently to make a post-merger price increase unprofitable for the merged entity*

(694) The Commission has assessed all the relevant factors relating to whether the Parties EEA rivals have an incentive to react aggressively to a post-merger price increase by the merged entity. The different elements of the analysis are described below.

**i) Pre-merger price competition between European producers is not intense and reflects market power**

(1) Pre-merger competition from rivals provides the relevant benchmark for the post-merger competitive constraints that are likely to be exercised by rivals

(695) 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. In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison.<sup>451</sup>

(696) In its investigation, the Commission has not found any evidence of future changes to the EEA CR market that can reasonably be predicted and which would have a significant influence on its assessment. In particular, the Commission has found that entry in the market is unlikely because of the high costs of stainless steel meltshops and mills, and in any event is not expected by market participants (see above, Section 5.5.4.2). Furthermore, the Notifying Party has not argued that the counterfactual to assess the effects of the proposed transaction would have to be different from the pre-merger scenario.<sup>452</sup> As a result, in line with the Horizontal Merger Guidelines, the Commission considers that the most appropriate counterfactual for the assessment of the proposed transaction is the pre-merger situation.

(697) Furthermore, under a theory of harm based on non-coordinated effects, the nature of competition from the merging parties' rivals in the market does not normally change as a result of the transaction. While the merging parties' competitors are likely to react to a unilateral price increase by the merged entity, these post-merger reactions will be generally governed by the same incentives as these firms' actions pre-merger. In other words, the expected post-merger reactions by rivals are likely to be similar (if not identical) to their reactions to a hypothetical price increase by both merging parties pre-merger.

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<sup>451</sup> Horizontal Merger Guidelines, paragraph 9.

<sup>452</sup> When interpreted widely, the Parties' arguments may have an impact on the counterfactual in relation to POSCO's new plant in Turkey. The Commission has assessed the effect of this project above in paragraphs (588)-(592) and concluded that its impact on the EEA market is likely to be limited.

- (698) The Commission therefore concludes that pre-merger competition from rivals provides the relevant benchmark for the post-merger competitive constraints that are likely to be exercised by rivals.
- (2) The pre-merger situation is characterised by the coexistence of positive margins and excess capacity
- (699) The Commission considers that there are a number of factors which are important in order to assess the nature of competition pre-merger in the EEA CR market.
- (700) Firstly, according to the Notifying Party, EEA producers earn substantial margins on incremental sales. An econometric study submitted by the Notifying Party<sup>453</sup> estimates that the merging parties' average incremental margin on sales of additional volumes (of commodity products) is around [20-30]\*% of the current market price.<sup>454</sup> Other studies submitted by the Notifying Party suggest that incremental margins may be even higher.<sup>455</sup> Moreover, according to the Form CO, conversion margins (the difference between the transaction price and raw material costs which is a standard industry measure) are around [30-40]\*% of the sales price for the most important commodity grade (CR 1.4301, i.e. 304) while contribution margins (conversion margins net of variable costs) for this grade are in the order of [10-20]\*%. The Notifying Party also indicated at the Oral Hearing that the Parties earn substantial margins on additional sales.
- (701) Secondly, as discussed above in paragraphs (688)-(692), there is a certain degree of overcapacity in the European CR industry at the industry level. The merging parties' main rivals, Aperam and Acerinox also have spare capacity.
- (702) The Commission therefore concludes that the pre-merger situation is characterised by the coexistence of positive margins (on additional sales) and excess capacity.
- (3) Even pre-merger, there is a degree of market power in the CR industry
- (703) The standard measure of market power in economics is the Lerner Index. The Lerner index corresponds to the margin on additional sales expressed as a percentage of the sales price. A Lerner index above zero indicates market power.<sup>456</sup>
- (704) As discussed above, the margins on additional sales are positive and in the order of [20-30]\*% which implies that there is a degree of market power in the EEA CR industry pre-merger.
- (705) The Notifying Party appears to argue that there is no market power pre-merger.

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<sup>453</sup> Reply to the SO, Annex 10, ID 10001.

<sup>454</sup> The incremental margin reflects the increase in profits generated by a small increase in sales. For example, an incremental margin of [20-30]\*% of the sales price implies that the sale of one additional tonne of output increases the profits by [20-30]\*% of the sales price per tonne.

<sup>455</sup> Reply to the SO, Annex 4, ID 10007.

<sup>456</sup> Formally the Lerner index is the difference between the unit price (p) and marginal costs (c) divided by the unit price, or (p-c)/p. A Lerner index above 0 implies market power. The Lerner index varies between 0% and 100%, although for the Lerner index to approach 100% price would need to approach infinity (which positive marginal costs).

- (706) The Notifying Party argued that because cross price elasticities among firms are (near) infinite, stainless steel producers are price takers. According to the Notifying Party, the market price is given at any particular point in time from the perspective of management, leaving managers with only two 'levers' to improve financial returns: (i) improving efficiency and (ii) increasing the volume of sales. Both these strategies would lead the Parties' competitors to compete aggressively in the attempt to gain market shares. If the Notifying Party's argument that stainless steel producers are price takers was correct, it would imply that EEA producers have no market power and competition would be very intense.
- (707) Moreover, the Notifying Party argued in its Reply to the Article 6(1)(c) decision that "the existence of overcapacity and high conversion margins [...] provide[s] a strong incentive for steel producers to expand output."
- (708) At the State of Play Meeting on 8 June 2012, the case team therefore asked the question as to how the coexistence of current levels of excess capacity and positive margins could be reconciled with the propositions by the Notifying Party that competition was very intense pre-merger and that rival reactions would make a post-merger price increase unprofitable for the merged entity.
- (709) In response, the Notifying Party submitted an economic study. Regarding the pre-merger situation, this study examines various financial measures of profitability of European stainless steel producers. It concludes:
- "[...]"]<sup>457</sup>
- (710) The Commission agrees that prices above marginal costs do not imply absence of competition. However, prices above marginal costs imply that competition is not as intense pre-merger as the Notifying Party would appear to suggest. Instead, the recognition that increasing output would drive down prices and margins confirms the existence of market power pre-merger.
- (711) Moreover, the Notifying Party argues itself that short run margins are relevant for the incentives to expand output. In particular, the Notifying Party's analysis of reactions by their main competitors is based on short run marginal costs. Annex 5 to the Notifying Party's Reply to the SO notes that this is because short run marginal costs are relevant for an "analysis of the various firms' pricing incentives"<sup>458</sup>.
- (712) The fact that these firms do not react to positive short run margins by expanding output pre-merger although they would have the spare capacity to do so implies that these firms do not have an incentive to do so and demonstrates that there is a degree of market power in the industry pre-merger.
- (713) As a result, the Commission concludes that the co-existence of positive margins and spare capacity implies the existence of a degree of market power in the CR industry pre-merger. The presence of market power is consistent with the existence of

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<sup>457</sup> "Response to EC State of Play meeting concerns – the incentives of Acerinox and Aperam to unilaterally expand output pre and post-merger, CRA", ID 9080.

<sup>458</sup> Annex 5 to the Reply to the SO, page 6. ID 10008.

capacity constraints (in the economic notion explained at paragraph (401) above) and with the existence of frictions in the market which soften (non-coordinated) competition between firms.<sup>459</sup>

(4) Statements from the Parties and customers confirm that competition pre-merger is not intense

(714) The Commission has cross-checked the results coming from its economic assessment of the market with statements from the Parties and customers.

(715) Firstly, a number of internal emails submitted by the Parties with the intention of showing that the Commission's "conclusions concerning the existing lack of competition between European producers are not supported"<sup>460</sup> would actually appear to suggest the opposite, i.e. that competition on prices is not intense. These emails have been exchanged within Outokumpu's core pricing team. Some statements contained in these emails are reported below:

"[...] [...]"<sup>461</sup>

(716) Secondly, the view that competition in the market is not intense is also shared by many respondents to the Commission's requests for information. Customers for instance stated that:

*"In a first phase they look for an increase of prices, looking to profit of a probable increase of the demand volumes. But if the volumes begin to decrease they provide very soon to decrease the prices following the demand curve, looking to maximize volumes and prices. We can say the mills are really very careful to the price politics of each other. When one of them decide to try to increase the prices, the others normally try to follow."*<sup>462</sup>

*"According to [...] \* experience, suppliers are rather suspending operations of some of their mills in order to limit overcapacity on market, rather than maximising their output while maintaining low prices. [...]"*<sup>463</sup>

(717) Many customers have also confirmed that competition at present does not appear to be as intense as the Parties suggest.<sup>464</sup> When questioned about the presence of fierce on-going competition between the European suppliers, some customers replied:

*"No, I think that marke[...]t is divided."*<sup>465</sup>

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<sup>459</sup> See paragraphs (406) to (409) above.

<sup>460</sup> See Reply to the Article 6(1)(c) decision, ID 4766.

<sup>461</sup> Reply to the Article 6(1)(c) decision, Annex V, IDs 4766-4808.

<sup>462</sup> [...] \* Q9, ID 5918.

<sup>463</sup> [...] \* Q9, ID 5621.

<sup>464</sup> On the other hand, many customers have also stated that competition is intense. However, given that the Commission does not intend to show that there is no competition in the market, these answers do not appear to be incompatible with a scenario where competition is not intense or, at least, moderate.

<sup>465</sup> [...] \* Q9, ID 9806.

*"Not aware of fierce competition. Clearly there is competition with all parties trying to win a share of business. We have all parties contacting us but they are all similar in their offerings"*<sup>466</sup>

*"I do believe there is competition within the European suppliers, competition within a market place helps to maintain the market healthy. I do not believe that the competition within this market is fierce."*<sup>467</sup>

*"No, we don't see this hard competition between the European producers [...]"*<sup>468</sup>

*"No, there is not a competition. When we ask a quotation to a different supplier / producer the price is always 10-15% higher respect the prices of our current suppliers."*<sup>469</sup>

*"it is not fierce - all producers are quite certain of their market share"*<sup>470</sup>

(718) The Commission therefore concludes that statements from the Parties and customers confirm that competition pre-merger is not intense. This is in line with the finding of the existence of a degree of market power pre-merger.

(5) The Notifying Party's arguments are not sufficient to undermine the conclusion that competition in the EEA market for CR is not intense

(719) The Notifying Party argues in the Reply to the SO that the Commission's conclusion that the level of competition is "not intense" lacks quantification and relies on isolated quotes from market participants. The Notifying Party also states that the Commission's quotations are "selective" and that an overall assessment of the documents suggests that competition in the market is indeed intense.<sup>471</sup> Two of these quotes indicate that the level of spare capacity provides firms with incentives to lower prices to gain volumes.

(720) With regard to these criticisms, the Commission notes the following.

(721) Firstly, as regards the alleged lack of quantification, the Notifying Party argues that the Commission should have compared actual prices charged by different producers on the basis of data it has collected.<sup>472</sup> Later in the same paragraph, the Notifying Party states that "*customer statements that prices charged by different competitors are relatively similar are equally consistent with the existence of intense competition as with a hypothesis of little competition.*" The Notifying Party therefore criticises the Commission for not having performed an analysis of prices across supplies which, according to the Notifying Party, could not have shed light on the degree of competition.

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<sup>466</sup> [...] \* Q8, ID 8476.

<sup>467</sup> [...] \* Q9, ID 8720.

<sup>468</sup> [...] \* Q9, ID 5333.

<sup>469</sup> [...] \* Q9, ID 8802.

<sup>470</sup> [...] \* Q9, ID 9785.

<sup>471</sup> Reply to the SO, footnote 36. ID 10012.

<sup>472</sup> Reply to the SO, paragraph 50. ID 10012.

- (722) The Commission agrees that an analysis of price differences across suppliers would not allow conclusions on the intensity of competition to be drawn and therefore rejects the Notifying Party's criticism that the Commission should have carried out such an analysis.
- (723) Secondly, regarding the alleged lack of evidence for a finding that competition is not intense, the Commission does not base its view that competition pre-merger is not as intense as a result of market power exclusively on the views expressed in certain documents from the Parties, or on the views from a number of market participants.
- (724) The Commission's view is also based on the observation of substantial incremental margins for EEA producers ([20-30]\*% of the total price according to one study submitted by the Parties<sup>473</sup>, [70-80]\*% of the base price which corresponds to around [30-40]\*% of the total price according to another<sup>474</sup>) which co-exist with substantial excess capacity at the firm level. This indicates a degree of pre-merger market power and that competition is not intense.
- (725) Moreover, two paragraphs earlier in the response, the Parties refer to the "Bertrand[-Edgeworth] model of aggressive price competition" at Annex A of the SO. As one of the main criticisms of the Notifying Party of this "model of aggressive competition" is that it tends to predict more competitive prices pre-merger than the observed pre-merger price, the Notifying Party's own position appears to be that pre-merger competition is not as intense as a "model of aggressive competition" would suggest.
- (726) As explained in Section 5.5.4.10 and at Annex IV below, the Commission's Bertrand-Edgeworth model provides a benchmark for the most competitive situation that would be consistent with the observed levels of spare capacity and with the Notifying Party's arguments against non-coordinated effects when these arguments are taken at their most competitive interpretation.
- (727) There are many reasons why actual non-coordinated pre-merger competition is less intense than the assumptions of this model suggest. As discussed above (paragraphs (406) to (409)), such reasons include, for example, small search or switching costs for customers; small costs for suppliers to change their production mix; multi-sourcing strategies by customers; and a small degree of product and geographic differentiation between suppliers. The presence of any small frictions of this type reduce the degree of competition between competitors relative to what the Notifying Party's arguments in their most competitive interpretation suggest.
- (728) Lastly, as regards the alleged "selective nature" of the approach adopted by the Commission in quoting evidence on the file, the Commission notes that an assessment of the overall documents concerned does not appear to confirm that competition is intense. This would not imply the absence of competition, but rather a general lack of aggressiveness in the reactions from competitors. The Commission

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<sup>473</sup> "Response to the CET Comments on Marginal Cost Efficiencies, Compass Lexecon, July 6, 2012" ID 8730.

<sup>474</sup> "Estimation of Cold Rolled Margins, Jerry Hausman, August 212, 2012" at Annex 1 of the Reply to the SO, ID 10000.

therefore considers that statements from customers and competitors demonstrating that there is competition in the market are not incompatible with its position that competition in the market is not intense.

(729) In view of the above, the Commission concludes that the Notifying Party's arguments are not sufficient to undermine the conclusion that competition in the EEA market for CR is not intense.

(6) Conclusion: pre-merger, the level of price competition between EEA producers in the CR market is not intense which reflects a degree of market power.

**ii) Aperam and Acerinox will not start to compete more aggressively post-merger and are actually likely to compete less aggressively**

(730) In order to confirm that the pre-merged scenario is the relevant benchmark to assess the rivals' reaction post-merger, the Commission has assessed whether the proposed transaction will lead to a fundamental change in the Parties' main competitors' incentives that would induce these firms to compete more aggressively in the market for CR post-merger than pre-merger.

(731) In absence of such change, it has assessed whether the competitive pressure from rivals on the merged entity is likely to decrease post-merger when compared to the competitive pressure the same rivals exert on the merging parties pre-merger.

(1) There is no indication that Aperam and Acerinox would start competing more aggressively post-merger

(732) The Commission has not found any convincing evidence that post-merger the intensity of competition from the Parties' rivals would increase to any significant extent.

(733) Firstly, only a minority of customers replying to the relevant question in the Commission's questionnaires (29 out of 113, i.e. 21%) stated that competition will increase post-merger.<sup>475</sup> On the contrary, a large majority of customers (79%) replied that competition is expected to decrease or remain the same. As a result, customers generally appear to expect that competition will not become fiercer.

(734) In addition, both Aperam and Acerinox have publicly praised the proposed transaction insofar as it will increase the margins of European producers.

(735) Aperam has recently expressed appreciation for the deal in the course of an interview for SBB (Steel Business Briefing). The new CEO of the company stated that:

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<sup>475</sup> See question 26 of Q8/Q9.

*"Aperam has been taking its own measures to tackle overcapacity, but the merging of two main players will improve the breakeven point of Europe's stainless industry."*<sup>476</sup>

(736) Aperam has been also reported stating:

*"We would welcome [the proposed transaction's] implementation because we expect it will improve the attractiveness of the stainless steel industry. [...] Aperam is in a strong position to benefit from consolidation in its sector."*<sup>477</sup>

(737) Acerinox, who has previously attributed to the "lack of producers' discipline" the allegedly low prices for stainless steel products in Europe,<sup>478</sup> has also publicly expressed support for the deal. In a recent interview of Metal Bulletin to Acerinox' CEO, Acerinox was reported to be "fully behind the proposed €2.7 billion (\$3.4 billion) Outokumpu-Inoxum merger". Acerinox' CEO stated:

*"We want the [Commission] to understand that the merger is healthy for the stainless business. Excess capacity is not good for anybody [because it is] destroying the margin."*<sup>479</sup>

(738) These statements are indicative of a relatively low level of rivalry in the industry.

(739) In its Reply to the SO, the Notifying Party argues that the finding that competition from rivals will not increase post-merger does not address the relevant question. The Notifying Party also claims that the Commission appears to require that competitors must lower prices and compete more aggressively than they do pre-merger.

(740) The Commission considers that there will be no fundamental change in competition from rivals post-merger. Under a non-coordinated theory of harm, rivals should normally react to changes in price by the merged entity. Such reactions to price changes are expected to include an increase in sales volumes. However, rivals' reactions to changes in price post-merger are likely to be governed by the same incentives as their actions pre-merger. Therefore, the finding that competition from rivals will not increase post-merger to any significant extent from its current level is consistent with an assessment under non-coordinated effects.

(741) The Commission concludes that there is no indication that Aperam and Acerinox would start competing more aggressively post-merger.

(2) An interpretation of the public statements of Aperam and Acerinox, in light of additional evidence and in the Commission's general framework of assessment, confirms that competition is unlikely to increase post-merger

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<sup>476</sup> Annex I to the response to the Article 11 request of 6 July 2012, ID 8904.

<sup>477</sup> See Bloomberg: <http://www.bloomberg.com/news/2012-02-01/aperam-expects-to-gain-from-consolidation-after-outokumpu-deal.html>

<sup>478</sup> See Form CO, Annex 53 (part 1), ID 1127.

<sup>479</sup> ID 9829.

- (742) According to paragraph 24 of the Horizontal Merger Guidelines, a non-coordinated price increase by the merged entity will benefit rivals by shifting demand to the rivals who may then raise their prices in turn.
- (743) In the statements cited above, Aperam and Acerinox publicly welcome the proposed transaction. Moreover, the Notifying Party pointed to statements by Aperam who see the proposed transaction as an opportunity to gain market share.
- (744) Such statements show that the merging Parties' main competitors believe that the proposed transaction may produce beneficial results for them. As the Parties' main competitors would benefit from a post-merger price increase, the statements by Aperam and Acerinox may therefore support the finding of significant impediment to effective competition through non-coordinated effects by means of the creation of a dominant position.
- (745) In contrast, the statements by the merging parties' competitors appear incompatible with the Notifying Party's position that the merged entity has no incentive to raise price because any price increase would be defeated (by reactions from rivals or reaction from imports).
- (746) If this were the case, the merged entity would not attempt to raise price and the merging Parties' rivals would not benefit from the proposed transaction. They would therefore appear to have no reason to welcome the proposed transaction as addressing excess capacity or increasing the attractiveness of the industry.
- (747) The only case where the Parties' competitors might welcome the proposed transaction without expecting price increases would be a situation where their market share would increase substantially because of multi-sourcing strategies of customers.
- (748) In particular, according to the Notifying Party, a number of customers that currently purchase from both Parties are likely to switch post-merger to their competitors because of multi-sourcing strategies (which the Notifying Party calls the "merger dip"). The Notifying Party submits that this would provide incentives to the merged entity to reduce prices in order to limit the loss of customers and to competitors to fight in order to increase their market share.
- (749) However, as explained in paragraphs (504)-(506), multi-sourcing strategies by customers do not imply the absence of a price increase. On the contrary they may make such price increase more likely to materialise. For customers who multi-source, the merger leads to a more dramatic reduction in the number of alternative suppliers to their current suppliers. Moreover, the shift in demand towards the Parties' competitors as a result of multi-sourcing strategies by customers implies that the competitors of the merged entity would in fact have less incentive to compete fiercely to gain customers. This is because the Parties' competitors have to compete less fiercely to obtain the same level of demand as pre-merger. These factors are likely to increase the incentives for the merged entity to raise prices (see also paragraphs (758)-(761) below).
- (750) Furthermore, at least two statements from the Parties' competitors (namely Aperam's statement that the proposed transaction "*will improve the breakeven point of Europe's stainless industry*" and Acerinox's statement that "*the merger is healthy for*

*the stainless business. Excess capacity is not good for anybody [because it is] destroying the margin")* appear compatible only with a scenario of general price increase, which would constitute the only stable solution to "improve the breakeven point" of the industry and stop excess capacity "destroying the margin".

- (751) Moreover, the statements by the Parties' main competitors welcoming the proposed transaction (including statements that the proposed transaction would be an opportunity to gain market share) appear in contradiction with the Notifying Party's argument that synergies arising from the merger would, in fact, lead the merged entity to expand output relative to the pre-merger situation.<sup>480</sup> If this were the case, then the merger would increase the competitive pressure on the Parties' main rivals, lower prices (because of increased output) and take market share away from rivals. This would imply that the merger would reduce the profits of the Parties' main competitors which appears to be incompatible with public statements by these firms.
- (752) The Commission therefore concludes that an interpretation of the public statements of Aperam and Acerinox, in light of additional evidence and in the Commission's general framework of assessment, confirms that competition is unlikely to increase post-merger.
- (3) The merger will reduce competitive pressure on the Parties' rivals
- (753) The merger will eliminate competition between the merging parties. In particular, the merger will reduce the competitive pressure from rival spare capacity on the merged entity compared to the level of rival spare capacity each of the merging parties faced pre-merger. Post-merger, the merged entity as the new market leader will therefore have an interest in raising prices.
- (754) By raising prices, the merged entity will also relax the competitive pressure it exerts on its competitors. As paragraph 24 of the Horizontal Merger Guidelines notes, this price increase will shift some demand to rival firms which in turn may find it profitable to increase their prices.
- (4) The reduction in the number of competitors is also likely to further reduce the degree of competition from the Parties' main competitors
- (755) The reduction in the number of integrated EEA producers from four to three will reduce the customers' supply options and hence customer's ability to play competing producers off against one another.
- (756) In a context where customers solicit quotes from different suppliers the reduction in the number of suppliers is hence likely to reduce customers bargaining power which in turn is likely to affect the intensity of competition between the remaining suppliers when bidding for customer's business. See also paragraphs (491) to (495) above.

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<sup>480</sup> Reply to the SO, paragraph 18.

- (757) The Commission concludes that the reduction in the number of competitors is most likely to further reduce the degree of competition from the Parties' main competitors.
- (5) Increase in capacity utilisation by the Parties' competitors because of multi-sourcing strategies will decrease competition from rivals to some extent
- (758) The Notifying Party argued that multi-sourcing strategies by some customers will imply that the merged entity will lose some customers who switch part of their purchases away from the merged entity even without an increase in price by the merged entity.
- (759) The Commission notes that such mechanic shift in demand from the merged entity to its rivals ('the merger dip') will reduce rival excess capacity and hence the competitive pressure these rivals exert on the merged entity. The increase in demand also suggests that the Parties' rivals will have an incentive to increase price post-merger even without any price increase by the merged entity.
- (760) Therefore, even without unilateral price increases by the merged entity, rivals are likely to become less aggressive as multi-sourcing strategies by customers imply that they will face increased demand.
- (761) The Commission therefore concludes that an increase in capacity utilisation by the Parties' competitors because of multi-sourcing strategies is likely to decrease competition in the industry.
- (6) Expected demand growth will further reduce spare capacity of the Parties' competitors and make competition softer
- (762) A number of customers confirm the basic economic insight that levels of spare capacity play an important part in determining the intensity of competition in the market:

*"The potential consolidation of Outokumpu and Inoxum will lead into a decrease of capacities on the European market. This can also help their competitors to place higher prices on the market. The ris[k] that this leads to higher prices for years is high."*<sup>481</sup>

*"[whether European producers will follow price increases] depends on market request and capacity balance of producers"*<sup>482</sup>

- (763) It follows that the natural increase in capacity utilisation that is expected to take place in the next few years as a result of expected demand growth would in any event weaken the intensity of competition in the market. According to third parties' estimates, this increase in capacity utilisation would come both from the growth of demand and from shutting downs of plants.<sup>483</sup>

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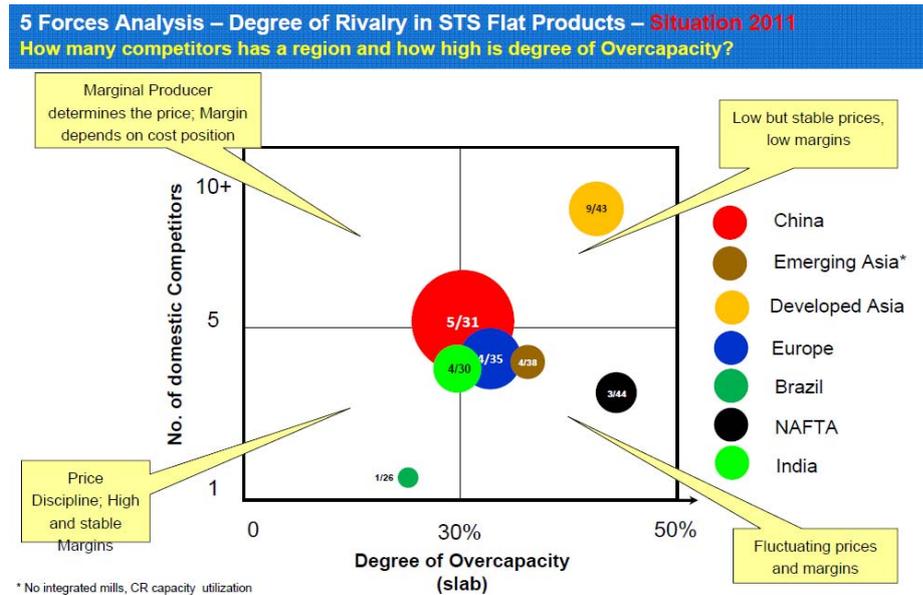
<sup>481</sup> [...] \* Q9, ID 8793.

<sup>482</sup> [...] \* Q9, ID 9776.

<sup>483</sup> Source: Form CO, Annex 32, ID 1076.

- (764) The conclusion that the level of spare capacity has an influence on the intensity of competition is confirmed by an analysis of competition in the stainless flat products markets included in a presentation from SMR.
- (765) As can be seen from Figure 21 below, the two relevant questions to ask concerning the intensity of competition according to SMR are: "how many competitors has a region" and "how high is the degree of overcapacity?".<sup>484</sup>
- (766) It is noteworthy that SMR associates low spare capacity (below 30% at melting level) and few producers with "price discipline; high and stable margins".

**Figure 21: Degree of rivalry in STS flat products - 2011**



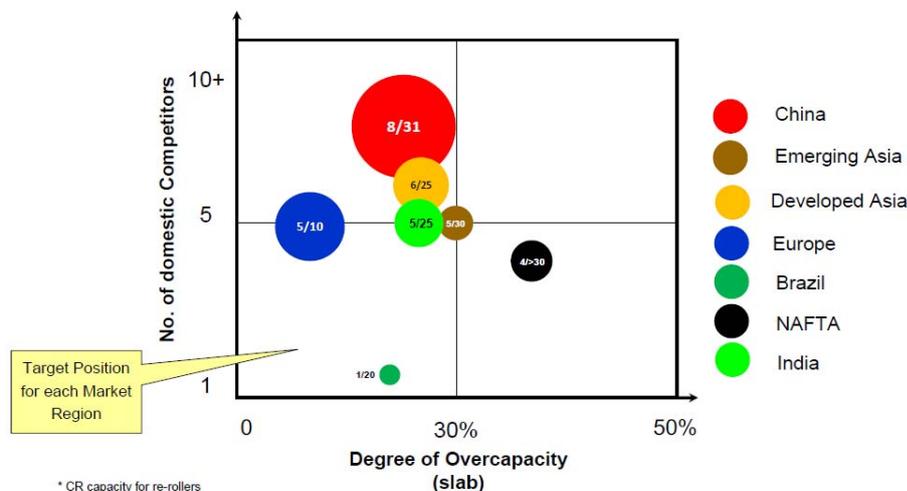
**Source: Form CO, Annex 30, ID 1074**

- (767) It is also noteworthy that without the merger, SMR estimated that by 2015 the number of competitors in Europe would have increased from 4 to 5 (most likely because of a possible sale of the [...] plant to [...]\*, see Figure 22). By contrast, according to SMR's forecast the level of spare capacity utilisation would have decreased.

<sup>484</sup> Source: Form CO, Annex 32, ID 1076.

Figure 22: Degree of rivalry in STS flat products - 2015

**Situation 2015 – More players, but a higher utilization**  
 The situation is improving everywhere, particularly in Europe



Source: Form CO, Annex 30, ID 1074

- (768) If the proposed transaction is placed in the framework of analysis of SMR, by decreasing the number of competitors from four to three, the proposed transaction would weaken the already seemingly feeble competition in the market. As a result, Europe would reach the "target position for each market region", namely a situation of "price discipline, high and stable margins". The SMR framework therefore confirms that both the reduction in the number of competitors and the expected reduction in overcapacity (at the industry level) will reduce the degree of competition.
- (769) In its Reply to the SO, the Notifying Party argues that the Commission's interpretation of the SMR presentation is incorrect, as it appears to be based on the mistaken assumption that the merger will lead to a reduction of the Parties' CR capacity.
- (770) The Commission notes that it is technically correct to state that further to the proposed transaction CR capacity in the EEA will be reduced, as the Parties are planning to shut down Nyby. The relocation of the Benrath lines to Krefeld is also likely to imply that some capacity will be temporarily taken out from the market. In any event, the Commission notes that SMR analysis above is based mainly on an observation of capacity at the level of melting, which will be significantly reduced by the Parties.
- (771) The Commission therefore confirms that expected demand growth will further reduce spare capacity of the Parties' competitors and make competition softer.
- (7) In view of the above, the Commission concludes that post-merger, the intensity of competition in the market is unlikely to increase and may actually decrease even further.

**iii) The Parties' EEA competitors will not find it profitable to expand output sufficiently to remove the incentives for the merged entity to increase prices post-merger**

(772) In light of the finding of a degree of pre-merger market power, that there will be no fundamental shift in the nature of competition from the merging parties' rivals post-merger and that the intensity of competition post-merger is unlikely to increase but may actually decrease further, the Commission has analysed whether the Parties competitors' are likely to find it profitable to react to a price increase by the merged entity to such an extent that such a price increase becomes unprofitable for the merged entity.

(1) According to economic theory, horizontal competitors will, in general, not have an incentive to react so aggressively that a non-coordinated price increase by the merged entity would be unprofitable

(773) Paragraph 24 of the Horizontal Merger Guidelines describes a scenario according to which a price increase from the merged entity shifts some demand to competitors and reduces the competitive pressure on competitors. Faced with increased demand and higher prices by the merged entity, competitors may find it profitable to increase their prices in turn.

(774) This reasoning is in line with standard economic theories of non-coordinated horizontal competition that are compatible with the observation of positive margins in the pre-merger situation.<sup>485</sup> Moreover, standard economic theories of non-coordinated competition also support the view that the merging parties' competitors, who are faced with an increase in demand following a price increase by the merged entity, will, in general, respond by both increasing their price and by expanding their output in return. Such reactions by rivals can generally not be expected to be sufficiently strong to make a price increase unprofitable for the merged entity.

(775) From an economic perspective, the view that post-merger reactions from rivals should a priori not be expected to be sufficiently strong to defeat a price increase by the merged entity – even in the context of the proposed transaction where rivals have spare capacity – has been confirmed by an independent economic expert report commissioned by the Notifying Party. The report explicitly notes that high level features of the transaction (i.e. combined market shares of the merging parties above 50%) would normally be presumed to lead to competitive harm. The report also notes that an argument to the contrary which relies on a reasoning of standard Bertrand competition (without capacity constraints) is incorrect in the presence of capacity constraints.<sup>486</sup>

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<sup>485</sup> The main exception would be price competition in homogeneous products in the absence of capacity constraints (standard Bertrand competition). However, this theory leads to perfectly competitive outcomes (i.e. prices at marginal costs) as long as there are two competitors in the market. This unintuitive result is called the "Bertrand paradox". As prices are substantially above marginal costs pre-merger, this extreme form of competition cannot apply in the present case.

<sup>486</sup> "Independent Expert Opinion by Professors Lyons, Rey, and Seabright on Economic Modelin in Case M 6471 (as of 23<sup>rd</sup> August 2012)", paragraph 2, ID10109.

- (776) As a result, the Commission concludes that according to economic theory reactions from horizontal competitors will, in general, not be sufficient to eliminate the incentive for the merged entity to raise price.
- (2) A detailed assessment of the merged entity's competitors' incentives to react to a price increase confirms that Aperam and Acerinox will not find it profitable to offset such a price increase
- (777) Against the legal and economic background described above, the Commission's Horizontal Merger Guidelines note that when market conditions are such that rival firms have enough capacity and find it profitable to expand output sufficiently, the Commission is unlikely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition.<sup>487</sup>
- (778) The Commission has therefore assessed whether the Parties' main competitors will find it profitable to expand output sufficiently (i.e. increase their production of CR), to make a post-merger price increase unprofitable for the merged entity.
- (a) *The Notifying Party's arguments on rival reactions are not reliable indicators of the likely actual reactions from the Parties competitors to a non-coordinated post-merger price increase by the merged entity*
- (779) The Notifying Party claims that Aperam and Acerinox would find it profitable to increase output sufficiently to defeat a price increase by the merged entity. The Notifying Party submitted several economic studies to support this claim.<sup>488</sup>
- (780) In the SO, the Commission rejected the Notifying Party's studies on several grounds, including the fact that the Notifying Party's studies do not examine the implications of the assumptions on which its claims about rival reactions are based for the pre-merger situation. The studies therefore do not provide an internally consistent comparison of the pre- and the post-merger situation which implies that they are uninformative for actual rival reactions.
- (781) The Notifying Party's Reply to the SO maintains the claim that the Parties' EEA competitors' reactions would defeat any attempt to increase price by the merged entity. The Reply to the SO also contained further economic studies which responded to some of the criticisms made in the SO.
- (782) A detailed evaluation of the Notifying Party's arguments regarding reactions by the Parties' competitors to hypothetical post-merger price increases by the merged entity is contained in Annex II.
- (783) Most importantly, the Commission notes that the Notifying Party's submissions on rivals' reactions to post-merger price increases are inconsistent with how these firms behave pre-merger. In particular, the Notifying Party's assumptions about post-

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<sup>487</sup> Horizontal Merger Guidelines, paragraph 33.

<sup>488</sup> Inter alia: "Response to EC State of Play meeting concerns, CRA" ID8731; "Response to Commission comments on CRA paper analysing industry financial state and competitor incentives, CRA" ID10008; "Critical Elasticity Calculation, Jerry Hausman, December 19, 2011" ID1135; "Case M.6471 – Answers to Commission Questions of 23 January 2012, Jerry Hausman, January 31, 2012" ID138.

merger reactions by the Parties' competitors are incompatible with the observation that Aperam and Acerinox refrain from expanding output pre-merger, despite having substantial levels of spare capacity and despite the existence of positive incremental margins.

- (784) In particular, as discussed in more detail in Annex II, when the calculations on which the Notifying Party bases the argument (namely that the Parties' competitors would find it more profitable to increase output in response to a post-merger price increase rather than maintain output) are applied to the pre-merger situation, they imply that competitors should already have the incentive to increase output pre-merger. However, the fact that Aperam and Acerinox do not expand output pre-merger implies that they do not have such an incentive. This shows that the Notifying Party's "simple" calculations of how rival would react post-merger are missing an important element of how the Parties' rivals behave.
- (785) The Notifying Party's allegedly "simple" exercise is therefore uninformative about the likely strength of rival reactions to a price increase post-merger. It assumes post-merger behaviour that is inconsistent with rivals' pre-merger behaviour. Therefore it does not allow a consistent comparison of how competitors will react in response to post-merger price increases.
- (786) The Notifying Party has provided no evidence or convincing explanation why post-merger reactions from rivals would be governed by different incentives than their pre-merger behaviour. Moreover, as discussed in paragraphs (730)-(771), under a non-coordinated theory of harm there is generally no shift in the nature of rivals' incentives.
- (787) The Commission therefore concludes that the Notifying Party's arguments on rivals' reactions are not informative about the likely reactions from the Parties' competitors to a non-coordinated post-merger price increase by the merged entity.

*(b) The Parties' EEA competitors do not compete aggressively pre-merger (consistent with a degree of market power pre-merger) and are therefore unlikely to do so post-merger*

- (788) The Parties' competitors do not compete aggressively for additional volume pre-merger. As noted above, the Parties' EEA competitors have substantial spare capacity and would earn significant margins on additional sales pre-merger. The fact that Aperam and Acerinox do not compete more aggressively pre-merger (i.e. that they refrain from lowering prices slightly to attract additional customers) implies that they do not have an incentive to do so. In other words, Aperam and Acerinox prefer not to sell more at a slightly lower price because each of these firms maximises its profits pre-merger at capacity utilisation levels well below full capacity.
- (789) This also implies that Aperam and Acerinox would not react very aggressively to a price increase by the merged entity post-merger, given that competition from these firms is not likely to increase, and if anything it is likely to decrease (see above, paragraphs (730)-(771)). While the Parties' competitors could, in theory, decide not to change their price in response to a price increase by the merged entity and in this way benefit from a substantial increase in sales, they could achieve a substantial

increase in sales already by lowering their price slightly in the pre-merger situation. In both cases, the Parties' competitors would benefit from a substantial increase in demand which they would supply at the pre-merger price (or just slightly below).

(790) The fact that the Parties' rivals do not find it profitable to do this pre-merger also implies that it is unlikely that they would find it profitable to react in this way post-merger as claimed by the Notifying Party. Instead the Parties' competitors are likely to find it more profitable to respond to a post-merger price increase by the merged entity with price increases of their own rather than to expand output sufficiently to make such a price increase unprofitable for the merged entity.

(791) Therefore, the Commission concludes that the finding that the Parties' main competitors do not compete aggressively as well as the existence of a degree of pre-merger market power imply that these firms are unlikely to have the incentives to react to a post-merger price increase to such an extent that such a price increase becomes unprofitable for the merged entity. Instead, they are likely to follow a price increase in a way that does not undermine the merged entity's incentive to raise price

(792) Such a moderate reaction is also in line with the predictions from standard economic theories of horizontal competition that are consistent with the existence of a degree of pre-merger market power.

*(c) Statements from the Parties' competitors support the view that they do not have an incentive to expand output sufficiently to make a post-merger price increase unprofitable for the merged entity.*

(793) In addition, as noted above, Aperam and Acerinox have publicly praised the proposed transaction. The most plausible interpretation of such statements would appear that these competitors expect the merged entity to increase prices, which these firms would then follow by price increases of their own that do not defeat the merged entity's price increase.<sup>489</sup> If the reactions of these competitors were as aggressive as the Notifying Party claims, then the merged entity would not increase price post-merger and the competitors would have no reason to welcome the proposed transaction.

(794) The statements by Aperam and Acerinox therefore appear to contradict the view that there would be no post-merger price increase because competitors have the incentive to react to such an extent that the merged entity would not find a price increase profitable.

(795) The statements are also in contradiction with claims by the Notifying Party that the merged entity would become more competitive and increase output because of synergies.

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<sup>489</sup> It would appear difficult to interpret otherwise the statements that "[...] *the merging of two main players will improve the breakeven point of Europe's stainless industry*" (Aperam's public statement, ID 8904) and "[...] *the merger is healthy for the stainless business. Excess capacity is not good for anybody [because it is] destroying the margin*" (Acerinox' public statement, ID 9829). As regards the possibility that competitors may refer in their statements to the advantage gained because of the switching behaviour of multi-sourcing customers, see paragraphs (747)-(751) above.

(796) The Commission therefore concludes that the statement by the Parties' EEA competitors are consistent with an expectation of price increases post-merger which contradicts the view that the merged entity would have no incentive to increase prices because of aggressive reactions from competitors.

*(d) If customers reacted as suggested by the Callson survey, then the Parties' competitors would follow post-merger price increases*

(797) An analysis of the implications of the results from the Callson survey also support the conclusion that the Parties' competitors will respond to a post-merger price increase with price increases of their own.

(798) As a preliminary remark, the Commission disputes the validity and probative value of the Callson survey, as discussed above (paragraphs (436)-(443)).

(799) In any event, if in response to a price increase by the merged entity, [80-90]\*% of customers tried to switch to an alternative supplier as indicated by the Callson survey, then Aperam and Acerinox would face more demand after the price increase than they can supply. The optimal response to such a shift by Aperam and Acerinox will then be to increase their prices in return (because they face excess demand).

(800) However, the fact that Aperam and Acerinox are not lowering price pre-merger to attract additional customers suggests that they do not believe that customers would switch suppliers in response to price differences to such an extent as the results from the Callson survey suggest.

(801) The Commission therefore concludes that the Parties' competitors would follow post-merger price increases even if customers reacted as suggested by the Callson survey. However, the pre-merger behaviour of Aperam and Acerinox suggests that these firms do not consider such large scale customer switching to be likely.

*(e) The Commission's Bertrand-Edgeworth model illustrates that even in a context of intense competition with substantial spare capacity held by the merging firms' rivals, reactions from rivals cannot be expected to prevent post-merger price increases.*

(802) Finally, the conclusion that reactions from the Parties' competitors will not be sufficient to make post-merger price increases unprofitable for the merged entity is also consistent with the results from a Bertrand-Edgeworth model prepared by the Commission. This model is further discussed in Section 5.5.4.10 and Annex IV. Of available standard models, this model provides the best approximation to relevant features of the industry, in particular price competition in (relatively) homogeneous products in the presence of capacity constraints. The model's assumptions imply that competition is at the most intense level that is consistent with the observed levels of capacity.

(803) As explained below, the Commission analysed this model to examine whether the Notifying Party's arguments against non-coordinated effects, when taken at face value and when used in their most competitive interpretation, are jointly sufficient to conclude that the merger would not lead to non-coordinated effects.

- (804) The results from this simple model indicate that even if price competition from rivals is at its most intense and even if there is substantial excess capacity at the industry level, a merger between firms that leads to a substantial consolidation of capacity can be expected to lead to significant price increases under a wide range of circumstances. This is in particular true when there is a degree of market power pre-merger, i.e. when pre-merger prices are above marginal costs.
- (805) These results from the model illustrate the general point that even when rivals have substantial excess capacity, the merging firms' competitors will, in general, not find it profitable to expand output sufficiently to defeat price increases by the merged entity.
- (806) To overturn this insight, one would have to make extreme and unrealistic assumptions about the parameter values of the model which would also imply pre-merger prices at marginal costs, in contradiction with the observed facts. With the exception of such extreme cases, the model's conclusions are in line with those from other standard models of non-coordinated competition, namely that the elimination of competition between the merging parties will provide the merged entity with an incentive to raise prices and that reactions from competitors are not sufficient to make such a price increase unprofitable.
- (807) This finding appears also in line with the view expressed in an expert report commissioned by the Notifying Party.<sup>490</sup>
- (808) As a result of the above, the Commission's Bertrand-Edgeworth model confirms that even in a context of intense competition with substantial spare capacity held by the merging firms' rivals, reactions from rivals cannot be expected to prevent post-merger price increases in a transaction of this type.

**iv) Conclusion**

- (809) It is therefore concluded that EEA rivals of the merged entity do not have the incentive to expand output sufficiently to such an extent that a price increase from the merged entity would be offset.

5.5.4.8. Independent distributors, beyond their already assessed role as gateway for imports, are not a strong competitive constraint on the merged entity

- (810) The Notifying Party argues that independent distributors are a significant competitive force in the market constraining producers of CR. According to the Notifying Party, independent distributors have access to supply from many non EU-based mills and they are the main channel for imports to enter the EEA market. They behave opportunistically in deciding whether to buy from Asia or in the EEA, influencing the level of prices in the latter. Moreover, the Parties are dependent on independent distributors, given that a large part of their sales to end-customers goes through distributors. Independent distributors' bargaining power is further strengthened by their speculative stocking and de-stocking strategies. In addition,

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<sup>490</sup> "Independent Expert Opinion by Professors Lyons, Rey, and Seabright on Economic Modelin in Case M 6471 (as of 23<sup>rd</sup> August 2012)", paragraph 2, ID 10109.

according to the Notifying Party, distributors pay approximately [0-5]\*-[5-10]\*% lower prices than processors or end users.

- (811) The Notifying Party argues further that distributors play a major role in downstream competition through their double role of major customers and major competitors of the stainless steel producers. In particular, they have the ability to defeat any attempts to increase prices unilaterally by the producers, simply by shifting a large part of their demand to other producers/imports. Moreover, they also represent an alternative source for end users.
- (812) After careful assessment of the arguments of the Notifying Party and the available evidence, the Commission notes that independent distributors can be indeed considered as an important part of the CR market, as they account for a large share of the European producers' sales to end consumers (approximately [40-50]\*% of the total deliveries to end users, see paragraphs (87)-(89) above). They also appear to see themselves as competing with integrated European producers at the level of end customers.<sup>491</sup> Moreover, independent distributors are the most significant distribution channel for imports as their sales account for [90-100]\*% of imports from Asia.<sup>492</sup>
- (813) The Commission however notes, firstly, that independent distributors, contrary to the Notifying Party's claim, do not seem to have buyer power. Moreover, the Commission disagrees with the Notifying Party's view that independent distributors can be regarded as an independent and separate competitive constraint *per se*.
- (814) Secondly, the Commission has already assessed the constraint coming from imports of CR into the EEA as imported by independent distributors and considered this constraint insufficient to offset a price increase. The argument that a switch from distributors to imports would have a price constraining effect has therefore already been taken into account above and dismissed.
- (815) Thirdly, the argument that distributors can easily switch supplier is no different from the Notifying Party's argument that other customers can do so. Moreover, as the analysis discussed in Section 5.5.4.10 and at Annex IV shows, even under the most extreme assumption about customer switching (which results in the most intense competition between competitors that is consistent with the observed level of sales and spare capacity), the argument that customers or distributors can easily switch suppliers is not sufficient to dispel anticompetitive non-coordinated effects concerns.
- (816) Fourthly, independent distributors are economically dependent on the integrated European producers since they procure a major share of their requirements from them. Independent distributors need to source from the integrated players (and re-rollers) all the part of their requirements that are not or cannot be satisfied with imports. This part is significant, given that Outokumpu and Inoxum sell a large part

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<sup>491</sup> The majority (19/22, 86%) of the distributors of Q6 and Q7 consider that independent distributors compete with the European suppliers' ex-mill sales.

<sup>492</sup> Source: Form CO, ID 953.

of their CR output to independent distributors (respectively [30-40]\*% and [30-40]\*%).

- (817) Fifthly, as regards the status of distributors as "power buyers", data submitted by the Notifying Party actually shows that independent distributors do not appear to pay less than other customers as far as direct ex-mills sales are concerned. There is no evidence that the bulk of distributor purchases would benefit from like-for-like better terms than other customers.
- (818) In that regard the Notifying Party submitted a paper which claims to show that "*distributors pay approximately [...] per cent less than other types of customers even after controlling for other attributes of the product and the transaction*".<sup>493</sup>
- (819) However, the Commission's analysis of the Outokumpu data used by the Notifying Party revealed that there is no systematic difference in prices paid by distributors, once the regression sample is limited to ex-mill sales and other reasonable changes to the regression specifications are made.<sup>494</sup> The Commission considers that focussing on the sample of ex-mill transactions is reasonable in light of the fact that more than [80-90]\*% of the volume sold to distributors across the three regression samples used by the Parties are made ex-mill. There is no indication that ex-mill purchases by independent distributors would benefit from systematically better terms than purchases from other ex-mill customers on a like-for-like basis.<sup>495</sup>

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<sup>493</sup> Annex IV to the Reply to the Article 6(1)(c) decision. "Analysis of Outokumpu Pricing, Compass Lexecon, 4 June 2012", page 1. ID 4752.

<sup>494</sup> The other changes to the regression specification were the use of log quantities as right hand side variables instead of absolute values and dropping freight as an explanatory variable as it takes negative values.

<sup>495</sup> In a further submission dated 5 July 2012 (ID 8733), the Notifying Party criticises the Commission's modifications to the regressions. In particular, the Notifying Party considers that restricting the sample to ex-mill transactions unduly restricts the number of observations in the sample in the three regressions to (respectively) 8773, 22655, and 8650. The Notifying Party proposes to instead keep the entire sample while introducing additional dummy variables for the invoice unit in its regressions. According to the Notifying Party, this specification shows that the "substantive results are unchanged, with industrial process end users paying prices three to six per cent higher than distributors, all else equal" (page 3). In the Commission's view, limiting the sample to ex-mill sales does not unduly restrict the number of observations as over 8000 observations remain for each regression. The Commission also disagrees with the Notifying Party's suggestion that the inclusion of a dummy variable for the invoice unit is sufficiently flexible. The difference in results between the Notifying Party's pooled regressions (columns (6), (11), and (16) of the Notifying Party's submission of 5 July 2012) and the respective regressions limiting the sample to ex-mill sales (columns (5), (10), and (15) of the Notifying Party's submission of 5 July 2012) shows that this is not the case. Running separate regressions on each sub-sample is more flexible than an approach which includes dummy variables for the invoice unit but restrains the coefficients of the variables of interest to be the same across sub-samples. As ex-mill sales to distributors account for more than [80-90]\*% by volume of the sales to distributors across the three of the Notifying Party's regression samples, restricting the sample to ex-mill sales to examine whether the bulk of distributors obtain like-for-like better terms than other customers purchasing ex-mill is reasonable.

A corollary to this result is that independent distributors that purchase from Outokumpu integrated distributors or service centres obtain like-for-like better terms than other customer purchasing from these integrated Outokumpu subsidiaries. However, the relevance of this is limited as it concerns only [20-30]\*% of the volumes sold to distributors. Moreover, the notifying party explained that [...] (Presentation for meeting with the Commission on 23 April 2012). [...]

- (820) In any event, even if independent distributors obtained systematically lower prices than other types of customers as a result of buyer power, this would not prevent a price increase by the combined entity. Any distributor buyer power would remain unchanged by the proposed transaction. Increased market power by the combined entity, on the other hand, would result in higher prices at the wholesale and at the retail level. There is no reason to believe that buyer power by distributors would be able to constrain such increases in particular since increased upstream market power would not necessarily be expected to hurt distributor margins. As already explained above, a large number of respondents to the market investigation considered that distributors are able to pass price rises on to end customers.
- (821) Furthermore, the fact that three out of four of the integrated producers changed unilaterally the calculation of the Reference Period for the alloy surcharge, thereby making it more difficult for independent distributors to compare prices in the EEA and Asia, shows that the European players behave to a significant extent independently from independent distributors.
- (822) Sixthly, the majority of respondents to the Commission's questions replied that distributors would not be able to defeat an increase in price from European suppliers (13/24, 54%).<sup>496</sup> Furthermore, the majority of those distributors responding that they would be able to do so, referred to their ability to import Asian material, which has been already assessed above. Statements from distributors also suggest that some of them regard themselves as price followers instead of an independent competitive force:
- "If the mills change the prices, market price will change, thus the distributor has to follow"*<sup>497</sup>
- "The 4 EEA integrated mills are too dominant in the EEA stainless steel market"*<sup>498</sup>
- (823) As regards the incentive to defeat an increase in price from the European suppliers at the level of ex-mill, a majority of the independent distributors replied that they would have such an incentive (14 out of 21, 66%).<sup>499</sup>
- (824) However, 65% of the respondents (13/20) stated that they would pass on to their customers any price increase fully, while 30% partially (6/20).<sup>500</sup> Thus, 95% of the distributors who replied to the question would pass on the price increase by the mills at least partially. As a result, given that distributors' margins are unlikely to be harmed by the proposed transaction, it appears that any incentive to defeat a price increase would not be particularly strong.

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<sup>496</sup> See responses to question 6 of Q6/Q7.

<sup>497</sup> [...]\*, Questionnaire 6 ID 8293.

<sup>498</sup> [...]\*, Questionnaire 6 ID 8373.

<sup>499</sup> Questionnaires 6 and 7 – Independent Distributors: Question 7.

<sup>500</sup> Question 32 of Q6 and Q7.

(825) In view of the above, the Commission concludes that independent distributors, beyond their already assessed role as gateway for imports, are not a strong competitive constraint on the merged entity.

#### 5.5.4.9. Potential synergies stemming from the proposed transaction would not offset its anticompetitive effects

(826) The Notifying Party argues that synergies are a key part of the rationale for the proposed transaction. They claim that the synergies that can be realised as a result of the proposed transaction go considerably beyond what each Party could achieve without the proposed transaction. Outokumpu claims that it would not have entered into the proposed transaction without the envisaged merger synergies.

(827) In particular, the envisaged merger synergies include the [...] ( [...] and [...] ) and [...] ( [...] ) production from [...] to the lowest cost integrated production facilities [...] and [...] as well as the closure of the [...] plant. On the other hand the plan also envisages expanding the [...] capacity and moving specialty grade production from [...] to [...].

(828) The Notifying Party claims that the proposed transaction will allow the Parties to harness the productive efficiency of Outokumpu's [...] plant and Inoxum's [...] facility to produce [...] for finishing on Inoxum's specialised [...] mills. This will enable the Parties to close some [...] million t of inefficient melt shop capacity in [...] ( [...] ), reduce the [...] work force by about [...] employees and maximize the utilization of the merged entity's most efficient facilities thereby making both its [...] mills and overall operations more cost-competitive in the medium to long term.

(829) The planned post-merger reductions of [...] and [...] capacity, combined with specialisation that will see the [...] mill focus on [...], the [...] mill increase its focus on [...], and the [...] mill specialize in [...] will not result in any net reduction of output.

(830) According to the Notifying Party's preliminary estimates the combined operations will give rise to substantial production synergies (to be fully realised by [...]) currently estimated at around EUR [...] million per year of combined fixed and variable cost savings (out of which variable cost savings are estimated at EUR [...] to [...] million with EUR [...] million being the likely level).

(831) The Notifying Party also claims that the proposed transaction produces marginal cost efficiencies, which will likely lead the merged firm to increase output post-transaction to the benefit of consumers.

(832) In particular, with the Reply to the Article 6(1)(c) decision, the Notifying Party submitted a paper on the Quantification of Marginal Cost Improvements<sup>501</sup>. The paper estimates Cobb-Douglas cost functions by production stage for Tornio and

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<sup>501</sup> "Quantification of Marginal Cost Improvements, Compass Lexecon, June 4, 2012" (ID 4750) Annex II to the Reply to the Article 6(1)(c) decision.

Terni. The estimations are based on variable cost data that include energy but exclude labour, raw materials, packaging and transport.

- (833) The Notifying Party estimates the reduction in variable costs due to enhanced capacity utilisation to be EUR [...] million per year at Tornio and EUR [...] million per year at Terni.
- (834) With respect to the reductions in marginal costs at Tornio and Terni, the Notifying Party finds that at Tornio, where it is projected that melt shop and HR utilisation will increase by [40-50]% and CR utilisation will increase by [10-20]%, the estimated marginal cost per ton across the three phases of production falls from EUR [...] to EUR [...] (a decline of marginal cost of [10-20]%).
- (835) At Terni, where the Notifying Party projects that melt shop and HR utilisation will increase by [90-100]% and CR utilisation will increase by [10-20]%, the estimated marginal cost per ton falls from EUR [...] to EUR [...] (a decline of marginal cost of [10-20]%). According to this evidence of the Notifying Party, the marginal costs savings are incremental to the variable cost savings described in the Form CO.
- (836) The Notifying Party has not presented these synergies as an efficiency defence in the sense of the Horizontal guidelines.<sup>502</sup>
- (837) However, the Notifying Party submits that should the Commission consider that the proposed transaction leads to a significant non-transitory increase in price, then the pro-competitive effects of the synergies should be taken into account. In fact the study concludes that the merger will result in significant marginal cost efficiencies which give the Parties powerful incentives to lower prices and increase output relative to premerger incentives. The Notifying Party argues that this is because the cost advantage resulting from the synergies will depend on sufficiently high utilisation levels.
- (838) The Commission agrees with the Notifying Party that most of the synergies will be achieved at the melting and hot rolled level, but that also some synergies may stem from the proposed transaction with regard to the production of CR. The concentration of production on the efficient and integrated sites of Tornio and Terni appears likely to produce some beneficial effects in terms of savings on production costs.
- (839) The Commission assessed the synergy claims both (i) from an efficiency defence perspective and (ii) according to the Notifying Party's claims that the achieved efficiencies will provide incentives for the merged entity to expand output.
- (840) The Commission notes however, that only marginal cost synergies will, according to economic theory, give merging parties an incentive to increase output post-merger (all else equal). General savings in fixed and variable costs as a result of re-optimising production do not have this effect. Moreover, only marginal cost reductions are likely to be passed on to consumers in the form of lower prices, with

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<sup>502</sup> See points 76 et seq. of the Horizontal Merger Guidelines.

the extent of pass-on depending on the shape of the demand function and on the degree of competition. Therefore, in the context of the case, only evidence on marginal cost reductions is relevant to evaluate the Notifying Party's argument that they would have an incentive to increase output post-merger.

- (841) As regards to the magnitude of the synergies, the Notifying Party's study estimates the marginal cost reductions resulting from the proposed transaction to amount to EUR [...] per ton in Tornio and EUR [...] per ton in Terni. As the stated percentage reduction in marginal costs are based on cost data that does not include raw material or labour costs, the claimed percentage reductions of [10-20]\*% and [10-20]\*% overstate the percentage reduction in total marginal costs including labour and raw materials.
- (842) In response to Commission comments that marginal costs savings of this order of magnitude would only appear to represent around [0-5]\*% of full marginal cost for grade 304 (including raw materials, packaging etc.) and likely around [0-5]\*% of total marginal costs for grade 430 and only [0-5]\*% of the average market price including alloy, the Notifying Party has submitted a further study on marginal costs efficiencies.<sup>503</sup> This study confirms that the percentage reduction in marginal costs is [0-5]\*%, on average, for grade 304 and [0-5]\*%, on average, for grade 430. The weighted average percentage reduction across both these standard grades is [0-5]\*%.
- (843) The study further provides estimates for the level of marginal costs. Pre-merger marginal costs are estimated to be around [80-90]\*% of the current price for grade 304 and [60-70]\*% of the current price for grade 430, with a weighted average across these grades of [80-90]\*% of the current price pre-merger. The estimated marginal costs are lower than average variable costs reported in the Form CO because marginal costs decline with increasing utilisation.
- (844) While the Notifying Party's analysis is based on cost data, it would be preferable to use engineering data on how the level of inputs (e.g. the amount of energy in kWh rather than the cost of energy) varies with changes with changes in output. This would avoid certain problems associated with the use of cost data (e.g. the potential endogeneity problem that firms might produce more when inputs are cheaper as noted in the Notifying Party's paper). However, the Commission considers the Notifying Party's estimates of marginal cost and marginal cost synergies resulting from the proposed transaction to be reasonable.
- (845) However, the Commission notes that marginal cost reductions in the order of [0-5]\*% (on average) as a result of the proposed transaction imply that the output expanding/price reducing effect of these synergies is also likely to be small.
- (846) Moreover, the Notifying Party argued that a presentation by Outokumpu submitted with their synergy study shows the sensitivity of Outokumpu's financial results to small changes in output or price.<sup>504</sup> The relevant slide of the presentation reports the earnings before interest and taxes ("EBIT") on a grid for comparing different

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<sup>503</sup> "Response to CET Comments on Marginal Cost Efficiencies, Compass Lexecon, 6 July 2012." ID 8730.

<sup>504</sup> ID 9086.

combinations of prices and quantities. This grid shows that [...]\*. Similarly, [...]\*. It is not apparent to the Commission how this grid allows any inference on the incentive effect of a relatively small change in marginal costs.

- (847) As to the efficiency defence, according to the Horizontal Guidelines, "[f]or the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative."<sup>505</sup>
- (848) The Horizontal guidelines consider efficiencies merger specific, "when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives."<sup>506</sup>
- (849) The Commission hereto notes that it seems that at least part of the synergies could have been achieved independently by each of the Parties without the merger. In particular, Inoxum has plans for wide-ranging stand alone cost saving measures involving structural changes (e.g. relocation of CR facility to [...]\*, closure of the [...]\* melt shop) which also form part of the merger synergies. Therefore, not all of the synergies can be regarded as merger specific.
- (850) Efficiencies should be also substantial and timely, and should, in principle, benefit consumers.<sup>507</sup>
- (851) Even if these marginal cost savings as described in paragraph (841) above were to be passed on in their entirety, which is unlikely and not supported by economic theory, the beneficial effects to customers would likely be limited and insufficient to offset anticompetitive effects.
- (852) In any event, for the sake of the assessment the Commission has included the Parties' estimates of the synergies generated by the proposed transaction in its economic model (see section 5.5.4.10 below).
- (853) In the light of the above, the Commission considers that potential synergies stemming from the proposed transaction would most likely not offset its anticompetitive effects.

5.5.4.10. The Notifying Party's arguments are not sufficient to dispel non-coordinated effects even when they are considered jointly

**1) *The countervailing factors assessed above, also taken jointly, appear unlikely to prevent the merged entity from increasing prices***

- (854) Neither the Notifying Party's submissions nor other evidence in the file suggest that all the arguments above, taken jointly, would prevent a price increase.

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<sup>505</sup> Point 78 of the Horizontal Merger Guidelines.

<sup>506</sup> Point 85 of the Horizontal Merger Guidelines.

<sup>507</sup> Point 79 of the Horizontal Merger Guidelines.

(855) In the course of the proceedings, the Notifying Party criticised the Commission for not taking into account in its assessment the joint impact of all the defensive arguments raised in the proceedings. The Commission asked the Notifying Party whether it wished to submit a joint economic assessment of the defensive arguments presented. The Notifying Party responded that such a joint assessment would have been "too difficult" or "impossible".

(856) All the evidence discussed above taken jointly does not at first sight appear to constitute a sufficient constraint to prevent the merged entity from increasing prices. In particular, the Commission considers that:

(1) The competitive constraint from imports falls far short of what would be required for imports to prevent post-merger price increases. As indicated above in section 5.5.4.6, imports are an imperfect and insufficient constraint. Moreover, the quantitative evidence indicates that for a hypothetical monopolist not to find it profitable to increase prices because of the reaction from imports margins in the EEA would have to be at least three times as high as estimated by the Notifying Party. As a result, the competitive constraint from imports on the merged entity is likely to be limited.

(2) EEA competitors, namely Aperam and Acerinox, do not have the incentive to react very aggressively to a post-merger price increase and are likely to respond by increasing their prices as well, as described by paragraph 24 of the Horizontal Merger Guidelines. As a result, their reactions, even if coupled with imports, is unlikely to make a post-merger price increase unprofitable for the merged entity.

(3) Independent distributors, for the reasons stated in section 5.5.4.8, are unlikely to constraint any price increase, in addition to what imports would already do. It is therefore unlikely that their role would have any impact on the behaviour of the merged entity in addition to that of imports.

(4) Synergies, and in particular marginal costs synergies, which are those more likely to be passed on to final customers, are small in magnitude (around [0-5]\*% of final price) and therefore unlikely to have such an impact on the merged entity as to prevent it from increasing prices.

(5) Other factors, such as entry and buyer power, have been already dismissed as unable to play any constraining role at all on the merged entity.

(857) It is therefore concluded that, at first sight, all the countervailing factors assessed above, if taken jointly, are unlikely to prevent the merged entity from increasing prices.

2) *These conclusions are confirmed by a joint assessment with a coherent economic model of price competition in homogeneous goods in the presence of capacity constraints*

(858) In absence of a framework for the joint appraisal of the countervailing factors proposed by the Notifying Party, the Commission has carried out an assessment of these factors using a coherent economic model of price competition in homogeneous

goods in the presence of capacity constraints ("Bertrand-Edgeworth competition"). This assessment is discussed in detail in Annex IV to this Decision.

- (859) Of the standard economic models for non-coordinated competition, the Bertrand-Edgeworth model provides the best approximation to important industry features because, as discussed above, EEA producers of CR produce relatively homogeneous products and compete on price in the presence of capacity constraints (in the notion explained at paragraph (401)). The framework is also capable of taking account of reasonable quantitative and qualitative economic arguments made by the Notifying Party including the constraint from imports and the effect of marginal cost synergies on the merged entity's pricing incentives post-merger.
- (860) It is important to note, however, that the assumptions of the Bertrand Edgeworth model imply that competition between firms is at the most intense level that is consistent with the existence of capacity constraints. In particular the framework of price competition in homogeneous products assumes that customers will instantly switch all their demand to the firm offering the lowest price, and that firms are instantly able to supply them up to the point where they reach their capacity constraints. As such, the assumption reflects the Notifying Party's arguments about (near perfect) supply side substitutability, homogeneity of products within grades, and costless switching by end customers and distributors) in their most competitive interpretation.
- (861) In practice, even small deviations from these extreme assumptions will imply that actual price competition between firms will be less intense than implied by the assumption of price competition in homogeneous products. For example: changing product mix or changing customer focus may imply small costs or delays for suppliers; customers may not instantly switch to the low price firm as such switches may imply some small costs (e.g. search costs) or delay; multi-sourcing strategies would prevent customers from switching all their demand to the lowest priced firm; there may be a small degree of geographic differentiation between firms etc. (see paragraphs (406)-(409) above). Any of these factors would introduce small frictions into the market which would imply that the actual degree of competition between firms is less intense than what is implied by the extreme assumption of price competition in completely homogeneous products.
- (862) In light of the degree of competition between firms that is assumed in the Bertrand-Edgeworth model, it is not surprising that the model, as discussed in Annex IV, has a tendency to under-predict the pre-merger price – i.e. to overstate the degree of competition pre-merger – in the initial calibration scenarios.
- (863) Nevertheless, the Commission considers that an analysis within a simple Bertrand-Edgeworth model is useful to examine the joint implications of the Notifying Party's arguments against non-coordinated effects. The analysis demonstrates that even with very significant excess capacity at the industry level and harsh competition there can

be very significant market power effects. This general insight is also confirmed by the expert report commissioned by the Notifying Party.<sup>508</sup>

- (864) Firstly, the Bertrand-Edgeworth model takes that Notifying Party's arguments (about supply side substitutability, the constraint from imports, excess capacity from rivals, customer switching and synergies) which the Notifying Party repeated in its Reply to the SO<sup>509</sup> at face value. For the sake of the analysis within the Bertrand-Edgeworth model, the Commission therefore accepts the Notifying Party's arguments in their most competitive interpretation. In the Commission's view, this gives the Notifying Party's arguments the greatest chance of being jointly sufficient to dispel non-coordinated effects concerns.
- (865) Even under this most competitive interpretation of the Notifying Party's arguments, the model predicts substantial increases in market power resulting from the proposed transaction. In other words, there is no indication that the Notifying Party's arguments in their most competitive interpretation would be sufficient to dispel non-coordinated effects concerns.
- (866) Secondly, when adjustments to the model calibrations are made that proxy the existence of a lower level of competition between firms than in the model's calibration scenarios without such adjustments, the pre-merger predictions from the model are in line with the observed pre-merger price.
- (867) Moreover, such adjustments which make the model's predictions of pre-merger prices more realistic do not change the qualitative predictions from the model of a substantial post-merger increase in market power. The conclusion that the Notifying Party's arguments are not sufficient to dispel non-coordinated effects concerns therefore also holds if the actual degree of competition was lower than suggested by the Notifying Party.
- (868) Thirdly, the Bertrand-Edgeworth model is also useful to check the sensitivity of the results against a wider set of possible parameterisations. The Commission has carried out substantial robustness checks (e.g. on the effect of POSCO's investment in a [...]kt CR plant in Turkey) to assess whether the effect of such other factors would be likely to lead to the conclusion that the Commission's assessment of the proposed transaction above in line with the Horizontal Merger Guidelines would be invalid.

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<sup>508</sup> This expert report states: "Under normal precedent in European competition law, a merger creating such a position [i.e. a combined market share over 50%] for the merged firm would be presumed to pose a risk of significant competitive harm. If the parties have argued that, in a market characterized by price competition and product homogeneity, competitive harm can no longer be presumed because two firms are enough under Bertrand competition to ensure competitive pricing, then it is a convincing reply to point out that this conclusion is invalid under capacity constraints, as the [Bertrand-Edgeworth] model demonstrates. The details of the specific BE model would not matter very much to make this point, because the general conclusion that prices may exceed marginal costs to a degree that is increasing in the restrictiveness of capacity constraints remains valid under many detailed specifications." (Independent Expert Opinion by Professors Lyons, Rey and Seabright on Economic Modeling in Case M 6471 (as of 23rd August 2012) ID10109).

<sup>509</sup> Reply to the SO, paragraph 5. ID10012.

- (869) In other words, the Bertrand-Edgeworth model can be seen as a "stress-test" for the Commission's assessment of the Notifying Party's arguments above. The results from the model show that the models predictions of substantial increases in market power are robust to such stress-tests.
- (870) The results from the model provide therefore no basis for an argument that the Commission's conclusions from its assessment as described above would be incorrect, even in the context of a wider sensitivity analysis.
- (871) The Notifying Party has advanced a number of criticisms of the Commission's model in the Reply to the SO. The Notifying Party argues *"that the BE model fails under the Best Practice Guidelines on Economic Evidence, that its application to the Transaction produces flawed and biased results, and that the severity of its restrictions go far beyond the conditions and analytic framework set out in the Horizontal Guidelines"*.<sup>510</sup>
- (872) The Commission rejects the Notifying Party's criticism of the model, including any suggestion that the Commission's analysis would not conform to the Commission's Best Practice Guidelines on Economic Evidence. The other criticisms raised by the Notifying Party will be discussed in detail in Annex IV.
- (873) Overall, the Commission therefore concludes that the results from the Bertrand-Edgeworth model to the specific circumstances of the proposed transaction (available capacity, EEA demand, import reactions, demand elasticity, marginal cost synergies etc.), confirm its conclusion that the various pieces of quantitative and qualitative evidence submitted by the Notifying Party – even when considered jointly and when taken at face value in their most competitive interpretation – are not sufficient to dispel non-coordinated effects concerns. This is fully consistent with the Commission's conclusion, based on an assessment of the evidence available and in line with its Horizontal Merger Guidelines and the relevant case law that the transaction is likely to lead to a substantial lessening of effective competition via the creation of a dominant position.

5.5.4.11. The proposed transaction is likely to result in a significant impediment to effective competition through non-coordinated effects, by means of the creation of a dominant position in the EEA market for CR

- (874) While market shares, increments and concentration levels only provide 'first indications' of market power and increases in market power, they are normally important factors in the assessment. Furthermore, according to well-established case-law, very large market shares - 50 % or more - may in themselves be evidence of the existence of a dominant position.
- (875) On basis of the replies to the market investigation alone, it is not possible to conclude whether it is more likely than not that the proposed transaction will lead to a detrimental effect on competition and prices. The Commission has therefore conducted its further assessment of the likely effects of the proposed transaction with particular care and on the basis of a thorough scrutiny of the responses of the

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<sup>510</sup> Reply to the SO, paragraph 16.

same market participants to the more factual questions in questionnaires, interviews, internal documents and industry reports. On the basis of this assessment, it has concluded that the concerns raised by approximately half of customers were confirmed.

- (876) The overlap between the Parties is substantial and the proposed transaction would lead to a significant loss of competition between the Parties.
- (877) Moreover, imports from Asia constitute an imperfect constraint on the merged entity and are thus unlikely to prevent price rises post-merger.
- (878) Although European competitors have in theory the ability to increase output, they would not find profitable to do so to the extent that a post-merger price increase would be unprofitable for the merged entity.
- (879) As regards the assessment of the likely reaction of independent distributors to a hypothetical CR price increase in the EEA, the Commission considers that independent distributors, beyond their already assessed role as gateway for imports, are not a strong competitive constraint on the merged entity.
- (880) With regard to the assessment as to whether the potential synergies generated by the proposed transaction would be likely to offset a CR price increase in the EEA, these synergies, if present, would be insufficient as their effect on the merged entity's marginal costs is relatively small.
- (881) The merged entity will have a very strong position in the EEA. The Commission's assessment that the proposed transaction will remove the competitive constraint between the Parties while constraints from the merged entity's rivals are limited confirms that the proposed transaction will increase the market power of the merged entity, providing the merged entity with the ability and incentives to increase prices.
- (882) Lastly, the Notifying Party's arguments are not sufficient to dispel non-coordinated effects even when they are considered jointly.
- (883) The Commission therefore concludes that the proposed transaction is likely to result in a significant impediment to effective competition through non-coordinated effects, by means of the creation of a dominant position in the EEA market for CR.

#### 5.5.5. *Assessment of coordinated effects on the EEA market for CR*

- (884) A concentration shall be declared incompatible with the internal market if it significantly impedes effective competition due to coordinated effects.<sup>511</sup> That would be the case if the proposed transaction changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices, or if it makes coordination easier, more stable or more effective for firms which were coordinating prior to the proposed transaction.<sup>512</sup>

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<sup>511</sup> Article 2(3) of the Merger Regulation.

<sup>512</sup> See Horizontal Merger Guidelines, paragraph 22(b).

(885) As explained by the Court of Justice in the *Impala* Judgment,<sup>513</sup> coordinated effects should be assessed in reference to an overall economic mechanism of tacit coordination, i.e. by taking into account a coherent economic framework in which tacit coordination would take place. Hence, the market investigation should be focused on identifying: (i) factors that would facilitate the colluding partners to reach a collusive understanding, (ii) plausible mechanisms for detecting (and retaliating against) deviations from such collusion, and (iii) the existence of potentially destabilising factors.

#### 5.5.5.1. The Notifying Party's arguments on coordinated effects and the assessment in the Article 6(1)(c) decision

(886) In the case at hand, the Notifying Party considers that coordinated effects are unlikely to stem from the proposed transaction.<sup>514</sup>

(887) Firstly, the Notifying Party claims that it would not be possible to reach terms of coordination because prices are not sufficiently transparent, the cost structures of the various firms differ and base prices are subject to severe fluctuation as a result of the speculative stocking and destocking activities of distributors.

(888) Secondly, the Notifying Party underlines that it would not be possible to monitor deviations from the coordinated equilibrium because of the lack of transaction-specific transparency, demand fluctuations caused by the speculative trading of distributors and the high degree of customer switching. In this respect, the Notifying Party puts forward that the procurement strategies of stainless steel customers and distributors are extremely varied and that the market presents significant elements of volatility. Furthermore, market intelligence reports provided by third parties do not provide for a sufficient level of detail and for information that is timely enough to facilitate co-ordination.

(889) The Notifying Party also maintains that coordination could not possibly take place in the market because of outsiders' reactions. Any potentially successful coordination would be fatally undermined by increases in imports in response to any price rise. In addition, distributors, processors and large buyers have substantial countervailing buyer power, particularly given the existence of readily available imports.

(890) The Notifying Party lastly argues that the domestic European firms would have strong incentives to deviate from the colluding practice as they have significant excess capacity in a scale business and face the threat of imports.

(891) Since the above conditions for coordination being sustainable are all necessary conditions, tacit coordination would not be possible even if only one of the conditions were not satisfied. According to the Notifying Party, in this case none of the above mentioned conditions are met.

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<sup>513</sup> Case C-413/06 P, Bertelsmann and Sony Corporation of America v Impala, [2008].

<sup>514</sup> Paragraph 643 of the Form CO.

- (892) In its Article 6(1)(c) decision, however, the Commission did not exclude the risk of coordinated effects after the proposed transaction due to the following factors: (i) the rather homogenous nature of the CR market and the significant concentration of the CR suppliers, (ii) the existence of previous cartelization in the industry and possible parallel behaviour as regards the application of the alloy surcharge, (iii) the degree of transparency regarding production, capacity, imports and prices, and (iv) the evidence that imports and distributors are not a significant competitive constraint. Consequently, the phase II in-depth investigation sought to further assess these elements in order to conclude whether the proposed transaction would facilitate the establishment of coordinated behaviour.
- (893) The Notifying Party did not agree with the potential risks of coordination identified by the Commission in its Article 6(1)(c) decision. On the contrary, in its Reply to the Article 6(1)(c) decision the Notifying Party insists on the impossibility for the rival firms to coordinate their behaviour given the reactions of outsiders. More specifically, the Notifying Party underlines the role of imports as a competitive constraint that would disrupt the ability of the three European mills to reach and maintain any tacit agreement on output or prices. Similarly, the reaction of distributors and processors would also disrupt any colluding strategy.
- (894) Further, the Notifying Party contends the Commission's views on market transparency. According to them, there is substantial price dispersion across customers. The Notifying Party's study on pricing<sup>515</sup> concludes that there is significant variation in total transaction prices which cannot be explained by external factors and that such idiosyncrasy in pricing makes coordination difficult. As regards the alleged parallel conduct regarding the alloy surcharge, the Notifying Party claims this argument is to a large extent irrelevant as base prices are negotiated individually. Moreover, the Notifying Party submits that it is the total price not just the alloy surcharge which is relevant for purchasing decisions. Moreover, some customers negotiate different arrangements with respect to the surcharge.
- (895) The Notifying Party also states that the existence of previous cartels is no longer relevant with respect to the analysis of coordinated effects, as the cartel was active approximately 20 years ago and the market dynamics in the meantime have changed in terms of imports and switching between grades.
- (896) Finally, the Notifying Party stresses that the merger efficiencies will reduce the merged entity's incentives to coordinate.
- (897) In addition to the claims included in the Reply to the Article 6(1)(c) decision, the Notifying Party puts forward new elements after the issuance of the SO as regards coordination. In particular, the Notifying Party argues that the proposed transaction would reduce the risk of coordinated effects post-merger compared to an unconditional clearance by increasing the asymmetry between EEA producers. The Notifying Party also argues that compared to an unconditional clearance any remedy

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<sup>515</sup> "Analysis of Outokumpu Pricing, Compass Lexecon, June 4, 2012" ID 4752.

would increase the risk of coordinated effects by reducing the asymmetry generated by the proposed transaction.

#### 5.5.5.2. Assessment of coordinated effects

- (898) The phase II investigation indicated that the change brought about by the merger is unlikely to make coordination more likely, stable or effective in the industry.
- (899) The proposed transaction will increase the degree of asymmetry between the remaining three players, which is likely to make reaching a collusive understanding more difficult. Based on market shares, the merged entity would be the clear market leader ([50-60]\*%), three times larger than its closest rival, Aperam with [10-20]\*% share, and five times bigger than the third competitor, Acerinox ([10-20]\*%).<sup>516</sup> In addition, other sources of asymmetry in the market will continue to exist post-transaction, in particular differences in the cost structures of the various firms and in the product focus.
- (900) The increase in asymmetry between competitors hinders the likelihood of coordinated effects (with or without remedies), as it makes it more difficult for the competing firms to reach a common understanding on the terms of coordination.
- (901) As regards market transparency, the phase II investigation revealed that price transparency is relatively limited. Although the existence of alloy surcharges for CR products in the EU suggests that there might be transparency on the market as regards this element of the final price, the actual transaction prices composed by base price and alloy surcharge are agreed bilaterally between producers and buyers and are not public. Indeed, price transparency at customer level is limited due to the high variations in the prices charged across customers, products, and through time.
- (902) This low level of price transparency concerning base prices makes it difficult to achieve and monitor a price agreement in this industry. In addition, the high level of switching by customers observed in the sales data gathered during the investigation does not appear to be consistent with coordination on prices, as it would be difficult to justify the amount of observed switching under such a scenario.
- (903) A coordination mechanism based on customer allocation among CR suppliers does not appear likely either. The phase II market investigation and the analysis of sales data provided by the Parties and their competitors have shown that demand is very "atomised" and includes a very large number of customers with different volume requirements. Moreover, as pointed out above, there is a high level of switching among customers. Therefore, coordination based on an allocation of customers appears unlikely in this case.
- (904) As regards the alleged competitive constraint coming from imports on the CR market, the Commission notes that imports alone are unlikely to jeopardize the outcome expected from coordination. These issues have been discussed in section

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<sup>516</sup> These findings remain valid even if the divestiture of Terni, submitted by the Notifying Party as commitment, is considered. The proposed transaction will still result in increased asymmetry given that the merged entity's shares would still rise as compared to the pre-merger scenario.

5.5.4.6 above, and remain applicable with regard to the competitive assessment for coordinated effects. As regards distributors, the same considerations expressed in section 5.5.4.8 apply.

- (905) Finally, the vast majority of customers during the second phase investigation did not indicate that the merger may lead to increased prices through coordination between CR suppliers. Although many respondents considered that the proposed transaction might lead to price increases, only a few pointed towards a colluding mechanism to align prices.
- (906) Lastly, one paper submitted by the Notifying Party at a late stage of the proceeding appears to assume the presence of coordinated effects in the market pre-merger. This submission argued that a remedy could result in more competition harm than an unconditional clearance given that "*mergers that create asymmetries in capacity can be beneficial in dynamically competitive industries even when a static model suggests adverse price effects.*"<sup>517</sup>
- (907) The Commission considers that the pre-merger situation is consistent with non-coordinated behaviour.
- (908) Firstly, according to the Notifying Party's estimates, incremental margins pre-merger are approximately [20-30]\*% of the pre-merger price while firms overall level of profitability (EBIT) is low. Successful coordination to the monopoly price would imply substantially higher prices/margins than in the pre-merger situation. This is demonstrated by the calculations in section 5.5.4.6 which show that a hypothetical monopolist would find it profitable to raise prices to achieve higher margins.
- (909) Secondly, the Commission acknowledges that the Bertrand-Edgeworth model tends to predict a pre-merger price range that is somewhat below the observed pre-merger price (in some calibration scenarios). However, the Bertrand-Edgeworth model takes the Notifying Party's arguments in their most competitive interpretation. There might be a number of reasons why non-coordinated behaviour can lead to prices above the level which would be achieved if competition is very intense. Such reasons include, for example: a small search or switching costs for customers to switch suppliers; small costs for suppliers to change their production mix; multi-sourcing strategies by customers; and a small degree of geographic differentiation between suppliers.<sup>518</sup> The presence of any of these factors would explain why non-coordinated competition in the market pre-merger is less intense than implied by the Bertrand-Edgeworth model which examines the implications of the Notifying Party's arguments and evidence against non-coordinated effects in their most competitive interpretation. Moreover, as discussed in Annex IV changes to parameter values of the model which can proxy for the effect of such factors bring the model's price predictions in line with observed pre-merger prices.

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<sup>517</sup> Compass Lexecon, "Implications of the Commission's Economic Model for Potential Remedies", September 3, 2012, ID 10103.

<sup>518</sup> See also paragraphs (406) to (409).

(910) It follows from the above that the observed pre-merger situation is consistent with non-coordinated competition. Moreover, the proposed transaction is unlikely to increase the risk of coordination in the future. Therefore, the Commission considers that the proposed transaction does not lead to a significant impediment of effective competition in the market for CR products based on coordinated effects.

#### 5.5.6. Precision strip

(911) According to the Notifying Party's estimates, the EEA shares of deliveries for precision strip in 2011 of Outokumpu were of approximately [10-20]\*% while Inoxum's shares reached [5-10]\*%, leading to a combined market share of approximately [20-30]\*%. The Parties' market shares in 2010 in the EEA were similar ([10-20]\*% and [10-20]\*% for Outokumpu and Inoxum respectively) as well as their combined market share of 23%. These figures are shown in the tables below:

**Table 16: EEA Shares of deliveries – Precision Strip (2011)**

EEA Shares - Precision strip (2011)			
	Volume	Market Share	HHI
Outokumpu	[...]*	[10-20]*%	[...]*
Inoxum	[...]*	[5-10]*%	[...]*
<b>Outokumpu +Inoxum</b>	[...]*	<b>[20-30]*%</b>	[...]*
Arinox	[...]*	[20-30]*%	[...]*
Samsung / Otelinox	[...]*	[10-20]*%	[...]*
Böhler-Uddeholm Precision Strip	[...]*	[0-5]*%	[...]*
Aperam / UIP	[...]*	[10-20]*%	[...]*
BWS	[...]*	[0-5]*%	[...]*
Sandvik Steel	[...]*	[5-10]*%	[...]*
Theiss	[...]*	[0-5]*%	[...]*
Ergste	[...]*	[5-10]*%	[...]*
MK Folien	[...]*	[0-5]*%	[...]*
CD Wälzholz	[...]*	[0-5]*%	[...]*
Lamina	[...]*	[0-5]*%	[...]*
<b>Total</b>	[...]*	<b>100.00%</b>	[...]*
Combined Share of Merged Parties:	[20-30]*%		
HHI Change:	[...]*		

Post-Merger HHI:	[...]*	
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Source: Parties' own estimates

- (912) The Notifying Party argues that following the proposed transaction, the Parties continue to face competition from a large number of competitors, including their two main competitors for precision strip, Arinox and Otelinox. These suppliers have proved to be strong and stable competitors of the Parties in the last three years, accounting respectively for approximately [20-30]\*% and [10-20]\*% of EEA shares of deliveries of precision strip both in 2011 and 2010. The Notifying Party claims that Arinox, an Italian manufacturer specialized in thin precision strip, competes very aggressively on the market with prices even below the Chinese suppliers. In addition, a number of competitors will remain in the market post-merger, such as Aperam, Sandvik, BWS and Ergste, *inter alia*. The Notifying Party also underlines that the merged entity's market share is overstated to the extent that the total market size included in the above table does not include imports, i.e. sales of non-EEA producers into the EEA. The Notifying Party further argues that European producers suffer from excess capacity and low utilization rates. In fact, European demand for precision strip reached [...]\* kt in 2010, while total EU sales were approximately [...]\* kt, which made Europe a net importer of precision strip, despite ample European capacity of approximately [...]\* kt.<sup>519</sup>
- (913) The Commission considers that the proposed transaction is unlikely to have a detrimental impact on competition in the market for precision strip given (i) the moderate combined market share of the merged entity, i.e. [20-30]\*%, (ii) the presence of a wide number of alternative manufacturers of precision strip, and (iii) the fact that the Parties' main competitors, Arinox and Otelinox, are well-established players in the market for precision strip and therefore will continue to exercise strong competitive pressure on the merged entity post-transaction.
- (914) In view of the above, the Commission concludes that the proposed transaction does not raise competition concerns with respect to its compatibility with the internal market insofar as it concerns the market for precision strip.

#### 5.5.7. *Distribution of stainless steel*

- (915) Outokumpu operates SSCs in Czech Republic, France, Germany, Italy, Sweden and the UK. Outokumpu operates QP service centres in Finland, France, Germany, Italy, Netherlands, Sweden and the UK.
- (916) On 3 September 2012 Outokumpu sold off its stockist/warehouse points in Belgium, Czech Republic, Estonia, Finland, Hungary, Ireland, Lithuania, Poland and the United Kingdom to Amari.
- (917) Inoxum's distribution activities consist exclusively of SSC operations. The company does not operate any stockists or QP centres anywhere inside or outside the EEA, and thus, there is no horizontal overlap as regards QP or stockholding centres. In the

<sup>519</sup> Form CO, paragraph 476.

EEA, Inoxum has SSCs in France, Germany, Hungary, Italy, Poland, Spain and the United Kingdom.

- (918) In the Article 6(1)(c) decision, the Commission raised concerns with regard to the links between the combined entity on the one hand and TKM and Rautaruukki on the other hand. In particular, TK, the main shareholder of Outokumpu post-transaction, will remain active in the market for stainless steel distribution through its subsidiary active in the distribution of metals, TKM. Furthermore, Solidium holds a significant stake in Rautaruukki, a distributor active in a number of Member States. The market shares of the combined entity would reach even higher levels if TK and Rautaruukki were to be included.
- (919) The Notifying Party submits that there are no grounds for assuming that the proposed transaction will affect in any way competition between Outokumpu/Inoxum and TK's distribution subsidiary and Rautaruukki. According to the Notifying Party, TKM operates fully independently from Inoxum, has a different business model, the current links between TKM and Inoxum are limited and the volumes of Inoxum's supplies to TKM will be even lower post-transaction. In addition, TK's minority shareholding will not create any possibilities or incentives for the Parties to coordinate their competitive behaviour in the distribution of stainless steel. Further, the Notifying Party submits that Solidium does not currently control Rautaruukki, and in any case TK and Solidium would not have any incentives to act in concert.
- (920) It is noted that as established in paragraph (28) above, although both Solidium (through its [30-40]\*% holding in Rautaruukki) and TK (through its subsidiary TKM) have interests in the distribution of stainless steel, there is no incentive for them to concert in the management of Outokumpu following the proposed transaction. In fact, Rautaruukki's sales of stainless steel are relatively minor and TKM's sales represent less than [0-5]\*% of TK's turnover. In its Reply to the Article 6(1)(c) decision, the Notifying Party also submitted a study on the effect of these partial shareholdings of the merger demonstrating that TK does not have any incentive to raise TKM's prices, nor does Solidium have the incentive to do so in any of the four countries where Rautaruukki is active. The Commission takes note of the results of this study and concludes that post-merger Solidium and TK will not have an incentive to co-ordinate their behaviour in the markets for the distribution of stainless steel products.
- (921) Both Parties have distribution sales in a number of EEA Member States where they do not have any physical distribution operations. The Parties do not overlap for the distribution of QP and for long products. The competitive assessment focuses on the countries and regions where the Parties have overlapping distribution sales.
- (922) Under the narrowest product market definition, SSC sales of flat stainless steel products, the proposed transaction will give rise to national affected markets in a number of Member States: Austria, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden and the UK.

- (923) The following competitive assessment will focus only on the SSC sales of flat stainless steel products which is the narrowest possible product market definition in this case.
- (924) In this regard, the Commission notes that the divestiture of certain SSCs form part of the Proposed Commitments as submitted by the Notifying Party on 19 October 2012. In particular, the SSCs included in the proposed divestiture package are Inoxum's SSC in Ceriano Laghetto (Italy) and Outokumpu's SSC in Willich (Germany).
- (925) Furthermore, at the option of the purchaser, there are two more SSCs included in the package: Inoxum's SSCs in Birmingham (UK), and/or Outokumpu's SSCs in Tours (France).
- (926) Consequently, taking into account the divestiture of the 2 SSCs included in the remedy package (i.e. not taking into account the UK and French SSCs which are at the option of the buyer), post-transaction the merged entity would have a market share exceeding 25%<sup>520</sup> (thus exceeding the threshold where the Commission normally starts considering whether there is competition) and with an increment above [0-5]\*% only in the following national markets for SSC sales of flat stainless steel products.

**Table 17: SSC sales of flat stainless steel products – National**

	2011 combined shares	Share increment	2011 combined shares (taking into account the remedy package)
<b>FRANCE</b>	[50-60]*%	[20-30]*%	<b>[50-60]*%</b>
<b>HUNGARY</b>	[50-60]*%	[10-20]*%	<b>[40-50]*%</b>
<b>PORTUGAL</b>	[30-40]*%	[0-5]*%	<b>[30-40]*%</b>

\*national market part of a cluster

- (927) The Commission also takes note of the fact that the impact of the proposed transaction might be further mitigated by the optional sale of the UK and French SSCs. Should the potential purchaser decide to buy SSC in Tours, the market share in France would decrease to [20-30]\*%. In case the Birmingham SSC is divested, the market share in Ireland amounts to [30-40]\*% and in the UK to [30-40]\*%.
- (928) As discussed above (section 5.4.3), the Commission found sufficient evidence to conclude that there are certain regions which form clusters for the SSCs sales of flat products, notably the Benelux countries, UK+Ireland, and the Nordic countries. The market shares for these markets are the following, taking into account the divestiture of Ceriano Laghetto and Willich.

<sup>520</sup> In the Czech Republic the combined market share would amount for [20-30]\*%.

**Table 18: SSC sales of flat stainless steel products – Regional**

	2011 combined shares	Share increment	2011 combined shares (taking into account the remedy package)
<b>BENELUX</b>	[40-50]*%	[5-10]*%	[30-40]*%
<b>NORDIC REGION</b>	[30-40]*%	[0-5]*%	[30-40]*%
<b>UK+IRELAND</b>	[20-30]*%	[5-10]*%	[20-30]*%

- (929) Should the potential purchaser decide to buy SSC in Tours, the market share in the Benelux would decrease to [20-30]\*%. In case the Birmingham SSC is divested, the market share in UK+Ireland amounts to [10-20]\*%.
- (930) The Notifying Party submits that the proposed transaction will not lead to a significant impediment of effective competition at the distribution level because despite becoming the leading stainless steel distributor in the EEA, the combined entity will continue to face strong competition from a large number of players (both integrated mono-brand distribution operations of the EEA stainless steel majors and independent multi-brand distributors).
- (931) The Notifying Party further submits that in the majority of the affected markets the Parties will continue to face strong competition from a number of equally large or larger competitors, including the vertically integrated distribution operations of Aperam and Acerinox; a number of established independent distributors<sup>521</sup>; and the recently established distribution networks of some non-EEA companies<sup>522</sup>.
- (932) The Commission addressed questionnaires to both competitors and customers of the Parties on the distribution market. Overall, in the market investigation, the distribution customers did not express major concerns with regard to the distribution market although a number of them indicated that the proposed transaction will have an impact on the market for distribution of stainless steel products in the relevant Member State.<sup>523</sup> Concerning potential regional delimitations of the market, the overall majority of the respondents did not express significant competition concerns.
- (933) With regard to the national markets where combined market shares exceed 25%, i.e. Hungary, France and Portugal, the Commission notes the following.
- (934) In Hungary, where combined market shares are close to [50-60]\*%, strong competitors include Aperam ([20-30]\*%) and AK Steel ([10-20]\*%), followed by smaller players such as TKM ([0-5]\*%) and Ital-Inox ([0-5]\*%), REV (IMS-Jacquet) ([5-10]\*%).

<sup>521</sup> Including TKM, Klöckner & Co. Group, Sassoli Group, Amari Group, Acciai Vender Group, Hernandez Edelstahl GmbH, Kreuzer Edelstahl GmbH, BE Group Oy AB, Tibnor AB, Irestal Group, Spaeter Group, Norder Bandstahl GmbH, MCB Group, Ruukki Group and Damstahl GmbH.

<sup>522</sup> such as Jindal Stainless Ltd, Baosteel, and Minmetals Corp.

<sup>523</sup> Q53 of q5, 98 out of 197 replied no, 99 out of 197 replied yes.

- (935) The Commission also notes that in Hungary, the distribution customers did not seem to be concerned. 73% of the respondents stated that the proposed transaction will not have an impact on the distribution market for stainless steel products.<sup>524</sup> No customers expressed concerns at distribution level with regard to the proposed transaction.<sup>525</sup> The Commission further notes that the geographic scope of the market is likely to be wider than Hungary, i.e. including some of its neighbouring markets. Under this scenario, the merged entity's market share will be significantly diluted.
- (936) In France, there are also several competitors present, with Aperam being second in the market with [20-30]\*%, while TKM ([10-20]\*%) and Azynox are also present. No customer from France expressed concrete concerns with regard to the proposed transaction at distribution level.
- (937) In Portugal, Acerinox is the clear market leader with [50-60]\*%. 67% of the respondents stated that the proposed transaction will not have an impact on the distribution market for stainless steel products.<sup>526</sup> No customer expressed substantiated concerns with regard to the proposed transaction at distribution level. Furthermore, the combined share of the merged entity will be moderate in this case ([30-40]\*%) and the increment brought about by the proposed transaction will be limited (below [5-10]\*%).
- (938) As regards the regional markets outlined above, i.e. Benelux, Nordic Countries and UK+Ireland, the combined market shares of the Parties do not exceed [40-50]\*%. Furthermore, the Parties face a number of strong competitors (in the Benelux Aperam, MCB, Roba; in the Nordic countries Aperam, Acerinox, Damstahl; and in the UK+Ireland region Amari Group, ASD Metals, Equinox). Moreover, as emphasized above, if the optional SSCs were to be included in the remedies' package, these market shares will be even lower.
- (939) It is therefore considered that the proposed transaction does not raise competition concerns with respect to its compatibility with the internal market insofar as it concerns non-coordinated effects in the market of SSC sales of flat stainless steel products and consequently in the market for distribution of stainless steel products.

*(B) Vertical effects*

*5.5.8. Supply of ferrochrome/production of stainless steel*

- (940) The proposed transaction gives rise to a vertical link between the supply of ferrochrome (upstream) on the one hand and the production of stainless steel products on the other (downstream). Outokumpu has a ferrochrome mine in Finland. It mainly uses its ferrochrome internally, but also supplies it to third parties, including Inoxum.

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<sup>524</sup> Q53 of q5, 8 out of 11.

<sup>525</sup> "[/]" ID 9550; "[/]" ID 9678

<sup>526</sup> Q53 of q5, 4 out of 2

- (941) At the upstream level for the supply of ferrochrome, Outokumpu has a low market share regarding production capacity, production, and merchant sales. Outokumpu's EEA merchant ferrochrome sales of [...] t in 2010 represent approximately [0-5]% of the total EEA merchant ferrochrome sales of [...] t<sup>527</sup>. Outokumpu only sells a small portion of the ferrochrome it produces due to its captive ferrochrome requirements. Outokumpu plans to increase its ferrochrome production capacity to [...] t per year, yet given that the captive ferrochrome requirements of the combined entity are of [...] t, merchant sales will probably not increase.
- (942) At the downstream level of slabs, HR and CR stainless steel production in the EEA, the proposed transaction would result in individual or combined shares of more than 40% under any market delineation retained. As a result, the markets for the supply of ferrochrome and the production of stainless steel are vertically affected by the proposed transaction.
- (943) The Notifying Party argues that input foreclosure is not a concern due to the de minimis levels of Outokumpu's ferrochrome production capacity, merchant sales, as well as abundant third-party supply of ferrochrome. According to the Notifying Party, given the absence of any market power in the upstream supply of ferrochrome, the combined entity will not have the ability to foreclose downstream stainless steel producers who will continue to have sufficient access to ferrochrome resources from competing suppliers in South Africa, India, China, Russia and Kazakhstan. Furthermore, customer foreclosure is not a concern either because Outokumpu's production would not be sufficient to satisfy the combined entity's ferrochrome requirements. Moreover, Outokumpu's competing ferrochrome suppliers will continue to have access to a sufficiently large customer base post-merger even if Outokumpu and Inoxum are no longer available as ferrochrome customers.
- (944) Considering (i) Outokumpu's low market share regarding production capacity, production, and merchant sales at the upstream level for the supply of ferrochrome, and (ii) the fact that none of the respondents to the requests for information sent by the Commission raised competition issues concerning this vertical relationship, it could be concluded that the proposed transaction does not raise competition concerns with respect to its compatibility with the internal market insofar as it concerns this vertical relationship.

#### 5.5.9. *Supply of Slabs / HBB / HWB / CR*

- (945) Outokumpu and Inoxum are both vertically integrated along all the various levels of the stainless steel production chain. For this reason, the proposed transaction would give rise to the following potential vertical links: the supply of slabs (upstream level) and the production of HBB (downstream level); the supply of HBB (upstream level) and the production of HWB (downstream level); the supply of HWB (upstream level) and the production of CR (downstream level).

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<sup>527</sup> Outokumpu's worldwide merchant ferrochrome sales in 2010 of [...] tonnes represent even a smaller percentage: these sales represent [0-5]% of the total worldwide merchant ferrochrome sales. Source for EEA and worldwide merchant ferrochrome sales: Notifying Party's estimates.

- (946) According to the Notifying Party there is neither an actual nor even a potential supplier/customer relationship between Outokumpu and Inoxum in the EEA for the supply of slabs, HBB, HWB and CR, because the Parties source these products internally from their own upstream activities. As a result, the Notifying Party claims there is no vertical relationship for the supply of slabs, HBB, HWB and CR that would arise from the proposed transaction.
- (947) In the case of slabs, the Commission acknowledges that the dimension of merchant markets is very limited, i.e. [...] t, which represents [0-5]% of the overall production of slabs. It is therefore very unlikely that the proposed transaction would give rise to any input or customer foreclosure.
- (948) As in the case of slabs, HBB and HWB merchant markets are small and represent less than 5% and around [5-10]% of the EEA production capacities of HBB and HWB, respectively. Furthermore, and according to the Parties' knowledge, there are only two significant customers in the merchant market for HBB, [...] and [...], which use HBB to produce HWB (downstream). Even if the merged entity would stop supplying HBB to these customers, other suppliers with substantial excess capacity, such as Aperam or Acerinox, could supply these re-rollers. Alternatively, both companies could purchase HBB from producers outside the EEA. Similarly, given the excess capacities in the market for HWB and the small size of the merchant market, any stainless steel EEA or non EEA competitor could start supplying HWB if the merged entity decides to stop its supplies.
- (949) Likewise, customer foreclosure does not arise, given that none of the Parties are currently purchasing slabs, HBB or HWB to any appreciable extent from third parties.
- (950) Given the above, the Commission concludes that the proposed transaction does not raise competition concerns with respect to its compatibility with the internal market insofar as it concerns these vertical relationships.
- (951) The Commission however notes that the concentration of very high shares of capacity and production at the level of slabs and HR products increases the risk for market power to arise at the downstream level for CR. This is because all major producers of CR are vertically integrated in the production of slabs and HR and a very large proportion of the production of slabs and HR is used for the purposes of producing CR. The risk that market power upstream will have an influence at the downstream level has also been mentioned by some respondents to the Commission's requests for information, who expressed concerns with regard to the level of consolidation that the proposed transaction will generate at the upstream level.
- (952) As such, the Commission considers that the important position that will be acquired by the merged entity with regard to all the products which are upstream to CR has an impact at CR level and strengthens its finding that the proposed transaction will result in a significant impediment to competition in the EEA market for CR discussed above in Section 5.5.4.

5.5.10. *Supply of HWB and CR / Distribution of stainless steel*

- (953) The proposed transaction gives rise to vertical overlaps between the markets for production of HWB and CR in the EEA and the distribution of these products in the Member States.
- (954) In particular, in its Article 6(1)(c) decision, the Commission raised doubts as for vertical effects between markets for production (upstream) and distribution (downstream) of CR in the EEA and the different Member States, given that as a result of the proposed transaction the Parties have a market share of [50-60]\*% in the market for production of CR in the EEA (see section 5.5.) and there are a number of affected national markets considering the narrowest possible distribution product market (SSC sales of flat products).
- (955) The Notifying Party acknowledges the vertical link between the production and distribution of stainless steel products created by the proposed transaction<sup>528</sup>.
- (956) As for input foreclosure the Notifying Party puts forward that competitive constraints from imports and other EEA mills would impede the exercise of any significant market power for the supply of CR products in the EEA. Moreover, many third-party distributors belong to vertically integrated companies active in both upstream and downstream levels such as Aperam or Acerinox in the EEA or POSCO and Jindal Stainless outside the EEA. In addition, it is also put forward that the post-merger entity would not have an incentive to apply an input foreclosure strategy either since independent distributors are multi-brand distributors with significant customer coverage. Therefore, the post-merger entity would still need these independent distributors in order to reach every customer segment<sup>529</sup>.
- (957) Concerning customer foreclosure, the Notifying Party puts forward that the post-merger entity would not have the ability to apply such strategy since Inoxum does not purchase from third parties and the volumes of third-party products sold by Outokumpu's integrated distributors are limited<sup>530</sup>.
- (958) The Commission notes that as a result of the proposed Commitments, the Parties' combined capacity share at upstream level (in the market for production of CR in the EEA) will decrease to below [40-50]\*% in the case of CR. The Commission notes also that the divestiture of certain SSCs will also result in a substantial decrease in national market shares in several affected markets at national/regional level, as described above in section 5.5.7.
- (959) As far as HWB is concerned, the proposed transaction is not likely to raise any competition concerns, given that the market share of the merged entity in the upstream market amounts to [40-50]\*% and a number of players will remain active on the market.

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<sup>528</sup> Paragraphs 1011 – 1014 of the Form CO.

<sup>529</sup> Paragraphs 1015 – 1017 of the Form CO.

<sup>530</sup> Paragraphs 1018 - 1020 of the Form CO.

(960) In view of the above, it can be concluded that the proposed transaction also does not raise competition concerns with respect to the vertical links between the production of HWB and CR in the EEA, and distribution of stainless steel products in different Member States.

## **6. PROPOSED COMMITMENTS**

### **6.1. Commitments submitted on 19 September 2012**

#### *6.1.1. Process leading to the submission of the Commitments of 19 September 2012*

(961) Shortly before the issuance of the SO, the Notifying Party engaged with the Commission in discussions aimed at preparing the submission of a remedy package suitable to solve the Commission's concerns on the EEA market for CR.

(962) The remedy package originally envisaged by the Notifying Party consisted of the combination of the following assets: three of Outokumpu's sites in Sweden (Avesta, Nyby and Kloster), one annealing & pickling line to be relocated from Inoxum's site in Dillenburg to Avesta, one cold rolling line to be relocated from Inoxum's site in Terni to Avesta and four service centres in France, Germany, Sweden and the United Kingdom.

(963) Since the beginning of the discussions, the Commission expressed doubts as regards the viability and competitiveness of the proposed package, given that it consisted of a combination of assets which were previously not operating as a standalone entity. In the course of the process, the Commission also expressed concerns as regards the insufficient size of the business to be divested, the product mix and the possible implementation risks related to the likelihood to find a suitable purchaser.

(964) In order to address the Commission's concerns, the Notifying Party increased in the course of informal remedy discussions the overall CR capacity by replacing the annealing & pickling line from Dillenburg and the cold rolling line from Terni with two larger annealing & pickling and cold rolling lines from Terni. The Notifying Party also added one service centre in Italy to the package. Lastly, in order to address the implementation issues raised by the Commission, the Notifying Party agreed to discuss in parallel with the launch of the market test for the proposed remedy an alternative remedy consisting of the divestment of Inoxum's plant in Terni.

(965) The Commission and the Parties had several meetings and conference calls to discuss technical details of the informal Swedish remedy package, in particular with regard to persisting doubts that the Commission had in relation to capacity, viability and product mix of the business, as well as the implementation of the new package.

#### *6.1.2. Description of the commitments*

(966) On 19 September Outokumpu submitted a formal remedy package ("Swedish Coil") consisting in the divestiture of a combination of the following assets:

- (a) three among Outokumpu's production sites, located in Avesta, Nyby and Kloster (Sweden);

- (b) two production lines to be relocated from Inoxum's plant in Terni to Avesta (one cold rolling production line and one annealing and pickling line); and
- (c) five SSCs: Inoxum's SSCs in Langenhagen (Germany) and in Birmingham (UK), and Outokumpu's SSCs in Tours (France) and in Eskilstuna (Sweden), and, at the option of the purchaser, Inoxum's SSC in Ceriano Laghetto (Italy).

(967) According to the Notifying Party the combined cold rolling capacity of Swedish Coil amounts to [...] kt/y. The capacity of the assets composing Swedish Coil is indicated in Table 19 below.

**Table 19: Total capacity of Swedish Coil according to the Notifying Party**

	Old Avesta (kt/y)	New Avesta (including A/P and CR lines from Terni) (kt/y)	Nyby (kt/y)	Kloster (kt/y)	Total Swedish Coil (kt/y)
Melting	[...] <sup>531</sup>	[...] <sup>532</sup>	[...]*	[...]*	[...] <sup>533</sup>
Hot rolling	[...]*	[...]*	[...]*	[...]*	[...]*
Cold rolling	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Schedule 1 attached to the Commitments document, ID 10274

- (968) In 2011, Avesta, Nyby and Kloster had sales of approximately [...] kt of CR. Of these sales, almost [...] was accounted for by 2 meters wide CR (for which there is no overlap between the Parties, given that only Outokumpu produces this exceptionally wide type of coil). Duplex grades, which Inoxum only produces to a very limited extent, also represented a significant proportion of the Swedish assets' sales ([20-30]%). Very thin products (thickness below 0.6 mm) constituted as well a large portion of the Swedish assets' sales ([20-30]%).
- (969) Most of the standard grades manufactured by the Swedish assets (304 and 316) are produced in Avesta and Kloster. These plants mainly produce exceptionally wide 2 meters CR (Avesta) or very thin CR (Kloster). Furthermore, approximately [...] of Nyby's output is accounted for by duplex grades.
- (970) In 2011, the Swedish assets also sold approximately [...] kt of HWB, [...] kt of VKS and [...] kt of precision strip. In addition, Avesta's meltshop produced approximately [...] kt of slabs for Degerfors' production of QP.
- (971) The Notifying Party argues that the current CR product mix of Swedish Coil, which is oriented towards specialty products such as duplex, 2-meters-wide CR and very thin CR, is exclusively a result of Outokumpu's strategy of concentrating commodity production in Tornio and specialties in Sweden. Once the annealing & pickling lines and the cold rolling lines from Terni are relocated, the Notifying Party submits that a

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531 [...]\*

532 Ibid.

533 Ibid.

suitable purchaser would have the ability and incentive to become an effective competitive force over all the range of CR products, including the commodities products produced for example in Tornio, Krefeld or Terni.

- (972) In addition, should a suitable purchaser wish to expand beyond the capacity constraint imposed by Avesta's meltshop, the Notifying Party argues that it could do so by purchasing stainless steel slabs on the market and making use of Avesta's excess capacity at hot rolling level.

### 6.1.3. *Investigation on Swedish Coil*

#### 6.1.3.1. Sources of evidence

- (973) In order to assess the remedies proposed by the Notifying Party, the Commission has relied on a number of different sources of evidence.

- (974) Firstly, on 20 September 2012 the Commission launched a market test on Swedish Coil by means of questionnaires sent to the competitors and customers of the Parties, as well as to independent distributors. The questionnaires were sent to all those market participants who replied to the phase II questionnaire, without any possible discrimination on the basis of the replies previously provided. As such, questionnaires were thus sent both to market participants who expressed concerns on the proposed transaction, and to those who had not expressed concerns.

- (975) Secondly, because of the expected difficulties in assessing the technical aspects of the remedies, the Commission suggested the Parties to hire three industry experts who would have had to reply to the Commission's questions on Swedish Coil, particularly with regard to the viability, competitiveness and attractiveness of the divested business.

- (976) Thirdly, the Commission also had a number of calls with companies which expressed a potential interest in purchasing Swedish Coil, in order to test the degree of effective interest and the use that these companies would have made of Swedish Coil.

- (977) Fourthly, the Commission sent a number of requests for information to the Parties, providing them with ample opportunity to submit internal documents and information on the proposed remedy package.

- (978) Fifthly, the Commission has carried out its own calculations on the basis of the costs figures included in the internal documents and other economic submissions on Swedish Coil provided by the Parties.

- (979) The Commission has assessed the market test (paragraphs (980)-(1030)) and the experts' submissions (paragraphs (1031)-(1065)) in detail and the results are set out in sections 6.1.3.2 and 6.1.3.3 below. The 3 other sources of evidence are not assessed separately but are incorporated into the assessment.

### 6.1.3.2. Overview of the results of the market test

(980) While a pure quantitative approach shows that the majority of respondents have expressed a favourable opinion of the remedy, overall the results of the market test for Swedish Coil have been mixed.

#### (1) *Suitability to remove competition concerns*

(981) The number of respondents who replied that Swedish Coil would solve the competition concerns are 59 out of 90 (66%) of direct customers, 100 out of 139 (72%) of indirect customers, 5 out of 6 (83%) of competitors and 16 out of 22 (73%) of independent distributors.

(982) It can be however noted that direct customers, i.e. the category of customers that would be most affected by a price increase according to the Commission's theory of harm, appear to be relatively more concerned. Thirty-one out of ninety of this category of respondents stated that Swedish Coil would not solve the competition problem identified by the Commission.

(983) A more detailed assessment of the replies also shows that certain customers who had expressed concerns in the phase II market investigation believe that the remedies would be sufficient to dispel the risk of a price increase (e.g. [...]\*). In contrast, a number of other customers which had previously expressed concerns believe that the sale of Swedish Coil would not be adequate (e.g. [...]\*)).

(984) Of those who expressed concerns, certain customers considered the capacity of Swedish Coil as insufficient to remove the competition concerns.

(985) [...]\*, considered that in spite of the remedy *“the merger will create by far the largest CR producer in the world and it will be very dominant on the EU market.”* In addition, [...]\* stated that *“the swedish coil assets are mainly HR coil producer (CR is only a minor part) We cannot predict what the capacity is of the CR line that will be transferred to Avesta is and what range of products will be offered from this line. However it will be very minor compared to the new OTK CR capacity.”*

(986) [...]\* commented: *“In our opinion, the production capacity of the Divestment Business is minimal and they should divest a bigger production capacity.”*

(987) [...]\*, stated: *“The new capacities can cover the nordic region but not mainland Europe due to the geographical distance”*.

(988) A number of respondents also expressed concerns on the range of products produced by Swedish Coil.

(989) [...]\*, a distributor and trader, stated that the Divestment Business: *“May be not competitive in terms of 'standard' stainless (Nyby), high cost, too small, may lead to closure of Nyby and concentrate on specialization of Avesta & Kloster.”*

(990) The German manufacturer of heating systems, [...]\*, also stated: *“The plants referred to do not produce commodities, but precision strip and special material. Moreover, the company figures do not look too bright for special material right now. There have been price increases on the marked recently [...]Since the current*

*portfolio of the plants more or less consists of niche products, it will be difficult to compete with the manufacturers of commodities. [translated from original in German language]"*

- (991) Finally, [...]\*, a leading supplier of automotive replacement parts, stated: "*The production units Avesta, Nyby, Kloster are specialised in the production of niche products. They don't have enough experience in manufacturing of all standard grades and thicknesses.*"
- (992) The efficiency and current profitability of Swedish Coil was also mentioned as a source of concerns.
- (993) The distributor [...]\* stated: "*At the best of my knowledge, the facilities part of the divesting package will not be enough cost efficient in order to be a valid competitor to other first class world wide producers of stainless steel.*"
- (994) [...]\*, a leading German supplier of innovative enclosure and housing technologies, also stated: "*It is not comprehensible why a healthy new entity should result from the merger of two unprofitable sites. In order to maintain the diversity and flexibility of the market, the merger should not be approved.*"
- (995) Lastly, certain customers stated that the relocation of the annealing & pickling and cold rolled lines from Terni could create competition problems in the south of Europe and particularly in Italy.
- (996) The distributor [...]\* stated: "*Relocating to Avesta means losing the region south europe, because Terni at the moment is fast in production and delivery to southern of germany, austria, switzerland and so on...*"
- (997) Furthermore, the Italian processor [...]\* submitted: "*The divestment of the CR- and A&P-line of Terni would reduce Terni's capacity, with the consequence of a major (or nearly total 100%) capacity utilization. This could induce Terni to offer higher prices.*"
- (2) *Viability of the divested business*
- (998) The number of respondents who replied that Swedish Coil would be viable are 55 out of 87 (63%) of direct customers, 102 out of 138 (74%) of indirect customers, 5 out of 6 (83%) of competitors and 14 out of 22 (64%) of independent distributors.
- (999) A minority of market players however also expressed concerns.
- (1000) The Commission considers that these comments are particularly important, given that a divestiture such as the one proposed by the Notifying Party which consists of a combination of certain assets which did not form a uniform and viable business in the past creates risks as to the viability and competitiveness of the resulting business.<sup>534</sup>

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<sup>534</sup> Notice on Remedies, paragraph 37.

- (1001) Firstly, some companies believe that the size of Swedish Coil will not be sufficient to reach the minimum efficient scale.
- (1002) The distributor [...] stated: *“How should this divested business then survive, if it is by far smaller than the merged OTK (from the moment of the sale the divested business is OTK’s direct competitor, without a chance to stand this competition, because they have only 15...20% of OTK’s capacity). [...] The melting capacity is too low to be cost competitive (purchase of raw materials, purchase of energy, transport costs etc.)”*.
- (1003) The Austrian steel processor [...] also stated: *“For the competition concerns to be removed (or at least diminished), the proposed business carve out would have to result in a viable entity. It is doubted that a new “small” entity resulting from a few loss making plants in Sweden (assumption based on Outokumpu’s financial results of the past 2-3 years) can be viable. How would this company be competitive with its high energy costs? How would it fund R&D and new products development to generate new profitable products for its future? As a stand alone it is doubted such an entity would survive for long, unless there is a global/big scale player interested in its acquisition.”*
- (1004) Similar concerns were voiced by the distributor [...]: *“The tonnages and assortments too small, to create a satisfactory competition against Aperam. The risk is therefore that there will not be produced standard products (EN 1.4301 and 4404) but primarily special qualities.”*
- (1005) In addition, the German cookware manufacturer [...] stated: *“The proposed divestment business is just a part of minor interest.”* [...] also raised issues in relation to the quality of the product manufactured by the Swedish assets: *“The old Avesta Sheffield activities have had a lower quality level in the past. To my opinion comparable stainless steel qualities are coming from Tornio, Krefeld and Dillenburg.”*
- (1006) Secondly a number of market players expressed concerns that the relocation of the annealing and cold rolling lines from Terni would risk to undermine the viability of the Divestment Business.
- (1007) The manufacturer of refrigeration equipment [...] stated that an element of concern is constituted by: *“Possible delays because the relocation of the two lines from Terni to Avesta”*.
- (1008) The shipbuilder [...] also stated: *“Our concern are the possible delays in supplies caused by moving and installing Terni production lines at Avesta”*.
- (1009) The trader [...] indicated that problems with the unions in Terni may delay the process (*“People in Terni won't be happy and they will raise a fuss.”*). This risk might be confirmed by statements in the press and the information provided by ThyssenKrupp in the course of the meetings and calls of the past days.
- (1010) Thirdly, a number of respondents also mentioned that the current excess capacity in Europe would imply a risk of viability for the Divestment Business.

(1011) In this regard, the competitor Acerinox stated: *“There is an excess of capacity in EU market anyway. Some shops must be closed sooner or later, whether these are the divested business or not, it does not make a big difference. Even if nobody purchases the elements, they would be probably doomed anyway.”*

(3) *Attractiveness of the divested business*

(1012) Even if the market test is overall relatively positive, it produced unenthusiastic replies with regard to the question as to whether any company would have been interested in purchasing the remedy.

(1013) The number of respondents who replied that Swedish Coil would be attractive are 44 out of 82 (54%) of direct customers, 98 out of 132 (74%) of indirect customers, 4 out of 5 (80%) of competitors and 15 out of 22 (68%) of independent distributors.

(1014) However, the number of direct customers replying that Swedish Coil would be attractive are significantly less than those who replied that Swedish Coil would be suitable to solve competition concerns and would be viable.

(1015) A significant number of respondents also noted that the market conditions are currently negative. In these circumstances, it is difficult to expect that a buyer could be easily found.

(1016) Lastly, many respondents stated that Swedish Coil would not be attractive.

(1017) [...]\*, for instance, stated that Swedish Coil would suffer from the following shortcomings: *“Relatively small scale “regional” player; Manufacturing base in an high energy cost region; More distant than competition from the biggest/most interesting markets (Germany/France/Italy); Technical complexity of moving assets and transferring knowhow between different/competing locations”*.

(1018) The distributor and processor [...] also stated: *“Who would be a suitable buyer after all? Aperam has been looking for a purchaser for a long time. Except for investors, who do not know the business, I cannot imagine a buyer. And even investors will be hesitant.”*

(1019) Moreover, with regard to the specific question as to whether any company would have been interested in purchasing Swedish Coil, the market test produced provided unenthusiastic replies or no replies at all.

(1020) Firstly, most of the large Asian stainless steel producers ([...]\*, etc.) have not replied to the Commission's questionnaires. Some of these companies are currently among the top stainless steel producers in the world and it has not been possible to test to what extent they would be interested in Swedish Coil.

(1021) Secondly, the only [...] non-European competitors that replied to the market investigation have not expressed interest in purchasing the Divestment Business. [...] showed no interest, since “[...]”. The US company [...] has not responded to the relevant question due to its limited knowledge of the European market, given that “[...]”.

(1022) Thirdly, [...] stated: “[...]”.

(1023) Fourthly, [...]\*.<sup>535</sup>[...]\*

(4) *Evaluation of the outcome of the market test*

(1024) Overall, the Commission considers that the market test has produced mixed results. The Commission therefore notes that the market test can be considered as inconclusive. A number of remarks needs therefore to be made.

(1025) Firstly, a significant number of respondents who expressed a negative view of Swedish coil stated their concerns in a relatively precise and substantiated manner.

(1026) Secondly, and in contradiction to the paragraph above, among the customers who replied in the multiple choice questions that the remedies would be suitable to solve the competition concerns, viable and attractive for a suitable purchaser, a very large proportion has not expressed any meaningful comment to justify its position.

(1027) Thirdly, overall, the market test has shown that a large number of market players do not appear to have an in-depth knowledge of the market, and certainly of the technical expertise required to express informed and substantiated positions on the viability and competitiveness of Swedish Coil. This is demonstrated by the large quantity of respondents stating "I don't know" or similar answers in their replies.

(1028) Fourthly, the Commission sent the market test questionnaires to all the respondents to phase II questionnaires, regardless of their opinion expressed in the market investigation. As discussed in paragraph (418) above, approximately half of the direct customers responding in phase II did not express concerns in the first place. As a result, one can assume that a large majority of these respondents replied "yes" to the questions of the market test, given that there was no concern at all for them, or have not focused on their replies when responding "yes".

(1029) On the other hand, however, there appear still to be a significant portion of direct customers who remains concerned. In particular, 31 out of 90 (34%) of direct customers still consider that Swedish Coil would not remove the competition concerns, 32 out of 87 (37%) do not consider Swedish Coil as a viable business, and 38 out of 82 (46%) do not consider Swedish Coil attractive for a suitable purchaser. When compared with the percentage of direct customers who raised concerns in the first place (46%, see paragraph (418) above), these figures are not very different.

(1030) It follows from the above that the market test taken as a whole can be considered as inconclusive. As such, the Commission has based its assessment also on a number of different sources of evidence.

6.1.3.3. Complement to the market test

(1031) Because of the expected difficulties in assessing the technical aspects of the remedies, the Commission suggested that the Notifying Party hires three industry

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<sup>535</sup> A few other companies stated that they would be interested. However, an examination of the comments provided after the reply shows that the reply was given because of a misunderstanding of the question (i.e. "[...]\*").

experts who could reply to the Commission's questions on Swedish Coil, particularly with regard to the viability, competitiveness and attractiveness of the divested business. The Notifying Party agreed with the Commission's proposal.

- (1032) On 13 September 2012, the Notifying Party proposed two candidates to form the team of experts (a former executive of Outokumpu and a former executive of ThyssenKrupp). A third candidate, a leading industry analyst, was proposed by the Commission.
- (1033) On 21 September 2012, the legal representatives of the Notifying Party and the three experts signed a "Retainer Agreement".
- (1034) According to the Retainer Agreement, the Experts' mandate is "*to prepare a neutral and objective Opinion and not to act as an advocate for either Outokumpu or the Commission*".<sup>536</sup>
- (1035) Furthermore, "*the Experts will act in full autonomy and will be allowed to present dissenting views*".<sup>537</sup>
- (1036) Under the Retainer Agreement, it is foreseen that "*the Experts will not discuss matters within the scope of the agreement, their preliminary or final findings or the fact of their retainer as Experts in the Transaction with any person other than each other*".<sup>538</sup>
- (1037) In addition, the legal representatives of Outokumpu had to supply the experts with "*(i) a copy of the form CO..., (ii) the commitments ..., (iii) information provided to the Commission concerning the production sites and equipment comprising the Remedy Package and (iv) any other information requested by the Experts for the purpose of their assessment*".<sup>539</sup>
- (1038) Lastly, the Retainer Agreement states that Outokumpu and its legal representatives "*may have to submit further reports and materials to the Experts, upon their request*".<sup>540</sup>
- (1039) On 21 September, the Commission sent a first round of questions to the experts. On the same day, the Commission had a phone call with the experts, which was also attended by the Parties' legal representatives. The Commission explained the general framework of its assessment and discussed some general organisational aspects.
- (1040) On 26 September 2012 the Commission had a call with the experts, which was also attended by the Parties' legal representatives. As foreseen in the Retainer Agreement, the purpose of the call was for the Commission to orally request the experts for their preliminary views on the viability and technical efficiency of the

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<sup>536</sup> Paragraph 4 of the Retainer Agreement.

<sup>537</sup> Paragraph 5 of the Retainer Agreement.

<sup>538</sup> Paragraph 6 of the Retainer Agreement.

<sup>539</sup> Paragraph 3 of the Retainer Agreement.

<sup>540</sup> Paragraph 6 of the Retainer Agreement.

assets comprising the remedy package on an informal basis and without any binding effect on the opinion that would have been subsequently submitted by the experts.<sup>541</sup>

- (1041) In the course of the call, the experts expressed strong doubts that a suitable purchaser would have the ability and incentives to be competitive in the commodities segment of CR. As indicated in the minutes of the call, which have been approved by two of the three experts:<sup>542</sup>

*"A potential buyer would have no incentive to be active in the commodity range for two reasons.*

*First, the divested business does not have enough capacity to be competitive in the production of commodity products. Avesta's melting shop is too small and a minimum cold rolling capacity of 600 kt/y would be required (as indicated by the merged entity's project to expand Krefeld's cold rolling lines).*

*Second, specialty products have very high margins and it would make commercial sense to continue to produce these products with the type of equipment of the divested business.*

*According to the Experts, a potentially winning strategy would be to shut down Nyby and to move Nyby's specialty production to the lines coming from Terni. Avesta would remain a specialty mill and Kloster would produce thin cold rolled and precision strip.*

*A potential modification to improve such portfolio would be the addition of Degerfors' quarto plate plant.*

*An additional order book would not be strictly necessary for this remedy package since Avesta, Nyby and Kloster already have an order book for their specialty production. The order book of the Terni's line will clearly disappear because of the 9-12 months relocation time. However, the Terni lines will replace Nyby and take over the latter's order book."*

- (1042) According to the experts' view as expressed in the call, a major obstacle that the purchaser of Swedish Coil would have to face in order to compete in the commodities segment would be represented by the insufficient size of Avesta's meltshop. Melt shop size is a fundamental requirement in order to compete in commodities, because of the importance of economies of scale and low margins in the commodities business (see below, paragraphs (1117) and (1123)).
- (1043) As regards the theoretical possibility of increasing the CR output by means of purchasing slabs on the market, the experts stated during the call:

*"This strategy would be however difficult to implement in practice, given that (i) Avesta is strategically not well located (no direct link to the sea), (ii) there are no 2 metres wide slabs available on the market (it would be however*

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<sup>541</sup> See in this respect paragraph 4 of the Retainer Agreement.  
<sup>542</sup> ID 12131.

*possible for slabs of 1500 mm width, which is the width of the relocated lines from Terni) and (iii) there is not a single producer in the world that has succeeded with a business model relying on buying slabs in the market (or even black or white bands, as shown by the poor performance of rerollers)."*

- (1044) On 27 September 2012, the Commission sent to the experts five follow up questions on the competitiveness of the Swedish Coil remedy.
- (1045) On 28 September 2012, the Commission received e-mails from all three experts expressing their dissatisfaction that their oral statements during the phone call on 26 September had allegedly had an effect on the remedies discussions between the Commission and the Parties, and forced Outokumpu to offer the Terni production facility instead of the Swedish Coil remedy. The Commission proposed a phone call with all experts in order to clarify the Commission's remedy process and to respond to the claims raised by the experts as regards the role of their statements in the Commission's assessment. Only one of the experts participated in the call. This expert admitted having been contacted by an unidentified third party, who informed him that because of the views expressed in the call of 26 September, the Notifying Party would have to divest Terni instead of Swedish Coil.<sup>543</sup> After the call, the Commission also sent to the experts a further round of questions.
- (1046) Later in the day, the experts sent the Commission a preliminary version of their report, which included the individual answers of each expert to the Commission's question before consolidation in a single document (the Preliminary Submission).
- (1047) The Preliminary Submission contains certain references to some possible production of commodity CR which were not mentioned in the call of 26 September:

*"Special grades are not enough to fill the Avesta melt shop capacity, therefore the balance (over 50%) will be commodity grades. These are important to dilute fixed costs and secure overall profitability."*

*"The increase of the CR capacity in Avesta (transfer from Terni) would only create value if this mill is supplied with competitively priced HRC from Tornio. The market for special grades (see list in answer No. 1) is primarily in HRC not CRC. Thus, if the CR capacity is lifted by 100 kt, some 'commodity' products will have to be produced competitively."*

- (1048) On the other hand, the Preliminary Submission contained also the following statements:

*"As commodity stainless steel CR business is very much volume and conversion cost driven, biggest question mark is the limited capacity of Avesta melt shop to provide sufficient slab feed for downstream units at competitive cost."*

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<sup>543</sup> The Commission prepared and sent for confirmation minutes of this call. The expert has not, however, confirmed the content of the minutes (ID 12131).

*“In the presented setup the biggest bottleneck will be steel melting capacity. This can be mitigated by buying slabs from the market. Full cold rolled product capacity can be achieved without external slabs, though. In general, producing low-margin standard grades in large volumes in Avesta is questionable because of Avesta’s non-coastal location.”*

(1049) In addition, as regards the cost structure of [...], the Preliminary Submission states:

“[...]”

“[...]”

(1050) On 29 September 2012, the legal representatives of the Notifying Party sent, without having been requested by the experts to do so, two documents to the experts, including a cost and depreciation analysis of Swedish Coil and data on the Langenhagen Stainless Steel service centre. Both documents were specially produced for this occasion and had not been sent to the Commission beforehand.

(1051) On 30 September 2012, the Commission expressed in an e-mail addressed to the legal representatives of the Notifying Party its concerns as regards (a) contacts which apparently had taken place between the experts and third parties with the objective of informing the experts of the alleged implications of their opinions on the remedy discussions; and (b) the two documents which were sent to the experts, without having been requested by the latter, and which had not been communicated to the Commission at any time of the proceedings. The Commission considered that on both elements there might be a breach of the conditions of the retainer agreement.

(1052) Also in the light of those two concerns, the Commission reserved in the same e-mail the right to consider and interpret the final submission of the experts foreseen for 1 October 2012 in the light of the previous oral and written statements of the experts.

(1053) On 30 September 2012, the Commission offered to provide the experts with pre-existing internal documents prepared by Outokumpu and Innoxum in the ordinary course of business on the cost efficiency of Swedish Coil and the other plants of the Parties. These documents had been prepared by the Parties in the context of their synergies calculations and submitted to the Commission in the course of the investigation. The experts did not reply to the Commission’s offer and did not ask for the documents in question.

(1054) By means of an email sent on the same day, the legal representatives of the Notifying Party acknowledged that the lead remedies negotiator of the Notifying Party had entered in contact with one of the experts on two separate occasions after the call of 26 September 2012. The legal representatives of the Notifying Party stated that such contacts were not intended to influence the experts, nor did it appear to the Notifying Party that they had the effect of doing so.

(1055) On 1 October 2012, the secretariat of one of the experts submitted three documents in electronic format which do not have a title, signature or date and which have the electronic document title 'consolidated replies to questions' (the “Experts’ Submission”). Some of the replies seem to represent the joint opinion of all three experts. Some replies are identified as the replies of one of the experts. Some replies seem to come from the three experts, but are formulated as if they came only from

one of them. There is no cover e-mail or explanation of what these documents are intended to represent. From the context and the content of these documents, the Commission understands that they are probably supposed to constitute the final consolidated opinion of the three experts hired by the Notifying Party.

- (1056) The Experts' Submission contains replies to all the questions asked by the Commission. These answers are however often laconic and unsubstantiated. This is particularly the case as regards answers meant to replace statements in the Preliminary Submissions, which were relatively well elaborated and could be interpreted as raising concerns on a number of aspects related to the competitiveness of Swedish Coil described above. For instance, to the questions as to whether the divested business would be viable, the experts' reply is: "Yes, it is viable." In addition, to the question as to whether the divested business has an attractive product mix for a suitable purchaser, the answer is: "Definitely yes."
- (1057) Two out of three experts also reply "yes" to the question as to whether a purchaser of the divested business would have the ability and incentive to compete effectively also in commodity CR. In the replies, however, the experts do not address the matter of the cost efficiency of Avesta's melt shop and mention a number of caveats, such as that the divested business would not in any event be able to compete with Asian imports. In addition, the experts mention the possibility of purchasing slabs on the market to increase the output of Swedish Coil.
- (1058) In general, the Experts' Submission does not contain any reference to the large majority of concerns expressed by each of the experts previously. It also does not contain any explanation as to the reason for these possible contradictions or guidance as to how to interpret these apparent changes of view.
- (1059) The Commission considers that the original rationale for involving the experts in the process was for it to be provided with an independent view regarding technical aspects of Swedish Coil.<sup>544</sup> This was in spite of the fact that two of the experts were previous employees of the Parties and that the Parties were in fact hiring the experts for their opinion.
- (1060) The Commission notes that, as confirmed by the Parties, there have been at least two contacts between the Notifying Party and one expert.<sup>545</sup> One additional contact might also have taken place between another expert and an unidentified third party.<sup>546</sup>
- (1061) The Commission also notes that the legal representatives of the Notifying Party sent the experts some documents which had not been previously requested by the experts. These documents have not been previously shared with the Commission and appear to have been prepared for the exclusive purposes of providing certain information to the experts.

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<sup>544</sup> See paragraphs 4 and 5 of the Retainer Agreement.

<sup>545</sup> See email of 30 September 2012, ID 12132.

<sup>546</sup> See minutes of the call with Mr Moll.

- (1062) The Commission considers that both conducts described above raise procedural concerns on the regularity of the process conducting to the issuance of the Experts' Submission. Both conducts would appear to constitute a breach of the terms included in the Retainer Agreement, and in particular of the provisions contained in paragraphs 3 to 6 thereof.
- (1063) The Commission takes note of the fact that the views expressed in the call of 26 September and the Preliminary Submission were purely of a preliminary nature and does not draw conclusions from them. However, the significant differences that can be found between the position expressed in the call of 26 September and in the Preliminary Submission on the one hand, and the views stated in the Experts' Submission on the other hand, appear to cast doubts as to the overall reliability and credibility of the experts. In particular, in the absence of explanations, it is difficult for the Commission to draw any meaningful conclusion as to the reason why a number of important issues which had been discussed in the call of 26 September and which were included in the Preliminary Submission had been largely excluded from the Experts' Submission. It is also hard for the Commission to understand why, on the contrary, certain points mentioned only in the Experts' Submission had not been raised in the context of previous opinions.
- (1064) Lastly, the Commission notes that the experts have not requested the Commission to provide contemporaneous documents on the cost structure of the Parties' plants, although the Commission offered to provide the experts with these documents. The fact that the experts appeared to have preferred to base their assessment on their previous knowledge or on documents prepared *ad hoc* for their assessment also appears to put into question the overall credibility of the experts' appraisal.
- (1065) On the basis of the above, the Commission concludes that there are significant doubts as to the credibility, reliability and authoritativeness of the Experts' Submission. For the purposes of its assessment of Swedish Coil, therefore, the Commission has disregarded the opinions provided by the experts in their entirety, regardless of the stage of the procedure at which these opinions were provided.

#### 6.1.4. Assessment

##### 6.1.4.1. Legal framework for the assessment of remedies

- (1066) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it.<sup>547</sup>
- (1067) Under the Merger Regulation the Commission has power to accept only such commitments that are capable of rendering the notified transaction compatible with the internal market.<sup>548</sup>

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<sup>547</sup> Merger Regulation, Recital 30.

<sup>548</sup> Case T-102/96 Gencor v Commission [1999] ECR II-753, paragraph 318.

- (1068) Structural commitments proposed by the parties will meet that condition only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future.<sup>549</sup>
- (1069) Under the Merger Regulation it is not the task of the Commission to determine whether the commitments limit the impact of a concentration on competition but rather to determine whether those commitments enable it to conclude that the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.<sup>550</sup>
- (1070) In assessing the second condition, whether the proposed commitment is likely to eliminate the competition concerns identified, the Commission will consider all relevant factors relating to the proposed remedy itself, including, inter alia, the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market.<sup>551</sup>
- (1071) A divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past creates risks as to the viability and competitiveness of the resulting business. This is in particular the case if assets from more than one party are involved. Such an approach may be accepted by the Commission only if the viability of the business is ensured notwithstanding the fact that the assets did not form a uniform business in the past. This may be the case if the individual assets can already be considered a viable and competitive business.<sup>552</sup>
- 6.1.4.2. The capacity of Swedish Coil is at the lower end of what would be required to potentially dismiss competition concerns
- (1072) In the Commission's enforcement experience, a remedy which does not eliminate an overlap in its entirety, or at least in a significant part, is generally not considered likely to solve the competition concerns resulting from a horizontal merger such as the present one. As concluded in the Commission's remedies study, an ex post evaluation exercise that reviewed the design and implementation of 96 merger commitments accepted by the Commission in the five-year period 1996 to 2000, remedies that target less than the overlap resulting from the merger were found to be far less likely to be fully effective.<sup>553</sup>

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<sup>549</sup> Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraph 555; Case T-342/07 *Ryanair Holdings v Commission* judgment of 6 July 2010, paragraph 453.

<sup>550</sup> Case T-48/04 *Qualcomm Wireless Business Solutions Europe BV v Commission* [2009] ECR II-2029, paragraphs 89 and 112. See also Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 63.

<sup>551</sup> Commission Notice on Remedies, paragraph 12.

<sup>552</sup> Commission Notice on Remedies, paragraph 37.

<sup>553</sup> [http://ec.europa.eu/competition/mergers/legislation/remedies\\_study.pdf](http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf)

- 6.1.4.3. In the present case, the proposed remedy would account for only [5-10]\*% of the EEA CR capacity and would remove approximately [40-50]\*% of the overlap between the Parties in terms of CR capacity.
- 6.1.4.4. Swedish Coil is a combination of assets which did not form a uniform and viable business in the past
- (1073) As indicated in paragraph (1071) above, a divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past creates risks as to the viability and competitiveness of the resulting business. This is in particular the case if assets from more than one party are involved. Such an approach may be accepted by the Commission only if the viability of the business is ensured notwithstanding the fact that the assets did not form a uniform business in the past. This may be the case if the individual assets can already be considered a viable and competitive business.<sup>554</sup>
- (1074) Swedish Coil is constituted by assets which did not form a uniform and viable business in the past. In fact, approximately [...] of Swedish Coil's CR capacity is accounted for by two lines which have to be relocated from Terni to Avesta, which have never operated together with the other assets, and which have been in addition run until now by a different entity (Inoxum).
- (1075) In addition, two of the Swedish assets, Avesta and Nyby, form part of Outokumpu's specialty division, which also includes Sheffield and Degerfors. The remedy does not include these latter plants and therefore, as a result of the divestment, Avesta and Nyby have to be severed from their original business unit. On the contrary, the remedy includes Kloster, which is currently part of Outokumpu's standard stainless division.
- (1076) The fact that Swedish Coil does not appear to be an autonomous self-standing combination of assets has been confirmed by the fact that two potential purchasers who have been interviewed by the Commission stated that their interest would not have referred to the entire package, but only to selected assets.<sup>555</sup> A third one stated that its interest has been expressed on the basis of very limited information.<sup>556</sup>
- (1077) Lastly, some of the assets have not operated profitably in recent years. Two out of three of the Swedish productive assets have been loss-making in the past three years, the only exception being Avesta, with earnings before interest, depreciation, taxes and amortisation ("EBIDTA") of [0-5]\*% in 2011.<sup>557</sup> [...]\*, in particular, "[...]\*".<sup>558</sup>
- (1078) The Commission notes that remedies consisting of a combination of assets ("mix-and-match remedies") generally pose serious risks in terms of effectiveness and implementation. In addition, the individual assets making up Swedish Coil do not

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<sup>554</sup> Commission Notice on Remedies, paragraph 37.

<sup>555</sup> See minutes of calls with [...]\*, ID 13118, and the [...]\*, ID 12858.

<sup>556</sup> See minutes of call with [...]\*, ID 13001.

<sup>557</sup> Reply to Article 11 request of 10 August 2012. ID 9910.

<sup>558</sup> Form CO, ID 953.

appear to be individually profitable and are therefore, at first sight, unlikely to become profitable and viable when combined.

#### 6.1.4.5. Suitability to solve competition concerns

(1) *Effective capacity figures are likely to be lower than or in the lower bound of the Parties' estimates*

(1079) As a preliminary remark, the Commission notes that the Parties' capacity estimates appear to overstate the effective capacity of Swedish Coil.

(1080) At cold rolling level, the Notifying Party submits that Swedish Coil will have CR capacity of [...] kt/y. This position appears to overstate the effective capacity at CR of Swedish Coil. The Commission considers that more conservative estimates would suggest taking into account a maximum capacity for Swedish Coil of approximately [...] kt/y. This is because Nyby's capacity is [...]\*. According to Outokumpu, with the current specialty-oriented mix, Nyby's capacity would be approximately [...] kt/y.<sup>559</sup> Furthermore, the capacity of Terni's CR line does not appear to be as high as [...] kt/y and more likely to be of maximum [...] kt/y, on the basis of the Notifying Party's submission.<sup>560</sup>

(1081) At melting level, the Notifying Party considers that Avesta has a capacity of between [...] kt/y and [...] kt/y, depending on the output composition, which can be more oriented towards specialties or commodities.

(1082) The Commission considers it unlikely that Avesta will abandon in the medium run its focus on high-margin specialty products (see more in detail below, paragraphs (1108) and (1111)). In addition, according to data submitted by the Notifying Party, Avesta's meltshop output<sup>561</sup> in the past ten years has never exceeded [...] kt/y.<sup>562</sup> As a result, the Commission considers that on conservative assumptions it would be more realistic to assume a maximum capacity utilisation of approximately [...] kt/y for Avesta's melt shop. The Commission however notes that in internal documents of Outokumpu, Avesta's melt shop is indicated as having a total production capacity of [...] kt/y. As a result, even the conservative estimate of [...] kt/y might overstate Avesta's effective capacity.

(2) *There is a serious risk that Swedish Coil's capacity will not be used up to its full potential for the production of CR*

(i) **There is a substantial risk that [...] would be shut down by a suitable buyer of Swedish Coil, thereby decreasing the overall CR capacity of Swedish Coil**

(1083) According to the Form CO, [...] "[...]"<sup>563</sup>

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<sup>559</sup> Annex 45 to the Form CO, IDs 1102, 1103.

<sup>560</sup> See slide 15 of Annex 1 to the Commitments of 19 September 2012.

<sup>561</sup> The meltshop capacity of an integrated plant is inherently higher than its HR or CR capacity.

<sup>562</sup> Reply to the Article 11 request of 12 October 2012. IDs 13095, 13096, 13097, 130958.

<sup>563</sup> Form CO, ID 953.

- (1084) As part of their proposed synergies plan, the Parties are planning to shut down [...] and to relocate its production to Inoxum's sites in [...] and [...].
- (1085) A respondent to the market test stated in its reply that there is a substantial risk that the proposed remedy would result in the closure of [...]:

*"May be not competitive in terms of 'standard' stainless (Nyby), high cost, too small, may lead to closure of Nyby and concentrate on specialization of Avesta & Kloster."*<sup>564</sup>

- (1086) Table 20 below shows a comparison of costs for the main CR mills of the Parties:<sup>565</sup>

**Table 20: Cost comparison between the Parties' main CR mills**

Cost	Tornio	Terni	Krefeld	Benrath	Avesta	Nyby
Variable costs (per t, in EUR)	[...]	[...]	[...]	[...]	[...]	[...]
Fixed costs (total, in EUR million)	[...]	[...]	[...]	[...]	[...]	[...]
Production (in thousand t)	[...]	[...]	[...]	[...]	[...]	[...]
Average cost per t	[...]	[...]	[...]	[...]	[...]	[...]

Note: the average cost per t figures reflect each assets current utilisation and product mix and include depreciation charges in addition to variable and fixed costs.

- (1087) As it can be seen in Table 20 above, at cold rolled level [...] is by far the most inefficient CR mill among those operated by the Parties.
- (1088) Given the cost figures above, the Commission has assessed whether a potential purchaser would be likely to find it profitable to operate [...], compared with shutting down [...] to save fixed costs.
- (1089) If the potential buyer continued the current focus of the business on HR and specialty products, it could do so most profitably with the assets at Avesta (including the new lines from Terni) and Kloster because these assets have a lower cost base. For the production of specialty CR products, for which the markets are relatively small, the buyer would no longer require [...] and would therefore be able to save costs by closing [...].
- (1090) On the other hand, if the potential buyer became, as the Notifying Party argues, an important producer of commodity CR products in the EEA (which are high volume low margin products) it would need to continue to operate [...], because it would

<sup>564</sup> See replies from [...], ID 10696.

<sup>565</sup> Given that the source for the data is different, these figures may not be directly comparable with those used for the assessment of meltshop efficiency.

otherwise not have sufficient CR capacity. However, as the cost figures above show, [...] at present is almost [...] times as costly as Tornio. As a result, it appears extremely questionable that a suitable purchaser would use such an inefficient plant for the production of low-margins commodity CR.

- (1091) This can further be illustrated by comparing the cost base of the Notifying Party's estimates for the possible future Avesta-Nyby combination (Avesta for melting and hot rolling and Nyby for cold rolling) to corresponding costs at Tornio and Terni. The bars in Figure 23 compare the cost situation at Tornio, Terni and Avesta-Nyby combination at current utilisation rates. In addition, the third bar gives the Notifying Party's estimates of the Avesta-Nyby combination at full utilisation as an extreme benchmark.<sup>566</sup>

**Figure 23: [...]**

- (1092) Figure 23 shows that variable costs of melting and hot rolling at Avesta followed by cold rolling at [...] are substantially higher for the new business than at Tornio (by more than [...] EUR/t) and Terni (by around [...] EUR/t).
- (1093) Once fixed costs are taken into consideration, this difference increases substantially with the new business at current utilisation rates having a cost disadvantage of more than [...] €t at current utilisation levels (in other words the current Avesta-Nyby average fixed and variable costs are more than [...] those of Tornio or Terni<sup>567</sup>). Even under the extremely optimistic scenario that Avesta-Nyby would operate at full capacity utilisation, it would still have a cost disadvantage in terms of fixed and variable costs in excess of [...] EUR/t.
- (1094) Given the above, the Commission notes that there is a very substantial risk that [...] would be shut down by a suitable buyer of Swedish Coil. In such a case, the total capacity of the divested business would be reduced by approximately [...] kt/y according to the Notifying Party's estimates, thereby weakening the ability of a suitable buyer to exercise a meaningful competitive pressure on the merged entity in the market for CR.

**(ii) There is also a substantial risk that a suitable purchaser would not find it profitable to increase the current CR output of Swedish Coil at the expense of its production of slabs for HR and QP**

- (1095) In its reply to the market test, the large pipes manufacturer [...] stated: "*The Swedish coil assets*" are mainly HR coil producer ( CR is only a minor part) We cannot predict what the capacity is of the CR line that will be transferred to Avesta is and what range of products will be offered from this line. However it will be very minor compared to the new OTK CR capacity."

- (1096) Indeed, Avesta appears to be focussing especially on HR products, given that in the same year the Swedish assets sold approximately [...] kt of HWB. On the other

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<sup>566</sup> The figure below provides a comparison based on information from the Parties on variable costs, fixed cost, other costs and depreciation charges. Variable and fixed costs are aggregated across production stages (melting, hot rolling and cold rolling).

<sup>567</sup> [...]

hand, in 2011, the Swedish units of the divested business only produced CR for a total of [...] kt.

- (1097) Avesta's meltshop is currently loaded at relatively high levels. In 2011, Avesta's meltshop produced approximately [...] kt of slabs. In addition to producing slabs for HWB and CR production, Avesta also currently produces slabs for [...] production of QP ([...] kt in 2011). Given that more than half of these slabs are of high margins duplex material and that Avesta is historically integrated in the same business unit as [...] and geographically close to it, the Commission considers that there is a least at significant risk that a suitable buyer would continue to produce these slabs and sell them to [...].
- (1098) In order for a suitable buyer to make full use of its [...] kt/y capacity at CR level, Avesta's slabs production would have to be increased to a very significant extent. Avesta could only increase its slabs output by approximately [...] kt/y, which implies an even lower CR output because of the amount of stainless steel lost in the production process.
- (1099) In order to produce more CR, a suitable purchaser would have only two possible options.
- (1100) The first option would be to switch the production of slabs currently used for HWB and QP to the advantage of CR production. This would, however, imply that a buyer would have to forego established sales to customers for certain products, many of which are high-margin specialty products, in order to increase its output in a market where it has currently no meaningful commercial presence.
- (1101) In this respect, the Commission notes that the order book of the CR lines from Terni, which accounts for approximately half of Swedish Coil's capacity, is transferred to the Swedish Coil's potential purchaser without any customer book.
- (1102) In view of the above, the Commission considers that there is a serious risk that a suitable purchaser would not forego production of slabs for HWB and QP to increase significantly its production of CR.
- (1103) According to the Notifying Party's claim, a second option would be to continue producing slabs for HWB and QP, but to purchase slabs on the market, in order to exploit Avesta's excess capacity at HR level and increase CR output without sacrificing other non-CR sales.
- (1104) As mentioned in section 5.3.1.1, the Commission considers that there is hardly a merchant market for slabs. This is because slabs are rarely sold on the market, and mainly used by integrated players for internal use.
- (1105) The Notifying Party has not been able to provide any indication of a company in the EEA or the world which is currently operating on a business model that foresees purchasing slabs on the market in large volumes for the production of CR products. Furthermore, calls with potential purchasers confirmed that this strategy would be unlikely to be effective:

*"As regards the possibility for a potential purchaser of buying slabs on the market which would then be used to produce commodity CR in Avesta, [...]"*

*excludes that this strategy would be profitable. The margins in the commodity segment are very small and therefore it is important for a producer to be fully integrated and to save costs to the extent possible in each step of the production chain. Purchasing slabs from an external producer (with the addition of transport costs) would be simply too expensive. This is why it is not reasonable to expect that a CR producer would engage in "steel-melting tourism" [...] in order to produce commodity CR products.*"<sup>568</sup>

*"[...] explained that there are no sellers of slabs as there is no real market for them. Buying-selling slabs would be very complicated due to its low-value added nature, transport costs, logistics, transport time and financing. [...] knows only two examples of slabs being sold on the market, in the past there used to be a Cuban mill (Acinox) and currently there is a Chinese player. However, to [...] knowledge, very few company are currently relying on the market to secure its requirements of slabs, and only very partially.*"<sup>569</sup>

- (1106) As a result, the Commission has serious doubts that a strategy for the systematic purchase of slabs on the market from competitors would be likely to be implemented, and even if it were to be implemented it would be unlikely to be successful.
- (1107) It follows from the above that there is a substantial risk that a suitable purchaser would not find it profitable to increase the current CR output of Swedish Coil at the expense of its production of slabs for HR and QP. As a result, there is a substantial risk that the activities of a suitable purchaser in the market for CR would remain limited and that such a purchaser would not be able to exercise any appreciable competitive constraint on the merged entity.
- (3) *A suitable purchaser would need to have the incentive to maintain Swedish Coil's focus on niche specialty CR*
- (1108) As stated above, the Swedish assets are currently focused on the production of specialty CR. Such a strong focus has been confirmed by many respondents in the market test. Some respondents also raised doubts as regards the product range that is currently produced by Swedish Coil and that would be produced post-divestment.
- (1109) The distributor [...]\*, for instance, stated: *"The tonnages and assortments too small, to create a satisfactory competition against Aperam. The risk is therefore that there will not be produced standard products (EN 1.4301 and 4404) but primarily special qualities."*
- (1110) This position has been confirmed by a call with [...]\*, a company which expressed a potential interest in purchasing parts of Swedish Coil. [...]\*, in particular, states that Swedish Coil could enter the commodity segment only if purchased by an Asian buyer, and even in that case not so much as productive assets but more as gateway into the EEA:

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<sup>568</sup> Minutes of call with [...]\*, ID 13118.

<sup>569</sup> Minutes of call with [...]\*, ID 13001.

*“[...]” considers that the current product mix of the Swedish assets is strongly focussed on specialty products. The Swedish assets have expertise and are considered as a quality producer of specialties. With the current set up, a potential purchaser would certainly find unprofitable to switch the product mix towards commodity CR products. This is because of the limited size of the meltshop and the reduced volumes at CR level, and in general the higher margins in specialty products.*

*As regards the hypothetical situation after the relocation of the Terni lines, [...]” considers that a financial investor, focussed on profits, would still find profitable to concentrate the business' activities on specialty products, which ensure higher margins and for which the Swedish assets have a competitive advantage. The insufficient size of Avesta's meltshop to produce commodities would indeed remain an issue.*

*On the contrary, in case an Asian company would purchase the Swedish assets, it could use Avesta as a sort of "large service centre" and gateway for commodity products produced elsewhere into Europe. [...].”<sup>570</sup>*

- (1111) The Commission considers that specialty products have generally higher margins than commodity products. Specialty products also require a more intense use of the equipment and therefore absorb a larger share of capacity than commodities.<sup>571</sup>
- (1112) Given the above, and in particular that it is doubtful whether a suitable purchaser would have the ability to increase its production of CR without foregoing sales of other products, the Commission considers unlikely that Swedish Coil's strong focus on specialty products in the future will change. Even if production of CR were to increase by a given amount, it is still likely that a suitable purchaser would try to increase its output of high-margin specialty products, for which the Swedish assets have a consolidated expertise and brand.
- (4) *Even if a suitable purchaser is active on the whole CR market, it would be unlikely to be competitive in the commodity segment*
- (1113) A number of respondents to the market test stated that a suitable purchaser would suffer from a competitive disadvantage vis-à-vis larger competitors, in particular with regard to the commodity segment of the EEA CR market.
- (1114) The distributor [...]”, for instance, stated: *“How should this divested business then survive, if it is by far smaller than the merged OTK (from the moment of the sale the divested business is OTK's direct competitor, without a chance to stand this competition, because they have only 15...20% of OTK's capacity). [...] The melting capacity is too low to be cost competitive (purchase of raw materials, purchase of energy, transport costs etc.)”.*
- (1115) The German manufacturer of heating systems, [...]”, added: *“The plants referred to do not produce commodities, but precision strip and special material. Moreover, the*

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<sup>570</sup> Minutes of call with [...]”, ID 13118.

<sup>571</sup> Form CO, ID 953.

*company figures do not look too bright for special material right now. There have been price increases on the market recently [...] Since the current portfolio of the plants more or less consists of niche products, it will be difficult to compete with the manufacturers of commodities.*<sup>572</sup>

- (1116) [...]\*, one of the leading suppliers of stainless steel tubes worldwide, also submitted that: *"The plants in Sweden have the attractiveness of offering special grades. I believe that standard production in Sweden would not be viable"*<sup>573</sup>
- (1117) According to Form CO submitted by the Notifying Party, the optimal capacity of a modern steel making unit is [...]\* t and the minimum capacity of a cold rolling unit is [...]\* kt.<sup>574</sup> The Notifying Party also submitted that the size and efficiency of production units dictate the type of products and grades that are best suited to each mill.
- (1118) In particular, larger mills, which need to achieve maximum scale efficiencies to cover their higher fixed costs, operate more efficiently and more profitably at high capacity utilisation rates through a non-fragmented and simple order book with long and continuous runs which minimize non-productive time. A large integrated mill like Tornio relies upon high throughput. While Tornio is technically capable of producing most grades, it is not efficient for it to do so because the lower volumes, and thus more frequent switching that is required to produce special or lower-volume grades would interfere with its efficient operation which is greatest at high throughputs of large volume products.<sup>575</sup>
- (1119) As a result, large mills naturally tend to focus on large volumes of commodity CR. The importance of economies of scale means that the margins for standard products are low.<sup>576</sup>
- (1120) On the contrary, due to a higher degree of flexibility derived by their lower fixed costs, smaller mills are better equipped to differentiate and competitively meet the fragmented and intermittent demand of more complex grades and products which are produced in small quantities. As a result of these already integrated shorter runs, switching between different grades is easier and less burdensome for smaller mills than for large mills. In that sense, switching costs are lower for smaller mills.<sup>577</sup>
- (1121) It follows from the above that smaller mills have a natural focus on specialty products, which can allow a producer, intuitively, to achieve higher margins.
- (1122) These differences are reflected in Outokumpu's decision to focus production of high volume grades at [...]\* mill and its production of lower volume grades at its smaller Swedish mills.<sup>578</sup>

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<sup>572</sup> "[...]\*" ID 11255.

<sup>573</sup> "[...]\*" ID 11282.

<sup>574</sup> Form CO, paragraph 775.

<sup>575</sup> Form CO, paragraphs 235 – 241.

<sup>576</sup> Form CO, paragraph 239.

<sup>577</sup> Form CO, paragraphs 235 – 241.

<sup>578</sup> Ibid.

(1123) The findings above also appear to be confirmed by a statement from three Swedish investors which have declared an interest in purchasing the Swedish assets of the remedy package:

*"The Consortium also explained that the Avesta's meltshop is designed for the specific purpose of producing efficiently small batches."<sup>579</sup>*

(1124) Given the foregoing, the Commission has verified in the internal documents of the Parties the cost structure of Avesta's melt shop to understand whether there was an appreciable difference between the costs of a large melt shop like Tornio and a small meltshop like Avesta, so as to put the latter in a competitive disadvantage for the production of low-margin commodity products.

(1125) Table 21 below contains an overview of the costs of different melt shops on the basis of data contained in internal documents of the Parties:

**Table 21: Cost comparison between the Parties' melt shops**

Cost	Tornio	Terni	Bochum	Krefeld	Avesta
Variable costs (per t, in EUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Fixed costs (total, in EUR million)	[...]*	[...]*	[...]*	[...]*	[...]*
Production (in thousand t)	[...]*	[...]*	[...]*	[...]*	[...]*
Average cost per t	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Parties' Synergies calculations – supporting documents ID 438.

(1126) As it can be seen from Table 21, Avesta has currently an average cost per t at melting level between [...]\*. Outokumpu is planning to shut down both of these melt shops, given their inefficiency.<sup>580</sup>

(1127) As submitted by the Notifying Party, the optimal size for a steel making unit is [...]\* t.<sup>581</sup> Avesta's melt shop is significantly smaller, with capacity between [...]\* and [...]\* kt/y, depending on the product mix oriented more towards specialties or commodities. Avesta's melt shop is much smaller than those operated by the main stainless steel producers, all of which are very active in the commodities segment (e.g. Outokumpu - Tornio, Inoxum - Terni, Aperam - Chatelet and Genk, and Acerinox – Las Palmas, all with capacity of or above approximately [...]\* t). As a result, Avesta would suffer a permanent limitation when it comes to commodity CR products, for which size and economies of scale are important.

<sup>579</sup> See minutes of the call with [...]\*, ID 12858.

<sup>580</sup> Form CO, ID 953.

<sup>581</sup> Form CO, paragraph 775, ID 953.

- (1128) The Notifying Party submits that further to the divestment, Avesta will have the incentive to increase its utilisation rate, given that a suitable purchaser would have increased CR capacity and would have an incentive to expand up to the maximum capacity level of [...] kt/y. As a result, the average costs for Avesta's melt shop would decrease.
- (1129) The Commission preliminary notes that even if Avesta expanded capacity to [...] kt/y, its production of commodities is still likely to remain much less efficient than that of its competitors, given Avesta's relative small melting capacity. As submitted by the Notifying Party, indeed, the optimal size of a melt shop is estimated at [...] kt/y.
- (1130) In any event, the Commission considers that a scenario where Avesta were to increase its output up to [...] kt/y with competitors remaining at constant utilisation levels is unrealistic and unlikely to materialise.
- (1131) Firstly, as discussed in the sections above, there is a significant risk that Avesta's output would remain focused on the current product mix focused on HR and slabs for QP, without any appreciable increase in the current CR production. This is particularly in view of the risk that a potential purchaser would close Nyby. As a result, there is a significant risk that Avesta's melt shop production would not increase in comparison to actual levels.
- (1132) Secondly, even on the assumption that Avesta were to increase CR production and start to produce commodities, there is no reason why a suitable purchaser would forego its production of high-margin CR specialty products. As a result, the product mix would be a mix of specialties and commodities. In such circumstances, the melt shop's theoretical maximum capacity would necessarily have to be lower than [...] kt/y, which is the maximum capacity submitted by the Notifying Party in case of production of commodities only.
- (1133) Thirdly, the historic production figures of Avesta show that the maximum production achieved at melt shop level in the past 10 years is [...] kt/y. As a result, a scenario of capacity utilisation of [...] kt/y appears unrealistic and untested. A maximum capacity utilisation of [...] kt/y would have appeared to be a more appropriate benchmark. This would imply that Avesta, with its production of approximately [...] kt of slabs in 2011, has been running at capacity utilisation of approximately [80-90]%, which is not far from full capacity utilisation and does not appear to leave significant spare capacity left for output increases.
- (1134) Fourthly, a scenario where only one producer in the market increases its production up to full utilisation rates while its competitors remain at current levels is extremely unlikely to materialise. It would appear more likely that capacity utilisation would increase generally in the entire market, for instance because of an increase in the demand for CR. This would in turn trigger improvements in the cost structure of rivals, with the annulment of or at least a significant decrease in any possible improvement in Avesta's cost structure deriving from higher capacity utilisation.
- (1135) As a result of the elements above, it can be concluded that even if there was a volume increase at melt shop level, such an increase would be likely to be limited and therefore not to have any meaningful impact on the costs of the melt shop. In

addition, any improvement would be likely to be offset by the parallel improvement in costs that would be caused by a potential increase in capacity utilisation for Swedish Coil's competitors.

- (1136) It is therefore concluded that even if a suitable purchaser were to expand its output of CR and switch the current focus of the Swedish assets away from specialties, it would still face significant challenges in terms of cost competitiveness. As a result, it is unlikely that a suitable purchaser would exercise sufficient competitive pressure on the merged entity, particularly on the segment where the overlaps between the Parties are the largest.

#### 6.1.4.6. Viability and competitiveness

- (1137) A number of respondent to the market investigation raised doubts as to the general viability and competitiveness of Swedish Coil.
- (1138) Acerinox, in particular, stated: *“There is an excess of capacity in EU market anyway. Some shops must be closed sooner or later, whether these are the divested business or not, it does not make a big difference. Even if nobody purchases the elements, they would be probably doomed anyway.”*
- (1139) The Austrian steel processor [...] stated: *“For the competition concerns to be removed (or at least diminished), the proposed business carve out would have to result in a viable entity. It is doubted that a new “small” entity resulting from a few loss making plants in Sweden (assumption based on Outokumpu’s financial results of the past 2-3 years) can be viable. How would this company be competitive with its high energy costs? How would it fund R&D and new products development to generate new profitable products for its future? As a stand alone it is doubted such an entity would survive for long, unless there is a global/big scale player interested in its acquisition.”*
- (1140) The distributor [...] also stated: *“At the best of my knowledge, the facilities part of the divesting package will not be enough cost efficient in order to be a valid competitor to other first class world wide producers of stainless steel.”*
- (1141) Also on the basis of the elements cited in the section above (e.g. insufficient profitability of the Swedish assets, [...] ; disadvantageous cost structure of the Avesta + Nyby combination; insufficient size of Avesta's meltshop), the Commission considers that as far as viability is concerned, Swedish Coil does not appear to have a cost position which would allow a suitable purchaser to operate competitively, especially as far as the low-margins bulk production of CR is concerned.

#### 6.1.4.7. Uncertainty of finding a suitable purchaser

- (1142) In the market test, three companies expressed a potential interest in purchasing Swedish Coil. In addition, the Commission was contacted by a consortium formed by three individuals who stated their potential interest in purchasing part of Swedish Coil's assets ("the Swedish Consortium").
- (1143) In order to assess whether Swedish Coil would be sufficiently attractive not to raise doubts as to its effective implementation, the Commission conducted phone

interviews with two of the three<sup>582</sup> potential buyers who expressed interest in their replies to the Commission's market test and with the Swedish Consortium.

- (1144) The Commission's investigation showed that in the end none of these buyers were interested in Swedish Coil in the configuration offered by the Notifying Party but only in part of its assets, sometimes in combination with other assets.
- (1145) [...]\*, an Italian producer of precision strip, has expressed a potential interest in Swedish Coil. [...]\*, however, is interested in purchasing a part of Swedish Coil.<sup>583</sup> As a result, the Commission considers that [...]\* cannot be considered as a potential buyer for Swedish Coil, given that it would not be interested in the whole remedy package. In addition, [...]\* has also expressed serious doubts as to the possibility of being profitably active in commodities, "*because of the limited size of the meltshop and the reduced volumes at CR level, and in general the higher margins in specialty products.*"<sup>584</sup>
- (1146) [...]\*, an Italian CR and tube maker, also expressed interest in purchasing Swedish Coil. However, according to the company, "*its interest in Swedish Coil has to be seen with all the necessary caveats, as it does not have profound knowledge of that plant.*"<sup>585</sup> Furthermore, [...]\* stated that due to its inexperience in managing the hot end of the stainless steel production process, it would require an industrial partner for the acquisition.<sup>586</sup> As a result, given the numerous caveats, the Commission considers doubtful that [...]\* statement can be considered as a serious expression of interest that would confirm the attractiveness of the Swedish Coil package. Finally, [...]\* has also confirmed that "*Swedish Coil is strongly oriented towards specialties*".<sup>587</sup>
- (1147) As regards the Swedish Consortium, the Commission was contacted by members on the Consortium on 2 October 2012. In particular, the Swedish Consortium wanted to inform the Commission:

*"that we have made an offer, subject to due diligence and financing, to acquire Outokumpu's Swedish operations in Avesta, Långshyttan, Nyby and possibly Degerfors."*<sup>588</sup>

- (1148) The Commission asked both the Notifying Party and the Swedish Consortium whether an offer had been actually submitted. Both parties denied, referring to the non-binding and oral nature of the offer. In particular, Outokumpu stated:

*"THERE ARE NO DOCUMENTS RELATING TO THE POTENTIAL TRANSACTION. ON 2 OCTOBER 2012, MR GOSSAS [of the Swedish*

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<sup>582</sup> In order to assess the *prima facie* attractiveness of Swedish Coil, the Commission has not contacted Aperam, given that the Notifying Party had excluded Aperam as a potential purchaser in the Swedish Coil Form RM.

<sup>583</sup> Minutes with [...]\*, ID 13118.

<sup>584</sup> Ibid.

<sup>585</sup> Minutes with [...]\*, ID 13001.

<sup>586</sup> Ibid.

<sup>587</sup> Ibid.

<sup>588</sup> [...]\* email of 2 October 2012, ID 12405.

*Consortium] APPROACHED MR MIKA SEITOVIRTA (CEO OF OTK) AND PRESENTED AN ORAL INDICATION OF INTEREST BY AN INVESTOR GROUP TO PURCHASE THE SWEDISH COIL BUSINESS.*<sup>589</sup>

(1149) The Swedish Consortium confirmed:

*"No binding agreement has been signed and any deal would be subject to due diligence, financing and contract"*<sup>590</sup>

(1150) In addition, the Commission notes that the Swedish Consortium would appear to be interested only in the purchase of the Swedish assets, thus excluding the lines to be relocated from Terni. Instead, the Swedish consortium would be interested in including in the package Outokumpu's QP plant in Degerfors:

*Our offers is for all assets in the following units: Avesta, Långshyttan, Nyby and Degerfors. The original structure as one integrated operation created for the four Swedish units back in 1992-1994 is still competitive, subject to re-establishing an own qualified sales force and distribution network. We have identified key sales people and distributors and are ready to within a short transition period build up this organisation. This structure has proven its viability from 1994 until the take-over by Outokumpu.*

*The existing plans to invest in additional cold rolling capacity will be carried out if we consider such expansion economically feasible. Obviously, the attractiveness of expanding the Swedish cold-rolling capacity would benefit if Inoxium/Outokumpu's other planned expansion in this area would be limited.*<sup>591</sup>

(1151) In the context of a call with the Commission, the Swedish Consortium also explained:

*"The Consortium explained that their main strategy would be to reinstate the "pre-Outokumpu" situation, and operate the Swedish Coil as a fully integrated stand-alone business.*

*Therefore, in addition to the Swedish assets included in the remedy package, the consortium would prefer to complement the acquisition with the Degerfors plant.*

*The Consortium however is not necessarily interested in the Terni lines to be transferred to the Swedish Coil as they regard it as a rather old technology. Rather they would develop capacity with technical arrangements which have not been fully implemented by Outokumpu so far.*<sup>592</sup>

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<sup>589</sup> Outokumpu's email of 3 October 2012, ID 12419.

<sup>590</sup> [...] \* email of 3 October 2012, ID 12422.

<sup>591</sup> Ibid.

<sup>592</sup> See minutes of the call with Swedish Consortium, ID 12858.

(1152) In view of the above, and as in the case of [...]\*, the Commission considers that the Swedish Consortium cannot be considered as a potential buyer that would confirm the attractiveness of the assets which constitute the proposed remedy, given that the Swedish Consortium would be interested in a different package which has not been submitted by the Notifying Party.

(1153) In addition, as regards financing of the acquisition, the Swedish Consortium stated:

*"With regard of the financing of the potential deal, the Consortium explained that in view of the assets, the price offered might be relatively low. In addition, the balance sheet to be transferred needs to contain working capital (e.g. inventories). In addition the investment cost to upgrade the capacity also had to be on the balance sheet of the assets to be acquired. There are on-going discussions with the banks but the Consortium currently believes that bank financing could be accompanied by vendor financing, in the form of subordinated loans for an undetermined period."<sup>593</sup>*

(1154) In previous and subsequent correspondence, the Swedish consortium has also confirmed that it is likely to require vendor financing from Outokumpu in the form of loans for an undetermined duration and payments for capacity expansion.

(1155) In view of the above, the Commission considers that at first sight the Swedish consortium appears to lack of the requirements necessary to be independent of and unconnected to the Parties, and to possess the financial resources to maintain and develop the divested business as a viable and active competitive force in competition with the Parties and other competitors.<sup>594</sup>

(1156) The Swedish Consortium's need for vendor financing also raises doubts on the viability of Swedish Coil overall, given that normally, a viable business is a business that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.<sup>595</sup>

(1157) Lastly, on 11 October 2012, the Swedish Consortium submitted to the Commission an unsolicited document "*to give a more detailed guidance how the Swedish Consortium would develop these Swedish units*".<sup>596</sup> The document contained three tables with a summary description of a plan that according to the Swedish Consortium would have resulted in an overall increase in the CR capacity for the Swedish assets, including Degerfors. Part of the strategy of the Swedish Consortium would have also foreseen the purchase of slabs from a third party. The document, however, did not contain references to sources or underlying studies, as well as important details such as the source for the procurement of the slabs required to expand output and the financing for the investments foreseen.

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<sup>593</sup> Ibid.

<sup>594</sup> Notice on Remedies, paragraph 48.

<sup>595</sup> Notice on Remedies, paragraph 32.

<sup>596</sup> See Swedish Consortium's email of 11 October 2012 ID 13067.

- (1158) On 12 October 2012, the Commission sent the Swedish Consortium a request for information to clarify certain elements discussed in the document above. In particular, the Commission asked for a detailed business plan and any further business document elaborated in relation to the offer, including internal documents on planned investments, financing, technical feasibility and cost efficiency, as well as the range of products the Swedish Consortium intended to produce. The Commission also asked for internal documents which demonstrate the practical feasibility and profitability of buying slabs (i.e. price, transport costs etc.) on the merchant market, and which discuss the possible source for the slabs and any previous experience in relation to the purchase of large volumes of slabs on the merchant market.
- (1159) On 15 October 2012, the Swedish Consortium submitted an additional document prepared for the purpose "*of trying to transfer a good understanding of why a divestment of these Swedish entities are a better option for the European Community and the European stainless industry than a divestment of Terni*". In this document, the Swedish Consortium includes some further detail of an alleged plan to expand capacity of the Swedish assets. The same document also included the text of two documents which, according to the Swedish Consortium, had been prepared in the context of the assessment of the offer. Despite being asked to do, the Swedish Consortium has not provided copies of the original documents.
- (1160) On 16 October 2012, the Swedish Consortium complemented the submission above, upon request from the Commission, with an additional email which contained text from additional documents in the bottom of the email. Also on this occasion, the copies of the original documents were not provided.
- (1161) It is noted that the Swedish Consortium has not provided the Commission with the underlying data which forms the basis of its calculations and copies of pre-existing internal documents, despite having been requested by the Commission of doing so on more than one occasion.
- (1162) In addition, the submissions of the Swedish Consortium appear to contain a significant number of omissions in relation to important aspects of the alleged plan. Most importantly, the Swedish Consortium has not clarified the possible source of the slabs which would require expanding CR production. Given the doubts expressed above in paragraphs (122)-(124) and (283)-(284), the Commission does not consider that a plan which relies on external slabs but does not clarify the source of these slabs can be considered as reliable.
- (1163) On the contrary, these documents contain numerous references to the Swedish assets' role as producer of specialty products, and suggestions that, post-acquisition, the Swedish units would have to establish a co-operation with Outokumpu for the commercialisation of commodity products.
- (1164) Furthermore, the Commission notes that the alleged plan aimed at increasing capacity and improving the efficiency of the Swedish assets which is outlined in the documents submitted by the Swedish Consortium necessarily requires significant investments. There is no indication on how timely these investments would be. This would appear to confirm that the Swedish Coil remedy as presented by the Notifying Party, and in particular the Swedish assets, is not likely to be competitive and viable

without significant investments. It is also noteworthy that the Swedish Consortium would prefer to carry out these investments, if possible with vendor financing, rather than relocating two production lines from Terni. Without these investments, the capacity at CR level would amount to merely 200 kt/y.

- (1165) Lastly, it appears that the project to increase CR output contrasts with the statement given by the Swedish Consortium in its call with the Commission, where the Swedish Consortium expressed its intention to increase its output of VKS (or *semi-freddo*), and not of CR:

*"The Consortium plans to enhance this output with the production of ca. 200kt of VKS which, in their view, would then compete with certain segments of the Cold Rolled market."*<sup>597</sup>

- (1166) In relation to the Swedish Consortium, therefore, the Commission concludes that it cannot at first sight be considered as a suitable purchaser because of the links that would be likely to be established with Outokumpu in the form of vendor financing. The Commission also considers that the Swedish Consortium cannot be seen as a potential purchaser, given its potential interest expressed in relation to a package which is different from Swedish Coil. Lastly, the Commission considers that the alleged plan submitted by the Swedish Consortium is largely unsubstantiated and, if anything, demonstrates the unsuitability of Swedish Coil to solve the competition concerns identified by the Commission in its current form.

- (1167) As a result of the above, the Commission considers that Swedish Coil raises doubts as to its implementation, particularly with regard to the likelihood to find a suitable buyer.

#### 6.1.5. Conclusion

- (1168) It is concluded that the proposed Swedish Coil remedy raises serious doubts as to whether this business can be competitive and viable in the form as proposed by the Notifying Party, and whether a suitable purchaser could be found and if so whether he would have the ability and incentive to compete effectively and on a lasting basis in such a way as to eliminate the competition concerns in the EEA market for CR in their entirety.

## 6.2. Commitments as revised on 1 October 2012

### 6.2.1. Description of the commitments

- (1169) On 1 October 2012, Outokumpu submitted revised remedies to alleviate the competition concerns identified by the European Commission. The new remedy package consists of the following divestitures ("Terni"):

- (a) Inoxum's production units (comprising all the related sales and marketing activities and personnel) at the Terni stainless steel production site;

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<sup>597</sup> See minutes of the call with Swedish Consortium, ID 12858.

- (b) Inoxum's Terninox SSC in Ceriano Laghetto (Italy);
  - (c) Outokumpu's SSC in Willich (Germany);
  - (d) At the option of the Purchaser, one or more SSCs located in France (Inoxum's Tours) and/or the UK (Outokumpu's Birmingham) and the Terninox warehouses in Padova, Ancona, Florence and Bologna (Italy);
  - (e) At the option of the Purchaser, the divestiture package will include Terni's forging business (*Società delle Fucine*);
  - (f) In addition, at the option of Outokumpu, Outokumpu and the Purchaser will enter into a transitional, arm's length supply agreement for the Purchaser to supply Black Hot Band from Terni to Outokumpu Calvert/Mexinox; and
  - (g) The divestiture package does not include Terni's tube-making business at *Tubificio di Terni SpA* ("Tubificio"), and Terni's bright annealing line LBA2 with a capacity of [...] kt/y.
- (1170) As an alternative to the Willich SSC, Outokumpu offered a smaller SSC in Germany located in Langenhagen together with the sales activities of the former AST Deutschland GmbH, as today included in TK Stainless International GmbH, Krefeld (hereinafter referred to as "the sales office").

## 6.2.2. Investigation on Terni

### 6.2.2.1. Sources of evidence

- (1171) Firstly, the Commission used the information submitted in the Proposed Commitments and the Form RM. The Commission addressed numerous Article 11 requests to the Parties, and also had a call with Mr Espenhahn (on behalf of TK) former CEO of AST Terni.<sup>598</sup>
- (1172) Secondly, a market test on Terni was launched on 1 October. The questionnaires were sent to the same market participants<sup>599</sup> as in the case of Swedish Coil.
- (1173) Thirdly, the Commission also used information on Terni already obtained during the calls with companies which expressed a potential interest in purchasing Swedish Coil, to the extent relevant.
- (1174) Fourthly, the Commission also conducted further calls with interested stakeholders (i.e. Terni's Trade Unions<sup>600</sup> and the Federmanager, the Italian National Federation of Managers<sup>601</sup>).

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<sup>598</sup> See minutes of the call with Mr Espenhahn, ID 12852.

<sup>599</sup> With the exception of some market participants who expressed during the Swedish Coil market test that they are not buying stainless steel from the Parties.

<sup>600</sup> Call of 16 October 2012 ID 13306.

<sup>601</sup> Call of 19 October 2012 ID 13275.

(1175) Fifthly, the Commission also conducted an interview by electronic means pursuant to Article 11(7) of the Merger Regulation with Mr Marco Pucci, CEO of AST Terni.<sup>602</sup>

(1176) The Commission will assess the market test (paragraphs (1177)-(1187)) in detail below. The other sources of evidence are not assessed separately but are incorporated into the assessment.

#### 6.2.2.2. Overview of the results of the market test

(1177) A pure quantitative approach shows that the majority of respondents have expressed a favourable opinion of Terni. A qualitative approach also confirms that in general Terni appears to be suitable, viable and attractive.

##### (1) *Suitability to remove competition concerns*

(1178) In terms of counting, the number of respondents who replied that Terni would solve the competition concerns are 54 out of 83 (65%) of direct customers, 101 out of 133 (76%) of indirect customers, 3 out of 5 (80%) of competitors and 17 out of 20 (85%) of independent distributors.

(1179) More importantly, however, an assessment of the qualitative replies suggests that Terni is regarded as a suitable remedy. For instance:

*"By this acquisition of the Divestment Business the purchaser can get strong position as a new player on stainless steel business"*<sup>603</sup>

*"AST Terni is a fully integrated stainless steel plant with significant capacity and a broad customer base. With an independent market strategy (i.e. when AST Terni is no longer bound by the Inoxum group strategy), AST Terni will likely be able to expand its customer base and compete heads on with European stainless steel producers in other core markets. Prior to the acquisition of AST Terni by ThyssenKrupp (then Fried. Krupp GmbH) AST Terni operated as an independent company on the market - after the divestment AST Terni can resume this position".*<sup>604</sup>

*"we consider that a suitable purchaser can concur efficiently on EEA market."*

*"can effectively compete on the EEA market"*<sup>605</sup>

*"I believe the proposal removes concerns."*<sup>606</sup>

(1180) In the case of Terni, the negative replies often do not relate directly to suitability, viability, competitiveness or attractiveness. Moreover, these replies mainly refer to insufficient market knowledge, the current market circumstances, the identity of the

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<sup>602</sup> ID 13243.

<sup>603</sup> [...]\*, ID 12874.

<sup>604</sup> ThyssenKrupp AG, ID 12577.

<sup>605</sup> [...]\* ID 12733.

<sup>606</sup> [...]\* ID 11795.

potential buyer or question the proposed transaction as a whole. Some examples are included below:

*"Terni has to belong to the INOXUM-Package to remain a competitive environment. If a split is done, Terni will perhaps become the position, as in former days, which were characterized by a price dumping strategy to strengthen specific Italian partners."*<sup>607</sup>

*"It is essential to know in advance who would be the potential purchaser. If it was an industrial partner, it would probably maintain a sufficient level of competitiveness. Otherwise I consider it difficult"*<sup>608</sup>

*"Terni is the only important italian inox steel mill. A divestiture (to Arcelor Mittal for example) would distorte completely the entire italian market."*<sup>609</sup>

*"From a market perspective it remove competition concerns. From a [...] perspective, not - Terni seems not to be able to provide the thickness required by [...]".*<sup>610</sup>

(2) *Viability of the divested business*

(1181) The number of respondents who replied that Terni would be a viable business are 52 out of 81 (64%) of direct customers, 111 out of 132 (84%) of indirect customers, 3 out of 5 (60%) of competitors and 16 out of 20 (80%) of independent distributors.

(1182) In particular, many comments refer to the fact that Terni is fully integrated and is capable of operate as a stand-alone business as it used to be an independent undertaking in the past.

*"The AST Terni package represents a sizeable enough stainless steel production unit to retain the status of a viable full value chain."*<sup>611</sup>

*"This proposal looks to have a better starting point than the previous 'piecemeal' activities that were were part of the original proposal"*<sup>612</sup>

*"My opinion is the Divestment Business is viable and can compete on the market. I think it is strong enough."*<sup>613</sup>

*"The divesture represents a fully integrated business"*<sup>614</sup>

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<sup>607</sup> [...] ID 11958.

<sup>608</sup> *"E' fondamentale sapere a priori chi sarebbe l'eventuale acquirente. Se fosse un partner industriale probabilmente mancherebbe un sufficiente livello di competitività. Altrimenti reputo difficile un mantenimento dello stesso."* [...] ID 12189.

<sup>609</sup> [...] ID 11825.

<sup>610</sup> [...] ID 12709.

<sup>611</sup> [...] ID 12511.

<sup>612</sup> [...] ID 12706.

<sup>613</sup> [...] ID 12487.

<sup>614</sup> [...] ID 11946.

*"The remaining AST Terni package includes all necessary viable value chain elements for its intended stainless production and competitiveness."*<sup>615</sup>

*"The new package removes the uncertainties or relocation, making this package even more suitable. This should be enough to operate a viable business."*<sup>616</sup>

*"Viable because Terni mill includes all processes from melting to Cold Rolling and can be considered as fully integrated. Therefore able to compete with other mills in Europe."*<sup>617</sup>

*"AST can compete on the EEA market and is able to have a the capacity on a lasting basis , as the market is in need to have material out of production of AST noto only for the distributors but also for enduser"*<sup>618</sup>

*"Yes if Terni is sold together with its distribution network and not only the production site."*<sup>619</sup>

*"Operation will be integrated on the cold rolling process stand point and will be able to offer a portfolio of products including service centers."*<sup>620</sup>

*"AST Terni is a fully integrated stainless steel plant with significant capacity and a broad customer base. With an independent market strategy (i.e. when AST Terni is no longer bound by the Inoxum group strategy), AST Terni will likely be able to expand its customer base and compete heads on with European stainless steel producers in other core markets. Prior to the acquisition of AST Terni by ThyssenKrupp (then Fried. Krupp GmbH) AST Terni operated as an independent company on the market - after the divestment AST Terni can resume this position."*<sup>621</sup>

*"AST Terni is well know[n] on the market to be quite competitive. Also the fact that it is a complete, integrated, modern mill helps a lot."*<sup>622</sup>

*"Terni use to be independent mill before it wa[s] acquired by TK. It should be viable after it is divested from Inoxum"*<sup>623</sup>

*"It should be viable since it's a large enough (and modern) melting and rolling capacity to get a competitive costlevel."*<sup>624</sup>

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615 [...] ID 12511.

616 [...] ID 12743.

617 [...] ID 12611.

618 [...] ID 12343.

619 "Oui si TERNI est vendu complètement avec son réseau de dist[r]ibution et non pas uniquement l'usine de production." [...] ID 12878.

620 [...] ID 12156:

621 [...] ID 12568:

622 [...] ID 12185.

623 [...] ID 12229.

624 [...] ID 12362.

*"Terni plant is a full cycle location, so who will acquire it will have everything, including skilled people with a professional history longer than 100 years."*<sup>625</sup>

*"The divested business represents an integrated and well organized unit of production and distribution"*<sup>626</sup>

- (1183) A few concerns have been expressed with regard to the viability and competitiveness of Terni. However, these concerns mainly relate to the general market conditions, the identity of the future buyer and not in general to the nature and scope of the business. Some respondents were also of the view that Terni's size is not sufficient.

*"The viability of the Package 'on-sale' depends directly on the installed production capacity of AST Terni, so that it can represent a reasonable market player in the future. Production costs and therefore stainless steel selling prices will depend on the weight of the new company in the European/global market when negotiating base raw materials."*<sup>627</sup>

*"Just competitors of equal size will be able to sustain their position"*<sup>628</sup>

*"Because I think that the only AST Terni will be too small to compete in the EEA market"*<sup>629</sup>

(3) *Attractiveness of the divested business*

- (1184) With regard to the attractiveness of Terni, the respondents who replied that Terni would be sufficient to attract a suitable purchaser are 47 out of 80 (62%) of direct customers, 104 out of 132 (79%) of indirect customers, 3 out of 4 (75%) of competitors and 15 out of 19 (79%) of independent distributors.

- (1185) As also confirmed by the replies to the viability question (see paragraph (1182) above), Terni is regarded as a relatively balanced and integrated plant. The qualitative replies also indicate that there may be buyers (European and Asian) with a potential interest in the business.

- (1186) Of the market participants who responded to the Commission's questionnaires, 3 companies expressed an interest in purchasing Terni. These companies are Aperam, Marcegaglia and AK Steel. Another company which has been considered by many respondents as potentially interested, POSCO, has not replied to the relevant question (whereas in the case of Swedish Coil it had explicitly excluded its interest). Acerinox, another company potentially considered as interested by many respondents, has not responded to the market test questionnaire (while it had replied and excluded its interest in the case of Swedish Coil). In addition, in a phone call

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<sup>625</sup> [...] ID 12288.

<sup>626</sup> [...] ID 12043.

<sup>627</sup> [...] ID 12592.

<sup>628</sup> "Nur ähnlich große Wettbewerber werden sich am Markt behaupten können" [...] ID 11749.

<sup>629</sup> [...] ID 12541.

with the Commission, Arinox has also confirmed its interest which was not clearly expressed in its reply to the market test to purchase Terni.

(4) *Evaluation of the outcome of the market test*

(1187) The market investigation suggests that Terni is regarded as a suitable remedy to eliminate competition concerns, it is sufficiently viable to compete effectively and it can be seen as sufficiently attractive to find a suitable purchaser.

6.2.3. *Assessment*

6.2.3.1. Suitability to solve competition concerns

(1188) Terni is an integrated site with a large meltshop (capacity up to [...] t) and a hot rolling part (capacity up to [...] t), as well as CR capacity of [...] kt.<sup>630</sup> In view of the elements discussed in the context of the Commission's assessment of Swedish Coil, at first sight Terni appears to have enough capacity to be competitive all over the CR market.

(1189) In 2011, Terni's CR output amounted to approximately [...] kt. Terni sold both austenitic and ferritic products of all the main finishes including 2B, 2D and BA. In addition, it sold CR to important segments such as distributors, tube makers, metal processors, kitchen and households goods makers, chemical and energy equipment producers, white goods manufacturers, heating and cooling systems producers and companies active in the light transport and ABC segments.

(1190) In 2011, Terni also sold [...] kt of HWB and [...] kt of HBB.

(1191) Terni also includes certain advanced machineries for the production of high quality products such as anti-fingerprints and coloured surfaces (Vivinox) and independent R&D activities which led to the achievement of numerous patents for innovative products such as super-ferritics and silver ice.

(1192) As Terni has a sufficiently large meltshop and HR capacity, the potential buyer could expand its present output of CR and thus compete effectively against competitors in the EEA.

**Table 22: Total capacity of Terni according to the Parties**

	(kt/y)
Melting	[...]**
Hot rolling	[...]*
Cold rolling	[...]***

**Source: Schedule 1 attached to the Commitments document**

\* out of which [...] kt/y to the Forge business.

\*\* actual CR is lower because of [...]\*.

<sup>630</sup> Parties' data. This capacity was also confirmed by interviews conducted with stakeholders.

- (1193) Terni's [...] capacity amounts to [10-20]\*% of the current EEA CR capacity, and represents [50-60]\*% of the overlap between the Parties. Although the proposed remedy can be considered suitable to eliminate the competition concern, it still appears to be at the low end in terms of what would be required to remove the overlap resulting from the merger. The Commission thus considers that the size of Terni in terms of capacity is proportionate to the competition concerns created by the proposed transaction.
- (1194) Moreover, the Commission notes that Terni is a separate and existing business within Inoxum with a strong customer base (especially in Southern Europe), which can start operating on a standalone business immediately after the divestment. In fact, since its acquisition by ThyssenKrupp in 1994 Terni has been run as an almost independent business with its own management within Inoxum, marketing its own name and brand and can therefore be easily spun off. The remedy package will also include Terninox, which has been historically Terni's main customer and most important service centre. As a result, problems related to the separation of Terni from Inoxum's remaining activities are unlikely to arise.
- (1195) On the basis of the above, the Commission considers that the proposed package is likely to be suitable to eliminate competition concerns on the EEA market for the production of CR products.

#### 6.2.3.2. Viability and competitiveness

- (1196) As described above in paragraphs (1188)-(1195), Terni is an existing and proven business, with a very strong position in Southern Europe. These elements have also been overall confirmed by the market test.
- (1197) In addition, Terni is recognised as a cost competitive CR production site.<sup>631</sup> In particular, its meltshop is almost as efficient as the one in Tornio (average costs in Terni amount to [...] EUR/t, compared to [...] EUR/t in Tornio, [...] EUR/t in Bochum, [...] EUR/t in Avesta and [...] EUR/t in Krefeld)<sup>632</sup>. With regard to CR, Terni's efficiency can also be regarded comparable to Tornio's (average costs in Terni amount to [...] EUR/t, against [...] EUR/t in Tornio, [...] EUR/t in Krefeld, [...] EUR/t in Benrath, [...] EUR/t in Avesta and [...] EUR/t in Nyby).<sup>633</sup>
- (1198) Third party studies submitted by the Parties also show that Terni is considered more efficient than TK's Nirosta plants and almost as efficient as Aperam's and Acerinox's plants with regard to the production of CR 304 with 2B finish under a cost-by-production-stage approach, more efficient than Aperam, Acerinox, and Nirosta

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<sup>631</sup> Cf. market test statements

<sup>632</sup> Parties' Synergies calculations – supporting documents ID 438.

<sup>633</sup> With regard to cold rolling, the Commission is lacking a comparable analysis to the one for the meltshop (such as the Synergies document). These data has been therefore prepared on the basis of information provided by the Parties in the context of remedies discussions. Given that the source for the data is different, these figures may not be directly comparable with those used for the assessment of meltshop efficiency.

under a cost-type study, and even more efficient than Tornio under a conversion-costs analysis.<sup>634</sup>

(1199) In view of the above, the Commission notes that Terni appears to be as a whole a competitive and viable business.

(1200) At a later stage of the procedure, concerns were raised with particular regard to the exclusion of the BA line LBA2 from the package. The facts, chronology and the Commission's assessment will be discussed in section 6.3.3 below.

#### 6.2.3.3. Attractiveness of Terni to find a suitable purchaser

(1201) Aperam, Marcegaglia, AK Steel and Arinox expressed interest as potential buyers for the Terni.

(1202) A phone interview with Marcegaglia showed that the company's interest for Terni would be much more concrete than for Swedish Coil, in particular because of geographical proximity and knowledge of Terni. As for Arinox, the company also expressed a more concrete interest given the fact that Terni is a pre-existing, integrated and full-fledged stainless steel plant.

(1203) Internal documents of Outokumpu and ThyssenKrupp also indicate that ThyssenKrupp planned to sell Terni in the past to a financial investor and that sales negotiations had reached an advanced stage.<sup>635</sup> This would appear to confirm that Terni is potentially able to attract interested parties.

(1204) Also in light of its assessment of Terni's viability and competitiveness, the Commission concludes that Terni is a business which is likely to attract a suitable purchaser.

#### 6.2.3.4. Other issues

##### (1) *Service centres (SSCs)*

(1205) With regard to the suitability of the SSCs in question (i.e. Willich or Langenhagen), the quantitative results of the market test on the SSC questions are mixed.

(1206) As regards direct customers:

(1) 26 out of 76 (34%) replied that a pure sales office is sufficient to reach the relevant SSC customers;

(2) 54 out of 81 (67%) replied that AST Terni needs a large SSC presence in Germany to compete effectively on the EEA CR market; and

(3) 46 out of 80 (57%) replied that the Willich SSC is sufficient to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries;

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<sup>634</sup> Annex 32 to the Form CO, ID 1076.

<sup>635</sup> Outokumpu's internal documents: "[...]" ID 7603. See also ThyssenKrupp internal document ID 264.

- (4) 42 out of 77 (55%) replied that the Langenhagen SSC together with the sales office is sufficient to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries;
- (5) 37 out of 60 (62%) replied that Willich is more suitable to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries than the Langenhagen SSC together with the sales office.

(1207) As regards indirect customers:

- (1) 76 out of 130 (58%) replied that a pure sales office is sufficient to reach the relevant SSC customers;
- (2) 72 out of 130 (55%) replied that AST Terni needs a large SSC presence in Germany to compete effectively on the EEA CR market;
- (3) 84 out of 132 (64%) replied that the Willich SSC is sufficient to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries;
- (4) 91 out of 132 (69%) replied that the Langenhagen SSC together with the sales office is sufficient to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries;
- (5) 69 out of 117 (59%) replied that Willich is more suitable to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries than the Langenhagen SSC together with the sales office.

(1208) As regards competitors:

- (1) 0 out of 5 (0%) replied that a pure sales office is sufficient to reach the relevant SSC customers;
- (2) 3 out of 5 (60%) replied that AST Terni needs a large SSC presence in Germany to compete effectively on the EEA CR market; and
- (3) 4 out of 4 (100%) replied that the Willich SSC is sufficient to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries;
- (4) 3 out of 4 (75%) replied that the Langenhagen SSC together with the sales office is sufficient to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries;
- (5) 4 out of 5 (80%) replied that Willich is more suitable to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries than the Langenhagen SSC together with the sales office.

(1209) As regards independent distributors:

- (1) 10 out of 20 (50%) replied that a pure sales office is sufficient to reach the relevant SSC customers;
  - (2) 7 out of 20 (35%) replied that AST Terni needs a large SSC presence in Germany to compete effectively on the EEA CR market; and
  - (3) 13 out of 19 (68%) replied that the Willich SSC is sufficient to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries;
  - (4) 13 out of 15 (87%) replied that Willich is more suitable to ensure that AST Terni competes effectively in Germany and the region Germany+Benelux+Nordic countries than the Langenhagen SSC together with the sales office.
- (1210) Although there are statements which could suggest that a sales office is sufficient to reach the relevant customer segments<sup>636</sup>, the majority of the qualitative quotes confirm that a large SSC presence in Germany is essential to become a significant player on the EEA CR market.

*"The European stainless steel market lacks independent service centers. This lack of independent service centers makes it difficult to enter the market going directly to end-users. End-users demand smaller quantities, niche products, JIT delivery, and a qualification process. Steel mills prefer supplying large, batch quantities with generic terms. Slitting and blanking lines help provide just-in-time products to large end-user customers. A sales office can arrange inventory and vendor processing in order to provide the same service in other countries. This is typically not as efficient or as effective as owning your own distribution network."*<sup>637</sup>

*"In some cases local SSCs are needed to perform finishing operations and to meet required lead times"*<sup>638</sup>

*"Pure sales office in SCC business is not reliable enough."*<sup>639</sup>

*"SSC customers need service. Only a sales office is not able to fulfill their requirements"*<sup>640</sup>

*"A logistic platform is important for customers that require shorter lead-times on the current + future projects. Large SSC presence, correctly geographically distributed, it's the complement of the strong sales organization"*<sup>641</sup>

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<sup>636</sup> It has to be noted however, that many of the respondents stating that no SSC presence of the AST Terni business is necessary are independent SSCs who regard the mill-owned SSCs as competitors.

<sup>637</sup> [...] \* ID 12746.

<sup>638</sup> [...] \* ID 12654.

<sup>639</sup> [...] \* ID 11873.

<sup>640</sup> [...] \* ID 12229.

<sup>641</sup> [...] \* ID 12592.

*"An office can give you "Service" but not "Material", so I guess a "stand alone office" can not satisfy a SSC customer"*<sup>642</sup>

*"With SCC's you are closer at your customer, your flexibility and service is much better. That is our experience, we operate also with 6 service centers worldwide!"*<sup>643</sup>

*"Germany is the main European market with high levels of service required"*<sup>644</sup>

*"Yes the german market is an important market so it would be important to have an SSC in Germany. Compare to the current marketsituation where every European producer has at least one SSC in Germany."*<sup>645</sup>

*"A great portion of business is done in blanks and cut pieces which are handled by Service Centers, hence to have penetration in the market it is mandatory to have a Service Center."*<sup>646</sup>

*"To be succesfull in the german market you wil need a strong distribution hub with servic center facilities. You will have as well endusers as distributors as customers, and you need to be efficient in distribution, and flexible on the product."*<sup>647</sup>

*"Without having SSC in diffrent regions of Europe it's difficult to compete nowadays."*<sup>648</sup>

*"Germany is a good central point to deliver large surrounded regions."*<sup>649</sup>

*"This is the only way compete succesfully."*<sup>650</sup>

*"Germany would be regarded as the hub of Europe as such,so a larger presence there would mean easier access to the markets and would and logistical ease of supplies to fring SSC."*<sup>651</sup>

*"We believe that a SSC presence in Germany is important to compete effectively. It extent will probably correspond to the sales needs and the customers demands in order to stay competitive."*<sup>652</sup>

*"Germany is the main market in EEC and to find & keep the customers, SSC is necessary."*<sup>653</sup>

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642 [...] \* ID 12679.  
643 [...] \* ID [...].  
644 [...] \* ID 12602.  
645 [...] \* ID 12362.  
646 [...] \* ID 12156.  
647 [...] \* ID 11952.  
648 [...] \* ID 12460.  
649 [...] \* ID 12589.  
650 [...] \* ID 12639.  
651 [...] \* ID 12690.  
652 [...] \* ID 12752.  
653 [...] \* ID 12442.

- (1211) The market investigation confirmed that Willich is a sufficiently large, modern and well-equipped service centre to serve the German market and also the Benelux territories.

*"Willich SSC is very well equipped and modern facility. It recently got a lot of investment by Outokumpu. It is one of the biggest SSC in Germany"*<sup>654</sup>

*"Given the history of the Willich SSC where it was the Outokumpu route into German and probably Benelux it should be sufficient for that. It should probably not give any bigger impact on the markets in the Nordic countries (excluding Denmark where it's possible to get a bigger market share, given the shorter distance to Denmark)."*<sup>655</sup>

*"In our opinion it has the size and geographic location to service the market"*<sup>656</sup>

*"We are currently using the Willich SSC for our range of products and it is viable enough to insure supply on the German market. Willich SSC is a well-organized service centre with good potential to attract/reach customers in Germany and in the region Germany+Benelux. We believe that Nordic countries should be covered by an SSC Scandinavian organization."*<sup>657</sup>

*"Willich is one of the strategic locations in Europe for the mentioned countries."*<sup>658</sup>

*"Willich is well established, professional and customer focused unit so can be very effective as an independent SC."*<sup>659</sup>

*"The Willich SSC is a modern unit with good reputation, supplying significant amounts of materials to the Polish market."*<sup>660</sup>

*"pretty modern equipment and sufficient capacity"*<sup>661</sup>

- (1212) As to the more specific question which of either the Willich or Langenhagen SSC is more suitable to serve the German market and possibly the wider region of Germany+Benelux+Nordic countries, the majority of respondents indicates it is Willich. The responses refer to more capacity, equipment and location.

*"Based on geographical location of the sales and service center. We don't have enough information to judge upon size and equipment."*<sup>662</sup>

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654 [...] ID 12229.

655 [...] ID 12362.

656 [...] ID 12156.

657 [...] ID 12592.

658 [...] ID 12457.

659 [...] ID 12077.

660 [...] ID 12629.

661 [...] ID 12430.

662 [...] ID 12654.

*"As far as we know, because of the better equipment, size and possibilities of Willich."*<sup>663</sup>

*"[Willich] Better production facilities."*<sup>664</sup>

*"Willich is a more complete SSC and bigger than Langenhagen."*<sup>665</sup>

*"Willich is geographical for us the best option as they also have 2 mtr wide in the package, and keeps AST as standalone enough space in the market, as AST has also good options for Bright annelaed material and smaller and thinner sizes"*<sup>666</sup>

*"[Willich] Because of the capacity."*<sup>667</sup>

*"Willich SSC offers a more wider service"*<sup>668</sup>

*"Due to their geographical synergy and better proximity to a larger part of the whole clientele in the mentioned region."*<sup>669</sup>

*"Willich's location , equipment and size may be is an advantage"*<sup>670</sup>

(1213) The main reasons why many market participants do not regard Langenhagen as a suitable SSC relate to its size, equipment and geographic location.

*"too small"*<sup>671</sup>

*"Langenhagen is too small"*<sup>672</sup>

*"Size and product mix not significant enough"*<sup>673</sup>

*"The SSC Langenhagen together with AST Krefeld are not able to met our requirements especially in the area of service business."*<sup>674</sup>

*"Langenhagen SSC is almost nothing and AST Deutschland as per today is almost empty. (at the best of my knowledge)"*<sup>675</sup>

*"In my opinion Langenhagen is a regionally active SSC for metal plates and cuts for Northern Germany. I do not reckon that is sufficient. The question is*

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663 [...] ID 12535.

664 [...] ID 12296.

665 [...] ID 12362.

666 [...] ID 12343.

667 [...] ID 12071.

668 [...] ID 12693.

669 [...] ID 12511.

670 [...] ID 12359.

671 [...] ID 12718.

672 [...] ID 12737.

673 [...] ID 12602.

674 [...] ID 12571.

675 [...] ID 12153.

*which counterbalance Terni should constitute in regard to OK/Inoxum on the market.*<sup>676</sup>

*"Too small service center to cover these regions."*<sup>677</sup>

*"In our opinion, Langenhagen SSC is too small and do not provide enough capabilities to serve the above mentioned countries"*<sup>678</sup>

*"The product range and machinery is not sufficient in my opinion."*<sup>679</sup>

(1214) In contrast with many qualitative quotes which explicitly support the view that only Willich is suitable to reach the necessary customer base in Germany, a few respondents suggested that Langenhagen could be sufficient.

(1215) The Commission notes that an overall assessment of the market test in this respect does not confirm that divestment of Langenhagen could be seen as sufficient. In addition to the quotes that only Willich would be sufficient reported above, there are even several replies which clearly state that not even the Willich SSC would be enough for such a large territory. These quotes actually demonstrate that certain market participants would consider that only a very large SSC could serve the Germany+Benelux+Nordic region. As a result, a relatively small SSC such as Langenhagen, together with the sales office, would clearly not be able to supply that region.

*"Maybe together with Langenhagen"*<sup>680</sup>

*"Willich cannot cover that big market area."*<sup>681</sup>

*"Region is too big for only one SSC"*<sup>682</sup>

*"The whole southern area is poorly covered."*<sup>683</sup>

*"One SSC for the whole are might not be enough"*<sup>684</sup>

*"Likely to be overwhelmed."*<sup>685</sup>

(1216) In addition to the above market test result, the Commission notes the following.

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<sup>676</sup> *"Langenhagen ist meiner Meinung nach ein Regional operierendes SSC für Bleche und Zuschnitte für Norddeutschland. Ich glaube das dies nicht ausreicht. Es stellt sich doch die Frage, welches Gegengewicht soll Terni zu OK/Inoxum im Markt darstellen?" [...]\* ID 12052.*

<sup>677</sup> [...]\* ID 11837.

<sup>678</sup> [...]\* ID 12611.

<sup>679</sup> [...]\* ID 12077.

<sup>680</sup> [...]\* ID 11882.

<sup>681</sup> [...]\* ID 12272.

<sup>682</sup> [...]\* ID 11937.

<sup>683</sup> [...]\* ID 11749.

<sup>684</sup> [...]\* ID 12049.

<sup>685</sup> *"Dürfte damit überfordert sein."* [...]\* ID 12125.

- (1217) Langenhagen is an SSC currently selling to [...]\*. The Commission notes that the buildings are [...]\*. Langenhagen is located in Lower Saxony, close to Hannover, in the "middle" of Germany.
- (1218) According to the Parties' own internal documents [...]\*.<sup>686</sup>
- (1219) The Commission takes also note that the sales office (which is located in Krefeld, Inoxum's heartland) is not a separate legal entity and would merely imply the transfer of employees and the order book, to which no assets are attached. The orderbook to be transferred amounts to [...]\* kt (out of which approximately [...]\* kt to TK subsidiaries).
- (1220) Willich is currently mainly selling to [...]\*, and is located in the North-West of Germany, in North Rhine-Westphalia. According to the Notifying Party, Willich effectively provides access to [...]\*. The site was recently modernised.
- (1221) A sufficiently sized SSC such as Willich would seem to counterbalance Terni's relative inactivity, resulting from Inoxum's internal organisation, in [...]\*.<sup>687</sup>
- (1222) Moreover, market share data at distribution level shows that competitors (i.e. Aperam and Acerinox) in Europe have significant SSC presence in Germany and seem thus to regard this as an essential element to compete successfully. Moreover, SSC presence expressed in market shares is roughly commensurate with their overall market share.
- (1223) In light of those figures, Langenhagen can comparatively be regarded as a very small service centre with just around [0-5]\*% of the SSC sales of flat stainless steel products in Germany<sup>688</sup> and consequently Willich with a [10-20]\*% share on the same market would much better correspond to the production and capacity shares of Terni. More precisely, according to the Notifying Party,<sup>689</sup> in Germany, European stainless steel producers have the following market shares (2011) in SSC sales (flat products): Inoxum [20-30]\*%, Outokumpu [10-20]\*%, Aperam [10-20]\*% and Acerinox [10-20]\*%.
- (1224) On the basis of the above elements, i.e. the market test and other evidence, the Commission concludes that the divestment of the Terni package with Langenhagen and the sales office would not eliminate competition concerns with certainty in their entirety, as the new market player would not have a sufficient "route to market" in the most important region of CR consumption.
- (1225) On the other hand, the Commission considers that the Terni package with the Willich SSC would indeed eliminate competition concerns raised by the proposed transaction in their entirety.

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<sup>686</sup> Annex 104 Form CO ID 1304.

<sup>687</sup> In 2011 Willich had total sales amounting to [...]\* kt, out of which [...]\* kt of CR products.

<sup>688</sup> In the Benelux countries, another very important European market for stainless steel products, Langenhagen has an SSC market share of [0-5]\*%, whereas Willich has [5-10]\*%.

<sup>689</sup> From CO Annex 92.

(2) *Transitional HBB supply agreement*

(1226) The market test indicated that a transitional, arm's length supply agreement for the Purchaser to supply HBB from Terni to Outokumpu's Calvert/Mexinox, would not be problematic.

(1227) The Commission considers that these quantities sold to Calvert/Mexinox during the transitional period might have a positive impact on Terni's viability as during this period, while finding new customers, the take-offs ensure that HR capacity is employed.

(3) *Tubificio*

(1228) There have been some comments by the respondents to the market investigation according to which the inclusion of the tube-making business is important for the viability and attractiveness of the Divestment Business, although these claims have not been substantiated, but referring merely to the fact that Tubificio is an important customer.<sup>690</sup> Other respondents did not regard this as being necessary.<sup>691</sup>

(1229) Tubificio is a tube manufacturer<sup>692</sup> that uses stainless steel sheets to welded tubes, which are then sold to the automotive, industrial and building industry. Tubificio is thus active in a downstream product market where there is only a minor overlap between the Parties and hence the Commission did not raise competition concerns with regard to this market.

(1230) With regard to the question whether Tubificio is necessary for the viability of the Divestment Business the Commission notes that Tubificio is a distinct, non-core business of Terni. Tubificio is a separate legal entity producing independently, 8km away from the stainless steel factory in Terni. Tubificio is not integrated in the production process of Terni.

(1231) The Commission takes note of the fact that Tubificio is indeed an important customer for Terni, with approximately [...]kt of purchases per year. The Commission also considers however, that the fact that Tubificio is not part of the Divestment Business, does not necessarily imply the loss of part or the entire sales of Terni to Tubificio. This is because it is possible that Outokumpu will still find it profitable to purchase the CR requirements for Tubificio from Terni because of the extreme geographic proximity and the long-lasting commercial relationship between the two entities.

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<sup>690</sup> Terni's Trade Unions and Federmanager also emphasise that [...] is an important customer for Terni.

<sup>691</sup> [...]: The removal of the tube making business should not affect the c/r plate business ID 12690.

<sup>692</sup> Tubificio is selling approximately [...] kt/y of exhaust tubes and approximately [...] kt/y of structural tubes. Tubificio sources cold rolled products for approximately [90-100]% of its requirements and hot white bands for approximately [10-20]% of its requirements. The total production capacity of Tubificio is approximately [...]kt/y. See minutes of the call with Mr Espenhahn, ID 12852.

- (1232) The Commission notes further that according to the Notifying Party it does not appear to be necessary for a CR producer to operate a tube-making business.<sup>693</sup> In addition, according to the Parties<sup>694</sup>, Terni has not been historically active to a large extent in sales of CR and HWB to Italian tube manufacturers, due to the fact that it had its own tube-making business<sup>695</sup>. A potential purchaser of Terni, which will not include Tubificio, could start supplying this market.
- (1233) Finally the Commission considers that the remedy package provides Terni with a substantial additional "route to market" in the form of the Willich SSC<sup>696</sup> and the optional SSCs in Birmingham<sup>697</sup> and Tours<sup>698</sup>. Thus, any potential loss in sales to Tubificio would be likely to be compensated by the sales of those SSC.

#### 6.2.4. Conclusion

- (1234) On the basis of the above the Commission considers that the proposed commitments with the Willich service centre are suitable to eliminate competition concerns on the EEA market for the production of CR products and sufficiently attractive to find a suitable purchaser. However, for the reasons described below in section 6.3.3 related to the exclusion of the BA line LBA2 from Terni, the Commission doubts as to whether the proposed remedy would be viable.

### 6.3. Commitments submitted on 9 October 2012

#### 6.3.1. Description

- (1235) On 9 October 2012, Outokumpu submitted modified commitments, i.e. the revised Terni package.
- (1236) The revised Terni package consists of the same divestitures (with the Willich SSC) as listed in 6.2.1 above, i.e.:
- (a) Inoxum's production units (comprising all the related sales and marketing activities and personnel) at the Terni stainless steel production site.
  - (b) Inoxum's Terninox SSC in Ceriano Laghetto (Italy).
  - (c) Outokumpu's SSC in Willich (Germany).
  - (d) At the option of the Purchaser, one or more SSCs located in France (Inoxum's Tours) and/or the UK (Outokumpu's Birmingham) and the Terninox warehouses in Padova, Ancona, Florence and Bologna (Italy).

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<sup>693</sup> According to the Notifying Party, most of the worldwide stainless steel producers do not have tube making operations ID 12424.

<sup>694</sup> See minutes of the call with Mr Espenhahn, ID 12852.

<sup>695</sup> [...] is an important producer of tubes and a customer of AST, but only for HBB.

<sup>696</sup> The total sales of Willich amounted to [...] kt in 2011. Source: Annex 1 of the Proposed Commitments of 19 October 2012.

<sup>697</sup> The total sales of Birmingham amounted to [...] kt in 2011. Source: Annex 1 of the Proposed Commitments of 19 October 2012.

<sup>698</sup> The total sales of Tours amounted to [...] kt in 2011. Source: Annex 1 of the Proposed Commitments of 19 October 2012.

- (e) At the option of the Purchaser, the divestiture package will include Terni's forging business (Società delle Fucine).
  - (f) In addition, at the option of Outokumpu, Outokumpu and the Purchaser will enter into a transitional, arm's length supply agreement for the Purchaser to supply Black Hot Band from Terni to Outokumpu Calvert/Mexinox.
  - (g) The divestiture package does not include Terni's tube-making business at Tubificio di Terni, and Terni's bright annealing line LBA2 with [...] kt.
- (1237) The difference between the 1 October commitments and the commitments as submitted on 9 October consists of further specifying the time period foreseen for the removal of the BA line LBA2. More specifically, Outokumpu commits, in order to avoid any disruption to the Divestment Business, to dismantle the LBA2 line within [...] from the date of the Commission Decision, in consultation with the Hold Separate Manager for Terni, Inoxum and the Purchaser. In addition, the commitments foresee the replacement of a 400-2100mm cut-to-length line for a technically comparable machine with a width range of up to 1600mm at the Willich SSC.

### 6.3.2. *Assessment*

- (1238) The Commission considers that these modifications do not alter its assessment of the Terni package in section 6.2.3 above.
- (1239) However, following the submission of the Commitments on 9 October 2012, new information came to light which altered the Commission's assessment with regard to the Divestment Business' viability and thus the ability to compete effectively on the EEA market for CR products.
- (1240) The new information is related to the provision according to which Outokumpu excludes the BA line LBA2 from the Divestment Business. The facts, chronology and the Commission's assessment will be discussed below.

### 6.3.3. *Carve-out of the BA line*

- (1241) In the market test launched on 1 October 2012, the Commission asked the market participants whether the exclusion of the LBA2 line would negatively affect the Divestment Business' competitiveness on the one hand and its viability on the other hand.
- (1242) As a reply to this question, 47 out of 77 (61%) of direct customers, 90 out of 128 (70%) of indirect customers, 3 out of 4 (75%) of competitors and 14 out of 20 (70%) of independent distributors stated that the exclusion of the LBA2 line would not negatively affect Terni's competitiveness. 48 out of 74 (65%) of direct customers, 93 out of 34 (73%) of indirect customers, 3 out of 4 (75%) of competitors and 14 out of 20 (70%) of independent distributors stated that the exclusion of the LBA2 line would not negatively affect Terni's competitiveness.
- (1243) A qualitative assessment of the market participants' quotes, however, shows that there have been a number of comments suggesting that the exclusion of the BA line LBA2 would decrease the viability and attractiveness of Terni:

*"It is worth considering whether the buyer will have sufficient BA capacity in order to be competitive on the Italian market."*<sup>699</sup>

*"Provided that LBA3 can cover remaining products volumes and required properties. With the information presented, excluding the tube business, it might be possible."*<sup>700</sup>

*"The BA demand is continuously growing and the sell out of one BA Line can have a big impact on this investment."*<sup>701</sup>

*"Terni Mill without one BA line is less competitive and less attractive for a third party investor."*<sup>702</sup>

*"Limitations of capacities are thereby predetermined."*<sup>703</sup>

(1244) On the other hand, there were also substantiated comments which expressed no concerns as to Terni's competitiveness and viability following the exclusion of the LBA2 line.

*"there are enough other possibilities to buy BA-Material - also outside from Europe"*<sup>704</sup>

*"One BA line should be enough for the Purchaser."*<sup>705</sup>

*"It should be enough capacity with one BA line, but its difficult to have an opinion about this since it's not clear what will happen to the BA line that is not included."*<sup>706</sup>

*"From the perspective of competitiveness one line is enough."*<sup>707</sup>

*"One BA line should be sufficient"*<sup>708</sup>

*"As other stainless steel producers in Europe, AST Terni does not operate at full capacity. Hence we do not see a negative impact as the other line can make up for the non-divested BA line."*<sup>709</sup>

*"In my opinion there is not significant demand for LBA3 and the divestment will not affect competitiveness"*<sup>710</sup>

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699 [...] ID 12272.

700 [...] ID 12654.

701 [...] ID 12526.

702 [...] ID 12337.

703 *"Kapazitätsbeschränkungen sind damit vorgegeben."* [...] ID 12125.

704 [...] ID 12313.

705 [...] ID 12185.

706 [...] ID 12362.

707 [...] ID 11873.

708 [...] ID 11795.

709 [...] ID 12568.

710 [...] ID 12034.

(1245) On 3 October 2012, the Notifying Party submitted information on the exclusion of the BA line and explained that Terni has 2 BA lines. These lines are [...] with capacity of [...] kt/y and able to process coils of up to 1.300 mm width, and [...] with a capacity of [...] kt/y and able to process coils of up to 1.500 mm width.

(1246) According to the Notifying Party, since there are no BA competition concerns stemming from the proposed transaction, the only issue would be whether the exclusion of LBA2 would affect Terni's viability. The Notifying Party put forward that:

*"- Terni sold [...] kt of BA material in 2011 to external customers of which only [...] kt were >1.300mm wide, and [80-90] % of the BA market is in <1.300mm width"*

*- Without LBA2 Terni would still be able to compete effectively for BA and could increase its BA output by +[40-50] %*

*- The fact that Terni does not make more BA to compensate for its A&P bottleneck for standard CR shows that BA is not of strategic interest"*

(1247) On several occasions,<sup>711</sup> the Commission requested the Parties to interview Mr Pucci, the current CEO of AST Terni. However, these requests have not been accommodated by the Parties, given that *"ThyssenKrupp at this time is not in a position to offer Mr. Pucci as an additional witness to be questioned by the Commission."* The Parties added a number of reasons as to why Mr Pucci should not be considered credible and therefore should not be interviewed by the Commission.<sup>712</sup> Instead, the Parties suggested that the Commission interview Mr Harald Espenhahn, a former TK manager<sup>713</sup> of AST Terni.

(1248) On 4 October 2012, as suggested by the Parties, the Commission interviewed Mr Harald Espenhahn. Mr Espenhahn confirmed that *"[i]n 2011, Terni sold only [...] kt of BA."*

(1249) As to the difference between the two production lines, Mr Espenhahn explained that:

*"LBA 3 has a production capacity of [...] kt/y and was transferred to Terni and modernized in 2008-9 after the closure of the Turin site" and that "LBA 2*

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<sup>711</sup> See emails of 1 October 2012, 3 October 2012, 4 October 2012, IDs 13377, 12415, 12683.

<sup>712</sup> In particular, according to Inoxum, *"to all of the questions the Commission has put, it has by now received credible, consistent and comprehensive answers from very reliable and competent sources. It is thus in our view neither necessary nor appropriate to interview further less credible witnesses regarding the same questions."* According to Inoxum, *"Mr. Pucci at this point in time is no longer a reliable and sufficiently objective witness - with regard to assessing any relevant merger control aspects of a Terni remedy. [...] ThyssenKrupp thus had to decide that he cannot be authorized to speak on behalf of the company to the Commission. It would appear to us that for the reasons described to the Commission, he should not only be considered to be disqualified to speak on behalf of ThyssenKrupp but also should he generally not be considered as a witness in the ongoing proceedings"*.

<sup>713</sup> Mr Espenhahn used to be Chief Executive Officer of AST and the managing director of the Terni site from 2005 to April 2012. Between 2003 and 2005, he was the Technical Chief Officer of AST.

*is more productive and efficient in terms of costs due to its larger capacity. [...] [...]\*. Currently [...] \* produces very low quantities."*

(1250) According to Mr Espenhahn:

*"[...] \*"*

(1251) In addition, in an email from Inoxum's external counsel of 10 October it is stated:

*"He has informed me that there will likely be [...] \* as a result of the removal of the bigger BA line. The line is technically staffed with a maximum of [...] \* if it is fully loaded. Currently, however, [...] \*. Jan estimates that around [90-100] \* percent of its production could be shifted to the other BA line which will [...] \* and which is currently not used or only marginally used."*<sup>714</sup>

(1252) The Commission conducted further investigation to assess whether the exclusion of the LBA2 line would be likely to raise concerns as to the viability and competitiveness of Terni.

(1253) In a phone call of 4 October 2012<sup>715</sup>, the potential purchaser [...] \* stated:

*"It is however surprising for Marcegaglia that only one of the two BA lines is included in the package since it is essential for any mill to have a good downstream/value added process."*

(1254) On 4 October 2012, three Italian Trade Unions (CGIL, CISL, UIL) sent a joint letter to the Commission expressing their concern, among others related to the planned removal of the BA line from the Terni site.

(1255) On 16 October 2012 the Commission held a conference call with the representatives of the three Trade Unions. They repeated their concern that the viability of Terni would be negatively affected through such a carve-out. In particular, the Trade Unions emphasised that the BA sales contribute to a large extent to Terni's profit margin and as such are essential for its survival.

(1256) On 12 October 2012, the Commission addressed an information request on several aspects of the case to the Notifying Party with a deadline of 15 October 2012. Question 3 of the request was *"Please provide information on utilisation rates and output for each of the two BA lines in Terni for 2009, 2010 and 2011."* On the same day, the Notifying Party asked by phone for a deadline extension to reply to some of the questions (among others to Question 3). A deadline extension until 16 October 2012 was granted by a follow-up email.

(1257) On 16 October 2012 the Notifying Party replied (among others) to Question 3 of the Article 11 request of 12 October 2012.

(1258) The Parties replied as follows:

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<sup>714</sup> ID 13371.

<sup>715</sup> ID 13001.

**Table 23: Breakdown of output of the Terni BA lines**

	LBA2		LBA3	
	[...] kt/y		[...] kt/y	
	throughput*	utilization	throughput*	utilization
2008/09	[...]*	[60-70]**%	[...]*	[50-60]**%
2009/10	[...]*	[70-80]**%	[...]*	[80-90]**%
2010/11	[...]*	[70-80]**%	[...]*	[70-80]**%

Source: Parties

\* coils produced

(1259) The Notifying Party further explained that

"[...]\*\*"

(1260) On 16 October 2012, the Commission addressed a further information request to the Notifying Party asking them to explain the inconsistencies between the information submitted on 3 October 2012 and the phone call with Mr Espenhahn on the one hand and the information submitted on 16 October 2012 on the other hand.

(1261) In particular, these inconsistencies were related to the fact that the Parties' submissions implied that a suitable purchaser would have sufficient BA capacity to increase Terni's BA output to a significant extent even with only LBA3 remaining on site. Statements of the call with Mr Espenhahn and the email from Inoxum's external counsel would appear to confirm this position. On the other hand, capacity utilisation and production figures provided on 16 October appeared to show that this would not have been possible.

(1262) The Commission also asked the Notifying Party to provide asset-specific information on the contribution margin for the LBA2 and LBA3 lines, in order to assess the relative importance of these lines for Terni's viability.

(1263) In its response of 17 October 2012, the Notifying Party explained that "*[t]he information provided in response to [the Commission's] RFI of 12 October was provided by AST/Inoxum and was not the subject of independent review by OTK. [OTK] apologize for any confusion caused by the initial response.*"

(1264) On substance, the Notifying Party explained that "*[i]n FY 2010/2011 Terni has produced [...] kt on LBA 2, of which were [...] kt BA material, and [...] kt of material on LBA 3, of which [...] kt were BA material. This brings total BA production in Terni to around [...] kt in 2010/2011. The previously indicated total production number of [...] kt for LBA 2 and LBA 3 included non-BA throughput which explains the higher number for total production on these assets.*"

(1265) According to Outokumpu, in the financial year 2010/2011, Terni sold [...] kt of BA to external customers and 57 kt BA to internal customers (mainly the Terninox SSC), i.e. a total of [...] kt. Moreover the value of internal and external BA sales in the financial year 2010/2011 amounted to EUR [...] million for internal BA

sales<sup>716</sup> and to EUR [...] million for external BA sales (a total of EUR [...] million).

- (1266) The Parties further explain that the difference of around [...] kt (between BA produced and BA sold in the financial year 2010/2011 on LBA2 and LBA3) is likely caused by a relatively low yield of the BA production in Terni as, typically, around [20-30]% of BA produced is lost in the production process for quality or process reasons.
- (1267) The Parties further explain that *"it is not possible to provide meaningful and sufficiently reliable asset-specific profitability calculations for single Terni BA lines"*. The Parties explain further that although they received a *pro forma* calculation of asset specific profitability for Terni provided by AST, these data are highly unreliable and TK is not comfortable presenting it to the Commission.
- (1268) On 17 October 2012 the Commission addressed a further request to the Parties, asking for, *inter alia*, the *pro forma* calculation of asset specific profitability for Terni provided by AST, referred to by the Parties in their reply of 17 October 2012.
- (1269) On 18 October 2012 the Parties submitted the following data:

**Table 24: Breakdown of contribution margins of the Terni BA lines**

	FY 2008/09				FY 2009/10				FY 2010/11			
	Sales		Contribution margin		Sales		Contribution margin		Sales		Contribution margin	
	kTon	€Mio	€Ton	€Mio	kTon	€Mio	€Ton	€Mio	kTon	€Mio	€Ton	€Mio
BA2	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
BA3	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Other CR	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
<b>total CR</b>	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

- (1270) The Parties submitted the above data under protest, with the following caveat: *"The calculation is [...] not a pre-existing document of the company. The document is a preliminary draft only, the quality of which is poor. TK had thus decided and explained to the Commission that it would not be willing to present this document as part of its answer to the RFI or otherwise. TK is not prepared to submit unreliable data or calculations performed by AST employees which are so obviously flawed that no meaningful inference can or should be drawn from them in any way. This has been explained to the Commission in detail and before the request for production was made."*
- (1271) The Parties also provide a number of reasons why the data provided above would not be reliable.<sup>717</sup>
- (1272) In addition to the above, the Commission notes that the Italian Competition Authority also made oral and written statements on the importance of LBA2 for Terni's viability and competitiveness.

<sup>716</sup> Internal customers include AST owned subsidiaries and other Inoxum owned companies.  
<sup>717</sup> See Inoxum's email of 13156.

- (1273) According to paragraph 23 of the Commission's Notice on Remedies, "*[t]he divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. For the business to be viable, it may also be necessary to include activities which are related to markets where the Commission did not identify competition concerns if this is required to create an effective competitor in the affected markets.*"
- (1274) Moreover, according to paragraph 25 of the Notice on Remedies "*[t]he business has to include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which is currently employed or which is necessary to ensure the business' viability and competitiveness.*"
- (1275) In addition, the Notice on Remedies states that in case of carve-outs, there is a particular risk to competitiveness. Even though normally the divestiture of an existing viable stand-alone business is required, the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing strong links or are partially integrated with businesses retained by the parties and therefore need to be 'carved out' in those respects. In order to reduce the risks for the viability and competitiveness to a minimum in such circumstances, an option for the parties is to submit commitments proposing to carve out those parts of an existing business which do not necessarily have to be divested. In effect, an existing, stand-alone business is being divested in those circumstances although, by way of a 'reverse carve-out', the parties may carve-out the limited parts which they may keep.<sup>718</sup>
- (1276) Furthermore, according to the Notice on Remedies, the Merger Regulation does not impose any obligation on the Commission to accept commitments after the legal deadline for remedies, unless the Commission voluntarily undertakes to assess commitments in specific circumstances. In view of this, where parties subsequently modify the proposed commitments after the deadline of 65 working days, the Commission will only accept these modified commitments where 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, fully and unambiguously resolve the competition concerns identified and where there is sufficient time to allow for an adequate assessment by the Commission and for proper consultation with Member States. The Commission will normally reject modified commitments which do not fulfil those conditions.<sup>719</sup>
- (1277) The General Court has confirmed that the parties to a notified concentration may have their commitments which were submitted out of time taken into account subject to two cumulative conditions, namely, first, that those commitments clearly, and without the need for further investigation, resolve the competition concerns

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<sup>718</sup> Notice on Remedies, paragraph 35.

<sup>719</sup> Notice on Remedies, paragraph 94.

previously identified and, second, that there is sufficient time to consult the Member States on those commitments.<sup>720</sup>

(1278) The Commission considers that, against the Notifying Party's initial claim, there is a serious risk that due to the reversed carve-out of LBA2, the viability and competitiveness of Terni will be seriously impacted, for the following reasons.

(1279) Firstly BA material makes up an important part of Terni's sales:

(1) BA accounts for around [5-10]\*% of total AST (internal and external) sales by value and volume in the AST transaction data (including QP, HBB and HWB internal sales). In addition in terms of CR only, BA accounts for around [10-20]\*% by value and [10-20]\*% by volume.<sup>721</sup>

(2) In total, Terni sold BA material of approximately [...]kt to external customers (ex-mill or via Terninox). On the assumption that both ferritics and austenitics generate a similar contribution margin (which does not appear to be unreasonable based on the Inoxum data at Annex 106 of the Form CO), the volume percentages might give an indicator of how important BA sales are for Terni overall.

(3) On the basis of the figures provided by AST (which the Parties contest), LBA2 accounts for [20-30]\*% of Terni's contribution margin. These are the only figures available to assess the relative importance of the line, and the Commission has not found evidence that departing from these figures would be justified.

(4) According to Mr Pucci, the BA material stemming from the LBA2 line has a [40-50]\*% higher contribution margin than the average CR product.<sup>722</sup> Federmanager, as well as the AST unions, also confirmed that BA is a high margin niche product.<sup>723</sup>

(5) According to the Parties “[...]/[...]\*”<sup>724</sup> However, the Commission notes that the very fact that Terni is currently [...]\*.

(1280) Secondly, approximately [...] kt of Terni BA material is sold via Terninox. Consequently, if LBA2 were to be removed, Terninox would either lose more than [...] of its customer base, or, alternatively, would have to source from competitors in the future.

(1281) Thirdly, according to information from the Trade Unions<sup>725</sup>, Federmanager<sup>726</sup> and Mr Pucci<sup>727</sup>, LBA3, [...]\*, whereas LBA2 is a [...]\*. LBA3 is also [...]\* LBA2. More specifically, LBA2 is overall [...]\* than LBA3.

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<sup>720</sup> Case T-87/05 EDP v Commission [2005] ECR II-3745, paragraph 163.

<sup>721</sup> The higher percentage by volume is due to the fact that BA is more prominent in ferritic CR sales (where it accounts for around [30-40]\*% of sales) than in austenitic CR (where BA accounts for around [10-20]\*% of sales).

<sup>722</sup> Interview via electronic means with Mr Pucci, ID 13243.

<sup>723</sup> Minutes of calls with Federmanager (ID 13275) and AST Unions (ID 13306).

<sup>724</sup> ID 13162.

- (1282) In addition, LBA2 can produce wider coils and is thus more versatile. In particular, LBA2 can produce coils up to a width of [...]\*, whereas LBA3 is limited to [...]\*. As a consequence, LBA3 is not optimal to [...]\*. Mr Pucci confirmed that Terni is [...]\* without the LBA2 line.
- (1283) Fourthly, Mr Pucci also explained that the main market for BA material is [...]\*. As a result, Terni's purchaser ability to expand in [...]\* might be also affected by the lack of supply of high quality BA. According to Mr Pucci, there are no growth chances for Terni on the [...]\* market without having high quality 1500mm wide BA material in the portfolio.
- (1284) Fifthly, the removal of the LBA2 line could create a bottleneck in the cold annealing and pickling ("CAPL") capacity. Without considering the 2 BA lines, Terni has a current total CAPL capacity of [...]\* kt/y, which is lower than total CR capacity of [...]\* kt/y.<sup>728</sup> Thanks to the addition of BA capacity, the total CAPL capacity for Terni actually exceeds [...]\* kt/y. If LBA2 is removed, a bottleneck would be created. This would result in a decrease in the overall CR capacity of Terni and would impose a limit in terms of expansion of output for a suitable purchaser.
- (1285) Sixthly, the removal of the LBA2 line would further increase the relative imbalance between Terni's hot and cold ends. This would result in cost disadvantages for Terni, given that its fixed costs at melting and hot rolling level would have to be covered through a smaller downstream sales basis. Further fixed cost disadvantages may occur because of unused capacities at the finishing shop level, which has [...]\*.<sup>729</sup>
- (1286) In view of the above, the Commission concludes that there is a serious risk that the exclusion of the LBA2 would endanger the viability and competitiveness of Terni.

#### 6.4. Commitments submitted on 19 October 2012

- (1287) On 19 October 2012, Outokumpu submitted modified commitments, i.e. a re-revised, "third Terni package".
- (1288) The third Terni package consists of the same divestitures as listed in 6.3.1 above, i.e., with the exception that LBA2 will be excluded at the request of the purchaser:
- (a) Inoxum's production units (comprising all the related sales and marketing activities and personnel) at the Terni stainless steel production site.
  - (b) Inoxum's Terninox SSC in Ceriano Laghetto (Italy).
  - (c) Outokumpu's SSC in Willich (Germany).

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<sup>725</sup> Trade Union submission ID 13169.

<sup>726</sup> Minutes ID 13275.

<sup>727</sup> Interview via electronic means with Mr Pucci, ID 13243.

<sup>728</sup> This is under the assumption that the LAC 4 annealing and pickling line (with CAPL capacity [...]\* kt/y or hot annealing and pickling ("HAPL") capacity [...]\* kt/y) is exclusively used for CAPL. In case LAC 4 is used at least to some extent for HAPL, CAPL capacity would be lower.

<sup>729</sup> Interview via electronic means with Mr Pucci, ID 13243.

- (d) At the option of the Purchaser, one or more SSCs located in France (Inoxum's Tours) and/or the UK (Outokumpu's Birmingham) and the Terninox warehouses in Padova, Ancona, Florence and Bologna (Italy).
- (e) At the option of the Purchaser, the divestiture package will include Terni's forging business (Società delle Fucine).
- (f) At the option of the purchaser Outokumpu commits to exclude from the Divestment Business Terni's bright annealing line LBA2.
- (g) In addition, at the option of Outokumpu, Outokumpu and the Purchaser will enter into a transitional, arm's length supply agreement for the Purchaser to supply Black Hot Band from Terni to Outokumpu Calvert/Mexinox.
- (h) The divestiture package does not include Terni's tube-making business at Tubificio di Terni.

(1289) According to point 15 of the Commitments,

*"in order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:*

*[...]*

*(b) both (i) have the financial resources, proven expertise and incentive and (ii) exercise the options in the present Commitments to purchase or exclude certain assets currently part of AST with a view to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;"*

#### 6.4.1. Assessment

(1290) The Commission notes that the LBA2 is thus included in the Proposed Commitments and would be excluded only at the option of the purchaser. Any potential exclusion is not at the discretion of Outokumpu.

(1291) Moreover, according to 15 of the Proposed Commitments, the purchaser criteria, the potential purchaser can exercise the option to exclude the LBA2 from the Divestment only with a view to maintain it viable. In particular, during the implementation of the remedies the potential buyer will have to demonstrate its suitability and in case the potential purchaser does not wish not to purchase LBA2, it will have to demonstrate that this would not affect Terni's viability and competitiveness. At that stage the Commission will be able to verify whether a potential exclusion for the LBA2 line does not affect Terni's viability and being an effective competitor on the EEA market for CR products. The Commission therefore considers that this provision is a further safeguard for the Divestment Business' viability.

(1292) The Commission considers that the inclusion of LBA2 in the Proposed Commitments, with the option to exclude it at the option of the purchaser, together with point 15 of the Proposed Commitments, ensures the viability of Terni in order to compete effectively on the EEA market for CR products.

(1293) Consequently, as regards the proposed divestiture of Terni, it follows from the market test and further evidence that the divestiture of the Terni package, included in the Proposed Commitments as submitted to the Commission on 19 October 2012, is likely to eliminate the competition concerns, proportionate in relation to the competition problem identified and the divested business is likely to be viable and to attract a suitable purchaser.

#### 6.4.2. *Aperam and Acerinox as potential purchasers*

(1294) In the Form RM, Outokumpu stated that it will not sell Terni either to Aperam or to Acerinox and it will not contact either Aperam or Acerinox as potential bidders of the Divestment Business. According to Outokumpu, the exclusion of Aperam and Acerinox from the list of potential purchasers will eliminate any potential competition issues or delays in the implementation of the divestiture.

(1295) The Commission takes note of this statement. The Commission will assess the potential buyer under the usual requirements for suitable purchaser described in its Notice on Remedies.

### 6.5. **Conclusion on Proposed Commitments**

(1296) The Commission therefore considers that the commitments, as submitted on 19 October 2012, are sufficient to remedy the competition concerns raised.

## 7. **RELATED STATE AID CASE**

(1297) On 25 July 2012, the Commission received a complaint<sup>730</sup> concerning a capital increase of at least EUR [...] million by several enterprises held by the Finnish state (among others Solidium) in Outokumpu.

(1298) The complainant claims that Outokumpu was in financial difficulty within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty<sup>731</sup> at the end of 2011 and that the Finnish state's participation (mainly through Solidium but also through other state bodies) in Outokumpu's capital increase does not meet the so called Market Economy Investor Test. Accordingly, the complainant alleges that the financial measures constitute State aid within the meaning of Article 107(1) TFEU which is incompatible with the internal market. The complainant also alleges that the capital increase is directly related to Outokumpu's plans to acquire Inoxum and that the deal would not be possible without the financial support of the state.

(1299) The Commission, according to the provisions of Council Regulation No 659/1999<sup>732</sup>, forwarded the non-confidential version of the complaint to Finland on 31 July 2012. On 19 September 2012, the Finnish authorities commented on the complaint.

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<sup>730</sup> State aid case No. SA.35204 - 2012/CP

<sup>731</sup> OJ C 244, 1.10.2004, p. 2-17.

<sup>732</sup> OJ L 83, 27.03.1999, p. 1-9.

- (1300) According to the RJB Mining case law, 'in adopting a decision on a compatibility of a concentration between undertakings with the common market the Commission cannot ignore the consequences which the grant of State aid to those undertakings has on the maintenance of effective competition in the relevant market'.<sup>733</sup> The Court specified that the Commission should have taken the supposed aid 'inherent in the merger' into account so as to assess 'whether, and if so to what extent, the financial and thus the commercial strength of the merged entity was strengthened by the financial support provided by that supposed aid'.<sup>734</sup>
- (1301) Thus the Commission's assessment needs to take into account the possible consequences which a possible grant of State aid to Outokumpu may have on competition in the relevant markets at issue.
- (1302) In the case at stake the Commission concludes that even if the State measure in question constitutes State aid, it does not increase the market power of the merged entity. Hence, it does not have an impact on the Commission's assessment of the proposed transaction under the Merger Regulation.
- (1303) This Decision is without prejudice to the parallel on-going State aid proceedings.

## **8. CONDITIONS AND OBLIGATIONS**

- (1304) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (1305) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (1306) In accordance with the basic distinction described in Recital (1304) as regards conditions and obligations, this Decision should be made conditional on the full compliance by the notifying party with the Section B (including Schedule 1 of the commitments submitted by the notifying party on 19 October 2012) and all other Sections should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as an Annex V to this Decision and forms an integral part thereof.

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<sup>733</sup> Case T-156/98 *RJB Mining plc v Commission* [2001] ECR II-337, paragraph 114.

<sup>734</sup> See paragraphs 124 and 125 of the *RJB Mining* judgement.

HAS ADOPTED THIS DECISION:

*Article 1*

The notified operation whereby Outokumpu Oyj acquires sole control of the whole of the undertaking Inoxum GmbH and Nirosta GmbH within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the internal market and the EEA Agreement.

*Article 2*

Article 1 is subject to compliance with the conditions set out in Section B of Annex V.

*Article 3*

Outokumpu Oyj shall comply with the obligations set out in Sections A, C, D, E and F of Annex V.

*Article 4*

This Decision is addressed to:  
OUTOKUMPU OYJ  
Riihitontuntie 7 A  
P.O.Box. 27  
02201 Espoo  
Finland

Done at Brussels, 07/11/2012

*(signed)*  
*For the Commission*  
*Vice-President*

## ANNEX I: DETAILED COMMENTS ON THE PARTIES' STUDIES ON IMPORTS

- (1) Prior to the Art 6(1)(c) Decision, the Parties' submitted a series of econometric papers in the competitive constraint from imports<sup>735</sup>. These papers present econometric estimates of import reactions to changes in the price difference between the EEA and Asia<sup>736</sup> as well as of the effect of the share of imports on the price in the EEA. The studies then combine these estimates in a critical elasticity analysis and claim that, "an attempted price increase [of 10%] by a HM would be unprofitable because of increased imports and decreased consumption ...". Pointing to capacity utilisation levels in the EU and margins reported by Aperam, the studies also claim that a unilateral price increase by the merged entity would be defeated by output expansions of European rivals.
- (2) In the Art 6(1)(c) Decision, the Commission acknowledged that there appears to be a certain competitive interaction between European and Far Eastern producers. However, the Commission noted that there were remaining technical concerns regarding the Parties' estimations and assumptions. Moreover, the Commission explained that conceptual flaws in the Parties' critical elasticity calculation lead to a substantial overstatement of the constraint from imports (because the import response is evaluated below the estimated import supply function) and that a corrected critical elasticity calculation could not support the Parties' conclusion that imports by themselves would be sufficient to constrain price increases post-merger even on the basis of the Parties' own econometric estimates. The Commission also explained that the Parties' analysis cannot be interpreted as an analysis of equilibrium effects (or an approximation thereof).<sup>737</sup>
- (3) The Parties' response to the Decision annexed a further "Explanation of [the] 'Critical Elasticity' Analysis"<sup>738</sup>. This paper "agree[s] with the Commission's

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<sup>735</sup> "Report on Cold and Hot Rolled Austenitic and Cold Rolled Ferritic Imports, Jerry Hausman, MIT, December 8, 2011" ID1138; "Critical Elasticity Calculation, Jerry Hausman, December 19, 2011" ID1135; "Case M.6471 – Answers to Commission Questions of 23 January 2012, Jerry Hausman, January 31, 2012", ID138; "Response to Questions dated 6 February, 2012, Jerry Hausman, Answers to Numbered Questions, February 8, 2012" ID217; "Explanation of Professor Hausman's critical elasticity calculations, 27 February 2012" ID457; and "Response to Commission Remarks, Jerry Hausman, March 19, 2012" ID1136.

<sup>736</sup> This price difference is proxied by the difference between public 304 prices in Germany and 304 prices in Hong Kong.

<sup>737</sup> The Commission further noted that the Parties' claims about quantity responses from rivals were simply based on assumptions rather than on an analysis of competitive interaction between European rivals (in addition to suffering the same flaws as his critical elasticity calculations). In the Parties' 5 July 2012 submission, Professor Hausman claims that the claimed response from rivals would be consistent with a Bertrand assumption. This is incorrect because a simple Bertrand assumption of price competition absent capacity constraints is inconsistent with an observation of positive margins pre-merger. A model of price competition that takes account of the presence of capacity constraints (Bertrand-Edgeworth competition), on the other hand, generates predictions that are in line with price increase by all EEA producers as a result of the merger.

<sup>738</sup> "Explanation of 'Critical Elasticity' Analysis, Jerry Hausman, MIT, June 2, 2012", ID4754.

conclusion that [the Parties'] first econometric equation, the import share equation, does not have a sufficiently high estimated coefficient on the price gap variable to replace the supply restriction imposed by a hypothetical monopolist" but stresses that the "economic analysis is designed to determine the potential effects on 304 prices of the proposed OTK/Inoxum merger" rather than an attempt to define markets. The paper stresses that the "critical elasticity analysis is not meant to be an economic analysis for a hypothetical monopolist" and "disagree[s] that it does not provide an approximation of post-merger effects."

- (4) The paper seems to acknowledge that the change in market structure following a merger can affect the results. But the paper criticises the Commission for providing no support that the merger will change incentives. The paper also claims that "existing economic theory does not give a prediction of the price response [of the oligopoly in the EU to the increase in imports]". The paper further considers that there is no evidence that a "dominant firm or 'price leadership' situation" would exist pre- or post-merger. The paper concludes that "[o]nly econometric estimates can estimate the expected post-merger price response". The Parties appear to consider that their second econometric equation performs this role.
- (5) The paper rejects the criticism that their critical elasticity calculation substantially overstates the import response. The paper argues that the results "are (approximately) homogenous of degree zero for a given price increase" and that a "tatonnement-like process (i.e. fixed point process [...]) will not allow for a profitable price increase".
- (6) Finally, the paper expresses concerns that the Commission considers "imports in isolation" and states that "[t]he effect of imports must be taken into account in the context of [the] post-merger competitive framework".
- (7) In the Issues Paper dated 21 June 2012, the Commission provided a detailed critique of the Parties' analyses.
- (8) On 5 July 2012, the Parties submitted a further short paper<sup>739</sup>.
- (9) The Commission's assessment of the Parties' studies on the constraint from imports which were submitted prior to the SO is as follows:
- (10) The methodological approach chosen in these papers is incorrect, either in its initial version of a hypothetical monopolist or "perfect cartel", or in the later interpretation of an alleged oligopoly model. In particular, while the first econometric equation in these studies might shed light on the constraint from imports faced by EEA producers, the second econometric equation and the subsequent calculations are irrelevant for an evaluation of the constraint imposed by imports, for an evaluation of the profitability of a price increase for a hypothetical monopolist or for an evaluation of the equilibrium effects of the proposed transaction.
- (11) The Parties' first equation estimates the import response to a hypothetical exogenous increase of prices in the EEA market. If properly identified and estimated, such an

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<sup>739</sup> "Discussion of CET Paper on Merger, Jerry Hausman, MIT, July 5, 2012", ID8726.

equation is sufficient to capture in full the effects of imports. It estimates the supply of imports (expressed as share of the total market demand) as a function of price. Subtracting the estimated import share from the total EEA demand results in the residual demand function faced by domestic producers (whether a hypothetical monopolist, a perfect cartel, or an oligopoly). The elasticity of this residual demand captures the full effect of the import constraint faced by EEA producers.

- (12) There is no economic ground, nor economic interpretation, for the second equation in this context.<sup>740</sup> To the extent that the second equation captures the pre-merger equilibrium in reduced form, there is still nothing in this equation that would measure or approximate the change in market structure brought about by the transaction. The second equation therefore cannot help approximate the post-merger equilibrium effects. The statement that the second equation reflects an "oligopoly market" (pre-merger) does not change the Commission's assessment.<sup>741</sup> An approach that does not take into account the change in market structure post-merger (either theoretically or empirically) cannot be indicative of the impact of the merger.
- (13) In response to the criticism that the Parties' critical elasticity calculations substantially overstate the import reaction because the combination of import share and price used lies below the import share equation, the Parties' study advances technical arguments. In particular the study argues that the results are approximately homogeneous of degree zero and proposes to iterate his procedure in a tatonnement-like process. According to the Parties' study, iteration to a fixed point shows that no attempted price increase (within reason) would be profitable because iterating the process always results in a net price change of zero. In simple terms, the Parties' fixed point argument claims that any initial price increase would within the logic of their system of equations always result in a net price increase of zero (after sufficient rounds of adjustments).
- (14) Neither of these technical arguments responds to the point that the Parties' calculations evaluate imports below the import share equation. The Parties' critical elasticity calculations are based a combination of import share and (net) price increase that lies below the import supply function. The Parties' arguments therefore do not require any comment. However, the Commission notes that a tatonnement-like process to a new equilibrium can only make sense in an approach that models the change induced by the merger. There is nothing in the Parties' second econometric equation and hence in the proposed tatonnement-like process that would capture this change. The Parties' fixed-point equation in Appendix 2 of the response to the 6(1)(c) Decision simply shows that the only price increase that

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<sup>740</sup> This is obvious in the Parties' critical elasticity analysis of a hypothetical monopolist / perfect cartel: a hypothetical price increase that is "partially defeated" is simply not interpretable in this framework, as it becomes unclear what the action of the hypothetical monopolist or cartel is being evaluated. But it is also true in the "oligopoly" interpretation proposed by the Parties in their later submission.

<sup>741</sup> The Parties studies do not explain on what type of oligopoly their interpretation is based. As econometric results only make economic sense when it is clear what (possibly implicit) economic model they seek to approximate, it is unclear how the second equation describes the nature of competition in the industry today in any meaningful way. It is therefore necessary to be explicit about the theoretical model that supports such a reduced-form equation.

remains unchanged after having been partially defeated is a price increase of zero. This "insight" holds for (almost) any values for his coefficient estimates.<sup>742</sup>

- (15) In other words, the Parties' conclusion that any attempted price increase would be fully defeated in their system stems directly from the flawed design of the procedure (which cannot model the change in equilibrium induced by the merger) rather than from their econometric results.
- (16) A further flaw in the Parties' critical elasticity calculations is that they formulate the critical elasticity in terms of the base price and then compare it to what they consider to be a reasonable range for the elasticity of market demand with respect to the total price. Such a comparison is invalid. A percentage change in the base price corresponds to a substantially lower percentage change in the total price because the alloy surcharge represents a substantial part (around [50-60]\*%) of the price. The demand elasticity in terms of the base price is therefore substantially lower than (around [...]\*) of the market demand elasticity in terms of the total price. A correct comparison would need to compare the critical elasticity in terms of the base price with the market demand elasticity expressed in terms of the base price.
- (17) Finally, the Commission points out that irrespective of all their methodological flaws, the Parties' studies do not support the argument that there should be no price effect of the merger even under his own (flawed) approach. The estimates proposed by the Parties in the studies discussed above are either not supporting the Parties' point, with the initial methodology, or are economically meaningless.<sup>743,744</sup>

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742 As long as the term in parenthesis is different from zero (which will empirically be the case with probability one, i.e. with certainty) the only fixed point in his equation will be a price increase of zero. Moreover, as long as the sum of the coefficient of lagged import shares is negative (whatever this identifies from a structural point of view) and the coefficient of capacity utilization is positive (whatever this identifies from a structural point of view) the derivative of the f function will be smaller than 1. Then, if we abstract from the implausible case where derivative would be smaller than -1 (i.e. an initial price increase of x% leads to a net price decrease that is larger in magnitude than the initial increase) f is a contraction mapping. The flawed tatonnement-like process in the Parties' study will then always come back to the initial point, irrespective of the estimated value of the parameters. The chosen methodology therefore does not allow for a different result independently of the econometric estimates. This is at odds with the claim in this study that "[o]nly econometric estimates can estimate the expected post-merger price response" (ID4754, p.3). The Commission therefore rejects such analyses.

743 The values of [...] or [...] submitted in the spreadsheet on 28 February 2012 falls within the range of the market demand elasticity in terms of the total price of -1 to -0.5 which, according to the Parties' study is a reasonable estimate. Market demand elasticity in terms of the base price is less elastic than these critical values. The Parties' do not challenge this point but rather focuses on the probability that the so-called critical elasticity would be smaller than -1. This claim is not only based on wrong figures on the variance of the estimates, but is also incorrect. If the overall elasticity is uncertain and lies between -1 and -.5, what is relevant is the probability that the critical elasticity is smaller than -.5. As regards the values included in the Parties' 19 March 2012 study (ID1136), the Commission first points out that the result a positive critical elasticity is contradictory to any economic intuition for this type of market. The result is only consistent with the fact that the methodology as a whole is flawed. Moreover, the estimate is so imprecise that it is impossible to draw any useful conclusions from it. (we do not understand this paragraph; could you try to explain?)

744 Another point relates to the Parties' adjustments for changes in capacity utilisation in the critical elasticity calculations. The Parties studies previously explained that the capacity utilization variable in his estimations is not there to capture the effect of capacity, which is assumed to have no direct effect,

- (18) On other points raised in Annex 2 to the Parties' response to the 6(1)(c) Decision, the Commission notes that the claim that the Parties' approach is not a market definition exercise does not imply that the econometric results (when interpreted correctly) do not have implications for market definition.
- (19) The Commission also disagrees with claims that economic theory cannot give predictions of the price effects of the proposed merger in the presence of an import constraint. Economic theory gives clear predictions for the impact of a redistribution of capacities on market power in the context of price competition with homogeneous goods in the presence of capacity constraints.
- (20) Therefore the economic and econometric evidence on imports submitted by the Parties prior to the SO does not support the view that the constraint from imports would be strong enough to defeat a price increase by EEA producers.
- (21) Two notes for completeness:
- (1) Annex 27 of the Form CO contained an economic study which looks at correlations of imports with relative prices. It also comments on the capacity situation outside the EEA.<sup>745</sup> The Commission does not dispute that imports are correlated with relative prices. However, correlations alone give us no quantitative measure of the extent of the import constraint (i.e. the extent to which imports would increase following a given price increase). For this question, a more classical econometric approach of the type proposed by the Parties' first equation appears more relevant.
  - (2) The Parties' handed out a graph during the State of Play meeting on 8 June 2012, which appears to be based on estimates from the Parties' second econometric equation. This graph was also presented at the Oral Hearing. According to the notifying party, this graph shows the effect of imports on EEA prices. The graph implies that a reduction in imports (holding all else equal, including EEA production and sales) would lead to substantial price increases in the EEA. However, this is not informative about the extent to which imports would constrain a post-merger price increase in the EEA. The relevant question is not whether a substantial shortage of supply in the EEA (such as an exogenous reduction in imports) would increase price. The relevant question is whether imports would react sufficiently strongly in response to a price increase in the EEA to make such a price increase unprofitable. The graph does not address this relevant question.
- (22) The Commission also noted in the SO that while it has taken the point estimates from the Parties' regressions of the import share equation at face value in its analysis, it does not accept the Parties' argument that it is more appropriate to use the contemporaneous price gap rather than the lagged price gap in the regression

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but rather to capture 'demand and supply conditions' and business cycles. It is then internally inconsistent to use this coefficient as an approximation for more intense competition. Dropping this effect in itself has dramatic consequences, even in the Parties' flawed critical elasticity framework.

<sup>745</sup> "Evidence that imports impose a competitive constraint on European stainless steel prices, CRA Charles River Associates" at Annex 27 of the Form CO, ID1056.

because "the time between ordering and delivery is similar in the EU and from Asia" (submission dated 19 March 2012, p.1). The price of imports (including alloy surcharge) is determined [...]\*, which is typically [...]\*. This indicates that the more relevant explanatory variable for analysing the responsiveness of imports is [...]\*.

- (23) Moreover, as explained above, the Parties' second equation is irrelevant for the assessment of the extent to which a price increase in the EEA as a whole or by the merged entity (with or without reaction by rivals in a new equilibrium) would be constrained by increased imports. Therefore, the Commission did not comment on the econometrics underlying the second equation in the SO.
- (24) The Parties' response to the SO discusses the Commission's analysis of the quantitative evidence on imports in two places.
- (25) At paragraphs 83 to 87 of the response to the SO<sup>746</sup> the Parties criticise a statement in Annex I to the SO that, due to delivery lags, the coefficient on the lagged price gap may be more appropriate than the estimated coefficient on the contemporaneous price gap.
- (26) As discussed in the main body of this Decision, this criticism has no relevance to the Commission's findings on imports because these findings are entirely based on the Parties' coefficient estimates for the contemporaneous price gap, i.e. on the estimates which the Parties consider to be relevant.
- (27) Paragraphs 54 to 57 and in Annex 4 of the Parties' response to the SO also relate to the Parties quantitative estimates of the constraint from imports.<sup>747</sup>
- (28) The first part of this Annex 4 reiterates the Parties' two step approach to calculate the claimed net effect of increased imports using the estimates from the two estimation equations. The Annex claims that the second equation measures the pressure of imports on prices which is partly due to increased competition between domestic producers after imports have increased. It claims that the Parties' approach using both estimation equations evaluates the import response along the estimated supply function and not below it.
- (29) The second part of the Annex then presents a calculation for a hypothetical monopolist and concludes that "*the hypothetical monopolist test demonstrates that imports do not constrain a perfect cartel's ability to increase prices for a linear demand curve, but price will not increase for a log linear demand curve*". It also claims that Aperam and Acerinox would not follow a price as these firms have excess capacity.

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<sup>746</sup> ID10012.

<sup>747</sup> "Note on Analysis of Price Determination, Jerry Hausman, MIT, 22 August 2012" at Annex 4 of the Parties' response to the SO, ID10007. The Parties summarise and refer to this Annex in paragraphs 54 to 57 of their reply to the SO (ID10012) which relate to the incentive of the Parties' main European rivals to respond to a price increase. However, since the main part of this Annex relates to the quantitative evidence on the competitive constraint from imports it is discussed at this part of the Decision.

- (30) As discussed in the main body of this Decision, the arguments at Annex 4 and in paragraphs 54 to 57 of the Parties response to the SO cannot be accepted.
- (31) First, the Commission notes that the submission contains a number of unsubstantiated statements and results for which the Parties have not provided supporting information or the details of the underlying calculations. On 10 September 2012, the Commission requested the Parties to submit all underlying analysis files for its Annexes to the Reply to the Statement of Objections as well as full details of the calculations or reasoning in these submissions. The Parties have not provided any additional explanations or material for Annex 4 to the response to the SO.<sup>748</sup>
- (32) As noted in the DG Competitions Best Practice Guidelines for the submission of economic evidence, economic analyses that do not explain "to the largest possible extent the economic reasoning and the observations on which it relies" so that "the Commission and all interested parties [can] scrutinise the economic evidence submitted [...] will normally be attached less probative value than otherwise and may not be taken into consideration".<sup>749</sup> On the basis of the argumentation in Annex 4 of the Parties' response to the SO the Commission is not able to fully replicate the Parties' reasoning to verify their claims.
- (33) Second, the first part of Annex 4 to the Parties' response to the SO simply reiterates the Parties approach without responding to the Commission's critique in the Statement of Objection that the approach: (i) does not fit the standard framework of a standard hypothetical monopolist test; and (ii) cannot approximate post-merger equilibrium reactions as it cannot capture the change in market structure resulting from the transactions. In fact, the Parties submission acknowledges the second point of the critique as it states "*... I do not claim that the exact same oligopoly behaviour would continue after the merger*" (page 4).
- (34) Moreover, regarding the Parties interpretation of their approach as an approximation of post-merger competition, the Commission considers that the essence in the assessment of any merger is an analysis of how the merger affects competition. An approach that does not measure or otherwise address the change brought about by the merger cannot be informative about the likely effects of a merger. Nor can it be used to support a claim of the absence of such effects.

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<sup>748</sup> For Annex 1 of the response to the SO (ID10000) the Parties have submitted a hard-coded spreadsheet which does not contain the formulae for how the figures in the spreadsheet were calculated.

<sup>749</sup> DG Competition, Best Practices for the submission of economic evidence, 17.10.2011 ([http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_submission\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf)). Paragraph 15 notes: "The following sections provide practical advice on the generation and communication of economic and econometric analyses. The goal of these recommendations is to ensure that every economic or econometric analysis developed by any party involved submitted for consideration in a case states to the largest possible extent the economic reasoning and the observations on which it relies and explains the relevance of its findings and the robustness of the results. This should allow the Commission and all interested parties to scrutinise the economic evidence submitted during the proceedings so as to avoid that empirical results that are not robust be disguised as such and key assumptions in theoretical reasoning be presented as innocuous. Economic or econometric analysis that does not strictly meet the standards set out in these Best Practices will normally be attached less probative value than otherwise and may not be taken into consideration."

- (35) Regarding the Parties' claim that their approach evaluates the import response along the import supply function, the Commission notes that the Parties' critical elasticity calculations combines the increase in import share that would result from an initial price increase of 5% with a much lower net price increase after a "partial defeat" of the initial price increase (i.e. the critical elasticity calculations evaluate the import response at a point corresponding to point C in the figure in the Decision rather than along the import supply function).
- (36) This is apparent from the discussion at the bottom of page 2 of the Parties' submission "Explanation of Professor Hausman's critical elasticity calculation" (dated 27 February 2012).<sup>750</sup> This submission explicitly states that the import share increase of [...] percentage points which results from a 5% increase in the (base) price is combined with a net (base) price increase of [0-5] % in the critical elasticity calculation. See also the Parties submission "Critical Elasticity Calculation, Jerry Hausman, December 19, 2012" in which it is also specifically claimed that this approach is a "Hypothetical Monopolist Scenario".<sup>751</sup>
- (37) These calculations by the Parties contradict the Parties' claim in their response to the SO that their approach evaluates import reactions along the import supply function. Moreover, the Parties' claim to this effect is also unsubstantiated.
- (38) Third, regarding the second part of Annex 4 to the Parties' response to the SO which contains the Parties' version of the hypothetical monopolist test, the Commission notes, first, that the Parties have not criticised the Commission's hypothetical monopolist test in the SO (and repeated in this Decision).
- (39) Instead, the second part of Annex 4 to the Parties' response presents alternative calculations for a hypothetical monopolist test which, according to the Parties, lead to different conclusions. These alternative calculations (which the Commission is unable to fully replicate with certainty because the calculations have not been provided) appear to suffer from a series of problems.
- (40) First, the Parties calculations rely on a new margin estimate. This margin estimate is calculated at Annex I to the Parties' response to the SO. It is based on figures from the Parties that estimated the impact of volume changes (at a given base price) on their EBIT. The calculation at Annex I to the Parties response to the SO estimate the margin for CR grade 304 to be around [70-80] % of the base price.
- (41) In contrast, the Parties' submission "Response to CET Comments on Marginal Cost Efficiencies, Compass Lexecon, July 6, 2012" estimated that incremental costs for grade 304 account for somewhat over [80-90] % of the total price of 304 (including the alloy surcharge) which implies a margin on additional 304 of somewhat less than [20-30] % of the total price.<sup>752</sup>
- (42) On 10 September 2012, the Commission therefore asked the Parties to reconcile these figures. The Parties response of 17 September 2012 noted that the different

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<sup>750</sup> ID457.

<sup>751</sup> ID1135.

<sup>752</sup> ID 8730, cf Table 4 (first column) of the submission.

margin figures were based on different data and that they were nevertheless consistent with one another. According to the Parties, the later figures of a margin of around [70-80]\*% of the base price implies marginal costs of around €...]\* which are consistent the marginal cost estimate of €...]\* at Tornio from the Parties' paper prepared by Compass Lexecon.

- (43) The Commission notes that the marginal cost estimate for Tornio the Parties refer to excludes raw material costs, whereas the marginal cost estimate implied by the most recent margin figure of [70-80]\*% appear to include raw material costs. Put differently, on the basis of CRU figures for the base price and the total price in 2011 which the Parties use in their calculation, [70-80]\*% of the base price of €...]\* corresponds to an incremental profit per tonne of €...]\* while [20-30]\*% of the total price of €...]\* implies an incremental profit per tonne of €...]\*. The Parties latest margin estimate therefore implied incremental profits per tonne that are around [40-50]\*% higher than what was implied by their previous estimate.
- (44) The Parties have therefore not been able to reconcile the differences in margin estimates.
- (45) Second, the Parties' finding in Annex 4 of their response that their conclusions depend on the assumption about the form of the demand function appears to be based on an incorrect view that, with a log-linear demand function, the elasticity of demand with respect to the base price would be the same as the elasticity of demand with respect to the total price.<sup>753</sup>
- (46) As a matter of economics the elasticity of demand for an increase of the base price will be substantially lower (by the fraction of the base price in the total price) than the elasticity with respect to an increase in the total price. The reason is that a given percentage increase in the base price corresponds to a lower percentage increase in the total price because the base price only represents part of the total price. For example, if the base price is one half of the total price, a 10% increase in the base price only leads to a 5% increase in the total price. Therefore, the elasticity of demand with respect to the base price is lower than the elasticity of demand with respect to the total price. In the example above, the elasticity of demand with respect to the base price would be one half of the elasticity of demand with respect to the total price.
- (47) This holds independently of the form of the demand function, because the reasoning above does not depend on whether demand is linear or "log-linear".
- (48) Annex 1 of the Parties' response to the SO claims that for a linear demand function a market elasticity of -0.75 implies an elasticity in terms of the base price of -0.339. This implies that the base price represents [40-50]\*% (= [...]\*) of the total price. Moreover, as the point estimate of the elasticity formula is independent of the form of the demand function, a demand elasticity in terms of the total price of -0.75 implies a demand elasticity to changes of the base price of [...]\*, even when the demand function is "log-linear".

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<sup>753</sup> This claim is made in Annex 1 to the Parties' response to the SO (ID10000, page 2 and footnote 1). It is then also applied to Annex 4 to the Parties' response to the SO (ID10007).

- (49) Third, Annex 4 to the Parties' response to the SO correctly states that "[T]he elasticity of residual demand is the sum of the (absolute values of the) market elasticity of demand and the elasticity of the share of domestic supply to price". Annex 4 to the Parties' response further states: "Using the SO's estimate of the elasticity of the market demand curve of 0.75 and using a domestic share of [...]\*, I estimate the sum of the elasticities to be [...]\* for a linear demand curve and [...]\* for a log linear demand curve."
- (50) Combined with the statements in Annex 1 to the Parties' response that the residual demand elasticity with respect to the base price would be [...]\* for a linear demand curve and -0.75 for a log linear demand curve, this implies that the Parties' use a value for the elasticity of the share of domestic supply of around [...]\* (which is obtained as [...]\* - [...]\* = [...]\* or alternatively as [...]\* - [...]\* = [...]\*).
- (51) It is unclear how this value of [...]\* is calculated. The Commission notes that Annex 4 to the Parties' response notes that the elasticity of the import share with respect to base price is [...]\*. Together with a domestic share of [...]\*, this implies an elasticity of the share of domestic supply to (base) price of [...]\*\*([...]\*)/[...]\* = [...]\*. This value of [...]\* is substantially below the value of [...]\* which is implied by the statements at Annex 4 to the Parties' response to the SO.
- (52) Therefore, the Parties' calculations for the hypothetical monopolist test need to be corrected in two ways. First, the calculations would need to use the correct value (based on the figures in the Parties' Annex 4) for the elasticity of the domestic share of supply to the base price of [...]\*. Second, the elasticity of market demand with respect to the base price should be [...]\* independently of the demand curve.
- (53) For both demand functions, the elasticity of residual demand with respect to the base price is therefore [...]\* = [...]\* + [...]\*. This in turn implies that the right hand side of equation (1) in Annex 4 of the Parties' response to the SO evaluates to [...]\* = [...]\*/([...]\* + [...]\*).
- (54) The implication is that for a price increase by a hypothetical monopolist to be unprofitable (in light the market demand elasticity and the response by imports), margins need to exceed 165% of the base price. This threshold is substantially above the Parties estimate at Annex 1 of their response of margins on the order of [70-80]\*% of the base price.
- (55) The Commission therefore concludes that when apparent mistakes are rectified, the Parties' calculations at Annex 1 and Annex 4 of their response to the SO support the Commission's conclusion that the constraint from imports is not sufficient to by itself eliminate price increases in the EEA.
- (56) Correcting the two apparent errors in the Parties calculation therefore brings the conclusions from the Parties' hypothetical monopolist test fully in line with the conclusion from the Commission's hypothetical monopolist test, namely that the observed margins are very substantially below the level that would be required to make a price increase unprofitable for a hypothetical monopolist.
- (57) The Parties' claim about reactions from rivals in Annex 4 of their response to the SO is addressed in Annex II.

## **ANNEX II: Assessment of the Parties' studies on reactions from competitors**

- (1) The Parties claim that Aperam and Acerinox would find it profitable to increase output sufficiently to defeat a price increase by the merged entity.
- (2) In support of this claim, the Parties have submitted several economic studies. Two of the Parties' studies were dedicated to the topic of reactions of the Parties' rivals. In addition, a number of the Parties' economic studies on imports also make claims about responses from their rivals post-merger.
- (3) The Commission considers these studies and arguments to be uninformative about the likely reactions from the Parties' EEA competitors to a post-merger price increase by the merged entity for the reasons discussed below. In particular, these studies do not allow the conclusion that reactions from the Parties' EEA competitors in response to a post-merger price increase by the merged entity would be sufficient to make such a price increase unprofitable for the merged entity.

### **1. ASSESSMENT OF THE PARTIES' ECONOMIC STUDIES DEDICATED TO RIVAL REACTIONS**

- (4) In support of the Parties' argument that reactions from their competitors would defeat any attempted post-merger price increase by the merged entity, the Parties submitted two economic studies dedicated to this topic. The first of these was submitted prior to the SO ["the Parties' first incentive paper"].<sup>754</sup> The second was submitted as Annex 5 to the Parties response to the SO.<sup>755</sup>

#### **1.1. The Parties' arguments about the implications of the financial state of the industry**

- (5) The first part of the Parties' first incentive paper examines various financial measures of profitability of European stainless steel producers. It concludes that:

*"[t]he European stainless steel industry is loss-making in economic terms. [...] This would be made worse by increasing output and further driving down prices and margins. It is therefore not surprising that the European producers are not currently doing this.[ ] In our view prices above short run marginal costs do not equate to a lack of effective competition in this industry, particularly when there is evidence that prices are below longer run measures of marginal costs. Indeed under current demand conditions, the current level of EU capacity is not sustainable in the long run"*<sup>756</sup>

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<sup>754</sup> "Response to EC State of Play meeting concerns, Mike Walker and Paul Muysert, CRA, 6 July 2012", ID8731.

<sup>755</sup> "Response to Commission comments on CRA paper analysing industry financial stat and competitor incentives, Mike Walker and Paul Muysert, CRA" submitted at Annex 5 of the Parties' response to the SO, ID10008.

<sup>756</sup> "Response to EC State of Play meeting concerns, Mike Walker and Paul Muysert, CRA, 6 July 2012", ID8731, p.7ff.

- (6) The Commission agrees that prices above marginal costs do not imply absence of competition. However, prices above marginal costs suggest that competition is not as intense pre-merger as the Parties suggest. Moreover, a recognition by rivals that increasing output would drive down price is why rival's reactions are unlikely to be as aggressive as the Parties' suggest. Instead it indicates market power by market participants.
- (7) The Commission further noted in the SO that the Parties appeared to suggest that the marginal costs that are relevant for the assessment of the intensity of competition are higher than the level of marginal costs estimated by the Parties' economic studies on synergies. The Commission also notes that this appears to be in contradiction with the use of incremental margins for the calculations in the second part of the Parties' paper.
- (8) The study at Annex 5 of the Parties' response to the SO states:

*"The Commission appears to be confused here and is clearly wrong. The marginal costs estimated by Compass Lexecon are relatively short-run marginal costs and it is these that are relevant to both the Commission's Bertrand-Edgeworth model and to our analysis of the various firm's pricing incentives. However in the longer run more costs can be varied or avoided.*

*[...] "With regard to the Commission's focus on measuring the intensity of competition, long-run costs are relevant to entry, expansion and exit decisions, and these are ultimately the decisions that decide the level of competition in a market." (page 6)*

- (9) The Commission agrees with the Parties that short-run marginal costs (or the short run incremental margins) are relevant for the analysis of the various firms' pricing incentives. However, these short run marginal costs (and incremental margins) are relevant for the pricing incentives not just post-merger but also pre-merger.
- (10) Under a non-coordinated theory of harm, there is no fundamental change in how non-merging firms respond to incentives following the transaction. The relevant benchmark for likely reactions by non-merging firms to price increases post-merger is therefore for the degree of pre-merger competition as indicated by the extent to which prices exceed short run marginal costs pre-merger.
- (11) The Commission therefore concludes that the measure of the intensity of competition that is relevant for the assessment of post-merger reactions by non-merging firms is the short-run incremental margin.

## **1.2. The Parties' arguments about responses by Aperam and Acerinox to post-merger price increases**

### *1.2.1. Assessment of the Parties' arguments prior to the SO*

- (12) The second part of the Parties' first incentive paper is titled "unilateral effects – modelling the likely competitive response of Aperam and Acerinox". In this respect, the paper concludes that:

*"[t]he merged entity would not profitably be able to raise prices post-merger because Acerinox and Aperam have a unilateral incentive to expand output in response. This incentive exists because imports severely limit any price increase than can result from reducing output"<sup>757</sup>*

- (13) In the Statement of Objections, the Commission concluded that the Parties' analysis is uninformative about the strength of reactions from rivals to a hypothetical price increase for several reasons.
- (14) First the Commission noted that the Parties' study which looks at only two possible extreme reactions by rivals – i.e. keep output constant or increase output to exactly off-set the effect of a hypothetical output reduction by the merged entity<sup>758</sup> – cannot shed light on actual reaction from rivals which are likely to be in between the extremes (in line with the standard insights from economic theories).
- (15) Second, the Commission noted that the calculations in these studies overstate the strength of the import constraint. If the import constraint is evaluated correctly, then the conclusions under the Parties' "conservative" scenarios are reversed.
- (16) Third the Commission noted that these studies do not examine the implications of the assumptions on which their claims about rival reactions are based for the pre-merger situation. The studies therefore do not provide an internally consistent comparison of the pre- and the post-merger situation which implies that they are uninformative about actual rival reactions.

#### *1.2.2. Assessment of the Parties' arguments in the response to the SO*

- (17) The Parties' response to the SO (paras 58 to 64 and Annex 5) argues the following.
- (18) The Parties maintain that their approach shows that (under what they consider reasonable parameter values) the Parties' EEA competitors "would have an incentive to undermine a price rise" post-merger. The Parties consider their approach to be a pragmatic modelling exercise which, by looking at key scenarios generates insights of considerable value. According to the Parties, their approach shows that their EEA competitors would rather expand output (to a point that would defeat any price increase post-merger) as opposed to following a price increase (by keeping output constant), even under the Commission's import response function.
- (19) The Parties argue that the criticism in the SO that their approach is internally inconsistent is equivalent to a criticism that their approach is not a "full equilibrium model". The Parties argue that a full equilibrium model is too difficult to construct as is illustrated by the Commission's model. Moreover, according to the Parties, their approach reflects the actual pre-merger market situation.
- (20) According to the Parties, their approach examines the implications of the Commission's assumptions that firms act like Bertrand competitors. According to

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<sup>757</sup> "Response to EC State of Play meeting concerns, Mike Walker and Paul Muysert, CRA, 6 July 2012", ID8731, p.4.

<sup>758</sup> See, e.g. the second paragraph of Section 3.1.2 of the Parties first incentive paper (ID8731).

the Parties, their economic experts do not think this assumption is a good assumption.

- (21) Lastly, the Parties argue that the Commission's hypothetical monopolist calculations would imply that a hypothetical monopolist in the EEA would choose to set an implausibly high price.
- (22) The Commission disagrees with these points raised in the Parties' response for the following reasons.
- (23) First, the Commission notes that if the Parties' experts believe that the Bertrand assumption is not a good assumption that can at least approximate firm behaviour, then the Parties' approach which, according to the Parties, examines the implications of this assumption, cannot be informative on likely reactions by their EEA competitors to a post-merger price increase.<sup>759</sup>
- (24) Second, and more importantly, the Parties' response does not address the Commission's point that the Parties' approach is internally inconsistent and hence cannot be informative on likely reactions of the Parties' competitors to a post-merger price increase.
- (25) This point raised by the Commission is not equivalent to a criticism that the Parties' should have done a full equilibrium model. The Commission accepts that under certain circumstances it can be useful to adopt an approach that limits itself to an examination of the incentives of individual firms instead of adopting a full equilibrium approach.
- (26) However, the Commission notes that any approach that attempts to model how firms (here the Parties' EEA rivals) are likely to react to a certain change (here a hypothetical price increase by the merged entity post-merger) must make a consistent comparison how this change in the market *affects* firms' incentives.<sup>760</sup>
- (27) An analysis that tries to draw inferences on how the Parties' rivals are likely to react to a price increase must therefore examine what the underlying reasoning implies about how these same firms should behave pre-merger. This does not require a full equilibrium model. But it requires an internally consistent analysis of the incentives

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<sup>759</sup> The Commission notes that it does not agree that the Parties' studies examine a Bertrand assumption of price competition. The Parties' analysis instead examines two possible output reactions to a hypothetical output reduction by the merged entity (see the description at the start of Section 3.1 on page 8 of the Parties' first incentive paper (ID8731)). In any event, the fundamental criticism that the Parties' approach assumes different behaviour from rivals post-merger than pre-merger is valid under either interpretation of their approach.

<sup>760</sup> For the avoidance of doubt, the Commission notes that this is fully consistent with a non-coordinated theory of harm under which there will be no fundamental change in incentives post-merger versus pre-merger. In economic terms, under a non-coordinated theory of harm, the "reaction functions" of the merging parties' rivals will not change as a result of a merger. This implies that the merging firm's competitors would react to an output reduction or price increase by their competitors in the same way in the post-merger situation as they do pre-merger situation. Under a non-coordinated theory of harm, the only firms whose incentives change fundamentally post-merger are the merging parties, because the merger eliminates competition between them. (In contrast, the merger does not eliminate competition between the merging parties and their rivals).

of those firms which are central to the question addressed before and after the post-merger price increase by the merged entity.

- (28) The Parties' approach fails to examine the implications of its assumptions in the pre-merger situation. To demonstrate the implications of the Parties' approach in the pre-merger situation, the Commission has re-calculated Aperam's and Acerinox' individual incentives to increase volume in the pre-merger situation, following the Parties' analysis at Appendix A to Annex 5 of their response to the SO. The results are displayed graphically in the two figures below which show the profit impact of increasing volumes relative to the situation of keeping volumes constant both in the pre-merger situation and following a post-merger price increase by the merged entity. These figures reproduce Figure 2 and Figure 3 respectively of Annex 5 to the Parties' response to the SO.

**Profit impact of increasing volumes for Acerinox (pre-merger and in response to a post-merger price increase)**

[...]\*

**Profit impact of increasing volumes for Aperam (pre-merger and in response to a post-merger price increase)**

- (29) [...]\*The vertical axes of these figures present the percentage impact on Acerinox' (respectively Aperam's) profits relative to holding output constant. The horizontal axes give the volume choice. Following the Parties' figures, this volume choice is expressed in terms of the current market share by each of these firms (i.e. an initial volume corresponding to [10-20]\*% of the market for Acerinox and [10-20]\*% for Aperam). The graphs cover a range corresponding to an increase in market share by around [...]\* percentage points which corresponds to a volume increase of around [...]\*KT.<sup>761</sup>
- (30) The solid line in these figures shows the impact on Acerinox' (respectively Aperam's) profits of increasing volume in response to a hypothetical price increase (or volume reduction) by the merged entity post-merger compared to maintaining volume at the current level (which corresponds to a [10-20]\*% pre-merger market share for Acerinox and a [10-20]\*% share for Aperam). The solid lines reproduce the solid lines in Figures 2 and 3 of Annex 5 to the Parties' response to the SO.
- (31) The dashed line has been added by the Commission. It provides the impact on Acerinox' (respectively Aperam's) profits of increasing in volume pre-merger (i.e. without any price increase or volume reduction by the merged entity) compared to maintaining volume at the current level. The dashed lines are based on a simple modification to the Parties' own calculations. The only change the Commission has

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<sup>761</sup> This range was chosen by the Parties' because, according to their calculations, this is the volume reduction required by the merged entity to achieve a 5% price increase assuming no reaction from imports.

made to these calculations is that it has removed the assumption of a hypothetical output reduction (or increase price) by the merging firms.<sup>762</sup>

- (32) The dashed lines in these graphs show that, according to the Parties' approach, their EEA competitors already have an incentive to increase output pre-merger even without any hypothetical price increase by the merged entity. According to the Parties' calculations, Acerinox and Aperam would improve their profits if they increased output by around [...]KT even pre-merger (despite the fact that this would lead to lower market prices).
- (33) The Parties' approach to calculate their competitors' incentives is therefore inconsistent with the observed pre-merger volume choices of these firms. The Parties' view that their approach reflects the pre-merger situation is therefore incorrect.
- (34) The above also implies that the Parties' calculations cannot provide insights on how their competitors are likely to react to a post-merger price increase. The Parties' conclusions about post-merger reactions are based on reasoning which implies that their rivals should increase output pre-merger. There is nothing in the Parties' analysis that can explain why their competitors would react post-merger in the way the Parties' analysis claims given that these firms do not behave in this way pre-merger.<sup>763</sup>
- (35) The Parties conclusions are therefore based on an implicit assumption that rivals' behaviour would fundamentally change as a result of the transaction. This is neither consistent with a non-coordinated theory of harm; nor is there any evidence for such fundamental change. Moreover, such an implicit assumption appears in contradiction with the Parties' position that short run marginal costs are relevant "*to our analysis of the various firms' pricing incentives.*" The Parties' analysis implicitly assumes that this would not be the case pre-merger.
- (36) In light of the above, the Commission concludes that the Parties' approach to predict post-merger reactions from rivals is internally inconsistent and therefore uninformative about likely post-merger reactions from the Parties' competitors to a price increase by the merged entity.
- (37) Third, regarding the Parties' argument that the Commission's assessment of import reactions would imply that a hypothetical monopolist would set an implausibly high

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<sup>762</sup> The Commission notes that the Parties calculations still assume that around [70-80]\*% of a target price decrease would be defeated (see Table 4 of Annex 5 to the Parties response to the SO which shows that a target price increase of [5-10]\*% results in a net price increase of [0-5]\*% in their calculations. In the SO the Commission has shown that this is incorrect and that only around [30-40]\*% of the target increase would be defeated. However, this is not central for the argument that the Parties' approach is internally inconsistent.

<sup>763</sup> The Commission notes that the figures indicate that the incentive to increase output by rivals is slightly higher in response to a post-merger price increase than pre-merger. However, the fundamental point is that the Parties' calculations imply that their competitors should already increase output. As these firms do not do so, the Parties' calculations are not reflecting how their competitors behave pre-merger. Therefore, the calculations cannot predict how the Parties' rivals will behave post-merger. Moreover, as the figures indicate, the difference in incentives pre- and post-merger is relatively small compared to the absolute incentive to increase output.

price, the Commission notes that this argument on assumptions which are made by the Parties, not by the Commission:

- To derive this claim the Parties assume that market demand is log-linear (or iso-elastic). This assumption on the functional form of demand is known to generate very large price increases relative to other more conservative assumptions about the form of demand. The Commission's assessment does not use this assumption for its conclusions.
- The level of the elasticity for the aggregate market demand in the range -1 to -0.5 was proposed by the Parties as a reasonable estimate for the aggregate demand for CR in the EEA.<sup>764</sup>
- The import reactions used are based on the Parties' econometric estimates of their import share equation. The Parties themselves have admitted that the estimated import response is not sufficient to prevent price increases by a hypothetical monopolist.

(38) Moreover, the Commission has accepted the Parties' estimates on the level of the elasticity of aggregate market demand as well as the estimates on the strength of the import reactions according to the Parties first estimation equation because it believes that these estimates are reasonable to assess how demand and imports (and hence residual demand for EEA suppliers) react to price changes in a reasonable vicinity of the pre-merger price. This does not imply that the Commission believes that such estimates would be reasonable to evaluate reactions to price increase of 100% or more as is implied by the Parties' arguments.

(39) Therefore, the Parties' critique that the Commission's analysis implies that an implausibly high monopoly price is also unfounded.

1.2.3. *Conclusion: the Parties' analysis is uninformative about reactions from Aperam and Acerinox to a post-merger price increase by the merged entity.*

(40) In light of the discussion above, the Commission concludes that the Parties' approach to derive post-merger reactions by their rivals is inconsistent with how firms behave pre-merger. The Parties' approach therefore implicitly assumes a fundamental change in how competitors behave post-merger for which there is no evidence and which would be inconsistent with how competitors react under a non-coordinated theory of harm.

(41) The Commission concludes that the Parties' analysis in the two studies discussed in this subsection is uninformative about the reactions from Aperam and Acerinox to a post-merger price increase by the merged entity.

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<sup>764</sup> ID1135.

## 2. ASSESSMENT OF THE PARTIES' ARGUMENTS ON RIVAL REACTIONS MADE IN THE CONTEXT OF ARGUMENTS ON IMPORTS

- (42) Several of the Parties' economic studies on imports also contain arguments about reactions from the Parties' competitors to a post-merger price increase by the Parties.<sup>765</sup> These fall into two categories:
- (43) The first category consists of the Parties' arguments that their estimated two equation system can approximate competitive reactions post-merger.
- (44) The second category consists of arguments made in the Parties' studies that Aperam and Acerinox would have an incentive to defeat a post-merger price increase by the merged entity because this would allow them to earn positive margins on additional volumes and because these firms have spare capacity.

### 2.1. The Parties' argument that their estimated two equation system approximates post-merger equilibrium reactions

- (45) The Parties initially presented the critical elasticity calculations based on their two equation system as measuring the competitive constraint from imports which would constrain a hypothetical monopolist or a perfect cartel.<sup>766</sup> Over the course of the Commission's investigation, the Parties then claimed that their two equation system approximates the post-merger equilibrium.
- (46) Paragraphs 55 to 56 as well as Section I of Annex 4 of the Parties' response to the SO<sup>767</sup>, reiterate the Parties' argument that the two equation system also captures competition between EEA producers.
- (47) As these arguments were initially advanced in the context of the competitive constraint from imports, the Commission's detailed assessment of these arguments is contained in the Section 5.5.4.6 of the Decision and in Annex I on imports.
- (48) In summary, the Commission's assessment of the Parties' system of equations remains that while the Parties' first econometric equation (which measures import reactions to price changes) is relevant for the assessment of the strength of the competitive constraint from imports, the second econometric equation is irrelevant for an assessment of the constraint on EEA producers from imports.

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<sup>765</sup> See, in particular, the Parties' submission "Critical Elasticity Calculation, Jerry Hausman, December 19, 2011" ID 1135; "Case M.6471 – Answers to Commission Questions of 23 January 2012, Jerry Hausman, January 31, 2012" ID138; "Response to Questions dated 6 February, 2012, Jerry Hausman, Answers to Numbered Questions, February 8, 2012" ID217; "Explanation of 'Critical Elasticity' Analysis, Jerry Hausman, MIT, June 2, 2012", ID4754; "Discussion of CET Paper on Merger, Jerry Hausman, MIT, July 5, 2012" ID8726; "Note on Analysis of Price Determination, Jerry Hausman, MIT, 22 August 2012" at Annex 4 to the Parties response to the SO, ID10007;

<sup>766</sup> See, in particular, the Parties' submission "Critical Elasticity Calculation, Jerry Hausman, December 19, 2011" (ID1135) which explicitly frames this calculation as a "Hypothetical Monopolist Scenario" and notes that it "model[s] the 'perfect cartel' as a hypothetical monopolist of EU stainless steel producers".

<sup>767</sup> ID10012 and ID10007 respectively.

- (49) The Parties second equation also cannot approximate post-merger competition between EEA producers, because there is nothing in this second equation that could capture the change in competition induced by the merger. The Parties seem to agree with this proposition.<sup>768</sup>
- (50) As the Parties' two equation system cannot capture the change brought about by the merger – which is the key part of any assessment of the effects of a merger – the Commission concludes that this approach cannot be informative about post-merger competition.

## **2.2. The Parties' argument that Aperam and Acerinox would find it profitable to defeat a price increase**

- (51) The Parties' submission "Critical Elasticity Calculation, Jerry Hausman, December 19, 2011"<sup>769</sup> also contained one paragraph on a "hypothetical unilateral price change" which argues, without any further justification, that because Aperam has significant gross margins, because Acerinox is cost efficient and because there is spare capacity, these firms would find it profitable to increase output and defeat a price increase. A number of further submissions by the Parties repeat this claim.
- (52) The Parties submission of 5 July 2012 claims that an assumption that firms "*behave in a Bertrand manner before and after the merger [...] will not affect my assumed response of ACX and APM*".<sup>770</sup>
- (53) Annex 4 of the Parties response to the SO (summarised in paragraph 57 of the response) argues:

*"Given the observed effects of imports on prices, an increase in imports would lead Aperam and Acerinox to not follow an attempted price increase because they would find it to be more profitable to increase output and they have more than sufficient unused capacity to follow this strategy."* (Parties response to the SO, Annex 4, page 4)<sup>771</sup>

- (54) The Commission noted in the SO that the Parties' studies do not examine the pre-merger implications of their argument that positive margins and spare capacity would imply strong post-merger reaction by rivals. The Commission also noted that an argument about reactions that follow assumed Bertrand behaviour (without capacity constraints) would be inconsistent with the existence of positive margins pre-merger.

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<sup>768</sup> For example, Annex 4 to the Parties' response to the SO (ID10007) notes: "While I do not claim that the exact same oligopoly behaviour could continue after the merger, I note that both Aperam and Acerinox have significant amounts of excess capacity."(page 4) The first part of this statement acknowledges that the empirical assessment cannot capture the change brought about by the merger. The second part of the statement is an entirely different argument from the empirical assessment and falls in the second category of arguments which will be discussed below.

<sup>769</sup> ID1135.

<sup>770</sup> ID8726.

<sup>771</sup> ID10007.

- (55) The Parties response to the SO does not address this criticism. The Parties argument that their competitors would find it profitable not to follow a price increase post-merger because they have spare capacity cannot explain why these competitors do not lower price pre-merger to earn positive margins on increased volumes. If the Parties' arguments are correct, a small price reduction by their rivals in the pre-merger situation would already be profitable. According to the Parties' logic a small price reduction would result in the same output expansion as a decision not to follow a post-merger price increase. Moreover, as the difference in price required to attract demand from customers under a "Bertrand assumption" would be very small, a price reduction pre-merger would result in almost the same increase in the profits of these firms as maintaining price in response to a post-merger price increase.<sup>772</sup> Therefore, if rivals' incentives to maintain price and expand output in response to a post-merger price increase were as the Parties' studies suggest, the Parties' competitors should already lower price pre-merger.<sup>773</sup>
- (56) The arguments on rival responses in the Parties' studies on imports are therefore also internally inconsistent. They do not recognise that the reasoning based on positive margins and spare capacity implies that the Parties' competitors already have an incentive to reduce price and increase output pre-merger. As the Parties' rivals do not behave in this way pre-merger such arguments cannot provide any insights on how the Parties' competitors would react to a post-merger price increase of the merged entity.
- (57) The Commission also notes that Annex 4 to the Parties response to the SO seems to imply that the hypothetical monopolist test is only just failed and that therefore only very limited responses by Aperam and Acerinox are required to defeat a price increase by the merged entity.<sup>774</sup>
- (58) The Commission disagrees with this view. The Commission's assessment of the Parties' hypothetical monopolist calculation in Section 2 of Annex 4 to the Parties response to the SO shows that these calculations suffer from a number of errors. (See Section 5.5.4.6 of the Decision and Annex I.) A correct calculation of the hypothetical monopolist test shows that the results from this test are not marginal. Instead, a hypothetical monopolist (or perfect cartel) would have a very clear incentive to raise price.

Overall the Commission concludes that the arguments in the Parties' economic studies on imports that their competitors would defeat a post-merger price increase because they have spare capacity and could earn positive margins on additional volumes are also inconsistent with the observed pre-merger behaviour by these firms. Therefore, the Commission concludes that these arguments are internally inconsistent and uninformative about likely reactions from rivals post-merger.

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<sup>772</sup> Technically, the difference in price could be made arbitrarily small and the profits in both cases would therefore be minimal.

<sup>773</sup> This argument is analogous to the analysis of pre-merger incentives of the Parties' competitors in the Parties' approach in the studies discussed in Section 1 of this Annex above.

<sup>774</sup> The Parties claim that "this incentive [to increase price] would no longer exist if there is a little 'slippage' from a perfect cartel." (ID10007, page 3)

### **ANNEX III: Assessment of the Parties' empirical analysis of Quarto Plate**

- (1) As part of the reply to the 6(1)(c) Decision, the notifying party submitted an empirical study on Quarto Plate (a stainless steel product).<sup>775</sup> According to the Parties, the analysis in this paper shows that the consolidation in Quarto Plate in 2003 which lead to a reduction in suppliers from four to three had no impact on margins.
- (2) The notifying party interprets this study in two ways. First, the Parties' argue that in the past experience in Quarto Plate indicates that structural presumptions cannot provide useful guidance in the stainless steel industry.
- (3) Second, the notifying party argues that the QP experience also undermines the Bertrand-Edgeworth model used by the Commission which, when calibrated to the QP situation prior to 2003 would predict price and margin increases after TKS' exit of QP, while their analysis of Quarto Plate shows no evidence of margin increases.<sup>776</sup>

#### **1. THE PARTIES' ANALYSIS OF QUARTO PLATE**

- (4) The Parties' analysis of Quarto Plate (QP) examines the evolution of annual percentage margins earned by OTK on Quarto Plate before and after TKS' exit of Quarto Plate in 2003.<sup>777</sup> The paper presents a simple comparison of average percentage margins in 2001/02 to the average percentage margin in 2004-2011 and observes that the average margin in 2001/02 was higher than the average margin over the period 2004-2011.
- (5) The study also presents econometric results that QP imports react to changes in the QP price gap between the EEA and Asia and that the level of imports increased in 2004.
- (6) According to the study, the margin comparison shows that "the consolidation among EU QP producers in 2003 did not have a significant effect on industry margins"<sup>778</sup> which the study attributes to an increase in imports following TKS' exit.<sup>779</sup>

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<sup>775</sup> "Report on Quarto Plate, Jerry Hausman, MIT, May 30, 2012", submitted as Annex I to the Parties response to the Art 6(1)(c) Decision. ID4749.

<sup>776</sup> "Response to the CET's Merger Simulation Model, Compass Lexecon, July 11, 2012" submitted in response to the Commission's Issues Paper (p.7-8), ID9141.

<sup>777</sup> In early 2003, TKS exited the production and sale of Quarto Plate – a stainless steel product – and sold its customer base and its Krefeld service centre to OTK.  
Thyssen Krupp Press Release, 10 February 2003,  
[http://www.thyssenkrupp.com/en/presse/art\\_detail.html&eid=tk\\_pnid747](http://www.thyssenkrupp.com/en/presse/art_detail.html&eid=tk_pnid747)

<sup>778</sup> "Report on Quarto Plate, Jerry Hausman, MIT, May 30, 2012", submitted as Annex I to the Parties response to the Art 6(1)(c) Decision. ID4749, p.1.

<sup>779</sup> "Discussion of CET Paper on Merger", Jerry Hausman, 5 July 2012, p.3, ID8726.

## **2. ASSESSMENT OF THE PARTIES' ANALYSIS OF QUARTO PLATE**

(7) The Commission considers that Parties' analysis of QP cannot be considered as relevant evidence. As explained to the notifying party at the SOP on 8 June 2012, in the Issues Paper of 21 June 2012 and in a telephone call on 23 July 2012, and in the SO, the margin comparison cannot be used to draw any inference on the effect of TKS' exit from QP in 2003.

### **2.1. The Parties' margin comparison does not control for important changes in external factors**

(8) The data on percentage margins in the Parties' study show that margins (in terms of the percentage of the "contribution" in sales as well as the percentage of profit in sales) fluctuate widely over time (as shown in the figure below). This indicates that the evolution of margins is affected by factors which are unrelated to the consolidation, such as, for example, changes in demand or cost conditions. Moreover, there might be factors that are causally related to TKS' exit (e.g. an industry expectation of a continued decline in margins).

#### **Figure III.1 [...]\***

(9) To examine the effect of QP's exit on prices or margins the effect of such external factors needs to be accounted for. In other words, one would require an empirical analysis of the counterfactual which provides a reliable estimate for what margins would have been absent TKS' exit against which the actual margins can be assessed.

(10) The Parties' simple before and after comparison of margins does not account for any external factors. In the context of stainless steel, the issue of controlling for external factors affecting prices or margins is not just academic. For example, costs of raw materials, and in particular of alloys (Nickel), show very substantial fluctuations over time. As a result, stainless steel prices (which include the alloy surcharge) have been increasing sharply between 2003 and 2007 which will partially be due to changes in the cost of raw materials such as nickel. The figure below plots the average annual (deflated) price of QP in Germany over time for the period covered by the margin data in the Parties' study.

#### **Figure III.2. [...]\***

(11) The evolution of price will reflect changes in demand and costs, the effect of the consolidation, as well as other relevant factors unrelated to the consolidation.

(12) Because the Parties' approach simply compares average margins before 2003 with average margins after 2003, the implicit assumption in their approach is that contribution or profit as a percentage of sales is not affected by substantial shifts in raw material costs or demand conditions. However, this assumption is in direct contradiction with the Parties' argument that changes in the costs of alloys are passed-on to customers at cost which implies that percentage margins decrease as costs increase.

(13) The fact that changes in cost and demand conditions may affect the counterfactual is also acknowledged by the statements in other economic studies submitted by the

Parties. One study notes "[f]or example, shifts in demand or costs could affect margins ...".<sup>780</sup> Another study submitted by the Parties notes "that the last three years since 2009 have been affected by severe recession which may have affected margins. We believe evidence of this can be seen in the QP margin data submitted as part of Professor Hausman's analysis of QP."<sup>781</sup>

- (14) The Commission concludes that the Parties' simple before-after comparison of margins therefore cannot identify the effect of TKS' exit of QP on margins. In other words, the Parties simple comparison cannot separate the effect of TKS' exit from the effect of other important factors such as changes in cost or demand conditions. The Commission therefore does not consider the results from such a simple comparison to be relevant evidence.

## **2.2. The evolution of prices of QP is inconsistent with the Parties' claim that TKS' exit had no effect**

- (15) The Parties' QP study also presents estimations on the reaction of imports to changes in the EEA price of QP. These show that the share of QP imports increases in response to increases in the price gap between the EEA and Asia. The Parties further find that the level of imports increased in Q1-2004.
- (16) Together, these two empirical findings imply that the price of QP in the EEA relative to Asia must have increased shortly after TKS' exit. This is because a finding of increased imports in 2004 would, by the Parties' own claim, be the result of an increase in the price gap between the EEA and Asia.
- (17) The Parties' study does not report how the price gap evolves over time. The figure below shows the evolution of the price gap over time.<sup>782</sup>

### **Figure III.3 [...]\***

- (18) The figure shows that the price gap in 2001/2002 was, on average, substantially lower than the price gap from mid-2003 until around 2009.
- (19) In particular, there seems to have been a substantial jump in the price gap shortly after TKS' exit of QP in February 2003 (marked by the first vertical line).
- (20) Moreover, during the period April 2003 to June 2006 (the month before the Krefeld fire) the price of QP in EEA relative to the prices of QP in Asia was, on average, [5-10]\*% higher than in the period January 2001 to February 2003.<sup>783</sup>

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<sup>780</sup> "Response to the CET's Merger Simulation Model", Compass Lexecon, 11 July 2012, footnote 32. ID9141.

<sup>781</sup> "Response to EC State of Play meeting concerns", CRA, 7 July 2012, p.8/11, ID8731.

<sup>782</sup> The figure plots the deflated gap between the SSFP price for QP in Germany and the corresponding price in HK which is the price gap data used in the Parties' econometric analysis. The Parties' econometrics only use price gap data from 2004 onwards. The Commission has extended this data backwards in time to the start of 2001 so that it covers the same period as the Parties' margin data.

- (21) The increase in the QP price gap shortly after TKS' exit is consistent with both, an increase in the QP price as a result of the consolidation and the observation of the increase in the level of QP imports starting in 2004 observed by the Parties' study.
- (22) Similarly, looking at the evolution of QP 304 prices in Germany relative to CR 304 prices in Germany suggests that relative prices of QP followed a downward trend in the period prior to TKS' exit and have since improved and have stayed consistently above the level immediately prior to TKS' exit. Again this is consistent with the view that the consolidation has improved prices of QP relative to CR prices in Germany.

**Figure III.4. [...]\***

- (23) The Commission emphasises that it does not regard the evidence on the evolution of relative prices as definitive proof that the consolidation in QP in 2003 led to increased prices of QP in the EEA. While the Commission believes that a comparison of relative prices (or price differences) is more informative than the Parties' simple before-after comparison of margins, because cost or demand factors that have similar effects on both price series should not be expected to have a lasting effect on the relative price (or the price difference), it notes that relative prices show fluctuations over time which suggest that there are price drivers which are not accounted for by looking at the ratio or difference of prices. For example, the recession in 2009 might have affected QP prices in the EEA more than those in Asia.
- (24) The Commission has not carried out a full counterfactual analysis of the effect of TKS' exit on QP prices or margins. The Commission does not regard it incumbent upon itself to conduct a detailed analysis of a consolidation that occurred more than 9 years ago in a different market.
- (25) Nevertheless, a simple analysis of relative prices based on the price data which the Parties' study uses in its empirical analyses is consistent with substantial increases in the price of QP as a result of TKS' exit relative to QP prices in Asia and relative to CR prices in Europe.
- (26) The fact that the evolution of relative QP prices indicates the opposite to what the Parties claim confirms the Commission's conclusion that the Parties' analysis of QP margins is uninformative and cannot be relied upon.

**2.3. An analysis of the consolidation of QP in 2003 does not allow inferences on the current transaction**

- (27) The Commission also notes that even if the Parties analysis did show the absence of an effect on TKS' exit on prices and margins, which, for the reasons discussed

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<sup>783</sup> This figure is based on the change in the relative price (i.e. the ratio between the price of QP in the EEA and the price of QP in Asia), as this provides a more straightforward indication of the size of the price increase than the change in the price gap.

above, the Commission does not accept, the Commission would not accept that this would allow the conclusion that the present transaction will not lead to unilateral effects or that presumptions of the Horizontal Merger Guidelines do not apply.

- (28) The Commission notes that prima facie the acquisition by Outokumpu of ThyssenKrupp's QP business appears to be different from the proposed transaction in terms of effects on the structure of the market.
- (29) First, the proposed transaction, i.e. the sale of TK QP business, did not consist of the transfer of productive assets. TK rather sold to Outokumpu only a service centre located in Krefeld and a customer portfolio, plus negligible productive assets that have not increased the total QP capacity of Outokumpu.
- (30) Second, the Decision of the Spanish Competition Authority clearing the merger presented the combined market shares of the merging parties at [30-40]\*%, [...]\*. Although the Parties submitted by email that the relevant market that should be analysed is a narrower market for "true QP", the Commission notes that this market definition is not the one considered by the Spanish Competition Authority and on which the Parties to the transaction at the time agreed. Furthermore, this market definition is not in line with the sales figures and production shares originally provided by the Parties in the Form CO.
- (31) Third, the market shares of competitors in the market for QP appear to be much higher than their shares in the market for QP (Aperam [20-30]\*% instead of [10-20]\*% and Acerinox [20-30]\*% instead of [10-20]\*%. A third competitor, Acroni, is also present, with market share of [5-10]\*%.
- (32) These elements suggest that even if there was reliable evidence that TKS' exit of QP did not lead to unilateral effects (which, for the reasons discussed above, is not the case) a preliminary analysis of the circumstances around TKS exit of QP suggest that such conclusions would not carry over to the present transaction.

### **3. THE PARTIES' RESPONSE TO THE SO DOES NOT AFFECT THE COMMISSION'S ASSESSMENT**

- (33) The Parties' respond to the Commission's assessment of their QP study in the main body of their response to the SO and at Annex II of the response.<sup>784</sup>
- (34) The Parties reiterate that they consider the consolidation of QP in 2003 to be structurally similar to the Transaction.
- (35) In response to the Commission's critique of the Parties' margin comparison, the Parties argue that the contribution margin used in their study (the ratio of contribution to sales) is a close approximation to the Lerner Index of market power and that the SO's criticism that margins fluctuate over time ignores that margins fluctuate around a lower level after 2003. Moreover, the Parties argue that the only

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<sup>784</sup> Parties' response to the SO, ID10012, and "Response to Discussion of QP in the SO, Jerry Hausman, MIT, August 22, 2012" at Annex II to the Parties' response to the SO, ID10004.

factor that the SO specifically refers to as a possible relevant factor is the nickel price, while another study by the Parties<sup>785</sup> had already found that the nickel price did not influence QP base prices.

- (36) Moreover, according to the Parties, there has been no significant diversion between the price of CR304 and QP304 since 2003 which they consider inconsistent with the QP transaction leading to significantly increases market power in QP as a result of the transaction.
- (37) Finally, the Parties also argue that the QP consolidation is a good test of the model at Annex A to the SO and that the model predicts an increase in margins which is the opposite of what happened. According to the Parties, the Commission's response that it does not consider it incumbent upon itself to conduct a detailed analysis of a consolidation that occurred more than 9 years ago in a different market is not an adequate response and the Commission should have conducted such an analysis to test its model.
- (38) The Commission notes first that its view on the comparability of the QP consolidation and the current transaction is discussed above and in Section 5.5.4.1 of the Decision.
- (39) As regards the Parties' response to the Commission's critique of their analysis of contribution margins, the Commission notes that the Parties' response does not address the Commission's points.
- (40) First, changes in the Lerner Index can, in theory, provide a measure of the change in market power when demand and cost conditions remain constant (i.e. all else equal). However, when cost and demand conditions change, the Lerner Index will, in general, also change. An argument that the contribution margin in the Parties' QP study approximates the Lerner Index therefore does not respond to the Commission's point that that the Parties' margin comparison fails to control for changes in demand and cost conditions that have occurred during the analysis period.
- (41) Moreover, in response to a request by the Commission to reconcile the margins used in the Parties' QP study (which are [10-20]\*% for 2010 and [10-20]\*% for 2011) with the corresponding margins on QP from the Parties vertical profitability database (which are [30-40]\*% for 2010 and [30-40]\*% for 2011) the Parties responded:

[...]\*

- (42) The Parties' response indicates that the margin data in their QP study excludes a large part of the total margin earned by an integrated producer of QP such as OTK or, prior to its exit, TKS. The Commission therefore considers that margins used in the Parties' QP study cannot be considered as the relevant Lerner index of market power for an integrated producer of QP even if demand and cost conditions had remained unchanged (which is not the case).

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<sup>785</sup> "The Effect of Nickel Prices of CR Imports, Jerry Hausman, MIT, April 27, 2012" ID3384.

- (43) Second, the observation that the Parties' margin data fluctuates around a lower level does not disprove the Commission's point that fluctuations in the Parties' margin data indicate that the evolution of margins is subject to factors unrelated to the consolidation (such as, for example important changes in cost and demand conditions over time) which the Parties' study does not control for. The Commission has provided evidence that the price of QP increased after 2003, partly as a result of increased raw materials. Such increase in raw materials, which the Parties' analysis does not account for, are one example why percentage margins post-2003 might have been lower independently of the transaction. It gives an example why the Parties' analysis should have separated the effect of the transactions from the effect of other factors on margins.
- (44) The Parties response about the difference between the QP downstream margins used in their study and the integrated margins also raises further doubts about whether any inferences can be drawn from the margin data used in the Parties' study of QP. This is because shifts in the relative magnitudes of upstream versus downstream margins – which the data indicate occurred [...] – can distort the Parties' analysis of downstream margins of QP over time. Any change in the upstream margin will necessarily also affect the downstream margins, because the upstream margin is included in total sales which are used as the denominator for the contribution margins used in the Parties' analysis. Such shifts are also unaccounted for in the Parties' analysis.
- (45) Third, the Parties' response that they tested the effect of the nickel price on the base price does also not address the Commission's criticism. The denominator for the Parties' contribution margins is based on total sales which include not just the base price but also alloy surcharges. Even if the nickel price does not affect the base price as argued by the Parties, the nickel price clearly affects the alloy surcharge. It will therefore also affect the percentage contribution margins used by the Parties (via the denominator of the margin calculation). Changes in the nickel price therefore affect margins and need to be controlled for.
- (46) In light of the above, the Commission concludes that the Parties' response does not address the Commission's criticisms. The Parties' QP study remains uninformative on the effect of the consolidation in QP in 2003 on the QP market. Any reliable analysis based on margins requires a careful counterfactual analysis of what margins would have been absent the transaction. In light of the important fluctuations in costs (for example nickel) and demand, the Parties' analysis of margins which fails to account for such factors (and which is based on the implicit assumption that margins should have remained constant absent the transaction) cannot be accepted. The Parties' analysis is unable to separate the effect of the transaction on the QP market from other relevant influences and is hence uninformative.
- (47) As regards the Parties response on the evolution of the relative price of QP to CR, the Commission notes that the Parties state: *"If the consolidation in 2003 had led to increases market power in QP, we should have expected QP prices to have risen relative to CR prices."*<sup>786</sup>

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<sup>786</sup> Response to SO, para 28. ID10012.

- (48) This is precisely what Figure III.3 and Figure III.4 above show: after the QP transaction in early 2003, the price of QP (grade 304) in the EEA rose relative to both the price of QP (grade 304) in Asia and relative to the price of CR (grade 304) in the EEA. Therefore, the evolution of relative prices follows what the Parties acknowledge should be the case if the QP transaction increased market power.
- (49) The Parties claim that there has been no significant divergence in the price paths of CR 304 and QP 304 does not address this point. As both products are based on the same stainless steel grade they are subject to the same fluctuations in raw material costs and their prices will follow similar paths. Moreover, the Parties' Graph 2 of Annex 2 of the response to the SO shows that average annual price of QP was below that of CR prior to 2004 and above after 2004. This is consistent with the Commission's findings of an increase in relative price following the transaction.
- (50) The Parties also claim in Annex 2 to their response to the SO that, while the price gap for QP increased after the transaction, the price gap of CR also increased with a one year lag. The Commission first notes, that on the basis of the Parties Graph 1 at Annex 2 to the response, there is a sharp increase in the price gap for QP between 2002 and 2003 (note that the QP transaction was in February 2003). There is no apparent increase of a similar order of magnitude in the price gap for CR until 2006.
- (51) The Commission also notes that even if the CR price gap showed a similar evolution to that of QR around 2003, then this would only show that the increase in imports was unrelated to the transaction. But then the increase in imports is a further external factor that the empirical analysis of margins would need to take into account, because it implies that margins would have decreased independently of the transaction as a result of the unrelated increase in imports.
- (52) As regards the Parties' argument that their QP study provides a relevant test for the Commission's model at Annex A to the SO, the Commission notes since the Parties' analysis is uninformative on the effect of the QP consolidation on QP margins and, more generally, on the QP market (for the reasons discussed above), it cannot be used to verify or falsify any model.
- (53) The Parties claim that the Commission should have performed a full detailed analysis to test its model is also misplaced. First, the Commission has analysed the evolution of relative prices in the SO. This evolution is consistent with the predictions of price increases from the Parties' calibration of the model to their interpretation of the QP situation. As the Parties' empirical analysis of the evolution of margin data is uninformative it cannot reverse this conclusion.<sup>787</sup>
- (54) Second, the Commission does not agree that it should have carried out a full and detailed analysis of a consolidation that occurred more than nine years ago in a different market.

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<sup>787</sup> The Commission notes that the independent expert report by Lyons, Rey and Seabright commissioned by the Parties also comments on the consistency between the empirical evidence on QP and the predictions from the model. However, the Commission notes that these experts were not provided with the Parties' empirical studies on QP nor with the Commission's assessment of these studies. The experts hence cannot comment on the validity of the empirical claims by the Parties.

- (55) The Commission has undertaken a careful assessment of the empirical evidence submitted by the Parties. The Commission concluded that the Parties' study is uninformative for the effect of the QP consolidation in the QP market and that the QP transaction in 2003 was, in any event different to the current transaction.
- (56) Moreover, as discussed above the Commission carried out an analysis of relative prices of QP which is it considers more informative than the simple margin comparison. This analysis is further consistent with price increases as a result of the QP consolidation and with the predictions from the Parties' calibration of the Commission's model to the QP consolidation.
- (57) In doing so, the Commission considers that it has gone beyond what would have been required to conclude that the Parties' analysis of QP margins is unreliable.
- (58) Moreover, the Commission notes that the Commission's main concerns about the Parties' QP analysis (i.e. the concerns about the lack of control for external factors and about external validity) were first communicated to the Parties in the State of Play meeting on 8 June 2012 following the Parties' response to the 6(1)(c) Decision. The concerns were further communicated to the Parties in writing in the Issues Paper and in the SO.
- (59) The Parties responses have not addressed any of these concerns. In particular the Parties have not presented any alternative analysis that would try to control for the influence of the mentioned external factors.

In light of all of the evidence above, the Commission concludes the Parties submissions on the QP consolidation in 2003 allow no inference of the effect of that consolidation on the market for QP. Moreover, the evolution of relative QP prices appears consistent with an increased QP prices as a result of that transaction.

## **ANNEX IV – Joint assessment of the Parties' arguments in a comprehensive economic framework**

### **1. INTRODUCTION**

- (1) This Annex examines in a comprehensive economic framework the question whether a contemplated merger, in an industry characterised inter alia with substantial excess capacity and intensive competition, is likely to lead to significant non-coordinated effects. This analysis responds to the claim of the notifying Parties according to which the proposed merger is not likely to be harmful to competition if its effects are examined in a comprehensive economic framework taking into account jointly all the parameters and characteristics of the industry in question.

### **2. A FRAMEWORK OF PRICE COMPETITION IN HOMOGENEOUS GOODS WITH CAPACITY CONSTRAINTS APPROXIMATES THE MOST IMPORTANT INDUSTRY CHARACTERISTICS**

- (2) Both in its written reply to the decision opening the procedure under Article 6(1)(c) of the Merger Regulation and in subsequent meetings, the Notifying Party urged the Commission to conduct an assessment of the joint effects of its arguments concerning the proposed merger, but it has not proposed itself any specific economic framework or model to do so.
- (3) The Commission considers that the stainless steel industry exhibits a number of characteristics which are of first order relevance for the economic assessment of the present transaction, namely:
  - (1) Within each grade, CR stainless steel is a relatively homogeneous, non-branded product. While responses from the market investigation indicate that some customers do not regard imports as fully substitutable, the Parties have submitted that there are no quality differences across producers and imports.
  - (2) There is a high level of supply side substitutability across grades. Therefore, although different grades may not easily be substitutable from a customer perspective, according to the Parties, each EEA producer can in principle produce the entire range of grades and finishes to satisfy demand from customers. The possible exception is [...] according to the Parties.
  - (3) EEA producers compete for customers on price.
  - (4) Imports account for a significant share of the market and exert a certain competitive constraint on EEA producers.
  - (5) EEA market demand for CR stainless steel is relatively inelastic.
  - (6) There is currently excess capacity in the EEA for the production of CR products at the industry level.

- (7) The transaction will lead to a substantial redistribution of CR capacities with the merged entity becoming the producer with the highest level of CR capacity in the EEA.
- (4) The above characteristics are broadly in line with the Parties' arguments. The combination of product homogeneity within grades and supply side substitutability across grades implies that each firm can supply the product requirements of every customer and that customers have no significant preferences for one supplier over another other than price. These features can be approximated by an assumption of homogeneous products.<sup>788</sup> In light of these features, the Commission considers the framework of price competition in homogeneous goods to be the most appropriate standard framework for an assessment of the joint effect of the Parties' arguments against anticompetitive non-coordinated effects.

### **3. THE EVIDENCE CAN BE BROUGHT TOGETHER IN A SINGLE MODEL**

- (5) The Commission analysed the implications of the various pieces of available quantitative and qualitative evidence together in a single comprehensive economic model of price competition with homogeneous goods in the presence of capacity constraints.<sup>789</sup>

#### **3.1. The role of the modelling exercise in the Commission's overall assessment**

- (6) It is important to clarify first what role can an economic modelling exercise of this kind play in a merger case like this. Indeed, the model used is the best available framework which can approximate the most important industry characteristics, including the main economic arguments upon which the Notifying Party bases its claim that the proposed merger will not give rise to any significant anticompetitive non-coordinated effects on competition.
- (7) Although the best available, this model cannot however integrate every aspect of competition in the industry. For instance, the assumption of price competition in homogeneous goods market implies that competition is at the most intense level, consistent with the observed levels of spare capacity pre-merger. There are many reasons however why actual competition in the market pre-merger is not as intense as the assumptions of this model suggest. Such reasons include small search or switching costs for customers; small costs for suppliers to change their production mix; multi-sourcing strategies by customers; and a small degree of product and geographic differentiation between suppliers. The presence of any small friction of this type reduces the degree of competition between competitors relative to what an

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<sup>788</sup> In contrast, a framework of differentiated products would imply that customers prefer a specific product by a specific supplier over any other product by other suppliers, which is, for example, the case when products are branded or have appreciably different physical characteristics across producers. This does not appear to be a first order characteristic of the industry.

<sup>789</sup> The term "capacity constraints" refers to a situation where firms cannot expand output beyond the overall capacity of their production assets. The presence of capacity constraints does not imply that firms have no spare capacity or that there is no excess capacity at the industry level, i.e. it the fact that there are overall capacity constraints does not imply that firms have to produce at their capacity limits.

assumption of price competition in perfectly homogeneous products without any switching costs implies.

- (8) For these reasons, the Commission considers that the model used illustrates that even under the assumption that competition in the market is very intense, which reflects the position of the Parties in this case that spare capacity combined with positive margins provides competitors with very strong incentives to compete aggressively for additional volume, a transaction of this type can be expected to lead to significant anticompetitive effects. Moreover, the qualitative conclusions from the model remain very robust even when changes are made in the parameters used to make it fit better with the pre-merger situation. Introducing such changes in the parameters would not lead to different conclusions about the order of magnitude of the increase in market power predicted by the model.

**3.2. A Bertrand-Edgeworth model of price competition in homogeneous products in the presence of capacity constraints reflects the Parties' main arguments against anti-competitive effects**

- (9) In addition to the industry characteristics mentioned above, the Parties have submitted that end customers can easily switch between suppliers; that independent distributors exercise buyer power as they can to switch between EEA producers and because they can easily increase the amount of imports; that the transaction will lead to a reduction of marginal costs; that the overlap between the Parties' activities is limited; and that multi-sourcing by some customers will lead to a reduction of demand for the merged entity.
- (10) The Bertrand-Edgeworth model of price competition in homogeneous goods markets with capacity constraints can assess most of the points raised by the Parties to suggest that post-merger prices are not likely to rise.
- (11) First, the assumption of price competition in homogeneous goods reflects the arguments about supply side substitutability and the argument that end customers and distributors can easily switch between different EEA suppliers (as well as the arguments about homogeneity within grades and supply side substitutability across grades). The assumption of price competition in homogeneous goods with capacity constraints implies the most intense level of competition one can assume because it assumes that customers instantly switch all their demand to the firm with the lowest price without any switching costs.
- (12) Second, the level of spare capacity by the Parties and their EEA competitors will be a key input into the model.
- (13) Third, the Parties' arguments and quantitative evidence about the competitive constraint from imports can be reflected in the calibration of the residual demand over which EEA producers compete. As explained in the Decision the residual demand (after imports) over which EEA producers compete will be more elastic than market demand because price increases in the EEA will lead to an increased supply of imports. This fully reflects the constraints by imports on EEA prices. Increased import activities by distributors in response to price increases are also captured in this way.

- (14) Fourth, the economic model includes marginal costs synergies and therefore includes an assessment of the incentives to pass-on such synergies to consumers in the form of lower prices.
- (15) The main argument which cannot be as easily assessed within the framework of price competition in homogeneous products is the Parties' argument that overlap between the Parties' activities is limited. As discussed in the Decision, the overlap between the Parties' activities appears to be greater than suggested by the Parties. The most relevant aspect for the assessment below appears to be that [...]\*. The detailed assessment below will therefore also assess whether the absence of an overlap with respect to BA qualitatively affects the conclusions.
- (16) Finally, the Commission has explained in the Decision that it does not consider the 'merger dip' to be a relevant argument because, if anything, multi-sourcing policies by customers will imply that the transaction has a worse impact on such customers. The merger dip will therefore not be assessed within the comprehensive economic framework.
- (17) The Bertrand-Edgeworth framework can therefore approximate the most important industry features as well as the Parties' main economic arguments against non-coordinated effects of the transaction in their most competitive interpretation.

### **3.3. Bertrand-Edgeworth model predicts a price range rather than a single equilibrium price**

- (18) The Bertrand-Edgeworth model described above will, in general, not give a prediction of a single stable equilibrium price. This is because, at any given combination of prices set by the firms in the market, at least one firm will have an incentive to change its price. The absence of a single stable equilibrium price (i.e. the absence of pure strategy Nash equilibria) is a well known property of Bertrand-Edgeworth models.<sup>790</sup> Nevertheless, a Bertrand-Edgeworth can be used to evaluate the change in market power arising from a transaction.
- (19) Economic theory offers a straightforward solution concept which is more general than the concept of Nash-equilibrium because it makes fewer assumptions on how rational firms behave. This solution concept is based on the repeated elimination of dominated strategies. It only requires that rational firms will not chose prices that can never be optimal and they assume their rivals to do the same.<sup>791</sup> In a Bertrand-Edgeworth model, repeated elimination of dominated strategies leads to a range of prices for each firm that could be observed in markets.<sup>792</sup>

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<sup>790</sup> More specifically, there will be no pure strategy Nash equilibria unless (i) capacity constraints are very tight so that firms produce at capacity, or (ii) capacities are so large that each n-1 coalition of firms can supply the entire market at marginal costs in which case the equilibrium price will be at (or just above) marginal costs.

<sup>791</sup> In contrast, the assumptions on firm behaviour to obtain a mixed strategy Nash equilibrium are much stronger.

<sup>792</sup> In economics the range of prices that remain after repeated elimination of dominated strategies is called the set of "rationalisable" prices. The set of rationalisable pricing strategies of a firm will coincide with the support of the mixed strategy that would be played in a Nash equilibrium.

(20) The price range in the Bertrand-Edgeworth model should therefore be interpreted as the range of prices which could be observed in markets.<sup>793</sup> Economic theory shows that under relatively weak assumptions on rationality (namely that firms try to seek higher profits) firm behaviour should converge to some price in the range.<sup>794</sup> An analysis of the range of prices, however, does not predict any price patterns over time or across firms.

### **3.4. The merger induced change in the predicted price range provides a measure of the increase in market power**

(21) A merger will change the range of prices predicted by the Bertrand-Edgeworth model. This is illustrated in the following figure. The two boxes represent the predicted price range pre-merger and post-merger.

(22) This merger induced shift in the entire price range provides a measure for the change in market power. It might also be appropriate to use the change in the mid-point of the range as a summary measure for this change in market power.

(23) The shift in the price range reflects the merger induced change in the distribution of capacities across firms in the market. The extent of the shift also reflects the overall elasticity of demand, the constraint from imports and the extent to which marginal cost synergies provide the merged entity with an incentive to increase output and pass-on synergies to consumers.

(24) The shift in the range should not be considered as giving a precise estimated of the likely price effect resulting from the transaction. Rather the change in the entire price range should be interpreted as qualitative evidence on the order of magnitude of the likely increase in market power.<sup>795</sup>

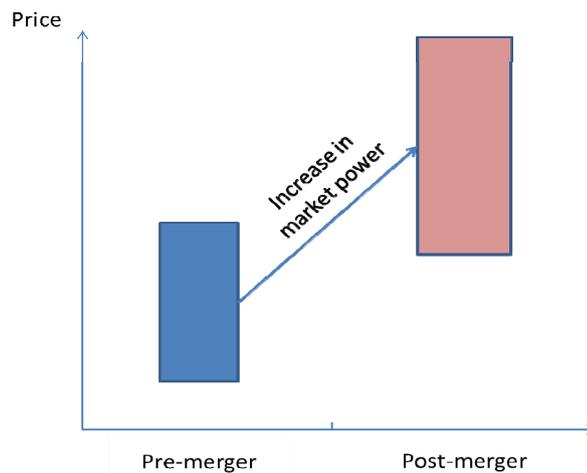
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<sup>793</sup> Under the header "The CET model relies on implausible assumptions about firm behaviour" the Parties point out that the upper bound of the range of rationalisable prices will not be a stable (Nash) equilibrium as at least one firm will have an incentive to deviate ("Response to the CET's Merger Simulation Model", Compass Lexecon, 11 July 2012, ID9141, p.2). The Parties' also claim that "the model operates on assumed behaviour that is not observed in the market (including non-stable prices [...])." (p.13). The Commission notes that absence of pure strategy Nash equilibria in the model is not an assumption about firm behaviour in the model. Rather it is a consequence of the assumption about price competition in homogeneous goods in the presence of capacity constraints. As discussed, the range of rationalisable prices is consistent with the predictions from a large class of solution and learning concepts. The range of rationalisable prices should be interpreted as prices that could be observed in markets.

<sup>794</sup> In a seminal contribution, Paul Milgrom and John Roberts have further shown that predictions which will result from a very large class of dynamic adjustment or learning processes will also converge to within the set of rationalisable prices. P Milgrom and J Roberts (1990), "Rationalizability, Learning, and Equilibrium in Games with Strategic Complementarities", *Econometrica* 58(6), 1255-1277.

<sup>795</sup> The Parties' argue that because the pre- and post-merger ranges often overlap and because the upper bound of the range may increase by more (in percentage terms) than the lower bound "it is difficult to evaluate the true effect of the merger on price. This difficulty is especially important when, as we show below, the lower end of the range decreases and the upper end of the range increases." (ID9141, p.3). As illustrated in the graph, assessing the extent of the shift in the range gives an indication for the change in market power even when the pre- and post-merger ranges overlap to some extent. The Parties' argument that the lower end of the price range decreases is based on extreme and unrealistic assumption. This is discussed in more detail below.

**Figure 1: Illustration of the increase in market power reflected by the change in the range of rationalisable prices**



#### **4. THE MODEL PREDICTS SUBSTANTIAL INCREASES IN MARKET POWER**

##### **4.1.**

- (25) To evaluate how the transaction changes the range of prices, the Bertrand-Edgeworth model needs to be calibrated. To the extent possible, the calibration takes account of (reasonable) arguments and evidence by the Parties even when, as discussed in the Decision, this has not been fully confirmed by the market investigation.
- (26) There are a number of assumptions and choices which need to be made in the calibration of the model. In doing so, the Commission has to apply a certain amount of judgement. The key parameters and assumptions for the main calibrations are discussed in the following. However, the Commission's assessment makes the best case for the Parties' arguments and explores the implications of the Parties' arguments both pre- and post-merger.
- (27) The model assesses competition over the **residual demand** (after imports) faced by EEA producers, which accounts the aggregate demand elasticity and the competitive constraint from imports. This relies on the following information and assumptions:
- (1) Market demand is assumed to be linear in the main calibrations. Iso-elastic demand (or log-linear demand) is used in one of the sensitivity analyses.<sup>796</sup>
  - (2) Market demand elasticity is assumed to be in the range -1 to -0.5 (in line with the Parties' use of this range in their critical elasticity submissions). Market demand is calibrated to have the assumed elasticity at the pre-merger market price. The pre-merger price is normalised to one.

<sup>796</sup> The Parties' have argued that iso-elastic (or log-linear) demand is more appropriate. However, in terms of merger effects, the assumption of linear demand is more conservative.

- (3) The reaction of the supply of imports to changes in EEA prices is based on the Parties' econometric results for austenitic CR from his import share equation. In various submissions, the Parties offered 15 different regression specifications. An analysis of the (approximate) 95% confidence intervals for the coefficient estimates across all the different regression specifications submitted by the Parties' indicates that a value in the range [...] to [...] for the coefficient estimate measuring the extent of the reaction by imports to price changes is most reasonable. However, some of the main calibrations below use the Parties' point estimate of [...], which implies a stronger import reaction. Moreover, the share of imports matches the observed share at the pre-merger price.
- (28) **CR capacity figures** are taken from the Form CO (Annex 59). These capacities are then adjusted in two ways.
- (1) First, as discussed the Commission considers that the maximum sustainable level of capacity utilisation in the longer run is likely around [90-100]\*%.
- (2) Second, total capacities are adjusted to reflect that certain production lines are under long term suspension or are mothballed. In particular, Aperam has permanently suspended its traditional cold rolling lines at Isbergues which account for at least [...]KT of CR capacity. Moreover, the Commission has (confidential third party) evidence that other production lines are mothballed. Not accounting for mothballed capacity in the initial scenario based on public data below leads to an over-statement of the intensity of competition from the Parties' rivals (pre- and post-merger).
- (3) Third, it is assumed that capacity which is currently used for CR production that is not sold in the EEA is not available for CR production for sale in the EEA. In other words, it is assumed that exports will continue at the current level. To obtain exports EEA sales of CR are subtracted from CR production figures. The simplifying assumption that exports will continue at the pre-merger level is supported by the empirical observation that exports have remained relatively stable over time, and do not appear to be responsive to fluctuations in the EEA price compared to prices in other regions of the world. This is discussed in Attachment 2 to this Annex.
- (29) Competition is modelled between the four integrated producers in the EEA (the merging Parties, Aperam and Acerinox) plus re-rollers which are treated as a single fully fledged fifth competitor, i.e. the model assumes competition between five EEA firms pre-merger. As re-rollers depend on the four EEA producers on upstream inputs (at least to some extent) this is likely to overstate their competitive significance.
- (30) The level of marginal costs as well as marginal cost synergies post-merger are based on the Parties' estimates. Pre-merger marginal costs are, on average, around [80-90]\*% of the pre-merger price ([70-80]\*% for Outokumpu and [80-90]\*% for

Inoxum). The post-merger marginal costs of the combined entity are [70-80]\*% corresponding to a [0-5]\*% reduction compared to the pre-merger situation.<sup>797</sup>

- (31) The Bertrand-Edgeworth model further requires an assumption about the order in which firms supply demand as well as what customers are supplied first. The model uses the standard assumption of "efficient rationing" which assumes that customers who put the highest value on a the good are served first.<sup>798</sup>
- (32) Finally, to solve the model pre- and post-merger, the Commission uses a numerical approach that evaluates profits arising from each combination of prices on a sufficiently fine price grid. The grid used in the results reported below has a step size of 1 percentage point of the pre-merger price.<sup>799</sup>

#### **4.2. Results indicate robust and substantial merger induced increases in market power**

- (33) This section presents and interprets the most important results from Commission's calibrations of the Bertrand-Edgeworth model.
- (34) The analysis starts with two initial calibration scenarios. The first is based on public data and estimates by the Parties. The second is based on actual data on sales,

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<sup>797</sup> Parties' submission "Response to CET Comments on Marginal Cost Efficiencies, Compass Lexecon, 6 July 2012", ID8730, Table 4, p.7

<sup>798</sup> Specifically, efficient rationing assumes that the firm posting the lowest price serves the highest value customers up to its capacity constraint; if the lowest price firm cannot supply the entire market at this price, firms setting higher prices supply remaining customers using the same procedure (in increasing order of their prices); if two firms set the same price, their residual demand is allocated in proportion to their capacities.

While recognising that efficient rationing is commonly used in Bertrand-Edgeworth models, the Parties have criticised the Commission for not testing the sensitivity of the model's results to alternative rationing rules. According to Parties the Commission should have used the alternative assumption of "proportional rationing". However, the Parties have not presented any specific results based on this alternative rationing rule.

In the Commission's view proportional rationing is not a plausible or useful alternative rationing assumption in the current context. The purpose of the Bertrand-Edgeworth model is the assessment of the likely extent to which the transaction affects market power as qualitatively measured by the change in the price range. As proportional rationing implies that the upper bound of the price range remains unchanged independently of the context of the transaction it is not useful for such an assessment. Furthermore, the Commission considers that proportional rationing rule is not plausible as it implies that at least one firm sets prices at or close to the monopoly price with positive probability.

Finally, the Commission also notes that the "Independent Expert Opinion by Professors Lyons, Rey and Seabright on Economic Modeling in Case M 6471 (as of 23<sup>rd</sup> August 2012)" (ID10109) commissioned by the Parties' (henceforth the "Wise Men Report") notes that its authors are not convinced that the Parties' objections to the rationing rule are an important objection to the Commission's model (para 19).

<sup>799</sup> The elimination of dominated strategies is based on the dominance concept and the approach proposed by Tilman Boergers. Under this concept, strategy a of firm f dominates strategy b of firm f if and only if (i) for any of the remaining combination of rival strategies firm f's profits from a are greater or equal than profits from b; and (ii) profits from a strictly exceed those from b for at least one combination of rival strategies and, in addition, for all rival strategies in which profits from b are positive. In other words, the concept requires strict dominance on at least one point on the grid and on every point where the dominated strategy yields positive profits. For points where the profits from the dominated strategy are zero, weak dominance is sufficient. Tilman Boergers (1992), Iterated Elimination of Dominated Strategies in a Bertrand-Edgeworth Model, Review of Economic Studies 59(1), pp. 163-176.

production and capacity from all main producers. These scenarios predict substantial increases in market power resulting from the transaction. However, as expected, they also tend to overstate the degree of pre-merger competition (although the scenario based on actual data does so to a lesser extent).

- (35) In the Commission's view there are two possible reasons why the initial scenarios tend to overstate the level of pre-merger competition. First, calibration parameters may not be measured correctly. Second, there may be behavioural reasons why the observed non-coordinated competition pre-merger is softer than implied by the model. The Commission has explored the effect of factors under both categories below. Moreover, the Commission has also examined the robustness of the results to wider sensitivity analyses relating to the counterfactual and the lack of overlap between the Parties with respect to BA products.

#### 4.2.1. Initial calibration scenarios

##### 1) Initial calibration based on Parties' and public data

- (36) Although it does not reflect all the information available to the Commission, the first calibration scenario is based on publicly available information and on information and point estimates provided by the Parties.
- (37) The calibration uses the following parameters: Demand is assumed to be linear with an elasticity of -0.75; the import coefficient is assumed to be [...] which, although outside the range discussed above, is the point estimate from the Parties' submission of 19 March 2012 which the Commission also uses its assessment of imports in the Decision; capacity figures are taken from the Form CO; Aperam's capacity is reduced by [...]kt to reflect the long term suspension of Aperam's traditional CR lines at Isbergues; the maximum utilisation is set to [90-100]%; EEA sales figures are from the notifying party's submission of 26 April 2012 for 2011 which were based on Eurofer data; production figures are 2011 actuals for Outokumpu and TKS and estimated based on CRU utilisation figures for the other firms; marginal costs (approximately [80-90]% of the pre-merger price) and marginal costs synergies (of [0-5]%) are as estimated by the Parties.
- (38) The following table provides the main results from this calibration (Full results are reported in Attachment 3 to this Annex:

**Table 1: Results based on Eurofer data at initial parameter values**

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)
upper end	[...]*	[...]*	[...]*	[10-20]*%	10.4%
mid-point	[...]*	[...]*	[...]*	[5-10]*%	7.4%
lower end	[...]*	[...]*	[...]*	[5-10]*%	4.1%

- (39) Column 1 of the table presents the predicted price range from the calibration for the pre-merger situation. The rows correspond to the upper end, the mid-point, and the lower end of the price range. The values correspond to the average across the two parties. Pre-merger the calibration predicts an average for the two Parties in the range [...] to [...]. This range starts above marginal costs (of [...]). However, the

upper bound of the range is below 1 which implies that this calibration of the model under-predicts the observed pre-merger price which is normalised to 1. This shows that the initial calibration scenario which relies on point estimates provided by the Parties is biased towards intense competition.

- (40) The post-merger prices range (before taking account of synergies) in the calibration is [...] to [...] (column 2 above). This upward shift of the price range compared to the pre-merger range is the result of the combination of the capacities of the merging Parties and the elimination of competition between them. Post-merger, the merged entity faces less competitive pressure from rivals than each of the merging parties per-merger. The shift in the predicted price range is substantial: the upper end of the price range increases by [10-20]%, the mid-point of the range by [5-10]% and the lower end of the range by [5-10]%. This shift in the range provides qualitative evidence for the order of magnitude of the change in market power in this calibration.<sup>800</sup>
- (41) Once synergies are taken into account, the range shifts by slightly less than before synergies. The post-merger predicted price range after synergies in this calibration is [...] to [...] (column 3). Compared to the pre-merger range, the shift in the range remains substantial at 4.1% at the lower and 10.4% at the upper end (column 5).
- (42) Compared to the post-merger situation before synergies (column 2), marginal cost synergies set incentives for the Parties to reduce price and increase output. The shift in the price range after synergies includes a full balancing exercise within the model of whether the increase in market power is off-set by the change in incentives from marginal cost synergies (including pass-on to consumers). As the shift in the price range after synergies is substantial, marginal cost synergies as estimated by the Parties are not sufficient to off-set the increase in market power in this calibration.
- (43) Overall, the initial calibration predicts that the transaction leads to a substantial increase in market power even after marginal costs synergies are taken into account. Therefore, even based on public data on the Parties' estimates alone, the model which takes the Parties' arguments and evidence in their most competitive interpretation provides no indication that the Parties' arguments would be jointly sufficient to dispel concerns about significant anticompetitive effects.
- (44) However, the initial scenario under-predicts pre-merger prices and hence overstates the level of pre-merger competition.

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<sup>800</sup> The discussion of the change in the predicted price range is based on the price range of the merged entity post-merger relative to the average price range of the merging parties pre-merger. This provides the most direct indication of the unilateral effect resulting from the change in merged entity's increase in market power and changed incentives resulting from the transaction. Full results on the price ranges for each firm are given in Attachment 2 to this Annex. The average change in the lower end (respectively average upper end) of the price ranges across all firms is lower by less than 1 percentage point (in most scenarios around 0.5 percentage points).

**2) Initial calibration based on actual data for sales, production and spare capacity for the EEA plus Switzerland**

(45) The Commission had access to actual data for production and EEA sales of the Parties, as well as (third party confidential) from the Parties' competitors which includes information on CR lines that are currently mothballed or suspended. Moreover, as the effect of the transaction is likely to include Switzerland, the Commission further includes information on sales and imports to Switzerland. Lastly, the Commission also includes internal sales of CR to downstream subsidiaries (e.g. to the tube maker TdT for Inoxum), as the strategic effect of the transaction will also extent to those sales.<sup>801</sup> The results from a calibration reflecting these changes are as follows:

**Table 2: Results based on actual data on sales, production and capacity**

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)
upper end	[...]*	[...]*	[...]*	[10-20]*%	9.9%
mid-point	[...]*	[...]*	[...]*	[5-10]*%	7.6%
lower end	[...]*	[...]*	[...]*	[5-10]*%	5.1%

(46) As a result of the calibration to available actual data, the predicted pre-merger range price range from the model increases to [...]\* at the lower end and to [...]\* at the upper end. The upper end of the price range is now only [0-5]\*% below the observed pre-merger price of 1. While this calibration still under-predicts pre-merger prices, the use of actual data improves the model's fit when assessed against the observed pre-merger price compared to the initial calibration based on the Parties' data.

(47) Importantly, the modifications to the calibration have no substantial effect on the observed shift in the price range resulting from the transaction. The post-merger price range after synergies is 5.1% higher at the lower end, 7.6% higher and the mid-point and 9.9% higher at the upper end than the pre-merger price range.

*4.2.2. Parameter variations that lead to more realistic pre-merger predictions*

(48) A key question is whether the over-prediction of the level of pre-merger competition in the initial scenarios above is likely to lead to an over-prediction of the change in market power.

(49) There are two main reasons why the initial calibrations may lead to such an over-prediction of competition. First, the level of competition in the industry may be as implied by the model but the calibration parameters used may be incorrect, e.g. because of measurement error. Second, EEA competitors may not compete with one another as aggressively as suggested by the model.

<sup>801</sup> This is because downstream subsidiaries of Inoxum or other EEA producers will benefit from the increase in upstream market power indirectly via a reduction of competition from their downstream rivals who will have higher input costs.

- (50) In the following the Commission examines the effect variation in parameters values that can reflect such factors.
- (51) As a preliminary remark that the Parties correctly noted that "[u]nlike standard merger simulation models, which calibrate the input parameters to explain observed prices and quantities, the [Commission's] approach is to assume what it believes to be reasonable values of the input parameters and then run the model."<sup>802</sup> The Commission considers that a variation in parameter values that improve the model's "fit" in terms of the pre-merger price is close to the standard approach in standard merger simulation models which leave enough degrees of freedom in the parameterisation to fit the pre-merger situation.
- (52) The Commission's analyses below are based on the Commission's initial calibrations based on actual data.

4.2.2.1. Changes to calibrations which might reflect more realistic parameter values.

**1) Effect of less elastic demand and a weaker constraint from imports (consistent with the Parties' estimates)**

- (53) The first modifications are to reduce the elasticity of market demand to -0.5 and the import coefficient to [...]\*. Both of these changes are within the reasonable estimated ranges for the respective parameters. A market demand of -0.5 is at the less elastic end of the range which the Parties consider reasonable of -1 to -0.5. As discussed in Attachment 1 to this Annex an estimate for the import coefficient from the Parties' first econometric equation of [...]\* is consistent with the standard statistical confidence intervals around the Parties' various estimates.<sup>803</sup>
- (54) These changes to the parameterisation affect the results from the calibration of the model based on actual data as follows:

**Table 3: Results based on actual data with market elasticity of -0.5 and import coefficient of [...]\***

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)
upper end	[...]*	[...]*	[...]*	[10-20]*%	14.7%
mid-point	[...]*	[...]*	[...]*	[10-20]*%	11.2%
lower end	[...]*	[...]*	[...]*	[5-10]*%	7.3%

- (55) As a result of these changes, the pre-merger range for the average price of the Parties has increased to [...]\* at the lower end and [...]\* at the upper end. In other words, in this calibration the upper end of the pre-merger range is very close to the observed pre-merger price. Therefore, the calibration is consistent with a market price which is only [0-5]\*% below the observed pre-merger price. The fit of the model has hence substantially improved compared to the initial calibrations above.

<sup>802</sup> ID9141, p.3-4

<sup>803</sup> Including those based on the contemporaneous price gap as explanatory variable.

(56) More importantly, the changes to the calibration do not change the model's prediction of significant market power effects. The shift in the price range is more pronounced in this calibration than in the initial calibration: after synergies the lower end of the price range now shifts by 7.3%, the upper end by 14.7% and the mid-point by 11.2%.

## 2) Effect of lower maximum sustainable nameplate capacity utilisation

(57) While the Commission has concluded above that the [90-100]\*% nameplate capacity utilisation represents a reasonable upper bound for the maximum sustainable nameplate utilisation, the actual level of sustainable capacity utilisation may be further affected by choice of product mix in term of grades, thickness and width. In particular, production of non-standard products is likely to require more production capacity than the production of standard products.

(58) The maximum sustainable level of nameplate capacity utilisation may hence be lower than [90-100]\*% when such product mix considerations are taken into account. This is explored in the scenarios reported in Table 4 below. The table below the results of reduction the maximum sustainable rate of capacity utilisation from [90-100]\*% to [90-100]\*% in the calibration in Table 3 above (using a demand elasticity of -0.5 and an import coefficient of [...]\*).

**Table 4: Results with maximum capacity utilisation of [90-100]\*%**

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)
upper end	[...]*	[...]*	[...]*	[10-20]*%	14.3%
mid-point	[...]*	[...]*	[...]*	[10-20]*%	10.9%
lower end	[...]*	[...]*	[...]*	[5-10]*%	7.1%

(59) The upper end of the pre-merger price range is now at [...]\*, i.e. the predicted pre-merger price range includes the observed pre-merger price of 1. The shift in the range after synergies is 7.1% at the lower end, 10.9% at the mid-point and 14.3% at the upper end.

## 3) Effect of higher marginal costs

(60) In their response to the SO, the Parties have argued that one would need to increase marginal costs to [...]\* for the upper bound of the predicted pre-merger range to be at the observed pre-merger price (normalised to 1).<sup>804</sup> This claim was based on the SO's initial calibration using public data and the Parties' estimates.

(61) The tables below report results when the level of marginal cost is increased from [...]\* to [...]\* and to [...]\* respectively in the initial calibration scenarios using actual data.

<sup>804</sup> Annex 10 to the Parties' response to the SO "Response to the Commission's Economic Model, Compass Lexecon, August 22, 2012", ID10001.

**Table 5. Result of initial scenario with actual data and marginal costs of [...]\***

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)
upper end	[...]*	[...]*	[...]*	[10-20]*%	10.4%
mid-point	[...]*	[...]*	[...]*	[5-10]*%	7.2%
lower end	[...]*	[...]*	[...]*	[5-10]*%	3.7%

- (62) When marginal costs are increased to [...] in the initial scenario with actual data the upper bound of the pre-merger price range just exceeds the pre-merger price. Furthermore, the model continues to predict a substantial shift in the price range post-merger by 3.7% at the lower bound, 7.2% at the mid-point and 10.4% at the upper bound (after synergies).<sup>805</sup>

**Table 6. Result of initial scenario with actual data and marginal costs of [...]\***

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)
upper end	[...]*	[...]*	[...]*	[10-20]*%	10.1%
mid-point	[...]*	[...]*	[...]*	[5-10]*%	6.7%
lower end	[...]*	[...]*	[...]*	[5-10]*%	3.1%

- (63) When marginal costs are further increased to [...]\*, the mid-point of the pre-merger range is just above the observed pre-merger price. In other words, the observed pre-merger price now falls in the middle of the pre-merger range. The width of the predicted pre-merger range is relatively limited ranging from [...] to [...]\*. Again, the conclusions about the merger-induced shift in the price range remain robust with an increase of 3.1% at the lower end and 10.1% at the upper end (after synergies).
- (64) Therefore, an increase in marginal costs in the model calibrations brings the model's pre-merger predictions in line with the observed pre-merger price without changing the qualitative predictions about the merger induced change in market power. Moreover, the required increase in marginal costs to achieve this is less than suggested by the Parties response to the SO.<sup>806 807</sup>
- (65) The examination of the effect of higher marginal costs on the model predictions also responds to another point raised by the Parties in their response to the SO. The Parties have argued that the Commission's model ignores the "shut down"

<sup>805</sup> The Commission notes that even in the scenarios presented by the Parties' at Annex 10 to their response to the SO (ID10001, Table 1) the predicted shift in the price range remains substantial (more than [5-10]\*% at the mid-point of the range).

<sup>806</sup> The Commission notes that the scenarios which increased marginal costs use a demand elasticity of -0.75 and an import coefficient of [...]\*, i.e. the same values as in the initial scenarios. If actual values for these coefficients are lower, the marginal cost increase required to bring the models predictions in line with the pre-merger situation would be lower.

<sup>807</sup> The Commission notes that the pre-merger price ranges in Table 5 and Table 6 above are relatively narrow and appear to be consistent with some observed price dispersion that is not explained by observable factors as indicated in the Parties' submission "Analysis of Outokumpu Pricing, Compass Lexecon, June 4, 2012," ID4752)

constraint. According to the Parties, if market prices are lower than the current price (as predicted by the Commission's initial scenarios) firms would likely find it more profitable to shut down because this would allow them to save avoidable fixed costs.<sup>808</sup>

- (66) The Commission acknowledges that the model does not model shut down decisions by firms in the market. As explained above, any economic model relies on certain simplifying assumptions and the Commission does not consider that an extensive model of a shut down constraint would be required to for its assessment of whether the Parties' arguments are likely to be sufficient to dispel adverse non-coordinated competition concerns.
- (67) Shut down decisions by firms imply that firms will only set prices which allow them to cover their average total avoidable costs or, if such prices cannot be achieved, shut down their operations. While an increase in marginal costs in the model calibration does not amount to a full modelling of such behaviour, the Commission considers that the qualitative effect of a full model that includes shut down decisions is likely to be very similar to the model calibrations above which assume short run marginal costs that are higher than estimated by the Parties.
- (68) The results above therefore suggest that a modelling of shut down constraints is also unlikely to affect the models prediction that a consolidation of capacity should be expected to lead to a significant increase in market power even when rivals have substantial excess capacity.
- 4.2.2.2. Changes in parameters that approximate softer competition between EEA producers as implied by a standard Bertrand-Edgeworth model.
- (69) The second set of reasons why the model may over-predict the level of pre-merger competition is that firms may not compete as aggressively as the assumption of price competition in homogeneous products implies.
- (70) As discussed in Section 5.5.4.3 of the Decision there are many reasons why this might be the case including, for example, the presence of small search or switching costs for customers, customer multi-sourcing strategies, a small degree of geographic differentiation, or small costs of changing product mix for suppliers. Such factors will (individually or jointly) generate small frictions in the competitive process that will imply less customer switching and less aggressive behaviour than implied by the model's assumptions. Moreover, firms may also not compete as aggressively as suggested by the model if, for example, pricing decisions are based on average variable costs (or contribution margins) instead of marginal costs (which the Parties have estimated specifically in the context of the present transaction).
- (71) To account for such factors it is common practice in model calibrations to introduce a behavioural parameter that reconciles the model's predictions pre-merger with the

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<sup>808</sup> The Commission notes that the Parties' "wise men" report considers the Parties' arguments about the shut-down constraint to be a "relatively unconvincing claim" as the wise men's understanding is "that firms in the industry have been operating loss-making capacity for some time".

observed pricing behaviour.<sup>809</sup> In the context of a Bertrand-Edgeworth model, the effect of softer competition pre-merger than what is implied by the initial model scenarios can be approximated by the following changes in parameters:

- (72) First, a reduction in the available level or capacity (via a reduction in the maximum sustainable utilisation rate) can proxy the effect that undercutting rivals on price leads to a less extreme shift in demand to the lowest price firm. This is because, for the firm's incentives to undercut, reducing the firm's available spare capacity and hence reducing the firm's ability to serve additional demand is equivalent to assuming that a price reduction will lead to a more limited shift in demand from customers.
  - (73) Second, an increase in marginal costs in the model may proxy costs of changing product mix or may otherwise capture that firms pricing decisions may be based on higher costs than the marginal costs estimated by the Parties. As discussed above, an increase in marginal costs can also approximate shut down considerations.
  - (74) A variation of these calibration parameters "softens" competition between firms in the model and can therefore proxy the effects of less intense competition between EEA competitors as the modelling assumptions would otherwise suggest. The effects of reducing the maximum sustainable utilisation rate and increasing the level or relevant costs have already been discussed above.<sup>810</sup>
  - (75) The results in Table 4 to Table 6 above show that changes in such behavioural parameters bring the model's predictions in line with the observed level of pre-merger competition.
  - (76) Crucially, the model's predictions about the order of magnitude of the effect on market power remain unaffected by the existence of "softer" price competition as implied by the initial calibration scenarios. In each case, the conclusion remains that the model predicts substantial increases in market power resulting from the transaction as reflected by the shift in the predicted price range (even after synergies).
- 4.2.2.3. Conclusion: the models' prediction about substantial increases in market power are robust to variations in parameters that make the model's pre-merger predictions more realistic
- (77) In light of the analysis of these variations to the initial model calibrations, the Commission concludes that the model's prediction that a transaction of this type is likely to lead to a substantial increase in market power are robust to changes in the calibration parameters which make the model's pre-merger predictions more realistic. There is therefore no indication that the Parties' arguments are jointly

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<sup>809</sup> For example, there is a class of models that use a "conjectural variation" parameter to adjust the model predictions to the observed behaviour.

<sup>810</sup> A third possibility to proxy less intense competition is to increase in market demand. Such an increase in demand would be qualitatively very similar to a reduction in available capacity. It is therefore not investigated further here.

sufficient to dispel concerns about significant anticompetitive effects, even in the presence of "soft" competition.

#### 4.2.3. Sensitivity analyses

##### 1) Accounting for no overlap with respect to BA products

(78) According to the Parties, there is no overlap between Outokumpu and Inoxum in the production or sale of bright annealed products [...]\*.

(79) The simplest approach is to calibrate the model based on sales of non-BA products only. This assumes that, as exports, BA sales will remain unchanged following the transaction. The calibration results below use actual sales of non-BA products, a demand elasticity of [...]\* and an import coefficient of [...]\* which has been scaled up to reflect the higher import share of non-BA products. The maximum level of capacity utilisation used is [90-100]\*%.

**Table 7: Results for non-BA under simple exclusion of BA sales from EEA sales**

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)
upper end	[...]*	[...]*	[...]*	[10-20]*%	17.6%
mid-point	[...]*	[...]*	[...]*	[10-20]*%	13.4%
lower end	[...]*	[...]*	[...]*	[5-10]*%	8.8%

(80) The results from the simple approach of limiting the analysis to non-BA sales of the EEA producers are two-fold. First, the upper end of the pre-merger range drops to [...]\* which is below the pre-merger price. Second, the qualitative result that the merger leads to a substantial shift in the price range remains unchanged. In percentage terms, the increase in the price range is higher with 8.8% (after synergies) at the lower end of the range if only non-BA products are considered.

(81) The under-prediction of the pre-merger price in this calibration is due to the fact that a simple exclusion of BA sales from the model implies that available capacity increases relative to the reduced demand of non-BA products. However, this simple adjustment also implies that there is little room for strategic behaviour in BA products in the EEA between the three BA suppliers (Inoxum, Aperam and Acerinox). With only three players, this seems unlikely.

(82) To approximate the likely effect of strategic behaviour on BA between the BA suppliers within the model, the calibration below assumes that these firm's available capacity for CR sales in the EEA is allocated between non-BA and BA products in proportion to their sales of non-BA and BA. As BA accounts for [20-30]\*% of Inoxum's CR sales, it is assumed that only [70-80]\*% of Inoxum's available capacity is relevant for competition in non-BA products. A corresponding modification to available capacity is implemented for Aperam and Acerinox:

**Table 8: Results for non-BA with proportional adjustment of available capacity**

Parties' price range	Predicted price range			Changes in the price range	
	Pre-merger (1)	Post-merger (2)	After synergies (3)	Post-merger (4)	After synergies (5)

upper end	[...]*	[...]*	[...]*	[10-20]*%	18.1%
mid-point	[...]*	[...]*	[...]*	[10-20]*%	14.1%
lower end	[...]*	[...]*	[...]*	[10-20]*%	9.7%

(83) With this assumption, the upper end of the range increases to [...]\* which is only [0-5]\*% below the pre-merger price. The merger effect on the predicted price range remains very similar with a 9.7% increase even at the lower end of the range.

(84) Finally, the Commission has examined the effect of reducing the maximum utilisation rate in the two non-BA calibrations above. As explained above, this proxy for softer price competition than predicted by the initial calibration. With the proportional adjustment of available capacity (the second non-BA scenario above) a reduction of the maximum utilisation rate to [90-100]\*% increases the average upper bound of the range across the parties to 0.995 (Inoxums' upper bound is at 1). With the simple exclusion of BA sales (the first non-BA scenario above), the maximum utilisation rate needs to be reduced to [...]\* for the range to include 1. As reported in Attachment 3 to this Annex neither of these scenarios changes the prediction of substantial upward shifts in the price range.

## 2) Changes in market conditions unrelated to the merger

(85) While the above calibrations have focused on the pre-merger situation as a benchmark, the Parties have argued that the analysis should use the likely market situation absent the merger in future years as the relevant benchmark. In particular, the Parties have argued that POSCO's investment in a [...]\*kt cold rolling plant in Turkey should be considered. Moreover, the Parties have argued that in response to the transaction, Aperam and Acerinox might take measures to become more efficient.

(86) The Commission has analysed the POSCO investment with the Bertrand-Edgeworth model in two ways: First, it has assumed that POSCO would supply Turkish demand so that the effect in the EEA would be that EEA producers will no longer export to Turkey and that the capacity used for such exports would become available for sales in the EEA. Second, the Commission has assumed that the relevant market for the assessment includes Turkey. In this scenario demand was increased (conservatively) by [...]\*kt and the capacity of the 5th competitor was increased by [...]\*kt, thereby treating POSCO jointly with re-rollers as a fifth competitor in this market. There is no indication that transaction would not lead to a substantial increase in market power in either of these scenarios.

(87) The Commission also notes that SMR predicts that total industry capacity would reduce over the coming years even including POSCO's investment. Moreover, demand is expected to grow. Both of the POSCO scenarios above therefore likely overstate the competitive constraint on the merged entity over the coming years.

(88) Second the Commission has also run calibrations assuming that Aperam and Acerinox would benefit from the same marginal cost reduction as the merged entity post-merger. This does also not affect the qualitative shift in the price range.

(89) Therefore, neither of the Notifying Party's arguments about factors that should be included in the assessment affect the qualitative results.

3) Further sensitivity analyses

- (90) The qualitative results from the model (in particular a significant shift in the price range) is very robust to additional sensitivity checks including: the shape of the demand function, the overall elasticity of demand, an increase of maximum utilisation rate to 100%, and the assumption that mothballed capacity was active. Results from such analyses are reported in Attachment 2 to this Annex. As explained in section 5 a review of the Parties' modifications to the model further confirm to robustness of the results to reasonable changes in assumptions and calibration parameters.

**4.3. Remark: an internally consistent analysis within the model shows that the competitive constraints on the merged entity from its rivals are not sufficient to prevent post-merger price increases**

- (91) As the model takes account of competitive reactions from rivals, the model's predictions of price increases also imply that competitive reactions from rivals (within the model) are not sufficient to make post-merger price increases unprofitable. This result is based on an internally consistent comparison of rivals' incentives pre- and post-merger. Moreover, the result is robust to changes in parameters that make the models' pre-merger price predictions more realistic.
- (92) In contrast, the Parties' arguments on rival reactions (in the Parties' submissions including in the economic studies discussed in detail in Annex II ignores that their argument implies that the Parties' competitors should already reduce price and increase output pre-merger. The Commission therefore considers such arguments internally inconsistent and uninformative about actual reactions by rivals. Any approach which is used to derive reactions of rivals must be based on a consistent comparison of pre- and post-merger incentives. In contrast to the Commission's model, the Parties' approach fails to do so.

**4.4. Conclusion: the model provides no indication that a transaction of this type would not lead to substantial increases in market power**

- (93) The Bertrand-Edgeworth model approximates important industry features and can be used to assesses the Parties' main arguments in their most competitive interpretation. As any economic model, the Bertrand-Edgeworth model relies on a number of simplifying assumptions and hence it may not reflect every aspect of reality. However, the qualitative predictions of the model are very robust, in particular to changes which make the model's predictions in terms of pre-merger outcomes more realistic.
- (94) Overall, the results from the model provide no indication that the Parties' arguments against anti-competitive effects would be sufficient – even when they are considered jointly and including a full balancing exercise of marginal costs synergies arising from the transaction – to refute the Commission's conclusion that the transaction is likely to lead to a significant impediment to effective competition by means of the creation of a dominant position.

**5. THE PARTIES' CRITIQUE DOES NOT UNDERMINE THE ROBUSTNESS AND RELIABILITY OF THE CONCLUSIONS FROM THE MODEL**

- (95) Prior to the SO the Parties submitted an economic paper which commented on the Bertrand-Edgeworth model and the calibrations presented in the Issues Paper.<sup>811</sup> The Parties' response to the SO contained two further economic papers at Annex 10 and Annex 11.<sup>812</sup>
- (96) Moreover, the Parties' have commissioned an expert report from three academic economists (Professor Bruce Lyons, Professor Patrick Rey and Professor Paul Seabright (the "Wise Men Report")<sup>813</sup>. According to the Parties, these economists were provided with the section on the model contained in the Issues Paper dated 21 June 2012, the Parties' submission prior to the SO dated 11 July 2012, the Commission's revised model in the SO (in particular Annexe A to the SO with accompanying Annexes containing tables of full results), and Annex 10 and Annex 11 of the Parties' response to the SO.
- (97) The Parties' submissions contain various points of critique of the Commission's model. One of these points is the argument that the model, when calibrated correctly, shows less indication of price increases than suggested by the Commission.
- (98) However, the changes in assumptions of the model which the Parties have to apply to obtain a result of a small shift or no shift in the predicted price range in the model are rather extreme. In the Commission's view, this demonstrates the remarkable robustness of the model's prediction on market power effects to parameter changes and further underlines that a transaction that leads to a dramatic consolidation of capacity should be expected to lead to significant anticompetitive effects, even when there is substantial excess capacity at the industry level.
- (99) In the following, the Commission briefly discusses its response to the main points of critique raised in the Parties' submissions. Points on which the Commission's position has already been explained in the foregoing will only be repeated very briefly.

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<sup>811</sup> "Response to the CET's Merger Simulation Model, Compass Lexecon, July 11, 2012", ID9141

<sup>812</sup> "Response to the Commission's Economic Model, Compass Lexecon, August 22, 2012" at Annex 10 of the Parties' response to the SO (ID10001); and "Fundamental Economic Problems with the CET BE Model, Jerry Hausman, MIT, August 22, 2012" at Annex 11 of the Parties' response to the SO, ID10002.

<sup>813</sup> "Independent Expert Opinion by Professors Lyons, Rey and Seabright on Economic Modeling in Case M 6471 (as of 23<sup>rd</sup> August 2012)." ID10109.

**1) The Parties alternative assumptions which are required to generate small or no increase in market power within the model are extreme and unreasonable.**

- (100) According to the Parties, once the Commission's model has been calibrated correctly, the Commission's economic model shows less indication of price increases than suggested by the Commission.<sup>814</sup>
- (101) In the SO, the Commission identified the Parties change in the assumption of how exports are treated as a key driver of this claim. As in Attachment 2 to the Annex, the Commission simplifying assumption that export activities will continue at the present level is supported by the observed empirical facts on exports.
- (102) The alternative proposed by the Parties is to assume that all capacity is used to produce for domestic sales first, i.e. that domestic sales are always given preference over exports. The SO showed that without this alternative assumption, none of the alternative scenarios presented by the Parties pre-SO generated small shifts in the predicted price range. The Commission also explained that it considers the Parties' alternative assumption on the treatment of exports to be unrealistic and implausible.
- (103) The Parties' response to the SO argues that the empirical evidence on exports is irrelevant and that the Commission's argument that it is implausible that the producers would forego profitable export sales in favour of less profitable EEA sales ignores that margins on EEA sales are on the order of [20-30]\*%. The Parties also argue that the Commission should have modelled opportunity costs of exports explicitly.
- (104) The Commission maintains its view in the SO that the Parties' alternative assumption is highly implausible. The Commission does not consider that the empirical evidence on export behaviour pre-merger to be irrelevant.
- (105) Moreover, the Parties' response that margins are around [20-30]\*% pre-merger misinterprets the Commission's critique in this respect. The Commission's critique is that the Parties' results demonstrate that a reduction at the lower bound of the post-merger price range, which the Parties point to as evidence of "ambiguous effects", only occurs when the lower bound is very close to marginal costs. To obtain the effect on which the Parties' base their claim, one has to assume that firms use all of their capacity for sales very close to marginal costs, i.e. that firms divert profitable export sales towards EEA sales with very little margin. This is highly implausible.
- (106) Regarding the point that the Commission should have fully modelled export behaviour, the Commission notes that its export assumption (although a simplifying assumption) appears justified by the observed empirical stability of exports.
- (107) The Wise Men Report also notes that its authors are "unconvinced" by the Parties' criticism and, moreover, that they are "not convinced that the parties' alternative

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<sup>814</sup> Response to the SO, Annex 10, ID10001, Section 2.4

hypothesis, unsupported as it is by empirical evidence, is in any way to be preferred to that of the Commission".

- (108) The Commission therefore maintains its view that the Parties export assumption is unrealistic and implausible.
- (109) Regarding the impact of this assumption on the Parties' results presented in Table 5 of Annex 10 of the response to the SO, the Commission notes that without the Parties' alternative assumption on export behaviour, the Parties "recalibrated scenario" (column 2) predicts again significant price increases even at the lower bound of the range. Without the alternative assumption on exports, the two scenarios with higher marginal costs (columns 3 and 4) continue to predict a small reduction at the lower bound of the range but also predict a substantial increase in the upper bound of the range.
- (110) The Commission considers these scenarios remain extreme (even under the Commission treatment of exports) for the following reasons. First, the Parties' focus on non-BA sales leaves no room for strategic interaction on BA sales which is implausible because there are only three BA suppliers. Second, the Commission does not consider it plausible that mothballed capacity and in particular capacity under long term suspension would be reactivated quickly. Third, the maximum sustainable capacity utilisation is likely no more than [90-100]\*%.
- (111) Moreover, the scenarios in Annex 10 of the response to the SO use the Parties' data and estimates rather the data from all market participants, including the Parties' main competitors. The Parties appear to agree in principle that the use of actual data would be preferable but claim that it is unlikely to affect their results.<sup>815</sup>
- (112) The Commission has run a scenario using actual data. This scenario assumes that mothballed capacity (although not suspended capacity) would be reactivated and that marginal costs would be at [...]\*. The scenario also uses the Commission's export assumption. On other aspects it follows the Parties assumptions used for the results in Table 5 of Annex 10 of the response to the SO. This scenario generates a pre-merger price range of [...]\* to [...] and predicts a merger induced shift of the price range (after synergies) of 1% at the lower bound and 9% at the upper bound.
- (113) The Commission does not consider this scenario to be reasonable for the reasons discussed above. However, the scenario indicates that even when the Parties' extreme assumptions are followed to a very large extent, the model still predicts a clear shift in the price range.
- (114) The Commission concludes that the changes in the assumptions which the Parties have to apply to obtain a result of small or no increase in market power in the model are extreme and unreasonable, in particular the parties alternative assumption on

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<sup>815</sup> The Parties' study (ID10001) notes in passing that its authors "have not had full access" to the actual data which included third party confidential information. The Commission notes that the Parties' were informed that their advisors could access this data via the Commission's standard data room procedure. The Commission had prepared such a data room. However, the Parties chose not to request access to the data room.

exports but also their view on reactivation of suspended capacity. Removing only these most extreme assumptions but maintaining other alternative assumptions which the Commission considers unreasonable and using actual data from market participants leads the model to predict significant increases in market power as the result of the transaction.

**2) The limited empirical evidence on Quarto Plate is not inconsistent with substantial price increases following TKS' exit as predicted by the model**

(115) The Parties' have calibrated a version of the Bertrand-Edgeworth model to TKS' exit of the production and sale of Quarto Plate in 2003. Under the Parties baseline calibration, the consolidation in QP should have lead to an increase in the price range by 3% at the lower end, 15% at the upper end and 9% at the mid-point of the range.<sup>816</sup> According to the Parties, the results suggests that the model may significantly overstate the effect of consolidation on prices and margins and may even produce false positives, because the Parties' empirical study on QP found no evidence of a margin increase after 2003.

(116) As discussed in detail in Annex III, the Commission's assessment of the Parties empirical study on QP cannot be regarded as informative on the effect of the consolidation in early 2003 on QP margins. In particular, the Parties' empirical analysis does not control for external variation in relevant factors that would be required for a reliable empirical counterfactual analysis. Moreover, a simple analysis of relative prices of QP by the Commission indicates that QP prices increases shortly after the QP consolidation in early 2003, consistent with substantial price effects as a result of the transaction.<sup>817</sup>

(117) The Commission therefore concludes that the available empirical evidence on QP is not inconsistent with the model's predictions from the Parties' calibrations for QP. There is therefore no indication that the model would lead to the wrong qualitative conclusions about the order of magnitude of the increase in market power resulting from consolidation; nor is there any evidence that the model might provide false positives.

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<sup>816</sup> "Response to the CET's Merger Simulation Model, Compass Lexecon, July 11, 2012", ID9141, p.7 and Table 2.

<sup>817</sup> The Commission notes that the Parties' "Wise Men Report" (ID10109) also comments on the predictions of the model for the QP consolidation. However, these comments do not relate to the core issue of disagreement between the Parties and the Commission in relation to the evidence on QP which is the question of whether the *empirical* evidence allows conclusions about the effect of the QP transaction on the QP market.

As discussed in Annex III, the Commission's assessment of the Parties' empirical evidence on QP is that it is uninformative about the effect of the consolidation of QP in 2003 on the market for QP and that simple alternative analyses of relative prices suggest the opposite conclusion to the one reached by the Parties.

The "Wise Men" have not been provided with the Parties' empirical study of QP or with the Commission's Annex VI of the SO which assesses the Parties' empirical evidence on QP. Moreover, the "Wise Men" have been asked to assess the Commission's Bertrand-Edgeworth model not the Parties' empirical study on QP. As a consequence, the "Wise Men" do not comment on the merits of the empirical evidence QP (and were not put in a position where they could do so).

- (118) Moreover, the Commission does not accept the Parties' argument that the Commission should have provided affirmative case study evidence of a transaction that occurred more than nine years ago in a different market in order to test the efficacy of its model.<sup>818</sup> The primary role of the model is to analyse whether there is any indication that a substantial consolidation of capacities, even in the presence of substantial excess capacity, should not be expected to lead to substantial increases in market power and hence price effects under reasonable assumptions on the level of spare capacity. The Commission concludes that this is not the case.
- (119) The Parties' Wise Men Report seems to agree that this conclusion is reasonable and valid under many detailed specifications of the model. Moreover, the Wise Men Reports argues that the same conclusion would follow from other models of price competition under capacity constraints.
- 3) The pre-merger industry situation is consistent with non-coordinated competition; the Parties' argument that the industry is characterised by dynamic interaction contradicts their earlier arguments in the Form CO.**
- (120) The Parties argue that since the initial calibrations of the Commission's model under-predict the pre-merger price, the industry is characterised by different competitive process, namely dynamic interaction. Pointing to the theoretical literature of coordinated effects, they argue that by increasing the asymmetry between producers, the transaction would make post-merger coordinated effects less likely.
- (121) First, the Commission notes that the Parties' recent argument that the market is characterised by dynamic interaction implies coordinated behaviour pre-merger. This argument is in clear contradiction to the Parties' arguments in the Form CO that none of the criteria for coordination are satisfied.
- (122) Second, the Commission does not regard the fact that the pre-merger price is somewhat above the predicted price range of the initial calibrations of the model as an indication of pre-merger coordination. As discussed, there are many reasons which would imply that the level of non-coordinated competition is less intense as suggested by the initial calibrations of the model (which examines the implications of the Parties' arguments against non-coordinated effects in their most competitive interpretation). The Commission's calibrations above which make adjustments to parameter values that can proxy for the effect of "softer" non-coordinated competition predict pre-merger behaviour that is in line with observed prices.
- (123) As discussed in Section 5.5.5 of the Decision, the Commission considers the pre-merger situation to be consistent with non-coordinated competition. Moreover, the Commission's theory of harm is exclusively based on non-coordinated effects. Therefore, the Parties' arguments about a decreased likelihood of post-merger coordination is irrelevant for the Commission's assessment.

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<sup>818</sup> The Commission has not conducted such a detailed analysis and has not verified the accuracy of the Parties' calibrations of the Bertrand-Edgeworth model to the consolidation in QP in 2003.

**4) The model's results are robust to the adjustments which bring the model's predictions in line with observed outcomes; the criticism that the model fails to explain market outcome is hence over-stated and does not affect the conclusions.**

- (124) In various submissions, the Parties' have criticised the model for under-predicting the market price (and as a consequence margins and the share of imports). The Parties also argue that this biases results. The Parties further claim that there is no basis for the Commission to vary the elasticity of demand and the import coefficient to improve the fit of the model or to use of the capacity as a behavioural adjustment. The Parties further argue that the model under-predicts the Parties' utilisation rates and fails to consider fixed costs and a shut down constraint. Finally the Parties' Wise Men Report also sees the model's tendency to under-predict the pre-merger market price as a key weakness of the model.
- (125) The Commission has explained above why it considers its approach to be appropriate, including the variation of parameters within reasonable ranges of their estimates as well as the use capacity or marginal costs as behavioural parameters. The Commission has also explained that the effects of such fixed costs or shut down considerations can be approximated by increases in the marginal costs used in the calibrations.<sup>819</sup>
- (126) Regarding the points raised in the Wise Men Report<sup>820</sup>, the Commission notes that the report acknowledges that there may be features which would lead to soft non-coordinated price competition in the market (e.g. on-going contracts).<sup>821</sup> Moreover, while the Wise Men also mention coordination as a theoretical possibility, they do not take a view on the likelihood of the existence of pre-merger coordination.
- (127) For the reasons discussed above, the Commission considers the adjustments to the calibrations which bring the model's pre-merger predictions in line with observed outcomes to be reasonable to assess whether the model's tendency to under-predict pre-merger prices is likely to bias results. As reasonable variations in parameter values which generated more realistic price predictions do not change the qualitative predictions from the model about the effects on market power, any potential biases are highly unlikely to affect the conclusions (within the stated context of the model) that there is no indication that the Parties' arguments would be jointly sufficient to dispel the Commission's concern about significant anti-competitive effects arising from the transactions.

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<sup>819</sup> As noted above, the Commission further notes, that the model focuses on the range of rationalisable prices and does not make specific predictions about output (and hence utilisation). Moreover, the analysis of utilisation rates in Annex 11 of the Parties response to the SO is mainly based on evaluations at the upper or lower bound rather than at points where all firms set the same price. This selective approach biases the Parties' analysis towards lower utilisation rates for the Parties.

<sup>820</sup> ID10109.

<sup>821</sup> Regarding the Wise Men's comments (ID10109) on under-prediction of utilisation rates, the Commission notes that the model does not make direct predictions about utilisation rates and that the Parties' argument of such under-predictions is due to an arbitrary choice by the Parties to evaluate utilisation at the upper bound rather than, e.g., at symmetric price outcomes.

**5) Technical points that the model only predicts a range of prices and about alternative rationing assumptions cannot undermine the model's general insights or its use as a stress test of the Parties' arguments against non-coordinated effects**

- (128) The Parties argue that the fact that Commission's model only predicts price ranges rather than a specific equilibrium pricing strategy and the fact that the predicted pre- and post-merger price ranges overlap makes it difficult to assess price effects with the model. The Parties' have also suggested that the models' results are sensitive to alternative rationing assumptions.
- (129) The Commission's view on both points is discussed above. Regarding the choice of rationing assumption, the Commission has noted above that it considers that alternative less plausible and less suited to analyse merger effects because it implies that the upper bound always includes the monopoly price for at least one firm already pre-merger. The Wise Men Report also notes that its authors are "not convinced that [the Parties arguments about the Commission's rationing assumption] is an important objection to the Commission's model".<sup>822</sup>
- (130) Regarding the prediction of a price range, the Commission considers that the shift in the entire price range provides a reasonable measure of the change in market power. Moreover, the Commission notes that the overlap in the ranges pre- and post-merger is limited. The Wise Men Report also notes that "as conceptual tool, in the absence of a pure strategy equilibrium [an analysis of the] properties of the price distribution can provide useful predictions about the impact of a structural change such as a merger." Moreover, the report notes that "the determination of a price range is likely to be the best that can be achieved in such a case".<sup>823</sup> This supports the Commission's use of the shift in the price range as an indicator of the change in market power.
- (131) The Commission therefore concludes that Parties' critique of technical properties of the model is of minor importance. This critique cannot undermine the use of the model to generate general insights.

**6. OVERALL CONCLUSIONS**

On the basis of the analysis above, the Commissions considers that there is no indication that the proposed merger would not give rise market power and hence to significantly anticompetitive effects. This analysis shows that the Parties' arguments, even when they are considered jointly in their most competitive interpretation and even when they are adapted to fit better the pre-merger situation, are not sufficient to dispel the Commission's finding that the merger is likely to lead to significant anticompetitive effects by the creation of a dominant position.

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<sup>822</sup> ID10109, para 19.

<sup>823</sup> ID10109, para 5.

**ATTACHMENT 1 TO ANNEX IV: CONFIDENCE INTERVALS OF PARTIES' ESTIMATES FOR THE PRICE GAP COEFFICIENTS IN THEIR IMPORT SHARE EQUATION**

- (1) The following table lists the Parties' econometric estimates for the increase in the import share in response to a change in the (lagged) deflated price gap between Europe and Asia. The table reproduces the point estimates for the price gap coefficient and the associated standard errors from the Parties' tables.

Table IV.1.1. Price gap coefficients from the Parties' regressions of the import share equation

Date of Submission		Price gap variable	Grade family	Price gap coefficient		95% Confidence interval	
				estimate	std.err.	lower end	upper end
08/12/2011 (ID1138)	p4	L.Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p14	L.Dcrpgap	CR FE	[...]*	[...]*	[...]*	[...]*
08/02/2012 (ID217)	p8	L.DCRPGAP	CR AU	[...]*	[...]*	[...]*	[...]*
	p21	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p21	L.Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p23	L.Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p23	L.Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p24	L.Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
19/03/2012 (ID1136)	p4	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p5	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
27/04/2012 (ID3384)	p2	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p3	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p5	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p6	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p7	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
	p9	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
02/06/2012 (ID4754)	p8	Dcrpgap	CR AU	[...]*	[...]*	[...]*	[...]*
						Max lower	Min upper
	Min			[...]*		[...]*	[...]*
	Max			[...]*			

- (2) Over the 18 estimates the point estimates in varied between [...]\* and [...]\*. The table also give approximate 95% confidence intervals around the coefficient estimates. The confidence interval for the first coefficient estimate is the confidence interval reported by EViews, the software package used for the Parties' estimations. The confidence interval in this regression is given by +/- 1.9886 times the standard error of the estimate. The confidence intervals around the point estimates from the

other regressions are approximated by applying this factor – i.e. the lower end of each confidence interval is -1.9886 standard errors below the point estimate, while the upper end is 1.9886 standard errors above the point estimate.

- (3) The table does not consider the Parties' joint GMM estimation of his two equations. As the Commission does not accept the Parties' second equation, it does not regard the confidence interval around coefficient estimates from a joint estimation to be informative. The Commission does not agree with the Parties' response that even if the Commission does not accept the second equation, it should still consider the confidence interval from the GMM estimation.
- (4) Moreover, while the Commission has taken the point estimates from the Parties' import share equation at face value in its analysis, it does not accept Parties' argument that it is more appropriate to use the contemporaneous price gap rather than the lagged price gap in the regression because "[...]" (submission dated 19 March 2012, ID1136, p.1). The price of imports is determined at the time of order, which is typically [...] before delivery. This indicates that the more relevant explanatory variable for analysing the responsiveness of imports is the lagged price gap used in the Parties' earlier regressions rather than the contemporaneous price gap. The Parties' response that the contemporaneous price gap is the better empirical predictor, does not respond to the point that the contemporaneous price gap was not known at the time of order because of delivery lags of several months.
- (5) However, the Commission notes that the analysis in the Decision is either based on the Parties' point estimate for the current price gap, or on a lower value which is nevertheless within the statistical confidence interval of the various estimates for the current price gap in the table above.
- (6) Across the 18 estimates, the maximum of the lower end of the confidence intervals is [...]. The minimum of the upper end is [...]. Therefore, a price gap coefficient in the approximate range [...] to [...] is consistent with each of the 18 different regression specifications. Values for the effect of the price gap on the import share outside this range would be rejected by at least one of the Parties' regression specifications.

## ATTACHMENT 2 TO ANNEX IV: EVIDENCE ON THE EMPIRICAL STABILITY OF EXPORTS

- (1) The Commission's calibrations of the Bertrand-Edgeworth model assume that capacity which is currently used for CR production that is not sold in the EEA is not available for CR production for sale in the EEA. In other words, it is assumed that exports will continue at the current level.
- (2) While a simplifying assumption, this treatment of exports is supported by the empirical observation that exports have remained relatively stable over time, and do not appear to be responsive to fluctuations in the EEA price compared to prices in other regions of the world.
- (3) The figure below plots the evolution of CR exports expressed as a share of 2011 EEA capacity on an annual basis.<sup>824</sup> It also plots the average deflated price gap between the EEA and Asia for all CR and the share of CR imports from Asia in EEA consumption. The figure illustrates that exports have declined 2005 and 2009 and have since recovered somewhat. In particular, between 2007 and 2009, exports have accounted for between [10-20]\*% and [10-20]\*% of current EEA capacity despite a substantial decrease of prices in the EEA relative to Asia. In 2010, exports were [10-20]\*% of EEA CR capacity.

Figure IV.2.1: [...]\*

[...]\*

- (4) The conclusion that exports are unresponsive to changes in relative prices is further supported by simple correlation analyses of monthly data on export flows and prices of austenitic CR. The Commission has examined correlations between (i) the price gap to Asia and exports to China, HK and Taiwan; (ii) the price gap to Japan and exports to Japan; and (iii) the price gap to the US and exports to North America. The results indicate no significant correlation between exports and price differences. Raw and partial correlation coefficients (allowing for a linear trend) were very small (below [...]\* in absolute value) in the case of exports to China, HK and Taiwan and have the wrong (positive) sign in the case of exports to Japan and to North America.<sup>825</sup> In all cases, the correlation coefficients were insignificant.<sup>826</sup>

This indicates that export behaviour is not primarily driven by changes in the relative price between the EEA and export markets which supports the assumption that exports will remain stable at their pre-merger levels even post-merger.

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<sup>824</sup> This normalisation reflects the extent to which level of exports has fluctuated in recent years relative to current EEA capacity.

<sup>825</sup> The correlation coefficients were computed over the period [...]\*.

<sup>826</sup> In contrast, the Parties found raw correlations between the price gap and import flows of the right sign and on the order of [...]\* (Form CO, Annex 27, ID1056, p.10).

### ATTACHMENT 3 TO ANNEX IV: Detailed results from calibrations of the Bertrand Edgeworth model

- (1) This Annex contains full results from the Commission's main calibrations of the model referred to in Annex IV.
- (2) The tables below are organised in sets of two columns, where each set of two columns contains the results from one calibration of the model. The first set of rows for each calibration summarises the parameters used in the model calibration: the shape of the assumed market demand; the market elasticity at the pre-merger price; the import share pre-merger; the value of the normalised import coefficient which measures the increase in the import share (in percentage points) for a 1% increase in price;<sup>827</sup> the maximum sustainable utilisation rate; the level of marginal costs (as a fraction of the pre-merger price) and the synergies factor (corresponding to one minus the percentage reduction in marginal costs post-merger).
- (3) The next set of rows give, for each firm, the lower and the upper end of the range of rationalisable prices in the pre-merger situation ("Pre-merger price range"). OTK stands for Outokumpu, TKS for Innoxum, APM for Aperam, ACX for Acerinox, and RER for re-rollers which, as discussed are treated jointly as one fifth competitor in the model.
- (4) The rows headed "Post-merger price range" provide the range of rationalisable prices post-merger before synergies for each firm. The combined entity is labelled OTK. The rows headed "Post-merger range after synergies" give corresponding price ranges after synergies are accounted for in the model. Within each set of two columns, the left cell reports the lower end of the price range, while the right cell provides the upper end of the price.
- (5) The final two sets of rows measure the percentage change of the lower and the upper bound of the range. Average changes are calculated relative to the pre-merger situation for both the pre-merger situation before and after synergies. The table gives two separate calculations for the change in the price range. The first provides the change in the (simple) average lower (respectively upper) bound of the price range across all firms. The last set of rows reports the change in the range for the merging parties.
- (6) Table IV.3.1 reports the main results.

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<sup>827</sup>

The estimated coefficient for the effect of the price gap is normalised so that it expresses the percentage point change in the import share resulting from a 1 percentage point increase in the pre-merger EEA price. A price gap coefficient of [...] implies that a [...] percentage point increase in the EEA price results in an increase of the import share of [...] percentage points. At a price gap coefficient of [...], a 1 percentage point increase in the import price leads to an increase of the share of imports of [...] percentage points. This is computed as follows by multiplying the price gap coefficient by the [...] \* [...] and dividing the result by 100. [...] is the mean base price in USD reported by the Parties submission dated 19 December 2011, p.5). [...] is the ratio between the full price and the base price for 304 in 2011 from Table 4 of the Form CO. The division by [...] is done because the import share variable by the Parties was measured on a [...].

- (7) Calibration (1) is the calibration based on Eurofer sales data and estimated production values which was summarised Table 1 of Annex IV. The calibration uses the mid-point of the range for the elasticity of market demand (-0.75), and the point estimate for the import coefficient used in the issues paper of [...] which, after normalisation, implies that a [0-5]% increase in price increases the import share by [...] percentage points. The maximum utilisation rate is [90-100]%. Marginal costs are as estimated by the Parties. For OTK and TKS the values are as estimated (the value of [...] corresponds to the value for OTK). Marginal costs for the other firms are assumed to be [...]. Marginal costs synergies are also as estimated by the Parties. The "synergies factor" of [...] ensures that post-merger marginal costs are [...] (i.e. [0-5]% lower than the average pre-merger marginal costs of the parties).
- (8) As reported in Annex IV, the Parties' lower end of the range of rationalisable prices is [...] ([...] for OTK, [...] for TKS) while the upper end is [...] ([...] for OTK, [...] for TKS). The corresponding post-merger ranges are [...] to [...] before synergies and [...] to [...] after synergies. This corresponds to a [0-5]% increase in the lower end of the range after synergies and an increase of [10-20]% at the upper end of the range.
- (9) These results are discussed in more detail in Annex IV.
- (10) Calibration (2) ("Actual sales/production data") corresponds to the results reported in Table 2 of Annex IV. The calibration uses actual data on sales in the EEA plus Switzerland as well as on CR production in the EEA. The calibration also confidentially uses data on mothballed and suspended capacity obtained from third parties. All other calibrations below are also based on this actual data.
- (11) Calibration (3) ("Change in import coeff and elasticity") gives the results once the import coefficient has been reduced to [...] (normalised [...]) and the demand elasticity has been reduced to -0.5 which brings the pre-merger price range close to the observed pre-merger price of 1. This corresponds to Table 3 of Annex IV.
- (12) Calibration (4) ("Maximum utilisation of [90-100]% ") shows that the pre-merger price range includes the pre-merger price if the level of maximum capacity utilisation is reduced to [...]. This corresponds to Table 4 of Annex IV.
- (13) Calibration (5) ("Marginal cost at [...]") shows the results when marginal cost in calibration (2) is increased to [...]. This corresponds to Table 5 of Annex IV.
- (14) Calibration (6) ("Marginal cost at [...]") shows the results when marginal costs in calibration (2) is increased to [...]. This corresponds to Table 6 of Annex IV.
- (15) Table IV.3.2 below reports the results for non-BA products and the results under different Counterfactual.
- (16) Calibration (7) focuses on non-BA products by simply removing BA sales from the EEA sales, thereby treating BA sales in the same way as exports. This corresponds to Table 7 of Annex IV.
- (17) Calibration (8) applies a proportional adjustment of available capacity to proxy for the effect of strategic interaction between the three BA suppliers on BA sales for

which the simple adjustment in calibration (7) leaves no room. In this calibration the available capacity after exports of Inoxum, Aperam and Acerinox is adjusted by the proportion of non-BA sales in total sales. This corresponds to Table 8 of Annex IV.

- (18) Results from calibrations (9) and (10) are reported in the text of Annex IV. Calibration (9) reduces the maximum utilisation rate to [...]\*. In the simple non-BA adjustment (calibration 7). This increases the upper end of the price range to include one without materially changing the shift in the price range post-merger.
- (19) Similarly calibration (10) reduces the maximum utilisation rate of the scenario with a proportional BA adjustment (calibration 8) to [...]\*. Again the upper end of the range not includes 1 while results do not change materially.
- (20) Calibration (11) ("Turkey method 1") is based on Calibration (3) in Table A5.1 but assumes that exports to Turkey will cease so that the corresponding volume will be added to available capacity in for sales in the EEA plus Switzerland. The level of exports is taken from Eurofer figures. Eurofer reports [...]\* of exports for OTK, [...]\* for Inoxum and [...]\* across all EEA suppliers. The difference between [...]\* and the parties' exports is allocated to the other suppliers in proportion to their sales. The increase in available capacity compared to calibration (3) reduces the pre- and post-merger price ranges somewhat but leaves the shift in the price change practically unaffected.
- (21) Calibration (12) explores a second method to adjust for Posco's investment in Turkey. The scenario assumes that Turkey is part of a wider market. The Posco investment is accounted for by adding [...]\* of capacity to the reroller capacity to the model. Moreover, [...]\* are added to the demand in the wider market. Finally sales by EEA producers to Turkey (as given by Eurofer) are added to the available capacity in the wider market. Under this approach, the price ranges are further reduced somewhat compared to calibrations (11) and (3). The shift in the price range post-merger compared to pre-merger remains very similar.
- (22) Calibrations (13) and (14) correspond to calibrations (11) and (12) but only look at non-BA sales using the simple BA adjustment in calibration (7) as a starting point. For simplicity it is assumed that exports to Turkey are all non-BA. With both of these calibrations, the pre-merger ranges shifted down slightly. However, the percentage shift in the price range post-merger is higher. This is likely due to a change in the distribution of available capacity induced by the adjustments for Turkey. There is no indication that taking account of Posco's investment in Turkey would change the qualitative results.
- (23) Finally, calibration (15) is based on calibration (1) in Figures X but applies the marginal cost synergies to all firms in the market. (Due to practical constraints on how the numerical model had to be modified to accommodate this change no results before synergies are reported). Allowing for marginal costs improvements by other firms (rather than just the merged entity) does not affect the post-merger price range after synergies of calibration (1).
- (24) Table IV.3.3 below provides calibrations referred to under "further sensitivity analysis" in Annex IV. These are sensitivity scenarios around calibration (3) in

Table X which uses actual sales and production data of all cold rolled in the EEA and Switzerland, takes account of information from third parties regarding moth-balled capacity, uses a market elasticity of -0.5 and an import coefficient of [...] (normalised [...]).

- (25) The first set of columns reproduces calibration (3).
- (26) Calibration (3b) only accounts for the long-term suspension of Aperam's traditional CR lines at Isbergues and treats all other moth-balled lines as available.
- (27) Calibration (3c) uses nameplate capacity figures as a basis for available capacity (after adjustments for exports and subject to a maximum utilisation rate of [90-100]\*%).
- (28) Calibration (3d) is equivalent to calibration (3) but assumes that the market demand function is iso-elastic.
- (29) Calibration (3e) uses a linear demand function with elasticity of -1 and an import share coefficient corresponding to the point estimate used in the Issues Paper (which lies above the range generated by the intersection of [90-100]\*% confidence intervals).
- (30) Calibration (3f) increases the maximum capacity utilisation rate to [100]\*%.
- (31) None of these changes significantly affect the results from calibration (3). Even when demand is at the elastic end of the reasonable range and import reactions are measure by the point estimate of Professor Hausman submitted on 19 March 2012, the model still predicts a substantial increase in the price range (after synergies) of 3.9% at the lower end and 9.0% at the upper end.
- (32) Table IV.3.4 below provides sensitivity analyses around the main non-BA calibrations (calibration (7) and calibration (8)). These calibrations are reproduced in the table.
- (33) Calibrations (7b) and (8b) assume that mothballed lines other than Aperam's traditional cold rolled lines at Isbergues are part of available capacity
- (34) Calibrations (7c) and (8c) uses nameplate capacity figures as a basis for available capacity (after adjustments for exports and subject to a maximum utilisation rate of [90-100]\*%).
- (35) Calibrations (7d) and (8d) are based return to assumptions used for calibrations (7) and (8) respectively but increase the elasticity or market demand to -1 and use an import share coefficient corresponding to the point estimate used in the Issues Paper (which lies above the range generated by the intersection of [90-100]\*% confidence intervals).
- (36) As for all CR, none of these changes significantly affect the respective results from calibration (7) and (8). Even when demand is at the elastic end of the reasonable range and import reactions are measure by the point estimate from the Parties' econometric study dated 19 March 2012, the model still predicts a substantial increase in the price range (after synergies) on the order of magnitude of 5-10%.

- (37) Finally, Table IV.3.5 presents the Commission's modifications to the calibrations reported in Table 5 of Annex 10 to the Parties response to the SO.<sup>828</sup>
- (38) For the avoidance of doubt, the Commission notes that it does not regard these calibrations realistic as they combine a series of assumptions which the Commission considers implausible. For example, the simple exclusion of BA sales does not allow for strategic interaction on BA. Moreover, the Commission regards it as highly plausible that all capacity (including capacity under long term suspension would be reactivated). The Commission has also concluded that a reasonable estimate for an upper bound for the maximum sustainable capacity utilisation rate is [90-100]\*%. Last, the calibrations are based on the Parties' estimates and public data rather than actual (including third party) data on sales, production and capacity.
- (39) However, for the sake of argument the Commission has reproduced the scenarios from Table 5 of Annex 10 to the Parties response to the SO with the Commission's adjustment of exports rather than the Parties' alternative assumption which does not make any adjustment of available capacity for the observed level of exports.
- (40) Calibrations (16) reproduces the Commission's calibration (1) above and is identical with column (1) in the Parties' Table 5 to Annex 10 of the response.
- (41) Calibrations (17) to (19) give the results corresponding to columns (2) to (4) of the Parties' Table 5 to Annex 10 of the response when the Parties modifications except for the Parties' assumption that no adjustment for exports should be made.
- (42) As noted in Annex IV, without the Parties' alternative treatment of exports, calibration (17) predicts significant price increases. Calibrations (18) and (19) still predict significant price increases at the upper bound. The calibrations also predict small price increases at the lower bound before synergies and small price decreases at the lower bound after synergies.
- (43) However, as explained in Annex IV these calibrations are not based on actual sales and production data. Moreover, they assume that even capacity that is under long term suspension would be reactivated. This seems highly implausible when prices are close to marginal costs.
- (44) Calibration (20) addresses these issues. The calibration is based on actual data (including confidential third party data) which is preferable to the use of public data. For the sake of argument, the calibration further assumes that that mothballed capacity is reactivated but not capacity under long term suspension. The Commission still regards the set of assumptions as fairly extreme.
- (45) Moreover, in line with the Parties' approach the calibration increases the level of marginal costs until the pre-merger range includes 1. This is achieved with marginal costs of 0.97.
- (46) The results from calibration (20) indicate that, even under this rather extreme set of assumptions, the model predicts a substantial shift in the predicted price range (after

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<sup>828</sup> ID10001.

synergies) by 1% at the lower bound and 9% at the upper bound, i.e. 5% at the mid-point. Before synergies, the shift is more pronounced.

- (47) Therefore, even under rather extreme assumptions, the model still predicts significant price effects (even after synergies).

**Table IV.3.1. Detailed results from the Commission's main calibrations of the Bertrand-Edgeworth model.**

[...]\*

**Table IV.3.2. Counterfactual scenarios for Posco investment in Turkey and efficiency improvements by rivals.**

[...]\*

**Table IV.3.3. Sensitivity analyses around main calibration (3) for all cold rolled.**

[...]\*

**Table IV.3.4. Sensitivity analysis around the main non-BA calibrations.**

[...]\*

**Table IV.3.5. Modifications to Parties' recalibrations.**

[...]\*

**CASE No. COMP/M.6471 – *Outokumpu / Inoxum***

**Commitments to the European Commission**

Pursuant to Article 8(2) of Council Regulation (EC) No. 139/2004 (the “**Merger Regulation**”), Outokumpu Oyj (“**OTK**” or the “**Notifying Party**”) hereby provides the following commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare the acquisition of Inoxum (“**Inoxum**”; OTK and Inoxum jointly referred to as the “**Parties**”) (the “**Transaction**”) compatible with the common market and the EEA Agreement by its decision pursuant to Article 8(2) of the Merger Regulation (the “**Decision**”).

These Commitments are given by the Notifying Party without prejudice to its position that the Transaction does not significantly impede effective competition within the common market or a substantial part of it and is therefore compatible with the common market and the functioning of the EEA Agreement.

These Commitments shall take effect upon the date of adoption of the Decision but will be subject to the closing of OTK’s acquisition of Inoxum.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under the Merger Regulation and under Commission Regulation (EC) No. 802/2004.

**Section A. Definitions**

For the purpose of the Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings:** undertakings controlled by OTK, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Consolidated Jurisdictional Notice.

**Closing:** the transfer of legal title of the Divestment Business to the Purchaser.

**Divestment Business:** the business comprised of the assets that OTK commits to divest, as defined in Section B and the attached Schedule I.

**Divestiture Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by OTK and who has received from OTK the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

**Effective Date:** the date of adoption of the Decision.

**First Divestiture Period:** a period of [CONFIDENTIAL]\* from the Effective Date within which OTK may conclude one or more binding agreements to sell the Divestment Business before providing a mandate to the Divestiture Trustee.

**Hold Separate Manager:** the person appointed by OTK for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

**OTK:** Outokumpu Oyj, incorporated under the laws of Finland, with its registered office at Riihitontuntie 7 A, P.O. Box 27, FI-02201 Espoo, Finland.

**Key Personnel:** all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in Schedule 1.

**Monitoring Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by OTK, and who has the duty to monitor OTK's compliance with the conditions and obligations attached to the Decision.

**Personnel:** all personnel currently employed by the Divestment Business, including Key Personnel, staff seconded to the Divestment Business, shared personnel and the additional personnel listed in the Schedule.

**Purchaser:** the undertaking approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

**Trustee(s):** the Monitoring Trustee and/or the Divestiture Trustee.

**Trustee Divestiture Period:** the period of [CONFIDENTIAL]\* from the date of expiry of the First Divestiture Period within which the Divestiture Trustee shall have the irrevocable and exclusive mandate from OTK to sell the Divestment Business for which a binding agreement is not yet concluded at the end of the First Divestiture Period.

## **Section B. The Divestiture commitment**

### **Commitment to divest**

1. In order to restore effective competition, OTK commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 16 (the “**Divestiture Commitment**”). To carry out the divestiture, OTK shall seek to find a Purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If OTK has not entered into such an agreement at the end of the First Divestiture Period, OTK shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business within the Trustee Divestiture Period in accordance with the procedure described in paragraph 26.
2. OTK shall be deemed to have complied with the Divestiture Commitment if, (i) by the end of the Trustee Divestiture Period, OTK or an Affiliated Undertaking has entered into a final binding sale and purchase agreement for the Divestment Business; (ii) the Commission approves the Purchaser and the terms in accordance with the procedure described in paragraphs 15 and 16; and (iii) Closing takes place within a period not exceeding the later of [CONFIDENTIAL]\* after the approval of the Purchaser and the

terms of sale by the Commission or such time when the Purchaser has obtained all competition law approvals required for the Closing.

3. In order to maintain the structural effect of the Divestiture Commitment, OTK shall, for a period of [CONFIDENTIAL]\* after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the market structure has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the Merger Regulation.
4. The commitment to divest will be subject to the closing of OTK's acquisition of Inoxum.

### **The Divestment Business**

5. The Divestment Business consists of (i) Inoxum's production units (including all the related sales and marketing activities and personnel) at the Terni stainless steel production site; (ii) Inoxum's stainless steel service center ("SSC") in Ceriano Laghetto ("Terninox", Italy) and Outokumpu's ("OTK") SSC in Willich (Germany); and (iii) at the option of the purchaser, the Parties' SSCs located in France and the UK, and Terninox warehouses in Padova, Ancona, Florence, and Bologna ("Terninox warehouses"). At the option of the purchaser, the divestiture package will also include Terni's forging business (Società delle Fucine). For the avoidance of doubt, it is understood that the divestiture package will not include Terni's tube-making business at Tubificio di Terni.
  - At the option of the Purchaser, OTK commits to exclude from the Divestment Business Terni's BA line LBA2.
  - At the option of OTK, OTK and the Purchaser will enter into a transitional, arm's length supply agreement for the Purchaser to supply Black Hot Band ("BHB") from Terni to OTK Calvert/Mexinox.
  - OTK will replace the CTL line with 400-2100mm width range in Willich with an unused CTL line with technically comparable specifications, but with a width range of up to 1600mm.
6. The divestiture of the Divestment Business will proceed by way of an asset transaction, a share transaction or a combination of the two (including transfer, sale, assignment, license, as the case may be). The Divestment Business shall include the following elements, as more specifically defined in Schedule I:
  - (i) those tangible and intangible assets (including intellectual property rights or licenses to intellectual property rights) by way of transfer, sale, assignment or

license, which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;

- (ii) licences, permits and authorisations issued by any governmental organisation currently in place and necessary for the operation of the Divestment Business;
- (iii) contracts, leases, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business to the extent legally transferable;
- (iv) the Personnel;
- (v) at the option of the Purchaser, transitional agreements for the supply or distribution of products and/or technical assistance.

## **Section C. Related commitments**

### **Preservation of viability, marketability and competitiveness**

7. From the Effective Date until Closing, OTK shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular OTK commits:
  - (a) 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 Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
  - (b) to make available sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;
  - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage Key Personnel to remain with the Divestment Business.

### **Hold separate obligations**

8. OTK commits, from the Effective Date until Closing, to (a) keep the Divestment Business separate from the businesses it is retaining; (b) ensure that Key Personnel (if applicable) of the Divestment Business - including the Hold Separate Manager - have no involvement in any retained business and vice versa; and (c) ensure that the Personnel do not report to any individual outside the Divestment Business.
9. Until Closing, OTK shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses it is retaining. OTK shall also appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and 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 OTK.

### **Ring-fencing**

10. OTK 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 Divestment Business. In particular, the participation of the Divestment Business in a

central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. However, OTK may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to OTK is required by law.

#### **Non-solicitation clause**

11. OTK undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [CONFIDENTIAL]\* after Closing.

#### **Due diligence**

12. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, OTK 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 Divestment Business; and (ii) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

#### **Reporting**

13. OTK shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than ten (10) days after the end of every month following the Effective Date (or otherwise at the Commission's request).
14. OTK 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**

15. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:
  - (a) be independent of and unconnected to the Parties;
  - (b) both (i) have the financial resources, proven expertise and incentive and (ii) exercise the options in the present Commitments to purchase or exclude certain assets currently part of the Divestment Business with a view to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;

- (c) 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 Commitment 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 Divestment Business (the before-mentioned criteria for the purchaser hereafter the “**Purchaser Requirements**”).
16. The final binding sale and purchase agreement shall be conditional on the Commission’s approval. When OTK 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. OTK must be able to demonstrate to the Commission that the Purchaser meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the Purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more assets or members of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed Purchaser.

## **Section E. Trustee**

### **I. Appointment procedure**

17. OTK shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee.
18. If OTK has not entered into a binding sale and purchase agreement [CONFIDENTIAL]\* before the end of the First Divestiture Period or if the Commission has rejected a Purchaser proposed by OTK at that time or thereafter, OTK shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
19. The Trustee(s) shall be independent of the Parties, 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 OTK 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 Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

### **Proposal by OTK**

20. No later than one (1) week after the Effective Date, OTK shall submit to the Commission for approval a list of one or more persons whom OTK proposes to appoint as the Monitoring Trustee. No later than one (1) month before the end of the First Divestiture Period, OTK shall submit to the Commission for approval a list of one or more persons whom OTK proposes to appoint as Divestiture Trustee. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 19 and shall include:
- (d) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
  - (e) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
  - (f) 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**

21. 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, OTK 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, OTK 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 OTK**

22. If all the proposed Trustees are rejected, OTK shall submit the names of at least two (2) more individuals or institutions within [CONFIDENTIAL]\* of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 17-19.

### **Trustee nominated by the Commission**

23. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom OTK shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

## **II. Functions of the Trustee**

24. 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 OTK, 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**

25. The Monitoring Trustee shall:
- (g) 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.
  - (h) oversee the ongoing management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by OTK with the conditions and obligations attached to the Decision, and in particular shall:
    - (i) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business in accordance with paragraph 7;
    - (ii) Ensure that the Divestment Business is kept separate from the businesses retained by OTK, in accordance with paragraph 8;
    - (iii) Supervise the management of the Divestment Business as a saleable entity, in accordance with paragraph 9;
    - (iv) Ensure that the Divestment Business is managed as a going concern in the best interests of the Divestment Business with a view to its sale;
    - (v) (a) in consultation with OTK, determine all necessary measures to ensure that OTK 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 that Divestment Business, in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (b) decide whether such information may be disclosed to OTK as its disclosure is reasonably necessary to allow OTK to carry out the divestiture or as the disclosure is required by law;
    - (vi) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and OTK or Affiliated Undertakings;

- (i) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (j) propose to OTK such measures as the Monitoring Trustee considers necessary to ensure OTK'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 Divestment Business, the holding separate of Divestment Business and the non-disclosure of competitively sensitive information;
- (k) 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 Divestment Business and the Personnel 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;
- (l) provide to the Commission, with a simultaneous non-confidential copy to OTK, a written report within fifteen (15) days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the business is 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 OTK a non-confidential copy at the same time, if it concludes on reasonable grounds that OTK is failing to comply with these Commitments;
- (m) within one week after receipt of the documented proposal referred to in paragraph 16, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestment Business without one or more assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

#### **Duties and obligations of the Divestiture Trustee**

26. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price any Divestment 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 paragraph 16. 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 Trustee 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 effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of OTK, subject to OTK's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

27. In the Trustee 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 [CONFIDENTIAL]\* after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to OTK.

### **III. Duties and obligations of OTK**

28. OTK shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of OTK's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and OTK and the Divestment Business shall provide the Trustee upon request with copies of any document. The Trustee 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. OTK and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
29. OTK shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. OTK 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. OTK 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.
30. OTK shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, 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, OTK shall

cause the documents required for effecting the sale and the Closing to be duly executed.

31. OTK 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 OTK 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.
32. At the expense of OTK, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to OTK 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 Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should OTK refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard OTK. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 31 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served OTK 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**

33. 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 OTK to replace the Trustee; or
  - (ii) OTK, with the prior approval of the Commission, may replace the Trustee.
34. If the Trustee is removed according to paragraph 33, 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 17 through 23.
35. Beside the removal according to paragraph 33, 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. The review clause**

- 36. The Commission may, where appropriate, in response to a request from OTK 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 undertakings in these Commitments.
  
- 37. Where OTK 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 OTK be entitled to request an extension within the last month of any period.

\*\*\*\*\*

Name: James Venit  
Title: Partner, Skadden Arps, Brussels  
Duly authorised by the Extended Power of Attorney,  
dated 18 September 2012, a copy of which is attached,  
  
for and on behalf of Outokumpu Oyi

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Date: 19 October 2012