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***Case No COMP/M.7174 - FEDERAL-MOGUL
CORPORATION/ HONEYWELL FRICTION MATERIALS***

Only the English text is available and authentic.

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

Article 6(1)(b) in conjunction with Art 6(2)
Date: 16/06/2014

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Madam(s) and/or Sir(s),

Subject: Case M. 7174 FEDERAL-MOGUL CORPORATION / HONEYWELL FRICTION MATERIALS
Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004¹

- (1) On 16 April 2014, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Federal-Mogul Corporation ('FDML', of USA) ultimately controlled by Carl Icahn acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control from Honeywell International Inc. (of USA) over its friction materials business ('HFM'), by way of purchase of shares and assets (the 'proposed concentration').² (FDML and HFM are designated hereinafter together as the 'Parties', FDML as the 'Notifying Party'.)

I. THE PARTIES

- (2) FDML is an international company which develops, manufactures and sells engine, transmission and driveline components as well as brake friction materials, chassis, sealing and wiper products for automotive, rail and other applications. FDML also distributes, markets and sells brake fluids and hardware (e.g. discs), chassis, sealing and engine components as well as ancillary equipment.

¹ 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.

² Publication in the Official Journal of the European Union No C 130, 29.04.2014, p. 5.

- (3) HFM is an international company which designs, develops, manufactures, markets, repairs, overhauls and sells brake friction materials and ancillary equipment for automotive, rail and other applications. HFM also distributes, markets and sells brake fluids, and brake hardware (e.g. discs, drums) for automotive and rail applications.

II. THE OPERATION AND THE CONCENTRATION

- (4) The proposed transaction involves the indirect acquisition of sole control by FDML through its solely controlled subsidiaries Platin and Saxid over the transferred businesses of Honeywell, HFM, by way of purchase of shares and assets. This comprises certain Honeywell companies and assets collectively referred to as HFM. The acquisition of sole control over HFM by FDML therefore constitutes a concentration within the meaning of Article 3(1) of the Merger Regulation.

III. EU DIMENSION

- (5) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million³ (FDML: [...] (2012); HFM: EUR [...] (2013)). Each of them has an EU-wide turnover in excess of EUR 250 million (FDML: EUR [...]; HFM: EUR [...]), but each does not achieve more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension according to Article 1(2) of the Merger Regulation.

IV. MARKETS

- (6) The Parties activities mainly overlap with respect to original and replacement automotive brake friction material, both for light passenger and commercial vehicles and for heavy commercial vehicles, as well as regarding rail brake friction material.
- (7) Friction material is part of the brake. Brakes consist of a (hydraulic or pneumatic) actuation system, connecting the brake pedal to the brake, and a foundation brake, which applies the braking power to the axle. The latter consists of the brake disc and usually two brake pads (i.e. the friction material).
- (8) In its previous decisions, the Commission has not yet taken a view on the product or geographic market definition for brake friction material.⁴ However, the Commission has already established market definitions for brakes, which the Parties submit are also relevant for the segmentation of the friction materials markets.

IV.1. Product Market definition

Automotive brake friction material

- (9) The Parties submit that in line with the market definitions for automotive brakes, a distinction should be made between drum and disc brakes and by type of vehicle into light vehicles (LV) and commercial vehicles (CV)⁵ as there is no demand-side and only partial supply-side substitutability for different designs of brakes and between

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

⁴ In the only relevant decision, COMP/M.2091 HSBC / BBA Friction Materials, the Commission left the market definition open, since HSBC did not have any investments in this sector.

⁵ CVs are vehicles with a weight of more than 6 tons.

light and commercial vehicles. Moreover, the Parties submit that the market should be segmented by type of sales into original equipment/original equipment services (OEM/OES) and independent aftermarket (IAM).

- (10) For automotive brakes, the Commission distinguished between drum and disc brakes because of the different design of these brake types.⁶ It distinguished further by type of vehicle due to the fact that light vehicles are usually equipped with hydraulic brakes, whereas in commercial vehicles, that is vehicles with a weight above 6 tons, pneumatic/air brakes are most frequent.⁷ Moreover, markets were further sub-segmented by type of sales into OEM/OES and IAM, as different conditions of competition were found to exist, such as price level or identity of customers.⁸
- (11) The market investigation confirmed that friction material for disc brakes is not substitutable to friction material for drum brakes. The majority of the market players confirmed that these products are neither comparable in terms of price nor technical characteristics.
- (12) The market investigation also confirmed that a difference has to be made between friction material for light vehicles (i.e. mostly passenger cars and vehicles up to 6 tons) and commercial vehicles (i.e. vehicles above 6 tons). The majority of the market players confirmed that these products are neither comparable in terms of price nor in terms of technical characteristics.
- (13) The Commission therefore considers separate markets for automotive brake friction materials by design (drum linings - disc brake pads), type of vehicle (light vehicle - commercial vehicle) and by sales channel (OEM/OES - IAM).

Rail brake friction material

- (14) With regard to rail brake friction material, the Parties submit that – contrary to Commission precedents for the rail brake market - the market has to be segmented by foundation brake into disc brakes and tread (or block) brakes (comparable to the distinction with regard to automotive brake friction material)⁹ and by ingredient into organic, sintered and cast iron (the latter only exists for tread brake blocks). In particular, they also argue that no IAM exists, as usually replacement parts are supplied by the original friction material manufacturer and therefore it has the same supply structure as the OEM/OES market.¹⁰

6 With friction material for drum brakes being called linings, whereas friction material for disc brakes is called pads.

7 COMP/M.149 – Lucas / Eaton, COMP/M.768 - Lucas / Varsity.

8 COMP/M.337 Knorr Bremse / Allied Signal, COMP/M.726 Bosch / Allied Signal. The Parties submitted that a possible further segmentation of the OEM/OES markets and IAMs by type of customer does not apply.

9 With friction material for tread brakes being called blocks, whereas friction material for disc brakes being called pads.

10 The information submitted in the Form CO on the markets for organic blocks and organic pads estimates the relevant IAM at more than twice the size of the respective OEM/OES markets (para. 446).

- (15) The Commission has considered with respect to rail brake systems a distinction by actuation system into pneumatic and hydraulic and by sales into OEM/OES and IAM.¹¹
- (16) The market investigation confirmed the segmentation proposed by the Parties into disc brakes and tread (or block) brakes and by material (organic, sintered and cast-iron). However, it also supported the Commission decision making practice for rail brake systems that is different markets for OEM/OES and IAM.
- (17) The Commission will therefore consider separate markets for rail brake friction material according to the foundation brake (disc brake - tread/block brake) and by ingredient (organic – sintered - cast iron), as well as into OEM/OES and IAM. However, the exact product market definition can be left open as serious doubts do not arise under any product market definition considered on the market for rail brake friction material.

IV.2. Geographic Market definition

Automotive brake friction material

- (18) The Parties state that the EEA-wide market definition for the OEM/OES markets for automotive brakes should also apply for the friction material markets. They make reference to transport costs and tariffs for imports from outside the EEA, which increase the cost for imports by between 9.5 and 20 % as compared to friction material produced within the EEA, as FDML estimates that transport costs for friction material into the EEA would amount to 5 – 15 % of net sales value of friction material with additional tariffs of 4.5 – 5 %. According to statistical information provided by the Parties, imports into the EEA account for only 3% of the EEA consumption of brake friction material.¹²
- (19) The Parties submit that the IAMs are also EEA-wide, as there would be increasing concentration, internationalisation and many suppliers would only operate few plants in the EEA, from which they service their entire customer base. In addition, they argue that price differences between EEA countries would not be significant.
- (20) The Commission has previously considered that the relevant markets for OEM/OES are at least EEA-wide, whereas the IAMs were seen as rather national in scope. However, in the decision in case M.134 Mannesmann / Boge the Commission considered that also in the IAMs strong competition and high shares of imports/exports with other Member States exist. The exact delineation was left open.¹³
- (21) With regard to the automotive brake friction material for the OEM/OES market, in the market investigation most customers state that there are significant price differences between the EEA and the rest of the world for the OEM/OES market, which can be explained by the aforementioned relatively high transport costs and import duties. Limited competitive pressure from production outside the EEA cannot be excluded.

¹¹ COMP/M.1629 Knorr Bremse / Mannesmann.

¹² DG Trade Market Access Database (http://madb.europa.eu/madb/statistical_form.htm). This information does not differentiate between OEM/OES and IAM.

¹³ COMP/M.149 Lucas / Eaton, COMP/M.768 Lucas / Varsity, COMP/M.337 Knorr Bremse / Allied Signal, COMP/M.726 Bosch / Allied Signal, COMP/M.134 Mannesmann / Boge, COMP/M.1207 Dana / Echlin.

- (22) With regard to the automotive brake friction material for the IAM, the market investigation was inconclusive as to whether the market is national or EEA-wide. Some customers see the main price differences between the EEA and the rest of the world, whereas other customers see price differences even between different EEA countries.
- (23) On the basis of the above and all available evidence, the Commission considers the OEM/OES markets on an EEA-wide basis and IAMs on both EEA and national basis. The exact geographic market definition for IAMs can be left open (national or EEA-wide) as the proposed transaction does not raise serious doubts on this market regardless of its geographic scope (that is EEA or national).

Rail brake friction material

- (24) The Parties submit that the geographic market for all rail brake friction material is EEA-wide in scope. With respect to rail brake systems, the Commission has previously considered both OEM/OES and IAM markets to be EEA-wide.¹⁴
- (25) The view that the geographic scope of the markets for the rail brake friction material does not differ from the one for rail brake systems is confirmed by the market investigation, which indicates that customers mainly purchase their supplies at EEA-level.
- (26) The Commission therefore considers that the OEM/OES and IAMs for rail brake friction material are at least EEA-wide.

V. COMPETITIVE ASSESSMENT

- (27) The transaction leads to affected markets for automotive brake friction material (i) in the EEA-wide OEM/OES for commercial vehicle pads and (ii) in the EEA-wide OEM/OES for light vehicle pads, (iii) in the EEA-wide IAM for commercial vehicle pads, (iv) in national IAMs for light vehicle pads, commercial vehicle pads and commercial vehicle linings; and for rail brake friction material with respect to (v) the EEA-wide OEM/OES markets for organic pads, (vi) the EEA-wide IAM for organic pads and (vii) the EEA-wide IAM for organic blocks.

V.1. OEM/OES for automotive brake friction material – non-coordinated horizontal effects

- (28) According to the applicable Commission 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 larger the market share, the more likely a firm is to possess market power and the larger the addition of market share through the transaction, the more likely it is that a merger will lead to a significant increase in market power.¹⁵

Commercial Vehicle Pads – Market Structure

14 COMP/M.818 Cardo / Thyssen, COMP/M.1629 Knorr Bremse / Mannesmann.

15 Guidelines for the Assessment of Horizontal Mergers, para. 24, 27 (OJ C31, 5.2.2004, p.5).

- (29) The EEA-wide OEM/OES market for commercial vehicle pads (CVP) is affected by the proposed transaction. The below table sets out the relevant market shares by value according to the Parties.

CVP OEM/OES	2013	2012	2011
FDML	[10 – 20] %	[10 – 20] %	[10 – 20] %
HFM	[20 – 30] %	[30 – 40] %	[30 – 40] %
Combined	[40 – 50] %	[40 – 50] %	[40 – 50] %
N/TDM	[40 – 50] %	[40 – 50] %	[40 – 50] %
ITT/Galfer	[0 – 10] %	[0 – 10] %	[0 – 10] %
Bremskerl, others	[0 – 10] %	[0 – 10] %	[0 – 10] %

Source: Form CO.

- (30) Volume-based market shares do not significantly differ from the figures above and are set out in the following table.

CVP OEM/OES	2013	2012	2011
FDML	[10 – 20] %	[10 – 20] %	[10 – 20] %
HFM	[30 – 40] %	[30 – 40] %	[30 – 40] %
Combined	[40 – 50] %	[40 – 50] %	[40 – 50] %
N/TDM	[40 – 50]-[50-60] %	[40 – 50]-[50-60] %	[40 – 50]-[50-60] %
ITT/Galfer	[0 – 10] %	[0 – 10] %	[0 – 10] %
Bremskerl, others	[0 – 10] %	[0 – 10] %	[0 – 10] %

Source: Form CO.

- (31) The tables show that on the OEM/OES market for CVP, the Parties have consistently held high market shares over the last three years. The combined market share by value 2013 amounts to [40 - 50] % (FDML: [10 – 20] %, HFM: [20 – 30] %, up from [40 – 50] % in 2012) with a substantial increment.
- (32) The transaction leads to a significant increase in the concentration of an already concentrated market. The concentration level is assessed by the Herfindahl-Hirschman Index (HHI).¹⁶ The change in concentration directly brought about by a proposed transaction can be calculated as the change of the HHI (known as 'HHI delta').¹⁷ It is assumed that a merger is unlikely to lead to competition concerns if the post-merger HHI is below 1 000 with an HHI delta below 250 or above 2 000 with an HHI delta below 150.¹⁸ With respect to the OEM/OES CVP market however, the concentration level is approximately 4 034 and the HHI delta amounts to 882, a value far above the relevant threshold, indicating that the concentration level in this market will increase significantly.
- (33) On this market, only one competitor of the merged entity with comparable market shares will remain post-merger. Nisshinbo/TMD, which is also active to a lesser extent on the

¹⁶ The HHI is calculated by summing the squares of the individual market shares of all the firms in the market.

¹⁷ While the absolute level of the HHI can give an indication of the competitive pressure in the market post-merger, the change in the HHI (known as the HHI delta) is a proxy for the change in concentration directly brought about by the merger.

¹⁸ Guidelines for the Assessment of Horizontal Mergers, para. 16, 20.

OEM/OES LVP market, has over the past years consistently held a market share of [40 – 50]-[50-60] %. The merged entity will have approximately the same share.

- (34) Nisshinbo is a Japanese brake friction material manufacturer previously mainly active in Asia and North America. It acquired TMD, a brake friction material manufacturer with a focus on Europe, in 2011.¹⁹
- (35) Other market participants are few and have relatively limited market shares: ITT/Galfer, who entered this market segment 8 years ago, has held a market share of [0 – 10] % during the last four years. This company is rather active on the OEM/OES LVP market. Apart from ITT/Galfer, only Bremserl holds appreciable market shares (below [0 – 10] % for the last four years) and other companies account combined for [0 – 10] %. The transaction therefore leads to two equally strong players on the OEM/OES market for CVP that leave the remaining competition far behind.

Commercial Vehicle Pads – Impact of the Transaction

- (36) The contemplated market is characterised by individual price setting through tenders. In the market investigation, all responding customers from the CVP segment stated that they organise their sourcing process through tenders, combined with bilateral negotiations.
- (37) With regard to CVP, vehicle manufacturers usually buy the whole brake from a brake manufacturer, who is responsible for sourcing the friction material and the respective commercial conditions. With respect to technical conditions, on the other hand, vehicle manufacturers get involved through the process of homologation or type approval. This term relates to a vehicle manufacturer 'auditing' friction material manufacturers before a certain project, testing the characteristics of their friction material and visiting production sites. Brake manufacturers can then choose one of the homologated friction material manufacturers for the respective project.
- (38) With the proposed transaction, an important competitive constraint, in the form of the third established and sizeable competitor HFM, would be removed from this market. The Commission considers that this loss of competition is significant for several reasons.
- (39) Firstly, almost half of the respondents have multi-sourced at least occasionally in the last 10 years. Amongst these are large companies that source significant amounts of friction material from both Parties. Therefore, with respect to these OEM/OES CVP customers, no competitive constraint would remain in the market post-merger, as soon as only two competitors are active, as both could be sure to be awarded a part of the tendered volumes.
- (40) Secondly, also for all further customers, the intensity of competition in tenders is likely to decrease post-transaction. In the presence of tenders, a merger most directly leads to a price increase where the Parties are respectively the preferred option and runner-up. However, if uncertainty exists with respect to relative positions, upwards pricing pressure can apply widely across bids. The Parties argue that particular tenders are not transparent and competitors only have limited information on how they are ranked compared to the competition.

¹⁹ Cf. http://www.nisshinbo.co.jp/english/news/pdf/754_1_en.pdf.

- (41) In the market investigation, customers reported 25 recent tenders for the CVP segment. Both Parties were bidders in a large majority of these tenders. In addition, combined they won the majority of the reported tenders and in almost half of these instances they were winner and runner-up, whereas in almost all of the instances they were ranked among the top bidders. This indicates the strength of the competitive constraint that the Parties exert upon each other pre-merger and which would be eliminated post-merger.
- (42) Regarding competitors, Nisshinbo/TMD also participated in a majority of the tenders, but did not win as frequently as either of the Parties. On the other hand, ITT/Galfer only participated in the minority of the reported tender procedures and won even less. Only in a few instances were other companies mentioned as tender participants. Moreover, they won almost none of the reported tenders.
- (43) Thirdly, all OEM/OES CVP customers made clear in the market investigation that at least three suppliers are needed for a competitive tender outcome, while half also mention four or more.
- (44) Finally, with respect to CVP, the majority of the responding customers state that the proposed concentration will decrease the intensity of competition. The majority of responding customers forecast that prices will increase, some quantifying this at 5 - 10%. One customer states: "With less suppliers and decreasing competition there are not enough competitors on the market who are able to deliver the required quality."

Light Vehicle Pads – Market Structure

- (45) Also the EEA-wide OEM/OES market for light vehicle pads (LVP) is affected by the proposed transaction. The below table sets out the relevant market shares by value according to the Parties.

LVP OEM/OES	2013	2012	2011
FDML	[20 – 30] %	[20 – 30] %	[20 – 30] %
HFM	[20 – 30] %	[20 – 30] %	[20 – 30] %
Combined	[40 – 50] %	[40 – 50] %	[40 – 50] %
N/TDM	[10 – 20]-[20-30] %	[10 – 20]-[20-30] %	[10- 20] - [20 – 30] %
ITT/Galfer	[20-30] – [30-40] %	[20-30] – [30-40] %	[20 – 30] %
Akebono,Roulunds, Raicam	[0 – 10] %	[0 – 10] %	[0 – 10] %
Others	[0 – 10] %	[0 – 10] %	[0 – 10] %

Source: Form CO.

- (46) Volume-based market shares on this market do differ to an extent from the figures above and are represented in the following table.

LVP OEM/OES	2013	2012	2011
FDML	[20 – 30] %	[10 – 20] %	[10 – 20] %
HFM	[10 – 20] %	[10 – 20] %	[10 – 20] %
Combined	[30 – 40] %	[30 – 40] %	[30 – 40] %
N/TDM	[10-20] [20-30] %	[10-20] [20-30] %	[20 – 30] %
ITT/Galfer	[30-40] – [40-50] %	[30-40] – [40-50] %	[30 – 40] %
Akebono, Roulunds, Raicam	[0 – 10] %	[0 – 10] %	[0 – 10] %
Others	[0 – 10] %	[0 – 10] %	[0 – 10] %

Source: Form CO.

- (47) On the OEM/OES market for LVP, the Parties have held high combined market shares over the last three years. These have been declining from 2010 until 2012, but the trend reversed and market shares increased again in 2013.
- (48) The combined market share of the merged entity by value in 2013 would amount to [40 – 50] % (FDML: [20 – 30] %, HFM: [20 – 30] %), creating the market leader. The post-merger HHI is approximately 3 003 and therefore lower than in the CVP segment. However, the HHI-delta for this market is even higher and amounts to 941, again indicating a significant increase in market concentration.
- (49) In the OEM/OES market for LVP, two competitors other than the merged entity would remain post-merger. Nisshinbo/TMD, the only strong competitor in the OEM/OES CVP market, holds a share of [10 – 20] – [20-30] % in the OEM/OES LVP market in 2013, which is about half the size of the combined entity. ITT/Galfer would be the second strongest competitor on this market after the merged entity, holding a share of [20 – 30] – [30-40] % in 2013.
- (50) Other competitors, such as Akebono, Roulunds and Raicam account for only a minor part of the market with shares remaining below [0 – 10] % and probably even lower in all the years between 2011 and 2013. Other market participants account combined [...] [0 – 10] % of sales.
- (51) By volume, the combined market share of the Parties would amount to [30 – 40] % (FDML [20 – 30] % and HFM [10 – 20] %). With regard to volume-based market shares in this market, HFM therefore accounts for [10 – 20] %, while ITT/Galfer would have a market share of [30 -40] – [40 – 50] %. The Parties explain this by [different supply foci].

Light Vehicle Pads – Impact of the Transaction

- (52) Also on this market, the Commission considers that the proposed transaction would remove an important competitive constraint, in the form of the fourth established and strong competitor HFM.
- (53) The large majority of responding customers stated in the market investigation that they procure friction material from both Parties, indicating that the Parties are indeed an important supply option for clients.
- (54) Firstly, with respect to the number of competing supply sources, even though multi-sourcing is less frequent for LVPs than for CVPs with about one third of customers at

least occasionally multi-sourcing, the majority of customers are concerned about the loss of competition resulting from the transaction.

- (55) Customers moreover frequently mention the fact that each single supplier is important for a competitive market outcome, as a certain number of competitors is necessary to organise a competitive bidding process. Also, customers are of the opinion that on average 3 to 4 suppliers are needed in a bidding process to achieve this. One customer for example states that "(t)he experience shows that without a minimum of 4 suppliers the tendency of price level increases and market domination exist."
- (56) Given that not all companies participate in every bidding procedure, the number of credible bidders post-transaction seems to reach a critical level for a competitive outcome, according to some customers. The industry is generally marked by low spare capacity, as amongst others a full utilisation is not feasible due to technical restrictions and contractual obligations, as further detailed in para. (62) et seq. below. Therefore, in particular with respect to contracts comprising larger volumes, it is not likely that all competitors are able to participate in each tender, as some might not have the required associated capacity available.
- (57) Secondly, the analysis of the tender data provided by customers during the market investigation shows that tenders are held frequently, that is multiple times per year, with some customers organising between 10 and 30 tenders per year. Out of the 38 tenders reported by customers in the market investigation for LVP, both Parties participated in almost half and at least one of the Parties participated in virtually every tender. ITT/Galfer participated in almost the same number of tenders as the Parties, whereas Nisshinbo/TMD participated in less, but still the majority of the reported tender procedures. Out of the total number of reported tenders, both Parties combined were awarded almost half of the contracts. ITT/Galfer shows similar strength in winning tenders, whereas TMD only received the award in a small number of the reported cases. In the majority of the procedures, where one of the Parties won, the other Party was also placed amongst the top bidders, indicating *prima facie* a considerable level of competitive interaction.
- (58) The Parties submitted in the course of the investigation an economic analysis²⁰ of the bidding data for LVP. The paper analysed the extent to which the Parties bid for the same contracts and the closeness of competition between them. The paper came to the conclusion that the Parties would rarely compete for the same tenders and would not impose a uniquely strong constraint on each other. However, the paper itself acknowledges that the underlying bidding data available has certain weaknesses and it is likely that it leaves out a considerable part of the LV segment. In addition, it only analyses the final round of bidding and not participation in the whole process. For these reasons, the Commission considers that no robust conclusions can be drawn from the analysis submitted.
- (59) Thirdly, a majority of customers voices concerns with respect to the proposed transaction and indicates that it expects a price increase post-merger on this market in a range between 5 and 15%.

20 RBB Economics: "Honeywell / Federal Mogul: Assessment of bidding data in the LV segment", 29 April 2014.

- (60) One customer states: "After the takeover an immediate price increase is not to be expected due to the contractual agreements. However, a rather slowly increasing price level on any given technical change implementation or on any new tenders are to be expected. A supplier switch would be too costly and especially on a running product line."
- (61) One customer explains: "Reduced number of technically capable suppliers especially for the European market, from 3 down to 2. No free capacity at alternative suppliers and high entry barriers (no new suppliers in past 5 years) will lead to upward price pressure or market pricing pressure." Another one adds: "For OEM supplies, natural competition will decrease to two actors (ITT and FDML). TMD is not strong enough about technical requirement."

Barriers to Expansion (Capacity)(CVP and LVP)

- (62) The OEM/OES markets for CVP and LVP share a number of characteristics with regards to capacity constraints, which will therefore be discussed below for both markets.
- (63) In principle, merging firms may have an incentive to reduce output with a view on increasing prices, if competitors face capacity constraints and the expansion of capacity is costly.²¹
- (64) With regard to a possible expansion, the Parties submit that in particular one competitor, namely ITT/Galfer, has sufficient capacity to expand its market share should the merged entity or N/TMDF start increasing their prices or reduce output. In that regard the Parties submit that ITT/Galfer operates three production sites in Italy, invests into a production site in China and is able to produce both CVP and LVP on the same production equipment.
- (65) However, the Commission considers it to be unlikely that competitors are able to swiftly expand their production if the new entity would raise its prices or reduce its output, for the following reasons:
- (66) Firstly, the Commission considers it unlikely that competitors will supply the OEM/OES market from outside the EEA. As indicated above, the Parties themselves submit that the geographic scope of these markets is EEA-wide, since transport costs and tariffs increase the cost of imports between 9.5% and 20% compared to friction material produced within the EEA. This is also in line with the fact that imports into the EEA account for only 3% of the EEA consumption of brake friction material. In the market investigation, most customers confirmed that there are significant price differences between the EEA and the rest of the world.
- (67) Secondly, the Parties themselves indicated that capacity utilisation in the EEA is generally high. The Parties submit that the average LVP capacity utilisation in the EEA between 2010 and 2011 was about [80-90] % for LVP and [80 – 90] % for CVP. In comparison, FDML's average capacity utilisation was [...] % for LVP and [...] % for CVP and HFM's average capacity utilisation was [...] % for LVP and [...] % for CVP. This suggests that spare capacity of the Parties' competitors is even lower than

²¹ Guidelines for the Assessment of Horizontal Mergers, para. 32-35.

the Parties' own spare capacity.²² In that regard, the Commission notes that the Parties themselves submit that friction material manufacturers need to hold a spare capacity for tooling change, shift changeover and maintenance, such that a plant running at [80 – 90] % of its nominal capacity is de facto already running at full capacity. Also, customers in the OEM/OES markets regularly require friction material manufacturers to hold a [10 – 20] % spare capacity (above peak volume).

- (68) Thirdly, the creation of additional capacity in the OEM/OES market for CVP and LVP in the EEA is likely to be costly and time-intensive. The Parties themselves indicate that it would take an investment of EUR [at least 4 million] for setting up a viable friction material production site from scratch in an existing factory. The market investigation showed that competitors estimate the costs of setting up a new production site at EUR 10-40 million. Moreover, the homologation of a new production line is likely to be at least as time consuming as the homologation of an existing production line for a new product requiring at least 2 years for the homologation process alone (not taking into account the planning and construction of the new production line). The market investigation indicated that the homologation of a new supplier takes between 2 and 3 years.
- (69) Moreover, it should be noted that according to internal documents from 2012, FDML intended [description of initial capacity-related considerations].²³ In response to a request for information dated 8 May 2014, the Parties submitted on 12 May 2014 that this early document does not reflect FDML's current plans with regard to the business, as then it still related to a different scope of the target business, and that according to the current strategy [description of revised capacity-related considerations]. However, the Commission considers that there is still a significant possibility that the merged entity will reduce its overall capacity.
- (70) In view of the above, the Commission considers that the merged entity will have an incentive to reduce its output, especially since its competitors are unlikely to be able to react to such a capacity reduction by increasing their capacity in a timely manner.

Barriers to Entry (CVP and LVP)

- (71) The OEM/OES markets for CVP and LVP share a number of characteristics with regard to barriers to entry, which will therefore be discussed below for both markets.
- (72) In principle, when entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive effects.²⁴
- (73) The Parties submit that new players could easily enter the OEM/OES markets for CVP and LVP, should the merged entity or a competitor start increasing their prices or reduce output post-transaction.
- (74) According to the Parties, entry could occur by geographic expansion or extension of the product range of other companies. The Parties argue that brake pads are generally a low-technology product, which does not necessitate the acquisition of important

22 HFM's modern Romanian plant runs at only [...] % of its capacity. The new entity might therefore try to close old production lines in favour of more modern ones.

23 [Reference to an FDML internal document].

24 Guidelines for the Assessment of Horizontal Mergers, para. 68-74.

patents or specialised know-how. Also, regulatory requirements (ECE R13 for OEM/OES) are allegedly strict, but easy to meet for any producer of friction material within a few weeks. The Parties note in particular that in recent years ITT/Galfer entered the OEM/OES CVP segment and Raicam and Akebono entered the OEM/OES LVP segment.

- (75) However, the Commission considers it unlikely that new competitors are able to enter the market and develop a significant impact within a reasonably short timeframe.
- (76) Firstly, an entry into the OEM/OES market for CVP and LVP in the EEA is costly and time-intensive. The Parties themselves concede that it would take an investment of EUR [at least 4 million] for setting up a viable friction material production site from scratch in an existing factory. The market investigation showed that competitors estimate the costs of setting up a new production site at EUR 10-40 million. Furthermore, the Parties concede that the costs of homologation are significantly higher for a new entrant (i.e. EUR 150 000 to EUR 900 000) than for an incumbent supplier (EUR 100 000 to EUR 300 000). Moreover, an entry into these markets is time consuming. The Parties themselves concede that a new entrant has to calculate approximately 2 years for the homologation process alone (not taking into account the planning and construction of the production site). The market investigation indicated that the homologation of a new supplier takes between 2 and 3 years.
- (77) Secondly, with respect to both the OEM/OES market for CVP and LVP, it should be noted that customers extensively test brake friction material producers before accepting them as supplier (so-called "homologation"). This process involves intensive testing and may take more than 18 to 24 months from the request for quotation (i.e. up to 6 months), over the selection of the final supplier (up to 6 months), to the final validation for production (up to 18 months).²⁵ Once a contract is awarded, the supply relationship usually lasts 15 years or longer. The homologation of a new entrant is therefore costly and time consuming also for the customers. Customers therefore prefer to grant new contracts to incumbent suppliers. The market investigation confirmed that almost all customers prefer to choose incumbent suppliers for new contracts for successor vehicle models. The market investigation further suggests that customers are very reluctant to switch existing contracts to new suppliers because of the additional time and cost effort required.
- (78) Thirdly, there has been no significant new entry in the last years. As regards ITT/Galfer, an incumbent LVP supplier who entered the CVP segment, the Parties themselves concede that this competitor has – over the last 8 years - only gained a market share of [0 – 10] % in the CVP segment (by value and volume). As regards Raicam,²⁶ a new entrant in the LVP segment, the Parties themselves concede that this competitor has had a market share not exceeding [0 – 10] % (by value and volume) in the last four years. As regards Akebono, an incumbent supplier in Japan amongst whose shareholders are Bosch and Toyota, who entered the LVP segment, the Parties themselves concede that this competitor's market share has been below [0 – 10] % since 2010 (by value and volume). Other new entrants into the LVP segment, such as Brembo and Tiir, did not manage to obtain a significant market share (that is below [0

²⁵ For LVP, with regard to CVP an additional 12 months of field testing are required.

²⁶ Raicam was founded by former ITT/Galfer employees and is mainly active on the IAM. It has so far gained one contract for Fiat and one contract for GM.

– 10] %). Furthermore, according to the Parties' own estimates, market shares remained fairly stable for all of these smaller competitors between 2010 and 2013.

- (79) Moreover, the Commission notes that at least one new entrant failed to successfully enter the market in the last years. In 2006, two former Nisshinbo/TMD employees founded Saxid and were awarded contracts mainly by [customer name]. However, it took the company two years to start production and, in 2011, FDML purchased this competitor for [a symbolic price]. FDML subsequently closed the plant and moved production to one of its other production sites. This example suggests that an entry into the OEM/OES markets for LVP and CVP can be a time-intensive and loss making endeavour despite experienced personnel and contracts with a premium customer, such as [customer name] in this case.
- (80) Fourthly, the market investigation confirmed that the large majority of the customers do not expect any new entry in the coming five years. This is in line with the fact that customers in the OEM/OES segment in the EEA have a preference for their incumbent suppliers and are reluctant to grant contracts to new entrants without track record (see para. (77) above).
- (81) The Commission therefore considers it to be unlikely that new entrants are able to enter the OEM/OES markets for LVP and/or CVP in the EEA in a significant manner within a reasonably short timeframe.

Buyer Power (CVP and LVP)

- (82) The OEM/OES markets for CVP and LVP share a number of characteristics with regard to buyer power, which will therefore be discussed below for both markets.
- (83) In principle, even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, if customers possess countervailing buyer power.²⁷
- (84) The Parties argue that any market power that might stem from the Parties' high combined market shares in the OEM/OES markets for CVP and/or LVP is counter-balanced by a high degree of buyer power at customer level.
- (85) Firstly, according to the Parties, the customer side of the market is highly concentrated with vehicle and brake manufactures consisting of a few large and sophisticated companies. The Parties note that the Commission has previously accepted the existence of buyer power in the automotive sector.²⁸ Moreover, the Parties have submitted articles from the specialised press which comment on the buyer power of OEMs in the automotive sector.²⁹
- (86) However, in the case at hand the Commission considers it to be unlikely that vehicle and brake manufacturers have enough buyer power to prevent the new entity, post-merger, to significantly impede effective competition. As to precedents, the Parties refer to Commission decisions with regard to other automotive components, which are

27 Guidelines for the Assessment of Horizontal Mergers, para. 64-67.

28 COMP/M.5039 Brose Fahrzeugteile/Contental Assets; COMP/M.4878 Continental/Siemens VDO; IV/M.1245 Valeo/ ITT Industries.

29 See e.g. <http://www.kerkhoff-consulting.de/hk/references/press-reports/singel-view/archive/2011/march/article/ueberdreht.html>.

subject to a different market structure than the one at hand. Also, the articles from the specialised press refer to the situation of small and medium sized suppliers of automotive components, whose market has not yet been consolidated.

- (87) By contrast, with regard to the case at hand, the Commission notes that most suppliers are themselves large and sophisticated companies which operate in a consolidated market. Moreover, the Parties themselves indicate that the supply side of the market is significantly more concentrated than the customer base, both with regard to the OEM/OES market for CVP and LVP.
- (88) It follows from the Parties' submission that, with regard to the market for CVP, post-merger, mainly two suppliers (the new entity and N/TMD), which account for at least [90 - 100] % of the market by value and volume, compete for contracts from at least 6 vehicle manufacturers (not taking into account brake manufacturers).
- (89) With regard to the market for LVP, post-merger, mainly three suppliers (the new entity, N/TMD and ITT/Galfer), which account for almost [90 - 100] % of the market by value and volume, compete for contracts from at least 10 vehicle manufacturers (not taking into account brake manufacturers).
- (90) Secondly, the Parties submit that their customers can switch suppliers easily and regularly threaten to do so. The market investigation indeed showed that many customers use the threat to switch suppliers in the course of their negotiations.
- (91) However, the Commission considers it unlikely that customers can exercise buyer power by immediately switching suppliers, in particular in view of the Parties' submission that the homologation of a new supplier usually takes approximately 2 years.
- (92) This was largely confirmed by the market investigation which showed that this process takes 2 to 3 years (see para. (68) above). In that regard the Commission notes that, contrary to the Parties' argument that no incumbency advantage exists for tenders for new projects, a clear majority of customers indeed indicates that they would more likely opt for an incumbent supplier for a successor vehicle model. It seems therefore that switching from an incumbent supplier to an alternative does not seem to be a frequently nor is it an important feature of the OEM/OES markets for CVP and LVP.

Moreover, in a market with only two main suppliers (the OEM/OES market for CVP) as well as in a market with three main suppliers (the OEM/OES market for LVP) the switching of a supplier might prove to be difficult in view of the capacity constraints in these markets. It is therefore unlikely that a customer would be able to switch to a different supplier within a reasonably short timeframe.

- (93) Thirdly, the Parties argue that their customers exercise buyer power in many other ways while negotiating new contracts. In particular, the Parties submit that customers require suppliers to accept their terms and conditions. Furthermore, as a pre-requisite for entering into new projects they request a pre-payment for the chance to be awarded new business. Moreover, the Parties also state that even after the award of a certain project, customers continuously pressure the chosen supplier to improve its production process, lower its production costs and consequently also its prices. In that regard the Parties submit that customers require a detailed list of production costs, which gives their requests additional weight.

- (94) The market investigation confirmed that especially OEM/OES customers generally require suppliers to accept their terms and conditions. Moreover, the market investigation indicates that many customers do indeed require better conditions on existing supply contracts when entering into new contracts.
- (95) However, the fact that some customers ask for better conditions on existing contracts in exchange for granting new contracts, as well as for improved production processes and a lowering of prices during the course of the supply relationship, appears to be common in contractual negotiation and does not seem sufficient to indicate buyer power. Also, the market investigation shows that, even if the some customers request information on production costs, the extent of these requests vary from case to case and suppliers may reject such requests especially in view of their IP rights on the composition of their friction material.
- (96) Moreover, the market investigation did not confirm that customers require friction material manufacturers to pay lump-sums in exchange for new business. Furthermore, customers only rarely threaten to start procuring material in house, threaten to delay procurement or threaten to delay payment. Moreover, contrary to the Parties' argument that contractual arrangements between the customer and the successful bidder do not normally foresee obligations on the part of the former to buy any minimum quantity or guarantee a minimum period of supply, the majority of customers at least occasionally bear such a minimum quantity and period.
- (97) In conclusion, the market investigation did not confirm that customers have a level of buyer power vis-à-vis suppliers of friction material that would be comparable to their buyer power vis-à-vis suppliers of some other automotive components that has been the object of "the previous cases to which the Parties referred". This is in line with the fact that the markets for many other automotive components are more fragmented and sometimes characterised by numerous small and medium sized suppliers, while the market for the supply of friction material is already consolidated and dominated by few large and sophisticated suppliers.
- (98) On the basis of the above, the Commission considers it unlikely that these customers can effectively exercise buyer power in a manner sufficient to overcome, post-merger, the market power of the remaining friction material suppliers.

Preliminary Conclusion

- (99) In view of the above reasons and all available evidence, the Commission considers that the transaction raises serious doubts as to its compatibility with the internal market with regard to the OEM/OES market for CVP and LVP in the EEA as a result of non-coordinated horizontal effects.

V.2. OEM/OES for automotive brake friction material – coordinated effects

- (100) According to established case law³⁰ and the Commission guidelines on the assessment of horizontal mergers,³¹ it must be established in order to assess coordinated effects that a proposed merger will make coordination more likely, more effective or more sustainable.

³⁰ Cases T-342/99, *Airtours v Commission*; T-464/04, *Impala v Commission*.

³¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, p. 5, paras. 39–57.

The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reactions of outsiders such as potential competitors and customers.

- (101) The Commission has investigated the possibility that the proposed merger, besides raising serious doubts on the non-coordinated effects described above, may also lead to a weakening of competitive pressure as a result of coordinated effects. These coordinated effects would result in prices on the market rising higher than if they were dictated only by the individual, non-coordinated, profit maximising behaviour of each individual competitor.
- (102) The reduction in the number of firms from 3 to 2 in the OEM/OES CVP market and from 4 to 3 in the OEM/OES LVP market and the increase in symmetry among players may, in itself, be a factor that facilitates coordination and increase the likelihood of coordination. In particular, with respect to the above-mentioned CVP market, only two competitors of equal size with activities throughout all regions of the world would remain. In addition, these two companies both supply the full range of automotive friction material.
- (103) The internal documents provided by the Parties together with the Form CO make clear that both markets are much more transparent than the Parties suggest. In particular, in one of FDML's presentations with respect to the commercial vehicle friction materials, a detailed overview with market shares of the Parties and various competitors with brake and vehicle manufacturers, as well as interrelations between the brake and vehicle manufacturers are given.³²
- (104) In addition, there are indications that brake friction material is a rather homogeneous product.
- (105) Several customers alleged in the market investigation that at least tacit coordination might already take place and that such could be strengthened by the proposed transaction. One customer with regard to the situation post-merger expresses: "Furthermore, there is potential for suppliers to be selective in terms of their bidding in terms of which platforms they wish to gain. Given the small community it will be easier to track wins and losses in the market and thereby drive market pricing up."
- (106) It is however to be emphasised that a significant part of sales result from competitive tendering which is generally not compatible with a finding of price transparency, the ability to monitor deviations to a tacitly coordinated outcome and the likelihood of effective retaliation.
- (107) As the Notifying Party proposed Commitments which allow for a new competitor to develop on both OEM/OES markets for automotive brake friction material in the EEA and resolve the competition concerns, there is no need to make a definitive finding on coordinated effects.

V.3. IAM for automotive brake friction material

- (108) On the basis of an EEA-wide IAM, only the market for CVP would be affected, with a moderate combined market share (in value) of the parties of [20 – 30] % with an increment of [0 – 10] % (in 2013 the Parties' market shares in value were [10 – 20] % for FDML and [0 – 10] % for HFM).

³² FDML: Global CV Braking Strategy: 2014-2018, 1 December 2013, submitted as Annex 5.4.w.

(109) The Commission considers that post-transaction the Parties will continue to face competition on the IAM from competitors active across the EEA such as Nisshinbo/TMD, Knorr-Bremse, Meritor and Wabco, having EEA market share in value equal to [20 – 30] %, [10 – 20] %, [0 – 10] % and [0 – 10] % respectively.

(110) If the geographic scope of the IAM market were to be considered national, on the basis of the Parties' best estimates of national market shares³³, the proposed transaction would lead to affected markets for:

- LVP in Austria, Czech Republic and France;
- CVP in Austria, the Czech Republic, Denmark, Estonia, Germany, Italy, Latvia, Luxembourg, Slovenia, Spain and the United Kingdom;
- CVL (Commercial Vehicle Linings) in Austria, the Czech Republic, France, Germany, Latvia and Lithuania.

(111) The following table shows the Parties' market shares (in value) during the period 2011-2013.

FDML/HMF shares on national IAM markets	2013	2012	2011
<i>LVP</i>			
Austria	[30 – 40] %	[30 – 40] %	[40 – 50] %
Czech Republic	[20 – 30] %	[10 – 20] %	[10 – 20] %
France	[20 – 30] %	[20 – 30] %	[20 – 30] %
<i>CVP</i>			
Austria	[30 – 40] %	[20 – 30] %	[30 – 40] %
Czech Republic	[30 – 40] %	[30 – 40] %	[30 – 40] %
Denmark	[20 – 30] %	[30 – 40] %	[20 – 30] %
Estonia	[20 – 30] %	[30 – 40] %	[20 – 30] %
Germany	[30 – 40] %	[30 – 40] %	[30 – 40] %
Italy	[20 – 30] %	[20 – 30] %	[20 – 30] %
Latvia	[20 – 30] %	[20 – 30] %	[20 – 30] %
Luxembourg	[20 – 30] %	[30 – 40] %	[40 – 50] %
Slovenia	[30 – 40] %	[10 – 20] %	[10 – 20] %
Spain	[30 – 40] %	[20 – 30] %	[20 – 30] %
UK	[20 – 30] %	[20 – 30] %	[20 – 30] %
<i>CVL</i>			
Austria	[20 – 30] %	[30 – 40] %	[30 – 40] %
Czech Republic	[20 – 30] %	[20 – 30] %	[20 – 30] %
France	[20 – 30] %	[30 – 40] %	[30 – 40] %
Germany	[20 – 30] %	[20 – 30] %	[20 – 30] %
Latvia	[20 – 30] %	[20 – 30] %	[20 – 30] %
Lithuania	[30 – 40] %	[30 – 40] %	[40 – 50] %

Source: Form CO.

(112) In the following Member States, the Parties' combined market share post-transaction ranges between 20% and 30%: Austria (for CVL), Czech Republic (for LVP and

³³ The Parties explain that market shares should take into account cross-border sales, as not all friction material sold by them to wholesalers and retailers would be sold to customers in the same country.

CVL), Denmark (for CVP), Estonia (for CVP), France (for LVP and CVL), Germany (for CVL), Italy (for CVP), Latvia (for CVP and CVL), Luxemburg (for CVP), Slovenia (for CVP), Spain (for CVP), and UK (for CVP). In the following Member States the transaction leads to a combined market share of the Parties of more than 30%: Austria ([30 – 40] % for LVP and [30 – 40] % for CVP), Czech Republic ([30 – 40] % for CVP), Germany ([30 – 40] % for CVP) and Lithuania ([30 – 40] % for CVL). The structure of these markets is analysed in further detail below.

- (113) On the Austrian IAM market for LVP, the combined market share of the Parties is [30 – 40] % (FDML: [10 – 20] %; HFM: [20 – 30] %). The main competitors for LVP in Austria are Nisshinbo/TMD, TRW, Bosch and ATE with market shares in 2013 of [10 – 20] %, [10 – 20] %, [0 – 10] % and [0 – 10] % respectively. A number of other competitors with smaller market shares are also active on this market. On the Austrian IAM market for CVP the combined market share of the Parties is [30 – 40] % (FDML: [10 – 20] %; HFM: [20 – 30] %). The main competitors on this market are Nisshinbo/TMD, Knorr-Bremse, Meritor and Wabco with market shares in 2013 of [10 – 20] %, [10 – 20] %, [0 – 10] % and [0 – 10] % respectively. The Commission considers that post-transaction, these competitors will continue to act as competitive constraint on the Parties in the Austrian IAM markets.
- (114) The Parties submit that they do not serve an Austrian market individually but the wider territory of the DACH region (Germany, Austria, German speaking part of Switzerland). Both Parties serve this region with the same brands, have one single sales leader for all these countries and serve the countries from the same warehouses. The Parties also do not prepare separate sales reports for Austria. Furthermore, FDML has only one CVP customer and only few LVP customers in Austria, some of which are Austrian branches of Germany-based companies, and it does not have a presence in Austria as sales and customers are managed out of Germany. Extending the scope of the relevant geographic market to include Germany and Switzerland would significantly dilute the Parties' combined share. In particular, for the DACH region the Parties' market shares would be [20 – 30] % for LVP and [20 – 30] % for CVP, with the main competitor, Nisshinbo/TMD, having [10 – 20] % on the LVP market and [10 – 20] % on the CVP market.
- (115) On the Czech IAM market for CVP the combined market share of the Parties is [30-40] % (FDML: [20 – 30] %; HFM: [10 - 20] %). The Parties will face competition from a number of competitors with significant market shares such as Nisshinbo/TMD, Knorr-Bremse, Meritor, Fras-le, Lumag and Formar with market shares in 2013 of [10 – 20] %, [0 – 10] % , [0 – 10] % , [0 – 10] % , [0 – 10] % and [0 – 10] % respectively.
- (116) On the German IAM market for CVP, the combined market share of the Parties is [30 – 40] % (FDML: [20 - 30] %; HFM: [10 – 20] %). The Parties face competition from a number of competitors, such as Nisshinbo/TMD, Knorr-Bremse, Meritor and Wabco with market shares in 2013 of [20-30]%, [10 – 20] %, [0 – 10] % and [0 – 10] % respectively.
- (117) On the Lithuanian IAM market for CVL the combined market share of the Parties is [30 – 40] % (FDML: [0 – 10] %; HFM: [30 – 40] %). The Parties face competition from a number of competitors such as Nisshinbo/TMD, Fras-Le, Lumag and Roulunds with market shares in 2013 of : [0 – 10] %, [0 – 10] %, [0 – 10] % and [0 – 10] % respectively.
- (118) The Commission considers that each national IAM is characterized by more suppliers than those who are active in the OEM/OES markets. Competitors are not only friction

material manufacturers from the OEM/OES markets, but also brake manufacturers and aftermarket-focussed suppliers that offer "OE-quality" and/or very low prices. The products of all these suppliers are interchangeable from a technical point of view and do not differ substantially in terms of their braking performance. Quality differences mostly affect comfort criteria such as durability, braking noise level and product appearance. Some suppliers specialize in the production of a certain quality level, whereas most players (including the Parties) offer a range of products at different quality levels. Therefore, the Commission concludes that several players will be active on the different IAM national markets and able to exert sufficient competitive constraint on the merged entity.

(119) Even though the demand-side on the IAM is less concentrated than in the OE/S-segment, IAM customers are typically large, sophisticated buyers of friction materials, mainly wholesalers, buying groups of retailers as well as large retail chains with centralized purchasing for individual countries, regions or even the EEA as a whole. On the basis of the results of the market investigation, the Commission considers that customers can easily switch suppliers, in particular as purchases are mainly made via weekly or monthly orders³⁴.

(120) Finally, the majority of customers does not take the view that the transaction will have an impact on either of the affected markets.

(121) In view of the above and all available evidence, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the IAMs for LVP, CVP and CVL in the EEA or on a national basis.

V.4. Rail brake friction material

(122) Concerning rail brake friction material, the markets affected by the proposed transaction are both the market for OEM/OES of organic pads and IAM of organic pads and the IAM for organic blocks. In all of these markets the Parties' combined market shares by value remain at or below [30 – 40] %, as reported in the tables below. Moreover, if market shares by volume are contemplated, only the market for organic blocks would be affected with a market share of [20 – 30] %.

	2013	2012	2011
<i>organic pads OEM/OES</i>			
FDML	[20 – 30] %	[10 – 20] %	[20 – 30] %
HFM	[0 – 10] %	[0 – 10] %	[10 – 20] %
combined	[30 – 40] %	[20 – 30] %	[30 – 40] %
Wabtec	[30 – 40] %	[30 – 40] %	[30 – 40] %
Frenoplast	[0 – 10] %	[0 – 10] %	[0 – 10] %
Knorr-Bremse/Icer	[0 – 10] %	[0 – 10] %	[0 – 10] %
N/TMD	[0 – 10] %	[0 – 10] %	[0 – 10] %
Others	[10 – 20] %	[20 – 30] %	[0 – 10] %

Source: Form CO.

³⁴ The only topic mentioned by the majority of IAM customers is that there is a certain 'must-have stock' and therefore friction material sometimes must be purchased from certain producers and brands due to several reasons, among them customer and security preferences.

(123) With respect to the OEM/OES market for organic pads, the Parties have a combined market share of [30 – 40] % with an increment below [10 – 20] % (FDML: [20 – 30] %, HFM [0 – 10] %). The Commission considers that other significant competitors would continue to exert significant competitive pressure on the combined entity also post-merger. These competitors are in particular Wabtec ([30 – 40] %), Frenoplast ([0 – 10] %), Knorr-Bremse/Icer ([0 – 10] %) and Nisshinbo/TMD ([0 – 10] %).

	2013	2012	2011
<i>organic pads IAM</i>			
FDML	[10 – 20] %	[10 – 20] %	[0 – 10] %
HFM	[10 – 20] %	[10 – 20] %	[10 – 20] %
combined	[20 – 30] %	[20 – 30] %	[20 – 30] %
Wabtec	[30 – 40] %	[30 – 40] %	[30 – 40] %
Bremskerl	[20 – 30] %	[20 – 30] %	[20 – 30] %
Frenoplast	[0 – 10] %	[0 – 10] %	[0 – 10] %
Knorr-Bremse/Icer	[0 – 10] %	[0 – 10] %	[0 – 10] %
Others	[0 – 10] %	[0 – 10] %	[0 – 10] %

Source: Form CO.

(124) On the IAM for organic pads the Parties have a combined market share of [20-30] % with an increment of [10-20] % (FDML: [10-20] %, HFM: [10-20] %). On this market, the combined entity would become the third-largest competitor through the transaction. The Commission considers that also with respect to the IAM for organic pads, a number of sizeable competitors remain in the market, such as Wabtec ([30-40] %), Bremskerl ([20-30] %), Frenoplast ([0-10] %) and Knorr-Bremse/Icer ([0-10] %).

	2013	2012	2011
<i>organic blocks IAM</i>			
FDML	[0 – 10] %	[0 – 10] %	[10 – 20] %
HFM	[10 – 20] %	[10 – 20] %	[10 – 20] %
combined	[20 -30] %	[20 -30] %	[20 -30] %
Wabtec	[50 – 60] %	[50 – 60] %	[50 – 60] %
Knorr-Bremse/Icer	[0 – 10] %	[0 – 10] %	[0 – 10] %
N/TMD	[0 – 10] %	[0 – 10] %	[0 – 10] %
Others	[0 – 10] %	[0 – 10] %	[0 – 10] %

Source: Form CO.

(125) Regarding the IAM for organic blocks, the Parties have a combined market share of [20-30] % with an increment of [0 – 10] % (FDML: [0 – 10] %, HFM: [10 – 20] %). On this market, in particular the strongest competitor Wabtec with a market share of [50 – 60] % would continue to exert significant competitive pressure on the Parties post-merger. In addition, further competitors are active on the market, such as Knorr-Bremse/Icer ([0 – 10] %) and Nisshinbo/TMD ([0 – 10] %).

(126) Therefore, in each of the affected markets, the Commission considers that at least three competitors will continue to be active post-merger. Knorr-Bremse/Icer is vertically integrated also having activities on the markets for brake systems. Nisshinbo/TMD is also active on the markets for automotive brake friction material.

(127) The Notifying Party submits that barriers to entry in the market for rail brake friction material are not very high. Some low cost friction material suppliers from Central and Eastern Europe, such as Ferex (Czech Republic), OZB (Poland) or Spomel (Poland), and some manufacturers from Asia have already entered the EEA market. In the future, imports from Eastern Europe, Asia and India are expected to increase.

- (128) However, the market investigation indicates that entry was limited in the past 5 years and is not forecasted for the future. It also displayed some concern in the market, in particular with regard to the availability of rail brake friction material. Customers state that the Parties are indispensable suppliers.
- (129) The Parties also submit that the customer-side of the market for rail friction material is highly concentrated in the EEA. The main customers on the market for foundation brakes for rail applications are Knorr-Bremse, Faiveley and to a lesser extent, Hanning & Kahl, while the three main customers that are active on the markets for rail vehicles are the three manufacturers Siemens, Alstom and Bombardier.
- (130) The Commission considers that there is to a certain extent countervailing buyer power on the investigated markets for rail brake friction material after the transaction. The market investigation shows that customers have already threatened to source in-house. Knorr-Bremse entered into a joint venture, ICER Rail, in order to reduce the dependency from its suppliers. A large majority of customers also state to already have threatened to switch suppliers. Moreover, two customers report to have actually switched supplier before the end of a contract.
- (131) In light of the above and all available evidence, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with regard to the markets for rail brake friction material.

V.5 Conclusion

- (132) In light of the above and all available evidence, the Commission therefore has serious doubts with respect to its compatibility with the internal market on (i) the OEM/OES market for CVP in the EEA and (ii) the OEM/OES market for LVP in the EEA.

VI. PROPOSED REMEDIES

VI.1. Description of the proposed commitments

- (133) In order to render the concentration compatible with the internal market, the Notifying Party has modified the notified concentration by entering into the following commitments (the "Commitments")³⁵, which are annexed to this decision and form an integral part thereof.
- (134) Pursuant to the Commitments, FDML commits to divest production facilities for both the OEM/OES market for commercial vehicle pads (CVP) in the EEA and the OEM/OES market for light vehicle pads (LVP) in the EEA as well as associated personnel, contracts and customer orders and development functions (the "Divestment Business") to an independent third party.
- (135) The Divestment Business consists of three elements, which essentially represent FDML's production and sales of OEM/OES for CVP in the EEA and one production plant for OEM/OES LVP in the EEA, namely:

³⁵ The Notifying Party submitted a first set of commitments on 21 May 2014. In the light of the results of the market test, the Notifying Party implemented specific improvements in the second and final version of the proposed commitments, which was submitted on 5 June 2014.

(i) its entire CVP business relating to the OEM/OES market in the EEA, based at the manufacturing plant at Marienheide (MH plant), Germany. This plant in 2013 had a product-specific output of [...] million pieces and a product-specific turnover of [...] million. It has an overall installed capacity of [...] million CVP per year;

(ii) a part of FDML's LVP business relating to the OEM/OES market in the EEA, based at the manufacturing plant at Noyon (NOY plant), France. This plant in 2013 had a product-specific output of [...] million pieces and a product-specific turnover of [...] million. It has an overall installed capacity of [...] million LVP per year;

(iii) to the extent necessary and required by the Purchaser, FDML will provide certain transitional services to the purchaser in order to ensure a smooth transition of a fully operational business to the purchaser. In particular, FDML offers access to its testing centre located in Bad Camberg for a transitional period of up to 12 months on a cost-plus basis. After the transitional period, it is prepared to sell the respective testing equipment at market price to the purchaser and offer him to hire the respective personnel.

(iv) intangible assets: all intangible assets that are used in the operation of the Divestment Business and all other intellectual property and know-how that the Divestment Business uses in its production and marketing of CVP and LVP for the OEM/OES market in the EEA. FDML would obtain a non-exclusive, irrevocable, perpetual and royalty free license of the respective intellectual property rights.

(136) In addition the Notifying Party has entered into related commitments, *inter alia* regarding the separation of the Divestment Business from their retained businesses, the preservation of the viability, marketability and competitiveness of the Divestment Business, including the appointment of a monitoring trustee and, if necessary, a divestiture trustee.

VI.2. The Commission's assessment of the Commitments

VI.2.1. Framework for the Commission's assessment of the Commitments

(137) Where a notified concentration raises serious doubts as to its compatibility with the internal market, the Parties may modify the notified concentration so as to remove the grounds for the serious doubts identified by the Commission with a view to having it declared compatible with the internal market pursuant to Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

(138) As set out in the Commission Notice on Remedies,³⁶ commitments have to eliminate the Commission's serious doubts entirely, they have to be comprehensive and effective from all points of view and they must be capable of being implemented effectively within a short period of time, as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.³⁷

(139) In assessing whether or not commitments will restore effective competition, the Commission considers their type, scale and scope by reference to the structure and the

³⁶ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), (the "Commission Notice on Remedies").

³⁷ Commission Notice on Remedies, paragraph 9.

particular characteristics of the market in which the Commission has identified serious doubts as to the compatibility of the notified concentration with the internal market.³⁸

- (140) Divestiture commitments are the best way to eliminate serious doubts resulting from horizontal overlaps of the merging parties' activities.³⁹ The 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.⁴⁰
- (141) The business to be divested must include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which are currently employed or which are necessary to ensure the business' viability and competitiveness. Personnel and assets which are currently shared between the business to be divested and other businesses of the Parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, must also be included. Otherwise, the viability and competitiveness of the business to be divested would be endangered. Therefore, the business to be divested must contain the personnel providing essential functions for the business, at least in a sufficient proportion to meet the on-going needs of the business to be divested.⁴¹
- (142) Furthermore, the intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable purchaser with proven relevant expertise and ability to maintain and develop the business to be divested as a viable and active competitive undertaking.

VI.2.2. The Commission's market test and assessment of the Commitments

The results of the market test

- (143) The Commission launched a market test of the Commitments on 22 May 2014. Overall, the market test was positive as to the scope and general suitability of the Commitments to remedy the serious doubts identified by the Commission as to the compatibility of the transaction with the internal market. However, the market test identified two specific elements of the Commitments that were subsequently improved by the second and final version of the Commitments submitted on 5 June 2014.
- (144) Competitors and customers generally considered that the Divestment Business includes all necessary assets and would be able to compete effectively with the merged entity, with the exception of testing.
- (145) Indeed, testing is considered an integral and essential part of the business by almost all competitors and customers, with only a minority envisaging that the proposed transitional service agreement or third-party testing services could be a sufficient alternative. It was, however, also mentioned that this essentially depends on the identity of the purchaser. A company that has in-house testing facility might perceive an additional testing facility from the Divestment Business as a disadvantage to its

38 Commission Notice on Remedies, paragraph 12.

39 Commission Notice on Remedies, paragraph 17.

40 Commission Notice on Remedies, paragraph 23.

41 Commission Notice on Remedies, paragraphs 25 and 26.

ability to compete effectively. This relates mainly to competitors that are already active in the OEM/OES markets and have in-house testing in the EEA.

(146) With regard to intellectual property rights, a provision was included in the Commitments that granted FDML a non-exclusive, irrevocable, perpetual and royalty free license for any and all IP-rights transferred. Many customers and competitors evaluated this as impeding the purchaser from effectively competing on the markets.

(147) The Notifying Party agreed to address the issues expressed during the market test and on 5 June 2014 submitted a revised version of the Commitments addressing the issues in the following way:

(i) FDML also includes as part of the Divestment Business virtually all necessary testing equipment and personnel used and responsible for the MH and NOY plants currently based at FDML's centralized testing site in Bad Camberg, Germany.

(ii) With regard to the intellectual property rights, FDML will receive a license back of formulations with regard to (a) other geographic regions than the EEA and (b) the independent aftermarket (the Commission has not raised serious doubts for both (a) and (b)). In addition, with respect to the NOY plant, it receives a license back for certain formulations that are also used to serve OEM/OES LVP customers from other FDML plants in the EEA.

(iii) With regard to a certain formulation mix used for one project which is provided by another plant, namely [plant name], and one type of CVP which is sourced from the [plant name] plant, the Notifying Party commits to enter into a standard supply agreement with the purchaser on commercially reasonable terms for the duration of the underlying contract.

Suitability of the Commitments to remove the serious doubts

(148) The Commitments, consisting in the divestiture of two production facilities and associated assets, constitute a structural measure. In fact, the sale of the Divestment Business to an independent and suitable purchaser will dissipate the serious doubts identified by the Commission as to the compatibility of the transaction with the internal market and will not require medium or long-term monitoring measures. The new commercial structure resulting from the implementation of the Commitments will be sufficiently workable and lasting to ensure that a significant impediment to effective competition will not materialise.⁴²

(149) The proposed divestment will eliminate the Parties' overlap in the OEM/OES market for CVP and allows the entry of an additional competitor or expansion of a fringe competitor in the OEM/OES market for LVP with existing customer contracts and a proven track record, and is therefore considered suitable to remove any serious doubts as to the compatibility of the concentration with the internal market.

(i) OEM/OES for CVP in the EEA

(150) FDML commits to divest its complete OEM/OES business for CVP in the EEA, which is located at the manufacturing plant at Marienheide, Germany. Assuming this part of the Divestment Business would continue to produce the same amount of CVP

⁴² See also Commission Notice on Remedies, paragraphs 10 and 15.

for the OEM/OES market in the EEA as in the pre-merger situation, the post-remedies market shares for the supply of this product would change as follows:

SALES 2013 – Current Market Shares

FDML	[10 – 20] %
HFM	[20 – 30] %
Combined	[40 – 50] %
N/TDM	[40 – 50] – [50 - 60]%
ITT/Galfer	[0 – 10] %
Bremskerl	[0 – 10] %

Source: Form CO.

SALES 2013 – Post-Remedies Market Shares

FDML	[0 – 10] %
HFM	[20 – 30]%
Combined	[20 – 30] %
N/TDM	[40 – 50] – [50-60] %
ITT/Galfer	[0 – 10] %
Bremskerl	[0 – 10] %
Buyer	[10 – 20] %

Source: Form CO.

(151) Therefore, the Commitments would remove the entirety of the increment that would have been added by the transaction in the OEM/OES market for CVP in the EEA. The HHI-delta compared to the pre-merger situation would therefore be 0 with no increased concentration in the market. At the same time, the Commitments would lead to the creation of a new significant player or strengthening of a fringe competitor with approximately [10 – 20] % (additional) market share in such a market and therefore the pre-merger market structure with three sizeable competitors would largely be maintained.

(ii) OEM/OES for LVP in the EEA

(152) Assuming the Divestment Business continues to produce the same amount of LVP for the OEM/OES market as in the pre-merger situation, the post-remedies market shares for the supply of this product would change as follows:

SALES 2013 – Current Market Shares

FDML	[20 – 30] %
HFM	[20 – 30] %
Combined	[40 – 50] %
N/TDM	[10 – 20] – [20-30]%
ITT/Galfer	[20 – 40] %
Akebono,Roulunds, Raicam	[0 – 10] %

Source: Form CO.

SALES 2013 – Post-Remedies Market Shares

FDML	[10 – 20] %
HFM	[20 – 30] %
Combined	[30 – 40] %
N/TDM	[10 – 20]-[20-30] %
ITT/Galfer	[20-30]-[30-40] %
Others	[0 – 10] %
Buyer	[0 – 10] %

Source: Form CO.

- (153) The Commitments allow the entry of an additional ([0 – 10] % market share by value, HHI-delta reduced to 571) or expansion of a fringe competitor ([0 – 10] % market share by value, HHI-delta of 619)⁴³ in the OEM/OES market for LVP. Therefore, the concentration level would be reduced to approximately 2 650 with the HHI-delta ranging between 571 and 619, as opposed to 941 of the transaction as originally notified.
- (154) However, this would remove about [20 – 30] % of the overlap by value. By volume, because of HFM's lower market share of [10 – 20] %, this would constitute almost half of the overlap between the Parties.
- (155) Moreover, the OEM/OES market for LVP is marked by bidding procedures organised either by vehicle manufacturers themselves or brake manufacturers. Even though in theory in such markets the relevant positions of market participants are prone to change, as the award of few large contracts can significantly and within a short time-span alter the strength of competitors, in the case at hand market shares have in general remained stable during the years 2011-2013. The reason, why the purchaser of the NOY plant would in any event be a more significant competitive force than the current fringe competitors, whose market shares might be considerably lower than [0 – 10] %, ⁴⁴ is the fact that the purchaser would through the divested customer contracts already have business with 4 important OEM/OES customers, namely [customer names], as well as a number of brake manufacturers. It would therefore be able to quickly achieve a proven track-record for its production and experience, enabling it to effectively compete in upcoming tenders.
- (156) The Commission considers that this removes any serious doubts and thereby any significant impediment to effective competition by allowing for an additional viable and trusted alternative for customers to source their light vehicle brake pads from, thus maintaining a number of four main competitors on the market.

Testing facility

- (157) The two manufacturing plants do not contain an in-house testing facility for friction material, as FDML has organized its EEA testing of friction material in one central

⁴³ In case the fringe competitor had a market share of [0 – 10] % pre-transaction.

⁴⁴ The Notifying Party submitted for example that Raicam has so far gained one contract with Fiat and General Motors respectively for the OEM/OES market for LVP.

site in Bad Camberg, Germany. At this site, both dynamometer and vehicle testing capacities for CVP and dynamometer testing capacities for the production in the NOY plant are located. To still allow the Divestment Business to develop into a viable and strong competitor in the market FDML has offered for the Divestment Business to include the relevant testing equipment and personnel allocated to the testing processes for the MH and NOY plants. These resources are currently located in FDML's testing center in Bad Camberg. The only exclusion relates to one dynamometer that is only partially ([<30%]) used for testing of CVP and can easily be replaced with the current free capacity on the divested dynamometers.

- (158) In any event and as the described testing is perceived as essential for the continuation of a successful business, the provisions contained in the Commitments with respect to this aspect will ensure that the Divestment Business can effectively compete on both markets.

Viability of the Divestment Business

- (159) Both plants of the Divestment Business are profitable. In the years between 2012 and 2015 they have growing revenues and positive gross and EBITDA margins.
- (160) The MH plant generated revenues from the sale of CVP for the OEM/OES of EUR [...] million in 2012 and EUR [...] million in 2013. Capacity utilisation in these years was at [...] and [...] respectively. According to financial projections submitted by the Notifying Party, revenue is forecasted to increase to [...] million in 2015. Gross margins are stable at above [...] and are forecasted to remain so until 2015. EBITDA is projected at [...] in 2015.
- (161) The Divestment Business at the NOY plant generated revenues from the sale of LVP for the OEM/OES of EUR [...] million in 2012 and EUR [...] million in 2013. Capacity utilisation in these years was at [...] and [...] respectively. According to financial projections submitted by the Notifying Party, revenue is forecasted to increase to EUR [...] million in 2015. Gross margins are positive and forecasted to amount to [...] in 2015. EBITDA is projected at [...] in 2015.
- (162) The provisions with regard to a license for intellectual property rights will not impact the viability of the NOY plant, as this plant only delivers limited volumes of its production outside the EEA ([0-5]%) and to the IAM ([0-5]%). With regard to a license back for a limited number of formulations for use in the OEM/OES market in the EEA, which are also used by the Parties at other plants predominantly for projects different from the ones at the NOY plant, the viability will not be put at a risk.

Purchaser criteria and potential buyers

- (163) The market test revealed that generally the Divestment Business is perceived as an attractive offer for a purchaser. Several different categories of potential purchasers were suggested, including: (i) companies marginally active in the production of CVP and LVP for the OEM/OES market in the EEA today; (ii) companies with activities in brake friction material within the EEA or in other geographic areas and (iii) some customers.
- (164) Generally, both competitors and customers stated that the potential purchaser does need experience and reputation in the production of brake friction material or in related markets, like brakes or automotive. A strong majority of customers in particular rejected a purely financial investor as a suitable purchaser, as such buyer

would not have the necessary insight into the business, commitment and strategic orientation.

- (165) In particular, the MH plant makes approximately [...] of its business on the IAM, reaching [...] of its turnover in 2013. Despite the relevance of the IAM business for the MH plant, the respective customer contracts, trademarks, brands and further elements related to IAM specifically are not included in the Divestment Business. A suitable buyer that is capable of maintaining the competitiveness and viability of the MH plant will need to substitute the [...] of the turnover, either by increasing output for the OEM/OES market or by securing new contracts in the IAM market. Therefore, to ensure the continued and viable operation of the MH plant, the proposed purchaser will have to demonstrate that unless he can operate the plant successfully solely with OEM/OES business, he has the ability to effectively and swiftly contract EEA IAM volumes, in particular on the basis of having a proven track record in the IAM.
- (166) Specifically, the market test revealed eight interested buyers, the majority of which are friction material manufacturers or current customers. In addition, one respondent submits interest only in acquiring the Divestment Business at the MH plant producing for the OEM/OES market for CVP.

VI.3. Conclusion on the Commitments

- (167) On the basis of the above, the Commission concludes that the Commitments are suitable and sufficient to remedy the serious doubts raised by the transaction in the potential markets for: (i) OEM/OES of CVP in the EEA and (ii) OEM/OES for LVP in the EEA. Moreover, the Commitments are comprehensive and effective from all points of view, and are capable of being implemented effectively within a short period of time.
- (168) The Commitments will create an important or strengthen an existing fringe competitor in the supply of automotive brake friction material in the OEM/OES markets with a particularly strong position in the CVP segment.
- (169) Finally, the Commitments also remove the entire increment that would have been added by the transaction in the potential market for OEM/OES for CVP in the EEA through the divestment of FDML's only plant producing CVP for this market and [about 40-50%] of the increment by volume ([20-30]% by value) in the OEM/OES market for LVP in the EEA.
- (170) In addition, the emergence of an additional competitor in both of these markets also excludes any of the potential concerns with respect to coordinated effects on the OEM/OES markets for CVP and LVP in the EEA.

VII. CONDITIONS AND OBLIGATIONS

- (171) Pursuant to the first sentence of the second subparagraph of Article 6(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.
- (172) The achievement 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 and the EEA Agreement no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6)(b) 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.

(173) In accordance with the basic distinction between conditions and obligations, the decision in this case is conditional on full compliance with the requirements set out in Section B of the final Commitments, which constitute conditions. The remaining requirements set out in the other Sections of the said Commitments are considered to constitute obligations.

(174) The full text of the final Commitments is annexed to this Decision as Annex I and forms an integral part thereof.

VIII. CONCLUSION

(175) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in Section B of the commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

*For the Commission
(Signed),
Joaquín ALMUNIA
Vice-President*

05/06/2014

Case M.7174 – Federal-Mogul Corporation/Honeywell Friction Materials**COMMITMENTS TO THE EUROPEAN COMMISSION**

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (the “*Merger Regulation*”), Federal-Mogul Corporation (“*FDML*” or the “*Notifying Party*”) hereby enter into the following Commitments (the “*Commitments*”) vis-à-vis the European Commission (the “*Commission*”) with a view to removing the Commission’s serious doubts as to the compatibility of FDML’s acquisition of a portion of the friction materials business of Honeywell International Inc. (the “*Concentration*”) with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to Article 6(1)(b) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “*Decision*”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “*Remedies Notice*”).

Section A. Definitions

1. For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the “*Consolidated Jurisdictional Notice*”).

Assets: the assets that contribute to the current operation or are necessary to preserve the current status of the viability and competitiveness of the Divestment Business as indicated in Section B, paragraph 6 and described more in detail in the Schedules.

Closing: the transfer of the legal title to the Divestment Business to the Purchaser.

Closing Period: the period of [...] from the approval of the Purchaser and the terms of sale by the Commission.

Confidential Information: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Trustee’s objectivity and independence in discharging its duties under the Commitments.

Divestment Business: the businesses as defined in Section B and Schedules A and B which the Notifying Party commits to divest as a bundle to one single purchaser.

Divestiture Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by FDML and who has/have received from FDML 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: the period of [...] from the Effective Date.

Hold Separate Manager: the person appointed by FDML for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Interim Period: the period between the Effective Date and Closing.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Schedules, including the Hold Separate Manager.

Monitoring Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by FDML, and who has/have the duty to monitor FDML's compliance with the conditions and obligations attached to the Decision.

Parties: the Notifying Party and the undertaking that is the target of the concentration.

Personnel: all staff currently employed by the Divestment Business, including staff seconded to the Divestment Business, shared personnel (with the exception of shared personnel listed in Annexes A.10 and B.10) as well as the additional personnel listed in the Schedules.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

Purchaser Criteria: the criteria laid down in paragraph 17 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

Schedules: Schedules A and B to these Commitments describing more in detail the Divestment Business.

Trustee(s): the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

Trustee Divestiture Period: the period of [...] from the end of the First Divestiture Period.

Federal-Mogul Corporation ("FDML"), incorporated under the laws of Delaware, United States of America, with its registered office at 26555 Northwestern Highway, Southfield, Michigan 48033, United States of America.

Section B. The commitment to divest and the Divestment BusinessCommitment to divest

2. In order to maintain effective competition, FDML 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 18 of these Commitments. To carry out the divestiture, FDML commits 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 FDML has not entered into such an agreement at the end of the First Divestiture Period, FDML shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 30 in the Trustee Divestiture Period.

The Divestment Business shall be sold in its entirety to one single purchaser.

3. FDML shall be deemed to have complied with this commitment if:
 - (a) by the end of the Trustee Divestiture Period, FDML or the Divestiture Trustee has entered into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraph 18; and
 - (b) the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.
4. In order to maintain the structural effect of the Commitments, the Notifying Party shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Divestment Business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 44 of these Commitments), the Commission finds that the structure of the market 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 internal market.

Structure and definition of the Divestment Business

5. The Divestment Business consists of
 - a) the FDML business relating to the development, production and supply of commercial vehicle brake pads (“CVP”) for original equipment and original equipment spare part (“OE/S”) use to customers in the European Economic Area (“EEA”) and current limited export markets outside the EEA, based at FDML’s manufacturing plant at Marienheide, Germany (“MH”), and currently operated by FDML’s subsidiary, Federal-Mogul Friction Products GmbH (“FMFP GmbH”) (the “MH Divestment Business”); and

- b) the FDML business relating to the development, production and supply of light vehicle brake pads (“**LVP**”) for OE/S use to customers in the EEA and current limited export markets outside the EEA, based at FDML’s manufacturing plant at Noyon, France, and currently operated by FDML’s subsidiary Federal-Mogul Friction Products SAS (the “**NOY Divestment Business**”).
6. The legal and functional structure of the Divestment Business as operated to date is described in Schedules A and B (collectively: the “**Schedules**”). The Divestment Business, described in more detail in the Schedules, includes all assets and staff that contribute to the current operation or are necessary to preserve the current status of the viability and competitiveness of the Divestment Business, in particular:
- (a) all tangible and intangible assets (including intellectual property rights);
 - (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;
 - (c) all contracts, leases, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business; and
 - (d) the Personnel.
7. In addition, the Divestment Business includes the benefit, for a transitional period of up to [...] after Closing, and on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current arrangements under which FDML or its Affiliated Undertakings supply products or services to the Divestment Business, as detailed in the Schedule, unless otherwise agreed with the Purchaser. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside the FDML unit providing the respective transitional service.

Section C. Related commitments

Preservation of viability, marketability and competitiveness

8. From the Effective Date until Closing, the Notifying Party shall preserve or procure the preservation of 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 FDML undertakes:
- (a) not to carry out any action 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, or procure 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, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business, and not to solicit or move any Personnel to FDML's remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, FDML shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. FDML must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.

Hold-separate obligations

9. To the extent possible without impeding the proper functioning of the Divestment Business and/or the business retained by the Notifying Party during the Interim Period, the Notifying Party commits, from the Effective Date until Closing, to keep the Divestment Business separate from the business(es) it is retaining and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the business(es) retained by FDML have no involvement in the Divestment Business; (ii) the Key Personnel and Personnel of the Divestment Business have no involvement in any business retained by FDML and do not report to any individual outside the Divestment Business.
10. Until Closing, FDML shall assist the Monitoring Trustee in ensuring that each Divestment Business is managed as a distinct and saleable entity separate from the business(es) which FDML is retaining. Immediately after the adoption of the Decision, FDML shall appoint a Hold Separate Manager. FDML may either appoint one single Hold Separate Manager for the entire Divestment Business or one Hold Separate Manager for the MH Divestment Business and one Hold Separate Manager for the NOY Divestment Business. Each Hold Separate Manager shall be part of the Key Personnel and shall manage the relevant 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 FDML. Each Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of a Hold Separate Manager shall be subject to the procedure laid down in paragraph 8(c) of these Commitments. The Commission may, after having heard FDML, require FDML to replace a Hold Separate Manager.
11. The following applies as of the Effective Date if and to the extent the Divestment Business is divested by way of share deal, or, to the extent the Divestment Business is transferred after the Effective Date to an FDML entity the shares of which would be divested, from the effective date of such transfer: to ensure that the Divestment Business is held and managed as a separate

entity the Monitoring Trustee shall exercise FDML's rights as shareholder in the legal entity or entities that constitute the Divestment Business (except for its rights in respect of dividends that are due before Closing), with the aim of acting in the best interest of the business, which shall be determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling FDML's obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of FDML. Upon request of the Monitoring Trustee, FDML shall resign as a member of the boards or shall cause such members of the boards to resign.

Ring-fencing

12. To the extent possible without impeding the proper functioning of the Divestment Business, the business retained by the Notifying Party during the Interim Period and/or FDML's ability, as a consolidated tax filer, to make its legally required tax filings, FDML shall implement, or procure to implement, all necessary measures to ensure that it does not, after the Effective Date, obtain any Confidential Information relating to the Divestment Business and that any such Confidential Information obtained by FDML before the Effective Date will be eliminated and not be used by FDML. This includes measures vis-à-vis FDML's appointees on the supervisory board and/or board of directors of the Divestment Business. In particular, the participation of the Divestment Business in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. FDML may obtain or keep information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business, the disclosure of which to FDML is required by law, including but not limited to financial reporting obligations applicable to FDML as a publicly traded company, as well as information that is needed by Federal-Mogul, as a consolidated tax filer, to make its legally required tax filings. FDML may also keep Confidential Information obtained before the Effective Date to the extent reasonably necessary to allow FDML to continue to produce CVP and LVP in the production sites it retains and to fulfil its obligations under any development or supply contracts not forming part of the Divestiture Business (including, but not limited to, know-how related to friction materials formulations and friction materials production).

Non-solicitation clause

13. The Parties undertake, 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 2 years after Closing.

Due diligence

14. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, FDML shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

- (a) provide to potential purchasers sufficient information as regards the Divestment Business;
- (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

- 15. FDML shall submit written reports in English language 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 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). FDML shall submit a list of all potential purchasers having expressed interest in acquiring the Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within five days of their receipt.
- 16. FDML shall inform the Commission and the Monitoring Trustee on the preparation of the 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

- 17. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:
 - (a) The Purchaser shall be independent of and unconnected to the Notifying Party and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).
 - (b) The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors. Unless the Purchaser can demonstrate that the MH plant can be operated successfully solely with OE/S-business within a reasonable period of time post-Closing, the Purchaser must demonstrate the ability to effectively enter the EEA IAM on the basis of a proven track record in the aftermarket (not necessarily in the EEA).
 - (c) The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
- 18. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the Commission's approval.

When FDML has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. FDML must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commission's Decision and the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different 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

19. FDML shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Party commits not to close the Concentration before the appointment of a Monitoring Trustee.
20. If FDML has not entered into a binding sale and purchase agreement regarding the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by FDML at that time or thereafter, FDML shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
21. The Trustee shall:
 - (i) at the time of appointment, be independent of the Notifying Party and its Affiliated Undertakings;
 - (ii) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and
 - (iii) neither have nor become exposed to a Conflict of Interest.
22. The Trustee shall be remunerated by the Notifying Party 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, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

Proposal by FDML

23. No later than two weeks after the Effective Date, FDML shall submit the name or names of one or more natural or legal persons whom FDML proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period or on request by the Commission, FDML shall submit a list of one or more persons whom FDML proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 21 and shall include:
- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
 - (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
 - (c) 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

24. 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, FDML shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, FDML 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 FDML

25. If all the proposed Trustees are rejected, FDML shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 19 and 24 of these Commitments.

Trustee nominated by the Commission

26. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom FDML shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

27. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or FDML, 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

28. The Monitoring Trustee shall:

- (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
- (ii) oversee, in close co-operation with the Hold Separate Manager, the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by FDML with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 8 and 9 of these Commitments;
 - (b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 10 of these Commitments;
 - (c) with respect to Confidential Information:
 - determine all necessary measures to ensure that FDML does not after the Effective Date obtain any Confidential Information relating to the 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,
 - make sure that any Confidential Information relating to the Divestment Business obtained by FDML before the Effective Date is eliminated and will not be used by FDML and
 - decide whether such information may be disclosed to or kept by FDML as the disclosure is reasonably necessary to allow FDML to carry out the divestiture or as the disclosure is required by law;
 - (d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and FDML or Affiliated Undertakings;
- (iii) propose to FDML such measures as the Monitoring Trustee considers necessary to ensure FDML'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 the Divestment Business and the non-disclosure of competitively sensitive information;

- (iv) 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:
 - (a) potential purchasers receive sufficient and correct 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
 - (b) potential purchasers are granted reasonable access to the Personnel;
 - (v) act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;
 - (vi) provide to the Commission, sending FDML a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the operation and management of the Divestment Business as well as the splitting of assets and the allocation of Personnel 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;
 - (vii) promptly report in writing to the Commission, sending FDML a non-confidential copy at the same time, if it concludes on reasonable grounds that FDML is failing to comply with these Commitments;
 - (viii) within one week after receipt of the documented proposal referred to in paragraph 18 of these Commitments, submit to the Commission, sending FDML a non-confidential copy at the same time, 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;
 - (ix) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.
29. If the Monitoring and Divestiture Trustee are not the same legal or natural persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

Duties and obligations of the Divestiture Trustee

30. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the

purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 17 and 18 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) 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 FDML, subject to the Notifying Party's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

31. 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 language on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Notifying Party.

III. Duties and obligations of the Parties

32. FDML shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of FDML'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 FDML and the Divestment Business shall provide the Trustee upon request with copies of any document. FDML 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.
33. FDML 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. FDML 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. FDML shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.
34. FDML shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), 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,

FDML shall cause the documents required for effecting the sale and the Closing to be duly executed.

35. FDML 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 FDML 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.
36. At the expense of FDML, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to FDML’s approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should FDML refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard FDML. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 35 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served FDML during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
37. FDML agrees that the Commission may share Confidential Information proprietary to FDML with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.
38. The Notifying Party agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
39. For a period of 10 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Trustee

40. 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:
 - a) the Commission may, after hearing the Trustee and FDML, require FDML to replace the Trustee; or
 - b) FDML may, with the prior approval of the Commission, replace the Trustee.

41. If the Trustee is removed according to paragraph 40 of these Commitments, 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 hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 19-26 of these Commitments.
42. Unless removed according to paragraph 40 of these Commitments, 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

43. The Commission may extend the time periods foreseen in the Commitments in response to a request from FDML or, in appropriate cases, on its own initiative. Where FDML requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. Only in exceptional circumstances shall FDML be entitled to request an extension within the last month of any period.
44. The Commission may further, in response to a reasoned request from the Notifying Party showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. The Commission may also, in response to a reasoned request from the Notifying Party showing good cause, grant a derogation from the requirement in para. 2 sub-para. 2 that the Divestment Business shall be sold in its entirety to one single purchaser. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section G. Entry into force

45. The Commitments shall take effect upon the date of adoption of the Decision.

.....
duly authorised for and on behalf of Federal-Mogul Corporation

SCHEDULES, ANNEXES AND EXHIBITS TO THE DRAFT COMMITMENT OFFER

Schedule A: The MH Divestment Business

- **Annex A.1** List and description of products manufactured by the MH Divestment Business
- **Annex A.2** Tangible Assets of the MH Divestment Business
 - Exhibit A.2.1 Fixed assets register MH (*provided in a separate file*)
 - Exhibit A.2.2 Land register excerpt MH (*provided in a separate file*)
- **Annex A.3** Intangible Assets of the MH Divestment Business
- **Annex A.4** Main licences, permits and authorizations of the MH Divestment Business
 - Exhibit A.4 List of permits and authorizations MH (*provided in a separate file*)
- **Annex A.5** Personnel of the MH Divestment Business
 - Exhibit A.5 Organizational chart MH (*provided in a separate file*)
- **Annex A.6** Key customer contracts, commitments and orders of the MH Divestment Business
- **Annex A.7** Key supplier contracts, commitments and orders of the MH Divestment Business
- **Annex A.8** Customer, credit and other records of the MH Divestment Business
 - Exhibit A.8 Credit records MH (*provided in a separate file*)
- **Annex A.9** Shared assets not included in the MH Divestment Business
- **Annex A.10** Shared personnel not included in the MH Divestment Business
- **Annex A.11** Shared supply contracts not included in the MH Divestment Business

Schedule B: The NOY Divestment Business

- **Annex B.1** List and description of products manufactured by the NOY Divestment Business
- **Annex B.2** Tangible Assets of the NOY Divestment Business
 - Exhibit B.2.1 List of fixed assets NOY (*provided in a separate file*)
 - Exhibit B.2.2 Notarial documents related to the transfer of the real estate of the NOY plant (*provided in a separate file*).
- **Annex B.3** Intangible Assets of the NOY Divestment Business
- **Annex B.4** Main licences, permits and authorizations of the NOY Divestment Business
 - Exhibit B.4 List of permits and authorizations MH (*provided in a separate file*)
- **Annex B.5** Personnel of the NOY Divestment Business
 - Exhibit B.5 Organizational Chart NOY (*provided in a separate file*)
- **Annex B.6** Key customer contracts, commitments and orders of the NOY Divestment Business
- **Annex B.7** Key supplier contracts, commitments and orders of the NOY Divestment Business
- **Annex B.8** Customer, credit and other records of the NOY Divestment Business
- **Annex B.9** Shared assets not included in the NOY Divestment Business
- **Annex B.10** Shared personnel not included in the NOY Divestment Business
- **Annex B.11** Shared supply contracts not included in the NOY Divestment Business

SCHEDULE A
THE MH DIVESTMENT BUSINESS

1. The MH Divestment Business consists of the FDML business relating to the development, production and supply of commercial vehicle brake pads (“**CVP**”) for original equipment and original equipment spare (“**OE/S**”) use to customers in the European Economic Area (“**EEA**”) and current selected export markets outside the EEA, based at FDML’s manufacturing plant at Marienheide, Germany (the “**MH plant**”), and currently operated by FDML’s wholly-owned subsidiary Federal-Mogul Friction Products GmbH (“**FMFP GmbH**”).
2. The MH plant is currently owned by FMFP GmbH, and is approximately 142K sq. ft. The plant has installed capacity for [...] CVP per year [...]. A plan of the MH plant is contained in **Annex A.2**. The MH plant has a well-trained and experienced management and workforce [...]. An organizational chart is provided in **Exhibit A.5**.

I. Legal and functional structure of the MH Divestment Business

3. The MH Divestment Business is currently owned and operated by FMFP GmbH, a wholly-owned subsidiary of FDML, with registered place of business and main place of operations at Klosterstraße 16, D-51709 Marienheide, Germany. It comprises the MH plant and the business operated from that facility for the development, production and supply of CVP to OE/S customers in the EEA, together with all essential functions for that business which are necessary to ensure its viability and competitiveness, as set forth below.

1. Development

4. [...]

2. Testing

5. [...]

3. Production

6. [...]

4. Distribution

7. [...]

5. *Sales and marketing, customer relations*

8. [...]

6. *Supply chain, supplier relations*

9. [...]

10. [...]

11. [...]

12. [...]

13. [...]

7. *Information technology systems*

14. [...]

15. [...]

8. *Administration (plant management, finance/accounting, human resources)*

16. [...]

II. Products manufactured by the MH Divestment Business

17. A list and description of products manufactured by the MH Divestment Business, in particular their technical and other characteristics, the turnover generated with each of these products, and any innovations or new products planned, is contained in **Annex A.1**.

III. Composition of MH Divestment Business

18. In accordance with paragraph 6 of these Commitments, the MH Divestment Business includes, but is not limited to:

- (a) the main tangible assets listed in **Annex A.2**;
- (b) the intangible assets listed in **Annex A.3** (“Intangible Assets”); provided that FDML shall be entitled to continue to use Intangible Assets, and purchaser shall grant FDML a non-exclusive, irrevocable, perpetual and royalty-free license, which shall include the right to grant sub-licences to other entities of the FDML-group, to use Intangible Assets for the

development of formulations, manufacture and sale of products for the purposes of competing for and selling to

- any customers (OE/S or IAM) outside the EEA;
 - customers on the IAM(s) located within the EEA.
- (c) the main licences, permits and authorisations listed in **Annex A.4**;
- (d) all personnel as further described in **Annex A.5** to the extent still employed by the Divestment Business and/or another FDML entity at the time of Closing; to the extent an employee is entitled to object his/her transfer, FDML will use its best efforts to avoid the employee's objection. If an employee objects and thereby prevents his/her transfer, FDML commits, at the request of the Purchaser, to second the relevant employee to the relevant plant or the Purchaser for as long as legally permissible on the basis that the Purchaser bears all employment-related costs of FDML for that employee. In case such a secondment is not possible, FDML will use its best efforts to assist the Purchaser in finding a suitable replacement employee.
- (e) all customer contracts, commitments and orders listed in **Annex A.6**, to the extent still running at the time of Closing; To the extent the transfer of a customer contract requires the customer's consent, FDML will use its best efforts to procure the customers' consent.
- (f) all supply contracts, commitments and orders as listed in **Annex A.7** to the extent still running at the time of Closing; to the extent the transfer of a supply contract requires the supplier's consent, FDML will use its best efforts to procure the supplier's consent. If a supplier refuses to consent, FDML commits, at the request of the Purchaser, to supply the relevant material to the MH plant for the remaining duration and on the terms and conditions of the relevant supply contract.
- (g) all customer, credit and other records as listed in **Annex A.8**;
19. The MH Divestment Business shall not include:
- (a) the shared assets listed in **Annex A.9**;
 - (b) the shared personnel listed in **Annex A.10**;
 - (c) the shared supply contracts in **Annex A.11**;
 - (d) business for the supply of CVP to the Independent Aftermarket;
 - (e) any of FDML's brands or trademarks.
20. In addition to the MH Divestment Business as described at para. III of this Schedule, FDML commits to offer the purchaser supply of the materials covered by the shared supply contracts in

Annex A.11, to the extent still running at the time of Closing, for the remaining duration and on the terms and conditions of the relevant shared supply contract.

Strict firewall procedures will be adopted in relation to those agreements, so as to ensure that any competitively sensitive information related thereto will not be shared with, or passed on to, anyone outside the FDML unit providing the respective transitional service.

21. If there is any asset or personnel which is not covered by paragraph III of this Schedule but which is both used (exclusively or not) in the MH Divestment Business and necessary for the continued viability and competitiveness of the MH Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

ANNEX A.1

List and description of products manufactured by the MH Divestment Business

[...]

ANNEX A.2
Tangible Assets of the MH Divestment Business

[...]

ANNEX A.3
Intangible Assets of the MH Divestment Business

[...]

ANNEX A.4
Main licences, permits and authorizations of the MH Divestment Business

[...]

ANNEX A.5
Personnel of the MH Divestment Business

[...]

ANNEX A.6

Key customer contracts, commitments and orders of the MH Divestment Business

[...]

ANNEX A.7

Key supplier contracts, commitments and orders of the MH Divestment Business

[...]

ANNEX A.8
Customer, credit and other records of the MH Divestment Business

[...]

ANNEX A.9

Shared assets not included in the MH Divestment Business

[...]

ANNEX A.10
Shared personnel not included in the MH Divestment Business

[...]

ANNEX A.11
Shared supply contracts not included in the MH Divestment Business

[...]

SCHEDULE B
THE NOY DIVESTMENT BUSINESS

1. The NOY Divestment Business consists of the FDML business relating to the development, production and supply of light vehicle brake pads (“LVP”) for original equipment and original equipment spare (“OE/S”) use to customers in the European Economic Area (“EEA”) and current selected export markets outside the EEA, based at FDML’s manufacturing plant at Noyon, France (the “NOY plant”) and currently operated by FDML’s wholly-owned subsidiary Federal-Mogul Friction Products SAS (“FMFP SAS”).
2. The NOY plant is currently owned by FMFP SAS, and is approximately 215K sq. ft. The plant has installed capacity for [...] LVP per year, utilizing [...] technology (preferred by many OEM’s) and is currently [...]. A plan of the NOY plant is contained in **Annex B.2**. The NOY plant has a well-trained and experienced management and workforce. An organizational chart is provided in **Exhibit B.5**.
3. [...]

I. Legal and functional structure of the NOY Divestment Business

4. The NOY Divestment Business is currently operated by FMFP SAS, a wholly-owned subsidiary of FDML, with registered place of business and main place of operations at 205 Rue de l’Europe, 60403 Noyon, France. It comprises the NOY plant and the business operated from that plant for the development, production and supply of LVP to OE/S customers in the EEA, together with all essential functions for that business which are necessary to ensure its viability and competitiveness, as set forth below.

1. Development

5. [...]

2. Testing

6. [...]

3. Production

7. [...]

4. Distribution

8. [...]

5. *Sales and marketing, customer relations*

9. [...]

10. [...]

6. *Supply chain, supplier relations*

11. [...]

12. [...]

13. [...]

14. [...]

15. [...]

7. *Information technology systems*

16. [...]

17. [...]

8. *Administration (plant management, finance/accounting, human resources)*

18. [...]

II. Products manufactured by the NOY Divestment Business

19. A list and description of products manufactured by the NOY Divestment Business, in particular their technical and other characteristics, the turnover generated with each of these products, and any innovations or new products planned, is contained in **Annex B.1**.

III. Composition of NOY Divestment Business

20. In accordance with paragraph 6 of these Commitments, the NOY Divestment Business includes, but is not limited to:

(a) the main tangible assets listed in **Annex B.2**;

(b) the intangible assets listed in **Annex B.3**, Sections I.1. and I.2. (the latter however only to the extent the relevant production site listed in Section I.2. is Noyon) (“Intangible Assets”); provided that FDML shall be entitled to continue to use Intangible Assets, and purchaser shall grant FDML a non-exclusive, irrevocable, perpetual and royalty-free

license, which shall include the right to grant sub-licences to other entities of the FDML-group, to use Intangible Assets for the development of formulations, manufacture, and sale of products for the purposes of competing for and selling to

- any customers (OE/S or IAM) outside the EEA;
- customers in the IAM(s) located within the EEA; and
- customers in the OE/S-markets located within the EEA as far as the following formulations (including derivatives thereof) listed in Annex B.3, Section I., are concerned which are necessary for FDML to supply customers out of FDML plants in the EEA which do not form part of the Divestment Business: [...].

For the avoidance of doubt, FDML shall be entitled to continue the ongoing development projects listed in Annex B.3, Section I.2., for which the production site indicated in Annex B.3, Section I.2., is not Noyon, and/or to use know-how already obtained in the course of any of the ongoing development projects listed in Annex B.3, Section I.2., in order to innovate and develop friction materials for OE/S and IAM-customers in and outside the EEA.

- (c) the main licences, permits and authorisations listed in **Annex B.4**;
- (d) all personnel as further described in **Annex B.5** to the extent still employed by the Divestment Business and/or another FDML entity at the time of Closing; to the extent an employee is entitled to object his/her transfer, FDML will use its best efforts to avoid the employee's objection. If an employee objects and thereby prevents his/her transfer, FDML commits, at the request of the Purchaser, to second the relevant employee to the relevant plant or the Purchaser for as long as legally permissible on the basis that the Purchaser bears all employment-related costs of FDML for that employee. In case such a secondment is not possible, FDML will use its best efforts to assist the Purchaser in finding a suitable replacement employee.
- (e) all customer contracts, commitments and orders, including the ones listed in **Annex B.6**, to the extent still running at the time of Closing; to the extent a customer contract forms part of an ("umbrella") contract concerning the supply of products manufactured at the NOY plant as well as at other FDML plants, only the portion of the contract concerning the supply of products manufactured at the NOY plant will be transferred; to the extent the transfer of a customer contract (and its prior split-up, if applicable) requires the customer's consent, FDML will use its best efforts to procure the customers' consent.
- (f) all supply contracts, commitments and orders as listed in **Annex B.7** to the extent still running at the time of Closing; to the extent the transfer of a supply contract requires the supplier's consent, FDML will use its best efforts to procure the supplier's consent. If a supplier refuses to consent, FDML commits, at the request of the Purchaser, to supply the

relevant material to the NOY plant for the remaining duration and on the terms and conditions of the relevant supply contract.

(g) all customer, credit and other records as listed in **Annex B.8**;

21. The NOY Divestment Business shall not include:

(a) the shared assets listed in **Annex B.9**;

(b) the shared personnel listed in **Annex B.10**;

(c) the shared supply contracts in **Annex B.11**;

(d) business for the supply of LVP to the Independent Aftermarket;

(e) any of FDML's brands or trademarks.

In addition to the NOY Divestment Business as described at para. III of this Schedule, FDML commits to offer the purchaser supply of the materials covered by the shared supply contracts in **Annex B.11**, to the extent still running at the time of Closing, for the remaining duration and on the terms and conditions of the relevant shared supply contract. Strict firewall procedures will be adopted in relation to those agreements, so as to ensure that any competitively sensitive information related thereto will not be shared with, or passed on to, anyone outside the FDML unit providing the respective transitional service.

22. To the extent the NOY Divestment Business currently sources (i) the formulation mix for the manufacture and supply of [...] brake pads for the [...] from FDML's [...], and (ii) [...] brake pads from FDML's [...] for the supply of the [...], FDML commits to enter into a standard supply agreement for the relevant brake pads/formulation mix with the purchaser on commercially reasonable terms for the duration of the underlying customer contract."

23. If there is any asset or personnel which is not covered by paragraph III of this Schedule but which is both used (exclusively or not) in the NOY Divestment Business and necessary for the continued viability and competitiveness of the NOY Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

NON CONFIDENTIAL VERSION

ANNEX B.1

List and description of products manufactured by the NOY Divestment Business

[...]

ANNEX B.2
Tangible Assets of the NOY Divestment Business

[...]

ANNEX B.3
Intangible Assets of the NOY Divestment Business

[...]

ANNEX B.4

Main licences, permits and authorizations of the NOY Divestment Business

[...]

ANNEX B.5
Personnel of the NOY Divestment Business

[...]

ANNEX B.6

Key customer contracts, commitments and orders of the NOY Divestment Business

[...]

ANNEX B.7

Key supplier contracts, commitments and orders of the NOY Divestment Business

[...]

ANNEX B.8

Customer, credit and other records of the NOY Divestment Business

[...]

ANNEX B.9

Shared assets not included in the NOY Divestment Business

[...]

ANNEX B.10

Shared personnel not included in the NOY Divestment Business

[...]

ANNEX B.11

Shared supply contracts not included in the NOY Divestment Business

[...]