



EUROPEAN COMMISSION
DG Competition

***Case M.9057 -
HEIJMANS/BAM/JV***

Only the English text is available and authentic.

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

Article 4(4)
Date: 08/01/2019



Brussels, 08.01.2019
C(2019) 110 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying parties

To the Authority for Consumers & Markets, the Netherlands

**Subject: Case M.9057 – Heijmans/BAM/JV
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004¹ for referral of the case to the Netherlands and Article 57 of the Agreement on the European Economic Area².**

Date of filing: 28.11.2018

Legal deadline for response of Member States: 19.12.2018

Legal deadline for the Commission decision under Article 4(4): 14.01.2019

Dear Sir or Madam,

I. INTRODUCTION

- (1) On 28 November 2018, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Merger Regulation with respect to the proposed transaction cited above. The parties to the proposed transaction request the operation to be examined in its entirety by the competent authorities of the Netherlands.
- (2) According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to the proposed transaction may request that their transaction be referred in whole or in part from the Commission to the

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 OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

Member State where the concentration may significantly affect competition in a market which presents all the characteristics of a distinct market.

- (3) A copy of this Reasoned Submission was transmitted to all Member States on 28 November 2018.
- (4) The Autoriteit Consument en Markt ("ACM"), as the competent authority of the Netherlands, did not disagree with the proposed referral.

II. THE PARTIES

- (5) **Koninklijke BAM Groep N.V. ("BAM")** is a Dutch company active in i) construction and property, including the manufacturing and sale of asphalt and road construction; and ii) civil engineering. BAM is active in the Netherlands, as well as in several other countries of the EEA. Its annual turnover is EUR 6,604 million (2017) and its shares are listed on Euronext Amsterdam.
- (6) **Heijmans N.V. ("Heijmans")** is a Dutch company active in i) property development; ii) residential and non-residential building, including the manufacture and sale of asphalt and road construction; and iii) infrastructure. Heijmans is active exclusively in the Netherlands. Its annual turnover is EUR 1,478 million (2017) and its shares are listed on Euronext Amsterdam.

III. THE OPERATION AND CONCENTRATION

- (7) The proposed transaction involves the creation of a joint venture (the "JV"), to which each of BAM and Heijmans (together "the Parties") will contribute their respective asphalt production plants located in the Netherlands. Each of BAM and Heijmans will hold 50% of the JV's shares. The JV will manufacture asphalt and supply it to its parent companies as well as to third parties on the market.
- (8) BAM and Heijmans will exercise joint control over the JV pursuant to Article 3(1)(b) and Article 3(4) of the Merger Regulation. According to the letter of intent concluded by the Parties on 29 May 2018, which will form the basis of the JV agreement, strategic business decisions will be made by BAM and Heijmans as shareholders in the JV on a unanimous basis. The reserved matters, which will include at least [...], will be subject to unanimous shareholder approval.
- (9) The JV will operate as a full-function undertaking. First, the JV will have sufficient resources to operate independently on the market. It will hold all of the asphalt plants currently owned by its parent companies in the Netherlands, as well as the accompanying assets, laboratories and staff departments. It will have its own management and commercial targets and will be in charge of sourcing the input materials it requires for its production. Second, the JV's activities will go beyond one specific function for its parent companies as the JV will be active in the production and sale of asphalt in the Netherlands. Third, although the JV will provide its parent companies with asphalt, in similar volumes as those which BAM and Heijmans are currently using captively from the production of their plants, it is also expected to sell [a significant part] of its production to third party customers and the share of sales to third party customers is expected to increase as the JV establishes its position on the market. Furthermore, the JV's sales to its parent companies will be

made at arm's length, on the basis of normal commercial conditions. Fourth, the JV will be established permanently and will therefore operate on a lasting basis.

IV. EU DIMENSION

- (10) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million³ (BAM: EUR 6,604 million in 2017, Heijmans: EUR 1,478 million in 2017). Two of the undertakings concerned have a Union-wide turnover in excess of EUR 250 million (BAM: EUR 6,253 million in 2017, Heijmans: EUR 1,478 million in 2017). Heijmans achieves more than two-thirds of its Union-wide turnover in the Netherlands, but BAM does not. The notified operation therefore has an EU dimension within Article 1(2) of the Merger Regulation.

V. ASSESSMENT

- (11) The proposed transaction gives rise to the following overlap and link⁴:
- a. a horizontal overlap between the Parties' activities in the manufacturing and sale of asphalt; and
 - b. a vertical link between the Parties' activities in the manufacturing and sale of asphalt (upstream market) and the construction of roads (downstream market), on which both Parties are active.

A Relevant product markets

Asphalt

- (12) Asphalt is a composite material used for surfacing roads, car parks, footpath pavements, airport runways and other sites. According to the Commission's past decisional practice⁵, asphalt is typically purchased by private contractors appointed by public authorities in road construction and by customers involved in commercial and residential construction. It is manufactured by heating and mixing aggregates with a binding agent such as bitumen (typically 95% aggregates and 5% bitumen). Given its perishable nature, asphalt is best laid within approximately two to three hours of dispatch.

³ Turnover calculated in accordance with Article 5 of the Merger Regulation.

⁴ The Parties' retained activities also overlap on other markets and their possible sub-markets, including the Dutch construction market, the Dutch market for engineering services and the Dutch market for real estate services. These activities do not present any horizontal overlaps or vertical links with the intended activities of the JV.

⁵ See *e.g.* case M.7252 – Holcim/Lafarge.

- (13) The Commission has addressed asphalt in several decisions⁶ and found that asphalt is a distinct product market from the upstream market for aggregates and from the downstream market for road works. The Commission has also considered that different specifications of asphalt form part of the same relevant asphalt product market⁷.

Road construction

- (14) The Commission has previously defined a market for road construction which is vertically related to the market for the production of asphalt⁸.

B Relevant geographic market

Asphalt

- (15) Asphalt is a perishable product that needs to be transported in specially heated containers to prevent it from setting before it can be delivered and laid. This means that the asphalt needs to have a temperature of 150-190°C when arriving at the construction site. Consequently, the Commission has broadly considered a geographic market within a radius of 25-100 km from each asphalt plant⁹. The precise radius which the Commission has taken into account for the competitive assessment in its past decisional practice has varied depending on the specificities of the local markets at hand. In its most recent cases however, none of which concerned the Netherlands, the radius taken into account has been smaller than 50 km¹⁰.
- (16) In the absence of relevant merger decisions of the Commission specifically related to the Netherlands, the Notifying Party has in the Form RS adopted the approach taken by the ACM in its past decisional practice, *i.e.* a 50 km-radius¹¹.
- (17) For the purpose of the Commission's preliminary assessment under Article 4(4) of the Merger Regulation, it is sufficient to note that the relevant geographic market is likely smaller than national. The exact radius of those local markets need not be further defined. The 50 km-based approach proposed by the Notifying Party, which is in line with the ACM's practice, appears adequate. The outcome would not be

⁶ See cases M.7252 – Holcim/Lafarge, M.5803 – Eurovia/Tarmac, M.5158 – Strabag/Kirchhoff.

⁷ See *e.g.* cases M.7550 – CRH/Holcim Lafarge Divestment business, M.7296 – Eurovia/OVG/BRL, M.7684 – Eurovia Gestein/Kemna Bau Andreae/Steinbruch Lasbeck, M.5803 – Eurovia/Tarmac, M.5158 – Strabag/Kirchhoff.

⁸ See case M.5158 – Strabag/Kirchhoff.

⁹ See *e.g.* case M.7252 – Holcim/Lafarge. The Dutch ACM also seems to adopt a local approach to geographic market definition for the production and sale of asphalt, with notably a radius of 50 km around each plant having been considered in its decisional practice (see paragraph (16) below).

¹⁰ *E.g.* 25 km in M.7684 – Eurovia Gestein/Kemna Bau Andreae/Steinbruch Lasbeck and M.7296 – Eurovia/OVG/BRL, both of which concerned local markets in Germany, and 40 km in M.7252 – Holcim/Lafarge and M.7550 – CRH/Holcim Lafarge Divestment business, both of which concerned local markets in the UK.

¹¹ ACM Decision 3074/191 – BAM/HBG.

substantially different if a smaller radius of 40 km were taken into account (*cf.* the assessment in Section C below).

Road construction

- (18) The Commission has previously found the markets for road construction to be national in scope¹².

C Assessment

Legal requirements under article 4(4) of the Merger Regulation

- (19) The Commission has assessed whether there are indications that the proposed transaction significantly affects competition in a market or markets within a Member State and whether that market or those markets present all characteristics of one or more distinct markets.
- (20) First, the Commission's preliminary assessment shows that the proposed transaction may significantly affect competition in several local markets for the production and sale of asphalt around asphalt production sites located in the Netherlands. The proposed transaction may also significantly affect competition on the Dutch market for road construction, which is vertically related to those local markets for the production and sale of asphalt.
- (21) In the first place, the Parties will have high combined market shares in several local markets. The JV will operate¹³ a total of 10 asphalt production plants in the Netherlands, each with a local market around it. The Parties submit in the Form RS that on the basis of 50 km-radius markets, their combined market shares exceed 30% in a number of local markets for the manufacturing and sale of asphalt, 40% in two of these and 65% in one. The situation across the board is similar when a 40 km radius is taken into account, with the Parties' combined market share exceeding 30% in five markets, 40% in three of those and 65% in one¹⁴. The Parties are also active on the downstream Dutch market for road construction, which is vertically related to those local markets, with a combined market share of >10%. Accordingly, the proposed transaction will result in several horizontally and vertically affected markets. In the second place, it appears that only two main suppliers other than the Parties would remain available in each of these local markets. In the third place, the ACM has previously issued fines sanctioning Dutch companies active in the asphalt and road construction sectors (among whom the Parties) for entering into anticompetitive agreements¹⁵.

¹² See cases M.5158 – Strabag/Kirchhoff, M.7252 – Holcim/Lafarge, M.7550 – CRH/Holcim Lafarge Divestment business. This appears to be in line with the Dutch ACM's decisional practice, *cf.* ACM Decision 3074/191 – BAM/HBG.

¹³ In four cases as a co-owner with a third party.

¹⁴ It may be noted that even with a larger radius of 80 km, the Parties' combined market share would exceed 30% in four markets and 40% in one of those.

¹⁵ See in particular ACM Decision 3064/291.

- (22) Therefore, the first legal requirement set forth by article 4(4) of the Merger Regulation appears to be met.
- (23) Second, the Commission's preliminary assessment suggests that the proposed transaction's effects would take place on markets within the Netherlands which present all characteristics of distinct markets.
- (24) In the first place, the geographic scope of the markets at hand is either local (for the production and supply of asphalt) or national (for road construction). In the second place, all of the affected markets are located in the Netherlands. In the third place, the Parties' activities do not overlap at all outside the Netherlands, neither regarding the manufacturing and sale of asphalt nor regarding the construction of roads since, in particular, Heijmans currently does not achieve any turnover outside of the Netherlands. In the fourth place, the Parties submit in the Form RS that there is no specific intention for the JV to sell outside the Netherlands and any possible sales outside the Dutch territory would only be made sporadically¹⁶.
- (25) Therefore, the second legal requirement set forth by article 4(4) of the Merger Regulation also appears to be met.

Additional factors

- (26) Given that the likely focus of the competitive effects of the proposed transaction is confined to the Netherlands, the ACM is well placed to examine the case, especially since the ACM has previous experience in reviewing mergers on the markets for the manufacturing and sale of asphalt and for road construction¹⁷.
- (27) In addition, in several previous cases regarding the manufacturing and sale of asphalt, the Commission took the step of referring the matters to national competition authorities, in particular those of Germany¹⁸, the United Kingdom¹⁹ and Czechia²⁰.

VI. REFERRAL

- (28) On the basis of the information provided by the parties in the Reasoned Submission and the Commission's assessment above, the case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the proposed transaction may significantly affect competition in markets within a Member State which present all the characteristics of distinct markets.

¹⁶ Form RS, paragraph 187.

¹⁷ See in particular ACM Decisions 3074/191 – BAM/HBG and 2082 – BAM/NBM Amstelland.

¹⁸ M.3754 – Strabag/Dywidag; M.3864 – Fimag/Züblin; M.5200 – Strabag/Kirchner; M.7684 – Eurovia Gestein/Kemna Bau Andreae/Steinbruch Lasbeck; M. Eurovia/OVG/BRL.

¹⁹ M.6153 – Anglo American/Lafarge JV; M.4298 – Aggregate Industries/Foster Yeoman.

²⁰ M.6153 – Anglo American/Lafarge JV; M.4298 – Aggregate Industries/Foster Yeoman.

- (29) The Commission further considers, on the basis of the information submitted in the Reasoned Submission, that the principal impact on competition of the proposed transaction is liable to take place on distinct markets in the Netherlands, without having an impact on other markets within the European Union. The requested referral, therefore, would be consistent with points 17 and 18 of the Commission Notice on Case Referral in respect of concentrations²¹.

VII. CONCLUSION

- (30) For the above reasons, and given that the Netherlands has not expressed its disagreement, the Commission has decided to refer the proposed transaction in its entirety to be examined by the Netherlands. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

Johannes LAITENBERGER

Director-General

²¹ OJ C 56, 5.3.2005, p.2.