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2003/292/EC: Commission Decision of 9 April 2002 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.2568 — Haniel/Ytong) (notified under document number C(2002) 1396) (Text with EEA relevance)

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Commission Decision

of 9 April 2002

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

(Case COMP/M.2568 - Haniel/Ytong)

(notified under document number C(2002) 1396)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/292/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

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

Having regard to the opinion of the Advisory Committee on Concentrations(3),

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

Whereas:

(1) On 16 October 2001 Haniel Bau-Industrie Porenbeton Holding GmbH, which belongs to the Haniel group ("Haniel"), notified the Commission under Article 4 of Regulation (EEC) No 4064/89 ("the Merger Regulation") of a planned concentration whereby Haniel was, by share acquisition, to acquire sole control of Ytong Holding AG ("Ytong").

(2) The Commission examined the notification and found that the notified transaction fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and the EEA Agreement.

(3) On 30 November 2001, the Commission therefore decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation. In so far as the proposed concentration concerned Germany, the Commission adopted a decision on the same day referring the case to the competent German authorities under Article 9(3) of the Merger Regulation.

(4) Following a detailed investigation of the case, the Commission has now come to the conclusion that by itself the proposed concentration would indeed create or strengthen a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. But the commitments entered into by Haniel allow the competition concerns identified in respect of the concentration to be resolved.

I. THE PARTIES AND THE TRANSACTION

(5) Haniel is active in the construction materials industry, and specifically the manufacture and sale of wall-building materials such as sand-lime bricks, aerated concrete and ready-mixed concrete. Haniel's main centre of activities is Germany, but it is also active in the Netherlands through its indirect stake in the Dutch joint venture Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten ("CVK"). Haniel has a stake in around 30 sand-lime brick factories in Germany, eight in the Netherlands, one in Belgium and two in Poland. It operates a sand-lime facing brick factory in Denmark, and has stakes in three ready-mixed concrete plants in France.

(6) On 4 September 2001 Haniel notified its acquisition of Fels-Werke GmbH ("Fels"), a subsidiary of the German firm Preussag AG ("Preussag"), to the Commission as a concentration (COMP/M.2495 - Haniel/Fels). With regard to the German market, the Commission referred the case to the competent German authorities under Article 9 of the Merger Regulation on 30 November 2001. For the rest, the Commission declared the concentration compatible with the common market under Article 8(2) of that Regulation by decision dated 21 February 2002.

(7) Fels manufactures and sells - either itself or through its subsidiary Hebel AG ("Hebel") - building materials such as aerated concrete, lime products, plaster fibre plates and dry mortar. The firm is also active in the manufacture and sale of prefabricated houses made of aerated concrete and in the planning and construction of aerated concrete production plants.

(8) Haniel is party to another concentration too, notified on 24 January 2002 by Haniel and Cementbouw Handel & Industrie BV ("Cementbouw") (COMP/M.2650 - Haniel/Cementbouw/JV (CVK)). That notification had been requested by the Commission: Haniel and Cementbouw had acquired joint control of the Dutch sand-lime brick maker CVK. On 25 February 2002 the Commission took a decision initiating proceedings in the case under Article 6(1)(c) of the Merger Regulation. The proceedings are still pending.

(9) Ytong is a subsidiary of Rheinisch-Westfälische Kalkwerke AG, which in turn is controlled by the British firm RMC plc. Ytong manufactures and sells aerated concrete products and prefabricated houses in Germany, the Netherlands, Belgium, France and Austria.

(10) Haniel intends to acquire all Ytong's business shares.

II. CONCENTRATION

(11) Haniel intends to acquire all the business shares in Ytong and hence sole control of that firm. The transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

(12) The undertakings concerned have an aggregate worldwide turnover of over EUR 5 billion(5) (Haniel: EUR 18,7 billion, Ytong: EUR 0,4 billion). Both Haniel and Ytong have a Community-wide turnover of over EUR 250 million (Haniel: EUR 17,5 billion, Ytong: EUR 0,3 billion). Neither undertaking achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State. The notified concentration thus has a Community dimension.

IV. PROCEDURE

(13) On 13 November 2001 the Commission received a request from the competent German competition authority, the Bundeskartellamt, to refer the planned concentration to it in so far as it concerned Germany. The request for referral concerns the market in wall-building materials for rising back-up masonry in Germany, but not the markets in wall-building materials outside Germany. By decision of 30 November 2001 the Commission referred the part of the case relating to Germany to the competent German authorities.

(14) On 30 November 2001 the Commission decided under Article 6(1)(c) of the Merger Regulation to initiate proceedings in respect of that part of the case not referred to the German authorities.

(15) A hearing took place on 21 February 2002. Haniel and Ytong attended, as did Cementbouw and CVK.

V. COMPATIBILITY WITH THE COMMON MARKET

A. THE RELEVANT PRODUCT MARKETS

(16) The parties' operations overlap in the production and sale of wall-building materials. Haniel produces and sells sand-lime bricks and sand-lime blocks; in the Netherlands it does so via the Dutch joint venture CVK. Ytong produces aerated concrete. Besides sand-lime, aerated concrete and gypsum products, concrete products and clay bricks are also used in wall-building, as are, to a limited extent, steel plates and wooden panels.

1. THE PRODUCTS

(17) Sand-lime bricks are masonry units prepared from lime and sand by adding water and then compressing and hardening them under steam pressure. The bricks are used exclusively for building walls. They are generally rendered, filled in with thin plaster or hidden from view by a facing wall. When sand-lime masonry is visible, it generally consists of facing bricks, which are produced only in small formats⁽⁶⁾. These form a separate market, which will not be discussed in detail here, as the parties produce such facing bricks only in small quantities. Besides sand-lime bricks, other, larger sand-lime walling units are used (usually measuring up to 900 mm x 625 mm x 300 mm in the Netherlands).

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

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

(20) Concrete is another widely used wall-building material. Concrete walls can be made by pouring mixed concrete on site ("in-situ concrete") or by using precast concrete walling units. A third form of concrete comes in small-format concrete blocks. Concrete walls are built almost exclusively as load-bearing walls.

(21) In-situ concrete can be cast either by the traditional method of using formworks specially made on site or by "tunnel-forming" (tunnelgietsbouw in Dutch) using prefabricated tunnel formworks, whereby walls and ceilings are cast in a single process.

(22) Precast concrete walling units are produced in factories to precise specifications, then transported on site and built into the building for which they are intended. They generally constitute entire walls and are thus considerably larger than the sand-lime bricks or blocks predominantly used in masonry work and require heavy equipment.

(23) Brick - the classic masonry material - is manufactured from a mixture of clay and water by firing at temperatures of over 1000 °C. However, the size of individual bricks is limited, as the firing process causes deformations such as shrinkage and warpage. Jointing is therefore generally necessary when working with these products in order to offset these deformations.

(24) Steel plates are used mainly in non-residential construction, and to a lesser extent in residential construction. For example, they are used to fill in wall space in load-bearing concrete or steel structures. In such cases the wall usually consists of two steel plates with insulating material between them (metal sandwich plates).

(25) Wooden panels are employed in industrial and residential construction, mainly in the form of prefabricated walling units used to close off the building on the outside where there are no load-bearing walls. In the Netherlands wood is used for load-bearing walls only in exceptional cases.

2. DEFINITION OF THE RELEVANT PRODUCT MARKET

(26) In determining the extent of a product market, the Commission has to consider various product market definitions. In this case it has to be borne in mind that the use and exchangeability of various wall-building materials depend to a not inconsiderable extent on national building practices and traditions and are thus in some respects very different in some EEA member countries. In its investigation, the Commission has focused essentially on conditions in the Netherlands since it is only in that Member State that the concentration leads to additional market shares which are significant from a competition point of view.

(a) Market definition proposed by the notifying party (wall-building materials)

(27) Haniel claims there is a single market in wall-building materials, given the existing conditions of competition, in particular the lack of any price difference based on use and the fact that they are invariably sold via the building-materials trade. This market includes all products which are used in the construction of walls: clay bricks, concrete blocks, sand-lime bricks, aerated concrete blocks, precast concrete walling units, other sand-lime and aerated concrete units, masonry mortar, in-situ concrete, steel plates, gypsum plasterboards and planks, and wooden panels. Haniel argues that, when a building is designed, there is generally a choice of various solutions for constructing the walls.

(28) Haniel states that the architect or project developer generally defines the requirements to be met in relation to the building's load-bearing capacity, age resistance, ease of maintenance, thermal insulation, fire protection and noise insulation. In some cases the architect also makes a selection of building materials in the building's specifications, but, according to Haniel, these specifications leave ample room for alternative solutions. Building contractors have a free choice of building materials, provided that the specifications are met. In the project proposal they can opt for a specific building material or put forward several possible solutions.

(29) Haniel does concede, however, that the various wall-building materials are not entirely interchangeable for every purpose. In view of the considerable differences in the demands made on building materials, depending on whether they are used for load-bearing or non-load-bearing walls, Haniel considers that there is a case for dividing the market in wall-building materials into materials for load-bearing and for non-load-bearing walls.

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

(30) In its decision on Preussag/Hebel(7), the Commission looked at two alternative product market definitions, but without adopting any firm position. On the one hand, it considered the possibility of a market for all materials that can be used to build up walls by the "brick-on-brick" method (masonry), including clay bricks, sand-lime bricks, aerated concrete blocks and pumice blocks. Its investigations at that time suggested that these products were interchangeable at the building planning stage. Within this market definition, the Commission also considered that a further distinction could be made between load-bearing and non-load-bearing walls (load-bearing masonry). It took no account of precast concrete walling units or in-situ concrete.

(c) Practice of the German Bundeskartellamt (masonry)

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

(d) Practice of the Dutch competition authority, the NMa (building materials for load-bearing walls)

(32) By contrast, the Nederlandse Mededingingsautoriteit ("NMa", the Dutch competition authority) draws a distinction between load-bearing and non-load-bearing walls because, to its knowledge, different materials are used for each type of wall in the Netherlands(8). Because of this difference in uses, sand-lime bricks, which are used for both types of wall, are in competition with different materials in each case. The NMa has included all wall-building materials used for load-bearing walls in its definition of the market in wall-building materials for load-bearing materials. This covers not only the wall-building materials for masonry mentioned in recital 31 (the "brick-on-brick" method), but also precast concrete units and in-situ concrete. However, it should also be pointed out that, in a subsequent decision, the NMa opened up the possibility of a distinction between in-situ concrete and other wall-building materials(9).

3. ASSESSMENT

(33) On the basis of the information available to it and, in particular, the market investigation it carried out in this case, the Commission, like the NMa, concludes (as it did in its decision of 21 February 2002 in Case COMP/M.2495 - Haniel/Fels) that there is a relevant product market in the Netherlands for building materials for load-bearing walls and a separate one for building materials for non-load-bearing walls, but that within these markets a further subdivision into masonry building materials and other materials (concrete products in particular) is not appropriate. The market in wall-building materials for load-bearing walls includes all building materials used for load-bearing walls, such as clay bricks, sand-lime bricks, aerated concrete, concrete blocks, precast concrete wall units and, possibly, in-situ concrete. The result of the market investigation suggests that in-situ concrete, in particular that cast by tunnel-forming, should be excluded. However, it is not necessary to settle this matter conclusively since it does

not affect the assessment of the concentration. Likewise, the market for building materials for non-load-bearing walls thus covers all building materials used for non-load-bearing walls, such as sand-lime bricks, aerated concrete, gypsum plasterboards and planks, steel sheets and wood. This result is based on the following key factors.

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

(a) Properties of the various wall-building materials

(35) Each of the abovementioned wall-building materials has specific properties that are taken into account in the selection of a specific wall-building material for a specific building project.

(36) Sand-lime bricks are in themselves a cheap building material which, though they cannot achieve the size of aerated concrete precast products, nevertheless, with dimensions of up to 900 mm x 625 mm x 300 mm, are larger than traditional bricks. Furthermore, sand-lime bricks, like aerated concrete, have a smooth surface that does not have to be evened out by jointing. The units can be cemented together. In addition, sand-lime products can be cut to shape at the factory in accordance with the building plans, so that units forming the gable or window openings can be pre-prepared. All these factors mean that less time and less expenditure on wage costs are needed than in the case of, for example, ordinary bricks. At the same time, sand-lime bricks do not require any large-scale investment in heavy cranes, as in the case of precast concrete wall units, or casting moulds, as in the case of in-situ concrete. In the Netherlands, because of their excellent load-bearing properties, sand-lime bricks are used for load-bearing walls and, to a lesser extent, also for non-load-bearing walls. In the Netherlands, something of the order of [60 to 80](10) % of sand-lime bricks are used in load-bearing walls. When they are used in non-load-bearing walls, sand-lime bricks have the disadvantage of being relatively heavy (about twice as heavy as aerated concrete). However, the material does have good sound-insulating properties and is suitable in particular for high, non-load-bearing walls, such as those often required in non-residential construction. Sand-lime bricks are the traditional and most popular wall-building material in the Netherlands.

(37) Precast concrete sections do not require masonry work as they are already the size of the wall to be produced. Concrete as a product can be produced from relatively simple raw materials. However, fairly large-scale resources such as cranes must be used in erecting such walls, and this in its turn involves some investment costs. Precast concrete walling units are therefore used primarily for somewhat larger projects, chiefly in non-residential construction (utiliteitsbouw, abbreviated to u-bouw in Dutch) rather than residential construction (woningbouw, abbreviated to w-bouw). Even so, savings can also be made in medium-sized residential construction projects where around 10 or more units are used, since the wall is produced at the factory and erection at the building site requires relatively little labour and takes relatively little time. The bigger the project, the lower the costs for the precast wall.

(38) In-situ concrete requires the largest amount of on-site investment in its use, particularly in-situ concrete used in tunnel-forming. The manufacture and use of the frameworks required for repeated casting in the tunnel-forming method are so costly that this method is worthwhile only if there is a minimum of 30 to 50 residential units and only if the latter are identical in form and size. There is therefore relatively little flexibility as to form and size in construction using in-situ concrete in the tunnel-forming method. However, flexibility is an important criterion in the Netherlands, even in the case of fairly large projects, so as to avoid uniformity. Tunnel-forming is therefore not a suitable alternative for smaller construction projects or those not involving rectangular shapes or repeated applications. In-situ concrete is also used in the construction of high-rises if their load-bearing capacity is ensured by means of a cast concrete skeleton to which non-load-bearing wall-building materials are attached.

(39) Aerated concrete is in itself an expensive wall-building material. It is produced from high-grade, expensive basic materials with high energy costs. Large sections must be reinforced with steel, which further increases the price, since reinforced sections entail significant costs in the manufacture of the reinforcing elements. In contrast to steel reinforcement in the case of ordinary concrete, the steel used for reinforcement here has to be coated in order to protect against corrosion. The constructional properties of aerated concrete are somewhat more limited than those of sand-lime bricks, but it is possible to use it to build up to two stories with load-bearing walls. Aerated concrete does, however, have excellent thermal insulation properties. In Germany, some 80 % of the aerated concrete products used in wall-building is used for load-bearing walls, while only 20 % is used in non-load-bearing walls. In the Netherlands, however, the ratio is the reverse: something like 80 to 85 % of aerated concrete is used in non-load-bearing walls.

(40) Gypsum is a light material. Because of this property, it is very well suited to non-load-bearing walls. The load-bearing demands placed on floors are small, and space is saved. Because of its lack of load-bearing capacity, gypsum is used only for non-load-bearing walls.

(41) Bricks are relatively small wall-building materials, and because of their uneven surface they are usually jointed. Their use entails relatively high labour costs and is relatively time consuming, and this makes bricks unsuitable for industrial construction.

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

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

(43) The client's precise preferences regarding, for example, aesthetics and buildings costs are factors here, as are the architect's specifications. Criteria which are of relevance in the selection of the various wall-building materials are quality, constructional properties, flexibility of use, appearance, the purchase price of the material and the costs involved in using it. The special requirements of the building project must be taken into account in this respect, as must the use to which the building is to be put, the necessary load-bearing capacity, resistance to ageing, fire protection, sound insulating properties, other technical capabilities, timetable and the overall

costs of the project. The building contractor's main criteria, in so far as he has any options regarding the choice of wall-building materials, are costs and building speed. These in turn are influenced by his experience with specific building materials and the resources and facilities (e.g. cranes) available to him. As far as the cost factor is concerned, it must be borne in mind that the cost of materials is always just one part of the overall costs of erecting a wall.

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

(45) The difference between load-bearing and non-load-bearing walls, as the terms already suggest, is the load-bearing function of the relevant wall-building material. Load-bearing walls ensure the stability of a building. The relevant walls are often external walls. However, internal walls too may perform a load-bearing function. Such walls must be distinguished from walls which do not have any function in supporting the building, but merely divide up the space or fill gaps inside a load-bearing framework (external or internal walls). Building materials used in load-bearing walls must meet certain requirements as to resistance to pressure, load-bearing capacity and stiffness. Building materials used in non-load-bearing walls, by contrast, must meet other, possibly contrary requirements. Lighter, non-load-bearing walls, for example, have the advantage of making fewer demands on the load-bearing capacity of the ceilings. Thin non-load-bearing walls for their part save space.

(46) These varying requirements in respect of load-bearing and non-load-bearing walls result, in the Netherlands, in different building materials being selected for these different purposes. In the Netherlands, the main material used in load-bearing walls is sand-lime bricks. Sand-lime bricks are used in [50 to 60]* % of all load-bearing walls. Concrete is the next largest building materials category. In-situ concrete is used in 12 % of all load-bearing walls. At least two fifths of this building material is used in tunnel-forming(11). A total of 8 % is accounted for by load-bearing walls made from precast concrete wall units. Aerated concrete and bricks, accounting for proportions of 2 % and 5 % respectively, play a very minor role.

(47) In the case of non-load-bearing walls, by contrast, gypsum products are the main materials used. They account for 44 % of the materials used in non-load-bearing walls. Next comes aerated concrete with 20 %, followed by sand-lime bricks with [15 to 20]* %.

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

bricks to be the most common wall-building material. The use of in-situ concrete in tunnel-forming is much less widespread in Germany and Belgium than in the Netherlands.

(49) The reasons for these differences in demand-side behaviour stem, firstly, from differences in building traditions and aesthetic approaches and, secondly, from the advanced industrialised building methods used in the Netherlands.

(50) In the Netherlands, building and construction activity is based on large-scale projects even in the residential sector. Less than 20 % of all new residential building relates to individual house building. In Germany, by contrast, the figure is more than 90 %. In the Netherlands, large areas are released by the Government for building purposes, and on such areas the building and construction industry erects as much as several thousand residential units (e.g. VINEX locaties). In building projects on this scale, building materials that require high investment but involve lower wage costs, such as in-situ concrete using the tunnel-forming method, are profitable. Consequently, bricks, which are labour intensive at the building site (small size and need for jointing, though methods of cementing bricks do exist) and hence entail higher wage costs and are more time consuming, are used to only a minor extent.

(51) Sand-lime bricks are the traditional building material in the Netherlands; they are relatively cheap, and can be used with great flexibility, speed and on favourable cost terms in the building process (large units, cut to the required shape in the factory, no jointing necessary).

(52) Aerated concrete, which is very widely used in Germany in load-bearing walls because of its good heat-insulating properties, is, despite this advantage, not so widely used in the Netherlands because of its substantially higher price compared to sand-lime. In Germany, 30 cm-thick aerated concrete units are used for load-bearing walls. These have then only to be plastered and painted to produce a complete wall that meets high heat-insulation requirements. There are no costs for facing masonry and additional insulation. In the Netherlands, by contrast, smooth, plastered external walls are not customary. The preference there is for facades which give the impression of brickwork. This is done by means of brickwork facing in front of the load-bearing wall. This means that the cost advantage of aerated concrete, which does not need insulation and facing, is forfeited and hence that aerated concrete is a much more expensive building material than sand-lime. Consequently, aerated concrete is used only to a limited extent in the Netherlands for load-bearing walls in residential construction.

(53) However, since aerated concrete costs about the same as gypsum walls, is relatively light, but affords better heat insulation, aerated concrete products are used in the Netherlands for non-load-bearing walls. Sand-lime is also used here. This is because it has very good sound-insulating properties which may, in some cases, offset its disadvantages as a heavy building material. In addition, because of its constructional properties, it is particularly suitable for high, non-load-bearing walls, such as are required primarily in non-residential construction.

(54) There is therefore only limited competition in the Netherlands between, on the one hand, products used in load-bearing walls and, on the other, those used in non-load-bearing walls. This prompts the Commission to draw a distinction in the Netherlands between a relevant product market in load-bearing walls and one in non-load-bearing walls. This is despite the fact that some

wall-building materials that are suitable for load-bearing walls may also be used in non-load-bearing walls and vice-versa. Sand-lime especially is in this category: it is the only wall-building material which is used to any significant extent equally in load-bearing and non-load-bearing walls. Firms which make products suitable for both types of wall are, in the market in load-bearing walls, in competition with a largely different set of competitors and faced with different competitive conditions than in the market in non-load-bearing walls.

(55) In setting its prices for products used in load-bearing walls, CVK, as the only sand-lime brick producer in the Netherlands, is not restricted by prices charged on the market in products intended for non-load-bearing walls. The Commission's market investigation shows that CVK often knows the specific use of its products⁽¹²⁾ and might therefore be in a position to determine its prices on the basis of whether its sand-lime products are being used in load-bearing or non-load-bearing walls. If this is not the case, it is to be assumed that CVK tailors its pricing strategy primarily to the requirements of the market in load-bearing walls, since it sells [60 to 80]* % of its products on that market.

(56) The results of the market investigation raise the question of whether and to what extent in-situ concrete is also to be included in the market in wall-building materials for load-bearing walls. This applies in particular to in-situ concrete cast by tunnel-forming. As already explained in recital 38, this technique involves high fixed investment costs which become worthwhile only if at least some 30 to 50 residential units of identical form and size are to be built. This means that this method does not represent an alternative, not only in the case of small projects, but also in the case of large projects in which, for aesthetic and social reasons, a repetitive building style is to be avoided. Furthermore, as already explained, the tunnel-forming method allows not only walls but also, as part of the same process, ceilings to be produced. For these reasons, a decision to opt for the tunnel-forming method is not so much a price decision as a decision in favour of a particular system. However, the question of the inclusion of in-situ concrete and, in particular, in-situ concrete cast by tunnel-forming in the market in wall-building materials for load-bearing walls can be left open, as it does not affect the result of the assessment.

4. THE RESPONSE OF THE PARTIES TO THE STATEMENT OF OBJECTIONS

The views of the parties

(57) In its answer to the statement of objections, and at the hearing, Haniel said it maintained its view that the relevant market had to include all wall-building materials. Haniel conceded, however, that a case could be made for the distinction drawn by the Commission between building materials for load-bearing and non-load-bearing walls.

(58) The criticism Haniel regarded as essential concerned the possibility - which the Commission had raised but left open - that the product market might not include in-situ concrete, and more especially in-situ concrete cast by the tunnel-forming method. Haniel argued that these in-situ concrete products were in direct competition with other building products for load-bearing walls. Contrary to the view put forward by the Commission, this method of building did not entail any additional costs, and was not confined to large projects. The smallest number of residential units needed to make tunnel-forming worthwhile was 15, and not 30 to 50, as the Commission had

stated. Tunnel-forming offered sufficient design flexibility to ensure that residential units built using it need not be identical in appearance.

(59) Cementbouw and CVK agreed.

Assessment

(60) In the statement of objections, the Commission left open the question whether and to what extent in-situ concrete ought to be included in the relevant market, and it will do so again in this decision. There is no need in this decision to settle the question since, even if one were to accept the broader definition of the relevant product market advocated by the parties, which includes all classes of in-situ concrete, Haniel would in any event hold a dominant position in the Netherlands, and that dominant position would be strengthened by the merger at issue here. Nevertheless, the Commission's market investigation does provide evidence to suggest the possibility that in-situ concrete, and particularly in-situ concrete cast using the tunnel-forming method, does not form part of the relevant market.

(61) The main grounds for this assertion have already been set out in detail. In addition, it should be borne in mind that if a builder working on a project decides to change over from sand-lime products for example to tunnel-formed in-situ concrete, the change will affect not only the wall-building materials but the flooring and roofing materials too. Thus changing over to tunnel-forming will mean changing the entire design of the building. For builders currently using sand-lime products, therefore, tunnel-formed in-situ concrete is a rather remote alternative.

(62) It has also to be borne in mind that tunnel-formed in-situ concrete can be used only for fairly large projects. The parties have admitted this, but say that the smallest number of residential units for which this material is economical is about 15 rather than the 30 to 50 alleged by the Commission. In any event, though, it is clear that on smaller building projects sand-lime bricks do not face competition from in-situ concrete⁽¹³⁾. Aerated concrete in particular, which is produced by Ytong, may be used in smaller building projects of one to two residential units.

5. CONCLUSION CONCERNING THE RELEVANT PRODUCT MARKETS

(63) On the basis of the above considerations, the Commission takes the view that, for the purposes of assessing the notified concentration, a distinction has to be made in the Netherlands between a market in building materials for load-bearing walls and a market in building materials for non-load bearing walls. As far as the market in building materials for load-bearing walls is concerned, the question of whether in-situ concrete, in particular that used in tunnel-forming, is to be included in this market may be left open.

(64) In so far as the activities of Haniel and Ytong overlap in other Member States which, following the referral of part of the case to the German Bundeskartellamt, are still within the scope of the Commission's inquiries, the precise definition of the relevant product market can remain open, because whichever way the market is defined no competition concerns arise.

B. RELEVANT GEOGRAPHIC MARKETS

(65) Leaving aside Germany, the activities of Haniel and Ytong overlap in the Netherlands, Belgium and, possibly, France. As regards the part of the merger not referred to the Bundeskartellamt, the merger results in additions of market shares that are significant from a competition law point of view only in the Netherlands.

(66) Haniel defines the relevant geographic market with regard to the Netherlands as national. Although a few firms involved in the building-materials trade tend to operate on a regional basis, it argues, transport costs in the Netherlands are not of such significance that building materials cannot be supplied throughout the entire territory of the Netherlands. Haniel says that wall-building materials are transported by lorry, usually from the production site direct to the building site.

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

(68) Although in the Dutch border areas there are evidently imports of wall-building materials from Belgium and Germany into the Netherlands, these are marginal and do not justify the inclusion of parts of Belgium and Germany in the relevant geographic markets. The market investigation has revealed the existence of barriers to market entry based, in particular, on building and industrial safety regulations. For example, bricks laid manually may not weigh more than 18 kg in the Netherlands which is not the case in other Member States. On the other hand, building standards in Germany mean that walls of comparable wall thickness must be stronger and, given the extra materials that requires, are more expensive than in the Netherlands. All the important undertakings that operate on the Dutch market in wall-building materials are also established in the Netherlands. Belgian and German producers operating in the Netherlands also do so via Dutch subsidiaries.

(69) Accordingly, the Commission takes the view that the relevant geographic market, as far as the Netherlands is concerned is, for the purposes of this Decision, national.

C. COMPETITIVE ASSESSMENT

(70) The Commission considers that, through its shareholding in CVK - the only sand-lime brick manufacturer - Haniel already occupies a dominant position on the Dutch market in wall-building materials for load-bearing walls. This holds true irrespective of whether in-situ concrete as a whole or in-situ concrete cast by the tunnel-forming method is to be included in this market. This dominant position would be strengthened by the acquisition of Ytong. If Haniel also acquires Fels, this strengthening of a dominant position will be further accentuated.

(71) Haniel's and Ytong's activities overlap not only in the Netherlands but also in Germany, but the German markets are outside the scope of the Commission's inquiries in these proceedings. There is some small overlap in Belgium, and possibly in France too.

1. NETHERLANDS

(a) Control of CVK by Haniel

(72) The assessment of the merger in the Netherlands in the light of competition law depends on whether the market shares of the CVK cooperative, in which Haniel has an indirect shareholding of 50 %, are to be ascribed to Haniel.

(aa) Structure of CVK

(73) In the Netherlands there are altogether 11 sand-lime brickworks, all of which are members of CVK. Of these brickworks, five are wholly owned by Haniel, three are wholly owned by the Dutch building-materials group Cementbouw and the remaining three are owned 50/50 by Haniel and Cementbouw. The shares in CVK are apportioned among the 11 sand-lime brickworks that make it up in such a way that the wholly owned subsidiaries of Haniel and the wholly owned subsidiaries of Cementbouw together have equal-sized shareholdings in CVK, with the result that Haniel and Cementbouw each indirectly has a 50 % stake in CVK.

(74) CVK was originally set up to carry out joint marketing on behalf of its members; a pooling agreement concluded in 1999 transferred the management of the member companies to CVK. In the pooling agreement and in the statutes (statuten) of CVK, it is stipulated that CVK members are to be bound by CVK's instructions. There is only limited scope for the appointment of representatives of the shareholders to the governing bodies of CVK. On the managing board (Raad van Bestuur), no member may at the same time perform any function in a business belonging to any of the shareholders, and on the supervisory board (Raad van Commissarissen) only a minority of the members may do so. CVK member companies are also required to appoint CVK as one of not more than two managers of the particular company. The other manager is appointed by the company's own shareholders.

(75) Strategic decisions concerning CVK are taken by its managing board (Raad van Bestuur) by a simple majority. Members of the Raad van Bestuur and of the supervisory board (Raad van Commissarissen) are appointed and removed by the members' meeting. Pursuant to the pooling agreement and the statutes, no member of the Raad van Bestuur may perform any function in one of the parent companies of the CVK members (Haniel and Cementbouw), and no persons who perform any function in Haniel or Cementbouw may form a majority on the Raad van Commissarissen. The day-to-day management of CVK and its members is in the hands of the Raad van Bestuur; the Raad van Commissarissen exercises the supervisory powers normally vested in such an organ under Dutch company law without being able to exert a direct influence over strategic corporate decisions.

(bb) Joint control by Haniel and Cementbouw

(76) Haniel takes the view that, owing to CVK's corporate structure as described above, the cooperative is, despite the 50 % indirect interest which Haniel and Cementbouw each have in it, controlled exclusively by itself and not by its member companies and/or their shareholders.

(77) Pursuant to Article 3(3) of the Merger Regulation, the control of an undertaking consists in the possibility of exercising decisive influence on it. The question is whether the person or persons exercising control are in a position, alone or jointly, to determine the undertaking's strategic decisions. The decisive factor here as a rule is the composition and decision-making procedures of the body responsible for appointing and removing the management and approving any other strategic decisions.

(78) In CVK's case, strategic corporate decision-making is a matter solely for the Raad van Bestuur. Whoever determines the composition of the Raad van Bestuur is therefore in a position to control the undertaking, for it is to be expected that, when taking strategic decisions, the members of the Raad van Bestuur take into account the interests of the person or persons who decide whether to appoint or remove them. Since the members of the Raad van Bestuur are appointed by the CVK members' meeting by a simple majority, and since in the members' meeting the representatives of the member undertakings in which Haniel holds the entire share capital and the representatives of the member undertakings in which Cementbouw holds the entire share capital each have the same number of votes and hence the representatives of the member undertakings in which Haniel and Cementbouw each have a 50 % share have a casting vote, both Haniel and Cementbouw can indirectly block the appointment and removal of members of the Raad van Bestuur. Their joint agreement is accordingly needed for every appointment or removal of a member of the Raad van Bestuur.

(79) This means that Haniel and Cementbouw jointly control CVK within the meaning of Article 3(3) of the Merger Regulation.

(cc) The response of the parties to the statement of objections

The views of the parties

(80) In its answer to the statement of objections, and at the hearing, Haniel maintained its view that the rules of the pooling agreement and the statutes ensure that Haniel cannot exercise control over CVK. Haniel referred in particular to a decision taken by the Dutch competition authority, the NMa, dated 20 October 1998, which cleared a transaction giving CVK control of its member companies. At that time the shares in CVK's member companies were in the hands of three shareholders, namely Haniel, Cementbouw and RAG AG ("RAG").

(81) In its decision the NMa found that the pooling agreement and the corresponding changes to the CVK statutes broke the original economic and organisational links between the member companies and their owners in such a way that CVK would now have control of its members. This also meant that the member companies would not be under the control of their shareholders (Haniel, Cementbouw and RAG). The NMa attached decisive importance to the fact that, under the rules laid down, no member of the Raad van Bestuur and only a minority of the members of the Raad van Commissarissen were permitted to perform any function in businesses belonging to the shareholders.

(82) In support of its view, Haniel also refers to correspondence with the NMa in the first half of 1999, in which the NMa was informed that RAG proposed to withdraw from CVK and sell its

shares in CVK member companies to Haniel and Cementbouw and was asked to indicate whether this constituted a concentration under Dutch law. The NMa confirmed that the reduction in the number of shareholders in the CVK member companies from three to two did not in any event constitute a concentration under Dutch law if it took place after the transaction which the NMa had approved. The decisive consideration, in the NMa's view, was that after that transaction the shareholders would not be able to exercise control over the CVK member companies, so that the number of shareholders would no longer affect the question of control.

(83) A further criticism made was that in its statement of objections the Commission had failed to consider the NMa decision and its reasoning. In addition, the Commission's decision would "negate" a decision of a national competition authority.

(84) This criticism was put forward by Haniel, Cementbouw and CVK jointly.

Assessment

(85) In examining the question of control of CVK, the Commission applied the tests of the Merger Regulation in conjunction with the practice established in its own decisions. It considered the relevant agreements between CVK and its members and between the shareholders, and other relevant documents such as the statutes of the CVK and the correspondence between the parties and the NMa referred to.

(86) The Commission concluded that control of CVK was exercised jointly by its shareholders Haniel and Cementbouw because each had a indirect 50 % holding in CVK and consequently a veto at the members' meeting, which acted by simple majority. It was the members' meeting that determined who would sit on CVK's governing bodies, which decided the strategy to be pursued by CVK, so that the veto rights at members' meetings gave their holders joint control of CVK: appointments could be decided only by the two acting in agreement.

(87) The decisive test applied by the Commission to determine who controlled CVK, namely the right to decide appointments to its governing bodies, is therefore different from the test applied by the NMa, namely the composition of the governing bodies. The two authorities consequently came to different conclusions on the question of control. RAG's withdrawal from CVK was assessed differently for the same reason. In the NMa's view, RAG's withdrawal after the restructuring of CVK - an exercise it had examined and allowed to happen - was irrelevant once CVK's member companies had been deprived of control whereas, in the Commission's view, it was RAG's withdrawal which conferred control on Haniel and Cementbouw. When there were three shareholders majorities at the members' meeting could shift. When one shareholder withdrew, the remaining shareholders were left with a 50 % holding each: it was this which gave them veto rights at the members' meeting, which was the point that decided the question of control. Under the system of the Merger Regulation, therefore, RAG's withdrawal was the transaction by which the two shareholders acquired control of CVK. The Commission does not question the fact that the pooling agreement and the amendments to CVK's statutes gave CVK control of its member companies, as the parties have pointed out and as was made clear in the NMa decision. But that does not affect the Commission's conclusion. The effect of CVK's acquisition of control of its member companies is rather that Haniel and Cementbouw, instead of

exercising separate control of the member companies which are their respective wholly owned subsidiaries, and joint control of the member companies which they own jointly, now through their joint control of CVK exercise indirect joint control of all the member companies.

(88) In its statement of objections the Commission set out the reasons for its conclusion. The European Court of Justice has held consistently and in a wide variety of cases that the Commission is not in its reasoning obliged specifically to counter differing views or to answer objections that might conceivably be raised against the measures it proposes to take⁽¹⁴⁾.

(89) Nor will the present decision negate a decision of a national competition authority. There is no need here to consider questions of the primacy of Community law and the exclusion of national powers to vet a transaction in the event that Community powers exist: this is because the Commission has concluded that the planned transaction which was approved by the Dutch competition authority is not the transaction entered into by Haniel and Cementbouw.

(90) In 1998 a planned concentration was notified to the NMa by which the 11 member companies of CVK, which were owned by three shareholders, were to be brought under the control of CVK; CVK was not controlled by the shareholders because alternative majorities were possible at the members' meeting. But, by means of a single set of agreements concluded on 9 August 1999, the parties did in fact bring the 11 member companies under CVK's control and at the same time - by selling RAG's shares in CVK member companies to Haniel and Cementbouw - convert CVK from an undertaking with three indirect shareholders to an undertaking with two shareholders with an indirect 50 % holding each, with these shareholders acquiring control of CVK. As part of this set of agreements, Haniel and Cementbouw also concluded a "cooperation agreement" on cooperation in CVK which contained, inter alia, arrangements for the closure of plants. This agreement was not in the NMa's possession when it took its decision in 1998.

(91) Even if one were to regard these steps as two separate transactions with a lapse of time in between, they are interdependent to a point where they have to be regarded as a single concentration. The legal steps which gave Haniel and Cementbouw joint control of CVK and the legal steps which gave CVK control of the 11 sand-lime brickworks were performed on the same day, 9 August 1999, and were recorded by the notary in a single document. The parties to the agreement wanted to link the two changes of control so that one could not take place without the other. The conclusion of the agreements that had been submitted to the Dutch competition authority was accordingly postponed until the negotiations on the transfer of RAG's shares were complete. Answering questions on this point put by the Commission at the hearing, Haniel expressly confirmed that the agreements that had been submitted for the NMa's approval were not implemented immediately in view of the desire that had since been expressed by RAG to withdraw from CVK. The implementation of these agreements was postponed until the negotiations with RAG regarding the transfer of its shares were complete since RAG did not want to take part in the new CVK structure. In economic terms, therefore, the two acquisitions of control form a unity and are to be regarded as a single concentration distinct from the concentration approved by the NMa.

(92) Even if one assumes that CVK's acquisition of control over its member companies and the acquisition by Haniel and Cementbouw of control over CVK were two distinct mergers, this

would not alter the assessment that, on completion of the transactions described, Haniel and Cementbouw acquired joint control of CVK.

(dd) Conclusion

(93) The Commission is therefore of the opinion that for the purposes of this decision CVK's market shares must be assigned to Haniel.

(b) The market in wall-building materials for load-bearing walls

(94) Through its indirect holding in CVK, the sole manufacturer of sand-lime bricks, Haniel already holds a dominant position on the Dutch market in wall-building materials for load-bearing walls. This dominant position would be strengthened by the acquisition of Ytong. The grounds for this conclusion are set out below.

(aa) The structure of the market

(95) In 2000 the Dutch market in wall-building materials as a whole had a total volume quantity-wise of 3,8 million m³ and value-wise of some EUR 640 million. The market in wall-building materials for load-bearing walls had a volume of 2,1 million m³ and was worth EUR 356 million. If in-situ concrete is excluded from the load-bearing walls market, the size of the market shrinks to 1,8 million m³ and EUR 276 million. If only in-situ concrete cast by the tunnel-forming method is excluded, the market has a volume of 1,9 million m³ and a value of EUR 322 million(15).

(96) Below are the market shares (by volume) of the parties and of their main competitors including all load-bearing wall-building materials and, alternatively, excluding in-situ concrete and in-situ concrete cast by the tunnel-forming method(16):

>TABLE>

(bb) Existing dominant position of Haniel (CVK)

1. Grounds for assuming the existence of a dominant position

(97) The Commission considers that, through its holding in CVK, Haniel has a dominant position on the Dutch market in wall-building materials for load-bearing walls. This applies regardless of whether or not in-situ concrete should be included in this market.

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

develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

(99) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among which the existence of very large market shares is highly important. Important evidence of the existence of a dominant position is, moreover, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest(17).

(100) Haniel (CVK) has a share of more than [50 to 60]* % of the market in wall-building materials for load-bearing walls. Its main competitor is Cementbouw(18), with a market share of just under [2 to 5]* %. This figure does not take account of Cementbouw's stake in CVK, which for the purposes of this assessment is assigned in its entirety to Haniel. Cementbouw's market share of approximately [2 to 5]* % is based solely on its precast concrete walling unit and in-situ concrete activities. The next-largest competitor is the in-situ concrete manufacturer Mebin, with a market share of around [2 to 5]* %. Other competitors have market shares of 2 % or less.

(101) The market share of Haniel (CVK) is therefore more than 10 times bigger than that of the leading competitor. In view, however, of the close structural links between, and common interests of, Haniel and Cementbouw in CVK, it is by no means clear how far Cementbouw and Haniel are in competition with one another. The largest competitor with no links with Haniel is, with its [2 to 5]* % or so market share, much smaller, Haniel being [10 to 15]* times bigger than this competitor.

(102) If in-situ concrete were not to be included in the definition of the market in wall-building materials for load-bearing walls, the market share of Haniel (CVK) would be [60 to 70] % as Haniel (CVK) does not supply in-situ concrete. Furthermore, the largest independent competitor, Mebin, would then not be active in the relevant product market. This would leave only a limited number of much smaller competitors whose market shares do not exceed 2 %, or much less, even, in some cases. If only in-situ concrete cast by the tunnel-forming method is excluded from the market definition, the market share of Haniel (CVK) would be [50 to 60] %.

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

(104) Substantial market entry barriers exist. CVK controls all the sand-lime brick works in the Netherlands and hence the production of by far the most important wall-building material assignable to the relevant product market. The Commission's market investigation has shown that it would be possible for manufacturers of other wall-building materials to undertake the manufacture of sand-lime brick products only at great expense in terms of time and investment; the same is also true of other wall-building materials such as aerated concrete. The production processes and hence the production plants are different for each wall-building material. For these reasons, a switch of production by competitors is not considered a serious possibility.

(105) The customers of Haniel (CVK) have no buyer power. No one customer is potentially the buyer of a substantial part of CVK's output. In the case of sand-lime bricks, which are by far the most important of all the wall-building materials assignable to the relevant product market, there are no alternative suppliers.

(106) Haniel's market position can thus be summed up as follows: Haniel (CVK) has, at well over [50 to 60]* %, by far the biggest market share and is linked to the next-largest competitor, which is 10 times smaller, through CVK. The remaining market volume is fragmented and divided among competitors with market shares of just a few percent. Haniel controls, moreover, in the form of CVK, the only Dutch supplier of the most important building material in the Netherlands. The market power available to Haniel (CVK) is not offset by buyer power on the other side of the market. The combination of all these factors gives Haniel (CVK) a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

2. The response of the parties to the statement of objections

The views of the parties

(107) In their answer to the statement of objections, and at the hearing, Haniel, Cementbouw and CVK maintained that CVK and hence Haniel did not have a dominant position in the Netherlands. They gave four main reasons for this:

- in-situ concrete is a material that exerts considerable competitive pressure on sand-lime bricks. In-situ concrete producers are invariably large enterprises,
- CVK's direct customers - building-material dealers - have considerable buyer power. Of CVK's sales, [60 to 80]* % is accounted for by the five largest building-material dealers, the biggest customer alone being responsible for about 21 %,
- market entry barriers are low. Haniel states that the investment in a sand-lime brickworks comes to about EUR [...] million. An in-situ concrete producing plant costs as little as EUR [...] million,
- in its pricing, CVK must take into account competitive conditions on the neighbouring market in wall-building materials for non-load-bearing walls, in which it has a weaker market position, inasmuch as in regard to a substantial part of its sales it does not know to what end use its products are put.

(108) To back up these arguments, CVK points out that in recent years it has lost market share to its competitors.

(109) Cementbouw takes the view that, despite its 50 % holding in CVK, it is to be regarded as a competitor independent of the latter.

Assessment

(110) The arguments advanced by the parties do not negate the grounds on which the Commission finds that CVK is in a dominant position. The following points are conclusive in this respect:

- in-situ concrete cannot be regarded as a material with which substantial competitive pressure can be brought to bear on CVK. In-situ concrete's share of the market in wall-building materials as a whole comes to only 12 %, Cementbouw's share being approximately [0 to 2] %. As indicated above, competitors on the wall-building-materials market are thinly spread. If, in line with the intervening parties' thinking, in-situ concrete is to be included in the relevant market, the largest competitor, the in-situ concrete producer Mebin, has a market share of only [2 to 5]* %, while the other competitors have less than 2 %. This can be contrasted with a [50 to 60]* % market share for CVK, the only supplier of sand-lime bricks. The competitive pressure on such a market depends not only on a product's market position but also on competitors' market positions. Of relevance to the market position of competitors is what products they supply. This is especially true in the present case because the relevant market is a differentiated product market in which different products compete for the same end-uses. The possibility of supplying a certain product that may be particularly appreciated by certain consumers or for certain uses may be of importance as far as a firm's position on such a market is concerned,

- the large building material dealers do not have any buyer power. First of all, even a [20 to 30]* % share of total purchases does not confer any buyer power on the largest customers because there are a sufficient number of other building-material dealers available as an alternative. A few of these building-material dealers are, moreover, purchasing cooperatives (in Dutch: inkoopcombinaties). What matters is that building-material dealers are dependent on trade in CVK's products. Sand-lime bricks are the most important wall-building material in the Netherlands. The next most important wall-building material is - also in the parties' opinion - concrete. But this is not an alternative as far as the building-materials trade is concerned as neither in-situ concrete nor - in appreciable quantities - precast concrete walling units are distributed via that trade. No other building-material can therefore, from the building-material dealer's point of view, replace the distribution of sand-lime bricks. Moreover, CVK has more influence over pricing vis-à-vis building contractors than the parties admit. The following points are significant in this respect. Building-material dealers bear the financial risk inherent in distribution. It is not building-material dealers that choose the building material, but building contractors. As already indicated, CVK is generally well informed about the identity of users and the destination of its products. Deliveries are made direct from whichever sand-lime brickworks is closest to the building site. According to CVK, discounts are granted to building-material dealers, whereby the latter may be required to supply the goods to specific building contractors or for specific building projects. Building contractors are, however, dispersed and not in a position to exercise any buyer power themselves,

- the arguments adduced by Haniel to the effect that there are no market entry barriers are not sound. The investment costs to which Haniel refers are contradicted by competitors surveyed by the Commission in the course of its market investigation, who state unanimously that it is only with the greatest difficulty that they could expand their existing production capacities or embark upon the manufacture of another wall-building material. During the market investigation, even Cementbouw's estimate of the investment costs was significantly higher than Haniel's. According

to the competitors, there had been a small number of market entries, but they were confined to the concrete segment. Entries in the sand-lime brick segment were non-existent,

- according to the information in the Commission's possession, CVK is in a position, in its pricing, to take account of whether its products are used in either load-bearing or non-load-bearing walls. As stated above, sand-lime bricks are used essentially in load-bearing walls. CVK is aware of the specific use to which its products are put partly through its knowledge of the building site that is being supplied. It also has access, as far as sand-lime units are concerned, to the architects' plans for the building projects supplied by it. Haniel has pointed out, moreover, that the thickness of a substantial part of sand-lime brick products indicates whether they are being used in load-bearing or in non-load-bearing walls.

(111) There is no evidence in the Commission's possession to suggest that there has been any weakening of CVK's market position in favour of its competitors. On the contrary, Haniel has stated more than once in its correspondence with the Commission that operators' market shares have scarcely changed in recent years. Nor is there any evidence to suggest that the situation will change in the foreseeable future.

(112) The Commission does not agree with Cementbouw's assertion that it is to be regarded as a competitor independent of CVK. The Commission has already explained at length above that Cementbouw controls CVK jointly with Haniel and, for that reason alone, cannot be regarded as an independent competitor. Even if, as is maintained by the intervening parties, Cementbouw does not control CVK, a 50 % stake in a company with a [50 to 60]* % market share is so important a source of revenue that it is improbable that Cementbouw would not take this into account in its behaviour in relation to its other activities.

(cc) Strengthening of the dominant position of Haniel (CVK) through the merger

(113) The Commission is of the opinion that the concentration would strengthen the dominant position of Haniel (CVK) on the Dutch market in wall-building materials for load-bearing walls. The reasons for this are as follows:

1. Acquisition of Ytong

(114) On the assumption that Haniel acquires only Ytong, Haniel's market share would be increased by only around [0 to 2]* % to [50 to 60]* % as a result of the concentration. If in-situ concrete were deemed not to form part of the market in wall-building materials for load-bearing walls, Haniel's market share would be increased by [0 to 2]* % to [60 to 70]* %; and if only in-situ concrete cast by the tunnel-forming method were to be excluded from the relevant market, the increase would be [0 to 2]* % and the joint market share [60 to 70]* %. An additional factor is that, with sand-lime bricks, CVK controls by itself the most important wall-building material in the Netherlands. Owing to the abovementioned high market entry barriers, it is not to be expected that other suppliers will enter this segment. All of Haniel's competitors supply other products as wall-building materials for load-bearing walls. Cementbouw, the only supplier on the relevant market with a share of just under [2 to 5]* %, is itself a controlling shareholder of CVK and cannot therefore be considered an independent competitor. The remaining competition is

widely dispersed, no one competitor having a market share in excess of [2 to 5]* %. None of the competitors is thus of appreciably greater significance on this market than Ytong. This means that positions on the Dutch market are already so well established that very little in the way of competition takes place there. Consequently, even a small increase in Haniel's market position in conjunction with other factors may significantly reduce the few remaining opportunities still open to competitors.

(115) The strengthening of the existing dominant position of Haniel (CVK) through the acquisition of Ytong cannot be assessed on the basis of the size of the increase in market share alone. In the wall-building materials sector as a whole, Ytong is the largest competitor operating independently of Haniel without structural links to Haniel. Ytong is, moreover, the leading supplier of aerated concrete in the Netherlands, a material which is used both in load-bearing and in non-load-bearing walls. With a total of some [...] m³, Ytong sold more than five times as much aerated concrete in the Netherlands in 2000 as the only other supplier, Fels. As a result of the concentration, Haniel would therefore, with Ytong, acquire the largest producer of aerated concrete. In a differentiated product market, Haniel would thus be not only the sole supplier of sand-lime bricks, which is by far the most important wall-building material in the Netherlands, but, with [> 80]* % of sales, would also become the main supplier of aerated concrete. It is true that aerated concrete is, in principle, in competition with sand-lime bricks and the other products belonging to the market in load-bearing wall-building materials. However, in a differentiated product market such as the present market, in which different products are in competition with one another for the same types of use, the ability to offer a specific product which is perhaps preferred by certain users or for certain purposes may be important to the market position of a firm.

(116) Customers surveyed as part of the market investigation stated that they saw a danger of significant price increases if Ytong, as an independent active supplier of aerated concrete, were to depart from the market.

(117) The market investigation has shown that Ytong is well established in particular as a supplier to the leading Dutch building-materials trading groups. The other supplier of aerated concrete in the Netherlands, Fels, has difficulties supplying them as well. Consequently, Fels is currently reliant on the "independent" dealers, who make fewer sales and are less strong financially. Furthermore, in contrast to Fels, Ytong has its own production facilities in the Netherlands and does not operate on the market solely through imports.

(118) Ytong's favourable position is based on its strong position on the neighbouring market in non-load-bearing wall-building materials. As has already been pointed out, aerated concrete is the only other significant wall-building material apart from sand-lime bricks which is used both for load-bearing and for non-load-bearing walls. In 2000 the Dutch market in wall-building materials for non-load-bearing walls had a volume of 1,7 million m³ and was worth EUR 282 million. The following table shows the market shares (by volume) of the parties and of their main competitors, all non-load-bearing wall-building materials being included(19):

Non-load-bearing wall-building materials

>TABLE>

(119) After Haniel, Ytong is the strongest competitor on the market in non-load-bearing wall-building materials. As the only supplier of sand-lime bricks, Haniel (CVK) is once again the strongest competitor here, with a market share of more than [15 to 20]* %. Ytong is with aerated concrete the second strongest competitor with almost [15 to 20]* %. As a result of a concentration, Haniel (CVK)/Ytong would thus become about [2 to 5]* times as large as the next largest competitor. That competitor, GIBO, has a market share of [10 to 15]* %. Fels, the only alternative supplier of aerated concrete, has a market share of around [2 to 5]* %. All the other competitors supply only gypsum products.

(120) This strong position of Ytong on the market in non-load-bearing wall-building materials has a direct impact on its position on the market in load-bearing wall-building materials. Its turnover on the market in non-load-bearing wall-building materials gives Ytong access to customers for load-bearing wall-building materials too, since they are the same on both markets. The marketing structure and distribution system can therefore be used equally on both markets. Other suppliers which - apart from Haniel and Fels - operate on only one of the two markets do not have this possibility. The same applies to investment in production facilities, which can be used for supplying both markets.

(121) Prior to the merger, Haniel (CVK) can supply only one wall-building material, sand-lime bricks. Following the merger, Haniel (CVK) plus Ytong would be in a position, through the supply of sand-lime bricks and aerated concrete, to cover the bulk of demand from building-material dealers for wall-building materials both for load-bearing and for non-load-bearing walls. This would increase Haniel's lead over the suppliers of materials competing with sand-lime bricks on the market in wall-building materials for load-bearing walls, since none of its competitors is similarly able to cover its customers' requirements so comprehensively.

(122) In these circumstances, it is to be expected that, through the takeover of Ytong, Haniel will be placed in a position to induce customers to a significant extent to obtain all their wall-building-material requirements from itself and thus to further restrict the scope of other suppliers. As a result, the competitive pressure emanating from other suppliers of wall-building materials for load-bearing walls would be further diminished, leading to higher prices.

2. Acquisition of Ytong and Fels

(123) If, as a result of exemption by the Commission and the Bundeskartellamt, Haniel is allowed to take over not only Ytong, but also Fels, competitors would be even less able to stand up to a market leader consisting of Haniel/Ytong/Fels. On the market in load-bearing wall-building materials, the market share of Haniel (CVK)/Fels amounting to [50 to 60]* % (or alternatively: [50 to 60]* % or [60 to 70]* %)(20) would be increased by about [0 to 2]* % through the acquisition of Ytong. On the market in non-load-bearing walls, the market share of Haniel (CVK)/Fels amounting to [20 to 30]* % would increase through the acquisition of Ytong to [40 to 50]* %.

(124) In the circumstances, Haniel would accordingly control not only the sole supplier of sand-lime bricks in the Netherlands, but also all producers of aerated concrete. As a result, the remaining competitive pressure exerted by aerated concrete on sand-lime bricks would disappear altogether. Haniel would then by itself be in control of the only two most important wall-building materials that can be used in both load-bearing and non-load-bearing walls. Moreover, Haniel would, through Fels, also supply what is currently the most important wall-building material used in non-load-bearing walls, i.e. gypsum. As the only competitor, Haniel would thus be in a position to supply these three important wall-building materials from one source.

3. The response of the parties to the statement of objections

The views of the parties

(125) In its answer to the statement of objections, and at the hearing, Haniel maintained that the acquisition of Ytong would not lead to any strengthening of a dominant position. Haniel gave three main reasons for this:

- Haniel asserts that a [0 to 2]* % increase in market share is too small to justify the claim that a dominant position will be strengthened. It points to a number of Commission decisions in which market share additions of this order of magnitude were not considered sufficient for such a strengthening. It finds the Commission's attitude in this case to be inconsistent with its decision in Case COMP/M.2495 - Haniel/Fels. The Commission cleared Haniel's acquisition of Fels because it did not consider Fels's market position to be sufficient to strengthen a dominant position. Fels has a market share of [0 to 2]* %,
- the position of Ytong on the neighbouring market in non-load-bearing wall-building materials is not such as to influence Ytong's position on the market in load-bearing wall-building materials. Like the producers of other wall-building materials, Ytong has for decades had access to the building-material trade's distribution system. Owing to its considerable market share in the sand-lime brick segment, Haniel is already present in the neighbouring market in wall-building materials for non-load bearing walls, so any advantages stemming from a simultaneous presence in both markets already existed and would not be increased by the acquisition of Ytong. Moreover, apart from sand-lime bricks, aerated concrete is not the only wall-building material to be used in both load-bearing and non-load-bearing walls, as this also applies to clay bricks, concrete blocks and precast concrete units,
- Haniel can derive no advantage from being able to supply aerated concrete in addition to sand-lime bricks as in the building-materials trade a full product range includes more than just wall-building materials. There is, moreover, no commercial incentive to supply such a combination as only 50 % of profits on CVK's sales go to Haniel, whereas Haniel would receive all of the profit on Ytong's sales.

Assessment

(126) The arguments advanced by the parties cannot refute the grounds on which the Commission finds that CVK is in a dominant position. The reasons for this are as follows:

- the small size of the market share increase is not decisive as a means of excluding the strengthening of a dominant position. Haniel itself points out in its reply to the statement of objections that the market position cannot be inferred schematically from the market shares. As explained in detail above, the Commission was also influenced by this aspect when making its assessment. It focused on all factors constituting Ytong's market position, and explained in detail in this connection why the market positions of Ytong and Fels differ in such a way that it can rule out a strengthening in one case and rule it in in the other. The factors mentioned include the fact that Ytong is the leading supplier of aerated concrete in the Netherlands and sells five times more aerated concrete than Fels. Moreover, in assessing the size of the market shares and their ability to strengthen an existing dominant position, the size of the other market players has to be taken into account. None of the competitors is substantially larger than Ytong. Ytong's market share is twice the size of Fels's and there are a large number of substantially smaller suppliers of wall-building materials whose market shares are low, being well below [0 to 2]* %. The present case is characterised, furthermore, by a differentiated relevant product market. Every wall-building material has specific characteristics (see above for a detailed description), and any given wall-building material may be more suitable for some uses than for others. In-situ concrete, and in particular that cast by the tunnel-forming method, is, for example, better suited to larger projects, while aerated concrete is used in load-bearing walls in the Netherlands primarily in houses and hence in smaller-sized projects. On a scale depicting the magnitude of projects, in-situ concrete cast by tunnel-forming would therefore be right at the top, followed by in-situ concrete made by other methods. Aerated concrete would be at the bottom end of the scale, while sand-lime bricks would fill almost the entire scale. The acquisition of a product such as aerated concrete will therefore, by adding a further product, very likely strengthen an existing dominant position based on a single product such as sand-lime bricks,

- the arguments adduced by the intervening parties do not refute the considerations demonstrating that Ytong's position on the neighbouring market in non-load-bearing wall-building materials is quite likely to influence its position on the load-bearing walls market. The fact that Haniel already has, through CVK, a considerable market share on this neighbouring market with sand-lime bricks does not invalidate the above conclusion. As a result of the acquisition, Haniel could offer a further product in the form of aerated concrete on both markets. Ytong's established access to the large building-material dealers, through whom, as Haniel points out, almost all aerated concrete is distributed in the Netherlands, was expressly emphasised by the Commission, whereas Fels clearly does not have such access. Such access is, however, useful for purposes of distribution in both markets, with the result that a strong position on one of the two markets definitely strengthens the position on the other market. In contrast to other wall-building products such as clay bricks or concrete, aerated concrete is one of the three leading wall-building materials for non-load-bearing walls apart from sand-lime bricks, which are supplied by Haniel alone, and gypsum. These three products together make up more than [> 80]* % of the wall-building materials used in the non-load-bearing wall sector. Of these, only sand-lime bricks and aerated concrete are also used in load-bearing walls,

- nor does the fact that the building-materials trade supplies a large number of products stand in the way of the above advantages. On the contrary, the acquisition of the largest aerated concrete producer in the Netherlands would increase building-material dealers' existing dependence on CVK's sand-lime brick products even further as they would henceforth have to rely extensively

on CVK also for the distribution of aerated concrete. Since, as has already been explained, concrete products are not distributed via the building-materials trade, the building-materials trade would have to obtain a substantial part of the wall-building materials it distributes from Haniel through CVK. An economic incentive for the parties stems from the fact that the total attainable earnings can be increased by selling both products under one roof.

4. Result

(127) The Commission therefore concludes that the merger will strengthen the existing dominant position of Haniel (CVK) in the market for wall-building materials for load-bearing walls in the Netherlands - all the more so if Haniel simultaneously acquires Fels.

(c) The market in wall-building materials for non-load-bearing walls

(128) As stated in recital 115, Haniel has in the Netherlands, through its indirect stake in CVK, the only producer of sand-lime bricks, a strong, though not dominant, position on the market in wall-building materials for use in non-load-bearing walls. The acquisition of Ytong would not lead to the creation of a dominant position on this market. This would also be the case if Haniel were in addition to acquire Fels as well. The reasons for drawing this conclusion are as follows.

(129) Haniel (CVK) is, with a market share of [15 to 20]* %, the market leader on the market in wall-building materials for non-load-bearing walls and - as already stated - the only supplier of sand-lime bricks, the main building material for both load-bearing and non-load-bearing walls. As the leading producer of aerated concrete for non-load-bearing walls, Ytong, with a [15 to 20]* % market share, is very close to the market position of Haniel (CVK), and the three main gypsum producers, GIBO, Lafarge and Gyproc, have substantial market shares of between [5 to 10]* % and [10 to 15]* %. Given this market structure prior to the merger, the possibility of Haniel (CVK) having a dominant position can be ruled out.

(130) As a result of the merger with Ytong - a supplier of aerated concrete with a not insignificant market share of [15 to 20]* % - Haniel's market share would increase to [30 to 40]* %, thus widening the gap between it and its next largest competitors. Haniel would extend its product range to include aerated concrete, an important product for non-load-bearing walls. However, given the existence of strong competitors, especially in the gypsum segment, it is not to be expected that, as a result of the takeover of Ytong, Haniel would increase its competitive room for manoeuvre to such an extent that a dominant position would be created by the concentration.

(131) The same points apply if Haniel were in addition to acquire Fels as well. Haniel's market share would admittedly then increase to [40 to 50]* % and its product range would be extended to include gypsum. Haniel would thereby not only consolidate its position as market leader, but it would also be the only competitor to be able to supply all three essential wall-building materials for non-load-bearing walls. Nevertheless, the market structure outlined in the preceding recital suggests that, even in these circumstances, Haniel would not acquire a dominant position on the market in wall-building materials for non-load-bearing walls.

2. OTHER NATIONAL MARKETS

(132) Apart from in Germany, whose markets are not being examined by the Commission in these proceedings, and the Netherlands, the concentration would also lead to additions of market shares in Belgium, France and, if Haniel were to take over Fels, Austria.

(133) In Belgium, Haniel has one sand-lime brick factory. Ytong owns one aerated concrete plant there. The combined share of Haniel and Ytong in the sale of wall-building materials is [2 to 5]* % and, if all wall-building materials are included (including precast concrete products and in-situ concrete), less than [2 to 5]* %. Fels (Hebel) sells wall-building materials there but does not have any production plants of its own. The combined share of Haniel, Ytong and Fels in the sale of wall-building materials is [5 to 10]* % and, if all wall-building materials are included (including precast concrete products and in-situ concrete), less than [2 to 5]* %. Even if a distinction is made between building materials for load-bearing and non-load-bearing walls, these market shares are such that the possibility of their reaching competitively critical thresholds can be ruled out.

(134) In France, Haniel has a stake in ready-mixed concrete plants. Ytong owns one aerated concrete plant there. Market share additions will arise only if one assumes a larger market for wall-building materials that includes precast concrete products and in-situ concrete. In that case, the combined market share amounts to about [0 to 2]* %. Fels (Hebel) operates three aerated concrete plants in France. The combined share of Haniel, Ytong and Fels in the sale of wall-building materials is less than [2 to 5]* % and, if all wall-building materials are included (including precast concrete products and in-situ concrete), less than [2 to 5]* %. Even if a distinction is made between building materials for load-bearing and non-load-bearing walls and/or if a possible regional market definition is applied, these market shares are such that the possibility of their reaching competitively critical levels can be ruled out.

(135) Haniel is not active in Austria. Fels distributes in Austria, through a subsidiary, aerated concrete products and gypsum plasterboards. However the market is defined, Fels thus has market shares of less than 2 %. In the market in masonry materials, that market share is even less than [0 to 2]* %. Ytong operates one plant and sells aerated concrete products. In the market in masonry materials, the combined market share of Haniel, Fels and Ytong is about [5 to 10]* %, and in the market in wall-building materials about [2 to 5]* %. Even if a distinction is made between building materials for load-bearing and non-load-bearing walls, these market shares are such that the possibility of their reaching competitively critical levels can be ruled out.

(136) The concentration will not therefore lead to the creation or strengthening of a dominant position in Belgium, France and Austria.

3. RESULTS OF THE COMPETITIVE ASSESSMENT

(137) The Commission accordingly comes to the conclusion that the takeover of Ytong by Haniel would lead to a strengthening of a dominant position on the Dutch market in wall-building materials for load-bearing walls. If Haniel were in addition to acquire Fels as well, this strengthening of a dominant position would be even further accentuated. The Commission draws

this conclusion irrespective of whether in-situ concrete cast by the tunnel-forming method or in-situ concrete as a whole is to be included in this market.

VI. COMMITMENTS SUBMITTED BY HANIEL

(138) In order to remove the Commission's objections in relation to the market in wall-building materials for load-bearing walls in the Netherlands, Haniel has submitted the commitments described below. They are set out in full in the Annex.

(139) Ytong Holding AG holds all the shares in Ytong Nederland BV (hereinafter called "Ytong Nederland"). Haniel undertakes to cause this shareholding in Ytong Nederland to be sold within a period fixed for that purpose. The purchaser must be in a position to operate Ytong Nederland as an active force in competition with Haniel.

(140) Haniel undertakes, moreover, to ensure that, in the contracts to be concluded with the purchaser of the shareholding in Ytong Nederland, a provision is included to the effect that Ytong Nederland may control permanently the "Durox" trademark and, in the Netherlands for a transitional period provided for in the commitment, the "Ytong" trademark.

(141) The period for fulfilment of the commitments starts to run at the time of service of the Commission decision in Case COMP/M.2650 - Haniel/Cementbouw/JV (CVK) (hereinafter called the CVK decision). If an action is brought against the CVK decision under Article 230 of the EC Treaty or if applications for suspension of execution or other interim measures are made under Articles 242 and 243 of the EC Treaty, the period will start to run at the time of service of the order on the applications for suspension of execution or other interim measures pursuant to Article 107 of the Rules of Procedure of the Court of First Instance.

(142) The commitments will be without effect if, within the period referred to in recital 141 and within the framework of proceeding COMP/M.2650 Haniel/Cementbouw/JV (CVK), CVK is dissolved or undertakings in which Haniel has a direct or indirect interest no longer have a stake in CVK. If these circumstances obtain after the sale of the shares in Ytong Nederland by Haniel, the Commission may at Haniel's request annul the obligation to sell or amend it in Haniel's favour.

(143) With the Commission's agreement, Haniel may be granted a repurchase right in the sales contracts should the circumstances referred to in recital 141 obtain.

(144) The commitments also contain standard clauses on separate administration of the company to be sold and rules on trusteeship.

VII. COMPETITIVE ASSESSMENT OF THE NOTIFIED TRANSACTION IN THE LIGHT OF HANIEL'S COMMITMENT

A. ASSESSMENT OF THE COMMITMENT TO SELL THE SHAREHOLDING IN YTONG NEDERLAND

(145) In the Commission's opinion, the commitments described in recitals 135 to 141 suffice suitably to remove the objections regarding the Dutch market in wall-building materials for load-bearing walls. This has also been confirmed by the market investigation.

(146) As a result of the sale of Ytong's shareholding in Ytong Nederland, the combination, due to the concentration, of the market positions of Haniel (CVK) and Ytong on the relevant market will no longer occur. After the sale, Ytong Nederland will be in a position, as an independent competitor on the Dutch market in wall-building materials for load-bearing walls, to limit the room for manoeuvre of Haniel (CVK) in the same way as before the concentration.

(147) Ytong is active on the Dutch market exclusively through Ytong Nederland, so that after the sale the combination, due to the concentration, of the market shares of Haniel (CVK) and Ytong on the relevant market will be completely eliminated. Ytong Nederland is a legally independent undertaking with two production plants for aerated concrete products and an independent marketing structure. Prior to its being taken over by Ytong, it was, moreover, active on the Dutch market as an independent undertaking with no parent company.

(148) Ytong Nederland will be able to continue to use the "Ytong" trademark, under which its products are currently marketed, for a limited period only. Nevertheless, the Commission is convinced that the period provided for will enable Ytong Nederland to switch from using the "Ytong" trademark for marketing purposes to using the "Durox" trademark. The "Durox" trademark, under which the Dutch undertaking used to market its products before it was taken over by Ytong, continues to enjoy an excellent reputation among consumers of wall-building materials on the Dutch market.

B. TERMINATION OF THE OBLIGATION TO SELL YTONG NEDERLAND IF THE COMPETITION CONCERNS PUT FORWARD BY THE COMMISSION IN CASE COMP/M.2650 - HANIEL/CEMENTBOUW/JV (CVK) ARE RESOLVED

(149) The Commission is currently seeking to establish whether the acquisition of joint control of CVK by Haniel and Cementbouw in 1999 is to be considered a concentration within the meaning of the Merger Regulation with respect to its effects on the Dutch market in wall-building materials (Case COMP/M.2650 - Haniel/Cementbouw/JV (CVK)). On 25 February 2002 it decided to intimate proceedings in that case under Article 5(1)(c) of the Merger Regulation. The Commission must take a final decision on the compatibility of that concentration with the common market by 5 July 2002.

(150) As things stand at present it seems possible that in its decision in Case COMP/M.2650 case the Commission will either come to the conclusion that following modification the concentration it is compatible with the common market, as provided in Article 8(2) of the Merger Regulation, or require action that may be appropriate in order to restore conditions of effective competition, as provided in Article 8(4) of the Regulation. It may be that the dominant position which Haniel holds on the relevant market, and which has been identified here, will be brought to an end by any commitments entered into by the parties to the concentration in Case COMP/M.2650 with a view to a Commission decision under Article 8(2) of the Merger Regulation, or by any action required by the Commission under Article 8(4) of the Merger Regulation in order to restore

conditions of effective competition; and in that event the concentration which is the subject of the present proceedings would no longer strengthen such a dominant position.

(151) In the situation described in recital 150, the commitment entered into by Haniel would no longer be needed in order to prevent the concentration at issue here from strengthening a dominant position on the relevant market, and it seems appropriate in that event to release Haniel from its commitment to dispose of Ytong Nederland. The commitment entered into by Haniel therefore includes a clause stating that the promise to sell Ytong Nederland will be without effect if, in the proceedings in Case COMP/M.2650 and in accordance with the conditions set out in recitals 141 and 142, CVK is wound up or steps are taken to ensure that no firm participates in CVK in which Haniel already participates directly or indirectly.

C. OVERALL ASSESSMENT OF THE COMMITMENTS

(152) The Commission has accordingly come to the overall conclusion that, provided Haniel complies with the commitment it has entered into, the notified concentration would not strengthen Haniel's dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

VIII. CONDITIONS AND OBLIGATIONS

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

(154) Measures that effect a structural change to the market will be imposed in the form of "conditions"; implementing steps necessary to achieve this result will take the form of "obligations". If a condition is not fulfilled, the Commission decision declaring the concentration compatible with the common market is null and void. Where the undertakings concerned commit a breach of an obligation, Article 8(5)(b) of the Merger Regulation empowers the Commission to revoke a clearance decision, and Articles 14(2)(a) and Article 15(2)(a) empower it to impose fines or periodic penalties on the parties⁽²¹⁾.

(155) In accordance with this basic distinction, the Commission decision should be made subject to the condition that Haniel's commitments regarding the disposal of its stake in Ytong Nederland are complied with in full⁽²²⁾. These commitments serve to counterbalance the perceived strengthening of Haniel's dominant position on the Dutch market in wall-building materials for load-bearing walls and thereby to preserve competition on that market. By contrast, all the remaining parts of the statement of commitments, and in particular the commitment to temporary retention and separate management of the stake to be disposed of, and the detailed arrangements regarding the trustee to be appointed by Haniel are to be made subject to obligations since they are designed solely to apply the conditions mentioned previously.

IX. CONCLUSION

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

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration by which Haniel Bau-Industrie Porenbeton Holding GmbH acquires sole control within the meaning of Article 3(1)(b) of the Merger Regulation of Ytong Holding AG is declared compatible with the common market and the EEA Agreement.

Article 2

Article 1 shall apply subject to the condition that the commitments entered into by Haniel Bau-Industrie Porenbeton Holding GmbH and set out in points 1, 2, 9 and 17 of the Annex are complied with in full.

Article 3

The obligation is attached to this decision that the other commitments entered into by Haniel Bau-Industrie Porenbeton Holding GmbH and set out in the Annex must be complied with in full.

Article 4

This decision is addressed to: Haniel Bau-Industrie Porenbeton Holding GmbH

D-47119 Duisburg-Ruhrort

Done at Brussels, 9 April 2002.

For the Commission

Mario Monti

Member of the Commission

(1) OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.

(2) OJ L 180, 9.7.1997, p. 1.

(3) OJ C 107, 6.5.2003.

(4) OJ C 107, 6.5.2003.

(5) Turnover calculated in accordance with Article 5(1) of the Merger Regulation and with the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25). Turnover achieved before 1 January 1999 has been calculated in accordance with the average ECU exchange rate and converted into euro at a rate of 1:1.

(6) Maximum size - 240 mm x 175 mm x 113 mm.

(7) Decision of 29 March 2000 in Case COMP/M.1866 - Preussag/Hebel (OJ C 142, 20.5.2000, p. 36); see also the decision of 21 February 2002 in Case COMP/M.2495 - Haniel/Fels (not yet published).

(8) NMa, decision of 20 October 1998 in Case 124/CVK Kalkzandsteen.

(9) NMa, decision of 29 February 2000 in Case 2427/NCD - Fernhout.

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

(11) According to the information provided by the parties, in-situ concrete accounts for 40 % of the materials used in tunnel-forming; the market investigation suggested that the proportion might be even higher than that.

(12) In particular for elements cut for a specific use or for specific deliveries; see recital 32. Haniel has also indicated that, generally, it must be assumed that, above a given wall strength, the product is used for load-bearing walls.

(13) In many cases CVK knows the destination of its products, because it is itself responsible for the delivery of its products to a specific building site; for products which account for half of its turnover CVK has access to the architect's plans. The Commission therefore takes the view that CVK is in a position to differentiate its prices depending on the competition it observes. By means of discounts for volume and uniform transport prices it would be able to effect an implicit differentiation between large and small building projects. CVK has indicated that it grants dealers in building materials discounts which are specific to the project and the builder.

(14) See, for example, the Court's judgment of 19 September 2000 in Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraphs 89 et seq.

(15) On the assumption that 40 % of the in-situ concrete used in the Netherlands is cast using the tunnel-forming method; see footnote 10.

(16) The calculation is based on estimates made by the parties on the shares of the various building materials in the consumption of wall-building materials as a whole and broken down as

between load-bearing and non-load-bearing walls. Inasmuch as wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is estimated to be used in load-bearing walls was taken into account. On the basis of its market investigation, the Commission considers these estimates to be basically accurate; however, precise statistical data are not available.

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

(18) Until mid-2001, Cementbouw was a subsidiary of the Dutch building group NBM Amstelland NV. At the beginning of the year, the Cementbouw group was sold to CVC Capital Inc., a venture capital firm.

(19) Inasmuch as wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is used in non-load-bearing walls was taken into account.

(20) In so far as in-situ concrete cast by the tunnel-forming method or in-situ concrete not cast by the tunnel-forming method are not included in the market definition, the market shares of Haniel (CVK) increase accordingly; see table in paragraph 95.

(21) See the Commission notice on remedies acceptable under Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ C 68, 2.3.2001, p. 3, point 12).

(22) Annex, points 1, 2, 9 and 17.

ANNEX

The full original text of the conditions and obligations referred to in Articles 2 and 3 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html