



EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

***CASE M.8900 - WIELAND /
AURUBIS ROLLED PRODUCTS
/ SCHWERMETALL***

(Only the English text is authentic)

**MERGER PROCEDURE
REGULATION (EC) 139/2004**

Article 8(3) Regulation (EC) 139/2004

Date: 05/02/2019

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Brussels, 5.2.2019
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PUBLIC VERSION

COMMISSION DECISION

of 5.2.2019

**declaring a concentration to be incompatible with the internal market
and the EEA Agreement**

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(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

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

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

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹, and in particular Article 8(3) thereof,

Having regard to the Commission's Decision of 1 August 2018 to initiate proceedings in this case,

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

After consulting the Advisory Committee on Concentrations²,

Having regard to the final report of the Hearing Officer in this case³,

Whereas:

1. INTRODUCTION

- (1) On 13 June 2018, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 (the 'Merger Regulation') which would result from a proposed transaction by which Wieland Werke AG ('Wieland', Germany) intends to acquire within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of Aurubis Flat Rolled Products business ('ARP', Germany), and of the whole of Schwermetall Halbzeugwerk GmbH & Co. KG ('Schwermetall', Germany), by way of purchase of shares and assets (the 'Transaction')⁴. In this Decision, Wieland, ARP and Schwermetall are also referred to as the 'Parties', Wieland is also designated as the

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

² OJ C200. , p....

³ OJ C200. , p....

⁴ Publication in the Official Journal of the European Union No C 216, 20.6.2018, p. 4.

‘Notifying Party’. The undertaking that would result from the Transaction is referred to as ‘the merged entity’.

2. THE PARTIES AND THE TRANSACTION

- (2) Wieland is active in manufacturing and supplying semi-finished products made of copper and copper alloys. Wieland covers the production chain for copper products from casting shapes to selling semi-finished products. It operates a total of twelve plants with approximately 7 000 employees. Six of those plants produce rolled products and are located in Germany, the United Kingdom, the United States and Singapore.
- (3) ARP is controlled by Aurubis AG (‘Aurubis’, Germany) and is active in manufacturing and supplying semi-finished copper and copper alloy products. Aurubis is a worldwide provider of non-ferrous metals (including copper) and is the largest integrated⁵ copper producer in the European Union to serve the full vertical spectrum from the production of copper anodes, cathodes and shapes to the production of rolled and drawn products.
- (4) Schwermetall is a 50/50 joint venture between Wieland and Aurubis and is active in manufacturing pre-rolled strips and rolled copper alloy products. Schwermetall is jointly controlled by Aurubis and Wieland, [...]. Schwermetall also supplies third parties with pre-rolled strips to optimize its utilization rates. Moreover, Schwermetall sells coin strip - rolled strip that is used for the production of coins - which can be regarded as a semi-finished rolled product.
- (5) Wieland intends to acquire sole control of ARP and Schwermetall by way of purchase of shares and assets and through two different agreements (the Master Purchase Agreement between Wieland and Aurubis for the acquisition of ARP and the Schwermetall Share and Purchase Agreement for the acquisition of the 50% shareholding of Aurubis in Schwermetall), both signed on 29 March 2018, which are conditional upon each other and form one single concentration.
- (6) It follows that the Transaction would result in a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

- (7) The Parties have a combined aggregate worldwide turnover of more than EUR 2 500 million (Wieland: EUR 3 014 million – ARP: EUR 1 326 million – Schwermetall: EUR 278 million) and an EEA-wide turnover above EUR 100 million (Wieland: EUR 1 973 million – ARP: EUR 586 million – Schwermetall: EUR 245 million). In each of Germany, France and Italy, the combined aggregate turnover of Wieland and ARP is more than EUR 100 million and the aggregate turnover of each of Wieland and ARP is more than EUR 25 million. None of the Parties achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

⁵ In the context of the present Decision, the word ‘integrated’ refers to a market participant which is capable of manufacturing rolled products starting from pure copper cathodes. As opposed to integrated market participants, re-rollers produce rolled products starting from pre-rolled strip, a product that is downstream of copper cathodes and upstream rolled products (see Section 5.1). Aurubis’ integration, however, goes beyond this definition, because it also produces copper cathodes and anodes, which are upstream to pre-rolled strip.

- (8) Therefore, the concentration has a Union dimension within the meaning of Article 1(3) of the Merger Regulation.

4. THE PROCEDURE

4.1. Overview of the procedure

- (9) On 13 June 2018, the Notifying Party formally notified the concentration to the Commission by submitting the final Form CO.
- (10) During its initial (Phase I) investigation the Commission contacted a large number of market participants (mainly customers and competitors of the Parties, as well as other stakeholders), requesting information by means of questionnaires, telephone calls and written requests for information pursuant to Article 11 of the Merger Regulation.
- (11) In addition, the Commission sent several written requests for information to the Parties and reviewed internal documents submitted by the Parties at that stage.
- (12) On 4 July 2018, at a formal state of play meeting the Commission explained that, on the basis of the Phase I investigation the Transaction raised serious doubts as to its compatibility with the internal market and the EEA Agreement, as it appeared likely that it would lead to a significant impediment to effective competition in the form of increased prices for customers of rolled products; raising costs of Wieland's and ARP's rivals dependent on the supply of pre-rolled strip from Schwermetall, as well as gaining access to those rivals' confidential information.
- (13) On 11 July 2018, with a view to removing those serious doubts, the Notifying Party submitted commitments consisting of the divestment of ARP's plants in Zutphen (Netherlands) and Pori (Finland) and three slitting centres in Slovakia, Italy and the United Kingdom as well as a guarantee of continued supply of [...]. The Commission decided not to market test these commitments because it considered that they did not address all of the serious doubts raised by the concentration and did not remove in a clear-cut way those doubts that they were intended to address.
- (14) Consequently, on 1 August 2018, the Commission found that the concentration raised serious doubts as to its compatibility with the internal market and the EEA Agreement. The Commission therefore adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation (the 'Article 6(1)(c) Decision'). The Article 6(1)(c) Decision also found that the commitments proposed by the Notifying Party on 11 July 2018 were not sufficient to eliminate the Commission's serious doubts as to the compatibility of the Transaction with the internal market and the EEA Agreement, for the reasons described in that decision.
- (15) On 6 August 2018, the Commission provided Wieland and ARP with non-confidential versions of certain key submissions of third parties collected during the Phase I investigation.
- (16) On 3 August 2018, Wieland asked for an extension of 10 working days, pursuant to the first sentence of the second subparagraph of Article 10(3) of the Merger Regulation.
- (17) On 23 August 2018, Wieland and ARP submitted their written comments on the Article 6(1)(c) Decision ('Response to the Article 6(1)(c) Decision'). As part of their comments, two economic studies by an economic consultancy firm were submitted.
- (18) On 3 September 2018, following Wieland's and ARP's comments on the Article 6(1)(c) Decision, a formal state of play meeting took place between the Commission and Wieland and ARP.

- (19) During its in-depth (Phase II) investigation, the Commission has sent the Parties several requests for information, in particular on commercial strategy, post-Transaction plans, and market data (for example, sales, revenues and profitability).
- (20) In addition to collecting and analysing substantial amounts of information from the Parties (including internal documents, third party industry reports and submissions), the Commission also sent several requests for information to competitors and customers of the Parties.
- (21) On 4 October 2018, at a formal state of play meeting the Commission informed Wieland and ARP in detail of the preliminary results of the Phase II investigation. The Commission in particular informed Wieland and ARP that the Phase II investigation had strengthened the serious doubts raised in Phase I and that at that stage of the process, and on a preliminary basis, the Commission considered that the Transaction was likely to lead to a significant impediment to effective competition in the form of unilateral effects on prices and a creation of a dominant position caused by the horizontal combination of the three rolled products businesses. In addition, the Commission considered that there would be a significant deepening of the negative price effects and the creation of dominance as a result of the Notifying Party acquiring sole control over Schwermetall and the ensuing access that the Notifying Party would have on rivals' confidential information and the Notifying Party's ability and incentive to foreclose downstream rivals.
- (22) At that State of Play meeting, Wieland announced that it wanted to offer a remedy and requested an additional extension of the procedure by 10 working days
- (23) On 8 October 2018, the Commission adopted a decision extending the procedure by 10 days pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.
- (24) On the same day, Wieland provided a first draft "remedy concept" in which it set out the key points of Wieland's remedy offer, but without submitting a formal remedy proposal or commitments as provided for in Commission Regulation (EC) No 802/2004.⁶
- (25) On 9 October 2018, the Commission provided feedback on the remedy concept submitted by the Notifying Party. The Commission welcomed some elements of the package but also informed the Notifying Party that in the absence of a remedy which had the potential to clearly remove all the concerns it was unlikely to market test the remedy.
- (26) On 10 October 2018, Wieland informed the Commission in a letter that it would not improve the remedy.
- (27) On 17 October 2018, Wieland submitted a formal remedy proposal similar to that outlined in the first draft remedy concept (the 'Commitments of 17 October 2018').
- (28) On 24 October 2018, the Commission issued a Statement of Objections (the 'SO'). In the SO, the Commission reached the preliminary conclusion that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation and that such concerns would not be addressed in their entirety by the Commitments of 17 October 2018 which were not comprehensive and effective from all points of view.

⁶ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 (OJ L 133, 30.04.2004, p. 1).

- (29) The Notifying Party was first granted access to the Commission's file on 25 October 2018. Subsequent access to the file was provided on 13 December 2018, 17 December 2018, 21 December 2018, 16 January 2019, and 23 January 2019. Access to confidential data and information relied upon by the Commission in the SO was granted to the Notifying Party's economic advisors in accordance with the data room procedure⁷ on 30 and 31 October 2018, 6 November 2018 and 4 December 2018.
- (30) On 12 November 2018, the Notifying Party replied to the SO ('response to the SO').
- (31) On 19 November 2018, the oral hearing was held.
- (32) On 29 November 2018, a State of Play meeting between the Commission and the representatives of Wieland and ARP took place.
- (33) On 30 November 2018, the Commission sent the Notifying Party a Letter of Facts ('LoF') to inform it of pre-existing evidence that had not been relied on in the SO, but which, on further analysis of the file, the Commission considered might be relevant to support its preliminary conclusions. The First LoF also informed the Notifying Party of certain additional evidence brought to the Commission's attention after the adoption of the SO. On 7 December 2018, the Notifying Party replied to the First LoF ('response to the First LoF').
- (34) In its response to the First LoF the Notifying Party also asked for an additional formal oral hearing. On 19 December 2018, the Commission informed the Notifying Party that such an additional formal oral hearing in a response to a LoF was not provided for in Articles 14(1) and 14(2) of Regulation (EC) No. 802/2004 and not justified in the circumstances of the case.
- (35) On 20 December 2018 the Notifying Party referred its request for an additional formal oral hearing to the Hearing Officer. On 21 December 2018, the Hearing Officer informed the Notifying Party that its request for an additional formal oral hearing was rejected.⁸
- (36) On 3 December 2018 (day 65 of the Phase II procedure), the Notifying Party submitted new commitments pursuant to Article 8(2) of the Merger Regulation aimed at remedying the significant impediment to effective competition raised by the Transaction ('the Commitments of 3 December 2018'). The offer of remedies triggered the automatic extension of the time limit for adopting a final decision by 15 working days pursuant to the last sentence of the first subparagraph, of Article 10(3) of the Merger Regulation.
- (37) On 7 December 2018, the Commission launched a market test of the Commitments of 3 December 2018.
- (38) A Second Letter of Facts was sent to the Notifying Party on 11 December 2018 ('Second LoF'). Similarly to the First LoF, the Second LoF informed the Notifying Party of pre-existing evidence that was not relied on in the SO as well as of additional evidence gathered after the adoption of the SO. On 17 December 2018, the Notifying Party replied to the Second LoF ('response to the Second LoF').

⁷ Commission "Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation".

⁸ Email of the Hearing Officer of 21 December 2018 addressed to the external counsel of the Notifying Party.

- (39) A Third Letter of Facts was sent on 14 December 2018 ('Third LoF'). The Third LoF informed the Notifying Party of a correction to Table 6 of the First LoF. On 19 December 2018, the Notifying Party replied to the Third LoF ('response to the Third LoF').
- (40) On 19 December 2018, the Commission informed the Notifying Party of the negative results of the market test of the Commitments of 3 December 2018 and informed the Notifying Party, pursuant to paragraph 94 of the Commission notice on remedies⁹, that the Commission would only be able to accept modified commitments where such modifications enabled it to clearly determine — on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing, and without the need for any other market test — that such commitments, once implemented, would fully and unambiguously resolve the competition concerns identified and where there would be sufficient time to allow for an adequate assessment by the Commission and for proper consultation with Member States. On 20 December 2018, the Notifying Party indicated that no improved remedy proposal would be submitted.
- (41) On 20 December 2018, the Notifying Party also provided comments on the results of the market test.
- (42) On 21 December 2018, the chief executive officer of the Notifying Party addressed a letter to the Director General of DG Competition alleging that the case team had not conducted its assessment with an 'open mind' but with a 'high degree of bias'. The Director General of DG Competition responded on the same day.
- (43) On 28 December 2018, the Notifying Party provided comments on the non-confidential versions of internal documents of potential Purchasers of the Divestment Business proposed in the Commitments of 3 December 2018 and non-confidential minutes of meetings and calls between the Commission and these Purchasers.
- (44) On 17 January 2019, after the draft decision was sent to competent authorities of the Member States in preparation of the Advisory Committee pursuant to Article 19(5) of the Merger Regulation, the Notifying Party proposed a substantially different remedy concept under which Wieland would commit to sell (1) the two ARP plants in Zutphen and Pori to an industrial investor, but not any longer the plant in Stolberg and (2) a 33% share in Schwermetall to a financial investor, maintaining the current governance arrangements in Schwermetall. With this remedy, Wieland accepts to divest a share in Schwermetall but takes back the Stolberg plant which it had been offering since October 2018.
- (45) On the basis of evidence submitted in the Form CO by the Notifying Party and gathered during the market investigation,¹⁰ the Commission informed Wieland on 21 and 22 January 2019 that a divestiture which would not include the Stolberg plant would not address the horizontal competition concerns, because Stolberg is an essential part of the required remedy package necessary to address the central horizontal concern in this case, notably as regards high end products and connectors, as explained below in Sections 6.2 and 6.3 and because Pori is not active in

⁹ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1 ('Remedies Notice').

¹⁰ See in particular Form CO, Annex 25_Q19, Form CO Annex 17_Q11, and "Aurubis FRP site information 13 March 2018", annex to reply to RFI 8.

connectors. The Commission also explained that it could not agree to sale of the stake in Schwermetall to a financial investor, because such an investor would have no interest to continue to sell pre-rolled strip to Stolberg and Zutphen [...], which, as explained below in Section 7.3.3.1, would have a detrimental impact on the competitiveness of the Zutphen plant and of the Divestment Business.

- (46) Furthermore, and given that this new concept was submitted after the sending of the invitation and the preliminary draft of the decision to the Member States, the Commission informed the Notifying Party that such remedy would not meet the procedural requirements of “late remedies”¹¹ (remedies that would fully and unambiguously solve the competition concerns and without the need for any other market test) since a market test would be necessary. The Commission informed the Notifying Party that there was no time available, at this stage of the proceedings, for a new market test and a proper consultation of Member States on a new proposal.
- (47) Wieland decided not to formally submit these commitments.
- (48) On 29 January 2019, the Advisory Committee discussed a preliminary draft of this Decision and delivered a favourable opinion.

4.2. Alleged lack of due process

4.2.1. No market test of the remedy package of 17 October 2018

- (49) In the response to the SO, the Notifying Party submits that it “fails to understand” why the Commission did not market test the “extensive” remedy package which was submitted on 17 October 2018 (see recital (27) of this Decision). Although the Notifying Party acknowledges that the Commission has a certain margin of discretion in that regard, according to the Notifying Party, that discretion is not “unlimited” in the sense that “*consultation of third Parties may only be dispensable if the test would be superfluous, i.e. if the commitments are wholly inadequate in remedying the concerns, which is clearly not the case here*”.¹² The Notifying Party also considers that in the light of the principle of proportionality, there is no requirement for them to submit an “ideal package” that would result in “overcompensation” in comparison to the concerns raised.¹³
- (50) The Commission does not share the Notifying Party’s views and considers that the Commitments of 17 October 2018 did not have to be market tested. Those Commitments had been submitted after the Commission initiated proceedings but before the Commission had formalised its objections in the SO. As a result, in order to be acceptable, the Commitments of 17 October 2018 would need to be sufficient to rule out the “serious doubts”¹⁴ identified by the Commission in the Article 6(1)(c) Decision.
- (51) First, as explained by the Commission in Section 8.3 of the SO, those commitments were not comprehensive and effective because they did not provide for a structural long-term solution as regards the supply of pre-rolled strip to the divested plants of Stolberg and Zutphen. Moreover, those commitments did not remove all of the competition concerns identified by the Commission because they did not solve the risks of raising rivals costs and the risks associated with the Notifying Party’s access

¹¹ Remedies Guidelines, paragraph 94.

¹² Response to the SO, paragraphs 237 and 238.

¹³ Response to the SO, paragraph 239.

¹⁴ Remedies Notice, paragraph 18.

to competitors' information that would be triggered by its acquisition of sole control over Schwermetall.

- (52) Second, the Notifying Party had requested that the Commission take into account the fact that Sofia Med and Global Brass and Copper ('GBC'), which had informally expressed an interest in acquiring the Divestment Business, had upstream pre-rolled capacity to supply the Divestment Business. Under the paragraph 30 of the Remedies Notice and as explained in the SO, the business to be divested must be viable as such and the assets of a possible or even presumed future purchaser are not taken into account by the Commission unless the merging parties conclude, already during the course of the merger review procedure a sale and purchase agreement (fix it first solution), which was not the case with any of these potential purchasers.
- (53) In light of the considerations set out in recitals (49) to (52), the Commission did not have to market test the Commitments of 17 October 2018.

4.2.2. *First LoF violates rights of defence*

- (54) The Notifying Party claims the First LoF goes against the purpose of the procedural system under the Merger Regulation and thus violates the rights of defence of the Parties. The Notifying Party essentially relies on four arguments. First, the First LoF presents evidence submitted to the file long before the SO was issued, and which the Commission has hence failed to include in the SO. Second, the First LoF develops "*new lines of argumentation*". Third, the First LoF was sent on Friday, 30 November 2018, and the Parties had until Monday, 3 December 2018 to submit remedies, not giving the Parties enough time to "find/adjust" suitable remedies. Fourth, by issuing "pre-existent" evidence the Commission has "partially" deprived the oral hearing of its purpose. The Notifying Party further requested a "supplementary Oral Hearing".¹⁵
- (55) The purpose of a letter of facts is to inform the parties of all the facts the Commission may rely upon in the final decision and to give the parties an opportunity to express their observations in relation to those facts and to the preliminary conclusions that the Commission has drawn from them. Hence, contrary to what the Notifying Party argues, a letter of facts does not have to rely exclusively on evidence brought to the file as a result of the addressees' replies to the SO. A letter of facts may rely on evidence gathered before and after the adoption of the SO. On the other hand, a letter of facts cannot rely on facts that substantiate new objections, that is to say, concerns that were not presented in the statement of objections. In this case, the First LoF does not rely on facts that substantiate new objections. It identified additional evidence that supports the objections expressed in the SO. In addition, the alleged "new lines of argumentation" are not new objections but only an explanation of how the additional facts support the objections presented in the SO.
- (56) Both in the SO and at the post SO state of play meeting of 29 November 2018, the Notifying Party was extensively informed not only of all of the Commission's objections on the substantive assessment of the horizontal and vertical aspects but also of the Commission's objections in respect of the previously proposed remedy package. Moreover, throughout the procedure the Commission has been consistent that a remedy package which did not include the Aurubis' stake in Schwermetall was unlikely to address the significant impediment to effective competition identified. Hence, the Notifying Party had time and significant insight into the Commission's reasoning to find or adjust suitable remedies.

¹⁵ Response to the First LoF, paragraphs 2 to 7.

(57) The Commission also informed the Notifying Party that it could not accede to its request for an additional formal oral hearing, since such a hearing could only be requested (pursuant to Regulation (EC) No 802/2004) in written comments to a statement of objections. Since the First LoF did not raise new objections or concerns or materially alter the objections or concerns made in the SO there was no basis for holding an additional formal oral hearing. In any case, the Notifying Party's views were heard, given that its responses to the First LoF were transmitted to DG Competition hierarchy, to the Legal Service, to the Hearing Officer and to the Member States.

(58) As mentioned in recital (35), the Hearing Officer agreed with the case team's assessment and similarly rejected the Notifying Party's request for an additional oral hearing.

4.2.3. *Shortcomings of the investigation*

(59) In the response to the SO, the Notifying Party claims that the Commission's findings are largely based on the Parties' "internal documents". In particular when assessing the Parties' market position, the Commission "*does not primarily rely on economic data and other "hard facts" provided by third parties but rather on qualitative ("soft") criteria found in internal documents of the Parties (or verbal statements of competitors)*". In addition, the Notifying Party considers that the Commission has misinterpreted those internal documents. The Notifying Party argues that "*the Commission fails to recognise that most of the documents reflect the position of individuals and do not represent "the official internal position" of the Parties. (...) A great number of documents only reflect intentions, plans or certain strategy of the Parties. Some of them merely identify business opportunities and contain planning assumptions as well as forecasts and/or projections. Most of these internal papers therefore merely show "wishful thinking" or overly "self-promotion at most, such as to become a market leader"*". Moreover, the Notifying Party considers that the Commission equates such documents to proof of the Notifying Party's market leadership. However, when some documents state that other players pursue exactly the same strategy, the Commission does not draw the same conclusions.

(60) First, it is incorrect that the Commission's findings are pre-dominantly or even largely based on the Parties' internal documents reflecting strategic aspirations or opinions. As will be clear from the assessment in Section 6, the Commission's findings are based on a large body of evidence composed also of the information and data submitted by the Parties in the Form CO and its annexes, the Parties' replies to 32 requests for information, the Commission's extensive market reconstruction efforts, requests for information sent to the Parties' competitors, and questionnaires sent to 18 competitors and more than 50 customers.

(61) Secondly, the Commission considers internal documents produced in the ordinary course of business to be a legitimate and credible source of information on which it is entitled to rely. They are produced by persons who, because of their professional background, know the dynamics of competition in a given sector. They are also generally produced with care since they form the basis for, or reflect, important business decisions with serious economic implications for the businesses involved. If they are produced in the ordinary course of business *in tempore non suspecto* they are also unlikely to be produced with a view to influencing the views of competition enforcers. Such documents, therefore, generally have a high probative value regarding the dynamics of competition in a given sector.

(62) Thirdly, internal documents referring to specific facts or containing data and estimates (for example, internal documents reporting share estimates for the parties

and their competitors) may be particularly useful to help the Commission to get a better and deeper understanding of the main features and trends of the companies and the markets involved. Such documents reveal the facts, data and estimates that are regarded by professionals in the sector concerned as the most important for analysing the competitive dynamics in their sector and for designing their business strategy. Consequently, internal documents are, by their very nature, the best and often only source of information, as regards the future plans and strategies of the relevant parties. Furthermore, they also provide a useful benchmark for verifying the plausibility of claims made by the Notifying Party in the Form CO or the outcome of the Commission's own market reconstruction efforts.

- (63) Fourthly, the Commission agrees with the Notifying Party that statements in internal documents need to be interpreted in their context and that aspirational statements in internal documents may sometimes reflect exaggerated expectations, the isolated views of individuals or the intention of the author to promote himself or herself or the responsible department.
- (64) For the reasons given in recitals (60)-(63), however, the Commission does not agree with the Notifying Party that this disqualifies internal documents produced in the ordinary course of business in general and across the board as an important source of evidence. To the extent that evidence exists that the content of a particular internal document has been taken out of context; reflects exaggerated expectations; is an isolated view of just one individual, or is an effort at self-promotion, such aspects are taken into account by the Commission when evaluating the probative weight and value to be attributed to the document in question as well as the Commission's interpretation of such document. As a general remark, and as will be seen in the assessment below, in this case the Notifying Party has generally failed to substantiate or provide evidence that would give rise to doubt as to the probative value of specific quotes from any of the internal documents relied on by the Commission or the Commission's interpretation of those documents.

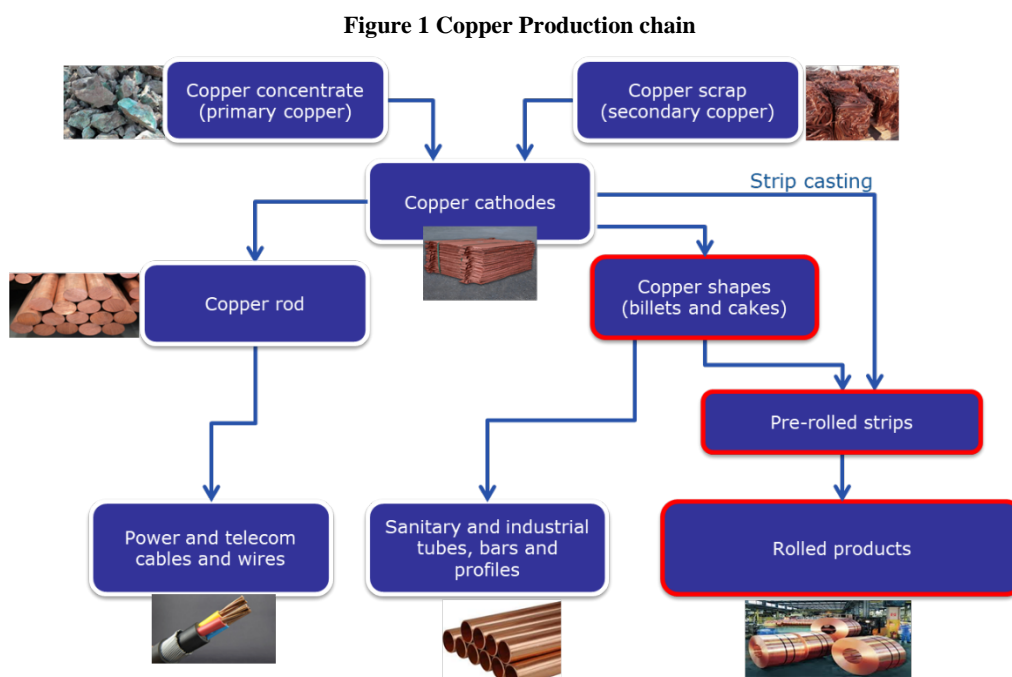
5. ROLLED PRODUCTS

5.1. Copper and Copper alloys rolled products ('rolled products')

- (65) Copper is a malleable and ductile metallic natural product that is an excellent conductor of heat and electricity, with corrosion resistance and also anti-microbial properties.
- (66) Copper is obtained from copper ore, which contains only a low concentration of copper (below 5% copper content). After extraction from the copper mine, it is enriched in processing facilities into copper concentrates (25–40% copper content). As illustrated in Figure 1, both copper concentrate (primary copper) and copper scrap (recycled copper material, also known as secondary copper) are converted into anodes which are used to produce copper cathodes (flat pieces produced in various grades) in an electrolytic process in a copper tank house.
- (67) Copper cathodes, together with other secondary copper, are then further processed by smelting and casting into (i) copper rods, (ii) copper shapes, or (iii) used as an input for direct strip casting using a continuous vertical or horizontal casting technology, often referred to as 'strip casting'. Copper rods are the main input for power cables and wires. Copper shapes fall into two categories – billets or cakes - depending on their form. Billets have a circular section with a diameter varying from 100-800 mm and a length of around 600 mm. Cakes have a rectangular section and weigh up to 25 tonnes per cake. Billets are transformed into sanitary and industrial tubes, bars

and profiles,¹⁶ whereas cakes (or slabs) are the input for pre-rolled strips, which are then further rolled down into rolled products.

- (68) The areas in which the Parties' activities are affected by the Transaction are pre-rolled strip and rolled products, as highlighted in red in Figure 1.



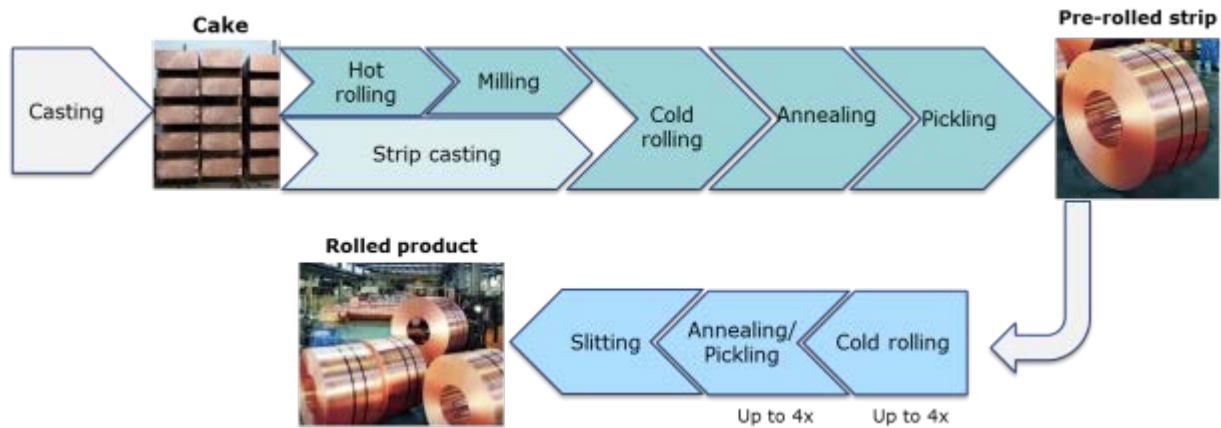
Source: European Commission, based on Parties' information

- (69) As shown in Figure 2, the manufacturing process of pre-rolled strip starts with a cake (either casted in-house, or purchased from third parties). A cake can have different chemical compositions, for example, it can be made of pure copper or of copper alloys. The cake (or slab) is then hot rolled and milled. These two processes have the main objective of transforming a shape (the cake) into a strip with thickness of 1.5 to 5 millimetres.¹⁷ In order to further reduce its thickness, the strip is further rolled at reduced temperature (cold rolling). The manufacturing process of pre-rolled strip is completed by an annealing and a pickling treatment, which have the main objectives of, respectively, enhancing certain physical properties (for example, metal ductility) and removing impurities on the strip surface. After additional cold rolling, annealing and pickling of the pre-rolled strip, the resulting rolled product may be submitted to special surface treatments such as coating (with tin, nickel, multilayer coating) and is finally stretch-bent to coils. Often the strip is subject to longitudinal cuts, typically referred to as 'slits'.
- (70) If the rolled products are manufactured via strip casting, the hot rolling process does not take place because the casting process does not produce cakes, but rather strips ready to be further processed.

¹⁶ Copper profiles are extruded, drawn, forged or formed copper products used in a variety of electrical applications which are usually tailor-made according to specifications provided by a customer.

¹⁷ Form CO, paragraph 137.

Figure 2 Manufacturing process of pre-rolled strip and rolled products



Source: European Commission, based on Form CO, Annex A(3), Question 22 and 23_Manufacturing footprint and on Langner, Bernd E. (2011), “Understanding copper. Technologies, Markets and Business”, figure 8.3.7.

- (71) Rolled products are available in different copper grades and copper alloy compositions, depending on the composition of the cake or pre-rolled strip used. They may take different shapes (plates, sheets, or strips) and are available in different dimensions. The grade, composition and dimension of the rolled product very much depend on the end application for which it will be used.
- (72) Rolled products are not finished products to the extent that they are an input in the manufacturing of, for example, electrical transformers, semiconductors, heat exchangers and roofing materials.
- (73) Plants with all production steps for manufacturing both pre-rolled strip and rolled products are considered vertically or fully integrated plants. Plants that start their manufacturing processes with a pre-rolled strip are considered to be ‘re-rollers’.

5.2. Relevant product markets

5.2.1. Introduction

- (74) The Parties' activities mainly overlap in the manufacture and supply of rolled products. In addition, Schwermetall is also active upstream in the supply (on the merchant market) of pre-rolled strip, which is an input for rolled products. ARP also supplies billets to third Parties for the production of sanitary and industrial copper tubes, in which Wieland is active.

5.2.2. Copper shapes (billets and cakes)

- (75) Copper shapes are products used as an input for the production of semi-finished copper products. Copper shapes can have a different content of copper and impurities, and can have different copper alloy compositions.
- (76) As mentioned in recital (67), there are two kinds of shapes: billets and cakes. Cakes have a rectangular section and weigh up to 25 tonnes per cake. Billets have a circular section with a diameter varying from 100-800 mm and a length of around 600 mm. Billets are transformed into sanitary and industrial tubes, bars and profiles¹⁸, whereas

¹⁸ Copper profiles are extruded, drawn, forged or formed copper products used in a variety of electrical applications which are usually tailor-made according to specifications provided by a customer.

cakes (or slabs) are the input for pre-rolled strip, which is then further rolled down into rolled products.

5.2.2.1. The Notifying Party's view

- (77) The Notifying Party, in line with previous decisions of the Commission, submits that copper shapes constitute a single product market regardless of whether they are cakes or billets, and regardless of the specific qualities of copper.¹⁹ The Notifying Party argues that there is a high degree of supply side substitutability between different forms and specific qualities of copper shapes.²⁰

5.2.2.2. The Commission's decisional practice.

- (78) Although in *Norddeutsche Affinerie/Cumerio*, the Commission found there is no demand-side substitutability between billets and cakes and it may not be possible for every copper producer or processor to easily switch between the production of cakes and billets on the same production line, or to easily switch between all sizes or weights of cakes and billets, the Commission concluded that “*the possibility and likelihood of such switching characterises the market situation in general (...) from the point of view of supply-side substitutability, billets and cakes are interchangeable*”.²¹

5.2.2.3. The Commission's assessment

- (79) In the Article 6(1)(c) Decision, the Commission preliminarily established that, in light of the findings of previous decisions, there is no demand side substitutability and the supply side substitutability between billets and cakes may be limited, therefore two separate markets should be considered depending on the specific form of the shape. The Commission indicated that it would further investigate in Phase II the effectiveness and immediacy of supply-side substitution between billets and cakes.
- (80) The market investigation carried out by the Commission has shown that supply side substitution is not necessarily immediate for some producers. Whilst some manufacturers produce both billets and cakes²², and in general do it on the same production lines by changing the mould²³, others are more specialized in the production of one kind of shape (in general billets).²⁴ Those specialized producers have indicated that they cannot produce cakes on their billets lines with the current production setting. However, with some capital investment expenditures, notably in the casting moulds, they could produce cakes with a small width.²⁵
- (81) The investigation of the Commission has shown that not all producers of copper shapes can switch between the production of cakes and billets of all sizes or weights on the same production line. As there is no demand side substitution and supply side substitution is not immediate, it is unlikely that billets and cakes belong to the same product markets. The question can, however, be left open, as the Transaction does

¹⁹ Form CO, paragraph 85.

²⁰ Response to the Article 6(1)(c) Decision, paragraph 8.

²¹ See Cases M.4781 - *Norddeutsche Affinerie/Cumerio*, recitals 70, 80 and 81; M.6316 – *Aurubis/Luvata Rolled Products*, recital 20.

²² Questionnaire to Competitors – Copper shapes, question 7.

²³ Questionnaire to Competitors – Copper shapes, question 8.

²⁴ Questionnaire to Competitors – Copper shapes, question 7.

²⁵ Questionnaire to Competitors – Copper shapes, question 11.

not impede effective competition for the supply of billets regardless the product market definition.

5.2.3. *Pre-rolled strip*

- (82) As already explained in Section 5.1, a pre-rolled strip is a thin strand of copper which can be produced by processing copper cakes by a hot rolling process, or by vertical or horizontal continuous strip casting when the production process starts directly with the copper cathodes, scrap and other metals being melted and casted into strip (that is to say neither shape casting nor hot rolling is necessary), followed by a first stage of cold rolling, and material treatments such as annealing and pickling. Pre-rolled strip is further processed into rolled products.
- (83) The chemical composition of a pre-rolled strip is determined at the casting stage: *i.e.* by defining the copper grade or copper alloy composition of the cake or the metals being melted for continuous strip casting. Further production steps such as milling, cold rolling, annealing, and sometimes pickling lead to certain thicknesses (down to 1.5-5 mm),²⁶ surface treatments, and physical properties of the final product.
- (84) Although a pre-rolled strip is an intermediate product, which is usually produced in-house by manufacturers of rolled products, it can also be purchased and sold on a merchant market. This merchant market serves the companies that do not have the capabilities to hot roll (or cast in a continuous strip casting) certain grades of copper and copper alloys. They buy the pre-rolled strip of the required compositions on the merchant market and further (cold) roll it to complete rolled products. Those manufacturers are referred to as 're-rollers'.

5.2.3.1. The Notifying Party's view

- (85) The Notifying Party submits that a distinct product market for pre-rolled strip does not exist. Pre-rolled strip is only one possible intermediate product between shapes and rolled products. The vast majority of pre-rolled strip is destined for captive use. Practically, all producers of rolled products have the necessary facilities to produce pre-rolled strip. The Notifying Party submits that the position of Schwermetall which sells large quantities of pre-rolled strip not just to its two parents but also to third parties is exceptional and is due to the historical intentions of its parent companies to outsource the casting and hot rolling processes. The volume that Schwermetall sells on the merchant market to third parties can be explained by the need to secure higher utilisation rate in order to keep production costs lower. In order to define the framework for competitive assessment, captive use of pre-rolled strip and capacities more generally should be taken into account.²⁷
- (86) The Notifying Party also submits that, if a distinct market for pre-rolled strip were to be assumed, that market would not need to be further segmented on the basis of the alloy or copper grade due to high supply side substitutability, but that the exact market definition could be left open. The Notifying Party argues that the chemical composition of the strip is defined at the casting stage of shapes and that processing of all copper grades and alloys follows the same production steps starting from hot

²⁶ Form CO, paragraph 137.

²⁷ Form CO, paragraph 144.

rolling. Furthermore, the Notifying Party submits that the switching time between processing of different alloys requires only small adjustments (up to 1 day).²⁸

5.2.3.2. The Commission's decisional practice

- (87) In *Norddeutsche Affinerie/Cumerio*, the Commission considered an overall market of semi-finished rolled products downstream of copper shapes.²⁹ However, in a subsequent decision, *Aurubis / Luvata Rolled Products*, the Commission left open the exact market definition of pre-rolled strip in the absence of any horizontal overlap between Aurubis and Luvata in pre-rolled strip.³⁰

5.2.3.3. The Commission's assessment

- (88) The Commission considers that pre-rolled strip constitutes a distinct market from rolled products for the reasons set out in recitals (89)-(94).
- (89) First, there is no demand side substitution between pre-rolled strip and rolled products. Due to the differences in physical properties of pre-rolled strip and rolled products, it is not possible for rolled product customers to switch to pre-rolled strip, which would always be thicker and would not have the same finishes as rolled products. Similarly, customers of pre-rolled strip cannot switch to rolled products. Customers of pre-rolled strip are typically re-rollers, which will further process the pre-rolled strip.
- (90) Second, the supply side substitution between rolled products and pre-rolled products is limited. Not all suppliers of rolled products are capable of manufacturing pre-rolled strip with the chemical composition and characteristics needed for their downstream rolled product business. As mentioned in Section 5.1, for the production of pre-rolled strip of certain alloy groups and product characteristics, it is necessary to hot roll the slabs of copper or of copper alloys. As the market investigation has shown, there are several competitors that do not have the hot rolling capabilities necessary to process these slabs.³¹ Moreover, these suppliers also do not have the incentive to acquire such capabilities because it would be difficult for them to recoup such investment.
- (91) In addition, the market investigation indicates that the continuous strip casting technology cannot be used, at least in an efficient manner, to manufacture certain grades of pure copper (Cu-ETP, CU-PHC) and certain copper alloys (certain copper iron and copper nickel silicone, copper magnesium alloys).³² Similarly, the continuous strip casting technology cannot be used to attain certain properties such as the suitability for deep drawing³³. This shows that suppliers of rolled products which for some of their products rely on continuous strip casting technology need to source pre-rolled strip for further cold rolling for other products in their product range.

²⁸ Form CO, paragraphs 145, 146, and 147; and Response to Article 6(1)(c) Decision, paragraphs 10-15.

²⁹ Commission decision in case M.4781 – *Norddeutsche Affinerie/Cumerio*, recital 91.

³⁰ Commission decision in case M.6316 – *Aurubis/Luvata Rolled Products*, of 8 August 2011, recital 26.

³¹ Questionnaire to Suppliers of Rolled Products, question 7.

³² Questionnaire to Suppliers of Rolled Products, question 1; Competitor's response to the Commission's request for information of 21.09.2018 (Id 1553).

³³ Questionnaire to Suppliers of Rolled Products, question 1, Questionnaire Q2 to Competitors of Rolled Copper Products, questions 7 and 8.2.; agreed non-confidential minutes of a call with a customer of Schwermetall, of 28 June 2018 (Id 513); agreed non-confidential minutes of a call with a competitor, 27 June 2018 (Id 567).

- (92) The Notifying Party itself recognises that “*certain know-how*” is required to produce pure copper and micro alloyed copper with continuous casting technologies.³⁴ Moreover, the Notifying Party also recognises that overall there are more disadvantages than advantages in using the continuous casting technologies (for example, continuous casting line and continuous strip casting entail a “*rather [a] complex process control for alloys with elements that tend to burn off*”).³⁵ The Parties themselves do not have pre-rolled production capabilities in all their plants and supply these plants (such as Wieland's plant in Langenberg and Villingen) either from their integrated plants or from their joint-venture company Schwermetall.³⁶
- (93) Third, there is a market for this intermediate product. The market investigation also indicates that not only Schwermetall but also a few other integrated suppliers offer pre-rolled strip on the merchant market³⁷. Even though most of these suppliers have a more limited portfolio of pre-rolled strip than Schwermetall (for some alloys Schwermetall appears to be the only available supplier on the merchant market), it appears that pre-rolled strip is routinely provided on the merchant market by a handful of independent suppliers.
- (94) To the extent that the demand for pre-rolled strip derives from the demand for rolled products (see Section 5.2.4), the Commission considers that pre-rolled strip as identified in this Section is a differentiated market. Pre-rolled strip is offered in different compositions and with different properties. The degree of differentiation is however not as high as it is in the rolled products market, due to several other properties that can be acquired in the later stages of production (from cold rolling onwards). However, there are significant differences in the production capabilities of pre-rolled strip of the main suppliers, with Schwermetall being the most diversified supplier of pre-rolled strip compared to other players. Moreover, the differences in production capabilities are also reflected in the properties of pre-rolled strip. Some pre-rolled strip is used mostly to manufacture high-end rolled products. Notwithstanding this, there is no need to further segment the pre-rolled strip market, as this differentiation would have no impact on the competitive assessment of the Transaction.
- (95) The Commission therefore considers that the merchant market for pre-rolled strip of copper (and copper alloys) is a distinct separate market from the market for rolled products.

5.2.4. *Rolled products*

- (96) Rolled products are available in copper and copper alloys depending on the composition of the cake or the composition chosen for the continuous strip casting (and subsequently, the composition of the pre-rolled strip). Rolled products can take different profiles – mainly plates, sheets or strips – and can be of different thicknesses. Rolled products are used in the manufacture of various different end-products, such as connectors, cables, semiconductors, transformers, transistors, musical instruments and sanitary equipment.

³⁴ Form CO, Annex A(3) “Manufacturing footprint and overview of casting technologies”, Ulm, 11 June 2018, slide 10.

³⁵ Form CO, Annex A(3) “Manufacturing footprint and overview of casting technologies”, Ulm, 11 June 2018, slide 10.

³⁶ Form CO, Annex A(3) “Manufacturing footprint and overview of casting technologies”, Ulm, 11 June 2018, slide 5.

³⁷ Questionnaire to Suppliers of Rolled Products, questions 22 and 22.1.

5.2.4.1. The Notifying Party's view

- (97) The Notifying Party submits that there is a single relevant product market for rolled products. Segmentation by copper composition, end-industry or application is, according to the Notifying Party, not warranted. Customers can and do switch between different composition of alloys and copper grade rolled products for the same application. All major competitors are able to offer the different copper and copper alloys products for different applications.³⁸
- (98) On the demand-side, the Notifying Party argues that within its requirements, a customer may switch to another alloy composition, even for applications in electrical engineering and the electronics industry. According to the Notifying Party, the selection of material usually represents a compromise between the characteristics of the material (such as conductivity, strength, bendability, elongation, etc.) and the design of the final product itself. Therefore, even for products which require certain conductivity it is possible to find alternative compositions that meet the customer's requirements³⁹.
- (99) The Notifying Party however acknowledges the exception of oxygen-free copper, which is not technically interchangeable with other copper compositions or any alloy composition.⁴⁰ Nonetheless, the Notifying Party submits that the ability to produce oxygen-free copper rolled products depends on the ability to secure the oxygen-free copper input (shapes). Neither Wieland nor ARP have production facilities to manufacture oxygen-free shapes and source them from elsewhere (ARP currently sources internally from Aurubis). In addition, Wieland's activities in oxygen-free copper represent approximately 1% of its sales in volume in Europe.⁴¹ Hence, the Notifying Party argues that any segmentation between oxygen-free and oxygen bearing copper rolled products is not necessary for the assessment of the Transaction.⁴²
- (100) On the supply-side, the Notifying Party submits that all alloys can be processed to rolled products on the same production lines.⁴³ According to the Notifying Party, there are off-the-shelf solutions for machines on which all copper and copper alloy compositions can be processed⁴⁴. Switching between alloys may require an exchange of rollers and require setting-up the individual production steps but these changes can be made within less than a day.⁴⁵ According to the Notifying Party, “[t]he question of copper compositions a manufacturer produces is part of basic portfolio management. As the machines that process different copper grades or alloys are identical, costs for switching (...) are in fact moderate and it is a mere business decision whether a broader portfolio is assessed to justify these costs by attracting additional demand”.⁴⁶
- (101) The Notifying Party also argues that at least the major manufacturers of rolled products supply the user industries singled out in the Commission's past decisions

³⁸ Response to the SO, paragraph 15; Response to the Article 6(1)(c) Decision, paragraphs 17-18, 20-23, 25-27; Form CO, paragraphs 145, 145, 164 and 166.

³⁹ Form CO, paragraphs 162 and 163.

⁴⁰ Response to the Article 6(1)(c) Decision, paragraph 22.

⁴¹ Form CO, paragraphs 172, 173 and 174.

⁴² Form CO, paragraph 175.

⁴³ Form CO, paragraph 166.

⁴⁴ Response to the Article 6(1)(c) Decision, paragraph 25.

⁴⁵ Form CO, paragraph 167.

⁴⁶ Response to the Article 6(1)(c) Decision, paragraph 26.

(that is to say, electrical engineering and the electronics industry; the building and construction industry; telecommunications; automotive industry; machine construction; and trade/slitting centres). Any differences in the competitors' strengths in relation to specific segments can be explained by historical reasons and local focus.⁴⁷

- (102) The Notifying Party has questioned the accuracy and practicability of a segmentation of the relevant product market by user industry as suggested in the Commission's previous decisions. In addition to the manufacturers being generally able to supply the different end-industries, the Notifying Party argues that there is a large overlap of applications within several industries. Not only is a specific property (such as conductivity) required in different end-industries (such as electronics, telecommunications and automotive); but certain finished products can also be used in different end-industries (for example, copper clamps) or attributed to several different industries (For example, USB components could be counted as electronics or when used in a car radio as automotive equipment).⁴⁸

5.2.4.2. The Commission's decisional practice

- (103) As mentioned in recital (87), in *Norddeutsche Affinerie/Cumerio*, the Commission considered an overall market for *semi-finished rolled products* downstream of copper shapes. In relation to the delineation of that overall market in that previous case, the Commission analysed the possible substitutability both in relation to alternative materials and different applications. The Commission underlined that the exact extent to which copper can be replaced by other materials depends on the characteristics of copper (*vis-a-vis* other materials), mainly with regard to electrical conductivity and processing characteristics. The Commission also underlined that copper products are used in different applications, namely: electrical engineering and the electronics industry (appliances, air conditioning and circuit boards); the construction industry (plumbing and roofing); telecommunications (cables); automotive industry (radiators); machine construction (motors). The Commission ultimately left the market definition open⁴⁹.
- (104) In *Norddeutsche Affinerie/Cumerio*, the Commission also investigated a product market upstream of rolled products: the market for shapes. The Commission considered the possibility of segmenting the copper shapes market according to the different qualities of copper and concluded that from a demand-side point of view, the different copper qualities are not fully substitutable. However, the Commission concluded that, from the supply-side, shapes from different copper qualities do not constitute a distinct product market - with the possible exception of oxygen-free copper shapes.⁵⁰ The Commission left open whether it would be necessary to identify a separate market for oxygen-free copper shapes.⁵¹ That precedent is relevant to the extent that the composition of copper rolled products depends on the composition of its feedstock.
- (105) In a subsequent decision, *Aurubis/Luvata Rolled Products*, the Commission considered departing from the *Norddeutsche Affinerie/ Cumerio* precedent in respect of the distinction between pre-rolled strip and the overall semi-finished rolled

⁴⁷ Form CO, paragraphs 155, 159 and 160.

⁴⁸ Form CO, paragraphs 157 and 158.

⁴⁹ Commission decision in case M.4781– *Norddeutsche Affinerie/Cumerio*, recitals 93 to 99.

⁵⁰ Commission decision in case M.4781– *Norddeutsche Affinerie/Cumerio*, recitals 65 and 67.

⁵¹ Commission decision in case M.4781– *Norddeutsche Affinerie/Cumerio*, recitals 72, 73 and 84.

products. Furthermore, the Commission confirmed its findings in relation to a possible segmentation of rolled products by end application. The Commission remarked that “*supply side substitutability may not be as easy as put forward by the notifying party*” and that the segmentation by application proposed in *Norddeutsche Affinerie/Cumerio* “*may be appropriate*”. The Commission also underlined that oxygen-free rolled products did not seem substitutable to other rolled products from a demand-side point of view.⁵² However, the Commission ultimately left the exact market definition open.

- (106) In *Aurubis/Luvata Rolled Products*, the Commission's investigation also supported the previous finding in relation to the substitution of copper by other materials. Since the Commission noted that for certain applications alternative materials could be used, it took the competitive constraint posed from other materials into account in the competitive assessment.⁵³

5.2.4.3. The Commission's assessment

- (107) Defining the relevant market definition is based on an assessment of demand-side and supply-side substitutability of products. In this regard, and as explained in the Commission Notice on the definition of the relevant market (‘Notice on the relevant market definition’), “[f]rom an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions”.⁵⁴ Nonetheless, “[s]upply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. (...). These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above”.⁵⁵
- (108) In light of these principles, and for the reasons set out in recitals (110)-(135), the Commission considers: (i) that it is appropriate to distinguish a market for rolled copper products from other materials, which in a limited number of end applications can substitute rolled copper; (ii) that an overall market for rolled products exists; but that (iii) due to the different characteristics of the input material and the different parameters in the manufacture of rolled products, as well as the different requirements in various end applications, this market is highly differentiated and consists of multiple segments, which exhibit different levels and intensities of competition and potential competitive pressure (see Section 6.3 below). Finally, the Commission will also take a position on the possible market segmentations considered in previous decisions.

⁵² Commission decision in case M.6316 – *Aurubis/Luvata Rolled Products*, recitals 30 and 31.

⁵³ Commission decision in case M.6316 – *Aurubis/Luvata Rolled Products*, recitals 30 and 31.

⁵⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C372/5, 9.12.97, paragraph 13.

⁵⁵ Notice on the relevant market definition, paragraph 20.

- (109) First, the results of the market investigation do not support the finding of a wider product market where rolled products compete with products made from other materials, such as aluminium, steel, or plastic. With regard to the substitutability of rolled products with other materials, although such possibility exists in relation to some products (for example, where electric connectivity plays no role or a minor role), the vast majority of respondents to the market investigation considered that copper cannot always be substituted with other materials because of its technical characteristics.⁵⁶ In fact, as ARP has recognised in one of its internal documents: “[c]ompetition from other materials (substitution) and miniaturization are negatively affecting the available market for copper and alloys. Despite this the total market is growing, driven by macro trends in infrastructure, electrical and electronic applications”.⁵⁷ In other words, ARP recognised that for some end uses copper may be substituted by other materials but for other end uses demand for copper is growing and, therefore, is not affected by the possibility to switch to other materials.
- (110) Second, although for most customers the different qualities of rolled products are not substitutable, the market investigation indicates that most suppliers are able to offer the different qualities of rolled products, indicating there is a considerable degree of supply-side substitutability. The vast majority of respondents said they were able to cold roll, anneal, pickle and slit any type of alloy for any type of final function.⁵⁸ In addition, there are minimum standards that most if not all suppliers can comply with: an EN standard⁵⁹ for plates, sheet, strip and circles for general purposes and another one for electrical purposes; an EN standard for strip for springs and connectors; and an EN standard for lead frames.⁶⁰
- (111) Third, while most suppliers are able to offer the different qualities of rolled products, and the EN standards assist supply-side substitutability, the market investigation nevertheless indicates that a considerable degree of differentiation exists in the rolled market, as demand substitution is very limited and supply substitution is not perfect.
- (112) Due to the specific requirements of customers, there is limited demand-side substitution between different kinds of rolled products. The restrictions start already at the chemical composition level, since different compositions provide different properties of the material. In fact, as regards, for example, oxygen-free copper, the vast majority of customers do not consider oxygen-free copper to be technically interchangeable with other pure oxygen bearing copper compositions and copper alloys.⁶¹ The technical requirements of the customers will also dictate the qualities of the rolled products in terms of temper, strength, conductivity, and bendability, as well as the dimensions (width, thickness, length), the surface qualities (roughness, coatings) and even packaging formats.
- (113) Demand-side substitution is therefore limited by the technical specifications that the customer has to meet in order to manufacture its final product. The more stringent the requirements, the more limited is demand-side substitution. Furthermore, some

⁵⁶ Questionnaire Q1 to Customers of Rolled Copper Products, questions 7 and 7.1.

⁵⁷ Parties' response to the Commission's request for information RFI 8, [Annex 13].

⁵⁸ Questionnaire to Suppliers of Rolled Products, questions 16 and 16.1.

⁵⁹ EN Standards are European Standards for copper and copper alloys. The EN series of standards for copper and copper alloys offers a selection of materials to suit a very wide variety of end uses.

⁶⁰ Notifying Party's submission of 13 September 2018 “Rolled products – supply side substitutability enabled by EN standards”.

⁶¹ Questionnaire Q1 to Customers of Rolled Copper Products, question 11.

end-industries need to qualify⁶² their rolled product suppliers and some qualification processes even entail research and development ('R&D') efforts (for example, automotive industry, power electronics).⁶³ In these cases, demand-side substitution is further reduced.

- (114) There are also limitations to the supply-side substitution leading to some suppliers being active and more focused on certain segments to the detriment of others. What rolled product manufacturers are able to supply depends not only on the technology (machines) they have, but also on their know-how, and their capability to be qualified or certified for a certain application.
- (115) Although all suppliers can cold-roll the more commoditised products, that is to say, the ones which do not require specific know-how or a particular technology in the annealing, pickling or coating process, not all suppliers have the capabilities and know-how to manufacture certain tolerances, thicknesses, surface cleanliness, flatness, or to coat with a certain quality. The majority of market respondents acknowledge they have been in situations where they were not able to meet customers' specifications due to limitations in their cold rolling, annealing, pickling and slitting capabilities.⁶⁴
- (116) Indeed, the more specialised the product, the fewer there are suppliers. As a customer has explained: “[a]s regards [the customer]’s *standard business*, all rolled copper product producers can supply the products requested by [the customer]. However, there are certain specific requests which only selected producers can serve. For example, copper and copper alloy products for the high-Tech connector industry are offered only through Wieland, Aurubis and KME”.
- (117) The Notifying Party, itself, when assessing the growth of the rolled products market distinguishes two general types of demand: one for the commoditised products and another one for the speciality products,⁶⁵ as shown in Figure 3.

Figure 3 Relative growth of high-end and commoditized products in the EU

[...]

Source: “Internal Communication_ Wieland Leadership Team EN version”, slide14.

- (118) The market investigation indicates that within the rolled products market there are, on the one hand, products that do not require specific technology, machinery or know-how and therefore have lower value – the commoditised products - and on the other hand, products that are know-how intensive, require a significant investment in technology or machinery and have a higher value – the more specialised products.
- (119) High-end (specialised) products are produced by fewer players and usually command higher conversion prices.⁶⁶ Lower-end (commoditised) products are produced by more players and usually command lower conversion prices.

⁶² The verb “to qualify” is often used in business for indicating the process of evaluating and approving a stakeholder, which, in this case, is a supplier.

⁶³ Questionnaire Q1 to Customers of Rolled Copper Products, question 9.1.

⁶⁴ Questionnaire to Suppliers of Rolled Products, questions 17, 18, 19 and 20.

⁶⁵ Form CO, Annex 5.4.g “Internal Communication_Wieland Leadership Team_EN _vf”, slide14. This document was produced to provide further information to the executives of the Notifying Party in relation to the acquisition of ARP.

⁶⁶ The word “conversion price” is referred to the price charged by a rolled product manufacturer for the manufacturing process, excluding metal price.

- (120) High-end products include, amongst others, connector strip for the automotive industry, in particular made from so-called High Performance Alloys ('HPAs') or bronze strip for stampers compliant with strict tolerances, hot dip tinned products and products made from high purity oxygen free copper. Lower-end commodity products include amongst others, products such as sheets for building and construction and standard cable strip made of so-called ETP copper.
- (121) In the light of the supply-side substitutability that exists to some extent between all of these products – with a number of suppliers manufacturing both commodity and specialised products and competitors who are present in the high-end of the market being capable of entering the low-end of the market even if they are not currently (or no longer) active in that part of the market – the Commission considers that all of these products belong to the same relevant market.
- (122) Such conclusion is further supported by the fact that it is not possible to draw a discrete line between the segments that are in the higher-end and lower-end parts of the rolled products market. In the segments drawn according to the different criteria - material composition, finishes, end application – it is possible to find high-value added products and low-value added products. For example, not all connectors are high-value added products. Rather, the relationship between the segments in the low-end and high-end parts of the market would be better depicted by a *Venn diagram*, where the multiple sets (in circles) overlap each other. In addition, what is considered to be a high-value added product may gradually change over time (a formerly specialty product may gradually become a commodity).
- (123) Nevertheless, it is clear that the products within that market exhibit different degrees of know-how intensity and imply different capabilities and thus show different degrees of supply-side substitution and therefore competition. Moreover, the Parties and market participants acknowledge clear differences between the conditions of competition in the low-end (commoditised products) and high-end (specialised products) parts of the market.
- (124) The extract in Figure 4, taken from an internal document where the Notifying Party sets out a 5 year strategy plan, "*Business Group Rolled Products OSWS*", clearly shows that the Notifying Party distinguishes between a commodity part and a specialty part of the rolled products market. [...] ⁶⁷.

Figure 4 Wieland's view of the rolled products market

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 2, slide 55, emphasis added.

- (125) ARP also distinguishes between commoditised and specialised products when it analyses market trends: "[...]" ⁶⁸.

⁶⁷ Parties' response to the Commission's request for information RFI 24, Annex 2. The document was prepared for an "Off-site Workshop" which is held semi-annually and part of the standard reporting procedures within the rolled products business unit of the Notifying Party. Mandatory participants in these workshops are the president of the rolled products business unit, sales directors, the director of controlling of the business unit and plant managers, for the members of the board of directors of the Notifying Party participation is optional.

⁶⁸ Parties' response to the Commission's request for information RFI 8, Annex 13.

- (126) In the response to the SO, the Notifying Party claims that the Commission has overstated the segmentation within the overall rolled products market and that “[T]he *idea of a highly differentiated market is based on wrong assumptions of the producers’ capabilities*”⁶⁹. According to the Notifying Party, “*practically all larger manufacturers of rolled products offer a wide range of alloys and tempers*”. In particular, the Notifying Party criticises the Commission for: (i) considering that a majority of respondents have difficulties meeting customers’ specifications due to limitation in pickling and slitting; (ii) not realising that hot dip tinning and electroplating are interchangeable; and (iii) not having contacted the manufacturers of the equipment for the production of rolled products, who would have explained the capabilities of their equipment and that they themselves have the know-how to manufacture certain tolerances, thicknesses, surface cleanliness, flatness and pass that knowledge to their customers, which are competitors of the Parties.⁷⁰
- (127) According to the Notifying Party, the Commission also errs when it considers that some manufacturers focus on certain segments to the detriment of others because of their capabilities and not because of a business decision to follow the actual demand of their customers. The Notifying Party argues that the machines for high-end products are the same as the machines for low-end products and gives the example of ARP’s plant in Pori, where copper for roofing (commodity) and copper for eMobility and electronic applications (specialties) are produced [...].⁷¹
- (128) In its response to the First LoF, the Notifying Party also claims that the Commission fails to recognise that “*the different types of alloys are largely substitutable*” and relies on a reply from a potential purchaser of the remedies package which chooses not to produce certain alloys because *inter alia* “*alloys in the same family of alloy have similar end use characteristics and are interchangeable to produce the same end products*” and “*an alloy may be market/ geography specific.*”⁷² The Notifying party claims that there are numerous contradictions in the SO between the claim that the vast majority of respondents indicate they were able to cold roll, anneal and pickle every kind of alloy (see recital (110)) and the claim that not all the suppliers have the capability to manufacture certain tolerances, thicknesses, surface cleanliness, flatness or to coat with a certain quality (see recital (115)).⁷³
- (129) In addition, the Notifying Party also argues that the differentiation between specialties in the high-end part of the market and commodities in the low-end part of the market is not feasible in practice.⁷⁴ The Commission does not offer any clear-cut definition of what high-end means, falls into tautologies by finding that fewer suppliers are able to offer specialised products⁷⁵ and hence “*ignore[s] that the European market is increasingly and rapidly changing in the direction that more and more competitors are turning towards a “high end” production*”.⁷⁶
- (130) Contrary to the Notifying Party’s claims, the Commission has not exaggerated the degree of differentiation in the rolled products markets. This differentiation stems

⁶⁹ Response to the SO, title of section C.I.2, page 14.

⁷⁰ Response to the SO, paragraphs 22 -24.

⁷¹ Response to the SO, paragraph 27 and Response to the First LoF, paragraph 16.

⁷² Response to the First LoF, paragraph 17.

⁷³ Wieland’s and ARP’s presentation at the oral hearing “Case COMP/M.8900 Wieland/Aurubis Rolled Products/Schwermetall/, Oral Hearing 19 November 2018”, slide 17.

⁷⁴ Response to the SO, paragraph 28, and Response to the First LoF, paragraph 18.

⁷⁵ Response to the SO, paragraph 28 and 30.

⁷⁶ Response to the SO, paragraph 31.

from the fact that, as explained in recital (112), due to the specific requirements of customers, there is limited demand-side substitution between different kinds of rolled products. However, because there is a significant degree of commonality in capabilities, the Commission recognizes that there is a sufficient degree of supply-side substitution that explains the existence of one single rolled products market. This is consistent with the fact that rolled products are not homogeneous products but highly differentiated and that only a few suppliers (those with vertical and horizontal casting capabilities) can offer the entire spectrum of products.

- (131) There are no contradictions in the Commission's assessment between the existence of a broad overall single market for rolled products, which stems from the fact that most of the suppliers are able to offer a wide array of rolled products and the fact that, for some specific high-end applications, not all suppliers can qualify. Supply-side substitution has equivalent effects to demand-side substitution when *“its effects are equivalent to those of demand substitution in terms of immediateness and efficacy”* and *“suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices”*.⁷⁷ In this case, whilst supply-side substitution applies *in general* to rolled products, it does not apply to *all* rolled products and particularly not to the high-end part of the market where restrictions in production processes prevent some players from operating. This definition of a broad product market where some manufacturers are unable to supply some specific (but highly valuable) rolled products is a mere characterisation of a market situation which is more complex and nuanced than the Notifying Party's description.
- (132) In particular, the fact that ARP's plant in Pori produces copper for roofing (commodity) and copper for eMobility and electronic applications (specialties) [...] shows that ARP's plant in Pori has broad capabilities. This example confirms the general supply-side substitutability that justifies one overall market. However, it does not explain the various steps (in terms of know-how acquisition or qualification process) that ARP had to undertake prior to the Pori plant and machines being qualified for both commodity roofing copper and specialties. If those steps were added, the example would also reflect the Commission's conclusion of an overall but differentiated market.
- (133) In addition, as demonstrated in recitals (117), (124) and (125), the Parties themselves recognise different dynamics in different parts of the overall market and the fact that there is a low-end/ commoditised part of the market and a high-end/ specialised part of the market. The Notifying Party itself analyses the demand, the competitive landscape and its own competitiveness in segments, not in the overall rolled products market. As shown in the Notifying Party's internal document *“SBU Connector OSWS”*, slide 28, the Notifying Party not only tracks the growth (both in volume and value) of the connector segment, but also estimates its own shares and its competitors' segment shares, analyses demand (including structure and customers preferences), and tracks its own competitiveness in that segment.⁷⁸ Moreover, even when it criticised the Commission's distinction between a high-end and low-end parts of the market, the Notifying Party also stated that *“the European market is increasingly and rapidly changing in the direction that more and more competitors*

⁷⁷ Notice on the relevant market definition, paragraph 20.

⁷⁸ Parties' response to the Commission's request for information RFI 24, Annex 6.

are turning towards a “high end” production” (recital (129)). Therefore the Notifying Party itself differentiates products within the overall rolled products market and recognises the existence of a high-end part of the market.

- (134) With regards to possible segmentation of the rolled products market by end application, as considered in previous decisions (see recital (105)), the market investigation indicates that such possible segmentation does not adequately reflect the very limited demand-side substitutability. For example: within the telecommunications industry, a rolled copper strip for coaxial cables is not substitutable with a rolled copper strip for connectors as they do not fulfil the same functions. In addition, such a segmentation does not reflect the actual capabilities of the suppliers. For example, a supplier may be able to produce copper strips to be used in connectors for the telecommunications industry and electrical engineering, but might not have the capability to produce the copper strip to be used in connectors for the automotive industry, as the customers' requirements are particularly different.
- (135) Finally, concerning, in particular oxygen-free copper, in the previous *Aurubis/Luvata Rolled Products* decision,⁷⁹ the Commission also considered the possibility of distinguishing a market for oxygen-free copper shapes (that is to say, the feedstock for rolled products made of oxygen-free copper) and later a market for rolled products made of oxygen-free copper. Although demand substitutability between oxygen-free and oxygen bearing copper rolled products is extremely limited, manufacturers of rolled products, which do not necessarily have casting or hot rolling capabilities, can purchase pre-rolled strip of oxygen-free copper and offer rolled products of oxygen-free copper. For this reason, the Commission does not consider it necessary to distinguish a separate market for rolled oxygen-free copper products.
- (136) In conclusion, in the light of the considerations in recitals (107) to (135) and taking account of the results of the market investigation and of all the evidence available to it, the Commission concludes that there is an overall rolled products market, covering a wide spectrum where more commoditised products are located at the lower-end of the spectrum and more specialised products at a higher-end of the spectrum. The high degree of differentiation in terms of product performance, know-how and technology, specifications of customers, intensity of competition and pricing, however, results in the existence of different segments within the overall market, that exhibit different levels and intensities of competition. The Commission will accordingly conduct its competitive assessment both at the overall rolled products market level and at segment level in the high-end part of the market – which constitutes the principal overlap between the Parties' activities in the rolled products market – such as high-end connector strip, HPAs strip and HDT strip.

5.3. Geographic market

5.3.1. Copper shapes (billets and cakes)

5.3.1.1. The Notifying Party's view

- (137) The Notifying Party refers to the Commission's precedents⁸⁰ and submits that the geographic market is EEA wide but that it can be left open because neither of the Parties offers cakes on the merchant market (Wieland offers billets on the merchant market).

⁷⁹ Commission decision in case M.6316 – *Aurubis/Luvata Rolled Products*, recitals 30 and 31

⁸⁰ See Commission decisions in case M.4781 - *Norddeutsche Affinerie/Cumerio*, recital 89, and case M.6316 – *Aurubis/Luvata Rolled Products*, recital 24.

5.3.1.2. The Commission's decisional practice.

- (138) Previously, the Commission has concluded that the relevant geographic market for copper shapes is at least EEA-wide.

5.3.1.3. The Commission's assessment

- (139) In the Article 6(1)(c) Decision, in the light of the statement by a customer of ARP for billets that transport costs of billets play a significant role for competitiveness on the downstream markets for copper tubes, the Commission indicated that it would further investigate whether the scope of the geographic market may be narrower than EEA-wide.
- (140) The market investigation carried out by the Commission has supported its previous findings that the geographic market for shapes (cakes or billets) is at least EEA wide. Half of the producers of billets submitted that they ship their billets within the EEA while the other half stated that they ship them worldwide. None of the respondents producing billets indicated that they ship billets only within national boundaries.⁸¹
- (141) In the light of the above, the Commission takes the view that the geographic market for copper shapes (cakes or billets) is at least EEA wide.

5.3.2. *Pre-rolled strip*

5.3.2.1. The Notifying Party's view

- (142) The Notifying Party submits that the geographical scope of the hypothetical market for pre-rolled strip is wider than the EEA. The Notifying Party argues that significant amounts of pre-rolled strip can at least potentially be imported from non-EEA countries and that the companies that currently sell pre-rolled strip on the merchant market export it outside the EEA. For example, Schwermetall sells in South Africa, China, and the USA.⁸²

5.3.2.2. The Commission's decisional practice

- (143) In *Norddeutsche Affinerie/Cumerio*, the Commission left open whether the markets of semi-finished copper products downstream to copper shapes were EEA or worldwide.⁸³ In *Aurubis/ Luvata Rolled Products*, due to absence of any overlap between the parties, the Commission left the precise geographic market definition for pre-rolled strip open (either EEA or worldwide).⁸⁴

5.3.2.3. The Commission's assessment

- (144) The results of the market investigation in this case indicate that EEA suppliers of rolled products who purchase pre-rolled strip do so from suppliers within the EEA⁸⁵. When asked to indicate the maximum distance a supplier of pre-rolled strip must be from their re-rolling plant (to have an economically viable supply), most of the respondents indicated distances from 500 km to 1500 km. Only one respondent

⁸¹ Questionnaire to Competitors – Copper shapes, question 19.

⁸² Form CO, paragraph 190.

⁸³ Commission decision in case M.4781 – *Norddeutsche Affinerie/ Cumerio*, recital 104.

⁸⁴ Commission decision in case M.6316 – *Aurubis/Luvata Rolled Products*, recital 26.

⁸⁵ Questionnaire Q2 to Competitors of Rolled Copper Products, question 7, and Questionnaire to Suppliers of Rolled Products, question 22.

considered there to be no limit, even though that supplier purchases pre-rolled strip only from EEA suppliers.⁸⁶

- (145) The Notifying Party does not disagree with the Commission's view that the geographic market for rolled products is EEA-wide in scope but claims that the Commission's analysis is "incomplete" in the sense that it overlooks the fact that some players send their pre-rolled strip (captive production) for production of rolled products everywhere in the world. To support this argument, Wieland only gives its own example explaining that [...].⁸⁷ The Commission notes that these examples refer to internal sales of pre-rolled strip and not the sale on the merchant market. In that regard, these examples and the existence of other possible internal sales of captive production of pre-rolled strip are not capable of expanding the geographic market definition for pre-rolled strip beyond the EEA.
- (146) Firstly, the Commission notes that, Schwermetall (which is the only one of the Parties present on the merchant market for pre-rolled strip) does not supply pre-rolled strip to third parties outside of the EEA. Secondly, other examples of internal sales relate to companies that are not present on the merchant market, and therefore do not constitute an immediate alternative source of supply. At most those companies could only be considered as potential competitors. Potential competition, however, is not generally taken into account for the purposes of defining the relevant market. As explained in the Notice on the relevant market definition: "the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers. The competitive constraints arising (...) from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis".⁸⁸
- (147) Finally, on the pre-rolled strip merchant market, there are no imports to the EEA. Indeed, an interested purchaser of the remedies package has also acknowledged that it would not be economically viable to bring large quantities of pre-rolled strip from the USA into Europe and it would need to source it at least partly from suppliers in the EEA.⁸⁹
- (148) In view of the above, the Commission considers that the pre-rolled strip market is EEA-wide.

5.3.3. *Rolled products*

5.3.3.1. The Notifying Party's view

- (149) The Notifying Party submits that the relevant geographic market for rolled products is worldwide because customers of rolled products have global multi-sourcing strategies and imports of rolled products into the EEA come from Turkey, China, Japan, the USA, and other countries.⁹⁰
- (150) The Notifying Party has considered, in particular in the response to the Article 6(1)(c) Decision, that a hypothetical market segment for rolled products with the

⁸⁶ Non-confidential reply to Questionnaire to Suppliers of Rolled Products, questions 22, 22.1, 23 and 25 (Id 1415).

⁸⁷ Response to the SO, paragraph 35.

⁸⁸ Notice on the relevant market definition, paragraphs 13 and 14.

⁸⁹ Non-confidential minutes of a meeting with GBC on 12 December 2018.

⁹⁰ Form CO, paragraphs 193 and 194.

potential function “semiconductor” would be of worldwide scope as only very small volumes of rolled products for this function group are sold within the EEA. Rather, the lead frame producers that source the respective rolled products are – like their customers, that is to say, producers of semiconductors – mostly located in Asia (China and South Korea). The same applies to rolled products that will be processed into connectors due to the fact that connector producers are operating worldwide. The Notifying Party further submits it has to be taken into account that Wieland exports high volumes ([...] tonnes) of rolled products to Asia and North America to serve local and international customers⁹¹.

5.3.3.2. The Commission's decisional practice

- (151) In *Norddeutsche Affinerie/Cumerio*, the precise geographic market definition was left open, although the Commission considered that the geographic scope of the market was at least EEA-wide⁹².
- (152) In *Aurubis/Luvata Rolled Products*, the Commission considered the market to be EEA-wide and conducted its assessment on that basis. Even though it recognised that exports existed, only a few customers pursued a multi-sourcing strategy outside the EEA⁹³.

5.3.3.3. The Commission's assessment

- (153) The results of the market investigation in this case suggest that the geographic market for rolled products is EEA-wide and that there is no functioning price arbitrage between the main rolled product consumption regions in the world, namely, the EEA, North America and Asia.
- (154) First of all, there are significant import duties for imports of rolled products into the EEA, but also into North America.
- (155) Secondly, those import duties and other factors such as transport costs lead to different market conditions in the EEA, North America and Asia. The competitive landscape is completely different in the EEA, the US and Asia. European players are hardly or not active in the US (except for Wieland and ARP) or Asia (except Wieland), as shown in Figure 5, which is taken from Wieland's internal documents.⁹⁴ This point is not contested by the Notifying Party.

Figure 5 Sales of rolled products per geographical region

[...]

Source: Außerordentliche Sitzung des Aufsichtsrats der Wieland-Werke AG –AurubisTransaktion Ulm, 9. Februar 2018) – slide 17.

- (156) Thirdly, the vast majority of customers do not source rolled products from outside the EEA and, when asked to identify the maximum distance for economically viable transportation of rolled products, the majority of respondents mentioned the EEA or said that it is within a radius of 500 km⁹⁵. Although the competitors consider it to be economically viable to transport rolled products worldwide, the majority of them

⁹¹ Response to the Article 6(1)(c) Decision, paragraphs 29 and 30.

⁹² Commission decision in case M.4781 – *Norddeutsche Affinerie/Cumerio*, recital 104.

⁹³ Commission decision in case M.6316 – *Aurubis/Luvata Rolled Products*, recital 32.

⁹⁴ Form CO, Annex 5.4 b). The document was prepared as a presentation for the extraordinary meeting of the supervisory board of the Notifying Party concerning the acquisition of ARP.

⁹⁵ Questionnaire Q1 to Customers of Rolled Copper Products, questions 17 and 20.

have not lost business in the EEA to imports from outside of the EEA.⁹⁶ While certain EEA suppliers do sell outside the EEA, the Commission considers that the existence of such supply is not sufficient to consider the geographic relevant market wider than the EEA in a context where customers located in the EEA source almost all of their rolled products from suppliers located in the EEA.

- (157) Fourthly, contrary to the Notifying Party's arguments in the Response to the Article 6(1)(c) Decision, these market investigation results are in line with Wieland's internal documents, including those related to connectors and semiconductors. When Wieland assesses its rolled product business it considers North America, Europe and Asia (with and without China) as separate markets. This is also true for connector strips.⁹⁷
- (158) Fifthly, even with regard to its major customers, who indeed have a global presence, Wieland assesses their demand by world regions (Europe, North America and Asia) and it seems to have [...], indicating that [...].⁹⁸ This is for example reflected in a Wieland internal document⁹⁹ related to [...], which is present on three continents (Europe, Asia, America - see Figure 6).

Figure 6 Wieland's assessment of [...] demand by geographic areas

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 4, slide 11.

- (159) Sixthly, with regard to semi-conductors, the fact that the majority of the business is located outside the EEA, mostly in Asia and that the Notifying Party's main customers are accordingly in Asia does not necessarily mean that the market is global. According to the market investigation, all EEA customers having responded to the market investigation mentioned European manufacturers as their suppliers. Wieland seems to supply its Asian customers from its Asian plant. In particular, it appears from one of Wieland's internal documents regarding its semiconductors business unit - which has its main focus on Asia – that going forward the “*Made in China 2025 Policy*” launched by the Chinese Government will incentivise suppliers to relocate their production of semi-conductors for the Chinese market on the Chinese territory.¹⁰⁰
- (160) Seventhly, the majority of respondents, including in high-end segments, have expressed doubts as regards the ability of non-EEA suppliers to supply them with the quality they need. As explained by a high-end product customer “*There are no suppliers outside the EEA available that are capable of meeting our specific quality requirements*”¹⁰¹. Another customer also explained that “*Special material alloys only available from EEA producers*”.¹⁰² In fact, ARP recognises that the Chinese local manufacturers do not have the same level of quality as European local producers, and that as the quality of the Chinese local manufacturers increases, imports into China

⁹⁶ Questionnaire Q2 to Competitors of Rolled Copper Products, question 21.

⁹⁷ Parties' response to the Commission's request for information RFI 24 [Annex 6].

⁹⁸ Parties' response to the Commission's request for information RFI 24 [Annex 6].

⁹⁹ The document was prepared for an “Off-site Workshop” (see description in footnote 67).

¹⁰⁰ Parties' response to the Commission's request for information RFI 4 [Annex 6].

¹⁰¹ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 20.1 (Id 167).

¹⁰² Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 20.1 (Id 1348).

from Europe decrease: “[i]ncrease in quality and capabilities at local Chinese strip producers continue to reduce the imports into China from Europe and Japan”.¹⁰³

- (161) In its response to the SO, the Notifying Party argued that the Commission did not take into account its distinction between high-end and low-end products in its definition of the geographic market for rolled products. Wieland submits that as “questionable as this distinction might seem”, following it would likely have led to the conclusion that “*a worldwide market exists for the products that it considers as high end as a number of producers are active globally*”.¹⁰⁴ As explained in recital (160), the Commission has assessed the sourcing patterns including on the high-end part of the market, and concluded that the market presents all the characteristics of being EEA-wide and not worldwide. The fact that suppliers are active globally is not sufficient to consider that the geographic market is global for as explained in recital (158), as the conditions of supply are different across continents.
- (162) Finally, in the market investigation, customers of rolled products submitted that there had either been no change or only a small increase in imports of rolled products into the EEA in the last three years.¹⁰⁵ Indeed, ARP recognises that Asian competitors have a limited presence in Europe: “*Asian companies are becoming more global, but not always with a clear strategy (Tongling Non Ferrous) or enough funds (Golden Dragon), and not yet very visible in Europe*”.¹⁰⁶
- (163) In the light of the considerations in recitals (153) to (162), and for the purposes of this Decision, the Commission concludes that the geographic scope of the market for rolled products (and its possible segments) is the EEA.

6. COMPETITIVE ASSESSMENT

6.1. Framework of the competitive assessment in this case

- (164) The Transaction creates horizontal overlaps in relation to rolled products combining the rolled products businesses of Wieland, Aurubis and Schwermetall. The Transaction also leads to a change of control at Schwermetall from joint control by Wieland and Aurubis to sole control by Wieland which has an effect on Wieland's access to information concerning Schwermetall's customers and Wieland's ability and incentive to foreclose or raise the costs of those customers which are Wieland's downstream rivals.

6.1.1. Two transactions in the same industry

- (165) Wieland publicly announced that it had entered into a share purchase agreement to acquire ARP on 29 March 2018. It initiated pre-notification contacts with the Commission on 6 April 2018 and notified the concentration to the Commission on 13 June 2018.
- (166) At the time of notification of the Transaction, another transaction affecting the same markets had already been notified to the Commission.
- (167) The Commission notes, in that regard, that in assessing the competitive effects of a proposed transaction under the Merger Regulation, it needs to compare the competitive conditions that would result from the notified concentration with those

¹⁰³ Parties' response to the Commission's request for information RFI 8 [Annex 13].

¹⁰⁴ Response to the SO, paragraph 37.

¹⁰⁵ Questionnaire Q2 to Competitors of Rolled Copper Products, question 20.

¹⁰⁶ Parties' response to the Commission's request for information RFI 8 [Annex 13].

that would have prevailed in the absence of the concentration. As a general rule, the competitive conditions prevailing at the time of notification constitute the relevant framework for evaluating the effects of a transaction. In some circumstances, however, the Commission may take into account future changes to the market that can be reasonably predicted.¹⁰⁷

- (168) Based on those principles, the principle of equal treatment and the provisions of the Merger Regulation, notably Article 6(1) thereof, the Commission has consistently taken the view that, in cases of parallel investigations into concentrations affecting the same relevant markets, the first transaction to be notified ('the first transaction') should be assessed on its own merits and on the basis of the market structure prevailing at the time of that notification.¹⁰⁸ The second transaction to be notified ('the second transaction') should, conversely, be assessed on the basis of the market structure resulting from the likely implementation of the first transaction.
- (169) On 4 June 2018, that is before the notification of the Transaction, KME AG ('KME') notified the Commission of its intention to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of MKM Mansfelder Kupfer and Messing GmbH ('MKM') (Case M.8909). The KME/MKM transaction affects the same markets as the Transaction assessed in the present decision, that is pre-rolled copper strip and rolled products.¹⁰⁹
- (170) Therefore, given the circumstances in this case, the Transaction should be assessed taking into account the KME/MKM transaction notified on 4 June 2018. The starting point for the Commission's assessment of the Transaction is therefore a likely market structure where the Parties' competitors KME and MKM would be treated as a single entity.
- (171) Notwithstanding the above, however, and as explained in more detail in Section 6.3, the Commission considers that the effect of taking into account the KME/MKM merger in the competitive assessment of this Transaction will be neutral. Whilst it is true that there will be one less competitor which will lead to a further concentration of the market, KME is currently experiencing significant difficulties - according to Wieland's own assessment of KME's capabilities. Furthermore, MKM is hardly present (or not present at all) on the high-end part of the rolled products market where the Parties focus their activities, and therefore MKM's combination with KME will not provide KME with more capabilities to operate on the high-end part of the market and thus will not make it a stronger competitor to the Parties.
- (172) In its response to the SO, the Notifying Party has claimed that the Commission applies the priority rule inconsistently. On the one hand, the Commission considers a new entity KME/MKM but on the other, the Commission does not take into account the "efficiencies" generated by the merger, which would make KME/MKM a stronger player and "*intensify competition on the market for rolled products, in particular in the high end segment*".¹¹⁰ As further explained in Section 6.4, the

¹⁰⁷ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004 p. 5 ('Horizontal Merger Guidelines'), paragraph 9.

¹⁰⁸ See, for example, Commission decisions in case M.6214 – *Seagate/HDD Business of Samsung*, case M.6203 – *Western Digital/Viviti Technologies*, case M.4942 – *Nokia/Navteq*, case M.4854 – *TomTom/Tele Atlas*, case M.4601 – *Karstadtquelle/My Travel*, case M.4600 – *TUI/First Choice*.

¹⁰⁹ The KME/MKM transaction also impacts the markets for copper tubes which are not affected in the present case as ARP is not active in this market.

¹¹⁰ Response to the SO, paragraphs 40 to 43.

Commission considers that KME/MKM is not a sufficiently strong competitor to defeat Wieland's ability to increase prices post-Transaction.

- (173) The Notifying Party has argued that due process considerations and the principle of equal treatment at least require that: (i) the Commission also takes the Transaction into account in its competitive assessment of the KME/MKM transaction, and (ii) the Commission takes into account the likely outcome of the KME/MKM investigation in its assessment of the Transaction.¹¹¹ In particular with respect to point (ii), the Notifying Party has submitted that the Commission cannot assess the Transaction without taking into account the effect of potential remedies that may be submitted by KME in Case M.8909 on the structure of the relevant markets.¹¹²
- (174) The Notifying Party submitted in that regard that, at the time of the notification of the KME/MKM transaction, the Commission was aware of the Transaction. In line with the principles described in recital (168), the Commission thus has to take into account the future change in the market structure brought about by the Transaction when assessing the KME/MKM transaction.¹¹³
- (175) The Commission considers that the Notifying Party's view that, first for the assessment of the KME/MKM transaction, it had to take into account the likely outcome of the Transaction is not correct for the following reasons.
- (176) In situations such as the present, where two transactions concerning the same markets are investigated in parallel, the first transaction has to be assessed solely on its own merits and on the basis of the markets structure prevailing at the date of the notification. This priority principle is inherent in the system of the Merger Regulation, Article 6(1) of which provides for the Commission to "*examine the notification as soon as it is received*" and sets time limits by reference to the date of notification.¹¹⁴ The date of notification is therefore the only criterion that can ensure sufficient legal certainty, transparency and objectivity in terms of priority and respect the other provisions and aims of the Merger Regulation.
- (177) Nor does the Commission consider that it would have been necessary, for the purposes of assessing the Transaction, to take into account the effect of potential remedies that may have been submitted by KME in Case M.8909 on the structure of the relevant markets. The second transaction has to be assessed in the light of the future changes that can reasonably be predicted. The only change in the market structure that could reasonably be predicted was the full implementation of the KME/MKM merger, as it would have been too speculative and uncertain, first, to take into account remedies which have not been formally accepted by the Commission in Case M.8909, and second, to try to evaluate what their effect would be on the relevant market before the commitments have even been given. In any case, the Commission cleared the KME/MKM transaction unconditionally on 11 December 2018. Therefore, there are no remedies in that case that could be taken into account in any event.

¹¹¹ Response to Article 6(1)(c) Decision, paragraph 33.

¹¹² Response to Article 6(1)(c) Decision, paragraph 33, footnote 27.

¹¹³ Response to Article 6(1)(c) Decision, paragraph 34.

¹¹⁴ See, inter alia, Article 10(1) of the Merger Regulation.

6.1.2. *The parallel acquisitions of the rolled products business of Aurubis and of sole control over Schwermetall are closely linked and need to be assessed together*

- (178) As explained in recital (5), Wieland intends to acquire sole control of ARP and Schwermetall by way of purchase of shares and assets and through two different agreements: the Master Purchase Agreement between Wieland and Aurubis for the acquisition of ARP and the Schwermetall Share and Purchase Agreement for the acquisition of the 50% shareholding of Aurubis in Schwermetall. Both agreements were signed on 29 March 2018 and are mutually conditional upon each other. Based on its standard practice, the Commission will therefore assess Wieland's acquisition of ARP and Aurubis' 50% stake in Schwermetall as one single concentration in this Decision.
- (179) While forming one single concentration, the two parallel acquisitions have different, complementary consequences. The acquisition of ARP has a strictly horizontal dimension. By contrast the purchase of Aurubis's 50% stake in Schwermetall has both a horizontal and a non-horizontal dimension given that Schwermetall is itself active on the rolled products market with respect to certain products and also active upstream of the rolled products market in the supply of pre-rolled strip to both Wieland and ARP and third parties competing with Wieland and ARP on the downstream rolled products market.
- (180) As part of its business activities, Schwermetall sells finished rolled products such as coin strip – rolled strip that is used for the production of coins – to industrial end customers such as producers of coins. Coin strip is a finished rolled product, in contrast to the intermediate product pre-rolled strip, which is sold to re-rollers. Schwermetall is, therefore, active with some products on the rolled products market in a similar way to Wieland and ARP.
- (181) Sections 6.2 to 6.8 discuss, in a first step of the assessment, the effects of the overall horizontal overlap between Wieland's, ARP's and Schwermetall's activities on the rolled products market caused by the two parts of the concentration.
- (182) As the larger part of its activities, Schwermetall also produces upstream intermediate products, that is pre-rolled strip, which its customers then further roll downstream. Schwermetall provides this intermediate product, pre-rolled strip, not just to its parents, Wieland and ARP, but also to third parties (referred to as the "merchant market" for pre-rolled strip) including third parties who compete with Wieland and ARP on the downstream rolled products market.¹¹⁵ Around [...] % of the pre-rolled strip sold by Schwermetall to third parties is used to manufacture rolled copper products, which compete with those of Wieland and ARP. This is, for example the case for [Competitor 1], [Competitor 2], [Competitor 3] and [Competitor 4]. The remaining [...] % of the pre-rolled strip sold by Schwermetall to third parties is used for other purposes than to manufacture rolled products.¹¹⁶ The presence of Schwermetall on the pre-rolled strip market gives rise to a non-horizontal relationship between Schwermetall's sales of pre-rolled strip and Wieland's sales of rolled products. Hence, the Transaction also entails a non-horizontal dimension.

¹¹⁵ Neither Wieland nor ARP supply pre-rolled strips to third parties.

¹¹⁶ Response to the Article 6(1)(c) Decision [Annex 2], Economic assessment of the risk of anticompetitive input foreclosure (E.CA Economics) ('Response to the Article 6(1)(c) Decision [Annex 2]'), page 6.

- (183) In the circumstances of this case, the Commission considers it important to note that this non-horizontal dimension is closely linked and intertwined with the horizontal dimension of the case.
- (184) First, the non-horizontal effects of the acquisition of the stake in Schwermetall reinforce and deepen the horizontal effects of the Transaction as they would allow Wieland to raise the costs of its rivals and access confidential information on their input volumes and prices. These effects arise in parallel and in addition to the purely horizontal effects triggered by the combination of the positions of Wieland, ARP and Schwermetall on the rolled products market. They also affect the same rolled products market.
- (185) Secondly, the non-horizontal effects in this case cannot be assessed without taking into account the parallel horizontal effects and, in particular, how Wieland's position is strengthened by the horizontal dimension of the overall transaction through the acquisitions of both ARP and the stake in Schwermetall. The acquisition of sole control over Schwermetall does not occur in isolation but in parallel to Wieland's acquisition of ARP and must be assessed bearing in mind the parallel effects of that acquisition. When assessing the non-horizontal dimension it is for example necessary to bear in mind that post-Transaction, Wieland will have a much higher share on the rolled products market.
- (186) Given these close links between the two dimensions of the case it is appropriate to analyse, in a second step, (see Section 6.9) how the horizontal effects of the Transaction are further reinforced and deepened by the non-horizontal dimension, taking into account the findings of the first step of the assessment.
- (187) The assessment of the reinforcement and deepening of the horizontal effects by the non-horizontal effects will follow the principles enshrined in paragraph 36 of the Horizontal Merger Guidelines¹¹⁷ and in paragraphs 18 and 78 of the Non-horizontal Merger Guidelines.¹¹⁸
- (188) Paragraph 36 of the Horizontal Merger Guidelines is relevant as the Transaction has both an important horizontal dimension and an additional non-horizontal dimension and, through the acquisition of the stake in Schwermetall, allows Wieland to obtain a position where it would have the ability and incentive to restrict the ability of rivals to compete on the rolled products market. Paragraph 36 refers explicitly to control or influence over the supply of inputs as a means to raise rivals costs.
- (189) Paragraph 18 of the Non-horizontal Merger Guidelines is relevant as Wieland's acquisition of sole control over Schwermetall could lead to "foreclosure" of the future smaller competitors on the rolled products market, that is "*(...) any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete*".
- (190) Paragraph 78 of the Non-horizontal Merger Guidelines is relevant as Wieland's acquisition of sole control over Schwermetall may give Wieland access to commercially sensitive information of its competitors on the rolled products market,

¹¹⁷ Horizontal Merger Guidelines, paragraph 36.

¹¹⁸ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (OJ C 256, 18.10.2008 'Non-horizontal Merger Guidelines'), p.6, paragraphs 18 and 78.

thereby enabling and incentivising Wieland to price less aggressively or to put those competitors at a disadvantage.

- (191) In application of those principles and in order to determine whether the acquisition of sole control by Wieland over Schwermetall contributes to a significant impediment to effective competition on the rolled products market, the Commission will assess to what extent the change of control over Schwermetall contributes to Wieland's ability and incentive to make the expansion of smaller competitors on the rolled products market more difficult, or otherwise restrict their ability to compete, thereby contributing to Wieland's ability to increase prices in a profitable manner on the rolled products market.
- (192) While, for the reasons given in recitals (178)-(191), also in addition to paragraph 36 of the Horizontal Merger Guidelines, paragraphs 18 and 78 of the Non-horizontal Merger Guidelines are in the Commission's view relevant for the assessment of the present case, the Commission considers that it does not have to carry out its assessment within the specific framework of input foreclosure effects of vertical mergers, as set out in paragraphs 28 to 77 of the Non-horizontal Guidelines.
- (193) In the response to the SO, the Notifying Party argues that such an approach constitutes a “*pseudo vertical test*”, which “*seems to encompass the same aspects as under the Non-horizontal Merger guidelines, i.e. purely vertical issues such as input foreclosure*” but requires a lower standard. As the Notifying Party explains, “*the Commission seems to be under the impression that a combination of vertical and horizontal issues would lead to a somewhat less strict test. The fact that a merger contains horizontal and vertical elements does not “lower the bar” for a negative decision.*” The Notifying Party claims that the theory of harm based on such test is “*sui generis*” and goes against the case law and a well-established Commission practice.¹¹⁹
- (194) In that regard, the Commission considers, first, that, in the specific circumstances of this case, it is correct to apply the more general principles on raising rivals' costs and foreclosure in non-horizontal settings in general enshrined in paragraph 36 of the Horizontal Merger Guidelines and paragraph 18 of the Non-horizontal Merger Guidelines, instead of the more specific rules on input foreclosure as a result of a vertical merger in paragraphs 28 to 77 of the Non-horizontal Merger Guidelines.
- (195) As can be seen from paragraphs 12 and 13 of the Non-horizontal Merger Guidelines the detailed framework in paragraphs 28 to 77 of those Guidelines has been mainly designed to address pure vertical mergers without parallel horizontal effects. Paragraph 12 states that “*unlike horizontal mergers, vertical mergers [...] do not entail the loss of direct competition between the merging firms in the same relevant market.*” Paragraph 13 refers to the substantial scope for efficiencies of vertical mergers.
- (196) In the circumstances of this case, the acquisition of sole control over Schwermetall is not a pure vertical merger. It does not generate the same efficiencies as a typical vertical merger and it does not take place in isolation. The Transaction is not a purely vertical merger because Wieland already has joint control over Schwermetall (together with Aurubis). It does not have the same effects as a vertical merger because it does not generate the efficiencies typically generated by a vertical merger, [...]. Before the Transaction, Wieland therefore already benefits from the typical

¹¹⁹ Response to the SO, paragraphs 146 and 147.

advantages of vertical integration, [...] and a reduction of transaction costs. Furthermore, and in particular, as described in recitals (178) to (183) above, the acquisition of sole control over Schwermetall does not take place in isolation but it is closely linked to the parallel acquisition of ARP.

- (197) Secondly, the Commission considers that the legal test under the more general principles in paragraph 36 of the Horizontal Merger Guidelines and paragraphs 18 and 78 of the Non-horizontal Merger Guidelines which allows the Commission to better take into account the non-horizontal features of the Transaction when assessing the effects of the horizontal dimension of the Transaction is neither stricter nor less strict than under the more specific rules in paragraphs 28 to 77 of the Non-horizontal Merger Guidelines.
- (198) This is, first, because the underlying legal test under the Merger Regulation is under both approaches the same, namely that the merger must lead to a significant impediment to effective competition. The distinction, however, being that, in reliance on paragraph 36 of the Horizontal Merger Guidelines and paragraphs 18 and 78 of the Non-horizontal Merger Guidelines, the Commission demonstrates how the non-horizontal dimensions of the Transaction reinforce and deepen the significant impediment to effective competition caused by the horizontal overlap between Wieland's, ARP's and Schwermetall's activities on the rolled products market, rather than identifying a separate, and stand-alone significant impediment to effective competition caused by the non-horizontal dimension of the Transaction in isolation.
- (199) Secondly, the framework of the assessment is also similar. Under both approaches the Commission must assess ability, incentives and likely effects. The elements for assessing raising rivals' costs and foreclosure under both approaches are also similar. In paragraph 18 of the Non-horizontal Guidelines foreclosure is described as *"any instance where actual or potential rivals' access to suppliers or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete"*. The same or similar elements are present in the input foreclosure section of part of the Non-horizontal Guidelines that specifically deal with vertical mergers: in paragraph 29 it is clearly mentioned that foreclosure *"can be found even if the foreclosed rivals are not forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less effectively"*. Similarly, paragraph 31 describes an "input foreclosure" in equivalent terms: *"input foreclosure arises where, post-merger, the new entity would be likely to restrict access to products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. (...) it is not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers"*. Moreover, according to paragraph 48, *"significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market (...). Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role, for instance because it is a close competitor of the vertically integrated firm or because it is a particularly aggressive competitor."*
- (200) The Commission considers therefore that, in the light of the close links between Wieland's acquisition of ARP and its acquisition of sole control over Schwermetall and the corresponding effects that each dimension is likely to have on Wieland's position in the rolled products market post-Transaction, the two aspects of the Transaction cannot be assessed in isolation. As such, in a first step the Commission

will assess the horizontal effects of combining the rolled products businesses of Wieland, ARP and Schwermetall on the rolled products market under the principles set out in the Horizontal Merger Guidelines. In a second step, the Commission will then assess whether and how Wieland's acquisition of sole control over Schwermetall reinforces those effects further through raising of rivals' costs, applying the principles in paragraph 36 of the Horizontal Merger Guidelines and paragraphs 18 and 78 of the Non-horizontal Merger Guidelines.

6.1.3. Test under the Merger Regulation and the Horizontal Merger Guidelines and theory of harm in this case

- (201) Article 2 of the Merger Regulation states that “[a] concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.” In its appraisal, the Commission is required by the Merger Regulation to take into account, among others, the need to maintain effective competition in view of the structure of the markets concerned, the market position of the undertakings concerned and their economic and financial power, as well as the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.
- (202) Recital 25 of the Preamble to the Merger Regulation clarifies that the language of Article 2 is meant to encompass the appraisal of the effects of concentrations in oligopolistic markets, and in particular those that may significantly impede effective competition by the elimination of important competitive constraints that the merging parties had exerted upon each other as well as by a reduction of the competitive pressure on the remaining competitors.
- (203) Recital 26 of the Preamble to the Merger Regulation clarifies that a significant impediment to effective competition generally results from the creation or strengthening of a dominant position and that therefore the reference to the creation or strengthening of dominance was added in Article 2 of the Regulation with a view to preserving the guidance which may be drawn from past judgments of the European Courts and Commission decisions under the previous Merger Regulation.
- (204) Recital 28 of the Preamble to the Merger Regulation explains that the Commission may publish guidance aimed at providing a sound economic framework for the assessment of concentrations, with a view to determining whether or not they may be declared compatible with the common market.
- (205) In this context, the Horizontal Merger Guidelines provide further guidance on the underpinning concepts of the Commission's assessment.
- (206) The Commission will first assess, in line with Article 2 of the Merger Regulation and the Horizontal Merger Guidelines, whether the Transaction would lead to large combined market shares and a high degree of concentration (see paragraphs 14 to 21, and 27 of the Horizontal Merger Guidelines).
- (207) Second, the Commission will assess whether the Transaction is likely to eliminate competition between two important and close competitors, in particular in the high-end of the rolled products market.
- (208) In this regard, the Commission will examine, first, the market position of Wieland prior to the Transaction in both the overall rolled products market and the high-end segment thereof. In that connection, the Commission will also assess the degree of market power that Wieland enjoys prior to the Transaction.

- (209) That assessment of Wieland's position prior to the Transaction will be followed by an assessment of whether the Transaction eliminates an important and close competitor of Wieland in the form of ARP. In this regard, the Commission will assess ARP's role as an important and close competitor of Wieland (i) in the rolled products market overall, (ii) in some key segments and (iii) from a dynamic perspective, that is whether ARP has become a more important competitor of Wieland over time and is likely to become even more important in the future.
- (210) Thirdly, the Commission will assess whether the reaction of competitors to the merger is likely to defeat any likely price increase (see paragraphs 32 to 35 of the Horizontal Merger Guidelines). The Commission will, in particular, consider: (i) the number of competitors of the Parties in the high-end of the rolled products market; (ii) whether competitors have large overcapacity in the high-end of the rolled products market, (iii) the likelihood of individual competitors to significantly challenge the Parties and (iv) the ease of entry/repositioning into the most affected segments of the rolled products market.
- (211) Fourthly, the Commission will assess, in line with paragraph 31 of the Horizontal Merger Guidelines, the ability of customers to switch suppliers. According to paragraph 31 of the Horizontal Merger Guidelines: “[c]ustomers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers [...]. The merger may affect these customers' ability to protect themselves against price increases”.
- (212) Fifthly, the Commission will consider evidence on the overall effects on prices from the internal documents of the Parties as well as from the market investigation.
- (213) Sixthly, following an intermediate conclusion on the effects of the horizontal part of the transaction on prices as well as on the creation of dominance, the Commission will examine possible additional negative effects stemming from the acquisition of sole control over Schwermetall by Wieland. The Commission will in particular discuss whether and to what extent the acquisition of sole control over Schwermetall, which needs to be analysed in conjunction with the horizontal part of the Transaction, will provide Wieland with the ability and incentive to foreclose or significantly raise the costs of downstream competitors or with access to sensitive commercial information of its downstream competitors.
- (214) Throughout its assessment, the Commission will analyse the impact of the Transaction both on the overall relevant market and on the different relevant segments to better assess and capture the closeness of competition between the Parties and to assess the competitive pressure exerted on them by the other market participants.
- (215) Contrary to what the Notifying Party claims, this two level assessment is not “inconsistent”, nor does it “amount to a very selective reasoning (“cherry picking”)”.¹²⁰ The two level assessment is in line with the Horizontal Merger Guidelines and the Commission’s practice when verifying the impact of mergers in differentiated markets.¹²¹

¹²⁰ Response to the SO, paragraph 17.

¹²¹ *Inter alia*, Commission decisions in case M.5658 - *Unilever/Sara Lee*; case M. 7278 – *GE/Alstom*; case M.7802 - *Amadeus/Navitaire*; Case M.7881 - *AB Inbev/SAB Miller*.

6.2. The Transaction would lead to large combined market shares and a high degree of concentration on the market for rolled products

6.2.1. Introduction

- (216) According to paragraph 14 of the Horizontal Merger Guidelines, market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.
- (217) According to paragraph 27 of the Horizontal Merger Guidelines, “*the larger the market share, the more likely a firm is to possess market power*” and the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power.
- (218) Moreover, paragraph 17 of the Horizontal Merger Guidelines states that “[a]ccording to well-established case law, very large market shares - 50 % or more - may in themselves be evidence of the existence of a dominant market position. (...) A merger involving a firm whose market share will remain below 50 % after the merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitute”.
- (219) Market shares of the Parties and of their rivals have been provided by the Notifying Party, based on the Parties' estimates of their competitors' sales, and on different sources regarding the overall EEA market size.¹²²
- (220) The Notifying Party provided value market shares based on the overall revenues, which also include metal prices charged to the customers. As explained further in Section 6.2.3 and in the Annex to the present Decision on the market reconstruction exercise (‘Annex’)¹²³, compared to overall revenues, in the context of the markets under consideration in this Decision, conversion revenues are better suited for estimating value market shares. However, the Notifying Party has no access to the conversion revenues of its competitors, thus it would not be in a position to provide reliable figures for market shares based on conversion revenues.
- (221) Indeed, following an examination by the Commission, the reliability of the estimates provided by the Notifying Party¹²⁴ appears to be questionable. For example, those estimates allocate a non-negligible part of the EEA rolled products sales ([...] tonnes, corresponding to, according to the data provided by the Notifying Party, [10-20]% of the total EEA sales) to non-identified parties, and those quantities cannot be justified by the limited imports to the EEA. Due to the lack of analysts' reports estimating market shares in the EEA, the Commission was not able to verify if those estimates are aligned with those of independent third parties.
- (222) Therefore, market shares of the Parties and of their main rivals have been estimated by the Commission by reconstructing the market for the years 2015 to 2017. The Commission requested the main market participants to provide their sales of rolled products and pre-rolled strip. On the basis of the data received, the Commission calculated market shares in volume and value. The methodology used for the market reconstruction and the assumptions used by the Commission are described in the Annex.

¹²² Form CO, paragraphs 199-217.

¹²³ This Annex is an integral part of this Decision.

¹²⁴ Form CO, paragraph 219.

- (223) In the response to the SO, the Notifying Party argued that the Commission did not collect sales volume data by field of use.¹²⁵ It was not possible to collect sales data per field of use because several competitors were unable to specify the field of use for the products they sold.
- (224) The main results of the market reconstruction for rolled products, with respect to the sales in volume and in value measured in conversion revenues, are reported in the Sections 6.2.2-6.2.6.
- 6.2.2. *The Transaction would lead to large combined volume shares with a significant increment*
- (225) This Section presents the main results of the market reconstruction with respect to the market shares in volume and demonstrates that: i) the Transaction leads to large combined volume shares with a significant increment; ii) the market shares of each of the Parties increased in the period 2015-2017, and Schwermetall and ARP had the highest growth; iii) the nearest competitor to the combined Parties, that is KME/MKM has a much smaller market share than the Parties' combined market shares; and iv) the remaining competitors have limited presence in the market, with individual market shares far below those of the Parties and KME/MKM.
- (226) Table 1 shows that the combined market shares of the Parties in rolled products were [40-50]% in 2017, [40-50]% in 2016 and [40-50]% in 2015, by far the highest in the EEA. Table 1 also shows that in the same years, Wieland's market shares were, respectively, [20-30]%, [20-30]% and [20-30]%. Therefore, in each of the years from 2015 to 2017, the Parties' combined market share was substantially higher than the individual market share of Wieland, thus indicating that the Transaction leads to a significant increase of the volume-based market share for the Notifying Party.
- (227) In terms of growth, in the period 2015 to 2017, each of the Parties increased both sales and market shares. Wieland increased its sales from 2015 to 2017 by more than [10-20]%, that is from [...] tonnes to [...] tonnes. In the same period, ARP increased its sales by almost [20-30]%, that is from [...] tonnes to [...] tonnes, and Schwermetall increased its sales of rolled products by almost [30-40]%, that is from [...] tonnes to [...] tonnes.¹²⁶ In the same period, the combined sales of the Parties increased by more than [20-30]%, that is from [...] tonnes in 2015 to [...] in 2017.

Table 1 EEA sales and market shares in volume of rolled products for the years 2015 to 2017*

	2015		2016		2017	
	Sales (tonnes)	Market share	Sales (tonnes)	Market share	Sales (tonnes)	Market share
Wieland	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
ARP	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%
KME**/MKM	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%

¹²⁵ Response to the SO, paragraph 13.

¹²⁶ In addition to sales of pre-rolled strip, Schwermetall also sells rolled products used for the manufacturing of coins.

	2015		2016		2017	
	Sales (tonnes)	Market share	Sales (tonnes)	Market share	Sales (tonnes)	Market share
Diehl	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%
EGM	[...]	[5-10]%	[...]	[5-10]%	[...]	[0-5]%
Kemper	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Messingwerk	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 1]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 2]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 3]	NA	NA	NA	NA	[...]	[0-5]%
[Competitor 4]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 5]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 6]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Imports	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Total market	[...]	100.00%	[...]	100.00%	[...]	100.00%

Source: European Commission, based on market participants' data.

* the Commission anonymised six market participants in order to better preserve their business secrets. These market participants are (here in alphabetical order, which does not correspond to the order given in the table): Azienda Metalli Laminati, Griset, Med Povrly, Silmet, WMD, and WMN.

** Sales of KME/MKM also include the sales of KMD, a JV between KME and Chinese player Golden Dragon.

- (228) The results of the market reconstruction also show that, in 2017, the Parties' combined sales were [50-70]% larger than the sales of KME/MKM, which had the second largest sales in the EEA in 2017, with a market share of [20-30]%. The remaining competitors are much smaller than the merged entity, and have individual market shares of [0-5]%, with the exception of Diehl, which in 2017 (and only in 2017), held a market share of [5-10]%.
- (229) On the basis of the data in recitals (226)-(228), the Commission considers that the Transaction would lead to the merged entity having large combined volume-based market shares, with a significant increment as compared to each of Wieland, ARP, and Schwermetall individually, and that all of the remaining competitors would have significantly lower market shares. Therefore, the Transaction would create by far the largest EEA rolled products market supplier, in terms of volume-based market shares, followed by KME/MKM and by a number of smaller competitors, which have individual market shares appreciably smaller than that of the merged entity.

6.2.3. The Transaction leads to very large combined value-based market shares

- (230) The Notice on the relevant market definition states that "[a]s a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier".¹²⁷ As pointed out in Section 5.2.4.3, the rolled products market is a highly differentiated market, and thus prices vary across commodities and specialties. Therefore, market shares in value, expressed in terms of conversion revenue, provide for a better indication of the relative strength of the Parties and their main competitors as they better reflect in

¹²⁷ Notice on the relevant market definition, paragraph 55.

which segments of the market the Parties and the other rolled products suppliers focus their efforts and closely compete. For this reason, in the Phase II investigation, the Commission undertook a market reconstruction based on value.

- (231) As can be seen from this Section in recitals (234)-(237), the Parties' market shares in value are likely to be even higher than the market shares in volume, while the competitors' market shares in value are often smaller than their corresponding market shares in volume. This appears to indicate that the Parties' market power might be even higher than that indicated by the market share in volume and that at least Wieland is, more than any other player, active predominantly in the high-end part of the market, where higher prices are charged to customers.
- (232) As explained in the Annex, for calculating market shares in value, the Commission used conversion revenues¹²⁸ provided by the market participants. In contrast to overall revenues, conversion revenues do not account for the metal cost and thus represent in a more realistic way the value associated with the rolled products sales. This is the case because the value of the metal is not accrued to the rolled product. Rather, the metal costs are passed on to the rolled product customers at the price set by the London Metal Exchange ('LME'). A number of internal documents of the Parties confirm that conversion revenues are used in the ordinary course of business as a metric of sales performance.¹²⁹
- (233) The Annex also explains that different market participants might have different definitions of conversion revenues. As a consequence, for calculating market shares based on value, the Commission used a conservative approach which is likely to lead to an underestimation of the Parties' conversion revenues and to an overestimation of the conversion revenues of their competitors (see Annex for details). Therefore, this analysis of the value-based market shares is likely to underestimate the Parties' market power and a more rigorous reconstruction exercise would likely result in even higher market shares for the Parties, indicating higher market power. Notwithstanding this shortcoming, the market reconstruction nevertheless gives reliable and useful data. First, suppliers use the conversion revenues measure in the course of their business and therefore, in the light of the reliance placed upon this measurement by competitors active in the market, the Commission considers it to be an appropriate tool to evaluate the relative strengths of each supplier in the rolled products market. Second, the data individually provided by each supplier is consistent throughout the years, making it possible to see trends for each supplier. Third, the differences in the way conversion revenues are calculated across the different suppliers are not so big as to prevent their comparison.
- (234) On the basis of the reconstruction exercise, Wieland's value-based market shares, which amounted to [30-40]% in 2017 (Table 2), is significantly higher than that based on volume, which amounted to [20-30]% in 2017 (Table 1). This indicates that Wieland charges higher prices (in terms of conversion revenues), compared to its competitors (see also recitals (254)-(255)). In this regard, it is significant to note that higher prices are not translated into lower market shares in volume, which seems to

¹²⁸ For the purpose of the present Decision, the expressions 'conversion revenue' and 'fabrication revenue' are used by the Commission interchangeably.

¹²⁹ See for example the Parties' response to the Commission's request for information RFI 4 [Annexes 4-9], where the conversion revenues are indicated as "Fab[rification] turnover", or the Parties' response to the Commission's request for information RFI 4 [Annex 14] slide 16, [Annex 15] slide 27, and [Annex 17], page 5 slide 10.

indicate that Wieland occupies a part of the market where higher prices can be charged, compared to more commoditised products, where prices are typically lower.

Table 2 EEA Conversion revenues and market shares in value of rolled products for the years 2015 to 2017*

	2015		2016		2017	
	Convers. revenues ('000 EUR)	Market share	Convers. revenues ('000 EUR)	Market share	Convers. revenues ('000 EUR)	Market share
Wieland	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
ARP	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[40-50]%	[...]	[40-50]%	[...]	[50-60]%
KME/ MKM**	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Diehl	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
EGM	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Kemper	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Messingwerk	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 1]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 2]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 3]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 4]	NA*	NA*	NA*	NA*	[...]	[0-5]%
[Competitor 5]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 6]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Imports	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Total market	[...]	100.00%	[...]	100.00%	[...]	100.00%

Source: European Commission, based on market participants' data.

* the Commission anonymised six market participants in order to better preserve their business secrets. These market participants are (here in alphabetical order, which does not correspond to the order given in the table): Azienda Metalli Laminati, Grisnet, Med Povrly, Silmet, WMD, and WMN.

** Sales of KME/MKM also include the sales of KMD, a JV between KME and Chinese player Golden Dragon.

- (235) Table 2 also shows that in the period 2015-2017, the value of Wieland, ARP and Schwermetall's sales, in terms of conversion revenues, increased by more than [20-30]% (from EUR [...] million in 2015 to EUR [...] million in 2017), by more than [20-30]% (from EUR [...] million in 2015 to EUR [...] million in 2017), and by more than [40-50]% (from EUR [...] million in 2015 to EUR [...] million in 2017) respectively. In the same period, the total conversion revenues in the EEA increased by approximately [10-20]% (from EUR [...] million in 2015 to EUR [...] million in 2017). Therefore, each of the Parties outperformed their competitors taken together, and thus their combined market share grew from [40-50]% to [50-60]%.
- (236) The second largest competitor following the Parties is KME/MKM, with much lower combined value-based market shares in the range of 20 to 30%. As already noted in recital (228) in respect of the volume-based market shares, all of the remaining competitors have individual market shares below 5%, with the exception of Diehl, with a market share of [5-10]%. In contrast to the volume market shares, however, where Diehl had market shares of [5-10]% only in 2017, Diehl's value-based market shares were between 5% and 10% in 2015, 2016, and 2017. By analogy with

Wieland, the fact that Diehl has higher market shares in value, compared to those in volume appear to reflect that Diehl is more active in the manufacture and supply of high-value products, where higher conversion revenues are charged (see Section 6.4.4.1 (d)).

- (237) Finally, the Commission notes that, in 2017, the combined value-based market share of the Parties was above [50-60]%, a value indicated in the Horizontal Merger Guidelines as possible evidence of the existence of a dominant position.¹³⁰
- (238) For the reasons set out in recitals (230)-(237), the Commission considers that the Transaction leads to very large combined value-based market shares. Those value shares are higher than the Parties' combined volume-based market shares and much higher than the value-based market shares of the merged entity's nearest competitor (KME/MKM). The very large combined value-based market shares indicate both that the Parties would have, post-Transaction, significant market power in value terms in the overall market, and that they are particularly active in the manufacture and supply of high value products.

6.2.4. *The Transaction would lead to very large combined production shares*

- (239) As demonstrated in the present Section, the Transaction will also lead to very large combined production shares,¹³¹ placing the merged entity once more on the top of the market, far above its nearest competitor (KME/MKM).
- (240) Together with market shares, production shares also reflect the power the merged entity will have post-Transaction. The market investigation has revealed that the competitive strength of a rolled products manufacturer is driven by, amongst other factors, economies of scale and a good utilisation of the manufacturing assets.¹³² Therefore, the production volume of the EEA manufacturing plants is also a good indicator of the Parties' competitive strengths, irrespective of whether the sales occur in the EEA or abroad.¹³³
- (241) In its Response to the Article 6(1)(c) Decision, the Notifying Party states that it exports "*high volumes of rolled products [...] to Asia and North America [...]*".¹³⁴ Concerning ARP, manufacturing data submitted to the Commission¹³⁵ show that ARP's production of rolled products¹³⁶ in 2015, 2016 and 2017 were, respectively, [...] tonnes, [...] tonnes, and [...] tonnes. These values are [...]. Whereas customers located in the EEA hardly source rolled products from outside the EEA and sourcing patterns remain European, customers located outside the EEA tend to buy significant volumes from the EEA, indicating one-way substitution (non EEA customers appear to be able to select suppliers in the EEA while the opposite is not true).¹³⁷

¹³⁰ Horizontal Merger Guidelines, paragraph 17.

¹³¹ Production shares are based on the total tonnes produced by the Parties and their competitors. These are to be distinguished from the total tonnes sold on the merchant market (volume of sales).

¹³² Parties' response to the Commission's request for information RFI 18, question 8.

¹³³ The production values are higher than the sales in the EEA due to the exports from the EEA.

¹³⁴ Response to the Article 6(1)(c) Decision, paragraph 30.

¹³⁵ Form CO, Annex 23_Q19, tab "Production".

¹³⁶ In the document, ARP uses the word "strip" to refer to rolled products.

¹³⁷ This does not mean that the relevant geographic market is wider than the EEA because the imports are considerably lower than the exports, there is no homogeneous trade flow from and into the EEA and, more importantly, due to transport cost and custom tariffs it is not possible to price arbitrage across the EEA, USA and Asia. Please see recitals (153) - (155) above.

- (242) An internal document of Wieland confirms that [...], and also shows that the Parties' production share is higher compared to other competitors in the EEA and, more broadly, in Europe¹³⁸ (Figure 7).

Figure 7 European production volume of the Parties and of their competitors in 2016

[...]

Source: Form CO, Annex 5.4.i, slide 5.

- (243) Based on data that underpins Figure 7, the Commission calculated the production share of the Parties and of their EEA competitors in 2016 (Table 3). The 2016 production share of the Parties in the EEA was [40-50]%, which corresponds to [...] tonnes, that is approximately 66% more than the second largest EEA competitor, namely KME/MKM. The individual production of the remaining competitors is 8-15 times smaller than the combined production of the Parties.

Table 3 EEA production volume and production shares in 2016

	EEA Production in 2016 (tonnes)	Production share (%)
Wieland Group	[...]	[20-30]%
ARP	[...]	[10-20]%
Schwermetall	[...]	[0-5]%
Combined Parties	[...]	[40-50]%
KME*/MKM	[...]	[20-30]%
Eredi Gnutti Metalli	[...]	[5-10]%
Halcor	[...]	[5-10]%
Kemper	[...]	[0-5]%
Diehl	[...]	[0-5]%
Plettenberg	[...]	[0-5]%
Med Povrly	[...]	[0-5]%
AML	[...]	[0-5]%
Silmet	[...]	[0-5]%
Walcownia Metali Labendy	[...]	[0-5]%
Walcownia Metali Dziedzice	[...]	[0-5]%
Griset	[...]	[0-5]%
Total production	[...]	100.0%

Source: European Commission, based on underlying data of Form CO, Annex 5.4.i, slide 5.

* production volume of KMD is included in KME/MKM's production volume.

- (244) Based on this data, the Commission considers that, according to Wieland's own estimates, the merged entity would become by far the largest producer in the EEA, almost twice as large as the second producer KME/MKM and eight times as large as the third producer. This also shows that already today not only is Wieland strong in the EEA market but also, when exports are taken into account, Wieland is in general much stronger than any other producer in the EEA.

¹³⁸ In Figure 6, which depicts the production volume in Europe, the Notifying Party also includes competitors located in Turkey and in Serbia. The document was prepared for an ordinary meeting of the supervisory board of the Notifying Party.

6.2.5. *The Transaction would lead to a significant increase of concentration in the markets for rolled products*

- (245) Paragraph 16 of the Horizontal Merger Guidelines states that "[t]he overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the Herfindahl-Hirschman Index (HHI). [...]. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the "delta") is a useful proxy for the change in concentration directly brought about by the merger".¹³⁹
- (246) When considering the 2017 market shares in volume, the Commission calculated that, post-Transaction, the Herfindahl-Hirschman Index ('HHI') would be 2 845, with an increase of 1 157. If market shares in value are considered, post-Transaction the HHI would be 3 317 and the delta is 1 226.
- (247) As such, regardless of whether volume-based or value-based market shares are considered, HHI and its increase post-Transaction appear to be well above the values indicated in the Horizontal Merger Guidelines below which it is unlikely that a transaction will result in competition concerns,¹⁴⁰ and rather appear to indicate that the Transaction would lead to possible competition concerns.
- (248) The Commission notes that the same conclusion applies irrespective of whether the KME/MKM transaction is considered to have taken place. Even if one were to analyse the market on the basis that the KME/MKM transaction has not taken place, the HHI post-Transaction and its increase would remain at values indicating high market concentration and well above the thresholds indicated in the Horizontal Merger Guidelines. In such a scenario, post-Transaction HHI in value and in volume would be, respectively, 2 904 and 2 444 and the related HHI increases would remain unchanged at 1 226 for the value-based market shares and 1 157 for the volume-based market shares.

6.2.6. *Conclusion on market shares and market concentration levels*

- (249) In the light of Sections 6.2.2 to 6.2.5, the Commission considers that: i) post-Transaction the Parties would have large or even very large combined market shares that would be the largest in the EEA, and significantly larger than the next competitor (KME/MKM) and multiple times higher than any other EEA competitor; ii) the Transaction would lead to a very high degree of concentration of the rolled products market; and iii) the even higher value shares indicate that the volume shares likely underestimate the true combined market power of the Parties. According to the Horizontal Merger Guidelines, in particular paragraphs 14, 17 and 27, the Parties' market shares are a first indication of the market power that the merged entity would have on the rolled products market. Read together with the high level of concentration resulting from the Transaction, these market shares indicate that the Transaction would lead to a significant impediment to effective competition in the rolled products market.

¹³⁹ Horizontal Merger Guidelines, paragraph 16.

¹⁴⁰ Horizontal Merger Guidelines, paragraphs 19-21.

6.3. The Transaction would eliminate competition between two important and close competitors in particular in the high-end part of the rolled products market

6.3.1. *Pre-Transaction Wieland (1) is the clear market leader in the overall rolled products market, (2) this applies in particular in the high-end of the market and (3) it already enjoys a significant degree of market power*

6.3.1.1. Pre-Transaction Wieland is the clear market leader in the overall rolled products market

(250) According to Article 2 of the Merger Regulation the Commission must look at the market position of the undertakings concerned when assessing the compatibility of a concentration with the internal market.

(251) This Section provides evidence of a number of elements indicating that prior to the Transaction Wieland is the clear market leader in the overall rolled products market.

(252) First, in the years 2015, 2016 and 2017, Wieland had the highest market share by sales volume, by sales value and in production (see Section 6.2). Particularly for the market share by value, Wieland has a leading position with market shares of [30-40]% in 2017, [30-40]% in 2016, and [30-40]% in 2015.

(253) Second, Wieland's sales grew at a higher rate than the growth of market demand. As already indicated in recital (227), the volume of Wieland's sales in the period 2015 to 2017 grew at a rate higher than [10-20]%, which is higher than the increase of the total volume sales in the EEA, which was less than 14% (from [...] tonnes in 2015 to [...] tonnes in 2017 – see Table 1). This growth indicates that Wieland has been proportionally more successful in winning new contracts than the rest of the market.

(254) Third, Wieland is the market participant with the highest growth in conversion revenues in the period 2015-2017 in absolute terms. In addition to the total conversion revenues, the Commission also computed conversion revenue per tonne, that is to say, it referred to the quantities sold and measured in EUR/tonnes. Conversion revenue per tonne provides indications of the average price (in terms of fabrication price)¹⁴¹ that a certain rolled products company charges to its customers for each tonne sold. These two parameters, namely, total conversion revenues and conversion revenue per tonne provide two different sets of information, that is to say, the former provides indications regarding the magnitude of the sales, and the latter the fabrication price at which rolled products are sold.

(255) As Figure 8 shows, in the period 2015-2017, Wieland consistently [...] per tonne of all competitors on the rolled products market, and such revenues were [...] than the average of all of the entities active in the market.

Figure 8 EEA conversion revenues and average conversion revenues per tonne of Wieland and ARP, compared to the EEA average, lowest and highest conversion revenues

[...]

Source: European Commission, based on market reconstruction data.

(256) In the response to the SO, the Notifying Party argues that no conclusion can be taken with regards to market leadership from conversion revenues because actual "conversion costs" are not considered; it would have been necessary to compare the

¹⁴¹ For the purpose of the present Decision, the expressions 'conversion price' and 'fabrication price' are used by the Commission interchangeably.

competitors' margins – data which the Commission did not gather in its investigation.¹⁴² However, the Commission notes that conversion revenues are the fabrication fee that suppliers charge their customers. Hence they include a cost calculation and the target margin resulting from the manufacture of their product excluding cost and revenue from the metal. To this extent, the target margins have been compared. Given that suppliers estimate their actual margins differently gathering this data would have not been meaningful because no comparison could have been established.

- (257) Fourth, Wieland has an extensive portfolio capable of addressing the needs of a variety of customers. During the market investigation, a large majority of the Parties' customers identified Wieland's rolled products portfolio as one of its strongest characteristics.¹⁴³ Wieland's portfolio spans from pure copper of different grades to different copper alloys of different chemical compositions, addressing different customer needs.
- (258) In addition, further specific customer needs are addressed with specific solutions going beyond the chemical composition or physical proprieties of the alloys. For example, Wieland is capable of addressing specific needs of customers which are manufacturers of connectors for the automotive industry, by hot-dip tinning the alloys' surface; or it can provide proprietary solutions to stampers for reducing lead time and increasing their productivity.¹⁴⁴ Taken together, the various products offered by Wieland constitute a portfolio capable of addressing the needs of a variety of customers. As further explained in Sections 6.4.1 and 6.4.2, while some competitors are able to address some customers' needs, only a few of them have a similarly comprehensive portfolio capable of addressing customers active in the high-end part of the market.
- (259) The strength of Wieland's portfolio is also due to its high quality. A large majority of the Parties' customers indicated that Wieland's products are of a high quality.¹⁴⁵ This is also recognised by Wieland itself in a number of internal documents. For example, in the connectors "cockpit charts", which Wieland's connectors business unit produce on a regular basis for assessing its competitiveness in connectors, "product technical value" is considered among the highest "relative customer value".¹⁴⁶
- (260) Fifth, both Wieland and ARP appear to be well aware of Wieland's leading market position. For example, a number of Wieland's and ARP's internal documents report Wieland's high market shares in rolled products and in a number of segments in Europe.¹⁴⁷
- (261) With respect to profits, Wieland appears to be [...] ¹⁴⁸ [...]. As indicated in a document produced by Wieland in its ordinary course of business (Figure 9) ¹⁴⁹,

¹⁴² Response to the SO, paragraph 49.

¹⁴³ Questionnaire Q1 to Customers of Rolled Copper Products, question 39.

¹⁴⁴ See for example, Wieland's trademark registered MULTICOIL solution, which allows stampers to reduce their lead time in changing coils. A description of MULTICOIL is available at https://www.wielandmetals.com/mediaPool/content/media/en/prospekte/baender_und_bleche_1/multicoil.pdf (last access on 11 October 2018).

¹⁴⁵ Questionnaire Q1 to Customers of Rolled Copper Products, question 39.

¹⁴⁶ Parties' response to the Commission's request for information RFI 4, [Annex 9], slide 9.

¹⁴⁷ For Wieland, see for example, Form CO, Annex A(73), slides 4-7, 11.

¹⁴⁸ The Earnings Before Interest, Taxes, Depreciation and Amortization (EBIDTA) is a widely used metric for measuring the profitability of a company.

Mueller [...] EBITDA, with a higher EBITDA per tonne, and similar (but smaller) revenues. However, as it is also indicated in Figure 9, Mueller is not present in the rolled products market but only in the market for extruded and drawn products, and, in any event, it is located outside the EEA (the US). All the remaining competitors, and particularly the EEA competitors active in the rolled products market, appear to have much lower [...].

Figure 9 Market performance of Wieland and its main competitors

[...]

Legend: RP= Rolled Products; EDP= Extruded and Drawn Products. *Source: Form CO Annex 5.4g, slide 7 (emphasis added by the Commission).*

- (262) A strategic planning document produced by ARP in its ordinary course of business (Figure 10) also indicates that ARP considers Wieland as its top competitor in rolled products. In that document, ARP considers a number of criteria - namely market shares, cost position, pricing, product quality, customer/ supplier service, technology capabilities, purchasing capabilities, sales/ marketing capabilities, and R&D/ Innovation- and assesses the strength of some market participants for each of these criteria and for the overall rolled products market. The resulting assessment of the overall rolled products market is expressed by a number (total score). ARP attributes the highest total score to Wieland ([...]), and attributes the second highest score to [...] ([...]), while [...] is given a negative score ([...]). The same document also shows that [...]. These three superior capabilities of Wieland, compared to its competitors, seem to indicate that Wieland is better positioned than its competitors to respond to customers with high quality and innovation requirements, that is to say, is better positioned for addressing the high-end of the market (see Section 6.3.1.2).
- (263) In addition, according to the same document, ARP considers that Wieland's position is [...] compared to its competitors in a number of criteria, namely: [...].

Figure 10 ARP market position in rolled products versus its top competitors

[...]

Source: Form CO, Annex 34_Q22, slide 4, as well as the Parties's response to the Commission's request for information RFI 8, Annex 13, page 1 (emphasis added by the Commission).

- (264) For the reasons set out in recitals (252) to (263), the Commission considers that prior to the Transaction Wieland is the market leader in the rolled products market.
- 6.3.1.2. Pre-Transaction Wieland is particularly active and strong in the high-end part of the market
- (265) Prior to the Transaction, Wieland is not only the market leader in the rolled products market overall but is also strong in the high-end part of the market. As mentioned in recitals (118) to (122) , while it is not possible to apply a strict delineation between the different segments of the rolled products market, the high-end of the market generally consists of specialised, value added products across different groups of alloys (for example High Performance Alloys ('HPAs'); bronze; or products made from high purity oxygen free copper); different fields of use (for example, strip for stampers compliant with strict tolerances; or certain connectors for the automotive or

¹⁴⁹ Figure 8 is taken from a document produced to inform the executives of the Notifying Party with further background on the ARP acquisition.

electrical engineering sectors); or products requiring specific treatments (for example, hot dip tinned treatment in particular for the automotive industry), which require different degrees of know-how and imply different capabilities and for which higher prices can be charged.

- (266) In the high-end of the market, as explained in recitals (280)-(281) and in Section 6.4.2. to Section 6.4.4, fewer competitors are present, demand is growing, capacity is fully used and the barriers to entry and expansion are higher compared to the low-end part of the market.
- (267) As confirmed by its internal documents, Wieland's [...] (Figure 11)¹⁵⁰. Wieland itself recognises (as shown in the title of the slide reported in Figure 11) that [...].

Figure 11 Market development in rolled products

[...]

Source: Form CO, Annex 5.4.g, slide 3.

- (268) To meet the opportunities associated with [...].¹⁵¹ HPAs and hot-dip tinned material are mostly sold by Wieland's connectors' business unit.¹⁵² Its sales of connectors are forecasted to [...].¹⁵³ This means that the connectors segment, and in particular the high-end part of it, is an important and growing area for Wieland in Europe.

Figure 12 Wieland's past and forecasted sales

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 2, slide 31.

- (269) The Notifying Party generates its rolled products turnover [...] in the connectors segment (Figure 13), which belong, to a large extent, to the high-end part of the market.

Figure 13 Wieland's fabrication turnover in rolled products for different market segments

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 2, slide 6.

- (270) According to an internal document produced by the Notifying Party in its ordinary course of business,¹⁵⁴ the Notifying Party tracks, in particular, orders received for HPA, HDT Strip and dual gauge milled material, which the Notifying Party regards as specialties in the same internal document.¹⁵⁵
- (271) From another part of the same internal document, [...], as shown in Figure 14.

¹⁵⁰ The figure is taken from a document that was produced to provide further background information to the executives of the Notifying Party in relation to the acquisition of ARP.

¹⁵¹ Parties' response to the Commission's request for information RFI 24, [Annex 2], slide 29. The document was prepared for an "Off-site Workshop" (see description in footnote 67).

¹⁵² Parties' response to the Commission's request for information RFI 24 [Annex 2].

¹⁵³ Parties' response to the Commission's request for information RFI 24 [Annex 2], slide 32.

¹⁵⁴ Parties' response to the Commission's request for information RFI 24, Annex 2, slide 7.

¹⁵⁵ Parties' response to the Commission's request for information RFI 24, Annex 2, slide 29 reads "Enhancement of sales of specialties materials (Hot-Dipped-Tinned Strip (HDT), High Performance Alloys (HPA), and Dual Gauge Strip (DG))".

Figure 14 Wieland's capacity plan until year 2020/2021

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 2, slide 39.

- (272) The Notifying Party does not agree with the Commission's view that Figure 14 confirms Wieland's focus on the high-end part of the market.¹⁵⁶ The Notifying Party argues that HPA and HDT require more complex and time-consuming manufacturing processes, and therefore create manufacturing bottlenecks that must be reduced or eliminated.
- (273) Contrary to the Notifying Party's line of reasoning, the fact that Wieland recognises the complexity and the time-intensive processes of manufacturing HPAs and HDT rolled products – products that the Notifying Party itself considers specialties – and that Wieland also recognises the need to address the bottlenecks created by such complex and time-intensive processes, demonstrates that [...].
- (274) Moreover, Wieland has decided to leave the very low-end of the market (DHP for roofing) and also other products which have become more commoditised, such as pure copper strip for cables. Indeed, Wieland's list of dedicated actions for its rolled products business states: [...].¹⁵⁷ The Commission agrees with the Notifying Party that Wieland's withdrawal from low margin segments is a "*strategic economic decision autonomously taken by Wieland*".¹⁵⁸ This shows that Wieland has decided to focus on the high-end part of the market and more importantly that it is in a position to do so, that is to say, that it has the necessary capabilities, know-how, reputation and financial means.

Segment shares in the high-end part of the market

- (275) In segments where Wieland is present on the high-end of the rolled products market, it also has large shares, as estimated by Wieland itself. According to its internal documents, not only does Wieland estimate a segment share of [...] % for HPAs in 2017/2018, but it also predicts an increase of its share in the coming years (Figure 15):

Figure 15 Total volume of HPA Strip with segment share projection

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 2, slide 35.¹⁵⁹

- (276) Similarly, for HDT materials Wieland estimates a very large segment share of [...] % in 2017/2018 and also predicts an increase for the next years (Figure 16):

Figure 16 Total volume of HDT Strip with segment share projection

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 2, slide 38.

- (277) Wieland's estimates are higher than the Commission's estimated shares based on the sales of HPAs and on the sales of bronze rolled products, as shown in Table 4 and in

¹⁵⁶ Response to the First LoF, section II.

¹⁵⁷ Parties' response to the Commission's request for information RFI 24 [Annex 2], slide 55.

¹⁵⁸ Response to the SO, paragraph 56.

¹⁵⁹ Produced for an "Off-site Workshop" (see description in footnote 67).

Table 5 respectively.¹⁶⁰ HPAs are mostly used in the manufacture of high-value added rolled products and bronze is particularly important for connectors on the high-end part of the rolled products market

Table 4 EEA HPA sales and segment shares in volume for the years 2015 to 2017*

	2015		2016		2017	
	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share
Wieland	[...]	[50-60]%	[...]	[50-60]%	[...]	[50-60]%
ARP	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[60-70]%	[...]	[60-70]%	[...]	[60-70]%
KME/ MKM**	[...]	[20-30]%	[...]	[20-30]%	[...]	[10-20]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Diehl	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
EGM	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Kemper	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Messingwerk	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 1]	0	0.0%	0	0.0%	0	0.0%
[Competitor 2]	0	0.0%	0	0.0%	0	0.0%
[Competitor 3]	0	0.0%	0	0.0%	[...]	[0-5]%
[Competitor 4]	0	0.0%	0	0.0%	0	0.0%
[Competitor 5]	0	0.0%	0	0.0%	0	0.0%
[Competitor 6]	0	0.0%	0	0.0%	0	0.0%
Altek	[...]	[0-5]%	0	[0-5]%	[...]	0.0%
Sevojno	[...]	[0-5]%	0	[0-5]%	[...]	0.0%
Other imports	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total segment	[...]	100.0%	[...]	100.0%	[...]	100.0%

* the Commission anonymised six market participants in order to better preserve their business secrets. These market participants are (here in alphabetical order, which does not correspond to the order given in the table): Azienda Metalli Laminati, Griset, Med Povrly, Silmet, WMD, and WMN.

** production volume of KMD is included in KME/MKM' s production volume.

Source: European Commission, based on market reconstruction data.

Table 5 EEA bronze sales and segment shares in volume for the years 2015 to 2017*

	2015		2016		2017	
	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share
Wieland	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
ARP	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%

¹⁶⁰

The underlying methodology for the market reconstruction per alloy segments and the arguments raised in this regard in Response to the SO and responses to the Letters of Facts are detailed in the Annex.

	2015		2016		2017	
	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share
KME /MKM**	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Diehl	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
EGM	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Kemper	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Messingwerk	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 1]	0	0.0%	0	0.0%	0	0.0%
[Competitor 2]	0	0.0%	0	0.0%	0	0.0%
[Competitor 3]	0	0.0%	0	0.0%	[...]	[0-5]%
[Competitor 4]	0	0.0%	0	0.0%	0	0.0%
[Competitor 5]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 6]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Altek	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Sevojno	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Other imports	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total segment	[...]	100.0%	[...]	100.0%	[...]	100.0%

* the Commission anonymised six market participants in order to better preserve their business secrets. These market participants are (here in alphabetical order, which does not correspond to the order given in the table): Azienda Metalli Laminati, Griset, Med Povrly, Silmet, WMD, and WMN.

** production volume of KMD is included in KME/MKM' s production volume.

Source: European Commission, based on market participants' data.

(278) Although the differences in the Wieland's and the Commission's estimates of HPAs' shares can be explained by what Wieland considers to be an "accessible market"¹⁶¹ and although Wieland's HDT strip shares estimates cannot be directly compared to the Commission's share estimates based on the different types of copper and copper alloys, both Wieland's own account and the results of the Commission's market investigation are consistent in demonstrating that Wieland enjoys large, and in certain instances very large, shares in these segments. Hence, the Notifying Party, already prior to the Transaction, enjoys large (and very large) shares on both the overall rolled products market and in particular segments on the high-end part of the market.

(279) Furthermore, as can be seen from Wieland's internal documents regarding its sales of strip for connectors and stampers, Wieland regards itself as the market leader, whereas it considers other competitors as followers: "[...]".¹⁶²

Barriers to entry

(280) In the high-end part of the market where the specialties can be found, the barriers to entry and to expansion are significant. As further explained in Section 6.4.2. and in

¹⁶¹ In the Parties' response to the Commission's request for information RFI 24 [Annex 2], for each market segment analysed, Wieland defines the "[total] consumption", a "strategically relevant market [segment]" (which is a part of the total consumption), an "accessible market [segment]" (which is a part of the strategically relevant market [segment]), and the "sales of Wieland Group" – see for example, slide 12.

¹⁶² Parties' response to the Commission's request for information RFI 24 [Annex 12], slide 5.

Section 6.4.4, the more specialised the product, the more know-how and technology intensive it is and the more difficult it is for a supplier to enter the segment. In addition, suppliers usually have to go through a qualification process that might entail R&D efforts just to be able to supply a specific rolled product for a given client and, for the automotive industry, this qualification processes may entail two phases, i.e. being qualified by the direct customer but also by the customer's customer.¹⁶³

- (281) Even for well-established suppliers it is not necessarily easy or quick to enter the high-end part of the market. For example, when planning to enter the connectors market, ARP had to go through its whole production chain and assess if it had the right capabilities and what it needed to change in relation to rolling, annealing, stretch leveller, tinning, slitting and finishing¹⁶⁴. This resulted in R&D activities, particularly focused on addressing the connector market segment.¹⁶⁵ Also to be able to continue supplying high-end customers with [...], in addition to R&D spending,¹⁶⁶ ARP had to modernise its [...], and thus "[...]".¹⁶⁷

Demand growth

- (282) The segments on the high-end part of the market are experiencing a growth in demand, in contrast with the segments on the lower-end part of the market where the demand is decreasing. As Wieland and ARP themselves conclude in their internal documents, the demand for commodity products has been decreasing while the demand for high-end, specialised products has been increasing. Figure 17 shows Wieland's own assessment of the growth of the rolled products market.

Figure 17 Market development for high-end products and commoditised products

[...]

Source: Form CO, Annex 5.4.g of the Form, "Internal Communication_ Wieland Leadership Team EN version", slide 14.

- (283) In contrast to the declining demand on the commoditised market side, Wieland's annual report highlights the growing demand for products at the higher-end of the market: *"[d]emand for high-performance alloys and plated strip was fuelled to a disproportionate degree by the car manufacturers' growing use of rolled products. Also increasing was the sales volume of near-net shape multi-gauge strip for the cost-efficient manufacture of electronic and electromechanical components. Demand from the electrical engineering, electronics, and machinery and plant construction sectors was also strong."*¹⁶⁸
- (284) A report produced by an independent market analyst also confirms that sales of commoditised rolled products, such as those for roofing, decreased in the last years to the extent that now it is considered a niche market, while in the past it was one of the *"largest outlets for FRPs copper [flat rolled products] in Europe"*.¹⁶⁹

¹⁶³ Agreed non-confidential minutes of a call with a customer, 15 June 2018 (Id 495).

¹⁶⁴ Parties' response to the Commission's request for information RFI 4 [Annex 13].

¹⁶⁵ Form CO, Annex 2.2.b, page 61.

¹⁶⁶ Form CO, Annex 2.2.b, page 61.

¹⁶⁷ Parties' response to the Commission's request for information RFI 4 [Annex 17].

¹⁶⁸ Form CO, Annex 2.2.a), page 22

¹⁶⁹ Form CO, Annex 6.3. a), slide 22.

Capacity

- (285) The distinctive competitive conditions on the high-end and the low-end parts of the market can be further explained by considering the available capacities. The internal documents of the Parties and the results of the market investigation (further explained in Section 6.4.3) suggest that in segments on the high-end part of the market capacity seems to be full, in contrast with the segments on the low-end where there seems to be overcapacity.
- (286) When characterising the rolled products market, Wieland mentions that there is [...], and [...] ¹⁷⁰. Also in its Annual Report, Wieland recognises that it has been producing at almost full capacity: “[a]t the German plants, capacity utilization was high throughout. In some workshops, demand could not be met as required, and the regular delivery times could not be adhered to, despite additional shifts and substantial overtime work. Capacity utilization at the Austrian locations improved successively until it reached the desired level again as from the early summer of 2017” ¹⁷¹.
- (287) Similarly, when ARP lists “the trends in the competitive environment” of rolled products market it mentions: “Commoditized products continue to suffer from overcapacity in Europe and North America making it a buyers’ market, while market demand has outgrown capacity for specialized products, [...], since a few months” ¹⁷².

Pricing

- (288) The barriers to entry and expansion in the higher-end part of the rolled products market, together with the growth in demand and with the capacity constraints, seem to be reflected in the pricing of the rolled products. The high-end part of the market seems to have significantly higher prices than the lower-end part of the market. For example in 2017, ARP’s conversion revenue ranged from around [...] to around [...]. ¹⁷³

Wieland's leading position

- (289) Already prior to the Transaction, Wieland's leading position in terms of sales (volume-based market share) on the high-end part of the market is reinforced by the high barriers to entry and expansion in those segments and the fact that demand is growing while capacity is full, thereby providing Wieland with a considerable degree of market power.
- (290) In fact, the Transaction aims at strengthening Wieland's market power, particularly on the high-end part of the market. According to Wieland's internal documents, the acquisition of ARP follows a “[...]” ¹⁷⁴. Moreover, as explained further in Section 6.3.2.2, the acquisition of ARP also translates into a defensive move to prevent ARP

¹⁷⁰ Parties' response to the Commission's request for information RFI 24 (Annex 1).

¹⁷¹ Form CO, Annex 2.2.a), page 20.

¹⁷² Parties' response to the Commission's request for information RFI 8 [Annex 13].

¹⁷³ Parties' response to the Commission's request for information RFI 9 [Expanded Annex 4]. Later ARP provided total conversion revenue figures in response to the Commission's request for information RFI 21, which were based on calendar years whereas profitability figures (including conversion revenues) in the response to RFI 9 were given for financial years. The data in the response to RFI 9 does not include sales of Buffalo in the EEA and the minor exports of Pori to Réunion and some minor volumes without alloy information as explained in response to RFI 26.

¹⁷⁴ Form CO, Annex 5.4.b), slide 2.

from growing as a high-end supplier.¹⁷⁵ Indeed, ARP is a player on the high-end part of the market, in particular in power electronics¹⁷⁶ and was also planning to enter other segments of the high-end part of the market, as for example the connectors for electric and hybrid cars.¹⁷⁷

- (291) For the reasons set out in recitals (265)-(290), the Commission considers that prior to the -Transaction Wieland is not only the market leader in the rolled products market, but is particularly strong in the high-end segments of that market.

6.3.1.3. A profitability analysis confirms that Wieland is profitable and strong on the high-end part of the rolled products market

- (292) Wieland's strength on the rolled copper market and in particular on the high-end part of the market is also reflected in its profitability, which is high, particularly when compared to the other EEA rolled products market participants (see Section 6.3.1.1, Figure 9). Wieland has also high profitability in different segments of the market. The profitability analysis presented in this section is based on the information provided by the Parties.¹⁷⁸
- (293) In each of the past three fiscal years, Wieland achieved positive profits both at EBITDA and EBT levels. Wieland estimated that the business unit of rolled products earned [...]. These figures translate to profit margins of, [...].
- (294) Based on the data for the past three calendar years, Wieland's EEA profits in [...]. Therefore, Wieland's profit growth cannot be fully explained by the increased volumes but rather by a combination of the price evolution and the increase in sales volumes.
- (295) The Commission requested profitability data from Wieland segmented by Wieland's internal business units: Connectors, Electrical Engineering, Energy/Signalling, Metal Goods, Semiconductor Components, Slitting Center, Stampers and Trade. Data analysis revealed that in 2017, the business unit for Connectors has contributed to about [...] of Wieland's Rolled Products business in the EEA.¹⁷⁹ The profitability of that business unit has also increased from 2015 to 2017 as the EBITDA of Connectors grew [...], while the volume growth of the same segment was [...] (which is still faster than the overall sales volume growth of [...]). Therefore, both the overall sales volume and profitability growth were strongly driven by the increased sales in Connectors.
- (296) The business units of Stampers and Electrical Engineering contributed to [...] % and [...] % of Wieland's contribution margins in 2017, respectively. The growth in sales volume in Stampers was also larger than the overall average growth across all rolled products: [...], while the EBITDA of the segment increased by [...]. Therefore, in Stampers also both the overall sales volume and profitability growth were driven by the increased sales in Connectors.

¹⁷⁵ Form CO, Annex 5.4. b), slide 25: "[...]".

¹⁷⁶ Parties' response to the Commission's request for information RFI 4 [Annex 17].

¹⁷⁷ Parties' response to the Commission's request for information RFI 4 Annex 13].

¹⁷⁸ Parties' response to the Commission's request for information RFI 9 and further follow up's received on 7 September 2018 and 13 September 2018. Please note that in Parties' response to the Commission's request for information RFI 26, question 2, Wieland noted that the conversion figures in the response to RFI 9 do not include Wieland Birmingham (Mason) and Wieland's slitting centres. As a result, the volumes and values covered by the profitability data in the response to RFI 9 amount to 88-89% of the total sales figure for Wieland.

¹⁷⁹ Contribution margin is defined as sales revenue less variable costs.

- (297) The Commission also analysed the contribution margin data broken down by Wieland's fields of use as per Annex 6.3.c of the Form CO. Given the large amount of differentiation in the rolled products market, that data allows for an examination of Wieland's profitability in different segments. The Commission identified the general field of connectors which are used in different segments: Electrical Engineering (Connectors for industrial application/usage), Telecommunications (Connector telecommunications), Electronic engineering (Connector computer and Connector consumer goods) and Automotive industry (Connector automotive industry, Connector Stamping automotive and Reroll Connector).
- (298) In 2017, connectors accounted for [...]% of Wieland's total contribution margin and [...]% of [...]. The volume growth of connectors from 2015 to 2017 was larger ([...]%) than the total volume growth across all fields of use ([...]%). Similarly, the margin contribution growth of connectors was also higher than the average: [...] for all fields of use combined from 2015 to 2017. Furthermore, the fields of use of connector automotive industry, of connector Stamping automotive and of connection and contact technology were [...], based on their contribution margin.
- (299) Based on the profitability analysis, the Commission concludes that Wieland is a successful, growing and profitable company, especially in connectors and stamping segments, which are for the most part in the high-end of the market. Combined with high market shares, Wieland's profitability is indicative of Wieland's market power.
- 6.3.1.4. Pre-Transaction, Wieland already possesses and exercises a significant degree of market power
- (300) Further to the analysis in Sections 6.3.1.1 to 6.3.1.3, this Section will identify a number of facts indicating that Wieland possesses and exercises a significant degree of market power in the overall rolled products market today, in particular in segments on the high-end part of the market.
- (301) In particular, the Commission will consider: (i) Wieland's ability to charge higher fabrication prices than its competitors in segments on the high-end part of the rolled products market as indicated by internal documents and the financial information of the Parties; (ii) the dependency of Wieland's customers on its supplies; (iii) the ability of Wieland to execute strategic decisions to exit lower value market segments; and (iv) the responses to the market investigation indicating that Wieland exercises significant market power today.
- (302) First, the internal documents of the Notifying Party show that it is able to charge higher fabrication prices than the market fabrication price in segments it considers strategic. For example, Wieland charges a fabrication price in stampers that is [...]% higher than the market price ([...], compared to [...], see Figure 18).

Figure 18 Wieland's cockpit chart for business unit Stampers

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 12, slide 10 (emphasis added by the Commission).¹⁸⁰

- (303) Similarly, in connectors Wieland has been able not only to set the fabrication price above the average market price but also to increase the gap between its price and the

¹⁸⁰ Produced for an "Off-site Workshop" (see description in footnote 67).

average market price from [...] % to [...] % in the last three years (that is in 2014/2015 Wieland [...] – compare Figure 19 and Figure 20).

Figure 19 Wieland's cockpit chart for business unit Connectors for year 2014/2015

[...]

Source: Parties' response to the Commission's request for information RFI 4, Annex 9, page 3 and the Parties' response to the Commission's request for information RFI 24, Annex 5, slide 25.

Figure 20 Wieland's cockpit chart for business unit Connectors for year 2016/2017

[...]

Source: Parties' response to the Commission's request for information RFI 4, Annex 9, page 9 (emphasis added by the Commission).

- (304) The proposition that Wieland is able to charge higher prices than other competitors can be corroborated by the financial information provided by the Parties.¹⁸¹ Based on the information provided in response to RFI 26, the average conversion revenue per tonne in 2017 [...]: Wieland's conversion revenue was [...] in all fields of use where the Parties overlap, including stampers and connectors, except in ammunition, DCB-substrates and heat exchangers.¹⁸²
- (305) In light of the above, the Commission considers that Wieland's ability to price higher than the market average, in particular when combined with its high profitability (see Section 6.3.1.3), indicates that Wieland possesses and exercises a significant degree of market power in the rolled products market, and especially in the high-end part of this market.
- (306) Second, Wieland is likely to enjoy leeway for its pricing behaviour because of the customers' "high dependency" on its supplies. The Notifying Party noted¹⁸³ that some of its customers of high-end products identified alternative suppliers in their responses to the Commission's questionnaires. However, this does not rule out the possibility that, for some alloys, those customers rely specifically on Wieland. The document that the Notifying Party cites for the customer [...], for example,¹⁸⁴ identifies KME as an alternative supplier for HPAs. In the same document, however, [...] states that, in relation to certain special alloys, there is no alternative supplier to Wieland on the market. This appears to be consistent with internal documents prepared by Wieland in its ordinary course of business. Those documents¹⁸⁵ show that Wieland considers that some customers depend on it because of Wieland's HPAs portfolio, including special qualities of certain Wieland alloys such as K75;¹⁸⁶ for

¹⁸¹ Parties' response to the Commission's request for information RFI 9.

¹⁸² In Parties' response to the Commission's request for information RFI 26, question 2, Wieland noted that the conversion figures of RFI 9 do not include Wieland Birmingham (Mason) and Wieland's slitting centres. For ARP, RFI 9 constitute conversion revenues as defined by ARP (i.e. including the difference between internal and customer-specific metal value), and would be slightly lower if Wieland's methodology was applied.

¹⁸³ Response to the SO, paragraph 55.

¹⁸⁴ The Notifying Party, for example, cites document ID 868, page 2, which refers to Wieland's customer [...].

¹⁸⁵ Prepared for an "Off-site Workshop" (see description in footnote 67).

¹⁸⁶ In the Parties' response to the Commission's request for information RFI 24, Annex 12, slide 15, Wieland considers that this alloy has a unique selling proposition, which does not have a "me-too" alternative.

Wieland's capacity to produce necessary volumes of tinned/plated materials; and for the "lock-in" effects of qualification (see Figure 21 and Figure 22).

Figure 21 Wieland's analysis of a major customer in connectors ([...])

[...]

Source: Parties' response to the Commission's request for information RFI 24 Annex 6, slide 15.

Figure 22 Wieland's analysis of a major customer in connectors ([...])

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 6, slide 11.

- (307) It is noteworthy that the extracts of both internal documents (represented in Figure 21 and Figure 22) refer to Wieland's two most important customers in terms of sales in 2017, [...].¹⁸⁷ These two companies are active in the automobile industry. Moreover, this evidence seems to be at odds with the Notifying Party's claim that customers have "*strong bargaining and buyer power*" in particular in the automotive sector.¹⁸⁸ In fact, Wieland also recognizes in its internal documents that these companies have a "*very strong position in negotiation with producers*" because they purchase high volumes "[b]ut [are] also dependen[t] on strong suppliers (reliability and capacity) like Wieland".¹⁸⁹
- (308) Moreover, the factors listed in the internal documents depicted in Figure 20 and Figure 21 explain why Wieland, itself, considers that the customers' dependence on its supplies also reflect the particular strengths of Wieland as identified in the Commission's in-depth investigation. First, as explained in Section 6.3.1.2, Wieland has one of the strongest portfolios of HPAs, which is necessary to serve the strategic segments of the market and deliver rolled products of high quality and with specific technical characteristics. Second, as also explained in Section 6.3.1.2, surface treatments such as HDT seem to be important on the high-end part of the market. Notably, Wieland has much higher capacity for HDT in the EEA than any other competitor and can better respond to the growing demand from its customers for tinned products (see Table 21 in Section 6.4.2). Third, as described in Section 6.5.2 switching suppliers on the high-end part of the market is not easy because of qualification processes, and may not be possible at all in the light of the product lifecycle in certain end-industries, such as the automotive industry.
- (309) Furthermore, Wieland's power to increase prices is further supported by an internal Wieland planning document prepared in the ordinary course of business¹⁹⁰, which shows that Wieland is in a position to increase prices in segments on the high-end part of the market [...] (see Figure 23 below). Even when this is a planning assumption, such assumption is in line with the Commission's finding that the profitability in connectors (from 2014/15 to 2016/17) grew more than the overall sales volume (recital (295)).

¹⁸⁷ Form CO, Table 18. [...] rank respectively as number 1 and number 2 in the top 15 customers list.

¹⁸⁸ Response to the Article 6(1)(c) Decision, paragraph 65.

¹⁸⁹ Parties' response to the Commission's request for information RFI 24, Annex 6, slide 28.

¹⁹⁰ Prepared for an "Off-site Workshop" (see description in footnote 67).

Figure 23 Wieland's planning assumption concerning price increases

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 6, slide 33 (emphasis added by the Commission).

- (310) This ability to charge high prices is also reflected in an internal strategic document on Wieland's rolled products business group which envisages [...] planning (see Figure 24). Such positioning of Wieland cannot be considered as only showing a particular situation for one specific year because the internal documents for the two following years provide for a similar "base case" scenario [...].¹⁹¹

Figure 24 Strategic planning for Wieland's rolled products business group

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 3, slide 24 (emphasis added by the Commission).

- (311) Third, Wieland is also able to withdraw from segments where there is price pressure (commodities) and eventually sacrifice its share in those segments to focus on the high-end part of the market. This ability shows that Wieland can, to a significant extent, behave independently of its competitors and customers in addition to its ability to enter and expand on the high-end part of the market as explained in Section 6.3.1.2.

Figure 25 Wieland's analysis of the consequences of withdrawing from certain business segments

[...]

Source: Parties' response to the Commission's request for information, RFI 24, Annex 7, slide 20.

- (312) In addition, internal documents of Wieland demonstrate that it chooses the customers it serves, by strategically allocating its capacity for the production of specialties (Figure 26).

Figure 26 Wieland's business strategy plan for rolled products

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 2, slide 55 (emphasis added by the Commission).

- (313) Fourth, the respondents to the market investigation also indicated that Wieland is a particularly expensive supplier whose prices are set at a relatively high level compared to its rivals in the rolled products market. This is in particular the case of this customer indicating that, as regards price, *"We have already asked for a quotation from Wieland that has shown that it has higher prices than its competitors"*.¹⁹² Another customer also emphasises the pricing power of Wieland: *"Price is the big variation, WIELAND the most expensive (far on top of others) - Quality wise, supplier are qualified at same level"*.¹⁹³

¹⁹¹ Parties' response to the Commission's request for information RFI 24, [Annex 2], slide 29, [Annex 1], slide 24.

¹⁹² Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1. (Id 1279).

¹⁹³ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 24 (Id 1239).

- (314) A further customer refers to Wieland's pricing policies in the context of a decreased capacity which resulted in a price increase: *"As less competitors in the market the price will increase. In any case it is depending on how Wieland approached the deal, if they feel that they have enough capacity then perhaps they do not put a pressure on price, but their last year policies have had an impact on price when production capacity has been reduced"*.¹⁹⁴
- (315) A customer active in connectors for the automotive industry also refers to Wieland also as an indispensable supplier compared to its competitors: *"Suppliers DMA [i.e. Diehl], Kemper, Aurubis, Wieland are mainly equal substitutes, but Wieland offers some specific alloy that others cannot supply"*.¹⁹⁵
- (316) In the light of all the above elements taken together, the Commission considers that Wieland already possesses and exercises a significant degree of market power which allows it to behave to some degree independently of its competitors and customers in the rolled products market and in particular in the high-end part of the market.
- 6.3.2. *The Transaction would eliminate the competitive constraints exercised by ARP on Wieland as a result of ARP being (1) an important competitor of Wieland in rolled products overall, (2) an important and close competitor of Wieland in key segments and (3) a competitor growing in importance while KME declines*
- (317) In this Section, the Commission will demonstrate that ARP is an important competitor of Wieland in the rolled products market overall and also a significant and close rival in key segments of the rolled products market in which Wieland is particularly active. Furthermore, the Commission will establish that ARP is growing in significance and relevance in competition with Wieland whilst other incumbent players such as KME are in decline. In that regard, the Commission will conclude that the Transaction would eliminate the important competitive constraints that ARP exerts on Wieland within the meaning of paragraph 25 of the Horizontal Merger Guidelines.
- 6.3.2.1. Pre-Transaction ARP is an important if not the most important competitor of Wieland in the rolled products market
- (318) For the reasons provided in recitals (319) to (328) , the Commission considers that prior to the Transaction, ARP is already an important if not the most important competitor of Wieland in the rolled products market for a number of reasons.
- (319) First, ARP sells significant quantities of rolled products in the EEA, which are about [...] in the EEA as indicated in Section 6.2.2. Wieland's internal document produced in its ordinary course of business also reports on the importance of ARP's sales in Europe.¹⁹⁶ Also, as indicated in Sections 6.2.2 and 6.2.3, ARP's sales increased in value and volume from 2015 to 2017 by more than [20-30]%.
- (320) Second, ARP has a large portfolio of rolled products, covering commodity as well as more sophisticated specialties products, where Wieland is particularly active. In its manufacturing facilities, ARP has all the three main casting technologies, namely horizontal strip casting, vertical strip casting and slab casting, foundries fuelled by gas or heated-up by electricity, as well as hot rolling, cold rolling and coating

¹⁹⁴ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1 (Id 1313).

¹⁹⁵ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 24 (Id 1278).

¹⁹⁶ Form CO, Annex A(73), slide 6.

treatments for covering a large number of customer needs.¹⁹⁷ ARP's website also shows that its rolled product offering spans from rolled products for engine cooling and buildings to more high-end rolled products for connectors, and "*a full range of copper and copper alloy strip for almost any industrial application in standard dimensions or custom made to special requirement*".¹⁹⁸ This indicates that ARP is capable of manufacturing, marketing and selling a variety of products, and, in particular, high-end products, where Wieland is mostly active.

- (321) Third, ARP has a competitive advantage in being part of Aurubis, which is vertically integrated throughout the production chain of copper, that is from the markets for copper scrap and concentrates, to the production of copper cathodes, and further downstream to the production of copper rod, copper shapes, pre-rolled strip and rolled products.^{199,200} In its most recent annual report, Aurubis describes its vertical integration as the core of its business model,²⁰¹ and defines such a business model as "*the foundation of our success*".²⁰²
- (322) If one considers as an example the copper cathode market, which is one level upstream of the copper shape market, Aurubis appears to be particularly strong with its production of "*more than one million tons of copper cathodes annually*",²⁰³ generating in fiscal year 2016/2017 revenues in excess of EUR 2.3 billion.²⁰⁴ As a consequence, ARP does not purchase cathodes from the merchant market, thus "*generat[ing] higher added value and [to] simultaneously control[ing] the quality of copper products during the entire process*".²⁰⁵ Similarly, ARP can benefit from Aurubis's strength in manufacturing cakes (a primary input to pre-rolled strip manufacturing). For example, in 2017, in addition to its captive use, Aurubis provided more than [...] tonnes of cakes to third parties, including [...].
- (323) The Notifying Party is of the view that ARP's integration into Aurubis does not provide any competitive advantage to ARP,²⁰⁶ and with respect to cathodes it argues that ARP purchases inputs from other Aurubis divisions or business units at market conditions.²⁰⁷ However, although this would suggest that ARP does not benefit from internalisation of double margins, as suggested in Aurubis's 2016/17 annual report, ARP can still benefit from, for example, "*control[ing] the quality of copper products during the entire process*" or from general preferential conditions that are likely to occur in a vertically integrated company.
- (324) Another advantage of ARP being part of a larger group is that, in contrast to its smaller competitors, it can invest in selected strategic segments of the market. Prior to the Transaction, Aurubis is larger than Wieland, with world-wide revenues

¹⁹⁷ Parties' response to the Commission's request for information RFI 2, ARP replies.

¹⁹⁸ "*Aurubis Rolled Products*", available at Aurubis website: https://www.aurubis.com/binaries/content/assets/aurubis-en/dateien/product-documents/aurubis_rolled-products_en_10_2016_ds.pdf (last access on 28 September 2018) (Id: 1557).

¹⁹⁹ Form CO, paragraphs 73-74.

²⁰⁰ For the avoidance of doubts, it is here clarified that the activities upstream to the rolled product, pre-rolled strip and shape markets remain with Aurubis and are not part of the Transaction.

²⁰¹ Form CO, Annex 2.2b "Annual Report Aurubis", page 56.

²⁰² Form CO, Annex 2.2b "Annual Report Aurubis", pages 7.

²⁰³ Form CO, Annex 2.2b "Annual Report Aurubis", page U2.

²⁰⁴ Form CO, Annex 2.2b "Annual Report Aurubis", page 77.

²⁰⁵ Form CO, Annex 2.2b, "Annual Report Aurubis", page 96.

²⁰⁶ Response to the SO', paragraphs 60-70.

²⁰⁷ Response to the SO', paragraphs 67-70.

exceeding EUR 11 billion,²⁰⁸ compared to Wieland's revenues of about EUR 3 billion.²⁰⁹ This economic magnitude provided ARP with the financial capabilities required, for example, for investing in R&D for developing rolled products for power electronics and connectors.²¹⁰

- (325) Fourth, in the last 10 years, ARP has grown in the rolled products market at a higher rate than Wieland. As shown in Figure 27, in the years 2007 to 2017, both Wieland and ARP increased their sales in the years of increased market demand, and they both outperformed the growth in market demand (they increased their sales at rates higher than the growth rate of the market demand). This indicates that in periods of increased market demand, both Wieland and ARP not only increased their sales, but they also gained market shares from their competitors.
- (326) When comparing the growth in sales of ARP with that of Wieland for more recent years, that is from 2014 to 2017, it appears that [...], particularly in 2017, when ARP's growth was [10-20]%, compared to [5-10]% for Wieland (Figure 27), thus indicating that in recent years ARP has been an important challenger to Wieland's market position and even outperformed Wieland in terms of growth in sales volume.

Figure 27 Growth in volume sales of Wieland and ARP, compared to the market demand growth for the period 2007-2017

[...]

Source: European Commission analysis, based on Parties' response to the Commission's request for information RFI 9 and Parties's response to the Commission's request for information RFI 26 for the Wieland's and ARP's sales, and Form CO, Annex 6.3.a, slide 8 for the market demand.

- (327) Fifth, contrary to the Notifying Party's claims,²¹¹ ARP also has a strong presence outside the EEA and can benefit from high economies of scale, and on intra-group synergies. According to Wieland, ARP is the second largest group in North America, in terms of rolled products' sales.²¹² This makes ARP a company with a well-balanced geographic presence, "*ensuring superior financial performance*",²¹³ and the second largest company in terms of world-wide sales of rolled products, preceded by a South Korean company and followed by Wieland.²¹⁴
- (328) Finally, and importantly, another very strong advantage of ARP is that it can purchase pre-rolled strip, the main production input, at preferential conditions from Schwermetall, in which Aurubis owns 50% of the shares. Aurubis is also entitled to [...] % of Schwermetall's pre-rolled strip capacity. ARP manufactures the pre-rolled strip needed as an input for its rolled products in-house, but it also purchases a large amount ([...] % of its own requirements) from Schwermetall, which is co-owned with Wieland. As explained in Section 6.9, Schwermetall is the largest supplier of pre-rolled strip on the merchant market and the world's leading manufacturer of pre-rolled strip made of different, and sometimes sophisticated, copper alloys.

²⁰⁸ Form CO, Annex 2.2.b "Annual Report Aurubis", page 78.

²⁰⁹ Form CO, Table 1 "Turnover figures".

²¹⁰ Form CO, Annex 2.2b, "Annual Report Aurubis", page 61.

²¹¹ Response to the SO, paragraph 73.

²¹² Form CO, Annex A(73), slide 9.

²¹³ Aurubis' Vision 2025, as reported in its website at <https://www.aurubis.com/en/about-aurubis/vision-2025> (last access 28 September 2018).

²¹⁴ Form CO, Annex 6.3.a, slide 15.

(329) The following analysis in recitals (330) to (344) demonstrates that Schwermetall supplies pre-rolled strip to ARP at [...] lower prices compared to third party customers (merchant market); Schwermetall supplies pre-rolled strip to ARP [...] ²¹⁵ (that is [...]); and that the reduced conversion price that ARP pays to Schwermetall compared to third parties represents an important part of the overall input costs of the downstream rolled products.

(a) Schwermetall's preferential prices for ARP

(330) For each of the years 2015, 2016 and 2017, ²¹⁶ the Commission analysed Schwermetall's conversion turnover ²¹⁷ of sales of pre-rolled strip to ARP [...], ²¹⁸ and compared those values with the conversion turnover of the same alloys sold to the merchant market, on the one hand, and to Wieland, on the other hand. The results of this analysis, presented below (recitals (331) to (334)), demonstrate that ARP pays [...] lower conversion prices for pre-rolled strip purchased from Schwermetall than third parties.

(331) Table 6 shows that, for [...] the years 2015, 2016, and 2017, Schwermetall's conversion turnover was [...] higher for pre-rolled strip sold to the merchant market than to ARP. In 2017, for example, Schwermetall's conversion turnover for sales to ARP was, on average, [...] EUR/tonne, as compared to an average of [...] EUR/tonne for sales to the merchant market, that is, on average, third parties paid a conversion price that was [...] % higher than ARP. Table 6 also shows that Wieland, as a parent company of Schwermetall, enjoys preferential conversion prices which are even lower than those to ARP.

Table 6 Schwermetall's conversion turnover for pre-rolled strip sales to ARP [...], compared to Wieland and to the merchant market

	2015	2016	2017
Sales volume to ARP (tonnes)	[...]	[...]	[...]
Sales volume to Wieland (tonnes)*	[...]	[...]	[...]
Sales volume to third parties (tonnes)*	[...]	[...]	[...]
Conversion turnover –sales to ARP (EUR/tonne)	[...]	[...]	[...]
Conversion turnover –sales to Wieland (EUR/tonne)*	[...]	[...]	[...]
Conversion turnover –sales to third parties (EUR/tonne)*	[...]	[...]	[...]
Conversion turnover –sales to third parties compared to ARP(%)*	[...]%	[...]%	[...]%

* these data are limited to those alloys that are also sold to [...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

²¹⁵ In the Parties' s response to the Commission request for information RFI 9, "follow-up – Profitability of Schwermetall", Contribution to operating Income (COI) is used as a metric for measuring profitability. According to the Notifying Party, the COI is "close to the EBT equivalent but not exactly".

²¹⁶ The Notifying Party noted that all data in the Commission request for information RFI 30, including the sales volumes, were only available on a fiscal year basis, namely: 2015 (FY 2014-2015), 2016 (FY 2015-2016), and 2017 (FY 2016-2017). Only transport costs for the input material provided by ARP and Wieland were given per calendar year.

²¹⁷ Conversion turnover corresponds to the revenue which comes from fabrication of the product. It does not take into account the metal value and does not include any potential metal revenue.

²¹⁸ Data refer only to those alloys that Schwermetall sells to [...]. This means that other alloys that Schwermetall sells to either Wieland or third parties, but not to [...] are not part of this analysis.

- (332) When a more granular analysis is performed, the data shows that ARP enjoys preferential conditions not only for pre-rolled strip overall but also at the alloy group level and particularly as regards HPAs. Such conclusion can be drawn in relation to the merchant market overall and also in relation to each of Schwermetall's customers. Table 7 shows that every third party customer of Schwermetall in the EEA paid [...] more than ARP [...] (with the exception of [Competitor 5], which purchased small quantities of HPA in 2017). These percentage values are even higher if prices paid by ARP [...] are considered. As such, the percentage values in Table 7 are conservative and underestimate the competitive advantage of ARP [...] versus ARP's competitors.

Table 7 Schwermetall's conversion turnover for HPA pre-rolled strip sales to ARP ([...]) compared to Wieland and to third parties in 2017

Customer	Volume (tonne)	Conversion turnover (EUR/tonne)	Conversion turnover versus ARP- [...] (%)
ARP [...]	[...]	[...]	[...]
ARP [...]	[...]	[...]	[...]
Wieland*	[...]	[...]	[...]
[Competitor 5]*	[...]	[...]	[...]
[Competitor 4]*	[...]	[...]	[...]
[Competitor 1]*	[...]	[...]	[...]
[Competitor 3]*	[...]	[...]	[...]
[Competitor 7]*	[...]	[...]	[...]
[Competitor 2]*	[...]	[...]	[...]
Average third parties	[...]	[...]	[...]

* these data are limited to those alloys that are also sold to [...] ARP [...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

- (333) The data submitted by the Notifying Party also shows that, in 2017, [...] % of the HPA pre-rolled strip provided to ARP by Schwermetall consisted in the following alloys: [Alloy 1], [Alloy 2], [Alloy 4], and [Alloy 3]. Out of those alloys, only [Alloy 4] is not sold to third parties. The Commission has also analysed the conversion turnover related to the three alloys which are sold to third parties, as shown in Table 8, Table 9 and Table 10.

Table 8 Schwermetall's conversion turnover for [Alloy 1] pre-rolled strip sales to ARP ([...]), compared to Wieland and to third parties in 2017

[Alloy 1]	Sales (tonnes)	Conv turnover (EUR/ton)	Conv turnover vs. ARP-[...] (%)
ARP [...]	[...]	[...]	[...]
ARP [...]	[...]	[...]	[...]
Wieland	[...]	[...]	[...]
[Competitor 2]	[...]	[...]	[...]
[Competitor 4]	[...]	[...]	[...]
[Competitor 1]	[...]	[...]	[...]
[Competitor 3]	[...]	[...]	[...]
Average third party	[...]	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

Table 9 Schwermetall's conversion turnover for [Alloy 2] pre-rolled strip sales to ARP ([...]), compared to Wieland and to third parties in 2017

[Alloy 2]	Sales (tonnes)	Conv turnover (EUR/ton)	Conv turnover vs. ARP-[...] (%)
ARP [...]	[...]	[...]	[...]
ARP [...]	[...]	[...]	[...]
Wieland	[...]	[...]	[...]
[Competitor 2]	[...]	[...]	[...]
[Competitor 4]	[...]	[...]	[...]
[Competitor 1]	[...]	[...]	[...]
[Competitor 3]	[...]	[...]	[...]
[Competitor 7]	[...]	[...]	[...]
Average third party	[...]	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

Table 10 Schwermetall's conversion turnover for [Alloy 3] pre-rolled strip sales to ARP ([...]), compared to Wieland and to third parties in 2017

[Alloy 3]	Sales (tonnes)	Conv turnover (EUR/ton)	Conv turnover vs. ARP-[...] (%)
ARP [...]	[...]	[...]	[...]
ARP [...]	[...]	[...]	[...]
Wieland	[...]	[...]	[...]
[Competitor 2]	[...]	[...]	[...]
[Competitor 1]	[...]	[...]	[...]
[Competitor 3]	[...]	[...]	[...]
Average third party	[...]	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

- (334) The results of the analysis at the alloy level show that, in 2017, for these alloys ARP's prices were [...] advantageous compared to third parties. For [Alloy 2], for example, third parties paid on average [...] % more than ARP [...]. [Competitor 2] and [Competitor 4] paid, respectively, [...] % and [...] % more than ARP [...]. Therefore, for these HPA alloys, which are required for rolled products in the high-end part of the market, ARP currently enjoys [...] preferential conditions.
- (335) These elements show that ARP's [...] plants purchase pre-rolled strip at [...] lower prices compared to third party customers. Therefore, ARP, compared to its competitors in the high-end, enjoys a significant competitive advantage regarding its input cost for the alloys sourced from Schwermetall. Only Wieland benefits from comparable input prices.
- a. Contribution to operating income (COI) from pre-rolled strip sold to ARP, compared to those sold to third parties
- (336) For the years 2015, 2016, and 2017, the Commission analysed Schwermetall's contribution to operating income (COI) from pre-rolled strip sold by Schwermetall to ARP, and compared those values to the respective COI of sales made to the merchant market and to Wieland (Table 11). Table 11 shows that Schwermetall sold pre-rolled strip to ARP (and to Wieland) at [...], whereas sales to third parties had [...]. This means that Schwermetall supplied ARP and Wieland at a price [...] and [...] higher conversion prices to third parties. In fact, the prices charged to third parties were high enough [...] for Schwermetall overall, [...] supplies to Wieland and ARP.

Table 11 Schwermetall's contribution to operating income (COI) of pre-rolled strip sales to ARP ([...]), compared to Wieland and to the merchant market

	2015	2016	2017
Sales volume to ARP (tonnes)	[...]	[...]	[...]
Sales volume to Wieland (tonnes)	[...]	[...]	[...]
Sales volume to third parties (tonnes)	[...]	[...]	[...]
COI –sales to ARP (EUR/tonne)	[...]	[...]	[...]
COI –sales to Wieland (EUR/tonne)	[...]	[...]	[...]
COI –sales to third parties (EUR/tonne)	[...]	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

(337) Similarly to the conversion turnover analysis above (recital (336)), the Commission has assessed the COI for HPAs overall and for the alloys which are sold to Wieland and ARP and to third parties. The results of the analysis for HPAs overall and per single alloy are provided in Table 12 to Table 15:

Table 12 Schwermetall's COI of HPA pre-rolled strip sales to ARP (...), compared to Wieland and to third parties in 2017

Customer	Volume (tonne)	COI (EUR/tonne)
ARP [...]	[...]	[...]
ARP [...]	[...]	[...]
Wieland*	[...]	[...]
[Competitor 5]	[...]	[...]
[Competitor 4]	[...]	[...]
[Competitor 1]	[...]	[...]
[Competitor 3]	[...]	[...]
[Competitor 7]	[...]	[...]
[Competitor 2]	[...]	[...]
Average third party	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

Table 13 Schwermetall's COI of [Alloy 1] pre-rolled strip sales to ARP (...), compared to Wieland and to third parties in 2017

<i>[Alloy 1]</i>	Sales (tonnes)	COI (EUR/ton)
ARP [...]	[...]	[...]
ARP [...]	[...]	[...]
Wieland	[...]	[...]
[Competitor 2]	[...]	[...]
[Competitor 4]	[...]	[...]
[Competitor 1]	[...]	[...]
[Competitor 3]	[...]	[...]
Average third party	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

Table 14 Schwermetall's COI of [Alloy 2] pre-rolled strip sales to ARP ([...]), compared to Wieland and to third parties in 2017

<i>[Alloy 2]</i>	Sales (tonnes)	COI (EUR/ton)
ARP [...]	[...]	[...]
ARP [...]	[...]	[...]
Wieland	[...]	[...]
[Competitor 2]	[...]	[...]
[Competitor 4]	[...]	[...]
[Competitor 1]	[...]	[...]
[Competitor 3]	[...]	[...]
[Competitor 7]	[...]	[...]
Average third party	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

Table 15 Schwermetall's COI of [Alloy 3] pre-rolled strip sales to ARP ([...]), compared to Wieland and to third parties in 2017

<i>[Alloy 3]</i>	Sales (tonnes)	COI (EUR/ton)
ARP [...]	[...]	[...]
ARP [...]	[...]	[...]
Wieland	[...]	[...]
[Competitor 2]	[...]	[...]
[Competitor 1]	[...]	[...]
[Competitor 3]	[...]	[...]
Average third party	[...]	[...]

Source: European Commission, based on data provided in the Parties' response to the Commission's request for information RFI 30.

- (338) The results of the analysis conducted at the alloy level show that also for the [...] profitable HPA alloys, and in particular for the alloy [Alloy 2], the commercial conditions that Schwermetall provided to ARP were so advantageous that they [...] for Schwermetall.

Importance of the preferential economic condition for ARP with respect to the final rolled product sold downstream

- (339) In its response to the Second LoF, the Notifying Party considered that preferential conditions enjoyed by ARP and the intragroup pricing of pre-rolled strip are irrelevant in terms of ARP's competitiveness and "any preferential conditions

granted to the parent companies do, on balance, not constitute an advantage since low prices [...] reduce their own profits [...]”.²¹⁹ The Notifying Party also argues that any preferential conditions for ARP versus its competitors should have resulted in a larger market presence of ARP in the rolled products market.²²⁰

- (340) In this Section, the Commission sets out its analysis as to how the evidence presented in (recitals (331) to (338)) supports the conclusion that ARP benefits [...] from being vertically integrated with Schwermetall and that Schwermetall is essential for the viability and competitiveness of [...] plants.
- (341) In this regard, Table 6 shows that in 2017 ARP purchased pre-rolled strip from Schwermetall at an average price of [...] EUR/tonne, that is to say, [...] EUR/tonne less than the average merchant market price. Although it is very difficult to assess the overall costs of manufacturing rolled products with pre-rolled strip from Schwermetall (these costs vary across the different types of rolled products) the Commission is able to estimate the minimum economic advantage that ARP has compared to third parties that purchase pre-rolled strip from Schwermetall. This advantage is based on conservative assumptions. Under realistic market conditions, it is likely that ARP’s competitive advantage would be [...] larger.
- (342) The first conservative assumption is that the manufacturing cost of rolled products is equal to their fabrication prices, and the importance of the pre-rolled strip cost is assessed versus the selling price, and not versus the manufacturing cost of rolled products (the proportion of the pre-rolled strip cost as part of the overall cost is therefore smaller).
- (343) The second conservative assumption is that all pre-rolled strip purchased by ARP from Schwermetall is used for manufacturing rolled products for connectors and for stampers. Under this assumption, the weight of the advantage is referred to a segment with higher conversion prices and therefore, such a weight is smaller than in real market conditions.
- (344) Under these two conservative assumptions, the conversion price of rolled products varies between [...] EUR/tonne (Figure 18), and [...] EUR/tonne (Figure 20). Therefore, ARP access to Schwermetall pre-rolled strip provides ARP with a cost advantage on the final product of [...]. This advantage is even higher when, more realistically, only the price advantage of ARP in HPA pre-rolled strip used for high-end rolled products is considered. If the alloy [Alloy 2] is considered, the cost advantage of ARP compared to third parties is [...] EUR/tonne, which translates into a cost advantage in downstream rolled product of [...].
- (345) The Commission concludes that by purchasing pre-rolled strip from Schwermetall ARP has a minimum cost advantage of [...] compared to other market participants purchasing pre-rolled strip from Schwermetall. As explained in recital (341), the Commission considers that it is very likely that the cost advantage is higher. In the rolled products market, which is a market for semi-finished products characterised by relatively low margins, cost represents an important competitive element. Therefore, ARP’s cost advantage of up to around [...] % on rolled product price is a significant advantage over its competitors. Contrary to the Notifying Party’s claim, the Commission considers that, in accordance with well-established industrial economic theories, the internalisation of double margins does generate efficiencies, and

²¹⁹ Response to the Second LoF, paragraphs 3-8.

²²⁰ Response to the Second LoF, paragraph 9.

therefore it provides both ARP and Wieland with a competitive advantage over their competitors. Secondly ARP's competitiveness does appear to be reflected in its presence in the rolled products market, because, as documented in Sections 6.2.2 and 6.2.3, ARP has managed to increase its market presence in the rolled products market significantly in recent years. The Commission concludes, therefore, that the purchase of pre-rolled strip from Schwermetall provides ARP with an important competitive advantage over its competitors, and significantly contributes to ARP's ability to compete with Wieland in the downstream market for rolled products.

(346) In the light of the above, the Commission considers that prior to the Transaction ARP is an important, if not the most important, competitor of Wieland in the rolled products market.

6.3.2.2. The Transaction would eliminate an important and close competitor of Wieland in key segments

(347) Although, as indicated in Section 6.3.2.1, ARP is growing in the rolled products market overall, it is also an important and close competitor of Wieland in key segments of the market and exerts significant competitive constraints on Wieland.

(348) Firstly, ARP is a growing competitor to Wieland in the strategically important segment of HPA. As indicated in Table 4, in the period 2015-2017, ARP increased its sales of HPA from [...] tonnes, that is a growth of [...]. In the same period, Wieland's sales of HPA grew from [...] tonnes, that is an increase of [...]. According to the Commission's market reconstruction for HPA, the total EEA sales of HPA in the same period grew from [...] tonnes, that is an increase of [...].

(349) When comparing the increase in sales of Wieland and ARP in HPA with the increase of the HPA segment size, it appears that both Wieland's and ARP's growth were [...]. ARP's similar [...], provides evidence of the important market presence of ARP.

(350) Secondly, in addition to HPA, ARP is also an important competitor to Wieland in a number of other strategically important alloys, such as bronze (Table 5) and brass (Table 16, which are also used for connectors.

Table 16 EEA brass sales and segment shares in volume for the years 2015 to 2017*

	2015		2016		2017	
	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share
Wieland	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
ARP	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%
KME /MKM**	[...]	[10-20]%	[...]	[10-20]%	[...]	[20-30]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Diehl	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
EGM	[...]	[10-20]%	[...]	[5-10]%	[...]	[5-10]%
Kemper	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Messingwerk	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
[Competitor 1]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 2]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 3]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 4]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%

	2015		2016		2017	
	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share	Sales (tonnes)	Segment share
[Competitor 5]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 6]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Altek	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Sevojno	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Other imports	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total market	[...]	100.0%	[...]	100.0%	[...]	100.0%

* the Commission anonymised six market participants for better preserving their business secrets. These market participants are (here in alphabetical order, which does not correspond to the order given in the table): Azienda Metalli Laminati, Griset, Med Povrly, Silmet, WMD, WMN.

** production volume of KMD is included in KME/MKM' s production volume.

Source: European Commission, based on market reconstruction data.

- (351) Particularly in brass, ARP managed to increase its market segment shares from [10-20]% in 2015 to [10-20]% in 2017, with an increase in sales of about [50-60]%, that is from [...] tonnes in 2015 to [...] tonnes in 2017. The increase in ARP's segment share resulted in a decrease in Wieland's segment share, which, in the same period decreased from [20-30]% to [20-30]%.
- (352) A more granular view of the segments at the individual alloy level confirms that ARP is a close and important competitor of Wieland in the high-end part of the rolled products market, whereas only limited competition occurs between Wieland and ARP for more commoditised alloys.
- (353) The Notifying Party submitted sales data for Wieland's and ARP's most sold alloys in 2017 in the EEA,²²¹ and the Parties provided estimates of the market segment sizes of each of the alloys where sales overlap.²²² By dividing the sales of the overlapping alloys by their respective segment sizes, the Commission calculated alloy shares of the Parties for these alloys (Table 17).

Table 17 Sales, segment size and related volume shares of the Parties' most sold alloys in 2017 in the EEA

Alloy name	ARP sales in 2017 (tonnes)	Wieland sales in 2017 (tonnes)	Segment size in 2017 (tonnes)	ARP segment share (%)	Wieland segment share (%)	Combined segment share (%)
Alloy 3	[...]	[...]	[...]	[10-20]%	[30-40]%	[40-50]%
Alloy 5	[...]	[...]	[...]	[20-30]%	[10-20]%	[40-50]%
Alloy 2	[...]	[...]	[...]	[5-10]%	[30-40]%	[40-50]%
Alloy 6	[...]	[...]	[...]	[5-10]%	[30-40]%	[40-50]%
[...]	[...]	[...]	[...]	[10-20]%	[20-30]%	[30-40]%

²²¹ Form CO, Annex 14_Q11a and Annex 15_Q11a.

²²² Parties' response to the Commission's request for information RFI 8, question 4.

Alloy name	ARP sales in 2017 (tonnes)	Wieland sales in 2017 (tonnes)	Segment size in 2017 (tonnes)	ARP segment share (%)	Wieland segment share (%)	Combined segment share (%)
[...]	[...]	[...]	[...]	[10-20]%	[10-20]%	[30-40]%
[...]	[...]	[...]	[...]	[10-20]%	[10-20]%	[30-40]%
[...]	[...]	[...]	[...]	[20-30]%	[10-20]%	[30-40]%
[...]	[...]	[...]	[...]	[10-20]%	[0-5]%	[10-20]%

Source: European Commission, based on data of the Parties' response to the Commission's request for information RFI 8, question 4, and of Form CO Annexes 14_Q11a and 15_Q11a.

- (354) The alloys where the combined segment shares of Wieland and ARP are [40-50]% or higher, namely [Alloy 3], [Alloy 5], [Alloy 2], and [Alloy 6] (Table 17) are all important alloys for manufacturing connectors.²²³ In contrast, Wieland and ARP have limited overlap in Cu-DHP (Table 17), which is a more commoditised pure copper product, and where Wieland has low market presence.
- (355) As shown in Section 6.3.2.1, both Wieland and ARP purchase pre-rolled strip of [Alloy 3] and [Alloy 2] from Schwermetall at preferential conditions, and therefore both have a competitive advantage over their competitors that purchase pre-rolled strip from Schwermetall at market price. Furthermore, ARP's preferential access to Schwermetall increases ARP's ability to compete with Wieland, particularly in these key alloys.
- (356) Thirdly, if market segments by field of use are considered, ARP appears to be an important and growing competitor to Wieland in key segments such as connectors and stampers.
- (357) In the course of the Phase II investigation, the Commission collected Wieland's and ARP's rolled product sales data broken down industrial sector in which the rolled product is used and by field of use (the more specific application within the industrial sector). In addition to their own sale volumes, the Notifying Party also provided an estimate of the total sizes of each field of use in the EEA. The Commission calculated the segment shares of Wieland and ARP per industrial sector and field of use based on the Notifying Party's estimations. The results of the estimated shares segmented by field of use for 2017 are set out in Table 18. The column "segment size (%)" indicates the size of the segment relative to the sum of all estimated segments, as provided by the Notifying Party.

²²³ Wieland's website, leaflet on strips for connectors, https://www.wieland.com/mediaPool/content/media/en/prospekte/baender_und_bleche_1/baender_fuer_steckverbinder.pdf, (last access on 28 September 2018) (Doc Id: 1558).

Table 18 EEA market share of Wieland and ARP by industrial sector and field of use for the year 2017²²⁴

Industrial sector	Field of use	Wieland (%)	ARP (%)	Combined (%)	Segment size (%)
Automotive industry	Brazing foil	[0-5]	[10-20]	[10-20]	[0-5]
Automotive industry	Connector stamping automotive	[20-30]	[10-20]	[40-50]	[5-10]
Automotive industry	Connector automotive industry	[50-60]	[5-10]	[50-60]	[10-20]
Automotive industry	Cooler belt system	[0-5]	[20-30]	[20-30]	[0-5]
Automotive industry	Reroll connector	[90-100]	[0-5]	[90-100]	[0-5]
Building/ construction	Boiler	[0-5]	[20-30]	[20-30]	[0-5]
Building/ construction	Heat exchanger	[0-5]	[60-70]	[70-80]	[0-5]
Building/ construction	Roof, faced, downpipe	[0-5]	[0-5]	[0-5]	[10-20]
Building/ construction	Solar thermal energy	[0-5]	[0-5]	[0-5]	[0-5]
Electrical engineering	Busbars	[0-5]	[0-5]	[0-5]	[0-5]
Electrical engineering	Connection and contact technology	[30-40]	[5-10]	[40-50]	[0-5]
Electrical engineering	Connector for industrial application/ usage	[20-30]	[80-90]	[90-100]	[0-5]
Electrical engineering	Electrical engineering products	[20-30]	[50-60]	[70-80]	[0-5]
Electrical engineering	Electrical installation material	[10-20]	[0-5]	[10-20]	[0-5]
Electrical engineering	Power cable	[0-5]	[0-5]	[0-5]	[0-5]
Electrical engineering	Switch and relay	[30-40]	[0-5]	[30-40]	[0-5]
Electrical engineering	Switch devices	[20-30]	[0-5]	[20-30]	[0-5]
Electrical engineering	Transformers	[0-5]	[0-5]	[5-10]	[0-5]
Electronic engineering	Circuit boards	[0-5]	[0-5]	[0-5]	[0-5]
Electronic engineering	Connector computer	[50-60]	[0-5]	[50-60]	[0-5]
Electronic engineering	Connector consumer goods	[30-40]	[20-30]	[50-60]	[0-5]
Electronic engineering	DCB-substrates	[0-5]	[90-100]	[90-100]	[0-5]
Electronic engineering	Discrete component	[90-100]	[0-5]	[90-100]	[0-5]
Electronic engineering	Heat sinks & base plates	[0-5]	[80-90]	[80-90]	[0-5]
Electronic engineering	Leadframe LED	[0-5]	[0-5]	[0-5]	[0-5]
Electronic engineering	Leadframe Standard	[70-80]	[0-5]	[70-80]	[0-5]
Electronic engineering	Re-rollers semiconductors	[90-100]	[0-5]	[90-100]	[0-5]
Others/ Metal goods	Ammunition	[20-30]	[5-10]	[20-30]	[5-10]
Others/ Metal goods	Clothing	[10-20]	[40-50]	[60-70]	[0-5]
Others/ Metal goods	Coin	[0-5]	[0-5]	[0-5]	[0-5]
Others/ Metal goods	Decorative/ jewellery	[40-50]	[0-5]	[40-50]	[0-5]
Others/ Metal goods	Keys, locks, fittings	[40-50]	[0-5]	[40-50]	[0-5]
Others/ Metal goods	Lamps, lightning	[10-20]	[0-5]	[10-20]	[0-5]
Others/ Metal goods	Metal goods	[10-20]	[30-40]	[40-50]	[0-5]

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The data provided by Wieland and ARP and reproduced here, contains some minor inconsistencies, such as segment share exceeding 100% for slitting center, and the inclusion of sales to re-rollers, which, according to the product market definition, should be considered pre-rolled strips. Furthermore, the shares of Wieland and ARP do not sum to 105 for slitting centre due to rounding up rules for their sales shares. The Notifying Party seems to have underestimated the size of slitting centres segment, which captures the sales where the end of use application is unknown to the Notifying Party. Hence, the total size of such sales in the market may not be clear to the Notifying Party. Nevertheless, these minor inconsistencies do not alter the main findings of the analysis conducted in this section.

Industrial sector	Field of use	Wieland (%)	ARP (%)	Combined (%)	Segment size (%)
Others/ Metal goods	Musical instruments	[10-20]	[0-5]	[10-20]	[0-5]
Others/ Metal goods	Sanitary accessories	[20-30]	[0-5]	[30-40]	[0-5]
Others/ Metal goods	Stamping	[20-30]	[0-5]	[30-40]	[5-10]
Others/ Metal goods	Watches	[10-20]	[0-5]	[10-20]	[0-5]
Telecommunications	Coaxial cable	[0-5]	[10-20]	[10-20]	[0-5]
Telecommunications	Connector telecommunications	[10-20]	[0-5]	[10-20]	[0-5]
Telecommunications	Submarine cable	[0-5]	[90-100]	[90-100]	[0-5]
Trade/ SC	Re-rollers	[0-5]	[20-30]	[20-30]	[0-5]
Trade/ SC	Slitting center	[5-10]	[90-100]	105	[5-10]
Trade/ SC	Trade	[20-30]	[0-5]	[20-30]	[0-5]

Source: European Commission, based on the Parties' response to the Commission's request for information RFI 9, Annex 1.

- (358) As shown in Table 18, it appears that Wieland and ARP are particularly strong in some fields of use which the Commission considers to be situated in the high-end part of the rolled products market. These fields of use include the Connector for Automotive industry , with high combined shares ([50-60]%) and the Connector stamping automotive ([40-50]%). These are estimated by the Notifying Party as the largest and the third largest segments in rolled products, respectively. As explained further in Section 6.3.2.4, ARP is currently engaged in growing its presence in the segment Connector automotive industry, thus its segment share of [5-10]% provides only partial information regarding the competitive constraint that it exerts on Wieland. However, in other segments its presence is already visible. In the segment Connector stamping automotive, for example, its segment share is already [10-20]% compared to Wieland's [20-30]%.
- (359) Wieland and ARP are also estimated to have high shares in the Electrical engineering industrial sector, with high combined shares in Connectors for industrial application/usage ([90-100]%), Connection and contact technology ([40-50]%).
- (360) Fourthly, Wieland appears to be well-aware of the likelihood of ARP further increasing its market position in high-end products, and thus constraining and challenging Wieland's position.
- (361) For example, Wieland regularly conducts a so-called Customer Benefit Analysis ('CBA'), where it allocates scores to itself and to its main competitors based on a number of customer benefits, such as the benefits derived from the product quality, from the price, from the delivery reliability, etc.²²⁵ In the CBA relative to connectors in fiscal year 2014/2015, Wieland gives itself a score of [...], and gives ARP a score of [...],²²⁶ which indicates that Wieland considers ARP a close competitor. Looking forward, Wieland considers that by fiscal year 2019/2020, ARP will be an even closer competitor to Wieland in this sector, because ARP's score will increase to [...], and Wieland's score will increase to [...],²²⁷ thus further reducing the difference between the two.

²²⁵ Parties' response to the Commission's request for information RFI 20, question 1.

²²⁶ Parties' response to the Commission's request for information RFI 20, question 1, [Annex 1].

²²⁷ Parties' response to the Commission's request for information RFI 20, question 1, [Annex 3].

- (362) Increased competitive pressure from ARP in connectors (and reduced pressure from KME/MKM) is also reported by Wieland when analysing one of its main customers in the connectors business, namely [...]. As Figure 28 shows, [...] to Wieland as the supplier for a particular project and is evaluating whether to switch from KME/MKM to Wieland for another project. In both cases, ARP is considered by Wieland as the (already qualified) competitor.

Figure 28 Wieland's analysis of projects with its customer [...]

[...]

Source: Parties' response to the Commission's request for information RFI 24, [Annex 6], slide 16.

- (363) When looking at Wieland's CBA documents for other strategically important segments, the situation appears to be similar to that for connectors. For rolled products for stampers, for example, the gap between Wieland and ARP is considered to have reduced from [...] %²²⁸ [...] to [...] % in fiscal year 2020/2021.²²⁹ Also, another document produced by Wieland in its ordinary course of business (Figure 29),²³⁰ shows that Wieland considers ARP and KME/MKM as its main competitors in stampers, but estimates that the market presence of ARP is higher than KME/MKM's.

Figure 29 Wieland's analysis of the stampers segment

[...]

Source: Parties' response to the Commission's request for information RFI 24, [Annex 12], slide 5 (emphasis added by the Commission).

- (364) The fact that Wieland considers ARP to be a growing challenger to its position in the high-end part of the market is also confirmed by a document produced by Wieland for an extraordinary supervisory board meeting on the Transaction, where it considers the Transaction as an opportunity for its long-term strategy ([...]) and at the same time as a defensive strategy to prevent ARP from transforming itself into a player active in the high-end part of the market (Figure 30).

Figure 30 Wieland's assessment of the Transaction's benefits

[...]

Source: Form CO, Annex 5.4.b, slide 25 (emphasis added by the Commission)²³¹

- (365) The fact that Wieland considers ARP to be a significant threat to its activities is also confirmed by a document produced by Wieland's executive board in its report to Wieland's supervisory board which viewed a purchase of ARP in the next two years as unlikely due to antitrust issues.²³²
- (366) Fifth, both ARP and Wieland regard themselves as closer competitors to each other than to other EEA competitors, such as KME/MKM.

²²⁸ These values in percentage are calculated by Wieland in the CBA for Stampers and refers to the difference between the scores given to ARP and to Wieland.

²²⁹ Parties' response to the Commission's request for information RFI 8, question 2 [Annex 5].

²³⁰ Prepared for an "Off-site Workshop" (see description in footnote 67).

²³¹ Translation of the German original (solely the highlighted text passage): "[...]".

²³² Form CO, Annex 5.4.c, slide 8 (slide 8 is numbered as 64), German original reads "Etwaige Transaktion mit Aurubis in 2 Jahren unwahrscheinlich, aus kartellrechtlichen Gründen".

- (367) As indicated in Figure 10 in recital (262), when evaluating the position of its competitors, ARP considers Wieland closer to itself, than to KME/MKM, with respect to a number of different criteria, and on an overall basis.
- (368) Similarly, as already shown in Figure 28, Figure 30, and recitals (362)-(363), Wieland considers ARP to be a closer competitor, compared to, for example KME/MKM. In addition, in the connectors CBA for fiscal year 2014/2015, Wieland gave itself a score of [...], and gave a score of [...] to ARP,²³³ while KME/MKM was given a score of [...].²³⁴ Wieland considers that, by fiscal year 2019/2020, the scores of both Wieland and ARP will increase, while KME/MKM's will remain unchanged. This indicates that Wieland envisages even closer competition with ARP and reduced competition with KME/MKM. Similar conclusions can be drawn when considering Wieland's CBA documents relating to another key market segment, stampers.²³⁵
- (369) In the Notifying Party's response to the SO, paragraph 77, it is stated that CBA documents do not constitute reliable evidence that Wieland is aware of ARP's market position. However, the Notifying Party itself recognises that the CBA documents are an "[...] *instrument of the Sales & Marketing managers [...]*" used to "[...] *assess the competitive position of Wieland in certain sales areas and the assumed development of the position in five years*";²³⁶ they are prepared by Wieland's employees with very good knowledge of the rolled products market and of its main market participants' competitive position. Consequently, and as explained in Section 4.2.3 for internal documents in general, the Commission considers that the CBA documents are a legitimate and credible source of information on which the Commission is entitled to rely.
- (370) Sixth, the preliminary view of the Commission on the importance of ARP as a competitor of Wieland is also supported by responses received from market participants. The majority of participating manufacturers have indicated that ARP and Wieland compete closely with one another.²³⁷ While one participant explained that Wieland and ARP are "*Actual competitors in comparable markets*"²³⁸, other respondents relativized it implying that this only concerns certain segments of the market:
- "Wieland and ARP do overlap in copper rolled products. However, ARP produces copper rolled products for building applications that do not overlap with Wieland"*;²³⁹
- "product Portfolios are more or less the same"*.²⁴⁰
- (371) A large majority of customers of rolled products responding to the Commission's questionnaires also considered ARP and Wieland to be close competitors.²⁴¹ One

²³³ Parties' response to the Commission's request for information RFI 20, question 1 [Annex 1].

²³⁴ Parties' response to the Commission's request for information RFI 20, question 1 [Annex 2].

²³⁵ Parties' response to the Commission's request for information RFI 20, question 1 [Annex 14].

²³⁶ Parties' response to the Commission's request for information RFI 20, question 1.

²³⁷ Questionnaire Q2 to Competitors of Rolled Copper Products, question 39.

²³⁸ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 39.1 (Id 158).

²³⁹ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 39.1 (Id 176).

²⁴⁰ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 39.1 (Id 173).

²⁴¹ Questionnaire Q1 to Customers of Rolled Copper Products, question 40.

customer said that *"Weiland [sic] offers some exclusive alloy and can't be substituted completely [sic]; by acquisition of Aurubis the market will lose [sic] a strong competitor [sic] for Wieland."*²⁴² Another added *"The proposed transaction would lead to the removal of the important competitor Aurubis. Wieland, known as a supplier with a general high price level and its own distribution network, might raise its prices post-merger due to its higher market power and absent the competitive pressure of Aurubis."*²⁴³ As in the case of the competing manufacturers, a number of customers did see close competition between ARP and Wieland but limited it to certain segments of the market:

*"both have modern manufacturing but focus on slightly different markets";*²⁴⁴

*"Wieland and ARP are close competitors in some alloys";*²⁴⁵

*"Mainly AURUBIS and WIELAND are direct competitors on distribution and partially on production".*²⁴⁶

- (372) According to some respondents, the overlap can be identified in the high-end of the rolled market. Two respondents stated that *"Wieland and Aurubis are currently the only suppliers to the DBC²⁴⁷ market",*²⁴⁸ *"Whilst Aurubis offers the full product portfolio (commodities and specialties), Wieland is focused on high-value products. Accordingly Aurubis, in particular through its German Aurubis Stolberg subsidiary, can be considered a close competitor to Wieland with regard to high-value products."*²⁴⁹ and *"the possible sources of the trips for a specific connector for electrical cars will be reduced to a monopolistic situation".*²⁵⁰
- (373) In the important connectors segment the majority of participants in the market investigation identified Wieland and ARP as close competitors.²⁵¹
- (374) In the response to the SO,²⁵² the Notifying Party claimed that ARP is not the closest competitor of Wieland and that the Commission overstates the closeness of competition between the Parties.
- (375) Contrary to the Notifying Party's contentions, the Commission has not considered ARP to be the closest competitor of Wieland. Rather, and in line with the position expressed in the Horizontal Merger Guidelines that *"[t]he higher the degree of substitutability between the merging firms' products, the more likely it is that the*

²⁴² Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1 (Id 1278).

²⁴³ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1 (Id 164).

²⁴⁴ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 40.1 (Id 77).

²⁴⁵ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 40.1 (Id 213).

²⁴⁶ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 40.1 (Id 1239).

²⁴⁷ DBC stands for (substrates for) direct bonded copper. Alternatively it is also known as DCB (Direct Copper Bond). Further details on DCB and on Wieland's and ARP's positions in this market segment is provided in Section 6.3.2.5.

²⁴⁸ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question (Id 167).

²⁴⁹ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 40.1 (Id 164).

²⁵⁰ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.2 (Id 1278).

²⁵¹ Questionnaire Q4.2 to Customers of Rolled Copper Products – Connectors, questions 9.1.1 and 9.1.2.

²⁵² Response to the SO, section VI.

merging firms will raise prices significantly” for the reasons set in recitals (347)-(373) (and consistently with paragraphs (226)-(237) of the SO) the Commission considers that, prior to the Transaction, ARP is an important, if not the most important competitor, of Wieland in the rolled products market. In the light of the above, the Commission considers that the Transaction eliminates an important and close competitor of Wieland, in key market segments. This conclusion remains valid regardless of whether ARP is Wieland’s *closest* competitor in these segments.

6.3.2.3. Profitability analysis confirms that ARP is profitable and in particular in those segments where it competes closely with Wieland

- (376) In the last fiscal year of 2016/2017, ARP was profitable at both EBITDA and EBT levels. ARP estimated that the business unit of rolled products earned EUR [...] million in EBITDA terms and EUR [...] million in EBT terms in the EEA. These figures translate, respectively, to [...] % and [...] % of ARP’s conversion revenues for 2016/2017. Although the Notifying Party criticised the Commission’s use of conversion revenues when analysing ARP’s and Wieland’s profitability, the Commission believes that it is a preferred measure as it does not take into account the metal value which is eventually passed on to consumers. In the view of the Commission, comparing total revenues of different companies may be misleading as they have different practices of internal scrap recycling and also different shares of customers which are served on a tolling basis.²⁵³ Hence, the use of conversion revenues is a more appropriate measure for the purpose of comparative analysis.
- (377) Despite a successful year 2016/2017, ARP [...] in the two previous fiscal years, of 2014/15 and 2015/16 ([...]). Based on ARP’s estimates for the EEA, EUR [...] and EUR [...] were recorded at EBITDA level for the fiscal years 2014/15 and 2015/16, respectively. The Commission requested the profitability data from ARP segmented by ARP’s internal business units, namely Building & Construction, Cable, Distribution, Electrical Industry, Electronic Devices, Engine Cooling, General Engineering, Internal, and Ordnance. Data analysis revealed that in fiscal year 2016/2017, Electronic Devices’ share of EBITDA was [...] %, [...]. Based on the explanations in Annex 6.3.c to the Form CO which matched Wieland’s and ARP’s segments based on the same field of use, the Electronic Devices segment covers Connectors and Stamping for Automotive, Consumer electronic industry and other products, [...]. The segment of Electrical Industry was [...] to 2016/2017 EBITDA for ARP accounting for [...] % of the total EBITDA. Based on the explanations in Annex 6.3.c to the form CO, Electrical Industry also covers connectors and stamping for the automotive industry, as well as connectors for wiring devices and connectors for construction. The sales volume in the Electronic Devices and Electrical Industry segments for ARP grew by [20-30] % and [20-30] % from 2014/15 to 2016/17, respectively. Therefore, the overall sales volume growth of [20-30] % was partly driven by the increased sales in these segments.
- (378) The growth in EBITDA from 2014/15 to 2016/17 was also [...] in these segments: [40-50] % growth in Electrical Industry from EUR [...] million in 2014/2015 to EUR

²⁵³ Tolling business relates to the customers which provide the metal to a rolled products manufacturer. For this reason, the total revenue coming from these customers would be lower as it would only reflect conversion revenue, whilst under the arrangement where the metal is also provided by the rolled products manufacturer, the total revenue would be higher due to the addition of the metal value. Therefore, even if different firms earned the same conversion revenue for identical service, this would not be reflected in the total revenue as it is a sum of both conversion and metal revenues.

[...] million in 2016/17; and even a larger growth in [...] – from loss of EUR [...] million in 2014/2015 to positive EBITDA of EUR [...] million.

- (379) The Notifying Party's criticised the Commission's analysis on the basis that if EBITDA per tonne is taken into account, the segments of Electral Industry and Electronic Devices only rank [...] segments and that Building & Construction Other, Ordnance, and Engine Cooling "[...]"²⁵⁴ While the Commission acknowledges that that statement is correct, these segments are significantly smaller in terms of sales volumes of ARP, and therefore, the total profits coming from the segments of Electronic Devices and Electrical Industry are much larger when sales volumes are taken into account.²⁵⁵
- (380) The Commission also analysed the contribution margin data provided by the Parties, which was based on Wieland's Field of Use applications as per Annex 6.3.c to the Form CO.²⁵⁶ The Commission identified the general field of connectors which are used in different segments: Electrical Engineering (Connectors for industrial application/ usage), Telecommunications (Connector telecommunications), Electronic engineering (Connector computer and Connector consumer goods) and Automotive industry (Connector automotive industry, Connector Stamping automotive and Reroll Connector). This group, that is to say, the general field of connectors, contributed to [...] % of ARP's total contribution margin and to [...] % of ARP's sales volume in calendar year 2017. The volume growth from 2015 to 2017 in this group was larger ([...] %) than the total volume growth across all fields of use ([...] %). Similarly, the growth of contribution margin for this group of connectors as field of use was also higher than the average – [...] % for connectors versus [...] % for all fields of use combined from 2015 to 2017. The Commission notes that the largest field of use ([...] % in terms of contribution margin and [...] % in terms of sales volume) was sold to [...], where ARP is [...]. The second, third and fourth largest fields of use to the total contribution margin for ARP were Connector Stamping, Cooler belt system (both in Automotive industry) and Connectors for industrial application/usage.
- (381) The Notifying Party argued that as a result of ARP [...], the general development of profitability should not be compared with that of Wieland. Furthermore, the Notifying Party claimed that it was likely that some other market participants had also recorded an improvement in results in the same period of time.²⁵⁷ The Commission notes that the profitability analysis was performed on the internal

²⁵⁴ Response to the SO, paragraph 79.

²⁵⁵ For example, total sales in tonnes of B&C (Building & Construction) Other, Engine Cooling, and Ordnance in 2017 were smaller than those in Electronical Industry alone, according to data submitted in the Parties' response to the Commission request for information RFI 9, Annex 4 updated on 07 September 2018.

²⁵⁶ The analysis is based on data received in the Parties' response to the Commission's request for information RFI 9, Annex 4 updated on the 7th of September 2018.. Please note that in Parties' response to the Commission's request for information RFI 26, ARP noted that figures provided in the Parties' response to the Commission's request for information RFI RFI 9 constitute conversion revenues as defined by ARP (i.e. including the difference between internal and customer-specific metal value), and would be slightly lower if Wieland's methodology was applied. Furthermore, ARP's figures provided for the total market reconstruction are based on calendar years whereas profitability figures (including conversion revenues) in the Parties' response to the Commission's request for information RFI 9 were given for financial years. The data do not include sales of Buffalo in the EEA and the minor exports of Pori to Réunion and some minor volumes without alloy information as explained in the Parties' response to the Commission's request for information RFI 26.

²⁵⁷ Responseto the SO, paragraph 79.

business unit level for both ARP and Wieland, which allowed the Commission to analyse segment specific growth and contribution to each of Wieland's and ARP's general profitability. Rather than focusing on static profits data for one year, the Commission analysed the dynamics in sales and profit changes in the period 2014 - 2017.

- (382) As a conclusion, the Commission notes that both Wieland and ARP recently experienced strong profitability in the high-end part of the market that in particular includes connectors, stampers and possibly other applications relevant for electrical and electronic end uses. Both Wieland and ARP improved their profitability in these fields which contributed significantly to driving both companies' overall profitability and sales volume growth. As such, the results of the profitability analysis are consistent with Wieland and ARP being close competitors as their most successful [and growing] business units relate to the same field of use, such as connectors.
- 6.3.2.4. ARP has taken numerous initiatives to grow in particular in segments where it competes with Wieland
- (383) ARP is engaged in a number of activities to increase its sales, reduce its operational costs, and, eventually, increase its profits. Those activities are aimed at making ARP even stronger and will result in making ARP a closer competitor to Wieland in the rolled products market.
- (384) With respect to the overall rolled products market, the so-called 'Emerald' project plays a particular role in improving ARP's market position. In particular, Emerald aims at *"increasing output, with productivity and quality, as well as with market penetration and customer retention"*,²⁵⁸ and is considered in ARP's 2017 annual report as a *"core project for optimising [...] flat rolled products"*.
- (385) [...] ²⁵⁹.

Figure 31 [...]

[...]

Source: Parties' response to the Commission's request for information RFI 20, Annex 20, slide 4.

- (386) Figure 31 shows that the second largest contribution to the profit improvement [...].
- (387) [...], ARP is continuously researching solutions for increasing productivity and increasing its presence in particularly important segments. For example, in a document produced in its ordinary course of business for a management team meeting of ARP, a number of solutions are discussed for increasing capacity and reducing manufacturing costs with a view to increasing presence in connectors and covering the increased demand generated by electric vehicles and hybrid electric vehicles.²⁶⁰ These measures are to be considered additional to the [...],²⁶¹ and include, for example, the development of the [...] (Figure 32).
- (388) These measures for expansion in the high-end part of the market do not appear to be sporadic or isolated activities, but rather examples of wider activities aimed at increasing market presence in key segments. In its most recent annual report, for

²⁵⁸ Form CO, Annex 2.2.b_Annual Report Aurubis, page 15.

²⁵⁹ Parties' response to the Commission's request for information RFI 20, ARP's replies, Annex 20, slide 8.

²⁶⁰ Parties' response to the Commission's request for information RFI 4 [Annex 13].

²⁶¹ Parties' response to the Commission's request for information RFI 4 [Annex 13], page 6 (original slide number: 42).

example, Aurubis indicates connectors for electromobility as an area that boosted product developments.²⁶²

Figure 32 ARP's excerpt from Management team meeting

[...]

Source: Parties' response to the Commission's request for information RFI 4, Annex 13, page 7 (emphasis added by the Commission).

(389) One large ARP customer of rolled products for connectors ([...]) seems to be well-aware of ARP's recent efforts in developing its activities in the high-end part of the market and appears to be worried about losing ARP as a supplier that “*recently upgraded to Wieland standards*” as a result of the Transaction. More specifically when asked about the expected impact of the Transaction, [...] stated that: “*One less supplier in the market therefore less alternatives. ARP upgraded to Wieland standards. Increase capacity for High Performance Alloy development. Less lever (power) with limited viable alternatives. Increase market share means increase market power. Limiting competitors limits the competitors market power*”.²⁶³

(390) In the light of the above, the Commission considers that ARP has taken numerous initiatives that are aimed at making ARP an even stronger competitor to Wieland in key segments of the rolled products market.

6.3.2.5. Wieland is also a growing competitor in segments where ARP is strong.

(391) In contrast to market segments where Wieland as the main player is challenged by ARP, there are also some segments situated in the high-end part of the rolled products market where ARP has managed to build a strong position and where Wieland is a challenger.

(392) For example, ARP has strong position in some high tech areas such as substrates for direct copper bond (‘DCB’) and substrates for active metal brazing (‘AMB’), and in the “heat sinks & base plates” segment.²⁶⁴

(393) Sales figures provided by the Parties show that ARP has a [90-100]% share of the DCB market segment, and [80-90]% in the heat sinks & base plate segment (Section 6.3.2.2, Table 18).

(394) The power electronics segment also appears to be strategically important for ARP (Figure 33) because ARP has dedicated lines for manufacturing what its customers require; [...]; ARP has almost [...]; the power electronics market is expected to grow, driven by the electric vehicle market growth; and ARP is in “[...]”.

Figure 33 Importance of the power electronics business to ARP

[...]

Source: Parties' response to the Commission's request for information RFI 4, Annex 15, slide 4.

(395) Internal documents of ARP show that the power electronics business grew at a combined annual growth rate [...] from fiscal year 2014/2015 to fiscal

²⁶² Form CO, Annex 2.2.b “Annual Report Aurubis”, page 61.

²⁶³ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1 (Id 1198).

²⁶⁴ As indicated in the Parties' response to the Commission's request for information RFI 4 [Annex 15], slide 3, as of March 2017, ARP grouped all these segments into one newly defined segment, constituting a business unit “power electronics”.

year 2016/2017, and that in fiscal year 2016/2017 the volume of rolled products for power electronics [...].²⁶⁵

- (396) With respect to DCB, a document produced by ARP in its ordinary course of business, which summarises the account plan of one of its strategically important customers in power electronics, [...], shows that ARP considers [...] (Figure 34).

Figure 34 ARP's one pager of its [...] customer [...]

[...]

Source: Form CO, Annex 46_Q23_aurubis (emphasis added by the Commission).

- (397) Rogers confirms that ARP is currently its only supplier of OFE²⁶⁶ copper strip for DCB and of PHC²⁶⁷ copper strip for AMB. It also confirms that Wieland is the only potential entrant to the OFE copper market segment for DCB, and that Wieland is currently in its supplier qualification process.²⁶⁸
- (398) When taking a view as regards OFE, this specific copper composition appears to cover applications in the high-end part of the market, such as DCB. In order to produce OFE rolled products, either particular know-how and capabilities are required for casting this alloy, or hot rolling facilities are needed for further processing the cakes ([...]).²⁶⁹ It seems that in addition to the producers with vertical casting and hot-rolling capabilities, only MKM with its Conti-M technology is able to cast and roll this copper alloy.²⁷⁰ All other producers have to purchase the pre-rolled strip of this quality on the merchant market. According to the market reconstruction undertaken by the Commission, ARP has a strong presence in OFE with a volume share in 2017 of [50-60]%. Noticeably, Wieland has OFE shares of [10-20]%, leading to a combined share of Wieland and ARP in OFE of [60-70]% (Table 19).

Table 19 OFE volumes and shares in 2017 in the EEA

	EEA sales in 2017 (tonnes)	Segment share (%)
Wieland	[...]	[10-20]%
ARP	[...]	[50-60]%
Combined Wieland and ARP	[...]	[60-70]%
KME/MKM	[...]	[20-30]%
Other competitors	[...]	[0-5]%
Imports	[...]	[5-10]%
Total	[...]	100%

Source: European Commission, based on market reconstruction data.

- (399) In terms of field of use and as indicated in Table 18, ARP holds [80-90]% of the demand for base plates and heat sinks, and Wieland has [0-5]%. For DCB substrates,

²⁶⁵ Parties' response to the Commission's request for information RFI 4 [Annex 15], slide 27.

²⁶⁶ OFE stands for Oxygen-Free Electronic, which is the highest purity grade of copper at 99.99% .

²⁶⁷ PHC is a deoxidized, oxygen-free *copper* with a very low residual phosphorus content .

²⁶⁸ Agreed non-confidential minutes of a call with a customer, 15 June 2018, (Id 495).

²⁶⁹ Response to the SO, paragraph 82.

²⁷⁰ Form CO, Annex A(50) "Conti-M® technology: smart solution for the high efficient production of Cu-OFE strip".

ARP has [90-100]% share, but ARP considers Wieland to be a “threat” to its current competition position for these products.

- (400) Internal documents of Wieland confirm that Wieland considers that the demand for DCB substrate is growing,²⁷¹ and that, with [...], it is developing an alloy named [...], and considers such a development to be a strategic measure.²⁷²
- (401) The loss of the competitive constraint exercised by Wieland on ARP post-Transaction is also one of the main concerns of ARP's customers. Rogers, for example, is concerned that the price for Cu-OFE for DCB could increase post-Transaction as a consequence of the loss of one potential market entrant.²⁷³
- (402) The Notifying Party agrees only partially with the Commission's analysis presented in this section and argues that the analysis on DCB substrates refer to the customer Rogers, and is “*not representative for the market situation as such*”.²⁷⁴ Nevertheless, the Commission considers that the example of the customer Rogers, which enjoys an important position in DCB substrates and power electronics, is illustrative of the competitive dynamics in relation to the rolled products supplied for these applications in the high-end part of the market.

6.3.2.6. Overall conclusion

- (403) In the light of the above, the Commission considers that the information gathered as part of its investigation, the internal documents of Wieland, the market reconstruction, the data submitted by the Parties, and the responses from market participants show that ARP is an important competitor in the overall rolled products market, exerts significant and increasing competitive constraints on Wieland, challenging Wieland's position as a market leader in the high-end part of the market and in the segments with higher profit margins such as connectors for the automotive industry. Also on the high-end of the market, ARP is strong in power electronics where Wieland is trying to expand. In addition, the Commission considers that, through the [...], Aurubis has tried to further optimise its flat rolled products business and that ARP would thus likely be able to put even more competitive pressure on Wieland in the future. The Commission therefore concludes that the Transaction would eliminate a competitor that exerts significant competitive constraints on Wieland and would enable Wieland to exercise its increased market power even more freely.

6.4. Competitors' reactions are unlikely to defeat the expected price increase

- (404) Paragraph 24 of the Horizontal Merger Guidelines recognises that a horizontal merger in an oligopolistic setting may not only remove competitive constraints between the merging firms, but also constraints on other competitors: “*Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to rival firms, which, in turn, may find it profitable to increase their prices*”. Paragraph 25 of the Horizontal Merger Guidelines also describes the possibility of a reduction of competitive pressure on the remaining competitors through a horizontal merger in an oligopolistic setting.

²⁷¹ Parties' response to the Commission's request for information RFI 24 [Annex 19], slide 4.

²⁷² Parties' response to the Commission's request for information RFI 24 [Annex 19], slides 6 and 9.

²⁷³ Agreed non-confidential minutes of a meeting with a customer, 15 June 2018 (Id 495).

²⁷⁴ Response to the SO, paragraph 81.

- (405) Conversely, paragraphs 32 to 35 of the Horizontal Merger Guidelines refer to the possibility that there may be situations where competitors have both the ability and incentives to increase output so significantly that it is sufficient to defeat the negative effects of the merger. For this to happen competitors need to have both enough capacity to expand output significantly and find it even more profitable to expand output significantly than to just increase prices reactively as explained in paragraph 24 of the Guidelines.
- (406) In this section, the Commission will explain why it considers that current competitors, in particular in the high-end part of the market (for example connectors for the automotive industry), do not have the ability and incentives to increase output so significantly that it would be sufficient to defeat the negative effects of the merger. In particular, the Commission will demonstrate that the high-end part of the rolled products market is characterised by few competitors (Section 6.4.1), high barriers to entry (Section 6.4.2) and capacity constraints (Section 6.4.3). As a result, the Commission considers that it would be difficult for competitors to reposition their products into the high-end part of the market so as to defeat a price increase by the merged entity (Section 6.4.4). The Commission reaches the same conclusion in relation to the capabilities of individual competitors (Section 6.4.4.1).

6.4.1. Fewer competitors are present in the high-end part of the market

- (407) The following recitals (409) to (430) set out the reasons underlying the Commission's conclusion that the number of competitors that are in a position to compete on a comparable footing with the Parties in the high-end part of the market is limited.
- (408) Taking the example of connectors, the Notifying Party has produced a document in the ordinary course of business analysing the competitive situation for supplies of connectors to [...] (Figure 35).²⁷⁵ From that document, it can be observed that, as regards the largest customer of strip for connectors in Europe, the Notifying Party competes with only 3 other connector strip suppliers besides ARP, namely KME/MKM, Diehl and Kemper.

Figure 35 – Analysis of purchase situation [...]

[...]

Source: Parties' response to the Commission's request for information RFI 8[Annex 4], slide 3 [emphasis added by the Commission]

- (409) The Notifying Party argued in its response to the SO that [...] has a global network of 15 suppliers, of which 6 suppliers from the EEA, and referred to the Response to the Article 6(1)(c) Decision.²⁷⁶ The paragraph referred to in the Response to the Article 6(1)(c) Decision includes a table for [...] which shows rolled products suppliers by region. For the region "Europe" the table includes 5 suppliers from the EEA (the same 5 producers as in Figure 35) with the addition of one Turkish importer. Under the assumption that [...] also procures from that Turkish importer, the Commission considers that that importer does not represent a significant competitive restriction for Wieland given that imports to the EEA are very limited

²⁷⁵ The document contains demand and competition analyses for the Notifying Party's customers which are shared with ARP. These analyses were produced at the request of the president of the rolled products business unit of the Notifying Party.

²⁷⁶ Response to the SO, paragraph 87 referring to the Response to the Article 6(1)(c) Decision, paragraph 29.

(see tables on alloy segment shares in Section 6.3.1.2 Table 4 and Table 5, and in Section 6.3.2.2 Table 16) and decreasing, and the name of the Turkish importer was not mentioned by other customers of connector strip in the Commission's market investigation.

- (410) Furthermore, analyses of other customers, provided in the same document (as a response to the same request for information) show that, if ARP is eliminated, then there are considerably fewer alternatives available for customers of products at the high-end part of the market - in some cases only one alternative, or even none. For the majority of customers, the alternative mentioned is KME/MKM.
- (411) The market investigation has indicated that only a limited number of companies are seen by a majority of market participants as competitors for Wieland and ARP in the high-end part of the market. In relation to connectors, the companies mostly named as alternative suppliers to Wieland and ARP: KME/MKM (including KME's joint venture KMD); Diehl (including Sundwiger Messingwerk) and Kemper.²⁷⁷ In relation to stampers, the companies named as alternative suppliers to Wieland and ARP were KME/MKM and Messingwerk Plettenberg.²⁷⁸
- (412) The Notifying Party has argued that Messingwerk Plettenberg, EGM, Sofia Med, Poongsan and PMX were also named by customers in the market investigation.²⁷⁹ Poongsan (Korean producer) and PMX (US producer) were mentioned by one customer each. The share of imports in the alloy segments (see Table 4, Table 5 and Table 16) are very limited. As set out in the section on the geographic market for rolled products (Section 5.3.3.3), customers in the EEA mainly source rolled products from within the EEA, partially due to transport costs and important customs tariffs. Hence, under current market conditions, the Commission considers it unlikely that PMX and Poongsan could constitute significant alternative sources of supply for the majority of EEA customers. With regards to EGM, Messingwerk Plettenberg, and Sofia Med, the Commission had included those producers in its assessment of individual competitors (see Section 6.4.4.1), as they were identified by a minority of customers as potential alternative sources for varying alloys. The individual assessment of these producers did not eliminate the Commission's doubts as to their ability to exert a meaningful amount of competitive pressure on the Notifying Party.²⁸⁰
- (413) Wieland and ARP argued, in the Response to the Article 6(1)(c) Decision that ample alternatives exist for customers from which they are already sourcing.²⁸¹ The following Table 20 was provided in the Response to the Article 6(1)(c) Decision which, according to Wieland, shows that Wieland represents a minor share of the demand of significant customers of rolled products:

Table 20 Purchase activities of the largest global connector manufacturers

[...]

Source: Response to the Article 6(1)(c) Decision.

²⁷⁷ Questionnaire Q4.2 to Customers of Rolled Copper Products - Connectors, question 9.

²⁷⁸ Questionnaire Q4.7 to Customers of Rolled Copper Products - Stampers, question 9.

²⁷⁹ Response to the SO, paragraph 89.

²⁸⁰ [...] is declining, [...] relies on Schwermetall for its HPAs and Sofia Med only recently entered the high-end part of the market.

²⁸¹ Response to the Article 6(1)(c) Decision, paragraph 59.

- (414) However, Table 20 presents demand at the global level of the selected customers which means that it includes demand outside of the EEA; (ii) only the Notifying Party's share of total supply is indicated and the table does not provide information on other suppliers. In this regard, Wieland and ARP also provided a list of manufacturers that supply customers [...], which included manufacturers such as Dowa, Kemper, KME/MKM (including KMD), Xinke, Xinye, Boway, JX (Nippon Mining), Mitsubishi, Olin, PMX, First Copper and Poongsan. Wieland and ARP did not specify, however, which products those manufacturers provide and in which geographic areas they are active. As stated in recital (413), imports to the EEA are limited and the majority of customers procure within the EEA (see recital (156)). In addition, the majority of customers expressed doubts as to the ability of non-EEA producers to supply them with the quality they need (see recital (160)). As regards [...] procures a significantly larger part of its rolled products from the Notifying Party than suggested by the global figures in Table 20, with the Notifying Party also apparently almost only facing competition from EEA producers for this customer (see recitals (409) and (410)). The Commission doubts that the non-EEA producers provided as examples by Wieland and ARP have a significant impact on the procurement of the customers mentioned in the table for their production in the EEA.²⁸²
- (415) In the response to the SO the Notifying Party argued that market participants considered competition to be increasing in the overall market.²⁸³ However, this statement is based on one customer, as well as Kemper's and MKM's, responses to the market investigation. On the customers' side, a large majority of customers indicated in the market investigation that they actually see either a calm competition situation in the market, or a decrease in competition. It was also indicated that this can be different for different products.²⁸⁴ On the producers' side, responses to the market investigation in respect of competitors in the high-end of the market were more split between indicating a calm market situation and a market with increasing competition.²⁸⁵
- (416) As regards MKM's response to the market investigation, MKM is mainly active in the low-end part of the market providing commoditized products. The low-end part of the market, in contrast to the high-end part, is characterised by overcapacities, decreasing demand, partially as a consequence of substitution of copper with other materials, and a high number of competitors. Hence, MKM's position concerning the activity in the market should be seen within this context.
- (417) The Notifying Party argued that there are low entry barriers to entry to the rolled products market and that entry costs do not play a significant role.²⁸⁶ In particular, the Notifying Party submitted that the most relevant applicable EN standards for rolled products are EN1652 for general purposes, EN1654 for strip for springs and connectors, EN1758 for strip for lead frames, and EN13599 for copper plate, sheet

²⁸² Response to the Article 6(1)(c) Decision, paragraph 59.

²⁸³ Response to the SO, paragraph 89.

²⁸⁴ Questionnaire Q1 to Customers of Rolled Copper Products - question 31.

²⁸⁵ Questionnaire Q2 to Competitors of Rolled Copper Products - question 29.

²⁸⁶ Response to the Article 6(1)(c) Decision, paragraph 64 and Response to the SO, paragraph 91.

and strip for electrical purposes.²⁸⁷ All suppliers have to comply with these standards, which can be easily attained by all rolled products suppliers.²⁸⁸

- (418) The Commission understands, however, that these standards represent minimum requirements²⁸⁹ and that customers can have more stringent specification requirements. This is also supported by the results of the market investigation. For example, customers in the connectors segment specified that: *“The dimensions, tolerances, strengths etc are individual for each product depending on the requirements of our customer/product”*.²⁹⁰
- (419) One respondent stated that the qualification of suppliers *“depends on supplier capability and technology as well as material complexity and customer requirements.”* Supplier capability, material complexity and customer requirements are apparently criteria which may cause customers not to use certain suppliers, as they may fail to obtain the qualification. Even if every supplier is able to produce rolled products according to the EN standards, it appears that certain capabilities are necessary in order to be able to fulfil the demand of customers.
- (420) These special requirements are not limited to the connectors segment but are present in all segments. The Commission acknowledges the argument of the Notifying Party that the market investigation, with regard to all the segments, is not fully conclusive.²⁹¹ However, special customer requirements differ between the segments. In segments such as Trade/Slitting Centres a minority of customers purchase rolled products customised for their needs.²⁹² In contrast, in segments where high-end rolled products are required, such as connectors segment, and where the Notifying Party's business focus lies, a majority of customers require customised products.²⁹³
- (421) Certain of the Notifying Party's internal documents support the conclusion that for some industries customer requirements are more demanding. A document²⁹⁴ produced by Wieland's stampers business unit explicitly refers to the requirements of the automotive industry.

Figure 36 – Strategic analysis of the European stampers segment

[...]

Source: Parties' response to the Commission's request for information RFI 24 [Annex 10], slide 12
[emphasis added by the Commission].

- (422) Some customers which have particularly demanding requirements may, for that reason, have a narrower range of suppliers to choose from because not all suppliers are able to meet those requirements. This can be seen from several customer replies in the market investigation: *“When we qualify a supplier we follow a qualification plan to check whether the supplier is able to produce a product that meets our*

²⁸⁷ These standards define chemical composition, mechanical properties, dimensional tolerances, and geometrical properties for the production groups.

²⁸⁸ Parties' submission "Rolled products –supply side substitutability enabled by EN standards", 13 September 2018.

²⁸⁹ Parties' submission "Rolled products –supply side substitutability enabled by EN standards", slide 2.

²⁹⁰ Non-confidential reply to Questionnaire Q4.2 to Customers of Rolled Copper Products - Connectors, question 18 (Id 1072).

²⁹¹ Response to the SO, paragraph 92.

²⁹² Questionnaire Q4.1 to Customers of Rolled Copper Products – Trade/Slitting Center, question 17.

²⁹³ Questionnaire Q4.2 to Customers of Rolled Copper Products – Connectors, question 18.

²⁹⁴ Prepared for an “Off-site Workshop” (see description in footnote 67).

*requirements. Some suppliers may not be able to fulfill our requirements”.*²⁹⁵. *“The products of the 3 existing suppliers in the European market are not equally. One of them is not able to supply the complete Portfolio for our Needs and requirements”.*²⁹⁶ *“(…) However, there are certain specific requests which only selected producers can serve. For example, copper and copper alloy products for the high-Tech connector industry are offered only through Wieland, Aurubis and KME”.*²⁹⁷

- (423) In its response to the SO the Notifying Party, argued that the Commission fails to further develop which requirements cannot be met by other producers. As can be seen from the answer of a customer (see recital (419)), the requirements that have to be met are manifold and include tolerances, dimensions, strengths, and other requirements like surface cleanness, or homogeneous properties. For some, like thin gauge strip, a specific machinery is required, for others the quality criteria of the customers provide a barrier. The results of the market investigation clearly show, as can be seen from the answers of customers (see recital (423)) and producers (see recital (115)), that not all producers can supply customers with the required products.
- (424) The Notifying Party argued that, if margins in the EEA increased, exports from EEA producers could be redirected and thus provide a source of competitive pressure for the new entity.²⁹⁸
- (425) The Commission recalls that competitors need not only the ability but also the incentive to defeat a price increase in a market. However, as set out in recital (405) of this Decision and in paragraph 24 of the Horizontal Merger Guidelines, in an oligopolistic setting, competitors would also benefit from a price rise after the merger as demand would be shifted to competitors who then could raise their prices.
- (426) As in particular the high-end part of the rolled products market shows oligopolistic features in nature with 3 – 5 significant competitors being present in this part of the market, namely the Notifying Party, ARP, KME/MKM, Diehl and Kemper, it is more likely that competitors would follow, rather than attempt to defeat, a price increase.
- (427) Furthermore, a large majority of customers indicated in the market investigation that prior to the Transaction the market is calm, or competition is decreasing (see recital (416)). In addition, the majority of customers expressed concerns with regards to post-Transaction price increases (see Section 6.6). The Commission has not found any evidence that indicates that there would be different incentives for competitors post-Transaction. In addition, the Notifying Party has not been able to substantiate why competitors in the rolled copper industry would behave differently. As the level of pre-merger competition is the benchmark for the post-merger competitive constraints²⁹⁹, the Commission doubts that competitors would have increased incentives post-Transaction to compete with the new entity.

²⁹⁵ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products , question 10-1 (Id 1279).

²⁹⁶ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products , question 10-1 (Id 1229).

²⁹⁷ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products , question 10-1 (Id 164).

²⁹⁸ Response to the SO, paragraph 94.

²⁹⁹ See for example Case M.6471 - Outokumpu/INOXUM, section 5.5.4.7 2).

(428) Moreover, the competitors who might be in the best position to counter a possible price increase, namely KME/MKM and Sofia Med³⁰⁰, have been continuously supportive of the proposed Transaction, which is also shown by the statements relied upon by the Notifying Party (see Section 6.6, and the Response to the SO, section VII). Such supportive statements show that important competitors of Wieland and ARP believe that the Transaction may, to some extent, produce beneficial results for them. These statements further reinforce the Commission's doubts that the Transaction would result in a potential change of incentives for competitors to defeat price increases.³⁰¹

(429) As regards the possibility of Wieland's and ARP's competitors redirecting exports to the EEA, the Commission has no indication that those competitors would not have the incentive to raise prices and thus it is questionable to what extent these redirected sales in the high-end part of the market, where demand is also growing, would provide a significant competitive pressure to counter a price increase.

(430) Based on the reasons set out in recitals (409) to (430), the Commission concludes that in the rolled products market, and particularly in the high-end part of the market, there are few competitors that are in a position to meet the specific demand and technical requirements and hence compete on a comparable footing with the merged entity.

6.4.2. *The high-end part of the rolled products market requires significant investments, which constitute barriers to entry.*

(431) The following recitals set out the reasons underlying the Commission's conclusion that entry and expansion in these high-end segments of the rolled products market require significant investments that could deter entry.

(432) To be able to provide specialties, rolled products manufacturers would need to be able to supply advanced materials, for example HPAs, high-end oxygen-free products, and to meet demanding technical specifications, for example a given tolerance, thickness, surface cleanliness or flatness, or coating with a certain quality. For this, suppliers would need to invest in research and development.

(433) For example, ARP, which is challenging Wieland on the connectors segment, has focused on developing new solutions in high-end part like power electronics and connectors, including connectors for automotive.

*"The developmental activities in the Flat Rolled Products division were primarily dominated by electromobility. In particular, product developments were boosted in the areas of power electronics and connectors,[...]" "A further research focus in the connector area was new coating systems for automotive applications."*³⁰²

*"We developed new products related to electric cars. In particular, high-conductivity and relaxation-resistant materials were successfully implemented in the connector sector. Moreover, a new copper strip product was developed for power electronics. Likewise, the long-term performance of tin-plated connectors for the automotive industry was also improved."*³⁰³

³⁰⁰ Although those competitors also face their own challenges limiting their ability to react on a price increase, see Section 6.4.4.1.

³⁰¹ See for example Case M.6471 - Outokumpu/INOXUM, section 5.5.4.7 2).

³⁰² Form CO, Annex 2.2.b, "Annual Report 2016/17 Aurubis", page 61.

³⁰³ Aurubis's Annual report 2015/16, page 62 https://www.aurubis.com/binaries/content/assets/aurubis-en/dateien/financial-reports/2015-16/161213_geschaeftsbericht-gb-2016-en_final.pdf

- (434) The Notifying Party stated that “only one small investment” of less than EUR [...] was made by ARP for the “sole” purpose of enhancing the product portfolio.³⁰⁴ The Notifying Party, however, failed to substantiate in how far “*product developments [...] in the areas of power electronics and connectors*”, “*high-conductivity and relaxation-resistant materials*” and “*a new copper strip product*” are not related to developments in the product portfolio.
- (435) Wieland is significantly active in R&D leading to a high number of patents, according to the European Patent Register, many concerning specific alloy compositions. The importance of R&D is not only recognised by Wieland in its annual report 2016/17 where it is stated that “*The development of new and improvement of existing materials, products and processes constitute an essential pillar of business success*”³⁰⁵ but also by Wieland's customers in the connectors segment. As [...] is quoted on Wieland's website “*Wieland is a premium partner in finding solutions to our challenges in the field of contact systems. The research and development opportunities that Wieland has, combined with the first-class know-how in the field of rolled products, are what we particularly appreciate about the cooperation*”.³⁰⁶ The Commission disagrees with the Notifying Party's view that R&D is not significantly important for Wieland.³⁰⁷ As quoted, Wieland's annual report 2016/17 to its shareholders characterises R&D as essential pillar of Wieland's business success. And although the Notifying Party views the dedicated section for newly developed solutions of Wieland's website as being of little value, the Commission regards the opinion of [...], which is the largest customer of Wieland and a global player in connectors, as expressed there, as a meaningful insight in the requirements of customers in the high-end part of the market.
- (436) It appears that, for the high-end part of the rolled products market, competitors must be able to fund R&D and new product developments to generate new profitable products. To be able to do this, a manufacturer needs to have the incentives to engage in the investment. A manufacturer would need a sufficient production scale for the new products and the technical capabilities, e.g. casting or tinning capabilities, to be able to produce and sell profitably, as well as sufficiently positive sales prospects. As a result of these constraints, it appears that a majority of suppliers have to specialise in a limited field of products and that only the four vertically integrated manufacturers (Wieland, ARP, KME/MKM and to some extent Sofia Med through its partnership agreement with Dowa Metaltech) can significantly invest in developing a wider range of new materials.
- (437) Secondly, product specifications by customers in the high-end part of the rolled products market are more demanding and possibly need additional equipment. For example, as regards the demand development in the connectors segment there appears to be a trend to [...] ³⁰⁸ (Figure 37).

Figure 37 – Trends in Connector segment

[...]

Source: Parties' response to the Commission's request for information RFI 4, Annex 13, page 5

³⁰⁴ Response to the SO, paragraph 96.

³⁰⁵ Form CO, Annex 2.2.a, “Annual report 2016/17 Wieland”, page 16.

³⁰⁶ <https://www.wieland.com/en/discoveries/temperature>, last accessed 22 October 2018.

³⁰⁷ Response to the SO, paragraph 97.

³⁰⁸ Produced for a Management Team Meeting on EV/HEV (electrical vehicles)/ (hybrid electric vehicles).

- (438) For producing connector strip [...], manufacturers need stretch-band levellers which are precisely calibrated to meet the tolerance values. Moreover, the personnel in charge of the equipment would possibly need additional training to efficiently manage the machinery, which results in higher personnel costs. The Notifying Party argues that for example stretch-band levellers and tinning equipment are “readily available” and that training is required for most rolled products segments.³⁰⁹ However, the Notifying Party fails to substantiate its claims with regards to stretch-band levellers (the availability of tinning lines is depicted in Table 21 below). Concerning training, the Commission has not contested that training is naturally needed for the operation of any machinery. However, the change of machinery, or the addition of new, possibly more complex, machinery, will add a new need for training. In this regard, the Notifying Party has illustrated the correctness of the Commission's assumption by providing the example of the relocation of the copper line from Sweden to Zutphen, which required the training of [...] new operators for the production of [...].³¹⁰
- (439) Not only does a rolled product have to meet specific requirements but it might also need additional surface treatment, which requires investment in special machinery and equipment. ARP states in its brochure for tin-plated products that *“In order to meet the high demands of the automotive, electrical and electronical industries on connectors and stamped grids – such as low insertion forces, good corrosion resistance and good solderability- the strip used is required to have surface treatments. [...] Pure thin coatings are particularly important due to their economic efficiency.”*³¹¹ Tinning can be done by hot-dip tinning (HDT) or electroplating. The end result appears to be the same under both approaches.³¹² Nevertheless, the Commission understands that for particular industries, e.g. the automotive industry, HDT lines are required to meet customers' expectations or requirements.³¹³ Internal documents of the Parties also suggest the important role of HDT connector strip for automotive connectors. For example, the internal document in Figure 37 explicitly mentions growing HDT strip demand of [...], which is a main supplier for automotive connectors.
- (440) Moreover, the internal document³¹⁴ presented in Figure 38 indicates that Wieland considers HDT as a speciality for [...]. [...]. The Notifying Party noted that HDT and electroplating are interchangeable and this is not sufficiently taken into account by the Commission.³¹⁵ However, as stated in recital (440), the Commission understands from market participants that HDT strip is particularly requested by customers in the automotive industry. In addition, the figure below is not the sole internal document focussing on HDT rather than on electroplating, for example Figure 37 also provides only increased demand for HDT by [...], Figure 14 (Section 6.3.1.2) shows the capacity plan of Wieland [...], and Figure 16 (Section 6.3.1.2) shows that Wieland's business section for rolled products tracks and projects the HDT strip market.

³⁰⁹ Response to the SO, paragraph 98.

³¹⁰ Response to the SO, paragraph 98.

³¹¹ ARP tin-plated solutions: https://www.aurubis.com/binaries/content/assets/aurubis-en/dateien/product-documents/tin-plated-solutions_en.pdf.

³¹² Parties' response to the Commission's request for information RFI 8 [Annex 7] page 7.

³¹³ Non-confidential minutes of a call with a competitor of 27 June 2018 (Id 567).

³¹⁴ Produced for an “Off-site Workshop” (see description in footnote 67).

³¹⁵ Response to the SO, paragraph 99.

Figure 38 – Strategic planning Business Group Rolled Products

[...]

Source: Parties' response to the Commission's request for information RFI 24 [Annex 2], slide 29 [emphasis added by the Commission].

- (441) According to the Parties, there are only a limited number of manufacturers with at least 1 HDT line (Table 21). [...].

Table 21 Tinning Lines per rolled products manufacturer

[...]

Source: Parties' response to the Commission's request for information RFI 8, page 9.

- (442) To be able to supply tinned strip for connectors for the automotive industry, therefore, manufacturers would need to have a HDT line: a significant investment apparently in the range of EUR 4 – 8 million.³¹⁶ Post-Transaction only 5 competitors with HDT lines, as Sofia Med has installed an HDT line in 2018, would be left with the merging entity, according to the table above, possessing almost the same number of HDT lines as all of the remaining competitors put together. As the demand in HDT strip appears to be rising competitors may easily reach the limit of their supply capabilities if they do not invest in further capacities in their HDT lines. Next to that, as only 5 alternatives remain for customers of HDT strip, this will also have an impact on customers' ability to switch to an alternative supplier, in particular in a situation of multi-sourcing strategies (see Section 6.5.3).
- (443) Tinning lines are considered not only by Wieland (see Figure 14 in Section 6.3.1.2) but also by ARP as a bottleneck in which [...].

Figure 39 – Status report on measures in Stolberg

[...]

Source: Parties' response to the Commission request for information RFI 20 [ARP Annex 3], slide 19.

- (444) The Notifying Party noted that Table 21 above shows a significant number of external electroplating companies.³¹⁷ However, as set out above (recital (440)) the Commission does not share the Notifying Party's view that customers can be indifferent between HDT and electroplating. If this were the case, Wieland and ARP would not have to remove their bottlenecks on the HDT lines as sufficient supply could be provided by external electroplating companies. Moreover, as the Notifying Party noted, Kemper and Sofia Med have recently invested in HDT lines, showing again the increased demand in HDT strip.³¹⁸ However, the Commission does not share the Notifying Party's view that Kemper's and Sofia Med's investment prove that investment in new machinery is not an entry barrier in the high-end part of the market.³¹⁹ As the Notifying Party pointed out, [...].³²⁰ In this regard, it is striking that in spite of the possible profit potential only Kemper and Sofia Med invest in HDT lines, that is two competitors of Wieland that are already present in the high-end part of the market. If the investment costs for tinning lines would not represent a significant barrier for producers without tinning lines, the Commission would have

³¹⁶ Non-confidential minutes of a call with a competitor of 27 June 2018 (Id 567).

³¹⁷ Response to the SO, paragraph 100.

³¹⁸ Response to the SO, paragraph 101.

³¹⁹ Response to the SO, paragraph 101.

³²⁰ Response to the SO, paragraph 101.

expected other producers that are not yet present in the high-end of the market to also invest and to tap into this possible profit potential.

- (445) Moreover, manufacturers entering the high-end part of the rolled products market have to face customer qualification processes, in particular for rolled products for the automotive industry. Qualifying suppliers can require a lot of effort and can be time-consuming due to necessary tests of the new products. It often requires final customer validation due to the impact of the rolled product quality on the end-product.³²¹ The Commission acknowledges the Notifying Party's argument that the qualification process depends on the requirements of the customer.³²² The duration and the intensity of the qualification process, for example by having to qualify not only the supplier but the individual plants, vary for customers of different segments, with the process taking more time and being more intense for products for selective industries such as the automotive industry.³²³ Moreover, the market investigation suggests that customers prefer to have long-term business relationships with their suppliers because of reasons like trust and quality concerns.³²⁴ Thus, new entrants in the market may be confronted with a possible bias in favour of the existing suppliers and doubts by customers as to whether they can supply credibly high-end products. The Notifying Party noted that not all customers prefer long-term relationships.³²⁵ However, the market investigation showed that almost all customers viewed long-term business relationships as essential.³²⁶ Customers' qualification processes will be addressed further in Section 6.5.2.
- (446) Manufacturers entering segments in the high-end part of the market face high qualification requirements and the seemingly existing challenge of convincing customers of their ability to credibly supply rolled products of reliable quality. This can prevent manufacturers from taking the risk of investing in serving the high-end part of the market.
- (447) To the Commission's knowledge, only Sofia Med has been able to enter the high-end part of the market with a degree of success in recent years. However, to be able to do so, it first entered into a partnership agreement with Dowa Metaltec for know-how and technological transfer. It therefore appears that, as a result of the barriers to entry represented by the significant investments which are required to further expand in the high-end part of the rolled products market, there is only limited fluctuation, if any, in the pool of suppliers competing for the customers of high-end quality products.

6.4.3. *Capacity constraints exist in the high-end part of the market*

- (448) In a previous case, the Commission considered that in a market that is characterised by excess capacities, the remaining competitors would, in addition to the incentive to react aggressively to a post-merger price increase, need to have at minimum spare capacities large enough to countervail the lost rival capacities, as well as lost rival spare capacities. Due to a merger the new entity would face significantly less competitive pressure than the individual merging entities were facing because the merger combines the capacities of the merging parties.³²⁷ Hence, the market would

³²¹ Non-confidential minutes of a call with a customer of 15 June 2018 (Id 495). .

³²² Response to the SO, paragraph 102.

³²³ Questionnaires Q.4.1 – 4.8 to Customers of Rolled Copper Products, question 16.

³²⁴ Questionnaires 4.2 – 4.8 to Customers of Rolled Copper Products, Question 23.

³²⁵ Response to the SO, paragraph 103.

³²⁶ Questionnaires 4.2 – 4.8 to Customers of Rolled Copper Products, Question 23; Questionnaire 4.1 to Customers of Rolled Copper Products, Question 22.

³²⁷ Commission decision in case M.6471 - *Otokumpu/INOXUM*.

need to be characterised by significant amounts of spare capacities of the competing participants. The following recitals (450) to (463) set out the reasons underlying the Commission’s conclusion that this is not the case as regards the high-end part of the rolled products market.

- (449) The Commission acknowledges that in certain segments of the rolled products market significant overcapacities seem to exist, in particular as regards commodity products in the lower-end of the market (for example, DHP copper strip for building and construction). However, it appears that this is not the case for all segments of this highly differentiated market. In particular, high-end products are in significant demand and often require special machinery or know how, which leads to less spare capacity for such products.
- (450) For the high-end part of the market it appears that demand follows an upward trend, as indicated in Sections 5.2.4.3 and 6.3.1.2, and confirmed in the annual reports for the financial year 2016/17 of Aurubis: *“Demand in flat rolled products developed positively in the markets significant for us. The automotive and electrical industries provided strong growth momentum.”*³²⁸ and Wieland *“Demand for high-performance alloys and plated strip was fuelled to a disproportionate degree by the car manufacturers’ growing use of rolled products.”*³²⁹
- (451) The positive development in the demand for high-end products impacts the capacity utilisation in these segments. Wieland, which specialises in high-end products, has a capacity utilisation rate of [...] % on a total rolled products level.³³⁰ The capacity constraints are also mentioned in an internal document³³¹ of Wieland’s connectors’ business unit (Figure 40).

Figure 40 – Strategic analysis of the market situation for connectors

[...]

Source: Parties’ response to the Commission’s request for information RFI 24 [Annex 6], slide 6 [emphasis added by the Commission]

- (452) [...] some capacity limitations, [...] high-end products (Figure 41 and Figure 42). In contrast, the Notifying Party explains that the Figure 41 does not relate to capacity limitations [...].³³² The Commission fails to see how the allocation of capacity for backup duties for the rolling mill and the increased capacity utilisation do not constitute a capacity constraint for ARP. In addition, Figure 42 explains that “[...]”

Figure 41 – Risk assessment of ARP for power electronics

[...]

Source: Parties’ response to the Commission’s request for information RFI 4 [Annex 16], slide 25 [emphasis added by the Commission].

³²⁸ Form CO [Annex 2.2b], “Annual report 2016/17 Aurubis”, page 87.

³²⁹ Form CO [Annex 2.2a], “Annual report 2016/17 Wieland”, page 22.

³³⁰ Form CO, Table 14; Commission’s calculation, based on the Parties’ response to the Commission’s request for information RFI 2, Wieland’s reply, tab “capacities”.

³³¹ Produced for an “Off-site Workshop” (see description in footnote 67).

³³² Response to the SO, paragraph 106.

Figure 42 – Strategic action plan for productivity optimisation

[...]

Source: Parties' response to the Commission's request for information RFI 4 [Annex 13], page 6 [emphasis added by the Commission].

- (453) In addition, respondents to the market investigation submitted that they doubted that for higher quality products there would be sufficient spare capacity available to increase supply if it were necessary.
- "It is plenty of rolling capacity available, however not all of it is suitable for manufacturing of connector Quality Level."*³³³
- "at the moment plants are fully loaded. For further growths invest is needed"*³³⁴
- "Generally, there are unused capacities in the market for rolled copper products, however this depends on exact product categories. While e.g. brass and roofing products are showing significant unused capacities, the high demand in other rolled copper product segments (e.g. high-performance alloys) results in limited availability of capacities for alloyed casting and surface treatment."*³³⁵
- (454) The market investigation has also revealed that at least some of Wieland's and ARP's competitors would be unable to increase supply as capacities are not available. One respondent differentiated the possibly available capacity according to the demanded quality.³³⁶ The following quotes show that competitors who responded to the investigation do not have the minimum spare capacities to be able to react aggressively to a post-Transaction price increase.
- "No more capacity available in our plant.[...]"*³³⁷
- "fully loaded"*³³⁸
- "[...]the concrete magnitude of capacity available depends on the product category with regard to material / alloy and specialized production assets."*³³⁹
- (455) Moreover, the vast majority of customers expressed doubts as to the ability of their suppliers to increase supply should this be necessary.³⁴⁰ Moreover, customers were concerned about the concentration of capacities. One respondent explained that *"Due to the merger Wieland would control a significant part of European production capacities."*³⁴¹

³³³ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 31.1 (Id 173).

³³⁴ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 31.1 (Id 158).

³³⁵ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 31.1 (Id 176).

³³⁶ Questionnaire Q2 to Competitors of Rolled Copper Products. question 32.1.

³³⁷ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products. question 32.1 (Id 173).

³³⁸ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products. question 32.1 (Id 158).

³³⁹ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products. question 32.1 (Id 176).

³⁴⁰ Questionnaire Q1 to Customers of Rolled Copper Products, question 33.

³⁴¹ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products question question 46.1 (Id 1235), German original reads *"Durch den Zusammenschluss würde Wieland einen erheblichen Anteil der europäischen Fertigungskapazität kontrollieren."*

- (456) The Notifying Party, in its response to the SO disagrees that capacity constraints exist in the high-end part of the market and argues that the decreasing demand in commodities would free up capacity to be used in the high-end.³⁴²
- (457) In the internal documents, however, the Notifying Party itself views the low-end part of the market as being characterised by extra capacity and the high-end part of the market as suffering from capacity constraints. The figure below, taken from an internal document³⁴³ where the Notifying Party sets out a 5 year strategy plan, shows that “*Commodities*” are characterised by “*overcapacity*” and “*Specialities*”, however, are characterised as having “*actual capacity constraints*”.³⁴⁴

Figure 43 –Evaluation for rolled products market

[...]

Source: Parties' response to the Commission's request for information RFI 24 [Annex 2], slide 55, [emphasis added by the Commission].

- (458) ARP also reached the same conclusion: “*Commoditized products continue to suffer from over-capacity in Europe and North America making it a buyers' market, while market demand has outgrown capacity for specialized products, like tin plated strips and high performance alloys for connectors, since a few months*”.³⁴⁵
- (459) As regards a possible reallocation of capacity in the low-end part of the market for the production of high-end products, assuming that no additional machinery is needed to change the production, it does not mean that spare capacity in the low-end of the market can be converted par-for-par to the needs of the high-end part of the market. Capacity is reliant on the current production portfolio of a manufacturer and changes with changes in the product mix. For example, a thin strip, which needs to be cold rolled several times, uses more capacity of the cold rolling mill than thick strip. The Notifying Party acknowledges the different uses of capacities by stating the following: “[...].”³⁴⁶ This quote also underlines that specialised products use more production capacity than commodities, as there are also more finishing steps, or more repetitions of finishing steps, required. As specialised products require more capacity, it is doubtful that any reallocation of capacities would provide enough excess capacity in the high-end part of the market to provide a competitive constraint for the new entity as set out in recital (449).
- (460) Furthermore, any producer of low-end or medium-range products would (i) have a limited product range (see Section 6.4.4), (ii) need to get qualified by customers (Section 6.5.2) and (iii) build up a relationship with customers (see Sections 6.4.2 and 6.5.2).
- (461) In its response to the SO, the Notifying Party argued that the Commission has failed to gather quantitative evidence of capacities in the rolled products market and relies only on qualitative evidence.³⁴⁷ The Commission notes that, as already mentioned in recital (460), the calculation of capacities relies heavily on the production mix of a producer. According to the information provided by the Notifying Party, the production of HPAs needs more time than standard brass, and hence uses more

³⁴² Response to the SO, paragraph 104.

³⁴³ Produced for an “Off-site Workshop” (see description in footnote 67).

³⁴⁴ Parties' response to the Commission's request for information RFI 24 [Annex 2].

³⁴⁵ Parties' response to the Commission's request for information RFI 8, Annex 13.

³⁴⁶ Response to the first LoF, paragraph 27.

³⁴⁷ Response to the SO, Section II.

capacity. For example, thinner products require more cold rolling repetitions and therefore use up more capacity than thicker products. In the rolled copper industry it is therefore difficult or even impossible to calculate and compare capacities, in particular for the high-end products. Furthermore, the internal documents of Wieland and ARP which were produced in the ordinary course of business do not attempt to exactly track the capacities (used and spare) of their competitors on an annual basis but rather rely on qualitative statements on available capacity. The Commission assumes that the Wieland and ARP would need to have knowledge of the exact production mix of their competitors to be able to do so. Moreover, such a calculation would only be a snapshot in time with limited explanatory power, as even one change in the production mix would render the calculation meaningless.

- (462) The Commission therefore considers that, based on the internal documents of Wieland and ARP, and the market investigation, capacity constraints exist in the high-end of the market, and that the limited spare capacities in the higher-end of the rolled products market will not enable rivals to react aggressively to a post-Transaction price increase.

6.4.4. *Repositioning in the high-end segment is not easy and entails time and sunk costs as well as less profitability*

- (463) According to the Horizontal Merger Guidelines, *“In some markets it may be relatively easy and not too costly for the active firms to reposition their products or extend their product portfolio. In particular, the Commission examines whether the possibility of repositioning or product line extension by competitors or the merging parties may influence the incentive of the merged entity to raise prices. However, product repositioning or product line extension often entails risks and large sunk costs and may be less profitable than the current line”*.³⁴⁸
- (464) As explained in Section 6.4.2, the Commission considers that there are significant entry barriers in the high-end part of the market which result in a lower number of competitors. In particular, it appears that investment into equipment and R&D to meet the requirements by customers coupled with more demanding qualification processes (as explained below in Section 6.5.2) tend to discourage entry into these market segments.
- (465) The same applies to the possible repositioning of the offer of a current supplier of rolled products of low to medium-range value. If such a supplier wished to reposition itself in high added value products, they would have to invest significantly in equipment and R&D before being able to provide a prototype to potential customers. The supplier would then have to go through a lengthy qualification process which is burdensome and costly and entails significant sunk costs (as described in Section 6.5.2). In the light of the above, the Commission considers that repositioning of a current product range into the high-end is difficult and costly and therefore cannot effectively constrain the merged entity from increasing prices.
- (466) The Commission considers that the limited possibility for market entry of competitors and the limited ability of competitors to reposition themselves on the market are such that they are unlikely to be able to exert a sufficient competitive constraint on Wieland and ARP, notably in the high-end part of the market where Wieland and ARP are closely competing.

³⁴⁸ Horizontal Merger Guidelines, paragraph 3.

- (467) In contrast to the Notifying Party³⁴⁹, the Commission does not believe that this finding contradicts recital (110), where it is stated that the vast majority of respondents said they were able to cold roll, anneal, pickle and slit any type of alloy for any type of final function.³⁵⁰ First, the theoretical ability to process any type of alloy does not automatically mean that any type of end product can be produced, for example, thin gauge strip, multicoil, and tinned strip require additional finishing steps and the relevant know-how has to be acquired to manufacture certain tolerances, thicknesses, surface cleanliness or flatness, or to coat with a certain quality.
- (468) Second, there is limited demand-side substitution between different kinds of rolled products as customers have different technical requirements and thus need different qualities, which may not be satisfactorily manufactured by all producers. Moreover, in more demanding industries, the suppliers of rolled products have to be qualified by the customers.
- (469) Third, as already stated in recital (115) the majority of market respondents acknowledge that they have been in situations where they were not able to meet customers' specifications due to limitations in their cold rolling, annealing, pickling and slitting capabilities³⁵¹.

6.4.4.1. Assessment of individual competitors does not lead to different findings

- (470) For the reasons mentioned above (Sections 6.4.1 to 6.4.4), the Commission considers that it is unlikely that manufacturers will be able to enter the high-end part of the market in significant numbers, and that existing competitors in the high-end part of the market will have the ability, and have the incentives to offset a possible price increase. The assessment of the ability and the incentives of individual competitors does not change this view.
- (471) The Commission will further assess successively the new entity (a) KME/MKM, (b) KME and MKM taken individually, (c) Sofia Med as well as (d) other competitors of smaller sizes.
- (a) *KME/MKM*
- (472) KME's acquisition of MKM will create a larger fully integrated competitor with a combined total market share in the region of [20-30]% in volume terms of rolled products. Although it is possible that the merger might improve the competitiveness of KME/MKM mainly in the low-end where KME and MKM overlap, a number of factors will negatively impact the new entity's ability to compete with the Parties in the rolled products market, and, more specifically with Wieland and ARP in the high-end.
- (473) First, in recent years, KME has experienced a period of structural weakness and decline which can be observed in decreasing market shares. Internal documents of the Parties suggest that they are aware of KME's weaknesses and that Wieland tried to take advantage of its competitor's deteriorating position in the connector business, as shown in Wieland's internal document presented in Figure 44:

³⁴⁹ Response to the SO, paragraph 105.

³⁵⁰ Questionnaire to Suppliers of Rolled Products, questions 16 and 16.1.

³⁵¹ Questionnaire to Suppliers of Rolled Products, questions 17, 18, 19 and 20.

Figure 44 - Wieland's connectors “cockpit chart”

[...]

Source: Parties' response to the Commission's request for information RFI 4 [Annex 9], page 6 [emphasis added by the Commission].

- (474) A strategic planning analysis conducted by one of Wieland's business units in its ordinary course of business produced a document³⁵² on the strengths, weaknesses, opportunities and threats (SWOT) as regards rolled products in electrical engineering. According to that analysis, KME's customers appeared to be concerned about security of supply and the ability of KME to deliver products meeting their performance requirements on time. This would indicate a serious issue concerning KME's performance vis-à-vis its customers.

Figure 45 – SWOT analysis of the rolled products market

[...]

Source: Parties' response to the Commission's request for information RFI 24 [Annex 7], slide 7 [emphasis added by the Commission]

- (475) The period of weakness of KME has apparently also resulted in a restructuring of the company since 2015. The Figure 46 is an assessment of KME by Wieland. The optimisation of current capacities is one target of the restructuring but it appears that KME was also structurally downsizing by selling production sites and reducing the number of employees. Wieland indicates in the same document in relation to KME that “*signs of financial difficulties get more and more visible*” and that in February 2017 “*customers confirm difficult situation at KME ([...])*”.³⁵³

Figure 46 – Wieland's competitive assessment of KME

[...]

Source: Annex 28 to the Form CO, Q22 Competitor Profile KME.

- (476) The decline of KME is also visible in the continual loss of shares in HPAs and other alloys.³⁵⁴
- (477) Second, the market investigation has shown that MKM is rarely mentioned as an alternative supplier to Wieland and ARP in market segments such as connectors, semi-conductors, or stampers. In the rare cases where MKM is mentioned, it is only for a limited number of pure copper grades, for example, CU-PHC and CU-ETP. Also, from the fact that MKM is not mentioned as a competitor in internal documents, it can be assumed that MKM is not highly active on the same high-end part of the market as Wieland and ARP.³⁵⁵ Moreover, MKM does not have a tinning line (see Table 21) and thus would not be able to produce tinned strip itself - for example for connectors - but would need to commission the tinning of its bare strip (or engage in significant investments in order to be able to produce tinned strip). It

³⁵² Produced for an “Off-site Workshop” (see description in footnote 67).

³⁵³ Form CO [Annex 28], Q22 Competitor Profile KME “Strategy” sheet.

³⁵⁴ The confidential data has been made accessible to the Notifying Party's economic advisers in context of the data room procedure.

³⁵⁵ Parties' response to the Commission's request for information RFI 8 [Annex 4], or Form CO, [Annex 34_Q22].

appears that MKM is mainly not present on the market segments where Wieland and ARP are close competitors.

- (478) The acquisition of MKM by KME will result in the new entity being the largest competitor of Wieland. Nevertheless, the Commission does not share the view of the Notifying Party that the merger of KME and MKM will make the new entity a stronger player in the high-end part of the market because of efficiencies.³⁵⁶
- (479) First, while the acquisition of MKM is likely to improve KME's position, potentially through the exploitation of synergy effects, it is not implausible to assume that, due to the current difficulties of KME (as mentioned in recitals (474) to (477)) and the challenge of integrating MKM, the merger could extend the restructuring period for KME/MKM.
- (480) Second, KME's problems prior to the merger with MKM in the high-end part of the market do not stem from a lack of capacity but from weak capabilities. Both Wieland and ARP are aware of this. Wieland lists, among strategic measures to be taken in relation to connectors: "*Take advantage of the weakness of competitors (KME/KMD) through appropriate positioning of Wieland*" (see Figure 44). Further, based on the ARP chart benchmarking ARP's business against its top competitors (see Figure 10, Section 6.3.1.1), [...], while KME comes last. Notably, ARP considers that KME does not have any competitive advantage as regards its cost position, product quality, technological capabilities and R&D. The list of top competitors does not feature MKM.
- (481) Third, as stated in recital (478), MKM focuses its activities on the commoditized market segment (mainly pure copper). Therefore, the merger with KME will not improve the competitive strength of the new entity in the high-end part of the market where Wieland and ARP are mostly competing.
- (482) Thus, it seems unlikely that, following the merger of KME and MKM, the new emerging entity would have an incentive to aggressively react to post-merger price rises.
- (483) Lastly, with respect to the overall rolled products market, the merger of KME and MKM would result in the removal of one competitor from the market, and therefore in a more concentrated market. Therefore, the Commission considers that the KME/MKM merger will not have a significant positive impact on the competitors' ability to react to price increases.
- (484) Contrary to the opinion expressed by the Notifying Party,³⁵⁷ the Commission does not suggest that the merger of KME with MKM will result in a weaker competitor. The Commission considers, however, as explained in recitals (473) to (484), that the acquisition of MKM, which is hardly present, if at all, in the high-end of the market, will not address KME's problems in the high-end, and that any potential positive effect of that merger could be offset by the negative effect of the more concentrated overall market. Thus, the Commission considers that the impact of the KME and MKM merger on the high-end part of the market, if there is any effect at all, will be neutral.

³⁵⁶ Response to the SO, paragraph 110; Wieland's and ARP's presentation for the oral hearing of 19 November 2018, slide 19.

³⁵⁷ Wieland's and ARP's presentation for the oral hearing of 19 November 2018, slide 19.

1.1.1.1. An individual assessment of KME and MKM would lead to the same results

- (485) An individual assessment of KME and MKM respectively would not change the assessment.
- (486) KME is a fully vertically integrated competitor and should technically be able to compete with Wieland and ARP post-Transaction. KME supplies different alloys, including HPAs, copper of different purity and also tinned products. However, as shown in recitals (474) to (477), KME has suffered a period of weakness and is in a state of restructuring. In the absence of the merger with MKM, KME will not be able to benefit from the positive synergy effects and will have to rely on its ongoing restructuring programme to increase its competitive ability.
- (487) Because of the weak performance of KME and the ongoing restructuring process in which it has engaged, it is unlikely that KME will be able to react through increased supply of high-end products should the merged entity increase prices as regards these products.
- (488) MKM is also a vertically integrated player. However, as stated in recital (478), MKM appears to be more active on the lower-end part of the market, compared to Wieland and ARP, and does not possess a tinning line or produce a large portfolio of HPAs, due to the technical limitations of its Conti-M line.³⁵⁸ Thus, even in the absence of a merger with KME, MKM would have to first build up the capability to compete with Wieland in the high-end part of the market which would take many years.

(a) Sofia Med

- (489) Sofia Med is a fully vertically integrated player. In contrast to KME, Sofia Med is growing, as supported by an internal assessment of competitors by Wieland and is expected to grow further in the future.³⁵⁹ In the internal document shown in Figure 47, Wieland estimates the sales volume of Sofia Med for rolled products as 30 000 tonnes in 2015 and 48 000 tonnes in 2017 which indicates a growth of 60% during a two year period. The Notifying Party has also pointed out that, according to a company presentation by ElvarHalcó (the parent company of Sofia Med) of May 2017, Sofia Med's worldwide sales grew by 66% between 2015 and 2017.³⁶⁰

Figure 47 – Wieland's analysis of Sofia Med

[...]

Source: Form CO [Annex A(63)], slide 4 [emphasis added by the Commission]

Translation of the German original (solely the highlighted text passage):

“Enormous growth in sales of rolled products (30 kt in 2015, 48 kt in 2017~ +60%)”.

- (490) Nevertheless, despite its growth in recent years, Sofia Med's overall market shares in value and in volume and its alloy shares appear to be limited to between 0% and 5% (see Sections 6.2.2 and 6.2.3).

³⁵⁸ MKM uses Conti-M horizontal strip casting technology mainly for pure copper –as mentioned in Response to the Article 6(1)(c) Decision, Annex 2, E.CA analysis “Economic Assessment of the risk of anti-competitive input foreclosure”; and also in Form CO [Annex A(50)], “MKM Presentation held at a IWCC technical seminar 2016”.

³⁵⁹ Non-confidential minutes of a call with a competitor of 18 September 2018 (Id 1311).

³⁶⁰ Response to the SO, paragraph 111.

- (491) Furthermore, although Sofia Med is growing, it is not yet a fully credible competitor in the high-end part of the rolled products market. In an internal ARP's document on competitive developments, produced in April 2017 (see Figure 48), ARP considered Sofia Med as "*trying to enter the higher-end markets of connectors*" but having not yet achieved the required quality. The Notifying Party pointed out that this does not show that Sofia Med is not a credible competitor.³⁶¹ However, Sofia Med has only in recent years, starting with its partnership agreement with Dowa Metaltec, begun to shift its focus from commodities to higher-end products. This implies that Sofia Med is currently building up its capabilities to supply the high-end part of the market, for example by the installation of the new HDT line in 2018, and needs to be qualified by the customers in the high-end. Therefore, Sofia Med cannot yet be seen as being fully competitive in the high-end part of the market.

Figure 48 – ARP's analysis of competition development

[...]

Source: *Parties' response to the Commission's request for information RFI 8 [Annex 13], page 2* [emphasis added by the Commission].

- (492) In its response to the SO, the Notifying Party points out that Sofia Med has a competitive advantage through its location in Bulgaria because of significantly lower labour costs in Bulgaria, compared to Germany (estimated as being EUR 5/h vs EUR 35/h) that is not offset by higher transportation costs.³⁶² The Commission notes that labour costs are not in their entirety variable costs but also contain fixed costs and thus cannot fully be used to offset any potential disadvantage from transportation costs. Moreover, as also noted in Section 7.3.3.2 (a), Sofia Med has not substantiated the low labour costs and the estimates it provided were based on Eurostat data on labour costs in Bulgaria, leaving uncertainty as to the exact level of the difference between transportation costs and Sofia Med's labour costs, which are likely to increase (see recital (877)). Moreover, the market investigation indicates that the majority of market participants purchased their supply from a distance of between 250 and 1500 km from their respective production plants.³⁶³ The purchasing radius as indicated by the response of market participants suggests that Sofia Med has a competitive disadvantage, being located in Sofia and therefore closer to the peripheral region of the EEA.
- (493) Even if Sofia Med is growing and apparently investing in the capability to produce high-end products, its total sales volume is by far not yet sufficient to compensate for the loss of ARP's sales volume. For example, in 2017 ARP's segment share in volume terms in HPAs was almost twice as large as Sofia Med's. Also, although Sofia Med has the capacities for further growth and is building up the capabilities, for example, the new tinning line, it will need to go through the qualification processes of the customers, for any new product.

(a) Other competitors

- (494) Next to the fully vertically integrated competitors,³⁶⁴ there is a number of smaller non-integrated competitors in the high-end of the market. These include, in particular, Diehl, Kemper, Messingwerk Plettenberg and Griset. However, as those

³⁶¹ Response to the SO, paragraph 111.

³⁶² Response to the SO, paragraph 112.

³⁶³ Questionnaire Q1 to Customers of Rolled Copper Products, question 16.

³⁶⁴ EGM is also vertically integrated but its overall market share is small (0-5%), see Section 6.2.2.

competitors are not fully vertically integrated and mostly possess only horizontal strip casting facilities, they are dependent on the supply of pre-rolled strip for alloys, which they cannot produce themselves via horizontal strip casting, such as strip made of some HPAs like Copper-Iron alloys.

- (495) According to an internal strategic document produced by the Notifying Party's connectors' business unit, Kemper and Diehl are, next to ARP and KME, its main competitors in connectors in the EEA. Based on that document, Kemper has the same segment share as ARP ([10-20]%), followed by Diehl with [5-10]% segment share.³⁶⁵
- (496) According to the Notifying Party's internal document, written in the course of its ordinary business, "*Market Analysis Aurubis*", [Competitor 2] and [Competitor 1] also compete for the Notifying Party's biggest customer [...], and they are that customer's third and fourth most important suppliers. Based on the Notifying Party's assessment of [...] demand and its competitors' sales to [...] in 2016/2017, the Notifying Party is the first supplier with [...]% of [...] demand, followed by [...] with [...]%, [Competitor 2] with [...]%, [Competitor 1] with [...]% and [...] with [...]%.³⁶⁶
- (497) [Competitor 2] and [Competitor 1] also compete for [...], the Notifying Party's third most important customer. Based on the Notifying Party's assessment of [...] demand and its competitors' sales to [...] in 2016,³⁶⁷ the Notifying Party is the largest supplier of [...] with [...]% of [...] demand, followed by [...] with [...]%, [Competitor 1] with [...]%, and [Competitor 2] with [...]%.³⁶⁸
- (498) The higher shares of [Competitor 1] and [Competitor 2] concerning the large customers [...], in correlation with the higher shares of these competitors in connectors, as estimated by the Notifying Party in the ordinary course of business, show that these small non-integrated competitors play a more important role in this part of the market than their overall market shares would suggest.
- (499) The Notifying Party correctly reminded the Commission that these non-vertically integrated players play "*an increasingly significant role in the market for rolled products, in particular in the "high end" segment.*"³⁶⁹
- (500) In its response to the First LoF, the Notifying Party, however disagreed that the fact that [Competitor 1] and [Competitor 2] also serve the largest and third largest customer of Wieland shows that they are more important competitors in connectors.³⁷⁰

³⁶⁵ Parties' response to the Commission's request for information RFI 24 [Annex 6], page 28.

³⁶⁶ Shares calculated on the base of the figures presented on page 3 of Notifying Party's internal document "*Market Analysis Aurubis*" – Parties' response to the Commission's request for information RFI 8 [Annex 4].

³⁶⁷ Shares calculated on the base of the figures presented on page 17 of Notifying Party's internal document "*SBU Connector OSWS 2017*" – Parties' response to the Commission's request for information RFI 24 [Annex 6].

³⁶⁸ With regards to [...], the second most important customer of the Notifying Party, a [...], slide 15 – Parties' response to the Commission's request for information RFI 24 [Annex 6].

³⁶⁹ Response to the SO, paragraph 113.

³⁷⁰ Response to the First LoF, paragraph 33, full quote: "*The first remark of the Parties is that the second and third additional pieces of evidence show nothing more than that [competitors] also serve part of the demand of Wieland's largest and third-largest customer. On this basis, however, it cannot be concluded*

- (501) The Commission notes in that regard that, (i) the Notifying Party itself reminded the Commission of the importance of these players (see recital (500)); (ii) [...] represent, according to internal documents of the Notifying Party, around 39.5% of total demand in Europe (that is approximately [...] tonnes of [...] tonnes), in the connector business in 2016 and are growing;³⁷¹ and (iii) the Notifying Party itself, in its ordinary course of business, estimated the shares of these competitors for connectors to be significantly higher than their market shares in the overall rolled products market (see recital (496)).
- (502) The Notifying Party also argued that “*there is clear evidence that [Competitor 1] and [Competitor 2] offer differentiated products compared to Wieland*”. With regards to this argument the Notifying Party states that “*just under 50% of total alloy purchases of [...] from Wieland in the EEA in 2017 consisted of non-HPA alloys*” and that [...] mentioned [Competitor 1] as an alternative supplier for bronze.³⁷²
- (503) As regards [...], the Commission notes that the breakdown of [...] purchases from Wieland by alloys does not say anything about the alloys that [...] buys from other EEA suppliers, unless the Notifying Party considers that the breakdown of its supplies to [...] is representative of [...] total purchases from the EEA rolled products market. In either case it does not demonstrate that [Competitor 1] and [Competitor 2] offer “*differentiated products compared to Wieland*”. Similarly, with regards to [...], the fact that [Competitor 1] was mentioned as an alternative supplier for bronze and [Competitor 2] for HPAs does not demonstrate that these competitors offer “*differentiated products compared to Wieland*”. The Commission has neither stated nor implied that [...] only source HPA connector strip from the EEA rolled products market, nor that all high-end connector strip is made exclusively from HPAs. More importantly, the Notifying Party has at no point sought to refute the importance of [Competitor 1] and [Competitor 2] for these two customers.
- (504) The Commission notes in this regard, that those smaller competitors mainly purchase the necessary pre-rolled strip for HPAs from the market leader in the pre-rolled strip market, namely Schwermetall. As the acquisition of sole control over Schwermetall is part of the Transaction, the Transaction could also have an impact on the smaller competitors from the supply side, that is by raising their production costs, rendering these competitors unable to react to price increases, in the sense of paragraph 36 of the Horizontal Merger Guidelines and paragraph 18 of the Non-horizontal Merger Guidelines. The Commission has undertaken a more detailed analysis of the purchase pattern of the non-integrated players and its impact on the downstream market. The detailed assessment of the additional negative effects due to the parallel acquisition of sole control of Schwermetall will be provided in Section 6.9.

6.4.5. Conclusion on competitors' reaction

- (505) Based on the reasons set out in recitals (408) to (505), and notably due to the limited number of players able to compete in the high-end part of the market, the existence of barriers to entry and expansion, which make entry or repositioning of new players a challenging task, and capacity constraints for know-how intensive rolled products,

(contrary to what the Commission does in para. 36) that these players are therefore important rivals to Wieland in the high-end segments, in particular in connectors”.

³⁷¹ Calculated on the figures presented on pages 12, 18, and 27 of Notifying Party's internal document "SBU Connector OSWS 2017" – Parties' response to the Commission's request for information RFI 24 [Annex 6].

³⁷² Response to the First LoF, paragraph 35 to 38.

the Commission considers that competitors are unlikely to have the ability and the incentives to defeat price increases which could be implemented by the merged entity post-Transaction.

- (506) The Notifying Party is the market leader in the overall market. However its business focus lies on the high-end part of the market (see Section 6.3.1.2). Thus its market power particularly derives from its position in the high-end part of the market. Wieland has previously taken strategic decisions to reduce its presence in the low-end part of the market (see recital (509)) and views that the market for specialities is growing, in contrast to commoditised products (see recitals (282) and (283)). For this reason, any rolled products manufacturer that would want to compete with the merged entity and act as an effective competitive constraint would have to have the ability to focus their business on the high-end part of the market and the incentive to defeat a price increase by the merged entity. Therefore, the Commission considers that taking an overall market view, competitors are unlikely to have both the ability and the incentives to defeat price increases by the merged entity.

6.5. Post-Transaction the customers would have limited possibilities to switch supplier in particular in the high-end products where the Parties overlap

- (507) According to the Horizontal Merger Guidelines: “[c]ustomers of the merging Parties may have difficulties switching to other suppliers because there are few alternative suppliers or because they face substantial switching costs. Such customers are particularly vulnerable to price increases.”³⁷³ For the reasons set out below (Sections 6.5.1, 6.5.2. and 6.5.3), the Commission considers that this is true for the high-end part of the rolled products market. It appears that the high-end part is characterised by a low number of alternative suppliers, as well as by substantial switching costs.

6.5.1. Due to the strong differentiation and specialisation in the sector at segment level there are fewer alternative suppliers in the high-end part of the market

- (508) Although the overall market for rolled products includes a significant number of competitors, not all competitors are active in the same parts of the market. Even the large fully vertically integrated players are not active across the entire products spectrum. For example, Wieland has taken the strategic decision to [...] and to reduce its presence in the low-end part of the rolled products market, and to stop supplying more commoditized products, such as HF cables (as explained in recital (274)).
- (509) The different expectations and requirements, *for example*, tight tolerances, homogeneous properties, high thermal performance, or high corrosion resistance, of customers in the different market segments create barriers for manufacturers to enter the high-end part of the market. While it could be assumed that manufacturers of high-end products could also supply low-end products, it seems difficult for competitors on the low-end part of the market to enter the high-end part of the market. The reason for this is the existence of technical barriers to the production of high-end products. To be able to provide high-end products, producers would need to have the appropriate know-how, experience and be qualified by customers. In addition, for certain products, like tinned strip or thin gauge strip, the manufacturers need to possess additional equipment which is not necessary for the lower-end products. Thus, theoretically, it is easier for producers active in the high-end part of

³⁷³ Horizontal Merger Guidelines, paragraph 31.

the market to switch production to low-end products than the other way around, as no capital expenditure ('CAPEX') would be necessary (see Sections 6.4.1, 6.4.2 and 6.4.4).

- (510) As explained in Section 6.4.1, the market investigation indicates that for connector strip, in particular made of HPAs, only a limited number of suppliers was identified by customers. In addition, the market investigation indicates that qualification by customers is more time consuming and costly in the higher-end of the market.
- (511) In the semiconductors segment, the market investigation identified in total 6 alternative suppliers to Wieland and ARP. However, not all alternative suppliers were present in all alloy segments. For example, for HPAs, only 2 alternative suppliers were identified.³⁷⁴ In electric engineering, 3 alternative suppliers for HPAs and 4 alternative suppliers for CU-OFE (with overlaps) were mentioned; no alternative supplier for DCB-substrates could be identified.³⁷⁵
- (512) For stampers in general, only 2 alternative suppliers were identified. In the energy/signal segment, very limited alternatives for HPAs, 3 suppliers could be observed.³⁷⁶
- (513) For connectors, in general, there seems to be a larger number of competitors in pure copper, bronze and brass, but only 5 alternative suppliers for HPAs. When a breakdown of the connectors segment by end-industry is attempted, the market investigation showed that there are 5 alternative suppliers for the automotive industry (including connector stamping); there are 4 alternative suppliers for industrial application, computers, and telecommunication, although some of them can only provide certain alloys. The alternative suppliers identified for HPAs and connectors for the automotive are KME/KMD, Diehl (including Sundwiger Messingwerk), Kemper, and Sofia Med. With the exception of Sofia Med, the same competitors were identified as alternative suppliers of connectors for industrial application, computers, and telecommunication.³⁷⁷
- (514) When assessed not by field of use but by material composition, the identified alternative suppliers for HPAs are KME/ KMD, Diehl (including Sundwiger Messingwerk), Kemper, and Sofia Med (not for all fields of use). These competitors are also identified as alternative suppliers for pure copper as well as brass and bronze (but not in relation to all fields of use). However, for pure copper, bronze and brass more competitors were generally identified than for HPAs.³⁷⁸ It appears that the more advanced the alloys have to be, the more competition in the market concentrates on the few mentioned alternative suppliers.
- (515) The Notifying Party has contested these findings. According to the Notifying Party the responses that the Commission received are not representative as only a few customers replied. The Notifying Party also argues that the Commission did not take into account the fact that two customers each mentioned one supplier from outside the EEA, PMX and Poonsang³⁷⁹. These suppliers are taken into account in the figures

³⁷⁴ Questionnaire Q4.3 to Customers of Rolled Copper Products – Semiconductors, question 6.

³⁷⁵ Questionnaire Q4.4 to Customers of Rolled Copper Products – Electric Engineering, question 6.

³⁷⁶ Questionnaires Q4.5 to Customers of Rolled Copper Products – Energy/ Signal, question 6, and Q4.7 to Customers of Rolled Copper Products - Stampers, question 6.

³⁷⁷ Questionnaire Q4.2 to Customers of Rolled Copper Products – Connectors, question 6.

³⁷⁸ Questionnaire Q4.1-Q4.8 to Customers of Rolled Copper, question 6.

³⁷⁹ Response to the SO, section VIII.

presented in recital (514).³⁸⁰ Moreover, the Commission has always acknowledged that there are small amounts of imports into the EEA, but not higher than 5% of the overall market. As regards the representative nature of the responses, the Commission has received 59 responses from customers which were separated into 8 different fields of use. The response rate lay between 39% (energy/signal) and 60% (connectors). In addition, the responses came from important customers of Wieland and ARP. Therefore the claim that the responses are not representative cannot be accepted. Concerning the criticism that in particular the figures in recitals (512) to (514) are based on too few answers, these answers concern particular fields which may use high-end products, like connectors stampers, connectors for the automotive industries, or alloys, that are used for high-end products, for example, HPAs. As these are further sub-segmentations, it is normal that fewer customers responded, as not every sub-segment concerns every customer. However, the Commission also notes that the internal documents of Wieland and ARP (see for example, Figure 35 and Figure 49) do not contradict the responses of the customers to the market investigation.

- (516) Wieland's and ARP's internal documents prepared in the ordinary course of business support the results of the market investigation confirming that only few companies compete in the EEA when it comes to high-end products, which is in line with the findings of the Commission in Section 6.4.1. Figure 49 shows a strategic analysis of the European connectors market produced by Wieland's connectors business unit. It shows that the main competitors in this segment for Wieland are (besides ARP), KME/KMD, Diehl (referred to in the document as "DMA" - Diehl Metall Applications)) and Kemper.
- (517) The Notifying Party, however, argues that Figure 49 contains "*a non-exhaustive list of examples of competitors*" and does not represent the real market situation.³⁸¹ The Commission disagrees with this view. The document was produced by experts in the connectors' business unit of the Notifying Party and represents a document setting out the strategic planning of this business unit for the period ending 2020/21. Moreover, as can be seen in Figure 49, the document not only contains a list of competitors but also their "*market shares*", including the shares of the Notifying Party. The shares of the named competitors and the Notifying Party represent [...] % of the sales for connectors in Europe. Other, unnamed, competitors only add up to [...] %. This clearly shows that ARP, KME/KMD, Diehl and Kemper are the competitors that exert competitive pressure on the Notifying Party in the field of connectors, where the Notifying Party makes the majority of its sales (see Section 6.3.1.2, Figure 13).

Figure 49 Analysis of the connectors segment

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 6, slide 28 [emphasis added by the Commission].

³⁸⁰ The Commission notes that PMX could also have been not taken into account in the analysis, as the customer, who mentioned PMX, stated in another question that "*Aurubis USA should have taken over the ept-Business from PMX (only USA).*" This can imply that PMX is only an alternative supplier for the customer in the US and not for the EEA market.

³⁸¹ Response to the SO, paragraph 119.

(518) In this Section mentioned alternative suppliers face different challenges (as also shown in Section 6.4.4.1). Sofia Med is a growing competitor but has just started building up capabilities to challenge on a wider range of high-end products. [Competitor 1] and [Competitor 2] belong to the non-integrated manufacturers relying to a significant extent on Schwermetall for their resource input. KME is currently in a restructuring process. So, even if these producers are nominally alternatives for customers, in reality, limitations apply. If the higher-end part of the market further concentrates as a result of the proposed Transaction, customers may find themselves in a situation where they have only 1 or 2, or even no other, alternative source of supply (see the example of [...] mentioned in Section 6.3.2.5).

6.5.2. *Switching is not easy for high-end products because of necessary qualification processes*

(519) The market investigation in Phase I revealed that a large majority of customers in the rolled products market did not switch their entire purchase volume, or significant parts of the volume, of rolled products over the last three years.³⁸² In general, switching suppliers also appeared to be a challenging task. The reasons for not switching suppliers were in many cases due to the sometimes lengthy and demanding qualification processes, particularly in the high-end part of the market, as can be seen from the customers' observations:

*"Qualification of a new supplier is a long process"*³⁸³

*"new supplier qualification cost is high"*³⁸⁴

*"Requalification is very expensive and there was no Need to Switch."*³⁸⁵

*"Switching suppliers is causing a lot of effort due to necessary [sic] tests of the new products. Also it may be connected with information obligations towards customers."*³⁸⁶

(520) The Notifying Party disagreed with the assessment that switching suppliers is particularly challenging. In its response to the SO, it argued that customers can, and do, easily switch suppliers.³⁸⁷ The Commission does not share this view.

(521) First, the market responses do not *"clearly demonstrate that customers did switch their suppliers and that customers can, and do, easily switch suppliers."* In fact, as stated in recital (520), the market investigation in Phase I revealed exactly the contrary.

(522) Second, the Notifying Party provides a quote by MKM stating that *"it is a commodity market with significant excess capacity. Customers can exchange suppliers easily. [...]"*³⁸⁸. As already stated in Sections 6.4.4.1(a) and 6.4.4.1(b), MKM is active in the lower-end of the market which has different characteristics from the higher-end. The

³⁸² Questionnaire Q1 to Customers of Rolled Copper Products, question.26.

³⁸³ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 26.2 (Id 1279).

³⁸⁴ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 26.2 (Id 1231).

³⁸⁵ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 26.2 (Id 1334).

³⁸⁶ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 26.2 (Id 232).

³⁸⁷ Response to the SO, paragraphs 120-124.

³⁸⁸ Response to the SO, paragraphs 122.

Notifying Party also provides a quote by [...] stating that it “*has switched products between Wieland and ARP, as well as other suppliers. [...]*”³⁸⁹. The Commission notes that [...], as one of the largest global suppliers of connectivity and sensor products, is able to switch suppliers. However, not many customers have the ability of a global player such as [...].

- (523) Third, the Notifying Party argues that “*numerous other customers did submit that they have switched their suppliers.*”³⁹⁰ The “numerous” customers are eleven customers out of 58 respondents to the questionnaires in Phase II. Those customers did not actually state that they had switched their suppliers but, rather, that they switched volumes between the Notifying Party and ARP at one point of time in the past, which would indicate closeness of competition between the Notifying Party and ARP. Nevertheless, this does not change the fact that no significant volume or entire volume has been switched between any suppliers by the majority of customers in the last 3 years, as the market investigation in Phase I showed (see recital (520)). Small volumes can also be switched for qualification reasons, for example, to sample possible new alternative suppliers.
- (524) Furthermore, the Notifying Party stated that, in particular, customers from the fields of engine cooling, building and ordnance supported the view that switching is not difficult. However, the Commission notes that only a minority of those respondents in the fields of engine cooling, building and ordnance consider that the qualification process does not pose any difficulty at all for switching suppliers. The majority of respondents view the qualification of suppliers as a difficult, although not insurmountable. In addition, the customer, which is quoted by the Notifying Party stating that “*Switching suppliers is not a problem, can be done very fast*” is a metal distributor and, as far as rolled copper products are concerned, it seems it has only qualified ARP “*because our customer wants only material from Aurubis, when we will change the supplier we must qualify.*”³⁹¹ More importantly, engine cooling, building and ordnance customers are not generally customers of high-end products, but rather of commoditised products. As noted above, barriers to switching and qualification requirements are generally lower with respect to commoditised products than for high-end products. In the Commission’s view, therefore, the context in which building and ordnance customers operate and the products that they purchase (that is, largely commoditised products) is likely to have an impact on their views as to the ease with which new suppliers can be qualified, and is not directly applicable to the segments which form the primary focus of Wieland’s and ARP’s activities in the rolled products market.
- (525) The Notifying Party also argued that qualification processes depended on whether an existing or a new supplier needed to be qualified, and whether the qualification was done for a new product or a running product line. Depending on such variables the qualification period usually lasted between few weeks and several months. The qualification process could, if needed, be accelerated.³⁹²
- (526) As regards the duration and costs of qualification processes as a barrier for customers for switching suppliers, the market investigation provided a different picture to that suggested by Wieland and ARP in the Response to the Article 6(1)(c) Decision. In

³⁸⁹ Response to the SO, paragraphs 123.

³⁹⁰ Response to the SO, paragraphs 124.

³⁹¹ Non-confidential reply to Questionnaire Q4.8 to Customers of Rolled Copper Products - Engine Cooling/Building/Ordnance (ID 1145).

³⁹² Response to the Article 6(1)(c) Decision, paragraphs 53 and following.

general, the vast majority of customers have to qualify their suppliers of rolled products, that is to say, to assess and verify that the suppliers' products meet their quality requirements and the requirements of the customers of higher tiers, irrespective of the segment. However, the duration and the intensity of the qualification process, for example having to qualify not only the supplier but also the individual plants, vary for customers of different segments, with the process taking more time and being more intense for products for selective industries such as the automotive industry.³⁹³ However, it appears that the processes do not take only few weeks to several months, as indicated in the Response to the Article 6(1)(c) Decision, but rather multiple months to possibly 2 years or more. For example, for connectors the majority of respondents indicated durations of between 6 and 24 months.³⁹⁴

*“For supplier change 6 to 9 months for current programs, for new programs 2 years”*³⁹⁵

*“Qualification usually 18 months for new supplier”*³⁹⁶

“- 6 months for the supplier

- 3 months for the stamping test in combination with the tooling

*- 6 month validation for each stamped product and 40K Euro/each”*³⁹⁷

*“6-12 months for the qualification process. For some products up to 18 months as we have to get the release from our customer. In some cases we don’t have the permission for changing the supplier”*³⁹⁸

*“12 -24 months The qualification of our cable strip portfolio (each of the rolled copper products = ~ 60 different dimensions of copper strip) takes round about 6-12 month, cost wise we need to take into account the product cost + qualification time = roughly 1,5M€ (including copper content!)”*³⁹⁹

(527) The Notifying Party argued in its response to the SO that, if a view of the overall market is taken, the indicated duration is not between 6 and 24 months and that the Commission should take a more overall view.⁴⁰⁰ The Commission acknowledges that the duration of the qualification processes differs and is longer for more demanding industries, such as the automotive industry (see Section 6.4.2). In fact, it is in the high-end part of the market that the qualification is not only longer but also more costly, for example connectors for the automotive industry, where. both Wieland and ARP compete (see Section 6.3.1.2, Section 6.3.2.1).

(528) In addition to the duration of qualification processes and the cost for qualifying their suppliers, customers of intermediate products also face the issue that, for multi-tier supply chains, their upper-tier customers need to qualify the supplier themselves,

³⁹³ Questionnaires Q.4.1 – 4.8 to Customers of Rolled Copper Products, question 16.-

³⁹⁴ Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 16-

³⁹⁵ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 21 (Id 1163).

³⁹⁶ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 21 (Id 1072).

³⁹⁷ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 21 (Id 868).

³⁹⁸ Non-confidential reply to Questionnaires Q.4.4 to Customers of Rolled Copper Products – Electric Engineering, question 21 (Id 1414).

³⁹⁹ Non-confidential reply to Questionnaires Q.4.5 to Customers of Rolled Copper Products – Energy/Signal, question 21 (Id 1335).

⁴⁰⁰ Response to the SO, paragraph 126.

which means that one supplier has to go through multiple qualification processes. This can take several months and also presents the risk that a change in the supplier will not be approved.

*“For some products up to 18 months as we have to get the release from our customer.”*⁴⁰¹

- (529) According to the market investigation, the vast majority of participants consider that the qualification processes constitute a problem for switching suppliers.⁴⁰² In particular, the time, costs and customer involvement were mentioned as issues for switching. Suppliers to the automotive industry seemed to be particularly affected by tight qualification requirements.

*“The qualification process of our customers is the main difficulty in changing a supplier. Often, the entire chain of downstream processors must agree (multiple tiers, especially Automotive OEM and TIER-1 difficult)”*⁴⁰³

*“Our customer have to go through a qualification proeedure [sic] with their customer [sic], which is also very difficult and expensive.”*⁴⁰⁴

*“yes because the equipment is not adjusted to the material, because there are differences in quality and the product must be very expensively tested. Furthermore, in many cases, the customer must be informed and also carry out a qualification first”*⁴⁰⁵

*“Qualifying process is time and money consuming. In automotive is almost impossible to change or qualify new supplier. Flexibility is very limited”*⁴⁰⁶

*“Yes, because of very high costs, long time and some end products of our customers are released with this special materials”*⁴⁰⁷

*“Certainly for the customer, a change of supplier is a difficulty (you must start from scratch to approve the product supplied, produce the samples, assemble the semi-finished products, carry out the tests, obtain the certifications, issue the approval). all this involves expenditure of timing, commitment to resources, additional [sic] costs”*⁴⁰⁸

⁴⁰¹ Non-confidential reply to Questionnaires Q.4.4 to Customers of Rolled Copper Products – Electric Engineering, question 22 (Id 1414).

⁴⁰² Questionnaires Q.4.1 – 4.8 to Customers of Rolled Copper Products, question 25.

⁴⁰³ Non-confidential reply to Questionnaires Q.4.1 to Customers of Rolled Copper Products – Trade/Slitting centres, question 24 (Id 1616), the German original reads *“Der Qualifizierungsprozess bei unseren Kunden ist die hauptsächliche Schwierigkeit, einen Lieferanten zu wechseln. Häufig muss die gesamte Kette der nachfolgenden Verarbeiter zustimmen (mehrere Stufen, insbesondere Automotive OEM und TIER-1 schwierig).”*

⁴⁰⁴ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question, 25 (Id 1072).

⁴⁰⁵ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 25 (Id 1218), the German original reads *“ja da die Anlagen nicht auf das Material eingestellt sind, es qualitativ Unterschiede gibt und das Produkt sehr aufwendig geprüft werden muss. Des Weiteren muss in vielen Fällen der Kunde informiert werden und auch zunächst eine Qualifizierung durchführen”*.

⁴⁰⁶ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 25 (Id 1157).

⁴⁰⁷ Non-confidential reply to Questionnaires Q.4.3 to Customers of Rolled Copper Products – Semiconductors, question 25 (Id 1162).

⁴⁰⁸ Non-confidential reply to Questionnaires Q.4.4 to Customers of Rolled Copper Products – Electric Engineering, question 25 (Id 1222).

“The qualifying process constitutes a difficulty to switching suppliers for several reasons :

- Lack of capacity on the market

- Qualifications processes are costly for quite small added value on the product (we dedicated more time to more important products / Families)”⁴⁰⁹

- (530) Having identified the qualification processes as one hindrance for switching, almost all customers view a long-term business relationship with their suppliers as essential in the market.

“Yes, it's essential!

Reasons:

-only few suppliers available

[...]

-cost and efforts are very high to establish new Business relationship”⁴¹⁰

“yes, due to limited competition, capabilities and capacities”⁴¹¹

“The market of copper tapes is an extremely concentrated market with very few actors. The capacity of the market is quite small.

In order to have a constant supply in products, long term relationships is essential to stabilize production, create synergies between the R&D departments of the two companies.”⁴¹²

“Yes, long term relationships are mandatory. The qualification of a new supplier and the product takes 6-12 month and cost a lot of money. In addition we are working closely together with our suppliers in regards to new products, Design to cost, new innovations.”⁴¹³

- (531) In combination with the absence of new entry in the overall market over the last 3 years, as indicated by manufacturers and customers, the market investigation suggests that majority of customers did not switch suppliers, or are reluctant to do so, due to the financial and operational risks related to such a switch, in particular because of the required qualification processes and the possible negative reaction of their upper tier customers.
- (532) Wieland and ARP have additionally argued that the qualification for running product lines would be less lengthy and would incur lower costs than the qualification of suppliers for new products. In this respect, Wieland and ARP stated in the Response to the Article 6(1)(c) Decision that *“Within a qualification process for a running series product (mainly within automotive or safety relevant electrical / electronic*

⁴⁰⁹ Non-confidential reply to Questionnaires Q.4.5 to Customers of Rolled Copper Products – Energy/Signal, question 25 (Id 1220).

⁴¹⁰ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 23 (Id 1072).

⁴¹¹ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 23 (Id 868).

⁴¹² Non-confidential reply to Questionnaires Q.4.5 to Customers of Rolled Copper – Energy/ Signal, question 23 (Id 1220).

⁴¹³ Non-confidential reply to Questionnaires Q.4.5 to Customers of Rolled Copper – Energy/ Signal, question 23 (Id 1335).

components), the qualification can be done – if required – very fast (usually 2-6 months at the example)”.⁴¹⁴

- (533) The market investigation, supported by internal documents of the Notifying Party, do not support this view. In particular for the automotive industry, it appears that the high costs for homologation lead to lock-in effects particularly during series production. This position is supported by Figure 50, taken from one of Wieland's internal documents. The document was produced in Wieland's normal course of business for an “Off-site Workshop”.⁴¹⁵

Figure 50 – Strategic analysis stampers segment

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 12 [emphasis added by the Commission].

- (534) Additionally, the SWOT analysis⁴¹⁶ of Wieland's electrical engineering business unit also referred to re-qualification issues in the automotive industry as one of the threats to its rolled products business.

Figure 51 SWOT analysis of the rolled products market

[...]

Source: Parties' response to the Commission's request for information RFI 24, Annex 7 [emphasis added by the Commission].

- (535) Participants in the market investigation provided the same view as that of the internal documents in Figure 50 and Figure 51.

“[...]

-if we qualify a product for series program it can not be changed easily during series (running Change)

[...]”⁴¹⁷

*“usually a switching [sic] of suppliers is not allowed during series production due to our customers regulations.”*⁴¹⁸

*“for new products there is not a big issue but for running products [sic] their [sic] is a switching really difficulty”*⁴¹⁹

- (536) The Commission therefore considers that qualification processes represent a barrier for customers to switch producers. In particular, it seems that in some industries requiring higher quality products, for example, the automotive industry, a change in supplier during the product life cycle is at least very difficult if not impossible.

⁴¹⁴ Response to the Article 6(1)(c) decision, paragraphs 54.

⁴¹⁵ For the description see footnote 67.

⁴¹⁶ Produced for an “Off-site Workshop” (see description in footnote 67).

⁴¹⁷ Non-confidential reply to Questionnaires Q4.2 to Customers of Rolled Copper Products – Connectors, question 23 (Id 1072).

⁴¹⁸ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 25 (Id1072).

⁴¹⁹ Non-confidential reply to Questionnaires Q.4.2 to Customers of Rolled Copper Products – Connectors, question 25 (Id 1221).

(537) As already explained in recital (507), the Notifying Party's business focus lies on the high-end of the market (see Section 6.3.1.2). In the high-end of the market there are fewer competitors present than in the lower-end (see Sections 6.4.1 and 6.5.1). Moreover, it is not easy for manufacturers in the lower end to reposition their production in a timely manner due to the significant investments (as described in Section 6.4.2) and the demanding qualification processes. Therefore customers of Wieland and ARP do not have many alternatives to switch their supplies, in particular when they require specialties that, producers active on the lower-end part could not easily supply. Thus when taking into consideration all the suppliers of rolled products, the Commission considers that customers of the merged entity would have limited possibilities to switch suppliers.

6.5.3. *Multi-sourcing strategies for security of supply reasons deepen the problem for customers*

(538) One of the reasons why customers may have few alternatives in suppliers is the application of multi-sourcing strategies, which are used in the entire rolled products market and in particular in the high-end part of the market. A reason for purchasing products from multiple suppliers would be to secure supply to minimise operational risks. Multi-sourcing strategies could also be imposed by upper tier customers⁴²⁰. If customers need to purchase from more than one supplier, they inevitably have fewer alternative sources. For example, in a market with four players (A, B, C, D), where a given customer sources from two players (B and C), if B merges with A, the customer will necessarily lose this potential alternative supplier A as A will be part of the same group as its current supplier B. As a result, suppliers' bargaining power increases further in comparison to a scenario where customers are not obliged to multi-source.

(539) The majority of customers having responded to the market investigation of the Commission indicated that they apply a multi-sourcing strategy.⁴²¹ The reason for such a strategy seemed to be risk mitigation through supply security.

*"We multi-source to mitigate the risk of supply and also for production capacities at supplier plant"*⁴²²

*"to avoid supply shortages"*⁴²³

(540) For suppliers in the automotive industry, it appears that multi-sourcing to secure the supply chain is compulsory and prescribed in international quality standards. One market participant, for example, stated that *"supplier risk management from IATF [International Automotive Task Force] standard us driving to multi-source, worried now to see 1 player less on market."*⁴²⁴

⁴²⁰ Upper tier customers refers to multi-tier supply chains where intermediate products are produced by manufacturers on different levels of the supply chain feeding the upper levels up to the finished products. This setup is common for example in the automotive industry where there are several tiers below the Original Equipment Manufacturers (OEM).

⁴²¹ Questionnaire Q1 to Customers of Rolled Copper Products, question 25.

⁴²² Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 25.1 (Id 1279).

⁴²³ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 25.1 the German original reads *"Um Versorgungsengpässe zu vermeiden."* (Id 1350).

⁴²⁴ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products - question 25.1 (Id 1239).

- (541) The market investigation in Phase II confirmed this view. Almost all customers across all segments (including segments like connectors, semiconductors, and stampers, where specialty products are used) apply a multi-sourcing strategy for the majority of their purchased products.⁴²⁵
- (542) The proposed Transaction will reduce the number of fully integrated players from four to three (KME/MKM, Wieland/ARP and Sofia Med). For customers, the proposed Transaction will therefore reduce the alternative sourcing options which compete with their current supplier or suppliers to possibly two or one, depending on how many suppliers customers source from. For customers of non-integrated players, the situation does not look any more optimistic due to the possible impact of the acquisition of sole control of Schwermetall on the non-integrated players (see Section 6.9).
- (543) As multi-sourcing is wide spread in the market, the concerns raised by customers in the market investigation would be amplified post-Transaction (because there would be a further reduction of possible alternative suppliers):
- “As only 3 competitors exist in this European [sic] market, the Transaction will have a negative Impact on our customer power.”*⁴²⁶
- “extreme dependency on a small number of suppliers, supply shortage, price issues”*⁴²⁷
- “Customers’ buyer power would decrease for us as we have only ARP and Wieland as suppliers of our rolled copper products.”*⁴²⁸
- “we (and our competitors) will solely depend on 1 single supplier for high end copper after the transaction”*⁴²⁹
- (544) In particular, in the market investigation, customers using ARP as one of their sources and [...], or which operate in market segments which [...] expressed concerns about negative effects of the Transaction on their supply security.
- “We started a project to buy Cu-OFE strips from Wieland as a second source (first source ARP). The project hasn’t finished yet and will most likely be terminated in case the merger will be approved.”*⁴³⁰
- “In case Wieland and ARP merge, Wieland will be the deciding partner. As they have stopped supplying the cable market and focus on automobile, we are almost sure that ARP will be definitely lost as potential supplier for our requirements.”*⁴³¹

⁴²⁵ Questionnaires 4.1 – 4.8 to Customers of Rolled Copper Products, question 14.

⁴²⁶ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 48.1 (Id 1229).

⁴²⁷ Non-confidential reply to Questionnaire Q.4.2 to Customers of Rolled Copper Products - Connectors, question 27 the German original reads *“extreme Abhängigkeit von wenigen Lieferanten, Versorgungsengpässe, Preisprobleme”* (Id 1218).

⁴²⁸ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1 (Id 1241).

⁴²⁹ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1 (Id 167).

⁴³⁰ Non-confidential reply to Questionnaire 4.3 to Customers of Rolled Copper Products – Semiconductors, question 5 (1777).

⁴³¹ Non-confidential reply to Questionnaire 4.5 to Customers of Rolled Copper Products – Energy/ Signal, question 27 (Id 1401).

*“It could be that Wieland Werke AG will discontinue the business relationship with us, because in the past we have worked with their main competitor ARP. It could be that we no longer have access to ARP products, which would severely restrict our business.”*⁴³²

*“Since Wieland informed us in writing in 2016 that it is not interested in a business relationship, we are concerned that we will not be supplied to the full extent anymore, or that supplies will entirely stop in the long-term.”*⁴³³

*“As Wieland stepped out of the Business section rolled copper products for the HF application back in 2013, we see the risk that through this Transaction also Aurubis won't serve anymore the market for rolled copper products for HF application. This would leave the customer market only with 2 remaining supplier and no more competition.”*⁴³⁴

- (545) The acquisition of ARP by Wieland could have a significantly negative impact on customers' security of supply. If those customers (see recital (545)) lost ARP as a possible supplier as a result of the Transaction, then, in many cases, they would be left with the merged entity as one of their suppliers and – due to multi-sourcing requirements – would be required to enter into supply agreements with one of the few remaining alternative suppliers. In such a situation, customers would enjoy significantly decreased buyer power in relation to the remaining suppliers as compared to the situation prior to the Transaction when suppliers compete against either Wieland or ARP by offering better terms in order to win the supply agreement. In a situation where only 2 suppliers remain, as indicated in recital (545) (*“This would leave the customer market only with 2 remaining supplier and no more competition.”*⁴³⁵), and an existing need to multi-source, customers would be required to source from both suppliers and, therefore would not have any alternatives, thereby significantly reducing the scope for them to exercise any constraints on the suppliers. Such customers would, in essence, be reduced to being solely price-takers.
- (546) The Commission considers that the existing multi-sourcing strategies by market participants amplify the negative effect on buyers' positions as the market power of the remaining suppliers, including the merged entity, will likely increase post-Transaction –.
- (547) The Notifying Party does not agree with the Commission. It argues that multi-sourcing strategies increase competition on the supply side and strengthen customers' buyer power by playing bidding suppliers off against one another.⁴³⁶ The Commission does not find the argumentation convincing. As explained in recital (539) and stated in recital (564), the number of active players in the industry overstates the actual competitive intensity when a customer has to maintain at least two sources of supply. For instance, in a market with four players where customers

⁴³² Non-confidential reply to Questionnaire 4.1 to Customers of Rolled Copper Products, question 26 (Id 1338).

⁴³³ Non-confidential reply to Questionnaire 4.1 to Customers of Rolled Copper Products, question 27, the German original reads *“Nachdem uns Wieland im Jahr 2016 schriftlich mitgeteilt hat, dass kein Interesse an einer Geschäftsbeziehung besteht, befürchten wir, dass wir nicht mehr im vollen Umfang oder auf Dauer gar nicht mehr beliefert werden.”* (Id 1615).

⁴³⁴ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.2 (Id. 1229).

⁴³⁵ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.2 (Id. 1229).

⁴³⁶ Response to the SO, paragraphs 129 and 130.

need to multi-source from at least two players, customers only have two further alternatives to their current suppliers, should one of the current suppliers increase prices. As a result, firms bargaining power increases further in comparison to a scenario where customers do not multi-source. The aggravating effect of multi-sourcing strategies on the impact of a merger is also established in previous Commission decisions.⁴³⁷

6.5.4. *The economic study submitted by the Parties does not support the proposition that switching in this industry is easy*

- (548) During the Phase II investigation, the Notifying Party submitted a study on the economic assessment of purchasing and switching patterns of Wieland and ARP rolled product customers.⁴³⁸ The study used combined transaction data of the Parties at customer level which covered approximately 80% of the total combined volume of Wieland and ARP in the years 2014–2017. The product offerings of Wieland and ARP were also matched at alloy level.
- (549) The analysis revealed that approximately [...] % of the total volume purchased in 2014–2017 in the EEA was purchased by the top Wieland and ARP customers, who sourced products of the same alloy group from both firms. The study also presented a per plant analysis which showed that a relatively large number of shared customers were served from ARP's Stolberg plant, amounting to [...] % of all customers shared with Wieland across all ARP's plants.
- (550) Using the differences in sales volume in the period 2014–2017, the study showed that both Wieland and ARP were strong in brass and copper, with Wieland being much stronger in HPA and bronze. In contrast, ARP was presented as stronger than Wieland in pure copper and oxygen-free copper in the period 2014–2017.
- (551) The study further analysed gained and lost customers in terms of volume changes and showed that between 2016 and 2017 Wieland won in total [...] tonnes of rolled products, representing [...] % of its total 2017 volume, and lost [...] tonnes, or [...] % of its total 2017 volume. Similarly, ARP won in total [...] tonnes of rolled products in total between 2016 and 2017, representing [...] % of the total ARP volume, and lost [...], representing [...] % of the volume. According to the Notifying Party, contrary to the Commission's preliminary view in the Article 6(1)(c) Decision, these volume changes showed that the competition cannot be said to be “calm”.
- (552) The study further focused on the customer switching patterns between Wieland and ARP. The analysis of switching patterns of Wieland's and ARP's customers was not based on direct evidence but, rather, was based on observed volume changes in Wieland's and ARP's supplies to specific customers. As also acknowledged in the study, this implies that part of the volumes won by Wieland and ARP was autonomous growth and not necessarily the result of other suppliers' loss. Based on this methodology, the study found that [...]. However, the study contrasted these alloy groups to [...], and, as argued in the paper, there was much [...]. The study also concluded that particularly in HPA, Wieland and ARP were more complementary to each other rather than competing against each other.

⁴³⁷ For example, Commission decisions in case M.6203 - *Western Digital/Viviti Technologies*, Section 5.4.2.B, or case M.6471 - *Outokumpu/INOXUM*, Section 5.5.4.5 ii.

⁴³⁸ E.CA Economics, Economic assessment of purchasing and switching patterns of Wieland and ARP rolled product customers of 29 August 2018.

- (553) The study also acknowledged that the analysis confirmed the preference of Wieland and ARP customers for multi-sourcing. However, in the Notifying Party's view, the switching pattern analysis revealed that much switching took place between the Parties and other alternative suppliers, and, in contrast to the Commission's preliminary view in the Article 6(1)(c) Decision, the obstacles to switching may be much more limited than previously described by the Commission.
- (554) After the State of Play meeting held on 4 September 2018, the Notifying Party submitted a follow-on study on the economic assessment of purchasing and switching patterns of Wieland and ARP's rolled product customers⁴³⁹. The follow-on study in particular discussed the nature of the overlap between Wieland and ARP in bronze and in connectors and followed the same data and the methodology as the original study.
- (555) The follow-on study analysed the volumes of three bronze alloys, namely CuSn4, CuSn6 and CuSn8, which were sold to common customers by both Wieland and ARP. The study concluded that due to strong competition Wieland faces from other suppliers of bronze and substitutable alloys and the relatively small volumes of ARP in this area, the proposed merger would not lead to any negative effects on competition.
- (556) Lastly, the follow-on study discussed the end field of use of connectors and the alloys which are sold by Wieland and ARP to customers of connectors. It emphasized that a wide range of alloys from different alloy groups (HPA, brass, bronze and copper) are used for connector products. According to the report, Wieland mainly produced HPA ([...] % of total volumes) and bronze ([...] %) alloys, whereas ARP predominantly supplied brass ([...] %) and copper ([...] %) alloys for connector applications.
- (557) In the response to the SO, the Notifying Party further argued that although contestable volume increases due to market growth are not related to switching, the volumes won indicate the intensity of competition and should be taken into account by the Commission⁴⁴⁰. The Notifying Party also claimed that the Commission should not selectively refer to the volumes won by ARP if lost volumes were viewed as a better measure ("cherry picking").
- (558) Furthermore, the Notifying Party argued that partial volume switching and multi-sourcing should not be disregarded by the Commission, in particular with respect to ARP's share in the segment of HPAs, and that ARP, in the Notifying Party's view, is acting largely as a complementary second source behind Wieland. The response to the SO also highlighted the Notifying Party's view that in [...], and thus ARP should be seen as a small and distant competitor. These arguments were also further developed in the response to the First LoF.⁴⁴¹
- (559) The Commission makes the following comments on the economic study on switching patterns and the subsequent statements in the follow-on study, response to the SO and the Response to the First LoF.
- (560) First, the study did not employ actual switching data which captures the change of supplier for a given customer, but merely interpreted the changes in total sales volumes of ARP, Wieland and other competitors as switching. Furthermore, the

⁴³⁹ "Follow-on points" by E.CA Economics of 17 September 2018.

⁴⁴⁰ Response to the SO, paragraphs 132-138.

⁴⁴¹ Response to the First LoF, paragraph 24.

study acknowledged that sales in the period under investigation were growing, which would distort the results. In particular, the study found that volumes won generally exceed volumes lost, which, in the view of the Notifying Party, is likely due to the fact that part of the allegedly won volumes were not due to actual switching but simply organic growth. The Commission observes that if the market was mature and stable, the total volumes lost in the market would be equal to the total volumes won, indicating that the changes in individual firm's sales occurred purely due to customer switching and not due to securing new contracts as a result of organically increasing demand. Whilst the Commission agrees with the Notifying Party that increased volumes due to organic growth indicate the level of competition in the market, this is reflected in the discussion of changes in market shares in Section 6.2 of the Decision. Lost volumes rather reflect the volume which was won by a competitor, or, in other words, switched, and not otherwise gained due to increased demand for the product.

- (561) Therefore, in the Commission's view, it would appear sensible to disregard volume percentages won and instead focus on volumes lost as a more likely, though still imperfect, indicator of genuine switching activity. On that basis, only [...] % and [...] % of volumes were switched in 2016/17 for Wieland and ARP, respectively. On average, at the rate of [...] %, the average customer retention is [...].⁴⁴² In the Commission's view, it is appropriate to characterize [...] average customer retention as a stable and calm market.
- (562) Second, the fact that in the instances where switching was recorded it was typically only for partial volumes, would suggest that it is hard to move all volume from existing to new providers. This difficulty also reinforces the importance of having multiple supply sources (the existence of multiple sourcing and the associated difficulty is emphasised in the study)⁴⁴³ because of security of supply reasons (see Section 6.5.3). Moreover, more than [...] % of customers in the same alloy group were overlapping between ARP and Wieland indicating the importance of the Wieland and ARP as competitive forces, as well as that of the competition between them. The data also showed that shared customers are frequently served from [...].
- (563) In the industries where multi-sourcing is important for reasons of security of supply, the number of active players in the industry overstates the actual competitive intensity if maintaining two sources of supply is indispensable for buyers.^{444,445,446} Post-Transaction, the customers of Wieland and ARP would effectively have one less rival to choose from available supply sources. The practice of multi-sourcing among customers in the market of rolled products was also mentioned by the Notifying Party in the response to the SO, which allows the Commission to conclude that it is a generally applied practice in the market, as also acknowledged by the Notifying Party.⁴⁴⁷
- (564) Third, while it appears that in HPAs the relevant volumes involved are more moderate, caution is warranted in the interpretation. The study interpreted these more

⁴⁴² [...].

⁴⁴³ E.CA Economics, Economic assessment of purchasing and switching patterns of Wieland and ARP rolled product customers, Section 4.1.

⁴⁴⁴ Horizontal Merger Guidelines, paragraph 31.

⁴⁴⁵ See for example, Commission decision in case M.6203 – *Western Digital/Viviti Technologies*, Section 5.4.2.B.

⁴⁴⁶ E.CA Economics, Economic assessment of purchasing and switching patterns of Wieland and ARP rolled product customers, Section 4.1.

⁴⁴⁷ Response to the SO, paragraph 36.

moderate HPA volume changes as evidence that Wieland and ARP are not so close competitors in HPAs. However, in the Commission's view, given that Wieland has the largest segment share in HPA, capturing more than [...] total sales of the HPA segment, any further segment share increment should be evaluated with caution even if Wieland and ARP were not so close competitors as the Notifying Party suggested.

- .
- (565) The Commission disagrees with the allegation by the Notifying Party that the Commission employs “cherry-picking” when looking into volumes won by ARP when evaluating ARP's growth, whilst at the same time disregarding won volumes when assessing switching in the market. Rather than describing the switching patterns as done in the study, the won volumes are indicative of ARP's growth, or, as also mentioned by the Notifying Party in the response to the SO, they are indicative of competition. As detailed in the study, the won volume of HPA for ARP grew by [...] % from [...] tonnes to [...] tonnes in the period 2014 to 2017, whilst the evolution of losses in the same period was only [...]. The difference between the two indicates that ARP has been increasingly more successful in winning HPA contracts, and could have a stronger competitive position against Wieland in future. This is also supported by the evolution of sales in the HPA segment as shown in Table 4, where ARP's growth in terms of sales volume ([...] %) was larger than the total market growth ([...] %) in the period 2015 to 2017.
- (566) Fourth, in the follow-on study, the Notifying party argued that the volumes sold per alloy group and in relation to connectors shows that Wieland and ARP have a different focus and that they are complementary to each other rather than competing.⁴⁴⁸ However, the presentation of sales volumes of Wieland and ARP within different alloy groups, in the Commission's view, does not provide sufficient evidence to undermine the Commission's conclusion that Wieland and ARP compete closely in the field of use of connectors. On the contrary, based on the market investigation and a review of internal documents as discussed in Sections 6.3.2.2, 6.5.1 and 6.6, they are seen as competitors in connectors by themselves as well as by their customers.
- (567) Finally, the Commission disagrees with the Notifying Party's view that in the HPA segment, ARP seems to act as a largely complementary source behind Wieland. Given Wieland's very high sales shares in the HPA segment ([50-60] %), it is natural that no other competitor, including ARP, can have a comparable sales volume. As shown in Table 4 in Section 7.3.1, the segment share in HPAs of the second largest competitor, namely KME/MKM, was smaller than that of Wieland by more than a factor of 2 in 2017. As both Wieland and ARP also compete for the same alloys within HPA, even a smaller segment share should not be seen as complementary but, rather, indicative of the competitive environment in that segment.
- (568) The Commission concludes that the findings presented in the study on the switching patterns of Wieland and ARP customers and its follow-on study, as well as responses to the SO and the First LoF do not weaken the Commission's findings set out in Sections 6.5.1, 6.5.2. and 6.5.3.

⁴⁴⁸ “Follow-on points” by E.CA Economics of 17 September 2018, section 3.

6.6. The internal documents of the Notifying Party and the results of the market investigation indicate that the Transaction would be likely to lead to a price increase on the rolled products market

- (569) The Commission notes that internal documents of the Notifying Party and the results of the market investigation provide a strong indication of the likely negative effects of the Transaction.
- (570) First, Wieland's internal documents suggest that Wieland expects the Transaction to further strengthen its market position and lead to increased pricing power.
- (571) Wieland's internal document on the ARP integration workshop contains detailed synergies assessments and activity planning after closing. That document suggests that immediately after closing Wieland will seek to exploit its increased market power by increasing prices to the customers of all plants acquired from Aurubis: "[...]" (excerpt reproduced in Figure 52).

Figure 52 - Aurubis Integration Workshop, Activities (ID 557)

[...]

Source: Parties' response to the Commission's request for information RFI 8, Annex "180327_Integration WS_Excel Doc Master_EN_v03", sheet "S2 Activities"

- (572) In the response to the SO, the Notifying Party contested the reliability of the internal document in Figure 52. In particular, it claimed that the document quoted does not reflect the Notifying Party's general strategy; it was "drawn up by a sales team member during Wieland's integration workshop where "bottom-up ideas were collected" and no "decision-makers" of Wieland were involved". However, the "sales & marketing" team in the workshop was headed by the current president of the rolled products business unit of the Notifying Party⁴⁴⁹, who is also a member of the Group's executive committee. The sales team has knowledge about the company and the market environment. The Commission considers, therefore, that the internal document provides a credible insight into Wieland's assessment of its ability to increase prices post-Transaction. In fact, the ability to increase prices is in line with the rationale of the Transaction. As explained in Section 6.3.2.2, the Transaction is also viewed as a defensive strategy to prevent ARPs from transforming itself into a player active in the high-end part of the market.
- (573) Second, the results of the market investigation in Phase I and Phase II, already reported in the SO, show that the large majority of customers and several competitors are in particular concerned about price increases on the rolled products market post-Transaction.
- (574) In its response to the SO (section VII), the Notifying Party argued that "[t]he SO draws a very biased picture of the effects of the transaction on the market for rolled products which is mainly based on internal documents of the Parties or on Statements of a small number of competitors". The Notifying Party quoted three competitors (MKM, Sofia Med and Ningbo Boway) and five customers⁴⁵⁰ of the Parties according to whom the Transaction would not raise concerns.⁴⁵¹

⁴⁴⁹ Notifying Party's response to RFI 8 Annex "180321 Aurubis Integration WS-EN_vff_Final", slide 29.

⁴⁵⁰ [...].

⁴⁵¹ Response to the SO, section VII.

- (575) With regards to the competitors' reactions, the Commission notes that one of the competitors mentioned by the Parties, Ningbo Boway, is hardly present on the EEA rolled products market (for it only exports small amounts into the EEA) and its knowledge about the competitiveness of the market seems to be limited as it replied "do not know" to the questions on Parties' and Competitors' market power. MKM refers in its answer to a "*highly competitive global market*" and thus does not consider the situation in the relevant EEA market. Moreover, MKM is not a close competitor to Wieland as it is hardly present on the high-end part of the market. The high-end of the market differs from other parts of the market in terms of intensity of competition. In particular, the low-end of the market is a buyers' market, characterised by a larger number of market participants, low-barriers to entry and over-capacity (see recitals (118), (119) and (123) to (125), as well as Sections 6.4.1, 6.4.2, and 6.4.3). MKM's views on the overall market may be influenced by that factor. This is particularly apparent when MKM's views are compared with those of KME, which is present on the high-end part of the market. In contrast to MKM, which considered that Wieland's market power would not change and competitors' market power would increase, KME considered that the Transaction would lead to an increase in quality and that customers' buyer power would not change,⁴⁵² however, KME also considered that Wieland's market power would increase and competitors' market power would decrease⁴⁵³.
- (576) When assessing the opinions expressed by the participants in a market investigation, the Commission has to take into account the incentives on which the opinions are based and in light of that attributes the degree of evidential weight to such comments. In this regard, given the oligopolistic setting found in the high-end part of the rolled products market, the Commission considers that more weight should be given to customers' views as they are directly negatively affected by a price increase created by a merger, than to the views of competitors who may benefit from such a price increase should a fraction of the customers' demand be diverted to them.⁴⁵⁴
- (577) With regard to customers' reactions to Questionnaire 1, out of 45 respondents only 5 companies considered that prices would not change⁴⁵⁵; 4 respondents considered that quality⁴⁵⁶ and innovation⁴⁵⁷ would increase; and only one respondent considered that customers' buyer power would increase⁴⁵⁸. Two respondents to Questionnaire 1 considered that the competitors' market power would increase but they also indicated that post-Transaction Wieland's power would increase too⁴⁵⁹.

⁴⁵² Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 50 (Id 176).

⁴⁵³ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 50 (Id 176).

⁴⁵⁴ See for example, Case M.6471 – *Outokumpu/INOXUM*, paragraph 309. On the potential benefit for competitors, see also Section 6.4.1, recitals (426) to (429) of this Decision.

⁴⁵⁵ [...] – mentioned by the Notifying Party and [...]: Non-confidential replies to Questionnaire Q1 to Customers of Rolled Copper Products, question 46 (Ids 1238, 1341, 1318, 1241, and 1348).

⁴⁵⁶ Non-confidential replies to Questionnaire Q1 to Customers of Rolled Copper Products, question 46 (Ids 1317, 1350, 1198, and 1348).

⁴⁵⁷ Non-confidential replies to Questionnaire Q1 to Customers of Rolled Copper Products, question 46 (Ids 207, 1198, 1698, and 1348).

⁴⁵⁸ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46 (Id 1698).

⁴⁵⁹ Non-confidential replies to Questionnaire Q1 to Customers of Rolled Copper Products, question 46 (Ids 1698, 164).

- (578) In relation to the customers' questionnaires sent in Phase II, out of 58 respondents only 2 customers expect a price reduction.⁴⁶⁰ One of these two customers gave positive feedback on the Transaction in terms of quality, choice and innovation⁴⁶¹. Five customers⁴⁶² do not expect any impact on their business and two respondents do not expect a “significant”⁴⁶³ or “major”⁴⁶⁴ impact on their businesses.
- (579) The Commission acknowledges that certain customers and competitors gave positive feedback on the Transaction. However, the Commission considers that such feedback from a minority of respondents to the market investigation is insufficient to outweigh, or put into doubt, the negative feedback received from the vast majority of the respondents during the Commission's market investigation both in Phase I and Phase II.
- (580) In this regard, a large majority of respondents to the market investigation who expressed a view in Phase II consider that the Transaction would lead to price increases on the rolled products market in the EEA. In particular, the respondents active in market segments such as connectors, electric engineering, energy/signal, and trade/slitting centres provided the strongest negative feedback in terms of expected price increases post-Transaction.⁴⁶⁵
- (581) The vast majority of customers sourcing rolled products for connectors, which is a strategic and important market segment for both Wieland and ARP, shared their concerns about price increases. As one customer answered the question concerning the impact (if any) of the Transaction on their business: “*we would expect high Price increases with a further reduction of our buying power*”⁴⁶⁶ or as other customer put it: “*price increases, absolutely marked leader on this business*”.⁴⁶⁷ Other customer refers to price increases together with other elements as an expected impact of the Transaction: “*extreme dependency on few suppliers, supply shortages, price problems*”.⁴⁶⁸
- (582) Similarly, the customers of the Parties active in other market segments are concerned that: “*After this transaction it will stay only 2 big suppliers on the market, it will be very difficult to find materials with correct delivery and prices.*”⁴⁶⁹
- As other customers explain: “*We expect a considerable increase of the prices*”⁴⁷⁰ and “*A big impact. If the main qualified producers of copper alloy will be reduced,*

⁴⁶⁰ Non-confidential reply to Questionnaire Q 4.8, question 28 (Id 1402) and non-confidential reply to Questionnaire Q 4.3, question 27 (Id 1412).

⁴⁶¹ Non-confidential reply to Questionnaire Q 4.8, question 28 (Id 1402)

⁴⁶² Non-confidential replies to Questionnaire Q 4.8, question 28 (Ids 827, 934; 1158), and non-confidential reply to Questionnaire Q 4.7, question 27 (Id 1417)

⁴⁶³ Non-Confidential reply to Questionnaire Q 4.7, question 27 (Id 1144)

⁴⁶⁴ Non-Confidential reply to Questionnaire Q 4.4, question 28 (Id 1242).

⁴⁶⁵ Questionnaires 4.2 – 4.8 to Customers of Rolled Copper Products, question 28 and Questionnaire Q4.1, question 27.

⁴⁶⁶ Non-confidential reply to Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 27, (Id 1156).

⁴⁶⁷ Non-confidential reply to Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 27 (Id 1163).

⁴⁶⁸ Non-confidential reply to Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 27, (Id 1218), German original reads: “*extreme Abhängigkeit von wenigen Lieferanten, Versorgungsengpässe, Preisprobleme*”.

⁴⁶⁹ Non-confidential reply to Questionnaire 4.1. to Customers of Rolled Copper Products – Trade/Slitting centres, question 28 (Id 1340).

the market that is already under pressure in term of limited production capacity, long lead time and strong price increasing will be more difficult to be manage.”⁴⁷¹ Or as another customer sourcing from both Wieland and ARP submits: “We expect an increase of the pricing level as the pricing of Wieland is approximately +30% above ARP and [...] believes that with this acquisition, Wieland will expand the scope of tying niche and standard products from a pricing standpoint.”⁴⁷² Other customers explain: “The processing prices will rise significantly, the delivery quantities will decrease, the very good cooperation will disappear”⁴⁷³, “We are sure, that the price will increase. We are very concerned about a restriction on quantities”⁴⁷⁴ or “Rolled market concentration with potentially higher price”.⁴⁷⁵ Similarly, another customer comments on the expected impact of the Transaction: “Strong concentration of production capacity. Increased susceptibility to unilateral price adjustments by the largest manufacturer.”⁴⁷⁶.

- (583) Another customer fears that the prices will increase not only for its own supplies but also for its suppliers sourcing from the Parties: “Most likely we expect impact on pricing of our supplier as it currently sources from ARP and Schwermetall.”⁴⁷⁷
- (584) These results are in line with the outcome of the market investigation in Phase I, in which the large majority of respondents already said that they expected the Transaction to result in price increases. As one customer explained “Due to Wieland + Aurubis production capacity, we won't avoid price increase and decrease of market competitiveness” and that he expected a forthcoming increase in price for specific alloy: “Brass prices could increase rapidly due to offer concentration”.⁴⁷⁸ This was confirmed by another customer who indicated that “price increase - Wieland is increasing prices, monopoly position will help Wieland to increase prices again/ customers' buyer power decrease - supplier is going to dictate conditions, monopoly position limits customers”.⁴⁷⁹ Other customers submitted that “Market concentration will lead to higher prices and higher market power of the new, bigger company”⁴⁸⁰.

⁴⁷⁰ Non-confidential reply to Questionnaire Q.4.5 to Customers of Rolled Copper Products – Energy/Signal, question 28 (Id 1401).

⁴⁷¹ Non-confidential reply to Questionnaire 4.1. to Customers of Rolled Copper Products – Trade/Slitting centres, question 26 (Id 1400).

⁴⁷² Non-confidential reply to Questionnaire Q.4.4 to Customers of Rolled Copper Products –Electric Engineering, question 27, (Id 1061).

⁴⁷³ Non-confidential reply to Questionnaire Q.4.4 to Customers of Rolled Copper Products –Electric Engineering, question 27 (Id 1406).

⁴⁷⁴ Non-confidential reply to Questionnaire Q.4.3 to Customers of Rolled Copper Products – Semiconductors, question 27 (Id 1162).

⁴⁷⁵ Non-confidential reply to Questionnaire Q.4.4 to Customers of Rolled Copper Products –Electric Engineering, question 27 (Id 1146).

⁴⁷⁶ Non-confidential reply to Questionnaire 4.1. to Customers of Rolled Copper Products – Trade/Slitting centres, question 26 (Id 1616), German original reads: “Starke Konzentration der Fertigungskapazitäten. Anfälligkeit für einseitige Preisanpassungen des größten Herstellers steigt”.

⁴⁷⁷ Non-confidential reply to Questionnaire Q4.6 to Customers of Rolled Copper Products – Metal Goods, question 27 (Id 1336).

⁴⁷⁸ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, questions 46-1 and 46-2 (Id 1319).

⁴⁷⁹ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46-1 (Id 1337).

⁴⁸⁰ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46-1 (Id 232).

(585) In this context, the market investigation indicates that the acquisition of ARP by Wieland would enable Wieland to maintain higher prices or even further increase them. Customers expressed concerns that ARP's prices would be aligned with Wieland's prices post-Transaction: *"PRICE: market already closed in terms of capacity, this transaction would make price increase, Prices of AURUBIS aligned on WIELAND standards, Wieland already leader on market with highest prices will also drive other competitors to increase"*.⁴⁸¹ Another customer explained that *"The proposed transaction would lead to the removal of the important competitor Aurubis. Wieland, known as a supplier with a general high price level and its own distribution network, might raise its prices post-merger due to its higher market power and absent the competitive pressure of Aurubis"*.⁴⁸²

(586) Based on the reasons set out in Sections 6.2 to 6.5 the Commission concludes that the Transaction is likely to result in a significant impediment to effective competition through the acquisition of large to very large market shares and the removal of an important competitor on the market, where the market concentration level is already significant and more importantly the remaining competitors do not have the ability or incentives to increase output sufficiently to defeat the likely result of an increase in prices.

6.7. The Transaction is also likely to lead to the creation of a dominant position for Wieland

(587) For the purposes of the present case and in light of the evidence available, for the reasons set out in recitals (589) to (596), the Commission considers that the Transaction would also result in a significant impediment to effective competition through the creation of a dominant position for Wieland on the rolled products market.

(588) First, the Transaction results in very high combined market shares in the rolled products market in terms of volume [40-50]% (Section 6.2.2 Table 1), value [50-60]% (Section 6.2.3 Table 2) and production [40-50]% (Section 6.2.4 Table 3). Given the large increment ([10-20]% in volume, [10-20]% in value) and against the background that already prior to the Transaction and notably in the high-end part of the market, Wieland possesses and exercises market power (see Sections 6.3.1.1 to 6.3.1.3) which allows it to behave to some degree independently of its competitors and customers (see Section 6.3.1.4), it is even more likely that the Transaction would lead to a significant increase in market power of Wieland.

(589) While the very high market shares of the Parties provide a first indication of the significant market power which would be created as a result of the Transaction, according to paragraph 17 of the Horizontal Merger Guidelines, market shares above 50% may in themselves be evidence of the existence of a dominant market position. Based on the data available to the Commission, the combined market shares in terms of value are [50-60]% and thus reach the specified threshold allowing the Commission to reach the preliminary conclusion that a priori the Transaction would result in creation of dominant position for Wieland.

⁴⁸¹ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46-1 (Id 1239).

⁴⁸² Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46-1 (Id 164).

- (590) Further to the analysis in recital (590), the Commission considers that there are a number of other indications which point to the creation of a dominant position for Wieland in the rolled products market.
- (591) First, the Transaction removes an important competitor in an already concentrated market. As demonstrated in Section 6.3.2.2, ARP is an important competitive constraint in the rolled products market because it: (i) has the necessary technical capabilities to supply customers with different technical requirements including customers in the high-end of the market, (ii) has been growing (in the last three years, ARP has increased its sales in volume by almost [20-30]%), and (iii) has been exerting significant competitive pressure in the high value segments such as HPAs or connectors which are of strategic importance to Wieland.
- (592) Second, the Transaction will lead to a market structure where the next closest competitor will be KME/MKM with a market share of [20-30%] and which, according to the Parties' own assessment, is to a certain extent experiencing some difficulties in serving the market (see Section 6.4.4.1 (a)), while the remaining competitors are much smaller. This indicates that the competitors of the merged entity, in particular in the high-end of the market, would have limited potential to effectively constrain the merged entity.
- (593) Third, several competitors of the rolled products market depend on supplies of the key input, mostly provided by Schwermetall, which, post-Transaction, will be controlled by Wieland (see Section 6.9). Hence, these competitors will likely not be in a position to constrain the new merged entity combining the two strongest players on the rolled products market.
- (594) Fourth, the evidence presented in Section 6.4 indicates that the high-end part of the rolled products market is concentrated with only few players who will likely not be in a position to defeat the expected price increase or exercise an effective competitive constraint on the merged entity post-Transaction. It also indicates that barriers for players from lower parts of the market to enter the high-end where the Notifying Party focusses its business activities are high, preventing such players from exercising an effective competitive constraint.
- (595) Fifth, the customers in the market investigation expressed strong reactions concerning the expected negative effects of the Transaction regarding the increased market power of Wieland. For example, a customer submitted: *"The dominance of Wieland will be further strengthened in Europe"*⁴⁸³ Another customer also considered: *"The transaction will create a market leader in Europe in the rolled copper and copper alloy product segment with an entire market share of around 50% of the overall production output"*⁴⁸⁴ or as another customer put forth: *"Wieland will gain power and influence massively."*⁴⁸⁵ Some customers hinted to the monopoly effects of the Transaction: *"Wieland is increasing prices, monopoly position will help Wieland to increase prices again"*⁴⁸⁶ or as further customer said: *"The market*

⁴⁸³ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 50 (Id 1317), German original reads: *"Die Dominanz von Wieland in Europa wird noch stärker werden."*

⁴⁸⁴ Non-confidential reply to Questionnaire Q.4.4 to Customers of Rolled Copper Products –Electric Engineering, question (Id 1061).

⁴⁸⁵ Non-confidential reply to Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 27 (Id 1072).

⁴⁸⁶ Non-confidential reply to Questionnaire Q1 to Customers of Rolled Copper Products, question 46.1 (Id 1337).

*will become even more concentrated which will create monopolistic effects.”*⁴⁸⁷(see also customers’ comments in recitals (582),(583) and (585)).

6.8. Conclusion

- (596) For the reasons set out in Sections 6.2 to 6.6 regarding the likely effects of the Transaction in the market for rolled products in the EEA, the Commission concludes that, given in particular (i) the large or very large and leading combined market shares of the Parties and the significant degree of concentration created by the Transaction; (ii) the elimination of competition between the current market leader Wieland which already enjoys significant market power, in particular in the high-end of the rolled products market, and its important and close rival ARP; (iii) the likely limited ability and incentives of competitors to defeat the likely price increase; (iv) the limited possibilities of customers to switch suppliers; and (v) the evidence in internal documents and from the market investigation on the likelihood of prices increases, the Transaction is likely to result in a significant impediment to effective competition through the removal of an important competitor on the market, with the likely result on an increase in prices. Moreover, for the reasons set out in Section 6.7, the Commission also concludes that the Transaction is likely to result in a significant impediment to effective competition through the creation of a dominant position for Wieland on the rolled products market in the EEA.

6.9. The parallel acquisition of sole control over Schwermetall aggravates the negative effects of the Transaction as it allows Wieland to hinder the expansion of competitors

- (597) For the reasons laid down in Section 6.1.2, the parallel acquisition of sole control over Schwermetall cannot be assessed in isolation from the acquisition of ARP. As explained further in Section 6.1.2, to address the particularities of the change of control in Schwermetall, it is appropriate to conduct the assessment in line with the principles enshrined in paragraph 36 of the Horizontal Merger Guidelines and in paragraphs 18 and 78 of the Non-horizontal Merger Guidelines. In other words, the Commission will assess whether the acquisition of sole control over Schwermetall would strengthen the Notifying Party's ability and incentives to raise its rivals costs and consequently its ability and incentives to raise prices on the rolled products market. Based on Sections 6.2 to 6.8 the Commission considers that the acquisition of ARP creates a significant impediment to effective competition. In this present section, the Commission will demonstrate how obtaining sole control over a very important input supplier will aggravate those negatives effects.

6.9.1. *Change from joint to sole control over Schwermetall gives Wieland the ability to raise its rivals costs*

- (598) As demonstrated in the following sub-sections, the acquisition of sole control over Schwermetall strengthens Wieland's ability to raise rivals' costs for the following reasons. First, Schwermetall is the leading supplier of pre-rolled strip in the EEA. Second, several competitors of Wieland and ARP depend on Schwermetall's supplies to exercise competitive pressure on Wieland and ARP, particularly in the high-end part of the rolled products market. Third, with a change to sole control, Schwermetall will no longer act as an independent player on the market and all the mechanisms put in place to safeguard commercially sensitive information of its customers from its

⁴⁸⁷ Non-confidential reply to Questionnaire Q.4.5 to Customers of Rolled Copper Products – Energy/Signal, question 27 (Id 1220).

current owners will disappear, providing Wieland with full insight into its competitors' needs and respective costs as well as an ability to decide alone on the pricing and commercial conditions of the sales of pre-rolled strip from Schwermetall. Fourth, Wieland's competitors and actual customers of Schwermetall have limited possibilities to switch suppliers of pre-rolled strip and/or to expand in-house capabilities.

6.9.1.1. Schwermetall is the leading supplier of pre-rolled strip

- (599) As described in recital (4), Schwermetall is a 50/50 joint venture of Wieland and Aurubis providing its parent companies and also third-party customers with pre-rolled strip. Schwermetall provides approximately two thirds of its output ([...] tonnes in 2017) to its parent companies and the remaining one third ([...] tonnes in 2017) goes to third-party customers (sales on the merchant market).⁴⁸⁸ As already explained in recitals (82) to (84), pre-rolled strip is an intermediary product and a necessary input for the production of rolled products.
- (600) Schwermetall, as it presents itself on its website, is “*the world’s leading manufacturer of pre-rolled copper and copper alloy strips*”⁴⁸⁹ with its “*state-of-the-art production facility and innovative manufacturing methods*”⁴⁹⁰ serving a wide array of industries, including electrical and electronic, automotive, and telecommunications, and which is able, due to a “*high degree of automation*” of its production processes, to ensure “*the perfect reproducibility of our products and therefore our quality level*”.⁴⁹¹
- (601) Consistent with the presentation on Schwermetall’s website, the market share data indicates that Schwermetall is by far the largest supplier of pre-rolled strip on the very concentrated merchant market with a volume-based market share in 2017 of [70-80]%, equivalent to more than [...] tonnes (Table 22).
- (602) The Notifying Party, in the response to the SO and at the oral hearing, argued that the figures presented in Table 12 and paragraph 426 of the SO were incorrect, as they included worldwide sales of Schwermetall. Moreover, the Notifying Party claimed that the position of Schwermetall with respect to HPAs was overstated.⁴⁹²
- (603) In light of the Notifying Party's comments, and given that the geographic relevant market of pre-rolled strip is the EEA, the Commission has excluded Schwermetall's volume sold outside the EEA for the purpose of the market reconstruction exercise and its assessment and has recalculated the market shares in the pre-rolled strip merchant market accordingly. The Notifying Party was provided with the revised market reconstruction figures in the First LoF.⁴⁹³ The updated figures are displayed in Table 22. The Commission notes that Schwermetall’s sales for 2017 totalled [...] tonnes, as per the external advisors’ calculations.⁴⁹⁴

⁴⁸⁸ Parties' response to the Commission's request for information RFI 4 [Annex 1].

⁴⁸⁹ <http://www.schwermetall.de/en/company/portrait.html> (last accessed on 3 October 2018).

⁴⁹⁰ <http://www.schwermetall.de/en/company/portrait.html> (last accessed on 3 October 2018).

⁴⁹¹ <http://www.schwermetall.de/en/company/portrait.html> (last accessed on 3 October 2018).

⁴⁹² Response to the SO, paragraph 151; Wieland’s and ARP’s presentation for the oral hearing of 19 November 2018, slides 21 and 25; E.CA Economics' Data Room Report of 31 October 2018, page 5

⁴⁹³ First LoF, Table 4.

⁴⁹⁴ E.CA Economics' Data Room Report of 31 October 2018, page 5.

Table 22 EEA market and segment shares of pre-rolled strip merchant market in 2017

	Schwermetall		KME/MKM		Sofia Med		Total
	Tonnes	MS%	Tonnes	MS%	Tonnes	MS%	Tonnes
Brass	[...]	[90-100]%	[...]	[0-5]%	[...]	[5-10]%	[...]
Bronze	[...]	[60-70]%	[...]	[30-40]%	[...]	[0-5]%	[...]
HPA	[...]	[80-90]%	[...]	[0-5]%	[...]	[10-20]%	[...]
Pure copper	[...]	[40-50]%	[...]	[50-60]%	[...]	[0-5]%	[...]
Other	[...]	[90-100]%	[...]	[0-5]%	[...]	[0-5]%	[...]
Total	[...]	[70-80]%	[...]	[10-20]%	[...]	[5-10]%	[...]

Source: European Commission based on market reconstruction data. Schwermetall's data are based on the Parties' response to the Commission's request for information RFI 28 [Annex 1].

* due to the high concentration on the market, the Schwermetall's shares are also provided in the form of ranges in order to better protect the confidentiality of competitors' data.

- (604) Moreover, the Notifying Party argued that the position of Schwermetall was overstated as the figures in Table 22 include pre-rolled strip sold to firms which are not direct downstream competitors of Wieland and ARP, that is, are not active in the rolled products market.⁴⁹⁵
- (605) As underlined in the First LoF, however, even if the Commission were to exclude the sales to customers that do not compete on the rolled products market from the pre-rolled strip merchant market, Schwermetall would still remain the leading pre-rolled strip provider with a [70-80]% market shares, as shown in Table 23.⁴⁹⁶

Table 23 EEA market and segment shares of pre-rolled strip merchant market in 2017, excluding Schwermetall's sales to third parties which are not downstream competitors of the Parties

	Schwermetall		KME/MKM		Sofia Med		Total
	Tonnes	MS%	tonnes	MS%	Tonnes	MS%	tonnes
Brass	[...]	[90-100]%	[...]	[0-5]%	[...]	[5-10]%	[...]
Bronze	[...]	[60-70]%	[...]	[30-40]%	[...]	[0-5]%	[...]
HPA	[...]	[80-90]%	[...]	[0-5]%	[...]	[10-20]%	[...]
Pure copper	[...]	[40-50]%	[...]	[50-60]%	[...]	[0-5]%	[...]
Other	[...]	[90-100]%	[...]	[0-5]%	[...]	[0-5]%	[...]
Total	[...]	[70-80]%	[...]	[20-30]%	[...]	[5-10]%	[...]

Source: European Commission based on market reconstruction data. Schwermetall's data are based on the Parties' response to the Commission's request for information RFI 28 [Annex 1].

* due to the high concentration on the market, Schwermetall's shares are also provided in the form of ranges in order to better protect the confidentiality of competitors' data.

⁴⁹⁵ Response to the SO, paragraph 152; E.CA Economics' Data Room Report of 31 October 2018, page 5.
⁴⁹⁶ First LoF, Table 5.

- (606) The Commission maintains, however, its view that to assess the actual size of the pre-rolled strip merchant market and the position of its suppliers, it is necessary to take into account all sales of pre-rolled strip, irrespective of whether those volumes are sold to downstream competitors of the Parties or not as both groups of customers compete for the purchase of the same product.
- (607) In conclusion, the Commission considers that the correct figures regarding the pre-rolled strip merchant market are those presented in Table 22 above. However, irrespective of whether all sales or only those sales to Wieland and ARP competitors are included, Schwermetall is the leading supplier of pre-rolled strip on the merchant market in the EEA.
- (608) Captive sales are not included in this assessment. In the response to the First LoF,⁴⁹⁷ the Notifying Party argued that to assess the position of Schwermetall it is necessary to take into account the captive production and the in-house capacity of the vertically integrated rolled products suppliers, because such in-house capacity exerts a competitive constraint on the merchant market. The Commission considers that taking into account captive production and in-house capacity would not change the fact that Schwermetall is the leading supplier of pre-rolled strip.
- (609) Firstly, so far there has been no evidence that captive production and in-house capacity exerts a competitive constraint on suppliers on the pre-rolled strip merchant market, nor has the Notifying Party provided evidence of such. When assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the merger with the conditions that would prevail before the merger.⁴⁹⁸ Before the merger the suppliers of the merchant market are Schwermetall, which has a very small presence downstream in the rolled products market, MKM (KME/MKM) and Sofia Med. The other vertically integrated producers of pre-rolled strip focus on their business on the rolled products market. The market investigation has shown⁴⁹⁹ that any sale of pre-rolled strip from any of these other vertically integrated producers has been minimal and opportunistic (including the very small volume sales of KME to third parties other than its joint venture). Therefore these producers are not active on the merchant market in a meaningful way. The Transaction does not seem to change the incentives of these producers to prioritise focusing their business on rolled products rather than pre-rolled strip, in particular because the benefit of selling pre-rolled strip to a competitor would have to compensate for the loss of not serving a customer on the rolled products market, where margins are higher than in pre-rolled strip. As further explained in recital (674), KME (which is the larger of the vertically integrated producers that are not present on the merchant market) stated that it would enter the merchant market only if it would find the right commercial conditions and if it would have enough capacity.⁵⁰⁰ The fact that KME makes its entry into the merchant market dependent on having available capacity and getting suitable commercial conditions, together with the fact that KME has no detailed plans to enter the merchant market, show that KME's entry into the pre-rolled strip merchant market is highly uncertain.

⁴⁹⁷ Response to the First LoF, paragraph 29.

⁴⁹⁸ Horizontal Mergers Guidelines, paragraph 9.

⁴⁹⁹ Questionnaire Q2 to Competitors of Rolled Copper Products, question 7; Questionnaire to Suppliers of Rolled Products, questions 22 and 22.1.

⁵⁰⁰ KME's response of 6 December 2018 to the Commission's request for information of 4 December 2018.

- (610) Secondly, even if all captive production and capacity were taken into account, not all vertically integrated producers would have the ability to cast and hot-roll the range of alloys of Schwermetall.
- (611) In addition to being the leading supplier of pre-rolled strip on the merchant market, Schwermetall also has the broadest portfolio. The data provided by the Parties show that Schwermetall has a large pre-rolled strip product portfolio, covering different copper grades and alloy compositions. As shown in Table 22, on the merchant market, the majority of Schwermetall's sales are in brass, with [...] tonnes and a volume share above 90%. This is followed by HPAs, with [...] tonnes and a volume share above 80%, pure copper with [...] tonnes, and a [40-50] % volume share, and bronze, with [...] tonnes and a [60-70]% volume share.
- (612) In its response to the SO, the Notifying Party refutes the argument that Schwermetall's wide portfolio constitutes a competitive advantage. First, the Notifying Party argues that only 10 alloys make 86% of Schwermetall sales to third parties. Second, these 10 alloys are offered by several suppliers on the market for rolled products and pre-rolled strip, hence they are not produced only by Schwermetall. Third, whilst Schwermetall's portfolio might be used by third parties to complement their own rolled product portfolio, this cannot be considered a relevant factor due to the small sales volumes.
- (613) The Commission disagrees with the Notifying Party for the following reasons. First, the fact that currently only 10 alloys make 86% of sales to third parties does not undermine the fact that all other alloys are available on the merchant market ([...]). The fact that there is more demand for some alloys than for others does not call into question that Schwermetall can and does offer a wide range of alloys compared to the other pre-rolled strip suppliers. Second, the fact that some of the alloys in Schwermetall's portfolio are produced by other manufactures of pre-rolled strip and rolled products does not undermine the fact that Schwermetall has the widest portfolio of pre-rolled strip on the merchant market and therefore provides its customers with a wider choice, which is in itself an advantage (as it allows customers to source a significant part of their needs from one supplier). Third, the fact that third parties source from Schwermetall to complement their portfolio with which they compete downstream with the Parties shows precisely the strength of Schwermetall's portfolio and its relevance for competition on the rolled products market.
- (614) As Table 22 indicates, the largest competitor of Schwermetall in pre-rolled strip is KME/MKM. However, KME/MKM is primarily active in bronze and pure copper and is hardly present in brass or HPAs on the merchant market. Hence, it cannot be an alternative to Schwermetall for those customers who need pre-rolled strip made of brass and HPAs to compete on the connectors segment. Sofia Med is active mainly in HPAs and brass, but, overall, it is a very small competitor with a market share of only [5-10]% and hence exerts a limited constraint on Schwermetall. As explained further in the Annex, the Commission found that small quantities of pre-rolled strip were sold by two other companies in 2017. However, the impact of these small quantities is negligible and does not change the results of the present analysis.
- (615) Schwermetall's strong position on the pre-rolled strip market is also recognised by its customers. The large majority of respondents to the market investigation consider that Schwermetall has competitive advantages in the pre-rolled products market⁵⁰¹

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Questionnaire Q2 to Competitors of Rolled Copper Products, question 37.

and, as some of them explain, these advantages lie in casting capabilities, the broadest available pre-rolled strip portfolio in copper and copper alloys, and good quality and delivery performance.⁵⁰²

- (616) Not only is Schwermetall the clear leader on the pre-rolled market, but it also supplies Wieland's and ARP's competitors, including competitors active in the high-end part of the rolled products market. According to Wieland's and ARP's submission, half of all of Schwermetall's EEA third-party customers, including its top [...] customers, are competitors of Wieland and ARP on the downstream market for rolled products. According to Wieland's and ARP's own estimates, 87% of all production destined for the merchant market went to competitors of Wieland and/or ARP.⁵⁰³
- (617) Furthermore, some of the top customers of Schwermetall compete downstream with Wieland and ARP in the key market segments. For example, [Competitor 1], considered as one of the main competitors of Wieland in stampers⁵⁰⁴ and connectors,⁵⁰⁵ is a top customer of Schwermetall sourcing from it approximately 50% of the pre-rolled strip needed for its activities downstream.⁵⁰⁶ [Competitor 2], also considered by Wieland as one of its main competitors in stampers⁵⁰⁷ and connectors,⁵⁰⁸ is Schwermetall's second biggest third-party customer sourcing from it approximately one third of its total needs for pre-rolled strip.⁵⁰⁹ Similarly, [Competitor 3] directly competes with Wieland downstream and, based on Wieland's and ARP's estimates, relies on Schwermetall for up to 95% of its total needs for pre-rolled strip.⁵¹⁰
- (618) Schwermetall is thus also the main pre-rolled strip supplier of Wieland's main competitors in the rolled products market, in particular in the connectors segments in the high-end part of the market. As demonstrated in the following sub-section, the supplies of Schwermetall to these customers are important for their competitiveness on the rolled products market.

6.9.1.2. The importance of Schwermetall's supplies

- (619) In the response to the SO, the Notifying Party argues that Wieland's and ARP's main competitors are not dependent on pre-rolled strip from Schwermetall, that customers can switch either to in-house production or to other suppliers for a significant share of the pre-rolled strip purchased from Schwermetall; and that only a small share (below [...]%) of the rolled products market in the EEA would be affected by the

⁵⁰² Questionnaire Q2 to Competitors of Rolled Copper Products, question 37.1 and Questionnaire to Suppliers of Rolled Products, question 23.

⁵⁰³ Response to the Article 6(1)(c) Decision [Annex 2], pp 6-7.

⁵⁰⁴ Parties' response to the Commission's request for information RFI 24 [Annex 12], slide 5.

⁵⁰⁵ Parties' response to the Commission's request for information RFI 24 [Annex 6], slide 28.

⁵⁰⁶ Data is based on Wieland's and ARP's estimates provided in the Response to the Article 6(1)(c) Decision [Annex 2], pp 19.

⁵⁰⁷ Parties' response to the Commission's request for information RFI 24 [Annex 12], slide 5.

⁵⁰⁸ Parties' response to the Commission's request for information RFI 24 [Annex 6], slide 28. See also the non-confidential reply of a competitor to the Questionnaire Q2 to Competitors of Rolled Copper Products, questions 2.1. and 2.2. (id 173): "*Wieland is our main competitors for alloys in the connector industry*" and "*Aurubis (...) one of our major competitors in the connector industry.*"

⁵⁰⁹ Data is based on Wieland's and ARP's estimates provided in the Response to the Article 6(1)(c) Decision [Annex 2], pp 19.

⁵¹⁰ Response to the Article 6(1)(c) Decision [Annex 2], p. 19, and the submission of a customer of Schwermetall, *Note à la Commission Européenne* of 26 June 2018 (Id 456).

implementation of a foreclosure strategy by the merged entity through Schwermetall. In the oral hearing, on 19 November 2018, the Notifying Party further highlighted that Wieland's competitors only purchase approximately 15-30% of their total pre-rolled strip requirements from Schwermetall (slide 26 of the Notifying Party's presentation).

- (620) For the following reasons (recitals (622) to (633)), the Commission maintains that the supplies of pre-rolled strip from Schwermetall are an important input for Wieland's competitors on the rolled products market, in particular for enabling them to exert competitive pressure on Wieland in the high-end part of the rolled products market.
- (621) First, as shown in Table 24, the Notifying Party's competitors, [Competitor 1], [Competitor 2], [Competitor 3] and [Competitor 4] rely on Schwermetall for [30-35%] of their pre-rolled strip requirements to manufacture rolled products sold in the EEA. The Commission has undertaken a quantitative assessment of Wieland's and ARP's and their competitors' purchase patterns from Schwermetall, and has analysed the magnitude of input dependency on Schwermetall for the Notifying Party's main competitors.
- (622) For the purposes of this exercise, the Commission matched Schwermetall's sales data for pre-rolled strip⁵¹¹ with the volumes of rolled products sold in the EEA by the Notifying Party, ARP and Schwermetall's customers, who compete with the Notifying Party on the EEA rolled products market.⁵¹² The sales of rolled products and the respective input share from Schwermetall were matched by alloy, taking into consideration the [...] ([...] tonnes of pre-rolled strip is required to manufacture 1 tonne of rolled products).⁵¹³ For each competitor, the Commission excluded Schwermetall's pre-rolled strip input which was in excess of the given competitor's actual rolled product sales in the EEA. Henceforth, the Commission will refer to this analysis as the 'sales matching exercise'.

Table 24 Schwermetall's input in the EEA sales of rolled products (2017)⁵¹⁴

	Schwermetall's share of rolled products (tonnes)	Total sales of rolled products (tonnes)	% share of Schwermetall input
Notifying Party	[...]	[...]	[...]%
ARP	[...]	[...]	[...]%
4 competitors	[15 000 - 25 000]	[60 000 - 70 000]	[30-35]%

Source: Parties' response to the Commission's request for information RFI 28, Parties' response to the Commission's request for information RFI 26 (Annexes 2 and 4 for Wieland and ARP, respectively), Parties' response to the Commission's request for information RFI 29, European Commission (market reconstruction data), Parties response to the Commission's request for information RFI 32

- (623) As seen in Table 24, in 2017 in rolled product terms, the share of Schwermetall's input in ARP's sales ([...]%) was larger than that of the Notifying Party ([...]%). The last row in the table shows the aggregate share of Schwermetall's pre-rolled strip input for [Competitor 1], [Competitor 2], [Competitor 3] and [Competitor 4],

⁵¹¹ Parties' response to the Commission's request for information RFI 28 [Annex 1].

⁵¹² The sales data of rolled products was taken from the market reconstruction exercise as described in the Annex.

⁵¹³ Form CO, paragraph 115.

⁵¹⁴ Third LoF, Table 1.

Schwermetall's four largest customers after the Notifying Party, ARP and [Competitor 5].

- (624) Second, Schwermetall's supplies seem to be also important for the global viability and competitiveness of the Notifying Party's competitors. In its analysis, the Commission solely considered volumes that were sold by the Notifying Party's competitors on the rolled products market in the EEA. However, in the majority of instances, the volumes of these pre-rolled strip alloys purchased from Schwermetall exceeded the respective rolled product sales in the EEA. This implies that the competitors also source pre-rolled strip from Schwermetall for their non-EEA sales. Thus, the extent of the actual dependency of competitors on Schwermetall's input for their global viability and competitiveness is likely to be even larger than the current EEA-only analysis suggests.
- (625) Third, the Notifying Party's competitors rely on Schwermetall's supplies in particular for three HPAs used in the manufacture of connector strip. The sales matching exercise also enabled the Commission to identify three alloys where the share of Schwermetall's input was particularly high for all market participants listed in recital (624), including the Notifying Party and ARP. Those alloys are [Alloy 1] and [Alloy 2], and, [Alloy 3]. They are included in the HPA segment and are used in the production of connector strip.
- (626) The results of the sales matching exercise revealed that [...] % of the sales of rolled products made of [Alloy 1] in the EEA in 2017 most likely came from Schwermetall input. The Notifying Party, in particular, appears to have sourced its entire needs of pre-rolled strip made of this alloy from Schwermetall. Only one small competitor appeared to have sold rolled products of [Alloy 1] without any Schwermetall input. However, the market share of this company on the rolled products market would represent only [0-5] %.
- (627) Similarly, [...] % of the sales of rolled products made of [Alloy 2] (excluding those of the Notifying Party) in the EEA in 2017 are likely to have been manufactured with pre-rolled strip sourced from Schwermetall. ARP seems to have sourced the entire needs of pre-rolled strip made of this alloy from Schwermetall. There were only two competitors, KME/MKM and Sofia Med, that, according to the analysis, used pre-rolled strip from different sources than Schwermetall. However, the aggregated segment share for those companies in [Alloy 2] rolled products in the EEA is in the range of [10-25] %.
- (628) Finally, [...] % of the sales of rolled products made of [Alloy 3] (excluding those of the Notifying Party) in the EEA in 2017 are also likely to have been manufactured with pre-rolled strip sourced from Schwermetall. The remaining [...] % belong to 2 competitors which seem to have used pre-rolled strip from a source other than Schwermetall.
- (629) Fourth, the identified three alloys account for an important part of the HPAs sales of ARP and of the Notifying Party's smaller competitors in the EEA. The combined share of [Alloy 1], [Alloy 2] and [Alloy 3] sourced from Schwermetall and sold by ARP in the rolled products market constituted the majority of ARP's sales in the HPA segment, amounting to [...] % of the total HPA sales in the EEA in 2017. As illustrated in Table 4 in Section 6.3.1.2., overall ARP's sales share in the HPA segment was [...] % in 2017. Furthermore, as shown in Table 17 above, [Alloy 2] and [Alloy 3] were also singled out as some of the most important alloys based on sales volume for ARP.

- (630) According to the market reconstruction, the combined shares of [Competitor 1], [Competitor 2], [Competitor 4] and [Competitor 3] in the HPA segment are in the range of [15-20]%. Any post-Transaction strategy to raise rival's purchase costs would affect rolled products of [Alloy 1], [Alloy 2] and [Alloy 3] alloys which constitute [10-15]% of the HPA segment and thus more than half of the combined share of [Competitor 1], [Competitor 2], [Competitor 4] and [Competitor 3] in this segment. More importantly, it would raise the costs of inputs that are important to compete with the Notifying Party in the connectors segment, and in the HPA segment where the Notifying Party is a leader.
- (631) Fifth, these three alloys are important to the Notifying Party. According to Annex 14 of the Form CO, these 3 alloys are among the 15 alloys with the highest sales volume for the Notifying Party. They contribute to [...] % of the Notifying Party's HPA sales. Moreover, according to the connectors strip brochure of Wieland, [Alloy 2] (under Wieland's nomenclature, '[...]') and [Alloy 3] ('[...]') are among the most important materials for connectors.

Figure 53 Most important materials for connectors

[...]

Source: The Notifying Party's previous brochure of connectors strip, registered in the case file on 28 August 2018 with the Id 1558, page 4

- (632) In fact, Wieland is the leading supplier of these alloys. Table 25, Table 26 and Table 27 present the sales shares for the three alloys: Table 25 for [Alloy 1], Table 26 for [Alloy 2] and Table 27 for [Alloy 3].⁵¹⁵ After the Transaction Wieland would be selling more than 60% of the total output of rolled copper products made of these alloys.

Table 25 - EEA product shares for [Alloy 1] for the years 2015 to 2017

([Alloy 1])	2015		2016		2017	
	Sales	Product share	Sales	Product share	Sales	Product share
Notifying Party	[...]	[60-70]%	[...]	[60-70]%	[...]	[40-50]%
ARP	[...]	[20-30]%	[...]	[10-20]%	[...]	[10-20]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[80-90]%	[...]	[80-90]%	[...]	[60-70]%
KME/MKM**	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Diehl	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
EGM	[...]	[5-10]%	[...]	[5-10]%	[...]	[0-5]%
Kemper	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Messingwerk	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
[Competitor 1]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 2]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 3]	[...]	[0-5]%	[...]	[0-5]%	[...]	[20-30]%

⁵¹⁵ While in the overall market reconstruction, as explained in the Annex to the SO, the Commission assumed that imports represent 5% of the market, due to the technical requirements and the observed patterns of the products imported, the Commission does not find it appropriate to assume any imports regarding these alloys.

([Alloy 1])	2015		2016		2017	
	Sales	Product share	Sales	Product share	Sales	Product share
[Competitor 4]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 5]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 6]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Altek	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Sevojno	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total	[...]	100.00%	[...]	100.00%	[...]	100.00%

Table 26 - EEA product shares for [Alloy 2] for the years 2015 to 2017

([Alloy 2])	2015		2016		2017	
	Sales	Product share	Sales	Product share	Sales	Product share
Notifying Party	[...]	[60-70]%	[...]	[60-70]%	[...]	[60-70]%
ARP	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[70-80]%	[...]	[70-80]%	[...]	[70-80]%
KME/MKM**	[...]	[5-10]%	[...]	[10-20]%	[...]	[10-20]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Diehl	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
EGM	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Kemper	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Messingwerk	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 1]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 2]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 3]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 4]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 5]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 6]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Altek	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Sevojno	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total	[...]	100.00%	[...]	100.00%	[...]	100.00%

Table 27 - EEA product shares for [Alloy 3] for the years 2015 to 2017

([Alloy 3])	2015		2016		2017	
	Sales	Product share	Sales	Product share	Sales	Product share
Notifying Party	[...]	[50-60]%	[...]	[50-60]%	[...]	[50-60]%
ARP	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Schwermetall	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[70-80]%	[...]	[70-80]%	[...]	[70-80]%
KME/MKM**	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Sofia Med	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Diehl	[...]	[10-20]%	[...]	[10-20]%	[...]	[5-10]%
EGM	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Kemper	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Messingwerk	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 1]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 2]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 3]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 4]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 5]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
[Competitor 6]	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Altek	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Sevojno	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total	[...]	100.00%	[...]	100.00%	[...]	100.00%

Source: European Commission, based on market participants' data.

* the Commission anonymised six market participants in order to better preserve their business secrets. These market participants are (here in alphabetical order, which does not correspond to the order given in the table): Azienda Metalli Laminati, Griset, Med Povrly, Silmet, WMD, WMN.

** Sales of KME/MKM also include the sales of KMD, a JV between KME and Chinese player Golden Dragon.

- (633) For the reasons set in recitals (622) to (633) above, the Commission considers that the pre-rolled strip procured from Schwermetall by the Notifying Party's competitors is very important for their ability to exert competitive pressure on the Notifying Party on the rolled products market, in particular on the high-end part.
- (634) The Notifying Party argued that the Commission's assessment of the dependency of Wieland's four competitors on Schwermetall for the three specific alloys does not correspond to an assessment of an anticompetitive input foreclosure risk as foreseen in paragraph 32 of the Non-horizontal Merger Guidelines.⁵¹⁶ Indeed this exercise does not intend to be or to substitute an input foreclosure assessment as foreseen in paragraph 32 of the Non-horizontal Merger Guidelines. The purpose of this exercise is to show the importance of Schwermetall's supplies to third parties that compete with the Notifying Party on the downstream market of rolled products.
- (635) The Notifying Party has, in particular, expressed criticism in respect of the subjective definition of HPA, which includes [Alloy 3], [Alloy 1] and [Alloy 2]. The Notifying Party argued that these three alloys are definitely not 'high-end' or even HPAs.

⁵¹⁶ Response to the First LoF, paragraph 52.

Furthermore, the Notifying Party claimed these three alloys do not constitute sophisticated alloys and there is a multitude of alternative alloys which could easily be used instead of [Alloy 3], [Alloy 1] and [Alloy 2].⁵¹⁷ The Commission disagrees with the Notifying Party's criticism, and considers that, as explained in the Annex to the present Decision, the alloy classification – and in particular regarding HPAs – is not based on a scientific definition, but it is rather a conventional definition widely used in this industry. Furthermore, in the economic analysis submitted by Wieland and ARP⁵¹⁸ [Alloy 1] and [Alloy 2] are considered HPAs. Moreover, as the Commission noted in the First LoF, Wieland itself used to classify [Alloy 3] as an HPA⁵¹⁹. In addition, during the market reconstruction, some other market participants reported their sales of [Alloy 3] under HPAs.⁵²⁰

- (636) In the Notifying Party's view, the Commission has also neglected to take account of the fact that the alloys for which competitors are dependent on Schwermetall are not necessarily the most important for the overall competition in HPAs or connector strip, more generally. According to the Notifying Party, the Commission obtains a distorted and biased picture of the overall situation by focusing on three specific alloys of the sales matching exercise. Furthermore, if some other alloys within HPA or connector segments were considered, the shares of Wieland and ARP would be completely different.
- (637) The Commission has not focused its analysis on these three alloys. The Commission focused its analysis on Schwermetall's supplies and their weight in the sales of rolled products in the EEA. By matching the pre-rolled strip sales of Schwermetall ([...]) with the respective alloy rolled product sales in the EEA, the Commission concluded that these three alloys were the alloys in respect of which third parties mostly relied on Schwermetall as a sources of supply. In the economic analysis submitted by Wieland and ARP, these alloys were also part of the top 10 'forecloseable' alloys.⁵²¹ The reason the Commission calculated the share of Wieland's, ARP's and their competitors' sales of each of these alloys was to verify whether Wieland was also the leading supplier in relation to these alloys.
- (638) This analysis serves to show the strength of Schwermetall in the pre-rolled strip market and identifies those alloys for which the Notifying Party's competitors are most dependent on Schwermetall.
- (639) In light of the reasons set in recitals (602) to (639), the Commission considers Schwermetall to be the leading supplier of pre-rolled strip on the merchant market and Schwermetall's supplies of pre-rolled strip are an important input for the Notifying Party's competitors on the downstream rolled products market, particularly on the high-end part.
- 6.9.1.3. Post-Transaction Wieland will have access to its competitor's commercially sensitive information on input costs, lot sizes, and planning and will be deciding alone on the pricing and portfolio of pre-rolled strip offered to the market
- (640) Wieland's acquisition of sole control of Schwermetall will give rise to two important changes having a direct effect on Wieland's ability to influence the competitiveness of its competitors downstream. First, Wieland will have access to sensitive

⁵¹⁷ Response to the First LoF, paragraphs 19 and 45 to 49.

⁵¹⁸ Response to the Article 6(1)(c) Decision [Annex 2]

⁵¹⁹ First LoF, paragraph 7.

⁵²⁰ First LoF, paragraph 6.

⁵²¹ Response to the Article 6(1)(c) Decision [Annex 2]

information regarding its competitors who are customers of Schwermetall. Second, Wieland alone will decide on pricing and the portfolio of pre-rolled strip offered by Schwermetall on the market.

- (641) Prior to the Transaction, Schwermetall enjoys operational autonomy when negotiating with third-party customers. In particular, Schwermetall sets its prices at arm's length independently of its parents. Prices are determined by market conditions and are unknown to Wieland and ARP. Neither Wieland nor ARP know the commercial conditions agreed directly between Schwermetall and its third-party customers.⁵²² Although the parents of the joint venture may indirectly influence the price to third parties, [...], in the form of [...].
- (642) Moreover, although the parents of the joint venture determine [...], as they have priority in [...] for their own production of rolled products, the planning of sales to third parties is done by Schwermetall, as shown in Schwermetall's medium-term planning: *“Die Mengenplanung der Partner und deren Konzerngesellschaften wurden ohne Änderungen in die Planung aufgenommen. Die Planung des Absatzes für Drittkunden erfolgte durch Schwermetall”*.⁵²³
- (643) Also, the information received by the joint-venture parents on sales to third-party customers is aggregated. For example, Figure 54 below is a graph that depicts how Schwermetall reports its sales volume to the advisory board in the monthly reports. The sales volumes to third-parties are aggregated on total volume level.

Figure 54 Presentation to the JV parents regarding the production in April 2018 and split by customer groups

[...]

Source: Parties' response to the Commission's request for information RFI 14 [Annex 3.15], page 1.

- (644) In addition to sales volume, the annual reports, that the parents of joint-venture parents receive, also include the conversion revenue, however always in an aggregated fashion. Only exceptionally do the annual reports refer directly to an individual third-party customer in cases related to the extension of credits lines.
- (645) As referred to in recital (600), a significant share of the pre-rolled strip sold by Schwermetall on the merchant market goes to competitors of Wieland and ARP, which has potential to give rise to tension between the downstream activities of the parents of joint venture and those of third-party customers. As can be seen from the internal documents of the Parties, this tension could be eased by referring to the operating model of Schwermetall whereby it sets the commercial terms to third-party customers at arm's length from the joint venture parents: *“Bisher war in fast jeder Diskussion mit größeren Vorwalzbandkunden die Nähe zu Wieland und Aurubis Gegenstand der Gespräche. Hier haben wir bisher immer argumentiert, dass wir mit unseren Anteilseignern nicht im Detail über die Geschäftsbeziehungen sprechen und wir auch keinen Einfluss auf deren Marktverhalten nehmen.”*⁵²⁴

⁵²² Response to the Article 6(1)(c) Decision [Annex 2], p.3.

⁵²³ Free translation: *“The quantity planning of the partners and their group companies was included in the planning without any changes. The sales for third-party customers were planned by Schwermetall”* in the Parties' response to the Commission's request for information RFI 14 [Annex 3.3], ‘Schwermetall-Beiratssitzung am 06 Juli 2018 – Sitzungsunterlagen.msg’, attachment ‘TOP 4 Mittelfristplanung.pdf’.

⁵²⁴ Parties' response to the Commission's request for information RFI 14, [Annex 5], ‘[...]’ (Convenience translation: *“So far, in almost every discussion with the larger customers of pre-rolled strip, the proximity to Wieland and Aurubis was the subject of discussions. We have always argued that we do*

- (646) Concerning Schwermetall's product portfolio, prior to the Transaction each parent of the joint-venture has a [...]. According to Wieland and ARP, currently, the joint venture parents have each a [...]; and [...].⁵²⁵
- (647) Following the transaction, Schwermetall would lose its operational autonomy *vis-à-vis* Wieland and the constraints exercised by Aurubis on Wieland in relation to [...] and Schwermetall's relationship with third-parties.
- (648) First, through the acquisition of sole control over Schwermetall, Wieland will gain access to the information regarding Schwermetall's third-party customers which it currently does not have, such as product lists, volumes and prices for each individual customer. As a result, Wieland will have direct access to sensitive commercial information of its competitors as it will be able to know the specific material mix and volumes required by each individual competitor. In other words, Wieland will know the exact cost, the product mix and the quality requirements of the pre-rolled strip that its competitors source from Schwermetall. After the Transaction, having access to this commercially sensitive information of its individual customers, the merged entity would be in a position to better target input price increases; be better placed to foreclose these competitors; or be better able to tailor its own competing product development strategies. Those strategies might make these downstream competitors less able to compete effectively with and constrain the merged entity.
- (649) Further, while pre-rolled strip constitutes, on average, around 30% of the cost of downstream rolled products it is an essential input for manufacturing rolled products (it is not possible to substitute pre-rolled strip copper products with any other product in the production of rolled copper products). When competitors acquire pre-rolled strip on the merchant market they are more likely to pass on a price increase to their final customers, otherwise they would reduce their margin. In the latter case, competition with Wieland on the rolled products market is also softened because in oligopolistic settings, such as the high-end of the rolled products market (recitals (427) and (577)), a rival faced with a reduced margin is more likely to accommodate Wieland's post-Transaction attempts to increase downstream prices (thereby increasing the likelihood of maintaining its original margins while minimising the loss of sales) rather than fighting those price increases by trying to under-cut Wieland (thereby reducing its margins without the certainty of increasing sales sufficiently to compensate the margin reduction).⁵²⁶
- (650) Finally, while even after the Transaction Wieland could still face some uncertainty about other costs and other commercial parameters of Schwermetall's customers, this uncertainty would be significantly reduced compared to the situation prior to the Transaction. Following the -Transaction Wieland would directly control the price of Schwermetall's pre-rolled strip (on which, as shown in recital (622), the competitors rely for [30-35%] of their pre-rolled strip requirements), and thus Wieland would have an increased ability to raise its rivals' costs.
- (651) Second, Wieland alone would decide on [...] offered by Schwermetall on the merchant market. Following the Transaction, Wieland would no longer be constrained by ARP as regards the strategic decisions determining what [...].

not talk in detail with our shareholders about business relationships and that we also have no influence on their market behaviour").

⁵²⁵ Response to the Article 6(1)(c) Decision [Annex 2],p. 2.

⁵²⁶ Horizontal Merger Guidelines, paragraph 24.

- (652) According to a customer of Schwermetall, [...].⁵²⁷ Following the Transaction, however, the risk of such behaviour would increase. Today Schwermetall's parents have to [...]. Following the Transaction, Wieland would no longer be constrained by Aurubis and could decide on its own [...].
- (653) In the response to the SO, the Notifying Party argued that the Commission failed to substantiate its theory of harm in relation to Wieland's access to sensitive commercial information of its competitors as a result of the Transaction and raised the following arguments. First, even if Wieland would get access to more disaggregated information following the Transaction, it is very unlikely that this would provide Wieland with a competitive advantage because the information is not strategic and a large uncertainty would remain about key competition parameters (such as large share of costs and profits, finishing, geographic location of a customer). Second, due to the small volume of Schwermetall's third-party business in relation to the overall rolled products market (only [5-10]%) and the known average sales price, Wieland and ARP already have an idea of the price levels of the third party customers and fail to see how access to the information would make it more difficult for competitors to compete.
- (654) First, the Commission has analysed Wieland's access to its competitors' commercially sensitive information and its implications for competition as one of the effects arising from the Transaction, in particular with regards to Wieland's ability to raise its rivals' costs, and not as a stand-alone theory of harm. Therefore, the Notifying Party's argument that the theory of harm is not substantiated has no grounds. Second, although some uncertainties about other features of the competitors' products and production costs would remain, with the acquisition of sole control over Schwermetall, Wieland would get full transparency with respect to an input material representing approximately 30% of the costs of the final rolled product, the product mix per competitor, and lot sizes. This information would give Wieland the opportunity to better target price increases and limit the availability of specific alloys to third parties, thereby enhancing its ability to raise rivals' costs. Hence, contrary to what the Notifying Party claims there is a difference between having access to this information and relying on estimates about the average prices Schwermetall charges to third-party customers (which is all that the Notifying Party can do prior to the Transaction.)
- (655) In light of the above, the Commission considers that the change from joint to sole control giving Wieland access to commercially sensitive information and the right to decide alone on the pricing and product portfolio offered on the merchant market would increase Wieland's ability to restrict the expansion of its downstream competitors that depend on Schwermetall supplies.
- 6.9.1.4. Wieland's competitors have only limited possibilities of switching suppliers of pre-rolled strip or expanding in-house capabilities.
- (656) Contrary to the Notifying Party's claims,⁵²⁸ at least with respect to certain qualities of pre-rolled strip that they require, Schwermetall's customers do not have other sources on the market for pre-rolled strip nor could they use their own in-house capabilities to produce those qualities of pre-rolled strip.

⁵²⁷ Non-confidential minutes of a call with a competitor of 21 June 2018, (Id 463).

⁵²⁸ Response to the Article 6(1)(c) Decision, p. 25 et seq.; response to the SO, p. 55 et seq.; response to the First LoF, p. 12.

- (657) The Notifying Party considered that Schwermetall's customers could use their own in-house capabilities to replace supplies from Schwermetall for all qualities of brass and bronze pre-rolled strip (including deep-drawing quality used in the high-end of the rolled products market).⁵²⁹ As regards the pre-rolled strip of other compositions, the Notifying Party provided a list of '[...]'.⁵³⁰ As it is apparent from that list, the Notifying Party has identified that in the base-case scenario (in-house production and MKM as an alternative supplier) [...] also identified by the Commission: for example, [Alloy 2]⁵³¹, [Alloy 1] and [Alloy 3]⁵³² (Section 6.9.1.1 and 6.9.1.2). In an alternative scenario where Sofia Med is also considered (but no in-house production is taken into account), the identified '[...]' include some HPAs and a specific bronze and brass composition.
- (658) For the reasons set out in recitals (660) to (681), the Commission considers that, at least in the short term, Schwermetall customers would not be in a position to replace supplies sourced from Schwermetall for specific alloy compositions (the so-called 'forecloseable alloys') and might not be able to completely replace the supply of their alloys with the current suppliers of pre-rolled strip on the merchant market.
- (659) The results of the market investigation provide indications that companies relying on Schwermetall do not have sufficient or necessary own capacities to produce pre-rolled strip, including of certain HPAs, brass and bronze alloys, and could not efficiently turn to alternative suppliers in the short-medium term.
- (660) As regards the in-house capabilities, customers of Schwermetall have explained that certain alloys, such as HPAs of the copper iron group (for example [Alloy 2]) or brass of deep-drawing quality require specific production processes for cake casting and subsequent hot rolling to produce pre-rolled strip. Hence, as illustrated by the evidence from the market investigation in recitals (662) and (663), the companies that do not have these casting and hot rolling technical capabilities cannot produce pre-rolled strip of the necessary alloy composition. Moreover, the market participants consider that the investment needed to develop these capabilities would not be an economically viable option because they would not be able to reach the scale needed to render such investment profitable (see recital (665)).
- (661) A customer of Schwermetall clarified regarding the HPAs [Alloy 2] and [Alloy 1] that: *"These alloys are typical alloys for slab-casting and hot-rolling processes. By technical and physical reason it is not possible, to cast those alloys with our process (horizontal continuous casting)."*⁵³³
- (662) Customers of Schwermetall have also provided similar explanations for deep-drawing quality: *"If one needs special properties like i.e. deep drawing properties for battery cups or ammunition cups due to the only low reduction in casted strip only slab casting / hot rolling can be used."* And also: *"if deep drawability is requested, there is no technical alternative present for some hot-rolled brass alloy*

⁵²⁹ In the submission "Follow-on points" by E.CA Economics) of 17 September 2018, it is acknowledged, however, that "[...]", p.3. See also the Parties' response to the Commission's request for information RFI 23, question 2.

⁵³⁰ Parties' response to the Commission's request for information RFI 23 [Annex 2].

⁵³¹ See Parties' response to the Commission's request for information RFI 24 [Annex 6], slide 18, which in relation to one of the biggest customers for high-end connector strip shows that [Alloy 2] alloy ([...]) has the highest share in terms of alloy demand.

⁵³² See Parties' response to the Commission's request for information RFI 24 [Annex 6], slide 18, which in relation to one of the biggest customers for high-end connector strip specify [Alloy 3] ([...]).

⁵³³ Non-confidential response to a request for information of 21 September 2018 (Id 1553).

pre-rolled strips according to our knowledge”⁵³⁴. A customer of Wieland for metal goods has also confirmed that in order for it to meet high quality and safety standards for ammunition components it requires finished strip in deep-drawing quality which can only be produced by cake casting and hot rolling: *“The melting technology from Schwermetall – the shape vertical casting line combined with a warm rolling technology – is especially designed to produce pre-rolled strip in deep-drawing quality. Most of the alternative European smelters use horizontal continuous strip casting or vertical continuous strip casting which is not useable for the manufacture of pre-rolled strip in deep-drawing quality.”*⁵³⁵

- (663) Based on the submissions of the Parties regarding the technical capabilities of customers of Schwermetall, only [Competitor 6] and [Competitor 7] have shape casting and hot rolling capabilities, while [Competitor 1], [Competitor 2], [Competitor 3], [Competitor 4], [Competitor 8] and [Competitor 5]⁵³⁶ have horizontal strip casting capabilities without hot rolling facilities.⁵³⁷ Accordingly, those companies are likely to rely on Schwermetall for the supplies of pre-rolled strip and cannot turn to in-house production to get pre-rolled strip in a specific quality.
- (664) Furthermore, customers of Schwermetall submit that developing in-house capabilities for hot-rolled alloys would require very significant investment and would take several years. As one competitor explains *“Developing a new hot roll source for pre-rolled supplies takes at least 5 Years, normally even more due to intense qualification procedures for connector alloys to be used in automotive applications”*.⁵³⁸ Or as another competitor puts it: *“Without major investments we would not be able to produce the high performance and low-alloyed or pure copper alloys in-house. Our estimation is that the investment for production facilities would sum up to approx. 100 to 200 Mio EUR.”*⁵³⁹ Another competitor relying on supplies from Schwermetall explains that investment in such capabilities could only be considered a viable option if one could envisage using the capacity at a large scale: *“A slab casting / hot rolling facility is economical only viable above 100.000 ton/year”* and that such capacity is *“too high for own consumption and therefore an investment is meaningless because the cost for running it on low capacity is too high”*.⁵⁴⁰
- (665) In its response to the First LoF, the Notifying Party claims that competitors can and do effectively produce HPAs with horizontal strip casting, including the top three alloys on which the Notifying Party's competitors rely the most, [Alloy 2], [Alloy 1], and [Alloy 3] (see Section 6.9.1.2) can also be produced on strip casting lines. To support its claim, the Notifying Party refers to a strip casting line manufacturer of machinery Wertli, according to which strip casting of [Alloy 2] is possible, and it also adds that *“Wieland does continuously cast [Alloy 2] on its casting lines”*.⁵⁴¹
- (666) The Commission does not contest that some HPAs can be and are produced with horizontal strip casting lines. However, a mere reference to machinery available on

⁵³⁴ Non-confidential response to a request for information of 21 September 2018 (Id 1578).

⁵³⁵ Non-confidential minutes of a call with a customer of Schwermetall of 28 June 2018 (Id 513).

⁵³⁶ See recitals (399) and (489) above on Conti-M line.

⁵³⁷ Response to the Article 6(1)(c) Decision [Annex 2],, page. 22.

⁵³⁸ Non-confidential reply to Questionnaire Q2 to Competitors of Rolled Copper Products, question 47 (Id 173).

⁵³⁹ Non-confidential response to a request for information of 21 September 2018 (Id 1578).

⁵⁴⁰ Questionnaire to Suppliers of rolled products, questions 21.1 and 21.2 (Id 986).

⁵⁴¹ Response to the First LoF, paragraph 46.

the market which potentially could do that does not suffice to rebut the appreciation of the customers of Schwermetall regarding their own capabilities (see also recital (662)). In fact, three competitors of the Notifying Party, which are also customers of Schwermetall, submit that [...] (including [Alloy 1] and [Alloy 2]) cannot be casted with horizontal strip casting.⁵⁴²

- (667) The Notifying Party also contests that deep-drawing quality of brass cannot be produced with strip casting technology because, according to the Notifying Party, that quality is determined not at the casting/hot rolling production step but, at the later, annealing process step, which applies for both strip and cake casting.⁵⁴³ In its response to the SO, the Notifying Party refers to its reply to the Commission's request for information RFI 23, where it provides a list of companies, which, to its knowledge, offer rolled products used for deep-drawn applications. In that list, the first six companies (or groups of companies) are considered to provide rolled products for deep-drawn applications produced via cake casting and hot rolling. Then, three companies are identified that are "assumed [to be using] strip casting", and another four companies which are identified as using strip casting. Within the last group, [Competitor 4] is listed. In addition, the Notifying Party claims that rolled products with deep-drawing quality do not belong to the high-end part of the market, therefore a foreclosure of this product is incompatible with the Commission's theory of harm.⁵⁴⁴
- (668) The list concerns rolled products, not pre-rolled strip. Hence, the list says nothing about the possibility of strip casting with deep drawing qualities. In fact, the listed companies which do not have cake casting and hot rolling casting may very well purchase the pre-rolled strip and continue to process it to obtain the rolled product with deep drawing qualities. This is precisely what one of those listed companies does: [Competitor 4], one of the companies listed, submitted to the Commission that "there is no technical alternative" for hot rolling for deep-drawing quality. Therefore the list presented by the Parties does not demonstrate that deep-drawing quality can be achieved by horizontal strip casting. Moreover, the Notifying Party itself has acknowledged that "[...]".⁵⁴⁵ With regards to the claim that [...], the Commission considers this product to be a speciality in brass. As a customer explained: "[m]anufacturers of high quality semi-finished brass products, e.g. in the automotive, medical devices and many other industries, require finished strip in deep-drawing quality in order to meet the quality requirements for their semi-finished products. Thus, from customers' perspective, finished strip in deep-drawing quality is not interchangeable with finished strip in simple (stamping) quality."⁵⁴⁶ This customer further stated that all its suppliers of deep-drawn quality brass rolled products source the respective pre-rolled strip from Schwermetall.⁵⁴⁷ Therefore also in relation to this product, the re-rollers that compete with Wieland would have limited alternatives of supply.
- (669) In its response to the SO, the Notifying Party further claims that even if the Commission concluded that deep-drawing quality cannot be produced with

⁵⁴² Non-confidential replies to the Questionnaire to Suppliers of rolled products, questions 1 and 1.1.

⁵⁴³ Response to the SO, paragraph 173; the Notifying Party's response to the Commission's request for information RFI 23.

⁵⁴⁴ Response to the SO, paragraph 194.

⁵⁴⁵ Submission "Follow-on points" by E.C.A Economics of 17 September 2018, p.3

⁵⁴⁶ Non-confidential minutes of a call with a customer of Schwermetall of 28 June 2018 (Id 513).

⁵⁴⁷ *Idem*

horizontal strip casting, it fails to show that Schwermetall's customers - that compete with Wieland and ARP on the rolled products market - actually process the pre-rolled strip into products for which such quality is required (for example ammunition). The Notifying Party explains that alloys with deep-drawing quality are also used for applications which do not require that quality. The Notifying Party, however has not provided any data to substantiate its claim regarding such demand side substitution. The Commission, therefore, considers that the weight to be attributed to Wieland's and ARP's claim is limited, and is not, therefore sufficient to undermine its conclusion that competitors without cake casting and hot rolling capabilities cannot, at least efficiently, manufacture pre-rolled strip with deep-drawing quality which is based on the testimony of Schwermetall's customers.

- (670) In light of the above, the argument of Wieland and ARP that competitors could use available in-house capacity in the short term or develop necessary capabilities to replace Schwermetall's supplies cannot be accepted because the in-house capabilities are unlikely to be sufficient to produce the specific pre-rolled strip that is currently sourced from Schwermetall.
- (671) With respect to possible alternative suppliers of pre-rolled strip, Wieland and ARP analysed the possibility for Schwermetall's third-party customers to switch to MKM and Sofia Med. Wieland and ARP also referred to KME as having capabilities to supply the pre-rolled strip in all alloys that Schwermetall offers on the merchant market.⁵⁴⁸
- (672) As noted in Section 6.1.1, for the purposes of this case the Commission assesses KME/MKM as one single entity. However, given that KME/MKM has not yet launched on the market as a single entity, the Commission will first assess the activities of KME and MKM on the pre-rolled strip market separately and will subsequently consider whether the merged entity can be seen as a viable alternative to Schwermetall.
- (673) First, if considered alone, MKM serves the merchant market mainly with pure copper, and to some limited extent, with bronze pre-rolled strip. MKM does not have the full portfolio of alloys of Schwermetall. As mentioned in recital (489), MKM's Conti-M line cannot economically produce HPAs. Second, if KME is considered on its own, it has a broader portfolio. However, it mainly sells pre-rolled strip to its joint venture KMD, which is one of Wieland's competitors in connectors. KME has only sporadically sold pre-rolled strip to third parties⁵⁴⁹. Third, as explained in Section 6.4.4.1(a), the acquisition of MKM by KME creates an undertaking with a larger volume of sales but MKM with primarily pure copper capabilities is unlikely to reinforce KME in the high-end part of the market. Fourth, in response to the Commission's request for information regarding the supply of pre-rolled strip on the merchant market,⁵⁵⁰ KME responded that *"if there is available free capacity and if the commercial conditions would be suitable for KME, then it would most likely supply pre-rolled strip, and in particular various alloys including Brass, Bronze or copper qualities for pre-rolled strip for various applications, based on its shift models, to actual and potential competitors"*. However, in the same response KME noted that: *"[i]t is important to recall that KME has not been active in this field so*

⁵⁴⁸ Response to the Article 6(1)(c) Decision [Annex 2], p. 24.

⁵⁴⁹ In the market investigation only one competitor mentioned to have purchased a very small volume of pre-rolled strip from KME.

⁵⁵⁰ KME's response of 6 December 2018 to the Commission's request for information of 4 December 2018.

far and therefore has no detailed plan to sell pre-rolled strip on the merchant market” and that “KME cannot provide a precise timeline as it has currently no detailed plan to provide pre-rolled strip to the merchant market”. KME's response supports the finding that KME is not an active player on the merchant market. In addition, the fact that KME makes its entry on the merchant market dependent on having available capacity and getting suitable commercial conditions, together with the fact that KME has no detailed plans to enter the merchant market, show that KME's entry on the pre-rolled strip merchant market is highly uncertain.

- (674) Sofia Med is still a small player on the pre-rolled strip market with a modest share of sales and a limited portfolio. Wieland and ARP themselves estimated the sales of Sofia Med at a low volume (5 000 tonnes), which is the equivalent of: less than one-tenth of Schwermetall's total supplies in 2017 to the merchant market, less than one-third of Schwermetall supplies to its largest customer; and only half of its supplies to the second largest customer⁵⁵¹. Sofia Med also does not have a portfolio of pre-rolled strip comparable to that of Schwermetall. Moreover, according to Schwermetall's second biggest customer, which also purchases pre-rolled strip from Sofia Med, Sofia Med does not have the capacity to become an effective alternative to Schwermetall: *“But Sofia Med would not be able to deliver the whole quantity of pre-roll alloys, which we purchase from Schwermetall. Sofia Med is delivering today pre-rolled strips to Kemper and other companies. They have not the capacity to increase these quantities additional for the Schwermetall alloys.”*⁵⁵²
- (675) Furthermore, given that Sofia Med is located significantly further away than Schwermetall⁵⁵³ for most of Schwermetall's current customers, Sofia Med could be considered as a less competitive option because of transport costs. This is in particular because, in addition to the transport cost for bringing the pre-rolled strip, the cost for transporting the scrap (resulting from processing pre-rolled strip into rolled products) back to the pre-rolled strip supplier has to be taken into account. This has the effect that the share of transport costs in the total cost structure of the product increases considerably. For example, one customer of Schwermetall submitted: *“Par conséquent, la distance a une double incidence sur les coûts supportés par les lamineurs : d'une part, dans le cadre du flux aller (livraison d'ébauches par la société Schwermetall) et, d'autre part, dans le cadre du flux retour (transport des déchets vers la société Schwermetall). Au-delà de 500 km, le coût du transport devient totalement dissuasif.”*⁵⁵⁴ The importance of distance has also been acknowledged by Schwermetall: *“For a business relationship between pre-rolled producer and re-roller also the return of scraps is an important issue, to minimize metal cost. Here a short distance helps to minimize logistical cost”*⁵⁵⁵.

⁵⁵¹ Data is based on the Wieland's and ARP's estimates as provided in the Response to the Article 6(1)(c) Decision [Annex 2], p. 21.

⁵⁵² Competitor's non-confidential response to the Commission's request for information of 21 September 2018, question 2 (Id 1553).

⁵⁵³ The distance between Schwermetall (Stolberg, Germany) and Sofia Med (Sofia, Bulgaria) is approximately 2000 km.

⁵⁵⁴ Free translation: *“Therefore, the distance has a double impact on the costs borne by the rollers: firstly, the way to [the roller plant] (delivery of pre-rolled strip by Schwermetall) and, secondly, the way back [to the supplier] (transport of scrap to Schwermetall). Beyond 500 km, the cost of transport becomes totally dissuasive”* - non-confidential submission of a customer of Schwermetall, Note à la Commission européenne of 26 June 2018 (Id 456).

⁵⁵⁵ Questionnaire to Suppliers of Rolled Products, question 25.

- (676) In the response to the SO, the Notifying Party claims that Sofia Med’s small market share is not indicative of its potential to expand on the markets for pre-rolled strip and rolled products. The Notifying Party supports its claim with a corporate presentation of Sofia Med’s parent company which shows that Sofia Med increased its total sales of pre-rolled strip and rolled products from 29 000 tonnes in 2015 to 48 000 tonnes in 2017. These figures do indicate that Sofia Med increased its sales by 65% in a period of two years. However, despite that increase, Sofia Med still has a market share of 5-10% in pre-rolled strip which is still very low. The Commission does not dispute that Sofia Med is a growing company. However, it is still not comparable with Schwermetall in terms of output volume, range and quality, and most likely cannot be in a similar position in a short period of time.
- (677) As the Notifying Party correctly observed, Sofia Med already supplies pre-rolled strip to customers located in Germany.⁵⁵⁶ However, that does not call into question that Sofia Med is in a less advantageous position when compared to the other two suppliers of pre-rolled strip. Even if the transport costs could - as claimed by the Notifying Party - be offset by a “significant” lower labour cost.⁵⁵⁷ As explained in recital (493), labour costs are not in their entirety variable costs but also contain fixed costs and thus cannot fully be used to offset any potential disadvantage from transportation costs and transportation duration. Moreover, as also noted in Section 7.3.3.2(a), Sofia Med has not substantiated the low labour costs and the estimates are based on Eurostat data on labour costs in Bulgaria, leaving uncertainty as to the exact level of the difference between transportation costs and labour costs of Sofia Med, with likely increasing labour costs (see recital (877)). Furthermore, as explained in recital (879), the transport costs provided by Sofia Med and which could be potentially offset by lower labour costs do not take into account the costs of returned scrap (which could potentially lead to higher transport costs). For these reasons, the Commission maintains that being in a peripheral region of the EEA is a disadvantage compared to the central location of the other pre-rolled strip suppliers.
- (678) In the response to the SO, the Notifying Party also claims that MKM can supply large amounts of pre-rolled strip that customers like [Competitor 2] and [Competitor 3] currently source from Schwermetall: [...] % and [...] % of the volume of pre-rolled strip purchased respectively by [Competitor 2] and by [Competitor 3] were made of alloys that MKM also offers. This concerns only the supply of pre-rolled strip made of pure copper, where MKM has a share comparable to that of Schwermetall. The situation is however different on the overall market and in other segments, such as HPAs, bronze and brass. As shown in Table 22, KME/MKM (whose share corresponds to MKM’s share as KME has not been active in the pre-rolled strip market) has a lower share in the overall market and in HPAs, bronze and brass segments. Given that MKM has a smaller portfolio than Schwermetall, the possibility to switch supplies to MKM is hence limited.
- (679) In the response to the SO, the Notifying Party argued that the Commission should take into consideration the plausible scenario where the new entity KME/MKM would “strive” to realize economies of scale by, for example, shifting the current production of pure copper in KME’s plants to MKM in order to free up capacities for other alloy groups such as HPAs.⁵⁵⁸ Furthermore, when confronted with KME’s response regarding the possibility to enter the pre-rolled strip merchant market

⁵⁵⁶ Response to the SO, para 186.

⁵⁵⁷ *Idem*

⁵⁵⁸ Response to the SO, paragraph 181.

(mentioned in recital (674)), the Notifying Party was of the view that KME will enter the merchant market, and therefore KME/MKM will be a stronger competitor⁵⁵⁹. First, as explained in Section 6.4.4.1(a), the poor financial position of KME together with the challenges of integrating MKM's could extend the restructuring period of KME/MKM, making the alleged efficiency unlikely. Second, as mentioned in recital (674), the Commission considers that it is still uncertain whether KME/MKM will have the available capacities to expand its presence on the pre-rolled strip merchant market and whether it will have the incentives to do so, for it depends – as KME puts it – on KME finding the suitable commercial conditions. For these reasons and contrary to what the Notifying Party claims, the Commission considers it to be more unlikely than likely that KME/MKM would expand its presence in the pre-rolled strip merchant market both in terms of portfolio range and quantities.

- (680) After the oral hearing, the Notifying Party submitted a list of suppliers that sell rolled products made of alloys that competitors of Wieland and ARP purchase from Schwermetall. According to the Notifying Party, those suppliers should be considered as alternative suppliers to Schwermetall.⁵⁶⁰ The Commission disagrees with the Notifying Party's conclusions for two principal reasons. First, the fact that companies are offering rolled products of a certain alloy does not necessarily mean they cast and hot roll the alloy themselves, in other words, that they manufacture the pre-rolled strip themselves. Second, the fact that they do manufacture the pre-rolled strip does not necessarily mean that they have the incentive to sell it on the merchant market, to third parties against which they most likely compete and will do so in the EEA (five of the companies mentioned are located outside the EEA). For these reasons the rolled products suppliers listed by the Notifying Party cannot be considered alternative suppliers to Schwermetall.
- (681) In light of the above, the Commission considers that customers of Schwermetall, and in particular those competing with Wieland and ARP downstream, could not efficiently and in due time replace the supplies of Schwermetall with alternative suppliers or by expanding their in-house capabilities.
- (682) As demonstrated in this Section 6.9.1, the change of control over Schwermetall would increase the Notifying Party's ability to raise its rivals' costs. In the absence of timely and efficient alternatives for Schwermetall's supplies, the Notifying Party would be able to raise its rivals costs either by raising the price of pre-rolled strip or by defining the quantities and alloys made available by Schwermetall on the merchant market, without fearing the loss of sales to other suppliers of pre-rolled strip. In addition through Schwermetall's activity, Wieland would have access to information regarding the precise needs for pre-rolled strip of the competitors that rely on Schwermetall's supplies. The acquisition of sole control over Schwermetall would further reinforce the Notifying Party's ability to increase prices on the rolled products market, which would already have been strengthened by the acquisition of ARP as explained in Sections 6.2 to 6.8.
- 6.9.2. *The acquisition of sole control of Schwermetall is also likely to increase the incentives of Wieland to raise rivals' costs*
- (683) The Commission considers that it is likely that the acquisition of sole control over Schwermetall would also increase Wieland's incentives to raise rivals' costs for the pre-rolled strip that they currently source from Schwermetall.

⁵⁵⁹ Response to the Second LoF, paragraph 14

⁵⁶⁰ Notifying Party's submission by email of 21 November 2018.

- (684) The Commission recalls at the outset that, for the reasons set out in Section 6.3, it concluded that the Transaction would eliminate competition between two important and close competitors, in particular in the high-end part of the rolled products market. As a result, post-Transaction Wieland would have more market power and would operate in a considerably more concentrated market downstream. This elimination of competition between Wieland and ARP on the downstream product market would increase Wieland's incentive to make the expansion of downstream rivals more difficult by raising Schwermetall's prices, or to otherwise weaken competition.
- (685) Prior the Transaction, neither Wieland nor ARP generally has had strong incentives to foreclose a rival (or otherwise induce it to compete less vigorously) by limiting the portfolio of products available from Schwermetall. This is because the customers of that foreclosed rival on the rolled products market could turn either to Wieland or to ARP as an alternative source of supply. Accordingly, such an attempt, by one of the parent companies to raise rivals' costs would not necessarily bring the desired commercial benefit to that parent company because, instead of switching its supply to that parent, the downstream competitor might source its supplies from the other parent. The Transaction would remove, the downstream constraint on Wieland, as ARP will no longer be an alternative source of supply for the rolled products manufactured with the relevant pre-rolled strip.
- (686) In its response to the SO, the Notifying Party disagreed with the Commission's position arguing that the Commission merely claims that prior to the Transaction, Schwermetall's parents constrain each other's incentives to foreclose: *"According to the Commission the benefits from a foreclosure strategy would be shared between the joint venture partners, as customers of foreclosed competitors would divert to both Wieland and ARP. The Commission fails to recognise that pre-merger also the costs of a foreclosure strategy, i.e. the foregone profits from third-party business are shared equally between Wieland and ARP. The change from joint to sole control would therefore only materially change the foreclosure incentives if the interests between the JV partners were not aligned pre-merger."*⁵⁶¹ The Notifying Party therefore seems to claim that prior to the Transaction the foreclosure incentives already existed as it would have been in both Wieland's and ARP's interest to foreclose their common competitors. Hence, the acquisition of sole control by Wieland would not change these incentives.
- (687) The Commission disagrees with the Notifying Party for the following reasons. Firstly, prior to the Transaction, under Schwermetall's current governance rules each parent has [...] (see recital (647)). Consequently, in order to prevent Schwermetall from [...] to that effect. The Transaction would remove the need for [...] on the merchant market. Post-transaction, [...], taking into consideration both its interests in upstream (pre-rolled strip) and downstream (rolled products) businesses which pre-rolled strip alloys and quantities to sell (or not) on the merchant market. In the context of the further concentration of the rolled products market through the removal of ARP, therefore, the Commission considers that Wieland would have a greater incentive to hinder its competitors' ability to compete on the rolled products market than it had prior to the Transaction when the likely benefit of any such strategy was liable to be reduced by ARP's presence on the downstream rolled

⁵⁶¹ Response to the SO, paragraph 197.

products market, either by increasing prices charged by Schwermetall or by reducing the scope of alloys available from Schwermetall.

- (688) Secondly, prior to the Transaction, Schwermetall enjoys operational autonomy for negotiating with third-party customers. All commercial conditions are negotiated between customers and Schwermetall directly (with prices being determined by market conditions), and are unknown to Wieland and ARP.⁵⁶² This implies that in the process of setting prices and commercial conditions to third-party customers, Schwermetall does not, or at least not explicitly and fully, take into account Wieland's downstream profitability (see recital (646)).⁵⁶³ Even so, Schwermetall's pre-rolled strip (input) prices and conditions offered to third-party customers directly affect Wieland's downstream profitability, because prior to the Transaction these third-party customers compete with Wieland in the rolled products market, and the price of pre-rolled strip represents an important input cost to them.
- (689) Following the Transaction, however, Wieland would obtain sole control over all aspects of Schwermetall's activities, including the setting of prices and commercial conditions for third-party customers of pre-rolled strip. It should therefore be expected that Wieland would take into account the impact that Schwermetall's pricing of pre-rolled strip has on its own rolled products business. In other words, Wieland would maximise its overall profits, which derive both from Schwermetall's upstream sales and from Wieland's downstream sales. An upstream price increase would not only increase Schwermetall's profit margin on third-party sales, but would additionally also benefit Wieland's own downstream business, as its rivals would become less competitive due to the increase in cost. Hence, after the Transaction, Wieland's incentives to increase its rivals' costs would not be the same as prior to the Transaction. On the contrary, following the Transaction Wieland would have more incentives to increase its rivals costs.
- (690) Thirdly, following the Transaction, Wieland would have no incentive to reduce the price of rolled products downstream. As explained in recital (196), the acquisition of sole control over Schwermetall would not eliminate double markups, because prior to the Transaction, Wieland and ARP already [...]. In the absence of this efficiency – which would generally give the merged entity the incentive to lower the price of rolled products – the acquisition of sole control over Schwermetall only appears to generate incentives for increasing (pre-rolled strip) prices charged to competitors, in order to soften downstream competition on the rolled products market. The Commission considers this to be the case in particular in light of the size of the merged entity present both on the upstream (pre-rolled strip) and downstream (rolled products) markets. Not only would Wieland become the leading supplier of pre-rolled strip in the EEA through its acquisition of sole control over Schwermetall, but, with its acquisition of ARP, the Notifying Party would also obtain a dominant position on the rolled products market, increasing significantly its incentives to raise rivals' costs, given the reduced risk of losing downstream sales due to the limited alternative sources of supply. Furthermore, as set out at recitals (577) and (650), in an oligopolistic setting, competitors are more likely to follow a price increase than attempt to defeat it.
- (691) The Notifying Party further argues that the Commission has failed to quantify the costs and benefits of a foreclosure strategy (including a raising rivals' costs

⁵⁶² Response to the Article 6(1)(c) Decision [Annex 2], page 3.

⁵⁶³ At most, there is [...] - see the Response to the Article 6(1)(c) Decision [Annex 2], page 3.

strategy).⁵⁶⁴ However, the Commission's concerns vis-à-vis the acquisition of sole control over Schwermetall are not based on a (fully fledged) input foreclosure theory, but rather on the merged entity's ability and incentive to raise rivals costs and thus (further) weaken competition on the rolled products market. Hence, a quantitative assessment of such input foreclosure, as submitted by Wieland and ARP, is based on an incorrect assumption, which limits its informative value. Moreover, as the Notifying Party recognises, a quantitative assessment of raising rivals costs is complex as it requires extensive information and data (for example, price elasticities).⁵⁶⁵ Such quantitative assessment would rely on very sensitive assumptions that would call into question its reliability. More importantly, taking into account the effects of the acquisition of ARP, the loss of the operational independence of Schwermetall (and all its implications in terms of pricing, available portfolio and, as explained in Section 6.9.1.3, access to competitors' sensitive information), together with the fact that the Notifying Party would not have incentives to decrease its rolled product prices indicate that the Notifying Party would have increased incentives to raise its rivals' costs following the Transaction.

- (692) In the light of recitals (687) to (692), the Commission considers that the sole control acquisition of Schwermetall would also increase the Notifying Party's incentives to raise its rivals' costs, especially when the level of concentration on the downstream rolled products market would be increased with the acquisition of ARP.
- (693) Against this background, the Commission considers that following the Transaction the Notifying Party would have the ability and incentive to reduce the competitive pressure stemming from companies relying on Schwermetall supplies by raising their costs (either by increasing input prices, or by reducing the portfolio range or the quality of the pre-rolled strip). The raise of rivals' cost and the consequent weakening of competition would, in turn, further reinforce and deepen the significant impediment to effective competition identified with respect to Wieland's acquisition of ARP.

6.9.3. *The negative impact of parallel acquisition of sole control over Schwermetall*

- (694) As referred to in Section 6.9.1.1, Schwermetall supplies competitors of the Notifying Party, who, despite their relatively small market shares on the rolled products market, compete with the Notifying Party in the high-end part of that market. Moreover, as shown in Section 6.9.1.2, Schwermetall's supplies are important for these competitors' ability to compete with Wieland.
- (695) As explained in Section 6.3.1.2 Wieland focuses its activities in the high-end part of the rolled products market. As explained in Section 6.4.4.1(d), together with ARP and [Competitor 6], [Competitor 1] and [Competitor 2] (who are also active in this part of the rolled products market in the EEA, and in particular in respect of the supply of rolled products for connectors for the automotive industry, for which they compete for the Notifying Party's [...], as set out in Section 6.4.4.1(d)) source a significant share of their pre-rolled strip requirements from Schwermetall – especially with respect to pre-rolled strip for use in the high-end of the rolled products market. Following the Transaction, the detrimental effects stemming from the elimination of competition between the Notifying Party and ARP would be further deepened, if these competitors' costs were raised (by price increases, or

⁵⁶⁴ Response to the SO, paragraph 191 and 192 and response to the First LoF, paragraph 61, 63 and 64.
⁵⁶⁵ Response to the SO, paragraph 205.

reduction of the portfolio, or quality of the pre-rolled strip supplied by Schwermetall) and their ability to compete reduced.

- (696) According to the Notifying Party, and as explained further in Section 6.9.3.1, if the merged entity were to raise [Competitor 1] and [Competitor 2]'s costs for the necessary pre-rolled strip that they currently source from Schwermetall, the potentially foreclosed share of supply would be [5-10]% and therefore this strategy would have no appreciable effect on competition.⁵⁶⁶ However, the Commission notes that even if it were accepted that the asserted [5-10]% foreclosure share is limited, the potentially foreclosed volumes would be significant for the individual customers. For example, based on the Parties' submission, [Competitor 1] and [Competitor 2] could potentially lose [0-5]% and [0-5]% respectively as a volume share of the total rolled products market.⁵⁶⁷ Given [Competitor 1]'s and [Competitor 2]'s limited market shares ([5-10]% and [0-5]%, respectively), those losses would represent a substantial part of their sales volumes (potentially more than [30-50]%). This raises the concern that, given the high fixed costs of downstream production, the whole downstream operation of those rivals might be put at risk and the intensity of the downstream competition reduced.
- (697) Market participants have also voiced their concerns regarding the parallel acquisition of sole control over Schwermetall, pointing in particular to price increases and to the softening of competition on the rolled products market.
- (698) Customers of rolled products explain: “[...] *if Schwermetall belongs to one Company which will serve its competitors with raw material as well a Price increase there could increase the whole market Price [...]*”⁵⁶⁸ or as another customer submits: “*Ein weiteres Risiko sehen wir bei der Schwermetall die dadurch zu 100 % an die Firma Wieland geht. Wir erwarten durch einen Zusammenschluss höher Marktpreise und eine zu starke Abhängigkeit bei Sonderlegierungen.*”⁵⁶⁹ Another customer also fears that Wieland' pricing power would be further strengthened: “*if Schwermetall 100% Wieland than Wieland is the marked driver for pricing.*”⁵⁷⁰ Asked whether it had further comments on the Transaction it wished to bring to the Commission's attention, [...] – Wieland's most important customer replied “*Schwermetall is a pre-material supplier which is currently jointly owned by Wieland and Aurubis - It is possible that suppliers using Schwermetall may have concerns about the control of Schwermetall post transaction.*”⁵⁷¹
- (699) The market participants have raised further concerns related to the weakening of competition downstream. As customers of Schwermetall and competitors of the Parties explained: “*If the merger is authorised, Wieland will control exclusively Schwermetall and will be able to conduct his commercial policies independently, either stopping supplying to its competitors in rolled products, or worsening considerably the previously existing commercial conditions.*”⁵⁷² Similarly other

⁵⁶⁶ Response to the Article 6(1)(c) Decision [Annex 2], page 39 et seq., and response to the First LoF, paragraph 30.

⁵⁶⁷ Response to the Article 6(1)(c) Decision [Annex 2], page 40.

⁵⁶⁸ Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 27 (Id 1156).

⁵⁶⁹ Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 29 (Id 1218).

⁵⁷⁰ Questionnaire Q1 to Customers of Rolled Copper Products, question 49.1 (Id 132).

⁵⁷¹ Non-confidential response to Questionnaire Q.4.2 to Customers of Rolled Copper Products – Connectors, question 29.

⁵⁷² Non-confidential submission of a customer of Schwermetall, *Note à la Commission européenne* of 26 June 2018 (Id 456).

customers submitted: *“Following the acquisition by Wieland it can be expected that Schwermetall will no longer supply competitors of its parent organization at competitive prices or conditions”*⁵⁷³ and that *“[m]any other suppliers are even depending [...] from Schwermetall for their prerolled strips. So in total there will be unhealthy impact on free trade for the whole business”*⁵⁷⁴. Another customer and competitor of Wieland said: *“once Schwermetall will be integrated with Wieland (a downstream competitor of [Competitor 4]), Wieland will have full transparency of input prices of its competitors. In addition, Schwermetall will align its incentives with Wieland and would either not sell (certain) alloys and/or would sell them at a higher price”*.⁵⁷⁵

- (700) In the response to the SO, the Notifying Party submitted that the Commission should not take the negative views expressed by the customers of Schwermetall about the Transaction at face value as some customers could be pursuing their interests to keep access to Schwermetall as a “public service”.⁵⁷⁶ However, the feedback received from the market participants is only one of the elements on which the Commission relies to support its assessment and which is balanced in the light of all other pieces of evidence. Moreover, as illustrated by the market feedback provided in recital (699), not only Schwermetall’s customers but also the customers of these customers are concerned with the Notifying Party’s acquisition of sole control over Schwermetall and its effects on the downstream rolled products market. The Commission therefore does not consider that these views are exaggerated or lead to misperceptions.
- (701) The Notifying Party argues that the Commission should not consider whether all supplies from Schwermetall could be replaced completely by in-house production or by a single alternative supplier, but should analyse whether part of the Schwermetall’s supplies could be replaced by an alternative source and whether this could be enough to render foreclosure unprofitable.⁵⁷⁷ Moreover, this ability to foreclose certain alloys (or quantities) would affect an even smaller share of the downstream market and hence would not have an appreciable effect on competition.⁵⁷⁸ With regard to the three HPAs alloys identified in Section 6.9.1.2, the Notifying Party also claims that given *“they represent such a small share of downstream the rolled products market, from an economic point of view it would be very unlikely that a considerable degree of the input price increase would be passed on (...) . When the rolled prices of the same or similar alloys of all other players remain unchanged, volumes would switch and this would be a reason to absorb the cost increases and not pass them on to a large extent.”*⁵⁷⁹ In addition, only in the case of considerable pass-on, could Wieland be able to increase rolled prices for some of its alloys.⁵⁸⁰ The Notifying Party recognises that the effect of foreclosure *“might be relatively more significant for smaller competitors as [Competitor 2] and [Competitor 1], which are currently purchasing relatively more pre-rolled strip than larger competitors like [Competitor 6] and [Competitor 5]”* however it argues that *“in an overall rolled product market, even with differentiation, the competitive*

⁵⁷³ Questionnaire Q1 to Customers of Rolled Copper Products, question 46-1 (Id 210).

⁵⁷⁴ Questionnaire Q1 to Customers of Rolled Copper Products, question 50 (Id 1278).

⁵⁷⁵ Non-confidential minutes of a call with a competitor of 21 June 2018 (id. 463).

⁵⁷⁶ Response to the SO, paragraph 210.

⁵⁷⁷ Response to the SO, paragraph 179.

⁵⁷⁸ Response to the SO, paragraph 205.

⁵⁷⁹ Response to the First LoF, paragraph 63

⁵⁸⁰ Response to the First LoF, paragraph 64.

pressure exercised by these small competitors is limited.”⁵⁸¹ The Notifying Party further claims that the Commission does not substantiate that a decrease of these competitors sales volume might put their business at risk due to high fixed costs.⁵⁸²

- (702) As explained in Section 6.9.1.4, Wieland's competitors have only limited possibilities of switching suppliers of pre-rolled strip or expanding in-house capabilities. This is in particular important for certain alloy compositions used in the high-end part of the market. Hence, even if the competitors could replace part of the supplies they currently acquire from Schwermetall, the Notifying Party would still have the ability and incentive to raise their costs on the alloys for which they would have no alternative to Schwermetall as the competitors would still need to source sufficient pre-rolled strip to meet that demand.
- (703) As such, even if competitors could procure a proportion of their pre-rolled strip requirements from alternative sources, a strategy by which the merged entity increases the price for part or all of Schwermetall's pre-rolled strip portfolio available on the merchant market would still have an appreciable impact on competition. First, while the higher input costs may not induce rivals to stop their activities completely, it would likely render them less aggressive competitors in the downstream market. To preserve their margins, the competitors would pass-on the input price increase and would not be able to undercut the Notifying Party's prices on the rolled products market. This holds true for the three alloys discussed in Section 6.9.1.2. In this respect, the Commission considers the Notifying Party's assertion that third-party customers, given unchanged rolled product prices, would not pass on an input price increase into their rolled product prices and, hence, Wieland would not be able to raise its own rolled prices to be circular and flawed. Wieland would anticipate that, facing higher input costs (set by Wieland-controlled Schwermetall), its third-party customers would act as less aggressive competitors on the rolled products market. Given this less strong competitive constraint, Wieland would be in a position to profitably increase price on the rolled products market and the competitors would be more accommodative of the price increase. That is, the rivals themselves would have an incentive to pass on their input cost increase.
- (704) Second, given the loss of ARP as a competitor, and the consequent increase of the Notifying Party's market power and of the level of concentration on the rolled products market, a loss of competition even from small competitors has a bigger impact on the market, since there are not many other alternatives on the market. Given that these competitors rely on Schwermetall for [30-35%] of their pre-rolled strip requirements (as explained in Section 6.9.1.2) and the alternatives are limited, an increase of the input price which accounts for about 30% of the total costs (see recital (650)) would reduce their margin and thus make it more difficult to cover the fixed costs of their operation, unless they adopt a higher downstream price.⁵⁸³ Hence, larger exposure of the small rivals to Schwermetall makes them more vulnerable to

⁵⁸¹ Response to the SO, paragraph 208.

⁵⁸² Response to the SO, paragraphs 207 and 208.

⁵⁸³ In general, a firm covers its variable and fixed costs from its revenues. Over the long run, no firm can allow itself to systematically run losses where the positive variable profits (that is, total revenues minus total variable costs) do not cover its fixed costs. In case of a (variable) input cost increase, when the input product is particularly important for a given firm, its thinner downstream margins – induced by its increased input costs –, make it less likely to be able to cover its fixed costs. Hence, it has an incentive to raise its price on the downstream market. (Note that the argument holds even if the fixed costs are not subject to an increase.)

input cost increases, and this is aggravated by the presence of fixed costs, making the pass-on of the input cost increase more likely.

- (705) The Notifying Party further claims that if the foreclosed competitor used the pre-rolled strip from Schwermetall to produce rolled products, that are sold outside the EEA, foreclosure of that competitor would not have an impact on EEA customers.⁵⁸⁴ The Commission calculated shares based on an EEA market. Hence, the existence of non-EEA sales does not change the Commission's conclusions as to the Transaction's negative impact on EEA markets. In any event, as mentioned in Section 6.9.1.1, the fact that competitors also purchase pre-rolled strip from Schwermetall to support their non-EEA rolled products sales implies that their actual dependency on Schwermetall's input for their global viability and competitiveness is even larger than the current analysis suggests.
- (706) In light of the reasons in recitals (695) to (705) above, the Commission considers that the acquisition of sole control over Schwermetall would allow the Notifying Party to raise rivals' costs and thus further reinforce and deepen the significant impediment to effective competition identified with respect to Wieland's acquisition of ARP.
- 6.9.3.1. The Commission's findings are not weakened by the Parties' economic submissions on input foreclosure
- (707) As part of the Response to the Article 6(1)(c) Decision, the Notifying Party submitted an economic paper on the assessment of the risk of anticompetitive input foreclosure,⁵⁸⁵ which it subsequently amended with another economic submission.⁵⁸⁶ These submissions assert that there is no risk of anticompetitive input foreclosure stemming from the Transaction, and in particular, no risk of foreclosing Schwermetall's customers, which compete with Wieland and ARP downstream.
- (708) According to the economic submissions that the maximum potential foreclosure share is very limited ([5-10]%) even if it is assumed that there is no alternative to purchase the foreclosed volumes.⁵⁸⁷ Moreover, the merchant market volumes supplied by Schwermetall could generally be replaced by in-house production, where sufficient spare capacity is available.⁵⁸⁸ In addition, the Transaction does not change the incentives of Wieland regarding foreclosure. In particular, being vertically integrated Wieland and Aurubis could have already, prior to the Transaction, foreclosed their Schwermetall customers. However, no foreclosure occurred in the past. Furthermore, although the sole ownership and control of Schwermetall would give Wieland access to more detailed customer-specific information regarding the prices, volumes and alloys of pre-rolled strip (while prior to the Transaction, Wieland had only access to aggregated information), it would not give Wieland a competitive advantage in the downstream rolled products market.⁵⁸⁹ This is because a number of Schwermetall customers are not competitors of Wieland; pre-rolled strip only makes up a small share of the total costs of downstream rolled products, and despite having more detailed information, Wieland would face much uncertainty stemming from other factors like the cost of pre-rolled strip produced in-house or purchased from other suppliers, whether the pre-rolled strip purchased from

⁵⁸⁴ Response to the SO, paragraph 196.

⁵⁸⁵ Response to the Article 6(1)(c) Decision [Annex 2].

⁵⁸⁶ Submission "Follow-on points" E.CA Economics of 17 September 2018.

⁵⁸⁷ Response to the Article 6(1)(c) Decision [Annex 2], page 39 et seq.

⁵⁸⁸ Response to the Article 6(1)(c) Decision [Annex 2], Section 5.

⁵⁸⁹ Submission "Follow-on points" by E.CA Economics of 17 September 2018, Section 2.4.

Schwermetall is used for the EEA market, and what are the fields of use in which the competitors use the pre-rolled strip.

- (709) As noted in recital (692) the economic assessment submitted by the Notifying Party deals with the question of full foreclosure as a stand-alone theory of harm and does not take into account the full impact on competitive conditions that would result from the Notifying Party's acquisition of ARP. The Commission's concerns regarding the acquisition of sole control of Schwermetall are, however, related to raising rivals' costs and are closely interlinked with the weakening of downstream competition resulting from the Notifying Party's acquisition of sole control over ARP. Hence, the Notifying Party's submission is based on incorrect assumptions which limit its informative value.
- (710) The Commission also considers that a foreclosure share of [5-10]%, as estimated by the Notifying Party, should be viewed relative to the size of competitors in the market. Such foreclosure should be assessed in the context of, and in addition to, the impact of the acquisition of ARP, which leads to a combined very large market share and a high degree of concentration on the rolled products market (see Section 6.2). In this case, a further increase in market concentration by taking out an additional [5-10]% of competitors' market share would be more detrimental to effective competition. Further, even if competitors would not reduce their volumes to the full extent of the alleged [5-10]% and instead would purchase their inputs from Schwermetall at a higher price (than prior to the Transaction), the detrimental effects stemming from the elimination of competition between Wieland and ARP would be further deepened by the rivals' reduced ability to compete.
- (711) The Commission concludes that the findings presented in the economic report on the risk of anticompetitive foreclosure do not weaken the Commission's findings.
- 6.9.4. *No countervailing efficiencies stemming from the acquisition of Schwermetall*
- (712) According to Article 2 (1) (b) of the Merger Regulation, in its competitive assessment, the Commission takes into account, among other factors, "*the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition.*"
- (713) According to the Horizontal Guidelines, "[f]or the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative."⁵⁹⁰
- (714) The Horizontal Guidelines consider efficiencies merger specific, "*when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives.*"⁵⁹¹
- (715) As set out in recitals (196) and (691), the Commission considers that the acquisition of sole control of Schwermetall does not provide the efficiencies usually generated by a classical vertical merger, namely the internalisation of the double mark-up.
- (716) [...].⁵⁹²

⁵⁹⁰ Horizontal Merger Guidelines, paragraph 78.

⁵⁹¹ Horizontal Merger Guidelines, paragraph 85

⁵⁹² Response to the SO, paragraph 211.

- (717) In this section the Commission will demonstrate that the acquisition of Schwermetall would likely not generate the efficiencies claimed by the Notifying Party because [...] ⁵⁹³ and hence the alleged efficiencies are not merger specific. As regards the Notifying Party's statement that "[...]", the Commission will not assess it in more detail as the Parties do not substantiate this point with any further elements.
- (718) Concerning the casting capacity, the Notifying Party stated that following the Transaction it intends to increase the Schwermetall's capacity in particular through the [...]. According to the Notifying Party's internal document ⁵⁹⁴ "[...]" ⁵⁹⁵ This production line is therefore not equivalent to a casting line, and thus it would not create new capacities within Schwermetall's shape casting, or hot-roll production.

Figure 55 – [...]

[...]

Source: Parties' response to the Commission's request for information RFI 27 [Annex 12], slide 4, emphasis added

Figure 56 – [...]

[...]

Source: Parties' response to the Commission's request for information RFI 27 [Annex 8], slide 15, emphasis added

Figure 57 – Implementation of the [...] on a stand-alone basis

[...]

Source: Parties' response to the Commission's request for information RFI 27 [Annex 12], slide 6, emphasis added

- (719) The Notifying Party does not agree with the Commission's analysis and argues that *"the Commission did not assess the documents, which were provided by the Notifying Party that evidencies these [i.e. Schwermetall's] efficiencies"*. ⁵⁹⁶ The Notifying Party further argues that in the Figure 57 "[...]" ⁵⁹⁷ [...], the Notifying Party did not provide any supporting evidence of investment plans, such as for example, business plans, CAPEX approval, etc. In addition, as per Figure 58 below, Schwermetall's foundry [...]. ⁵⁹⁸ In the response to the First LoF, the Notifying Party contests the Commission's conclusion that [...] ⁵⁹⁹. Therefore, the Commission considers that Wieland's plans to invest [...].

Figure 58 – [...]: next steps

[...]

Source: Parties' response to the Commission's request for information RFI 27, [Annex 12], slide 7, emphasis added

⁵⁹³ First LoF, Section 6

⁵⁹⁴ Parties' response to the Commission's request for information RFI 27 [Annex 8].

⁵⁹⁵ As explained in recitals (66) and (67) copper cathodes or secondary copper (scrap) are smelted and casted into cakes (or slabs). These slabs are further processed by hot-rolling and milling into a strip (the pre-rolled strip).

⁵⁹⁶ Response to the First LoF, paragraph 69.

⁵⁹⁷ Response to the First LoF, paragraph 71.

⁵⁹⁸ The highlighted text in Figure 52 reads (convenience translation): "[...]"

⁵⁹⁹ Response to the First of LoF, paragraph 73.

- (720) Concerning the alleged output increase mentioned in recital (718), the Notifying Party [...] sole control of Schwermetall to increase its output.

Figure 59 – Plan to increase production capacity in HPAs, HDT volumes

[...]

Source: Parties' response to the Commission's request for information RFI 24, [Annex 2], slide 39.

- (721) Currently, the Notifying Party only uses [...]). As shown in Table 28, the Notifying Party still has capacity available in its allotted capacity share to meet its production plans.

Table 28 – Share of used capacity of Schwermetall by the Notifying Party

	Global Sales 2017	Partner capacity share	Used capacity share	Global Sales 2016	Global Sales 2015
	(tonnes)	(tonnes)	(%)	(tonnes)	(tonnes)
Notifying Party	[...]	[...]	[...]	[...]	[...]
ARP	[...]	[...]	[...]	[...]	[...]
Third parties	[...]	[...]	[...]	[...]	[...]
Total	[...]	[...]	[...]	[...]	[...]

* excluding production for [...]

Source: European Commission, based on data of the Parties' response to the Commission's request for information RFI 4, the Form CO Table 11 page 92, and the Form CO [Annex 3.1.1.d] “[...]”.

- (722) In light of the above, the Commission considers that [...] neither free foundry capacity in Schwermetall, nor increase [...]. Therefore, the elements raised by the Notifying Party do not show that the acquisition of full ownership of Schwermetall is necessary for the alleged expansion plans of the Notifying Party. Consequently, the Commission does not consider that those plans substantiate the claims of the Notifying Party that the acquisition of Schwermetall is necessary to generate efficiencies. Hence, the efficiencies claims of the Notifying party are neither merger specific nor do they change the Commission's finding that the acquisition of sole control over Schwermetall would likely deepen the negative effects of the Transaction as it would allow the Notifying Party to hinder the expansion of an important share of the remaining competitors on the rolled products market.

6.9.5. Conclusion on the parallel acquisition of Schwermetall

- (723) In light of the above, the Commission considers that the parallel acquisition of sole control over Schwermetall would deepen the negative effects of the Transaction as it would allow the Notifying Party to hinder the expansion of an important share of remaining competitors on the rolled products market, which would be even more concentrated because of the elimination of ARP, particularly in the high-end of the

rolled products market. As a result, the parallel acquisition of sole control over Schwermetall would further reinforce and deepen the significant impediment to effective competition identified with respect to Wieland's acquisition of ARP.

6.10. The Transaction does not impede effective competition in relation to input foreclosure of billets

- (724) One customer of ARP has complained that Wieland would acquire control of its sole raw material (that is billets) supplier. Given that Wieland is a competitor of the complainant downstream in sanitary and industrial copper tubes in the Nordic regions, the complainant considers that Wieland would have the incentive to leverage its market power upstream to increase its sales downstream on the copper tubes markets by refusing to supply the downstream competitor with an essential input.⁶⁰⁰ The customer of ARP argued that in the Nordic region ARP is the only available supplier of billets. There are only a few other suppliers of billets in the EEA, who are not vertically integrated and are not active on the same markets downstream. However, the complainant claims that if it had to change the supplier the increased transport costs would prevent it from maintaining its competitive position in the copper tube market. The Commission has indicated in the Article 6(1)(c) Decision that it would investigate further in phase II whether Wieland could foreclose access to billets as an input for its rivals tubes producers following the Transaction.
- (725) The Commission has investigated this complaint and found that there is no risk of input foreclosure in relation to billets. The Notifying Party submitted that the Parties produce billets and cakes only for captive use, with the exception of ARP supplying billets to one single customer in Finland and Wieland's negligible sales of billets (approximately 60 tonnes overall) in the previous years.⁶⁰¹
- (726) The Notifying Party has confirmed that ARP delivers billets to the factory of Cupori Oy ('Cupori') which is located in the same industrial park that includes the ARP-production site of Aurubis Finland in Pori (Finland). Both plants used to belong to the same owner Outokumpu and were ultimately sold to Luvata and ultimately ARP ('the billets factory') and Cupori (the tubes plant). The geographic proximity and common history explains this supply relationship given that ARP does not offer billets to any other third parties.⁶⁰²
- (727) In the upstream merchant market for billets (total market estimated at 182 000 tonnes), the Notifying Party has estimated that ARP holds a market share of [5-10]% in the EEA (sales of [...] tonnes).⁶⁰³ The market investigation carried out by the Commission has provided no elements to suggest that that market share is any higher. Such a market share is not indicative of market power as regards supply of billets by ARP.
- (728) The market investigation has revealed that there are several alternatives for the merchant supply of billets, notably Aurubis (seller of ARP, not part of the Transaction) with a [30-40]% market share, Brixlegg with a [40-50]% market share and KHGM with a [10-20]% market share. These alternative suppliers are located in Central Europe, Germany for Aurubis, Austria for Brixlegg and Poland for KHGM.

⁶⁰⁰ Non-confidential minutes of a call with the complainant of 21 June 2018

⁶⁰¹ Form CO, paragraph 102 and 135

⁶⁰² Form CO, footnote 39

⁶⁰³ The Parties' response to the Commission's request for information RFI 7, page 6.

Although these alternative suppliers are not located in Finland and would need to transport billets to Finland to supply the complainant, the market investigation has shown that cross border sourcing of billets should be feasible given that all billets suppliers (with the exception of ARP which only delivers to Cupori, for reasons linked to their common history as explained in recital (727)) supply billets across borders in the EEA.

- (729) Furthermore, there is another billet supplier active in the merchant market, Luvata Pori Oy, which is located in the same Finnish industrial park as ARP's plant and Cupori's plant. Although Luvata Pori Oy only sells high-end billets (such as OF CU billets) and not standard billets, such as those sourced by Cupori from ARP, Luvata Pori Oy could easily switch from the production of high-end billets to the production of standard billets as such switching would not require any investment in know-how or specific equipment. Should the price increase for billets delivered to Cupori from ARP, Luvata Pori Oy could also constitute an alternative as there are no technical obstacles that would prevent it from producing and selling standard billets.
- (730) In the light of the above, the Transaction does not impede effective competition as regards risks of input foreclosure of billets.

6.11. Conclusion on the competitive assessment

- (731) For the reasons set out above in Sections 6.2 to 6.6, and 6.9 regarding the likely effects of the Transaction in the market for rolled products in the EEA, the Commission concludes that the Transaction is likely to result in a significant impediment to effective competition through the removal of an important competitor on the market, with the likely result of an increase in prices. Moreover, for the reasons set out in Sections 6.7 and 6.9, the Commission also concludes that the Transaction is likely to result in a significant impediment to effective competition through the creation of a dominant position for Wieland on the rolled products market in the EEA.
- (732) For the reasons set out in Section 6.10 above, the Transaction would not impede effective competition as regards risks of input foreclosure of billets in the EEA..

7. COMMITMENTS

- (733) In order to render the Transaction compatible with the internal market in relation to the market for rolled products in the EEA, the Notifying Party submitted the Commitments of 17 October 2018, pursuant to Article 8(2) of the Merger Regulation.
- (734) For the reasons set out in Section 8 of the SO, the Commission preliminarily considered that these commitments were not sufficient to eliminate the competition concerns identified in the SO and did not subject these commitments to a market test.
- (735) Following the adoption of the SO and the oral hearing, the Notifying Party submitted the Commitments of 3 December 2018. As the substance of these commitments is, to a very large extent, identical to the Commitments of 17 October 2018 (divestment of the Stolberg and the Zutphen plants and a [...] year supply and service agreement under which the Notifying Party would supply copper and copper alloy pre-rolled strip to Stolberg and Zutphen), the Commitments of 3 December 2018 and 17

October 2018 will be assessed jointly in terms of substance.⁶⁰⁴ The only differences between the two sets of commitments concern an additional purchaser criterion and an upfront buyer clause in the Commitments of 3 December 2018 that were not included in the Commitments of 17 October 2018, and which will be described further in Section 7.2.

(736) The Commitments of 3 December 2018 were market tested on 7 December 2018.

7.1. Commitments principles

(737) The following principles set out in recitals (739) to (751) from the Merger Regulation and the Remedies Notice⁶⁰⁵ apply where parties to a concentration offer commitments with a view to rendering a concentration compatible with the internal market.

(738) Where a concentration raises competition concerns in that it could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their concentration.⁶⁰⁶

(739) The Commission only has power to accept commitments that are capable of rendering the concentration compatible with the internal market in that they will prevent a significant impediment to effective competition in all relevant markets where competition concerns were identified.⁶⁰⁷ To that end, the commitments have to eliminate the competition concerns entirely,⁶⁰⁸ have to be comprehensive and effective from all points of view⁶⁰⁹ and they have to be capable of being implemented within a short period of time as the conditions of competition in the market will not be maintained until the commitments have been fulfilled.⁶¹⁰

(740) Structural commitments and particular divestitures will meet those conditions only where the Commission can conclude with the requisite degree of certainty that it will be possible to implement them and it will be likely the new commercial structures resulting from the commitments will ensure that the significant impediment to effective competition will not materialise.⁶¹¹

⁶⁰⁴ For ease of reference, the remainder of this Decision refers only to the Commitments of 3 December 2018. Unless otherwise indicated, however, the weaknesses identified with respect to the Commitments of 3 December 2018 apply equally to the Commitments of 17 October 2018.

⁶⁰⁵ Commission's Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ('Remedies Notice'), OJ C 267, 22.10.2008, p. 1.

⁶⁰⁶ Remedies Notice, paragraph 5.

⁶⁰⁷ Remedies Notice, paragraph 9.

⁶⁰⁸ Preamble to the Merger Regulation, recital 30. Case C-202/06 P *Cementbouw Handel & Industrie v Commission* ECLI:EU:C:2007:814, paragraph 54: "*it is necessary, when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration, not to determine whether the concentration still has a Community dimension after those conditions or obligations have been complied with, but to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified*".

⁶⁰⁹ Remedies Notice, paragraphs 9 and 61.

⁶¹⁰ Remedies Notice, paragraph 9.

⁶¹¹ Remedies Notice, paragraph 10. See also Judgment of 6 July 2010, *Ryanair v Commission*, T-342/07, ECLI : EU:T:2010:280, paragraph 453 "*it must be held in that regard that commitments proposed by one of the parties to a merger will meet that condition only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the remedies resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant*

- (741) The requisite degree of certainty concerning the implementation may for example be affected by risks in relation to the transfer of a business to be divested, including risks of finding a suitable purchaser. It is incumbent on the parties to remove such uncertainties as to the implementation of the remedy when submitting it to the Commission.⁶¹²
- (742) In assessing whether the Commission can conclude with the requisite degree of certainty that the commitments are likely to eliminate the competition concerns identified, the Commission has to take into account all relevant factors including the scale and scope of the remedy proposed, judged by reference to the structure and characteristics of the market concerned.⁶¹³
- (743) Where the parties submit remedies which are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of the decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted.⁶¹⁴
- (744) The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. The business must include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which are currently employed or which are necessary to ensure the business' viability and competitiveness.⁶¹⁵
- (745) The businesses to be divested have to be viable as such. Therefore the resources of a possible or even presumed future purchaser are not taken into account by the Commission at the stage of assessing the remedy. The situation is different if already during the procedure a sale and purchase agreement is concluded with a specific purchaser whose resources can be taken into account at the time of the assessment of the commitment.⁶¹⁶
- (746) Once a purchaser is identified after adoption of an authorisation decision, some of the assets or personnel included in the divested business may not be needed by the proposed purchaser. In the purchaser approval process, the Commission may, upon request by the parties, approve the divestiture of the business to the proposed purchaser without one or more assets or parts of the personnel if this does not affect the viability and competitiveness of the business to be divested after the sale, taking account of the resources of the proposed purchaser.⁶¹⁷
- (747) Normally, a viable business is a business that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.⁶¹⁸
- (748) Even though normally the divestiture of an existing viable stand-alone business is required, the Commission, taking into account the principle of proportionality, may

position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future”.

⁶¹² Remedies Notice, paragraph 11.

⁶¹³ Remedies Notice, paragraph 12.

⁶¹⁴ Remedies Notice, paragraph 14.

⁶¹⁵ Remedies Notice, paragraphs 23-25.

⁶¹⁶ Remedies Notice paragraph 30.

⁶¹⁷ Remedies Notice, paragraph 31.

⁶¹⁸ Remedies Notice, paragraph 32.

also consider the divestiture of businesses which have existing strong links or are partially integrated with businesses retained by the parties and therefore need to be ‘carved out’ in those respects. In order to reduce the risks for the viability and competitiveness to a minimum in such circumstances, an option for the parties is to submit commitments proposing to carve out those parts of an existing business which do not necessarily have to be divested.⁶¹⁹

- (749) In any case, the Commission will only be able to accept commitments which require the carve-out of a business if it can be certain that, at least at the time when the business is transferred to the purchaser, a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will thereby be reduced to a minimum.⁶²⁰
- (750) As regards commitments that are submitted out of time, the parties to a notified concentration may have such commitments taken into account subject to two cumulative conditions, namely, first, that those commitments clearly and without the need for further investigation resolve the competition concerns previously identified and, secondly, that there is sufficient time to consult the Member States on those commitments.⁶²¹

7.2. Description of the Commitments of 3 December 2018

- (751) Under the Commitments of 3 December 2018, the Notifying Party proposed to divest ARP's plants in Zutphen (the Netherlands) and Stolberg (Germany), as well as, at the option of the purchaser, three slitting centres in Slovakia, Italy and the United Kingdom ('the Divestment Business').
- (752) The divestment would be supported by a [...] year supply and service agreement under which the Notifying Party would supply copper and copper alloy pre-rolled strip [...] and provide toll treatment services for casted materials produced by Stolberg or procured by Stolberg and Zutphen on terms [...] Stolberg and Zutphen, including volumes, metals and partner pricing conditions (the 'Transitional Supply Agreements') .. These volumes may, upon request of the acquirer, be increased up to 3% compared to the volume delivered in each previous year and [...].
- (753) The [...] year contract for supplying those plants would be optional for the acquirer but binding for the Notifying Party (in order to allow the purchaser to use its own captive or additional / alternative third party sources for pre-rolled strip).
- (754) In addition to the standard purchaser criteria requiring independence from the Parties; proven expertise in the relevant field; incentives to maintain and develop the Divestment Business; and a lack of *prima facie* competition concerns, the Notifying Party included the following additional purchaser criterion in the Commitments of 3 December 2018: *“In order to ensure the viability of the Divestment Business, the Purchaser/s must be able to ensure, on a long-term basis, that is after the interim supply agreement has expired, sufficient supply of pre-rolled strip which is necessary for the Divestment Business, either through its own captive/in-house production and/or via purchase agreements concluded with other pre-rolled strip suppliers”*.⁶²²

⁶¹⁹ Remedies Notice, paragraph 35.

⁶²⁰ Remedies Notice, paragraph 36.

⁶²¹ Judgment of 21 September 2005, EDP v Commission, T-87/05, EU:T:2005:333, paragraphs 161 to 163; Judgment of 6 July 2010, Ryanair v Commission, T-342/07, EU:T:2010:280, paragraph 455

⁶²² Commitments of 3 December 2018, paragraph 19 d).

- (755) The Notifying Party also gave a commitment that the Transaction would not be implemented before the Notifying Party or a divestiture trustee had entered into a final binding sale and purchase agreement for the sale of the entirety of the Divestment Business and the Commission had approved the purchaser or purchasers and the terms of sale in accordance with paragraph 20 of the Commitments of 3 December 2018 (upfront buyer clause).
- (756) Although it has not concluded a sale and purchase agreement with a specific purchaser during the procedure, the Notifying Party has identified several potential purchasers of the Divestment Business such as Sofia Med and Global Brass and Copper, which will be described further in Section 7.3.1.

7.3. Assessment of the Commitments of 3 December 2018

7.3.1. The Notifying Party's arguments

- (757) In the Notifying Party's view, the Commitments of 3 December 2018 are sufficient to remove the competition concerns identified by the Commission. The Notifying Party submitted that the Commitments of 3 December 2018 would significantly reduce the merged entity's market share in the overall market for rolled products following the Transaction by divesting both the Stolberg and Zutphen plants and ARP's three slitting centres as well as removing the overlap in the high-end part of the market, in particular by divesting both of ARP high-end plants, that is the Stolberg and Zutphen facilities.⁶²³ The Divestment Business thus includes almost all of Aurubis' current EEA rolled products business and consequently all tangible and intangible assets located at the Stolberg and Zutphen plants and in the three slitting centres.
- (758) As regards the viability and competitiveness of the Divestment Business, the Notifying Party argued that the Divestment Business is a viable, competitive and long-established integrated rolled product business, because it consists of two ongoing, stand-alone businesses for the development, production and supply of rolled products to customers in the EEA. According to the Notifying Party, the Stolberg and the Zutphen factories are viable due to their attractive and complementary product portfolio, specific capabilities and finishing production lines. The Notifying Party submitted that the Stolberg plant, in particular, is a well-established business with extensive customer relationships across Europe and benefits from its comprehensive set of production and processing equipment in rolled products, which include horizontal strip casting, hot dip tinning, cold rolling, annealing, pickling and slitting.⁶²⁴
- (759) In addition to remedying the Commission's concern with regard to the overall rolled products market, the Notifying Party submitted that the Commitments of 3 December 2018, in particular, provide for a tailor-made solution to dispel the Commission's concerns with regard to the high-end part of the market. The Notifying Party submitted that both the Stolberg and the Zutphen factories are active in the high-end part of the market, and have established a strong footprint in the field of connector, electrical engineering, stampers, trade and tinning.⁶²⁵
- (760) Furthermore, in the view of the Notifying Party, any structural commitments regarding Schwermetall should not be part of the structural remedy package. The

⁶²³ Form RM submitted on December 3, 2018, paragraph 1.

⁶²⁴ Form RM submitted on December 3, 2018, paragraph 2 i).

⁶²⁵ Form RM submitted on December 3, 2018, paragraph 3.

Notifying Party's economic advisers have analysed "*input foreclosure effects*"⁶²⁶ and, according to the Notifying Party, this analysis rebutted any vertical concerns.

- (761) Finally, according to the Notifying Party, the supply and service agreement(s) offered to the purchaser(s) of the Divestment Business also address and remove any remaining vertical concerns with regard to Schwermetall's third party customers' supply of pre-rolled strip. While the purchaser(s) of Zutphen and Stolberg will benefit from a secure and stable supply situation offered by the long-term supply contracts, they could also choose to replace Schwermetall deliveries by internal supply using already existing own capacities or build up new internal capacities. If the purchaser(s) of Zutphen and Stolberg were to replace Schwermetall deliveries with internal supplies, Schwermetall would face a significant utilisation gap of approximately [...] tonnes/year. According to the Notifying Party, this would further underline Wieland's future need to supply third party customers in order to keep Schwermetall's utilisation at an economically sufficient level.⁶²⁷
- (762) The Notifying Party submitted that there are potential buyers for the acquisition of the Divestment Business, although the Notifying Party did not include the names of these potential purchasers in the binding commitments, but only mentioned them in the Form RM. Notably, the Notifying Party submitted that Sofia Med (Halcor Group) had communicated to the Commission its strong interest in acquiring the Stolberg plant. According to the Notifying Party, Sofia Med would be a suitable purchaser – due to its strong high-end focus with two-digit growth rates and its strategy to further expand its operations in Europe. According to the Notifying Party, should Sofia Med acquire Stolberg, this would lead to a doubling of its market share in the EEA, especially in the area of high-end products. According to the Notifying Party, Sofia Med would also be able to provide captive pre-rolled strip and optimise milling/ hot rolling operations with regard to the existing plant in Bulgaria and the new plant in Stolberg.⁶²⁸
- (763) The Notifying Party also put forward that the US-based company Global Brass & Copper ('GBC') would constitute an ideal purchaser for the Divestment Business. The Notifying Party also submitted that GBC has the necessary expertise and experience in the industry that allows the company to successfully operate the Divestment Business in the market and a comprehensive product portfolio with a strong focus on bronze, HPAs, copper and brass as well as coating technologies across all industries (electrical engineering, automotive etc.). According to the Notifying Party, a divestment to GBC would increase competition in the field of rolled products in the EEA even further, and, by acquiring the entirety of the Divestment Business, the potential buyer would immediately gain an EEA market share of more than [10-20]%, production capacities of more than [...] tonnes and EEA sales of approximately [...] tonnes per year.⁶²⁹
- (764) After the submission of the Commitments of 3 December 2018 and the launch of the market test, the Commission was informed by the Notifying Party on 12 December 2018 that KME, which is in the process of merging with rolled copper competitor MKM,⁶³⁰ would be interested in acquiring the Divestment Business. In

⁶²⁶ Response to the Article 6(1)(c) Decision [Annex 2].

⁶²⁷ Form RM submitted on December 3, 2018, paragraph 69.

⁶²⁸ Form RM submitted on December 3, 2018, paragraph 52.

⁶²⁹ Form RM submitted on December 3, 2018., paragraphs 50-51.

⁶³⁰ The KME/MKM transaction was cleared by the Commission on 11 December 2018 (see the Commission's press release available on http://europa.eu/rapid/press-release_IP-18-6771_en.htm).

particular, the Notifying Party submitted that KME/MKM would be in a position to ensure the supply of pre-rolled strip via existing plants in Stolberg, Osnabrück and Hettstedt (Germany) and that KME/MKM would, according to the Commission's own findings only have a "*relatively low combined market share*"⁶³¹ and hence the divestment would not give rise to "*prima facie competition concerns*".

- (765) As explained in recital (755), the Notifying Party also included in the Commitments of 3 December 2018 specific purchaser criteria that require that the purchaser(s) have sufficient pre-rolled strip capacities/sources, in particular after the expiration of the [...] year Transitional Supply Agreements. According to the Notifying Party, such provision would remove the Commission's concern regarding the viability of the Divestment Business as to sufficient pre-rolled strip supply. The Notifying Party submitted that the criteria would guarantee the long term viability of the Divestment Business and the suitability of the purchaser(s) that would continue the Divestment Business as a viable competitive force in the market and the specific purchaser criterion as to the pre-rolled strip access/capabilities would ensure that the potential purchaser(s) would provide effective competition on the market.
- (766) As explained in recital (756), the Notifying Party also included in the Commitments of 3 December 2018 an upfront buyer clause which prevents the Notifying Party from consummating the acquisition between Wieland, ARP and Schwermetall before the Commission has approved the purchaser(s) of the Divestment Business and the terms of sale.

7.3.2. *Results of the market test and comments of the Notifying Party on the market test*

- (767) On 5 December 2018, the Commission informed the Notifying Party in writing that, in its preliminary view, the Commitments of 3 December 2018 were insufficient to solve entirely and effectively the competition concerns identified by the Commission in the SO.
- (768) With regard to the substance of the remedies, the Commission indicated to the Notifying Party that the competitiveness of the Stolberg and Zutphen plants was, at least in part, based on its current access to the high quality and wide portfolio of pre-rolled strip from Schwermetall, which Schwermetall provides to these plants [...] and in respect of which, due to the Stolberg and Zutphen plants' proximity to Schwermetall, they incurred only low transport costs. The Commission also explained that the concerns related to the foreclosure of third parties were not addressed at all by the Commitments of 3 December 2018 and that the proposed remedy will create problematic links between horizontal competitors (supply relationships for crucial inputs, including access to competitively sensitive information)n, both during the transitional supply period and likely even afterwards - given the strong current dependency of Stolberg and partly Zutphen on Schwermetall and the lack of credible alternative supply concepts -. ⁶³²
- (769) Concerning the relevant procedural aspects, while the Commission took note of Wieland's decision to submit a commitment with a purchaser requirement and an upfront buyer clause, the Commission stressed that such an approach cannot provide a solution if there is not any potential buyer with the required upstream assets to operate and develop the business in a way which guarantees its competitiveness; and (ii) the scope of the remedy on a stand-alone basis is insufficient to address all of the

⁶³¹ Commission's press release available on: http://europa.eu/rapid/press-release_IP-18-6771_en.htm
⁶³² E-mail of the Commission to the Notifying Party of 5 December 2018.

identified concerns. The Commission explained that accepting an upfront buyer in such cases would simply postpone the problem and would not ensure a solution on which the Commission could conclude with confidence that it will, once implemented, eliminate the concerns in their entirety and be effective from all points of view.⁶³³

- (770) Without prejudice to the preliminary assessment of the insufficiency of the Commitments of 3 December 2018, on 7 December 2018, the Commission submitted the Commitments of 3 December 2018 to a market test.
- (771) In that market test, the Commission sought market participants' opinions on the following points:
- (a) whether the scope of the Divestment Business was structurally sufficient to eliminate all horizontal competition concerns raised by the Transaction, in particular the significant impediment to effective competition through the removal of an important competitor on the rolled products market, with the likely result of an increase in prices and whether the scope of the Divestment Business was sufficient to ensure viability and competitiveness of the Divestment Business on a lasting basis (questions 1 and 4 to 11 of the market test questionnaire).
 - (b) what would be the characteristics of a suitable purchaser to maintain and develop the viability and competitiveness of the Divestment Business on a lasting basis.⁶³⁴ In particular, the Commission asked market participants whether a potential buyer with the same characteristics as Sofia Med or Global Brass and Copper (identified by the Notifying Party when remedies were submitted as potential purchaser(s) of the Stolberg and Zutphen facilities) would be able to maintain and develop the Divestment Business so as to be as viable and as competitive as it was before the Transaction, in particular in relation to the supply of pre-rolled strip to Stolberg and Zutphen (questions 12 to 18, 22 to 23, 27, 30 and 31 of the market test questionnaire).
 - (c) whether the Commitments would eliminate the risk that the merged entity would raise the costs of competitors that rely on Schwermetall for their access to pre-rolled strip following the Transaction, and the risk that Wieland would obtain access to commercially sensitive information on volumes and prices of those competitors that rely on Schwermetall for their access to pre-rolled strip (questions 2 and 3, 19, 20, 21, 24; 25 and 26 of the market test questionnaire).
- (772) In this Section, the Commission will summarise the feedback that it received from respondents to the market test overall and on these different points. The Commission will report separately on feedback from customers and competitors as the different positions of customers and competitors in the supply chain provide different insights on the viability and competitiveness of the Divestment Business. In general, the

⁶³³ E-mail of the Commission to the Notifying Party of 5 December 2018.

⁶³⁴ In the market test, the Commission also asked market participants whether the Stolberg and Zutphen plants should be divested to a single purchaser or to separate purchasers (Responses to the questionnaire sent to customers and competitors on remedies, question 12). An absolute majority of customers and an absolute majority of competitors considered that there is no need to sell both the Stolberg and Zutphen plants to a single Purchaser. In the present Decision, the Commission will therefore consider the possibility of a sale to one or several purchasers. The specific issue linked to the potential acquisition of Stolberg only by some potential purchasers, which are not interested in purchasing Zutphen, will be discussed further in Section 7.3.3.2.

Commission gives more weight to customers' views as they are directly affected by the risks of a price increase created by a transaction whereas competitors might benefit from such a price increase should a fraction of the customers' demand be diverted to them.

- (773) The Commission also agrees with the Notifying Party⁶³⁵ that less weight should be attributed to Cupori's responses to the market test because that undertaking is not active in the rolled products market and was consulted because it lodged the complaint addressed in Section 6.10, which is unrelated to the rolled products market.
- (774) The Commission also considers that caution should be exercised when assessing the credibility of KME, MKM, Sofia Med and GBC's responses to the market test because each of those undertakings has a commercial interest in acquiring the Divestment Business, which could influence their replies.
- (775) In relation to customers and in terms of overall feedback, a majority of customers expressing a view considered that without including Schwermetall the remedy was structurally inadequate to address the horizontal concerns. Customers who responded to the market test have expressed mixed feelings regarding the ability of Sofia Med to successfully maintain and develop at least Stolberg. Many of those customers did not know GBC and a majority of those expressing a view had doubts about GBC. Furthermore, a clear majority of customers expressing a view considered that the Commitments did not address the concerns regarding foreclosure and access to confidential information.
- (776) In relation to competitors and in terms of overall feedback, the picture was more mixed. The non-integrated competitors dependent on Schwermetall considered that without including Schwermetall the Commitments of 3 December 2018 were inadequate to address the horizontal concerns and did not address the concerns regarding foreclosure and access to confidential information. The integrated competitors and potential buyers KME, MKM Sofia Med and GBC, considered that the Commitments are sufficient to address both the horizontal concerns and the concerns regarding foreclosure and access to confidential information. One non-integrated competitor (Kemper) has also indicated that the Commitments of 3 December 2018 were sufficient to address both the horizontal concerns and the concerns regarding foreclosure and access to confidential information, provided that Wieland is committed to long term contracts of pre-rolled strip with conditions agreed upon (presumably between the Notifying Party and Kemper, although it does not appear that an agreement has been signed or negotiated between Wieland and Kemper).⁶³⁶ As no commitments regarding the supply of pre-rolled strip to third parties have been submitted by Wieland, the Commission considers that this condition is not fulfilled and that the positive opinion of Kemper should be put into this context.
- (777) In relation to point (a) in recital (772), an absolute majority of customers expressed the view that the scope of the Divestment Business is not sufficient to eliminate the competition concerns raised by the transaction as regards price increases in the overall copper and copper alloys rolled products market and in particular in segments

⁶³⁵ Memorandum of the Notifying Party of 20 December 2018, paragraph 19.

⁶³⁶ See the non-confidential replies from Kemper to the questionnaire sent to customers and competitors on remedies, notably to questions 4.1, 9.1 and 38.1 as well as a non-confidential response from Kemper of 27 December 2018 to the Commission's request for information of 21 December 2018.

on the high-end part of the market.⁶³⁷ Overall an absolute majority of customers explained that the scope of the Divestment Business was not sufficient to eliminate all the competition concerns raised by the Transaction, notably because the input of pre-rolled strip by Schwermetall would become solely controlled by Wieland.⁶³⁸

- (778) A large majority of customers considered access to Schwermetall inputs for ARP's plant in Stolberg as important, very important or crucial as regards input costs, input quality, range of products, access to innovative alloys, range of input transport costs or just in time deliveries.⁶³⁹ An absolute majority of customers (slightly less than for Stolberg) considered access to Schwermetall inputs for ARP's plant in Zutphen as important, very important or crucial as regards input costs, input quality, range of products access to innovative alloys, transport costs or just in time deliveries.⁶⁴⁰ A majority of customers who expressed a view expected the non-inclusion in the Divestment Business of the 50 % stake in the Schwermetall to have a negative impact on the viability and competitiveness of the Divestment Business.⁶⁴¹
- (779) In relation to point (i) in recital (772), a majority of competitors (6 out of 11) expressed the view that the scope of the Divestment Business was sufficient to eliminate the competition concerns raised by the Transaction as regards price increases in the overall copper and copper alloys rolled products market and in particular in high-end part of the market. These six supporting competitors included the four potential buyers (KME and MKM, Sofia Med and GBC).⁶⁴² A majority of competitors (7 out of 13) did not expect the non-inclusion in the Divestment Business of the 50 % stake in Schwermetall to have a negative impact of on the viability and competitiveness of the Divestment Business. These seven supporting competitors included the four potential buyers (KME and MKM, Sofia Med and GBC).⁶⁴³
- (780) In relation to point (ii) in recital (772), a large majority of customers took the view that in order to maintain and develop the Divestment Business as an active competitive force on the market, the purchaser(s) of the Divestment Business should already be active in rolled copper products,⁶⁴⁴ have sufficient free pre-rolled strip capacity to be able to supply the Divestment Business' needs⁶⁴⁵ and have strong

⁶³⁷ Replies to the questionnaire sent to customers and competitors on remedies, question 1.

⁶³⁸ Replies to the questionnaire sent to customers and competitors on remedies, question 1, question 4 and question 4.1. As explained by one customer ([...]): *"The concerns that following the transaction, input of pre-rolled strip in deep-drawing quality (high-end) from Schwermetall is expected to be monopolized by its future solely controlling parent Wieland in such way that the pre-rolled strip will not be made available to the current customers ([...]'s suppliers) at all or only at significantly higher prices are not sufficiently addressed"*. Another customer ([...]) argued that *"Stated above the supply in Europe would be dominated by Wieland if 50% of Schwermetall is taken over"*. A third customer ([...]) explained that *"An idea could be that the third party investor would acquire a stake in Schwermetall in order to secure its pre-rolled products demand in a long term."*

⁶³⁹ Replies to the questionnaire sent to customers and competitors on remedies, question 7.

⁶⁴⁰ Replies to the questionnaire sent to customers and competitors on remedies, question 8.

⁶⁴¹ Replies to the questionnaire sent to customers and competitors on remedies, question 9, question 9.1 and question 10.1. As explained by one customer ([...]) *"No, the problem is the casting capacity. With 100% of Schwermetall, the dominant position of Wieland on the market will be too important"*. Another customer ([...]) put forward that *"Only through full independence of Schwermetall can competitiveness be guaranteed"*, German original reads *"Nur durch eine vollkommene Unabhängigkeit von Schwermetall kann eine Wettbewerbsfähigkeit gesichert werden"*.

⁶⁴² Replies to the questionnaire sent to customers and competitors on remedies, question 1.

⁶⁴³ Replies to the questionnaire sent to customers and competitors on remedies, question 9.

⁶⁴⁴ Replies to the questionnaire sent to customers and competitors on remedies, question 13.

⁶⁴⁵ Replies to the questionnaire sent to customers and competitors on remedies, question 14.

capabilities in particular in pre-rolled strip for high-end products.⁶⁴⁶ A majority of customers explained that a buyer with similar characteristics to, for example, Sofia Med would be able to maintain and develop the Divestment Business as a viable and competitive business.⁶⁴⁷ However, when asked about specific issues, an absolute majority of customers also explained that they did not know whether a buyer with similar characteristics to Sofia Med would be able to maintain and develop the Divestment Business to the same level of viability and competitiveness as before the Transaction in relation to input costs, input quality, range of alloys, innovation, transport costs or just-in-time deliveries.⁶⁴⁸ As regards GBC, an absolute majority of customers took the view that a buyer with similar characteristics to GBC would not be able to maintain and develop the Divestment Business as a viable and competitive business.⁶⁴⁹ In general, customers who responded to the market test were generally unaware of the capacities, capabilities or costs of GBC.⁶⁵⁰

- (781) In relation to point (ii) in recital (772), a large majority of competitors took the view that in order to maintain and develop the Divestment Business as an active competitive force on the market, the purchaser(s) of the Divestment Business should be already active in rolled copper products⁶⁵¹ and have sufficient free pre-rolled strip capacity to be able to supply the Divestment Business's needs.⁶⁵² Responses were more mixed as regards strong capabilities in particular in pre-rolled strip for high-end products.⁶⁵³ A majority of competitors explained that a buyer with similar characteristics to, for example, Sofia Med would be able to maintain and develop the Divestment Business as a viable and competitive business.⁶⁵⁴ However, when asked about specific issues, a majority of competitors also explained that they did not know whether a buyer with similar characteristics to Sofia Med would be able to maintain and develop the Divestment Business to the same level of viability and competitiveness as before the Transaction in relation to input costs, input quality, range of alloys, innovation, transport costs or just-in-time deliveries.⁶⁵⁵ As regards GBC, responses of competitors were mixed as to whether a buyer with similar characteristics to GBC would be able to maintain and develop the Divestment Business as a viable and competitive business.⁶⁵⁶ In general, competitors (except GBC itself) who responded to the market test were not fully aware of the capacities, capabilities or costs of GBC, although they had greater knowledge of GBC than customers.⁶⁵⁷
- (782) In relation to point (c) in recital (772), an absolute majority of customers explained that the scope of the Divestment Business was not sufficient to eliminate the competition concerns raised by the Transaction as regards the merged entity's future ability and incentive to foreclose/ raise costs of competitors relying on Schwermetall for their access to pre-rolled strip.⁶⁵⁸ Likewise, a majority of customers having

⁶⁴⁶ Replies to the questionnaire sent to customers and competitors on remedies, question 15.
⁶⁴⁷ Replies to the questionnaire sent to customers and competitors on remedies, question 18.
⁶⁴⁸ Replies to the questionnaire sent to customers and competitors on remedies, question 21.
⁶⁴⁹ Replies to the questionnaire sent to customers and competitors on remedies, question 23.
⁶⁵⁰ Replies to the questionnaire sent to customers and competitors on remedies, question 22.
⁶⁵¹ Replies to the questionnaire sent to customers and competitors on remedies, question 13.
⁶⁵² Replies to the questionnaire sent to customers and competitors on remedies, question 14.
⁶⁵³ Replies to the questionnaire sent to customers and competitors on remedies, question 15.
⁶⁵⁴ Replies to the questionnaire sent to customers and competitors on remedies, question 18.
⁶⁵⁵ Replies to the questionnaire sent to customers and competitors on remedies, question 21.
⁶⁵⁶ Replies to the questionnaire sent to customers and competitors on remedies, question 23.
⁶⁵⁷ Replies to the questionnaire sent to customers and competitors on remedies, question 22.
⁶⁵⁸ Replies to the questionnaire sent to customers and competitors on remedies, question 2.

expressed a view explained that the scope of the Divestment Business was not sufficient to eliminate the competition concerns raised by the Transaction as regards Wieland obtaining access to commercially sensitive information on the volumes ordered and prices paid by the competitors of Wieland in the EEA rolled products market which rely on Schwermetall for their access to pre-rolled strip.⁶⁵⁹ When asked the same questions in case of an acquisition of Sofia Med or GBC, a majority of customers having expressed a view stated that these issues would not be solved after an acquisition by Sofia Med⁶⁶⁰ or by GBC.⁶⁶¹

- (783) In relation to point (c) in recital (772) above, a majority of competitors having expressed a view (5 out of 9, including 3 potential buyers) explained that the scope of the Divestment Business was sufficient to eliminate the competition concerns raised by the proposed transaction as regards the merged entity's future ability and incentive to foreclose/ raise costs of competitors relying on Schwermetall for their access to pre-rolled strip.⁶⁶² A majority of competitors (4 out 7, including 2 potential buyers) explained that the scope of the Divestment Business was sufficient to eliminate the competition concerns raised by the Transaction as regards Wieland obtaining access to commercially sensitive information on the volumes ordered and prices paid by the competitors of Wieland.⁶⁶³
- (784) In a memorandum submitted on 20 December 2018, the Notifying Party submitted that it is "*beyond doubt that the market test has yielded some considerable positive results (...) which the Commission refuses to accept*".⁶⁶⁴
- (785) In particular, the Notifying Party noted that the majority of competitors took a positive view of the remedy package and confirmed that it would eliminate all potential competition concerns. According to the Notifying Party, competitors perceived the Divestment Business as viable and believed that it has all the assets necessary to ensure its viability and competitiveness. According to the Notifying Party, only a minority of competitors supported the view that the scope of the Divestment Business would not be sufficient to eliminate the concern related to the foreclosure/raising the competitors' costs the concern related to the "*access to commercially sensitive information*".⁶⁶⁵ Furthermore, according to the Notifying Party, only a minority of competitors and customers believed that the non-inclusion of the 50% stake in Schwermetall would negatively affect the viability and competitiveness of the Divestment Business.⁶⁶⁶
- (786) According to the Notifying Party, only 25% of competitors doubted that a buyer with similar characteristics as Sofia Med would be able to maintain the divestment business as a viable and competitive business⁶⁶⁷ and only 8% of competitors considered any element missing to be in the remedy package.
- (787) With regard to rolled products customers, the Notifying Party considered that their responses should be treated with caution because most of the Commission's questions focused on the (upstream) levels of pre-rolled strip and rolled products

⁶⁵⁹ Replies to the questionnaire sent to customers and competitors on remedies, question 3.

⁶⁶⁰ Replies to the questionnaire sent to customers and competitors on remedies, questions 19 to 21.

⁶⁶¹ Replies to the questionnaire sent to customers and competitors on remedies, questions 24 to 26.

⁶⁶² Replies to the questionnaire sent to customers and competitors on remedies, question 2.

⁶⁶³ Replies to the questionnaire sent to customers and competitors on remedies, question 3.

⁶⁶⁴ Memorandum of the Notifying Party of 20 December 2018.

⁶⁶⁵ Memorandum of the Notifying Party of 20 December 2018, paragraphs 14 to 20.

⁶⁶⁶ Memorandum of the Notifying Party of 20 December 2018, paragraphs 27 to 33.

⁶⁶⁷ Memorandum of the Notifying Party of 20 December 2018, paragraphs 34 to 45.

whereas the customers are active on (downstream) markets. The Notifying Party considered that it was clear from the replies that most customers lack the market knowledge and insight to assess the technical and economic aspects which are addressed in the questionnaire. In the Notifying Party's view, this was confirmed by numerous comments in which customers expressed that they were not in a position to answer the question.⁶⁶⁸

- (788) The Notifying Party also contended that a great number of (negative) customer replies were driven by self-interest⁶⁶⁹ and that some customers misperceived the market test as a wish list, such as those requesting the “*full independence*” of Schwermetall.⁶⁷⁰
- (789) In any case, according to the Notifying Party, more than 50% of the customers stated that a Purchaser like Sofia Med could run the Divestment Business in a competitive manner and only 23% of the customers believed that the non-inclusion of Schwermetall would have a negative impact on the Divestment Business.⁶⁷¹ In addition, the Notifying Party noted that KME was named several times by the customers as a potential buyer that has the resources, assets, ability and incentives to maintain and develop the Divestment Business on a lasting basis.⁶⁷²
- (790) The Notifying Party also pointed out that many questions were “*not clear, misleading or simply irrelevant from the perspective of the respective addressees*” or to some extent “*confusing*”.⁶⁷³
- (791) The Commission does not share the views of the Notifying Party for the following reasons.
- (792) First, the Notifying Party places significant emphasis on the competitors' view which it considers as more valid than customers' because, in its view, customers lack the market knowledge and insight to assess the technical and economic aspects addressed in the questionnaire. However, when assessing the outcome of a market test such as the one in the present case, the Commission cannot look at specific opinions – such as, those of competitors – in isolation, but must also attach the appropriate weight to all responses to the Commission's questionnaire, including the submissions by industrial customers. In general, the Commission gives more weight to customers' views as they are directly affected by the risks of a price increase created by a merger whereas competitors might benefit from such a price increase should a fraction of the customers' demand be diverted to them.
- (793) Second, in a market which presents all of the characteristics of an oligopolistic market like the rolled products market, notably in its high-end part, it is not surprising that competitors have a positive opinion on the impact of the Transaction to the extent that they can benefit from a price increase from the merging parties. For example, paragraph 24 of the Horizontal Merger Guidelines describes a scenario according to which a price increase from the merged entity shifts some demand to competitors and reduces the competitive pressure on competitors. Faced with increased demand and higher prices by the merged entity, competitors may find it profitable to increase their prices in turn. Therefore, positive comments from

⁶⁶⁸ Memorandum of the Notifying Party of 20 December 2018, paragraph 2.

⁶⁶⁹ E-mails of the Notifying Party of 20 and 28 December 2018.

⁶⁷⁰ Memorandum of the Notifying Party of 20 December 2018, paragraph 3.

⁶⁷¹ Memorandum of the Notifying Party of 20 December 2018, paragraph 34.

⁶⁷² E-mail of the Notifying Party of 20 December 2018.

⁶⁷³ Memorandum of the Notifying Party of 20 December 2018, paragraphs 10 and 11.

competitors on the outcome of a merger or the effectiveness of a remedy package are not as such indicative that the merger is harmless to competition or that the remedy package would eliminate the competition concerns.

- (794) Furthermore, in this market test, as explained above in recital (775), four of the competitors who responded to the questionnaire (Sofia Med, GBC, KME and MKM)⁶⁷⁴ are interested in buying the remedy package and their responses are likely to have been influenced by this interest. Other competitors that do not have the same objective (such as Messingwerk) have expressed less positive feedback about the remedy package.
- (795) The Commission also disagrees that negative answers, in particular those considering that ARP's shareholding in Schwermetall should be included in the Commitments, are driven by self-interest. This suggestion has also been made by competitors who have expressed an interest in one of ARP's plant which is not included in the remedy package (Pori) but not for Schwermetall and nonetheless consider that a divestiture of Schwermetall is necessary. This is, for example, the case of [...], a competitor active worldwide in rolled copper, which stated that "*Schwermetall is the key for the European high end market, so it should be, or 50% of it should be, part of Divestment Business*"⁶⁷⁵ and that "*Stolberg is 100% dependent on Schwermetall in pre-rolled supply and Zutphen is in a similar position on copper alloys. (...) Wieland cannot have 100% control of Schwermetall.*"⁶⁷⁶
- (796) Third, the Commission disagrees with the view that customers lack the market knowledge and insight to assess the viability and competitiveness of the remedy package. In an industrial setting where customers submit rolled copper products to stringent tests and checks for qualification purposes and where customers and suppliers carry out research and development activities together, it can be expected that customers are knowledgeable regarding the technical and economic issues which are addressed in the questionnaire. When respondents expressed lack of knowledge in the market test, in particular regarding the capabilities of potential buyers, competitors did not prove to be any more knowledgeable. The Commission therefore considers that it has to take seriously into account the opinion of customers, even on issues that are more related to the upstream part of the supply chain such as access to pre-rolled strip.
- (797) Fourth, while it is true that a majority of respondents explained that a buyer with similar characteristics to Sofia Med would be able to maintain and develop the Divestment Business as a viable and competitive business, some of those respondents have nuanced this opinion in their written comments. For example, one customer who responded "yes" to that question indicated in its comments "*I don't know Sofia Med, Bulgaria nor Stolberg and Zutphen Plant to express an opinion. I guess Yes if a similar buyer as, for example, Sofia Med knows the market and the needs of Stolberg and Zutphen plant*".⁶⁷⁷ Another customer with a positive opinion

⁶⁷⁴ KME and MKM have responded separately to the market test.

⁶⁷⁵ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 2.2 ([...]).

⁶⁷⁶ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, questions 10.1 and 10.2 ([...]).

⁶⁷⁷ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 18.1 ([...]).

added “*Not sufficient knowledge of the market, very small amount of purchases.*”⁶⁷⁸ This is also the case of this third customer who added that nevertheless a divestment of the stake in Schwermetall would be necessary “*Yes, if there is the intension (sic) to develop these mills by Sofia Med. But the scope of products for Stolberg is limited and does not cover the products for the high-end segment. This would be for Stolberg very important. Combined with a stake of Schwermetall this topic would be solved in our point of view.*”⁶⁷⁹

- (798) Fifth, while KME is mentioned by some respondents as a potential buyer, a larger number of market participants have submitted that they could not identify any other company that could purchase the Divestment Business and replace Schwermetall as a supplier for the Divestment Business’ pre-rolled strip needs, as illustrated by the following quotes “*we don't know how other player can put on this project*”; “*We don't know other competitors with the right features*”; “*Schwermetall is the only viable player providing all manufacturers of high quality finished strip with the required pre-rolled strip (high end) in Europe*”; “*I do not know who can be potential buyer*”.⁶⁸⁰
- (799) Sixth, as regards the clarity of the questions, the Commission notes that 42 out of 70 addressees have provided their feedback in this market test, which corresponds to a response rate of 60%. The Commission considers that given the limited time allowed to respondents to reply to the questionnaire, that response rate is satisfactory and illustrates that the respondents considered the questions to be clear enough to provide detailed answers.

7.3.3. *The Commission’s assessment of the Commitments of 3 December 2018*

- (800) The Commission has carefully assessed the Commitments of 3 December 2018 and, in the light of the market test, considers that they are not sufficient to remove the competition concerns identified in this Decision.
- (801) For the reasons set out in Sections 7.3.3.1 to 7.3.3.3, the Commission’s assessment revealed in particular that:
- (a) Due to the exclusion of a key asset of ARP (the 50% stake in Schwermetall) the divestiture is structurally inadequate to eliminate the significant impediment to effective competition as identified in Section 6 resulting from the elimination of the important competitive constraints exerted on Wieland by ARP and/or the creation of the merged entity’s dominant position;
 - (b) Even if the Commission were to take into account the resources of possible or even presumed future purchaser(s) (which should not be the case because this is not a fix-it-first remedy), there are significant uncertainties as to whether the assets and resources of one of those purchaser(s) would be able to eliminate the significant impediment to effective competition as identified in Section 6 above resulting from the elimination of the important competitive constraints exerted on Wieland by ARP as identified in Section 6 above and/or the creation of the merged entity’s dominant position;

⁶⁷⁸ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 18.1 ([...]).

⁶⁷⁹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 18.1 ([...]).

⁶⁸⁰ Non-confidential replies to the questionnaire sent to customers and competitors on remedies, question 27.1 ([...]).

- (c) The issues identified in Section 6.9 related to increasing costs of third parties reliant on supplies from Schwermetall and access to rivals' confidential information through the acquisition of the 50% stake in Schwermetall is not addressed by the Commitments of 3 December 2018 and the arguments of the Notifying Party on the incentives of Schwermetall to continue supplying those third Parties are not convincing.

7.3.3.1. Due to the exclusion of a key asset of ARP (the 50% stake in Schwermetall) the divestiture is structurally inadequate to eliminate the significant impediment to effective competition as identified in Section 6 resulting from (i) the elimination of the important competitive constraints exerted on Wieland by ARP above and/or (ii) the creation of the merged entity's dominant position.

Pre-Transaction Schwermetall is an integral and critical element of Stolberg's viability and competitiveness and is an important element in Zutphen's viability and competitiveness

- (802) In this Section, the Commission will explain why, prior to the Transaction Schwermetall is a crucial contributor to Stolberg's viability and competitiveness and an important element in Zutphen's viability and competitiveness.
- (803) In terms of volumes sold in the EEA in 2017, Zutphen and Stolberg account for about [...] tonnes per year out of ARP's total EEA sales of [...] tonnes per year. Stolberg accounts for [...] % of these volumes ([...] tonnes) and Zutphen for [...] % ([...] tonnes).⁶⁸¹ Under the Commitments of 3 December 2018, Wieland would divest almost [...] % of ARP. On the basis of the market reconstruction carried out by the Commission, the combined market share of the merged entity would fall from [40-50] % in volume to [30-40] % after divestiture of Stolberg and Zutphen. If implemented, the Commitments of 3 December 2018 would therefore have a significant impact on the market position of the merged entity on the overall rolled copper market.
- (804) Furthermore, the impact of the Commitments of 3 December 2018 would also be large in the high-end part of the market. The Stolberg plant has a particular focus on the supply of copper and copper alloy strip (including brass, bronze, HPA, micro- and high-alloyed copper strip) for connector applications in the field of automotive, electronic devices, electrical industry, cables and general engineering. The Stolberg plant has a comprehensive portfolio including in particular a broader range of HPA and micro alloyed copper. Some of the main downstream customers active in connector strips such as [...] source rolled copper products from Stolberg.⁶⁸² In terms of equipment, the Stolberg plant houses a comprehensive set of production assets in rolled products, which include horizontal strip casting, hot dip tinning (necessary to be active in the high-end part of the market), cold rolling, annealing, pickling and slitting.
- (805) The Zutphen plant is mainly specialised in the supply of brass alloys which account for almost three quarter of its sales. Although the Zutphen plant is less focused on high-end products than the Stolberg facility, its customer base also includes high-end clients such as [...].⁶⁸³ In terms of equipment, the Zutphen factory includes casting,

⁶⁸¹ Form RM submitted on December 3, 2018, paragraph 83.

⁶⁸² Form RM submitted on December 3, 2018, paragraph 186.

⁶⁸³ Form RM submitted on December 3, 2018, paragraph 31.

inline break-down rolling and surface milling, cold rolling, annealing, pickling and slitting; and finally also one electro-plating line.

- (806) The divestment of Stolberg and Zutphen could, therefore, potentially enable the purchaser(s) to compete effectively against the merged entity in the overall rolled copper market and the high-end part thereof. To be able to do so, however, the purchaser(s) of the Stolberg and Zutphen plants would need to be in a position to run these plants in a viable and competitive way. Of particular importance in this respect would be the purchaser(s)' ability to source raw-material input (that is pre-rolled strip) in sufficient quantities and on sufficiently competitive terms.
- (807) In this regard, first, Stolberg and Zutphen currently benefit significantly from both the economies of scale of Schwermetall and vertical integration with Schwermetall. Owing to the 50% stake of Aurubis in Schwermetall, pre-rolled strip is supplied to ARP by Schwermetall [...]. Schwermetall casts and hot rolls pure copper, brass and bronze products that are delivered to Stolberg, which is located only five kilometres away from Schwermetall's plants. Stolberg also casts bronze products which are delivered to Schwermetall for further re-rolling. In addition, the Stolberg plant uses standardized pre-rolled strips currently delivered from Schwermetall for the production of copper, brass, (phosphor) bronze and HPA finished strip.
- (808) Schwermetall also hot rolls copper products which are delivered to Zutphen, located at a distance of 230 km from Schwermetall's plant.
- (809) An internal ARP document estimates the volume of pre-rolled strip that will be delivered to Stolberg and Zutphen in 2018-2019 at [...] tonnes and [...] tonnes respectively. This has been confirmed by the Notifying Party in the Form RM. Table 29 below shows the purchases of the Stolberg and the Zutphen plants from Schwermetall per alloy in 2017, for a total of [...] tonnes.⁶⁸⁴

Table 29 Purchases of pre-rolled strip from Schwermetall by Stolberg and Zutphen

[...]

- (810) Table 29 shows that the Stolberg factory sourced [...] tonnes of pre-rolled strip from Schwermetall in 2017. The Stolberg plant operates a foundry for billets and a horizontal casting for strip but they do not operate hot rolling, milling and break down rolling. Therefore the Stolberg plant sources [...] pre-rolled input material from Schwermetall, including HPAs, pure copper, brass and bronze. As explained by the Notifying Party *"The capacity of the foundry does not meet the required output of the plant Stolberg which means that they have an urgent need to be supplied by an integrated plant like Schwermetall in addition"*.⁶⁸⁵ As regards Zutphen, the plant is fully vertically integrated as regards production of brass and therefore does not rely on external sources of supply for brass production. This is however not the case as regards the production of pure copper and micro-alloyed copper, which account for [...] % of Zutphen's sales in the EEA. For those products, the Zutphen plant exclusively relies on pre-rolled strip sourced from Schwermetall.
- (811) The dependency of Stolberg and Zutphen on Schwermetall has been flagged by respondents to the market test. As explained by one respondent *"Schwermetall is one of, if not, the biggest casting and rolling mill for connector and hot dip tinned strips*

⁶⁸⁴ Form RM submitted on December 3, 2018, paragraph 181. The difference between the volume of HPAs in Table 4 and the volume of [...], which is classified by the Notifying Party as a micro alloyed copper, whereas the Commission considers this alloy to be an HPA (see Annex).

⁶⁸⁵ Form CO, Annex A3.

*as well as for High Performance Alloys in Europe. If Wieland obtains 100% control of it we expect that will lead to less competition and price increases. Stolberg is a further processing mill for strips produced in Schwermetall, so it cannot operate without supply from there. To the contrary, Wieland can further process Schwermetall material at their existing rolling mills. Zutphen is essentially a brass mill and operates in low end connectors and industrial brass. Its copper operations are fully dependent on Schwermetall”.*⁶⁸⁶

- (812) Another respondent put forward that “Aurubis’ plants in Stolberg and Zutphen are dependent on the supply from Schwermetall. The plant in Stolberg cannot cast pre-rolled strip itself. The plant in Zutphen has only limited casting capacities for some alloys [...] Aurubis’ plants in Stolberg and Zutphen will no longer be able to source pre-rolled strip at competitive prices and conditions, they will probably have to close down in the long term.”⁶⁸⁷ As explained by another respondent to the market test “Aurubis Stolberg and Schwermetall have complementary process and has(sic) to be preserved. Separate Aurubis Stolberg and Schwermetall is not an option for us.”⁶⁸⁸
- (813) Second, not only do Zutphen and Stolberg source significant amounts of pre-rolled strip from Schwermetall, but they benefit from [...] by virtue of being integrated with Schwermetall. As explained in Section 6.3.2.1, Schwermetall sells pre-rolled strip to ARP (and to Wieland) [...], whereas sales to third parties have [...]. This means that Schwermetall supplies the Stolberg (mainly) and Zutphen plants, as well as Wieland, [...]. The Commission has explained in Section 6.3.2.1 that by purchasing pre-rolled strips from Schwermetall, ARP has in a [...] participants purchasing pre-rolled strip from Schwermetall (on a conservative basis). Thanks to its vertical integration with Schwermetall, the Divestment Business therefore benefits from [...] in the rolled copper market.
- (814) Third, Schwermetall’s plant is located five km away from the Stolberg plant and 230 km away from the Zutphen plant. This geographical proximity is important because it reduces transport costs and guarantees just in time deliveries, compared to the alternative solutions which will be discussed in Section 7.3.3.2. A number of production processes rely on the geographical proximity between the Stolberg plant and Schwermetall.
- (815) Fourth as explained by the Notifying Party in the Form RM, there are close links between the Stolberg and Schwermetall facilities in both directions. Apart from the alloys cast at Schwermetall and sourced by Stolberg, some copper alloys, mainly bronze, are cast on the Stolberg plant’s [...] horizontal strip casting [...], upcoiled on the integrated coilers, and homogenized in Stolberg’s bell furnaces, with further processing to pre-rolled strip taking place at Schwermetall. These bronze strips are then shipped to Stolberg for rolling to final thicknesses and tempering.⁶⁸⁹ A separation between Stolberg and Schwermetall would require the purchaser(s) to find alternative partners for this tolling arrangement (or perform it in its own facilities). Although the Notifying Party has claimed that any manufacturer and potential purchaser(s) with a milling line, a break-down rolling mill and annealing and heavy

⁶⁸⁶ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 1.1 ([...])

⁶⁸⁷ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 9.1 ([...]).

⁶⁸⁸ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 9.1 ([...]).

⁶⁸⁹ Form CO [annex A26], Overview activities of Aurubis, slide 4.

gauge pickling capabilities could further process the bronze strip cast at Stolberg into pre-roll strip, such a new arrangement would require transport to the new purchaser(s)' facility (and back to Stolberg) at higher costs and increased risk of belated deliveries.

- (816) Fifth, Stolberg and Zutphen plants source a number of very important alloys from Schwermetall. In particular, as explained in Section 6.3.2.1, the Stolberg plant sources significant volumes (more than [...] tonnes) of alloys such as [...] from Schwermetall. As already indicated in Sections 6.3.2.1 and 6.3.2.2, these alloys (and notably [...]) are important for the high-end part of the market as they are included in the HPA segment and are used in the production of connector strip. Although these alloys only represent [...] % of the total purchases of the Divestment Business and [...] % of the purchases of the Stolberg plant, access to these alloys from Schwermetall is crucial for the Divestment Business to be able to compete effectively against the merged entity, since these alloys are used to produce rolled copper products for the high-end part of the market where Wieland and ARP are strong competitors prior to the Transaction.
- (817) On the basis of the above elements, the Commission concludes that the 50% stake of ARP in Schwermetall, which is not included in the Commitments of 3 December 2018, is an integral and critical element of Stolberg' viability and competitiveness and is an important element in Zutphen's viability and competitiveness.

The remedy is structurally deficient because it carves up a functioning vertically integrated business and thereby significantly weakens its competitiveness

- (818) In the following Section, the Commission will demonstrate why the Commitments of 3 December 2018 will lead to a carve out of a pre-existing business with no certainty for the Commission that, at least at the time when the business is transferred to the purchaser, a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will be reduced to a minimum.⁶⁹⁰
- (819) As explained in recitals (803) to (818), Schwermetall is an integral and critical element of Stolberg's viability and competitiveness and is an important element in Zutphen's viability and competitiveness. Not only do Zutphen and Stolberg source significant amounts of pre-rolled strip from Schwermetall, but they benefit from significant production cost advantages by virtue of being integrated with Schwermetall. Transport costs of this pre-rolled strip are low, due to the geographical proximity between Schwermetall and the Stolberg plant in particular.
- (820) Moreover, as explained in Section 6.3.2.1, ARP (and in particular Stolberg and Zutphen) is only sourcing [...] % of the pre-rolled strip capacity of Schwermetall it is entitled to pursuant to the joint venture agreements. Should the Divestment Business remain integrated with Schwermetall, it could potentially have access to larger volumes of pre-rolled strip from Schwermetall at [...] supply conditions and continue to benefit from the advantages generated by its close proximity to Schwermetall.
- (821) Under the Commitments, the purchaser(s) could benefit during a transitional period of [...] years of a supply agreement under which Wieland would supply copper and copper alloy pre-rolled strip [...] and provide toll treatment services for cast materials produced by Stolberg or procured by Stolberg and Zutphen [...] agreed

⁶⁹⁰ See above recital (749).

with Stolberg and Zutphen. Considering the significant dependency of these plants on Schwermetall, it is very likely that the purchaser(s) would enter into this agreement with Wieland. The potential purchasers identified by the Notifying Party have confirmed to the Commission that this would be their intention if they were to acquire the Divestment Business, as explained in Section 7.3.3.2. Therefore, during the first five years following the implementation of the Commitments, it is likely that the Stolberg and Zutphen plants, if divested, would remain dependent on Schwermetall.

- (822) At the expiration of the transitional period of a maximum of [...] years, the purchaser(s) would not have access to these inputs from Schwermetall under the same supply conditions as under the supply agreement (that is to say, [...]). Should the potential buyer decide to continue its purchases of pre-rolled strip from its main competitors Schwermetall/Wieland, the buyer would have to source at [...] and therefore lose the cost advantage of the vertical integration.
- (823) After the termination of the transitional period, the purchaser(s) could also bring to Stolberg and Zutphen pre-rolled strip from the purchaser(s)' current operations, assuming that the purchaser(s) has (have) enough available capacity to supply its (their) current operations and the current and future requirements of Stolberg, or Zutphen, or both. However, even assuming that such a purchaser exists, it would have in this case to bear higher transport costs, the magnitude of which would depend on the location of the purchaser's casting and hot rolling plant, but would in any case be higher than the costs of transport between Schwermetall and Stolberg, which are very close.⁶⁹¹ In this situation, the purchaser is also unlikely to be as competitive as Stolberg and Zutphen were prior to the Transaction, when these facilities were vertically integrated with Schwermetall.
- (824) Another option for the purchaser(s) would be to build a very costly new casting and hot rolling mill during the transitional period. Such an investment of a large casting facility located in the centre of Europe was estimated by respondents to the market test to cost EUR 200 million and to require a preparatory phase of 4-5 years until functional start of production, which constitute a very significant investment for a potential purchaser(s).⁶⁹² In this case, assuming the purchaser(s) would be prepared to incur the capital expenditure to build this manufacturing facility, the purchaser(s) would not necessarily benefit from the low costs and high quality of Schwermetall. As the Stolberg plant is "*embedded in the copper city Stolberg*",⁶⁹³ with no space available nearby to build a casting house, it is likely that such casting facility would have to be built farther away from Stolberg, which would increase transport costs. In this situation, the purchaser(s) is (are) also unlikely to be as competitive as Stolberg and Zutphen were pre-Transaction when the facilities were vertically integrated with Schwermetall.
- (825) As explained in recital (781), a large majority of customers have indicated that as regards Stolberg (and to a lesser extent Zutphen) they consider access to Schwermetall inputs as important, very important or crucial for the competitiveness of the divested assets, in relation to various items such as input cost and quality, portfolio of input and transport costs. Consequently, those respondents expressed

⁶⁹¹ See in particular the discussion in Section 7.3.3.2 in relation to Sofia Med and GBC.

⁶⁹² Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 32.1 ([...]).

⁶⁹³ See the presentation made during the site visit of the Commission in Stolberg of 25 July 2018, slide 2.

scepticism as to whether a separation of Stolberg and Zutphen from Schwermetall would create a viable and competitive business. As explained by one customer “Wieland will hold 100% of Schwermetall after this transaction. They can control pricing for pre-rolled products as will(sic) as allocating capacities and material. There will be a negative effect for Zutphen and Stolberg. Even though they will be part of the Divestment business they won't have any control for the pre-rolled products. Wieland will have the 100% market power.”⁶⁹⁴

- (826) According to a competitor “The inclusion of Aurubis’ Stolberg and Zutphen in the Divestment Business is not sufficient to eliminate that significant impediment to effective competition since it does not change the aforementioned dependence of Schwermetall. Furthermore, to our knowledge the plants in Zutphen and Stolberg themselves rely on the supply from Schwermetall”.⁶⁹⁵
- (827) According to another customer, “The non-inclusion of the 50% stake in the Schwermetall plant in Stolberg, Germany in the Divestment Business has a sharply negative effect as to the viability and competitiveness of the Divestment Business, Aurubis Stolberg, in the EEA rolled product markets because Aurubis Stolberg is and will remain dependent on Schwermetall’s supplies with pre-rolled strip. Aurubis Stolberg uses the smelted and warm-rolled strip from Schwermetall, Stolberg. Moreover, it handles its metal management via the metal accounts centralized by Schwermetall. Both, Aurubis Stolberg and Schwermetall are located next to each other (distance of 4 km) in the same town.”⁶⁹⁶
- (828) Another respondent explained that “There will be a negative effect for Zutphen and Stolberg. Even though they will be part of the Divestment business they won’t have any control for the pre-rolled products”.⁶⁹⁷ According to a competitor “To our knowledge, Aurubis’ plants in Stolberg and Zutphen are dependent on the supply from Schwermetall. The plant in Stolberg cannot cast pre-rolled strip itself. The plant in Zutphen has only limited casting capacities for some alloys. The optional [...] years supply and service agreement with Wieland regarding the supply of pre-rolled strip from Schwermetall seems to be not sufficient to safeguard their existence and competitiveness in the market for finished copper strip products in the long term. If Aurubis’ plants in Stolberg and Zutphen will no longer be able to source pre-rolled strip at competitive prices and conditions, they will probably have to close down in the long term.”⁶⁹⁸
- (829) Finally, an additional competitor submitted that “It is difficult to think that any potential buyer would have a capability to replace Schwermetall as a source for input material in short term and to prevent current customers of Stolberg to follow Wieland to its offering through Schwermetall – their existing rolling capacity”.⁶⁹⁹

⁶⁹⁴ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 9.1 ([...]).

⁶⁹⁵ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 1.1 ([...]).

⁶⁹⁶ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 9.1 ([...]).

⁶⁹⁷ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 9.1 ([...]).

⁶⁹⁸ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 9.1 ([...]).

⁶⁹⁹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 16 ([...]).

- (830) The implementation of the Commitments of 3 December 2018 as submitted by the Notifying Party would therefore result in a separation of businesses, Stolberg and Zutphen on the one hand and Schwermetall on the other. Prior to the Transaction, these plants, , are vertically integrated, with Schwermetall being an integral and critical element of Stolberg's viability and competitiveness and an important element in Zutphen's viability and competitiveness. This situation is covered by paragraph 35 of the Remedies Notice. In such a case, the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing strong links or are partially integrated with businesses retained by the parties and therefore need to be "carved out" in those respects.
- (831) However, as explained in paragraph 36 of the Remedies Notice, when accepting the carve-out of a business, the Commission has nevertheless to be certain that, at least at the time when the business is transferred to the purchaser, a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will thereby be reduced to a minimum.
- (832) The Commission considers that, in this case, when the Divestment Business is transferred to the purchaser(s), the Commission will have no guarantee that a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will be reduced. This is because the dependency of these plants on Schwermetall is such that the purchaser(s) will in all likelihood use the supply agreement which will maintain these plants in a situation of dependency from Schwermetall during the transitional period (this conclusion is supported by the fact that all of the potential purchasers have confirmed to the Commission that they intend to make use of the supply agreement). Secondly the Commission has no guarantee that at the end of the transitional period, an independent long-term solution as regards access to pre-rolled strip will be found, in the light of the additional costs that such a solution would involve, as explained in recitals (823) and (824).
- (833) In the light of the above, the Commission has no certainty, at least at the time when the business is transferred to the purchaser(s), that a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will be reduced to a minimum, as required by Paragraph 36 of the Remedies Notice.
- Transitional supply agreement of [...] years will not be sufficient to develop an independent source of supply and creates the risk of long-term links between horizontal competitors*
- (834) In this section, the Commission will explain that the Transitional Supply Agreements ([...] years) proposed by the Notifying Party would not be sufficient for the purchaser(s) to develop independent sources of supply and creates the risk of long-term links between horizontal competitors.
- (835) A majority of the respondents to the market test who expressed an opinion on this issue indicated that the Transitional Supply Agreements would not provide the purchaser(s) enough time to start producing independently from the Parties the pre-rolled strip necessary to enable the purchaser(s) to maintain and develop the Divestment Business as a viable, active and competitive competitor of the merged entity. These respondents highlighted that the purchaser(s) would have to build a new plant, acquire the necessary know-how, attract customers and go through the qualification processes required by these customers. All these steps would be likely to last longer than the [...] years foreseen by the Transitional Supply Agreements.

- (836) As explained by one respondent which sources pre-rolled strip from Schwermetall, as well as from smaller players reliant on Schwermetall for their access to pre-rolled strip *“Such business investment would not be economically reasonable as it would require immensely high investment costs (approx. € 200 million) and a preparatory phase of 4-5 years until functional start of production. After these 4-5 years the potential purchaser/market entrant would neither have a product portfolio nor any customers. In order to develop such product portfolio another phase of approx. 3-5 years would need to follow the first phase of 4-5 years: know-how for production of pre-rolled strip in different qualities needs to be developed and customers have to be approached. In order to supply customers, the products must be specifically qualified according to the customers’ individual specifications”*.⁷⁰⁰
- (837) The results of the market test are more mixed on the question whether the transitional supply and tolling service agreement allow the purchaser(s) enough time to find alternative sources and negotiate supply agreements for pre-rolled strip from other sources of supply to enable the Divestment Business to develop as a viable and competitive business. While some respondents argued that the time allowed is sufficient, a slight majority of respondents who expressed an opinion on this matter argued that it might not be a sufficient. *“As said before a timeframe of [...] years is short to find alternative supplies of pre rolled strips”*.⁷⁰¹ In general, market participants who argued that this time period is too short are concerned about the availability of independent supply sources of pre-rolled strip in the market as explained by one respondent *“There are no other sources for pre-rolled strip of all necessary qualities. It is not expected that a new producer of pre-rolled strip (...) will enter the market.”*⁷⁰²
- (838) Not only is there significant doubt whether the potential purchaser(s) would have the ability to find an independent source of supply for pre-rolled strip after the end of the transitional period but it also appears that the purchaser(s) would not have the incentives to do so. Statements of potential purchasers (see Section 7.3.3.2) and comments from respondents to the market test suggest that even after the end of transitional period, the continuation of a supply relationship with Schwermetall is a likely scenario.
- (839) In particular, a majority of respondents to the market test explained that they expect that after the Transitional Supply Agreements, the purchaser(s) to have the incentive to seek a partial or full renewal of the supply agreements from the Notifying Party, rather than to supply Stolberg and Zutphen with all the necessary pre-rolled strip produced in house, or to source all the pre-rolled strip requirements for Stolberg and Zutphen from third parties at competitive conditions. This is, in particular, because the majority of these respondents consider the duration of the transitional supply agreements not long enough to find alternatives sources of supply.
- (840) The following quotes are informative in that respect.
- “We expect the acquirer to rely on the supply of Schwermetall/Wieland with pre-rolled products after the end of the transitional supply agreement. This is because*

⁷⁰⁰ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 32.1 ([...]).

⁷⁰¹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 32.1 ([...]).

⁷⁰² Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 33.1 ([...]).

*the time will not be sufficient to build a new production facility to produce pre-rolled products.”*⁷⁰³

*“The needed extension for the supply agreement (see answer to 32.1) is a clear sign that it is extremely difficult to replace Schwermetall and therefore compete with Wieland fully.”*⁷⁰⁴

*“Available portion pre-rolled strips will be controlled by Wieland. If market situation will be tensed, they will have to stay with Wieland. Still depended on Wieland..”*⁷⁰⁵

*“First, the transitional supply agreement would – if at all – be a short-term solution. After expiration of the transitional supply agreement Aurubis Stolberg would most likely lose its non-replaceable basic raw material supplier Schwermetall. The significant negative impact on effective competition of the proposed transaction would therefore (at best) be postponed but not solved. Aurubis Stolberg would even after a time period of [...] years still be dependent on Schwermetall supplies.”*⁷⁰⁶

*“it both interest to continue the cooperation”*⁷⁰⁷

*“No, because buyers will need pre-rolled strip capacity in the long term.”*⁷⁰⁸

- (841) In their exchanges with the Commission, the potential buyers of the Divestment Business identified by the Notifying Party have not excluded a continuation of the Transitional Supply Agreements, at least partially. KME has put forward that after the expiration of the Transitional Supply Agreements *“It will be a mixture of in-house and third-party supplies incl. Wieland/Schwermetall if there is a strategic purchaser”*.⁷⁰⁹ GBC has explained that *“It is GBC’s understanding that Zutphen and Stolberg have current [...] year supply contracts with Schwermetall. Should GBC purchase Zutphen and Stolberg, GBC would expect to accept assignment of this supply contract. Furthermore, it would be GBC’s intention to exercise the options on these contracts with Schwermetall and to strengthen and extend the terms of these contracts for a certain percentage of supply”*.⁷¹⁰ Sofia Med has suggested that a continuation of the agreements after the [...] year transitional period was desirable *“Sofia Med would be interested in the interim supply agreement with Schwermetall for [...] years following the acquisition of the Stolberg plant and would be a prerequisite for an agreement with Wieland. Sofia Med added that in some cases it would be good to have a long-term supply agreement with Schwermetall. For example, for CuAg alloys that Sofia Med does not produce but which are in the*

⁷⁰³ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 34.1 ([...]).

⁷⁰⁴ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 35.1 ([...]).

⁷⁰⁵ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 34.1 ([...]).

⁷⁰⁶ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 1.1 ([...]).

⁷⁰⁷ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 34.1 ([...]).

⁷⁰⁸ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 32.1 ([...]).

⁷⁰⁹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 34.1 ([...]).

⁷¹⁰ Non-confidential response from GBC of 26 December 2018 to the Commission’s request for information of 23 November 2018, page 5.

portfolio of Stolberg, as well as continuing the tolling services for phosphor bronze”.⁷¹¹

- (842) The Commission considers that such a potential extension of the Transitional Supply Agreements would have a detrimental influence on the potential purchaser(s)’ ability and incentives to effectively compete against the merged entity. By creating potentially long term links between the merged entity and the potential buyer of Stolberg and Zutphen, the Transitional Supply Agreements would maintain the purchaser(s) in a situation of dependency from the merged entity (in terms of input volumes, input costs or conditions of deliveries) which would negatively affect its incentives to compete against the market leader, the merged entity.
- (843) On the basis of the above, the Commission considers that the Transitional Supply Agreements would not be sufficient for the purchaser(s) to develop independent sources of supply and would create a risk of long-term links between horizontal competitors.
- 7.3.3.2. There are significant uncertainties as to whether the structural deficiencies of the Divestment Business can and will be compensated for by the potential purchaser(s)’ assets and resources.

Conditions for accepting commitments when assets are missing

- (844) As explained in Section 7.3.3.1, the Stolberg plant and partially the Zutphen plant are currently dependent on Schwermetall, with access to high quality pre-rolled strip at low production and transport costs. The Stolberg and Zutphen plants are not viable or competitive without access to Schwermetall under the current supply conditions.
- (845) The Notifying Party has argued that a number of potential purchasers, notably Sofia Med and GBC as well as Luvata-Mitsubishi (the latter only in case the Pori plant were to be included as part of the Divestment Business) would be interested in the acquisition of part or all of the Divestment Business. Wieland has argued that GBC or Sofia Med “*tick all the boxes to ensure viability of the Divestment business without any need for a structural commitment regarding Schwermetall*”,⁷¹² notably as regards the ability to develop the business and the capacities and commitments in place to supply the divested plants. According to the Notifying Party, “*GBC or Sofia Med meet all requirements to eliminate the Commission’s concerns*”.⁷¹³
- (846) On 12 December 2018, the Notifying Party informed the Commission that KME/MKM would be interested in the acquisition of the Divestment Business and that it believes that KME/MKM would be a suitable purchaser.⁷¹⁴ This interest was confirmed by KME in the market test.
- (847) The Notifying Party has hence requested that the Commission take into account the resources of these potential purchasers in order to conclude that the Divestment Business, if sold to the potential purchasers identified by Wieland, would present all the characteristics of a viable and competitive business in the rolled copper market. For such cases where the viability of the Divestment Business may depend on the in-house resources and assets of a potential purchaser, paragraph 30 of the Remedies

⁷¹¹ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

⁷¹² Case COMP/M.8900 Wieland/Aurubis rolled Products/Schwermetall, Wieland’s and ARP’s presentation for the oral hearing of 19 November 2018, slide 37.

⁷¹³ Case COMP/M.8900 Wieland/Aurubis rolled Products/Schwermetall, Wieland’s and ARP’s presentation for the oral hearing of 19 November 2018, slide 37.

⁷¹⁴ E-mail of the Notifying Party of 12 December 2018.

Notice clarifies the cases in which the Commission can take into account the resources of those purchasers.

- (848) First, as a matter of principle, the Divestment Business has to be viable as such and the resources of possible or even presumed future purchasers are not taken into account at the stage of assessing the remedy. However, according to paragraph 30 of the Remedies Notice, the situation is different *“if already during the procedure a sale and purchase agreement with a specific purchaser is concluded whose resources can be taken into account at the time of the assessment”* (fix-it-first remedy).
- (849) By analogy with paragraph 30, in certain past cases the Commission has taken into account the resources of the purchaser because, although it had not yet signed an agreement with a purchaser, the Notifying Party had committed to divest the business to a pre-identified Purchaser and because the transaction could not be closed before the divestment to that purchaser was agreed and approved by the Commission. Given that in these particular cases the purchaser had been identified, the Commission was able to assess in these decisions the sufficiency of the commitments made in the light of the characteristics of the purchaser in order to assess to what extent the divestiture of the business to such a purchaser would remove the competition concerns identified.⁷¹⁵
- (850) On the basis of paragraph 30 of the Remedies Notice and its previous case practice, in order for the Commission to be able to take account of the resources of a purchaser when determining whether the Commitments of 3 December 2018 would be sufficient to address the competition concerns identified in this Decision, the Notifying Party would either need to sign a binding agreement with a potential purchaser during the procedure; or clearly identify a purchaser to whom it commits to sell the Divestment Business. During the procedure the Notifying Party has not clearly committed to sell the Divestment Business to any of the potential purchasers who, in its view, fulfil the purchaser requirements for the Divestment Business. As the Notifying Party has not fulfilled the conditions set out in paragraph 30 of the Remedies Notice, the Commission does not have to take into account the resources of these potential Purchasers in its assessment of the Commitments of 3 December 2018.
- (851) The Notifying Party has however argued that by committing to a specific additional purchaser requirement according to which the purchaser(s) must be able to ensure, on a long-term basis, sufficient supply of pre-rolled strip which is necessary for the Divestment Business, either through its own captive/in-house production and/or via purchase agreements concluded with other pre-rolled strip suppliers; and an upfront buyer clause in a situation where several buyers have expressed an interest to acquire the Divestment Business, there was no need for a fix-it-first solution.
- (852) The Notifying Party further explained that the fix-it-first solution would be burdensome and disproportionate as it would force Wieland to find a buyer and commit to sell to that buyer within a very short period of time. Furthermore, the Notifying Party submitted that an upfront buyer solution would give the Commission sufficient safeguards as to the divestiture procedure since the Transaction could only be implemented once the up-front buyer condition is fulfilled and the Commission has approved the purchaser(s). Consequently, according to the Notifying Party, there

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See decision in case COMP/M.7278 GE/Alstom (Thermal Power & Renewable Grid Business).

could be no competitive harm during the period between completion of the Transaction and implementation of the divestment remedy.

- (853) The Notifying Party also referred to paragraph 57 of the Remedies Notice⁷¹⁶, and in particular the last sentence, which states: *“The Commission welcomes fix-it-first remedies in particular in cases where the identity of the purchaser is crucial for the effectiveness of the proposed remedy. This concerns cases where, given the circumstances, only very few potential purchasers can be considered suitable, in particular as the divested business is not a viable business in itself, but its viability will only be ensured by specific assets of the purchaser, or where the purchaser needs to have specific characteristics in order for the remedy to solve the competition concerns. If the parties choose to enter into a binding agreement with a suitable purchaser during the procedure by way of a fix-it-first solution, the Commission can in those circumstances conclude with the requisite degree of certainty that the commitments will be implemented with a sale to a suitable purchaser. In these situations, an ‘upfront buyer’ solution containing specific requirements as to the suitability of a buyer will generally be considered equivalent and acceptable.”* The Notifying Party therefore considers that a fix-it-first solution is not necessary since the Notifying Party would include an “upfront buyer solution” in the commitments and that paragraph 57 of the Remedies Notice explicitly recognises this option as an equivalent alternative to a “fix-it-first” solution.
- (854) The Notifying Party has also claimed that it is *“beyond any doubt that the three purchasers, who all are active in the production of pre-rolled strip, are best placed to judge whether their business model ‘could fly’”. What is more, they would certainly not be prepared to buy the production sites and to invest heavily into the process if they would not be convinced that they are in a position to ensure pre-rolled strip supplies”*.⁷¹⁷
- (855) The Commission disagrees with the interpretation of paragraph 57 of the Remedies Notice made by the Notifying Party and that an upfront buyer solution would provide the same safeguards as a fix-it-first procedure. For the reasons set out below, the Commission considers that for cases such as the present one where the Divestment Business is not viable as such because important assets are missing, the Commission would only be able to conclude with the requisite degree of certainty that the commitments will be implemented with a sale to a suitable purchaser only if a fix-it-first solution is retained (subject to the identity of the purchaser).
- (856) The Remedies Notice describes the cases where the proposal of an upfront buyer will allow the Commission to conclude with the requisite degree of certainty that the business will effectively be divested to a suitable purchaser. These concern, first, the cases where there are considerable obstacles for a divestiture, where the purpose of the up-front-buyer provision is to enhance the parties’ incentives to implement and finalize the divestiture as soon as possible in order to be able to complete their own transaction.⁷¹⁸ A Crown Jewel commitment would also address the same concerns.⁷¹⁹
- (857) The second situation where an upfront buyer provides the Commission with the requisite degree of certainty that the business will effectively be divested to a suitable

⁷¹⁶ Notifying Party’s submission “M.8900 Wieland/ Aurubis/ Schwermetall – Non-paper on Remedies” sent on 22 November 2018.

⁷¹⁷ E-mail of 28 December 2018.

⁷¹⁸ Remedies Notice, paragraph 54.

⁷¹⁹ Remedies Notice, paragraph 46.

purchaser concerns where there are considerable risks that the competitiveness and saleability of the divestment business would not be preserved in the interim period until divestiture. In these cases, the upfront buyer provision may accelerate the transfer of the business to be divested and therefore make sure that the risks regarding competitiveness and saleability of the divestment business will not materialise.⁷²⁰

- (858) By contrast, the fix-it-first solution is required in cases where “(...), *given the circumstances, only very few potential purchasers can be considered suitable, in particular as the divested business is not a viable business in itself, but its viability will only be ensured by specific assets of the purchaser, or where the purchaser needs to have specific characteristics in order for the remedy to solve the competition concerns*”.⁷²¹
- (859) In this case, as explained in Section 7.3.3.1, the Divestment Business is not viable and competitive in itself, but its capacity to address the competition concerns identified in this Decision depends on access to pre-rolled strip at competitive conditions. The upfront buyer solution, which concerns situations where there are obstacles to a divestiture or where the integrity of the Divestment Business is threatened during the interim period, does not address this lack of competitiveness of the Divestment Business *per se*. Only a fix-it-first solution in which the Commission would agree on a purchaser(s) whose resources unambiguously compensate for the inadequacies of the Divestment Business, would provide the Commission with the certainty that the Divestment Business will be sold to a suitable purchaser(s) and the competition concerns would be eliminated.
- (860) The last sentence of paragraph 57 of the Remedy Notice states that an upfront buyer is “*generally*” equivalent to a fix-it-first solution. In situations such as the present one where, for the reasons set out in recitals (803) to (844), the Divestment Business is structurally inadequate to address the competition concerns, the Commission does not consider that the upfront buyer is equivalent to the fix-it-first solution.
- (861) In recitals (866) to (920), and on a subsidiary basis, the Commission will explain why none of the potential purchasers identified by Wieland provide the Commission with the requisite degree of certainty that any of those undertakings would be a suitable purchaser for the Divestment Business (either in isolation or together with other potential buyers). Therefore, even if the Commission would follow the Notifying Party’s interpretation of paragraph 57 of the Remedies Notice, the Commission would not have the requisite degree of certainty that a suitable purchaser can be found as no purchaser appears to have the ability and the incentives to run the Divestment Business as a viable and competitive entity in the rolled copper products market. The Commission considers in that regard that the standard to assess whether one or several of the potential purchaser(s) are suitable is not whether their business model “could fly”, as claimed by the Notifying Party, but rather whether a divestment to that (those) purchaser(s) would provide the Commission with the certainty that the Commitments will be implemented in a way that would eliminate the competition concerns.
- (862) In other words, in this case, were the Commission to accept the upfront buyer solution proposed by the Notifying Party, the Commission would approve the Transaction without the requisite degree of certainty that a suitable buyer can be

⁷²⁰ Remedies Notice, paragraph 55.

⁷²¹ Remedies Notice, paragraph 57. Underlining added.

found and therefore that the Transaction can be remedied at all. In such a case an upfront buyer clause does not constitute a solution on which the Commission can conclude with confidence that the commitments can be implemented in a manner that will eliminate the relevant competition concerns in their entirety and be effective from all points of view. Such a situation of potentially long-lasting uncertainty would be contrary to the aim and purpose of the Merger Regulation, and in particular recital (25) thereof.

- (863) Furthermore, paragraph 14 of the Remedies Notice is clear that in cases where the Commission cannot conclude with the requisite degree of certainty, at the time of the decision, that remedies will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted. Therefore, the Commission cannot accept the Notifying Party's interpretation of paragraph 57 of the Remedies Notice, which would be in direct contradiction with the "*ratio legis*" of the Remedies Notice.
- (864) On the basis of the above, in the absence of the Notifying Party having signed a binding agreement with any of the potential purchasers or having clearly committed to sell the Divestment Business (as a whole or partly) to any of those potential purchasers, the Commission considers that it cannot take into account the resources of a potential purchaser when assessing whether the Commitments of 3 December 2018 are adequate to address the relevant competition concerns.

Significant uncertainty whether the structural deficiencies of the Divestment Business can or will be compensated by any of the potential purchaser's (or purchasers') assets and resources

- (865) Notwithstanding the conclusion at recital (865), for the reasons set out below, even if it were appropriate for the Commission to consider the assets, abilities or incentives of the potential purchasers identified by the Notifying Party (Sofia Med, GBC and KME) when assessing the Commitments of 3 December 2018, taking such considerations into account would not alter the Commission's conclusion that the Commitments of 3 December 2018 are insufficient to address the relevant competition concerns in the present case.
- (866) In particular, the Commission will demonstrate in the current Section that none of the potential purchasers can provide the Commission with the requisite degree of certainty, at the time of the adoption of this Decision, that they will fulfill the purchaser criteria and/or be in a position to maintain and develop the Divestment Business so as to ensure that the Commitments will be fully implemented and that they are likely to maintain effective competition in the market..

(a) Sofia Med

- (867) In a letter dated 22 November 2018, Sofia Med expressed its interest in the acquisition of the Stolberg plant.
- (868) In its three-page letter, Sofia Med claimed that it has over the past years expanded capacities and its product portfolio focusing on high-end products, for example in the area of strip for automotive and electronic applications such as connectors. Sofia Med submitted that a hot dip tinning line is being installed in its plant in Bulgaria and is scheduled to be put into operation at the end of 2018.⁷²²

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Non-confidential letter of 22 November 2018.

- (869) In this letter, Sofia Med claimed that pre-rolled strip capacities for supplying Stolberg, as currently done by Schwermetall, are already available and will be extended. Sofia Med also submitted that, with the new equipment, Sofia Med will be able to supply the current product mix of Stolberg, in particular copper, brass and HPA ([...]).
- (870) With regard to production costs, Sofia Med submitted in its letter that pre-rolled strip production in Bulgaria benefit from substantially lower costs (labour costs in Bulgaria are 6-7 times lower than in Germany) which compensates for any additional transportation costs with regard to the distance of 1922 km between Bulgaria and Stolberg plant in Germany.
- (871) In the market test a slight majority of customers and competitors expressed positive opinions as to the ability of Sofia Med to maintain and develop Stolberg as a viable and competitive business.⁷²³
- (872) The Commission has investigated Sofia Med's claims and found that there are several uncertainties as regards its claims that do not allow the Commission to conclude with the requisite degree of certainty that Sofia Med would be a suitable purchaser for the Divestment Business (including only the Stolberg plant).
- (873) Firstly, Sofia Med is only interested in buying Stolberg. Sofia Med indicates that Zutphen and Stolberg's total demand would exceed the ongoing expansion of their capacity.⁷²⁴ As no potential buyer is interested in purchasing Zutphen alone, the Commission has no guarantee that the sale of only Stolberg to Sofia Med would allow the sale of the Divestment Business to be fully implemented.
- (874) Secondly, whereas the market test was relatively positive on the general ability of Sofia Med to maintain and develop Stolberg as a viable and competitive business, as well as on other specific items such as input costs,⁷²⁵ a majority of respondents to the market test expressed concerns in relation to Sofia Med's know-how and innovation capabilities.⁷²⁶ As explained by one customer *"SofiaMed is not able to maintain and develop the Divestment Business Aurubis Stolberg as viable and competitive as before the merger due to SofiaMed's limited capacities and know-how concerning the manufacturing of pre-rolled strip in high-end qualities"*⁷²⁷ A competitor claimed that *"We assume that Sofia Med is not able to produce pre-rolled strip in the demanded amount and the demanded quality. Furthermore, the product range of Sofia Med does not include all different copper alloys"*⁷²⁸ As explained by another customer *"Improvement potential of quality standards and alloy experience & development has to be considered"*.⁷²⁹ A third customer stated that *"Sofia Med has*

⁷²³ Questionnaire sent to customers and competitors on remedies, question 18.

⁷²⁴ Non-confidential response from Sofia Med of 26 November 2018 to the Commission's request for information of 23 November 2018.

⁷²⁵ Questionnaire sent to customers and competitors on remedies, question 17.

⁷²⁶ Questionnaire sent to customers and competitors on remedies, question 17.

⁷²⁷ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 17.1 ([...]).

⁷²⁸ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 17.1 ([...]).

⁷²⁹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 17.1 ([...]).

the experience in the market but so far not the quality standards which are needed in the market”.⁷³⁰

- (875) Thirdly, a majority of respondents to the market test expressed concerns as regards Sofia Med in relation to transport costs and just-in-time deliveries. As explained by one competitor *“transport costs would presumably lead to significant price increases”*⁷³¹ Another competitor explained that *“Moreover, we note that Sophia Med is some distance from the Western European market, which may raise cost”*⁷³². This is confirmed by a customer *“Sofia Med’s own capacities are not sufficient in terms of quality and volume and would have to be delivered over too long distances (2000 km)”*.⁷³³
- (876) Fourthly, in relation to transport costs, Sofia Med has explained that, compared to the current situation in which Stolberg gets its pre-rolled strip from Schwermetall located a few kilometres away, the cost for transportation could be offset by lower labour cost in Bulgaria.⁷³⁴ The Commission notes in that regard that, as explained in recital (493), labour costs are not entirely variable but to some extent fixed. In that regard they cannot be fully used to compensate a transport cost disadvantage (since reductions in variable or marginal costs are in principle more likely to result in lower prices for consumer than reductions in fixed costs). Moreover, Sofia Med has not substantiated with internal evidence the low labour costs in Bulgaria despite two requests for information from the Commission, but has merely relied on statistics from Eurostat. These elements are not specific to the rolled copper industry, which requires skilled workers whose salaries are likely to increase, especially in the tight current labour market situation in Bulgaria.⁷³⁵ Sofia Med has also indicated that rising salaries could be partially offset by increased productivity of staff, but has not further substantiated this point.⁷³⁶
- (877) Not only is it not clear that higher transport costs can be compensated for by lower labour costs, but the data provided by Sofia Med on transport costs for the purposes of serving Stolberg and Zutphen are lower than the cost of transport of pre-rolled strip from Bulgaria to Germany charged in reality by Sofia Med to its current German customers (notably Kemper) and obtained from these customers in the course of the market investigation.⁷³⁷ Such a discrepancy casts doubts on the reliability of the transport costs data provided by Sofia Med.
- (878) Furthermore the transport costs provided by Sofia Med and which are potentially offset by lower labour costs do not take into account the costs of returned scrap (which could potentially lead to higher transport costs). Scrap return is important because a significant share of new pre-rolled strip is made from scrap originating from the processing of the pre-rolled strip by the customer (in this case Stolberg).

⁷³⁰ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 17.1 ([...]).

⁷³¹ Non-confidential response to the questionnaire sent to customers and competitors on remedies, question 17.1 ([...]).

⁷³² Non-confidential response to the questionnaire sent to customers and competitors on remedies, question 17.1 ([...]).

⁷³³ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 19.1 ([...]).

⁷³⁴ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018

⁷³⁵ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018

⁷³⁶ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

⁷³⁷ Kemper’s response of 6 December 2018 to the Commission’s request for information of 5 December 2018.

That scrap needs to be sent back to the plants where the casting for the manufacturing of the pre-rolled strip takes place, in this case in Bulgaria. The fact that the costs of returned scrap are not taken into account in Sofia Med's calculations has been confirmed by Sofia Med which also indicated that *"More information would be needed to be available before we determine the best course of action for the scrap"*.⁷³⁸

- (879) Fifthly, respondents to the market test have made clear that the buyer needs enough free capacity to serve the plants of Stolberg with pre-rolled strip, as indicated in the following quotes.

*"It is necessary that the potential buyer will have strong capabilities in particular in high-end pre-rolled strip products as it is crucial for Aurubis Stolberg that these products remain available. Currently, Schwermetall is the only viable player in Europe providing all manufacturers of high quality finished strip with the required pre-rolled strip."*⁷³⁹

*"It is necessary to have pre-rolled capacity to provide input material for the mills."*⁷⁴⁰

*"This condition [sufficient pre-rolled strip capacity] is necessary to maintain competitive the disinvested companies and a production flow well balanced, independent and under control."*⁷⁴¹

*"The Aurubis rolling mill in Stolberg is focussed on the higher margin products in the high-end segment, so especially for the casting processes high-end competences would be helpful. It is obvious that the access to a broad scope of alloys is necessary and that the competences shall cover these product categories."*⁷⁴²

- (880) Sofia Med has submitted its plans for capacity expansion, which include in particular the acquisition of a cold-rolling "Sundwig" mill in 2019.⁷⁴³ As a further step, by 2021, Sofia Med plans to upgrade the drives of the first (currently installed) mill, which should increase the productivity of that mill.⁷⁴⁴ Sofia Med has also indicated that the increase in capacity for cold rolling would require it also to expand the annealing facility (planned for 2020-2021).⁷⁴⁵ These capacity expansion plans are necessary, according to Sofia Med, in order to serve the Stolberg plant with pre-rolled strip.
- (881) Sofia Med has also provided on 27 November 2018, a 5-year business plan (2019-2023) which does not take into account the acquisition of the Stolberg plant. That 5-year business plan only showed projections of volumes sold for different

⁷³⁸ Non-confidential response from Sofia Med of 13 December 2018 to the Commission's request for information of 10 December 2018.

⁷³⁹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 14.1 ([...]).

⁷⁴⁰ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 14.1 ([...]).

⁷⁴¹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 14.1 ([...]).

⁷⁴² Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 15.1 ([...]).

⁷⁴³ Non-confidential response from Sofia Med of 26 November 2018 to the Commission's request for information of 23 November 2018.

⁷⁴⁴ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

⁷⁴⁵ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

types of rolled copper and pre-rolled strip.⁷⁴⁶ By reference to the 5-year business plan, Sofia Med explained that by 2023, it expects to grow its sales of flat rolled products in terms of volume. That plan is consistent with Sofia Med's assessment of the growing demand for electrical vehicles and batteries, which will require more HPAs.⁷⁴⁷ On the basis of those capacity expansion forecasts and the growth business plans (which are both confidential), the Commission has doubts whether Sofia Med would be in a position to serve Stolberg with pre-rolled strip in the long run (at current volume and assuming growth of Stolberg's sales in line with market growth) and achieve the business plan sales targets.⁷⁴⁸

- (882) Furthermore, Sofia Med explained that the acquisition of Stolberg would support its growth plans in Europe and would allow it to achieve the volume targets currently presented in the 5-year business plan faster. Sofia Med added that after due diligence they might need to revise their 5-year business plan and the CAPEX plan, in particular as regards the mix of investments and the focus products.⁷⁴⁹ There are therefore some uncertainties as to whether the capital expenditure plan, which is essential to enable Sofia Med to serve the Stolberg plant with pre-rolled strip, will be fully implemented after the due diligence.
- (883) Sixthly, Sofia Med would be interested in the Transitional Supply Agreements with Schwermetall for [...] years following the acquisition of the Stolberg plant and this would even be a prerequisite for an agreement with Wieland. Sofia Med added that in some cases it would be good to have a long-term supply agreement with Schwermetall, for example for some alloys that Sofia Med does not produce but which are in the portfolio of Stolberg, as well as continuing the tolling services for phosphor bronze. Sofia Med would also be interested in a know-how transfer agreement with Schwermetall or any other third party, depending on the terms.⁷⁵⁰
- (884) Such statements are strong indications that after the end of the transitional period during which Wieland will be in control of the volumes and prices of pre-rolled strip of one of its competitors, the continuation of a supply relationship with Schwermetall is a likely scenario, which creates risks of long-term dependency between the Divestment Business and its main competitor Wieland, and has a detrimental influence on the potential purchaser's ability and incentives to compete, as explained in recitals (835) to (844). Moreover, and in contrast with the period during which the Transitional Supply Agreements would be in place and the Divestment Business would be supplied at the same terms and conditions as the

⁷⁴⁶ The projections of volumes sold as regards pre-rolled strip in the business plan are not consistent with pre-rolled strip forecasts communicated to the Commission by Sofia Med during the conference call of 18 September 2018. Sofia Med has explained in that regard that *"As part of the annual budgeting and 5y-plan updating procedure, we have since then updated the 5y-plan, after decisions to invest in capacity for final products, and also the latest market updates, forecasts and our estimations. Therefore our latest 5y-plan includes only [CONFIDENTIAL] of pre-rolled, something that however could change according to market and internal developments"*. The Commission therefore considers that there are uncertainties as to the reliability of the business plan.

⁷⁴⁷ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

⁷⁴⁸ In the course of its review of Sofia Med's internal documents, the Commission also found references to business plans related to prices and costs which have not been sent to the Commission, despite requests to Sofia Med to provide *"the 10 most representative and comprehensive documents produced by Sofia Med (or any other company of its group) in its ordinary course of business regarding Sofia Med's strategy in rolled products, absent the potential acquisition of the Stolberg manufacturing site"* (Request for information of 10 December 2018, question 3).

⁷⁴⁹ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

⁷⁵⁰ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

current conditions offered by Schwermetall to Stolberg and Zutphen ([...]), following the end of the transitional period Wieland would no longer be required to provide the Divestment Business with pre-rolled strip [...], which would likely have a negative impact on the competitiveness of the Divestment Business.

- (885) Therefore, even if the Commission were to take account of Sofia Med’s assets, abilities or incentives when assessing whether the Commitments of 3 December 2018 would address the relevant competition concerns (which the Commission is not required to do for the reasons set out in recitals (845) to (865)), for the reasons set out in recitals (874) to (884), the Commission cannot, in any event, conclude with the requisite degree of certainty, at the time of the adoption of this Decision, that Sofia Med will be in a position to eliminate the significant impediment to effective competition as identified in Section 6 resulting from the elimination of the important competitive constraints exerted on Wieland by ARP and/or the creation of Wieland’s dominant position.

(b) GBC

- (886) In a letter dated 22 November 2018, GBC has expressed its interest in the acquisition of Stolberg and Zutphen plant, subject to due diligence.
- (887) In its seven-page letter, GBC claimed that it is a leading, value-added manufacturer, fabricator, converter, processor and distributor of specialized non-ferrous products. GBC is a profitable global conglomerate specializing in non-ferrous metals. Its global revenues in 2017 amounted to USD 1 561 million, with a gross profit margin of 12%. Net sales in 2017 increased by USD 222.3 million, or 16.6%, compared to 2016. GBC employs approximately 1 900 people and operates 21 manufacturing facilities and distribution centers across the US, Puerto Rico, Mexico and China. GBC services nearly 4 500 customers in 28 countries. GBC submitted that its copper products are used in a variety of applications across diversified sectors, including the building and housing, munitions, automotive, transportation, coinage, electronics/electrical components, industrial machinery and equipment, and general consumer sector.⁷⁵¹
- (888) GBC explained that it has a variety of alternatives to meet the specific supply requirements of pre-rolled strip for Stolberg and Zutphen. It could supply pre-rolled strip from GBC’s plant in East Alton, Illinois, USA facility where it has proven expertise in producing over 50 copper and brass alloys and is renowned for its state of the art casting, hot rolling, cold rolling, and finishing operations. At this level, GBC considers it has sufficient capacity to supply Stolberg and Zutphen with enough pre-rolled strip. It also has the capacity to source pre-rolled strip from other European producers on the basis of “*strong relationships with the key strip industry producers in the European Union*”. Finally, it could increase casting and rolling capacity, as a result of capital investment.⁷⁵²
- (889) The Commission has investigated GBC’s claims and found that there are several uncertainties that do not allow the Commission to conclude with the requisite degree of certainty that GBC would be a suitable purchaser for the Divestment Business. Those uncertainties are linked in particular to the supply of pre-rolled strip for the Stolberg and Zutphen plants (from GBC’s US facility or other suppliers in Europe)

⁷⁵¹ Non-confidential version of GBC letter of 22 November 2018.

⁷⁵² Non-confidential version of GBC letter of 22 November 2018.

and the risk of dependency on Wieland/Schwermetall after the termination of the [...] year Transitional Supply Agreements.

- (890) In the first place, respondents to the market test expressed concerns about the general ability of GBC to maintain and develop Stolberg and Zutphen as a viable and competitive business, in particular in relation to supply of pre-rolled strip from the US.⁷⁵³ Although the majority of respondents do not know GBC because of its location in the US and its lack of presence in Europe, those who expressed an opinion had strong reservations in relation to several factors.
- (891) Respondents to the market investigation indicated, in particular, that because of the distance between the US and Europe, transportation of pre-rolled strip could take up to several weeks.⁷⁵⁴ Costs would also be higher due to distance (for the pre-rolled strip from the US to Europe and scrap return to the US), interest costs due to binding of working capital during transportation and export duties.
- (892) It was also flagged to the Commission that in general US-based producers have difficulties supplying the European market because of the different measuring systems (metric system in Europe and imperial system in the US). For this reason, the dimensions would not necessarily match, for example for the supply of cakes.⁷⁵⁵
- (893) These uncertainties as regards transportation costs, distance, export duties, tie-up of working capital and scrap returns are illustrated by the following quotes from respondents to the market investigation.

*“Pre-rolled is too generic to commercially viably export overseas”*⁷⁵⁶

“Global Brass and Copper has its plants in the USA, so the transportation costs, import duties and logistic delays are increasing the cost and decreasing customer support too much. We do not think they are a relevant buyer/supplier”.⁷⁵⁷

“As stated above to be able to maintain the business to be divested viable and competitive the acquirer would need to source pre-rolled products for at least six to seven years (i.e. until a new production plant could be built). This also holds true for Global Brass and Copper since their pre-rolled production capacities are too remote to supply the plants in Zutphen and Stolberg. Furthermore, custom duties would make a supply too expensive. Since the proposed commitments only provides for a maximum supply period of [...] years, we expect a gap of at least one to two years that would make it impossible to maintain the business further on”.⁷⁵⁸

“Only with significant investments in production capacity and quality development located close to Aurubis Stolberg location, Global Brass would be able to maintain and develop the business to be divested as a viable and competitive business. Global Brass plant is located too far away from Stolberg”.⁷⁵⁹

⁷⁵³ Replies to the questionnaire sent to customers and competitors on remedies, question 22.

⁷⁵⁴ Non-confidential minutes of a meeting with GBC of 12 December 2018.

⁷⁵⁵ Non-confidential minutes of a call with KME of 14 December 2018.

⁷⁵⁶ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 22.1 ([...]).

⁷⁵⁷ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 22.1 ([...]).

⁷⁵⁸ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 22.1 ([...]).

⁷⁵⁹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 23.1 ([...]).

*“Furthermore, transport costs and import duties will make the production of strip made from pre-rolled strip originating from the USA uneconomic. Additionally, lead times will increase, which means that a quick response to market developments will be almost impossible. It would be a big challenge for the material logistics since a big portion of new material of pre-rolled strip alloys is made from scrap originating from the processing (e.g. stamping) of the specific finished strip by the customers of finished strip. This scrap needs to be sent to the plants where the casting for the manufacturing of the pre-rolled strip takes place, i.e. in this case to the USA”.*⁷⁶⁰

- (894) GBC has confirmed that it will not be able to supply large volumes of pre-rolled strip competitively from the US to the EEA because of taxes and tariffs. Although GBC considers that the variable transportation costs are not significant, according to GBC the 4.9% import duty represents the main barrier.⁷⁶¹ In relation to travel time, GBC has indicated that an average transport duration of two weeks has to be expected.⁷⁶²
- (895) In relation to the potential supply of pre-rolled strip from suppliers in the EEA, GBC has identified two possible suppliers: KME and Sofia Med.⁷⁶³ The Commission does not consider however that purchases from Sofia Med and KME would constitute a stable supply solution.
- (896) First, KME and Sofia Med will remain competitors of GBC in downstream rolled products market and it is uncertain whether they would be willing to supply their rivals with input. Second, in a response to a request for information from the Commission, KME has stressed that no in-depth discussions have taken place between KME and GBC concerning the potential supply of pre-rolled strip. Indeed, in the absence of any specific demand from GBC, KME simply indicated that it would be willing to supply GBC with pre-rolled strip should the commercial conditions be acceptable. KME stressed that KME has not been active in this field so far and therefore has no detailed plan to sell pre-rolled strip on the merchant market.⁷⁶⁴ The fact that KME makes its entry on the merchant market dependent on having available capacity and getting suitable commercial conditions, together with the fact that KME has no detailed plans to enter the merchant market, shows that KME's entry on the pre-rolled strip merchant market is highly uncertain.⁷⁶⁵ Sofia Med noted that, as far as it is concerned, *“pre-rolled strip is not their focus”*.⁷⁶⁶ There remains therefore significant uncertainties as to whether arrangements under which GBC would source pre-rolled strip for Stolberg and Zutphen from two of its main rivals in downstream markets would be feasible at all.
- (897) As regards investment in casting capacities, GBC has indicated that it could be undertaken if it is *“needed and possible”*.⁷⁶⁷ Such a general, and high-level statement, which is not supported by any quantitative assessment, in a context when GBC, which is not active in the EEA and is therefore not familiar with capital investments

⁷⁶⁰ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 24.1 ([...]).

⁷⁶¹ Non-confidential minutes of a meeting with GBC of 12 December 2018.

⁷⁶² Non-confidential minutes of a meeting with GBC of 12 December 2018.

⁷⁶³ Non-confidential minutes of a meeting with GBC of 12 December 2018.

⁷⁶⁴ Non-confidential response from KME of 6 December 2018 to the Commission's request for information of 4 December 2018.

⁷⁶⁵ Second LoF, paragraph 27.

⁷⁶⁶ Non-confidential minutes of a meeting with Sofia Med of 10 December 2018.

⁷⁶⁷ Non-confidential minutes of a meeting with GBC of 12 December 2018

in Europe, is not sure whether it is even possible to make such investments renders it highly uncertain that this would be a viable option.

- (898) In the second place, GBC has indicated that should GBC purchase Zutphen and Stolberg, GBC would expect to enter into the Transitional Supply Agreements with Schwermetall for a period of [...] years. Furthermore, GBC has the intention to exercise the options on those contracts with Schwermetall and to strengthen and extend the terms of those contracts for a certain percentage of supply.⁷⁶⁸ GBC has confirmed to the Commission that it intends to source part of its supply requirements from Schwermetall in the long run.⁷⁶⁹
- (899) These statements demonstrate that after the end of the transitional period during which Wieland will be in control of the volumes and prices of pre-rolled strip of one of its competitors, the continuation of a supply relationship with Schwermetall is a likely scenario, which creates risks of long-term dependency between the Divestment Business and its main competitor, Wieland, and have a detrimental influence on the potential purchaser's ability and incentives to compete, as explained in recitals (835) to (844). Moreover, and in contrast to the transitional period during which the Transitional Supply Agreements will be in place and the Divestment Business will be supplied at the same terms and conditions as the current conditions offered by Schwermetall to Stolberg and Zutphen ([...]), following the end of the transitional period, Wieland will no longer be required to provide the Divestment Business with pre-rolled strip [...], which would likely have a negative impact on the competitiveness of the Divestment Business.
- (900) Therefore, even if the Commission were to take account of GBC's assets, abilities or incentives when assessing whether the Commitments of 3 December 2018 address the relevant competition concerns (which the Commission is not required to do for the reasons set out at recitals (845) to (865)), for the reasons set out in recitals (890) to (900), the Commission cannot, in any event, conclude with the requisite degree of certainty, at the time of the adoption of this Decision, that GBC will be in a position to eliminate the significant impediment to effective competition as identified in Section 6 resulting from the elimination of the important competitive constraints exerted on Wieland by ARP and/or the creation of Wieland's dominant position.

(c) KME

- (901) During the market test, KME indicated that it would be interested in buying the Divestment Business. KME has not supplied any letter to the Commission to confirm its interest, but has replied to a request for information regarding KME's manufacturing capacity and production, KME's production of pre-rolled strip and the latest updates regarding integration plans with MKM. KME had a conference call with the Commission on 14 December 2018.
- (902) KME has explained that it is interested in the acquisition of ARP's plants in Stolberg and in Zutphen, subject to "*deep due diligence*". The buyer of the Stolberg Plant would not be KME itself, but the joint venture company KMD (joint venture of KME and Chinese players Golden Dragon and Wanzhou). KME cannot itself acquire the Stolberg plant due to a non-competition clause between KME and KMD preventing

⁷⁶⁸ Non-confidential response from GBC of 26 November 2018 to the Commission's request for information of 23 November 2018.

⁷⁶⁹ Non-confidential minutes of a meeting with GBC of 12 December 2018.

KME from being active in the same markets as KMD (HPAs and connector strip).⁷⁷⁰ KME further explained that it was interested in acquiring both plants, or only the Stolberg plant. KME would not be interested in acquiring only the Zutphen plant.

- (903) KME has explained that it cannot commit to the acquisition of the Stolberg plant as it is only one partner in the joint-venture. The Chinese partners (Golden Dragon and Wanzhou) would have to approve the acquisition as well.⁷⁷¹
- (904) Concerning the financing of the potential acquisition, it was stated by KME that either the shareholders of KMD would finance the acquisition (ultimately the Chinese state), or the acquisition could be financed via a swap of shares with Wieland in the Stolberg plant and KMD's plant in China with Wieland (KMD Precise Copper Strip Henan). The acquisition could also be further supported by accompanying divestiture measures of non-core assets of the KME group, although such non-core assets have not been specifically identified.⁷⁷²
- (905) Concerning the Transitional Supply Agreements offered in the Commitments, KME noted that any use of these agreements would depend on the specific alloys that the Stolberg and Zutphen plant procure from Schwermetall. If alloys are concerned that (i) KME has no experience in casting, (ii) do not fit the alloy sequence of KME, or (iii) are intellectual property of ARP or Wieland, KME would use the offered supply agreement regarding those alloys.
- (906) The Commission has assessed KME's suitability as a buyer and found that there are several uncertainties that do not allow the Commission to conclude with the requisite degree of certainty that KME would be a suitable purchaser for the Divestment Business. These uncertainties are linked in particular to the involvement of third parties (the Chinese partners of KME in the joint-venture KMD) in the finalisation and financing of the acquisition, the possible continuation of supply of pre-rolled strip from Schwermetall to Stolberg and Zutphen and the fact that the acquisition of Stolberg and Zutphen by KME may raise *prima facie* competition concerns.
- (907) First, as mentioned in recital (904), KME needs to obtain the agreement of its Chinese partners in the KMD joint-venture to carry out the acquisition. Although KME has stated that opposition from the Chinese partners to the potential acquisition is not likely as it would complement their business plan, there remain uncertainties as to whether these third Parties (which have not confirmed their interest to the Commission) would agree on the deal.
- (908) By the same token, the Chinese partners have not confirmed that they would be ready to finance the acquisition. The other means of financing (swap with a Wieland factory in China or divestiture of non-core assets of the KME group) have to the Commission's knowledge not been further explored by KME or Wieland.
- (909) Second, KME has not ruled out the possibility that it would make use of the Transitional Supply Agreements for alloys that it does not cast itself. For the period following the expiration of the Transitional Supply Agreements, KME indicated, during the market test, that after the expiration of the Transitional Supply

⁷⁷⁰ Non-confidential minutes of a call with KME/MKM of 14 December 2018

⁷⁷¹ Non-confidential minutes of a call with KME/MKM of 14 December 2018.

⁷⁷² Non-confidential minutes of a call with KME/MKM of 14 December 2018.

Agreements, “It will be a mixture of in-house and third-party supplies incl. Wieland/Schwermetall if there is a strategic purchaser”.⁷⁷³

- (910) These statements indicate that after the end of the transitional period during which Wieland will be in control of the volumes and prices of pre-rolled strip of one of its main competitors, the continuation of a supply relationship with Schwermetall is a likely scenario. This scenario would create risks of long-term dependency between the Divestment Business and its main competitors, Wieland, and would have a detrimental influence on the potential purchaser’s ability and incentives to compete, as explained in recitals (835) to (844). Moreover, and in contrast with the transitional period during which the Transitional Supply Agreements will be in place and the Divestment Business will be supplied under the same terms and conditions as are currently offered by Schwermetall to Stolberg and Zutphen ([...]), following the end of the transitional period, Wieland will no longer be required to provide the Divestment Business with pre-rolled strip [...], which would likely have a negative impact on the competitiveness of the Divestment Business.
- (911) Furthermore, KME currently supplies pre-rolled strip to its subsidiary KMD, which has no casting capacities. It is likely that, should KMD acquire Stolberg, after the expiration of the Transitional Supply Agreements, KME would also supply pre-rolled strip to Stolberg from one of its casting houses in Germany. As KMD is a full-function joint-venture between KME and Chinese partners, the Commission considers it to be likely and economically rational that pre-rolled strip will be supplied by KME to KMD at arm’s length conditions and that those conditions would apply to Stolberg as well. Therefore the Commission considers that after the expiration of Transitional Supply Agreements, not only will Wieland no longer be required to provide the Divestment Business with pre-rolled strip [...], but KME is also likely to provide the Divestment Business with pre-rolled strip at arm’s length conditions,⁷⁷⁴ which would likely have a negative impact on the competitiveness of the Divestment Business.
- (912) Third, in order to approve the purchaser of the Divestment Business, the Commission has to make sure that “*The acquisition of the Divestment Business by the Purchaser/s must neither be likely to create, in light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser/s must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business*”⁷⁷⁵. This standard of “no prima facie competition concerns” means, at the time of the buyer approval and hence without undertaking a material investigation, no competition concerns are immediately visible but this preliminary finding is without prejudice to subsequent investigation.
- (913) As explained in Section 6.2, the market share of KME after the acquisition of MKM, which was cleared by the Commission on 10 December 2018, in the rolled products

⁷⁷³ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 34.1 (KME).

⁷⁷⁴ [...]. In the KMD situation, both KMD and KME are active in rolled copper downstream in the EEA but the Chinese partners of KME (Golden Dragon and Wanzhou) are not. Therefore, supply of pre-rolled strip below costs by KME to KMD would indirectly subsidize KMD (in which KME is interested in only half of the profits) and partly Golden Dragon and Wanzhou, potentially to the detriment of the direct profits of KME.

⁷⁷⁵ Commitments of 3 December 2018, point 19 c).

market is [20-30]% and Stolberg + Zutphen would account for a market share of [10-20]%. The combined market share of KME/MKM and the Divestment Business would reach at least [30-40]% and would be comparable to, or potentially above, the market share of the merged entity after the Divestment. This market share is above the safe harbour of 25% in paragraph 18 of the Horizontal Merger Guidelines, under which a concentration is not liable to impede effective competition.

- (914) The acquisition of the Divestment Business by KME would also combine two of the last four integrated rolled copper producers active in the high-end part of the market (the other two being Wieland and Sofia Med, whose market share in the overall market and in the high-end part is much lower than KME/MKM) and would therefore lead to further significant consolidation in a market which is already concentrated.
- (915) On the basis of this combined market share in the overall rolled products market, and the further consolidation in the high-end part of the market, the Commission cannot conclude, in relation to an acquisition of the Divestment Business by KME, that, without undertaking a material investigation, no competition concerns are immediately visible. Therefore the Commission takes the view that it is unlikely that the standard of “no prima facie competition concerns” would be met for an acquisition of the Divestment Business by KME.
- (916) An acquisition of Stolberg alone by KME (KMD) would lead to slightly lower market shares. The increment in market share would be [5-10]%, which means that the combined market share of KME/MKM and the Divestment Business would reach at least [20-30]-[30-40]%. Here again, this market share is above the safe harbour of 25% in paragraph 18 of the Horizontal Merger Guidelines, under which a concentration is not liable to impede effective competition. There would also be consolidation in the high-end part of the market, as the Stolberg plant is mainly active in this field.
- (917) On the basis of this combined market share in the overall rolled copper market, and the further consolidation in the high-end part of the market, the Commission cannot conclude, in relation to an acquisition of the Stolberg plant by KME, that, without undertaking a material investigation, no competition concerns are immediately visible. Therefore the Commission takes the view that it is unlikely that the standard of “no prima facie competition concerns” would be met for an acquisition of the Divestment Business by KME.
- (918) Furthermore, as no potential buyer is interested in purchasing Zutphen alone, the Commission has no guarantee that the sale of only Stolberg to KME would allow the sale of the Divestment business to be fully implemented.
- (919) Therefore, even if the Commission were to take account of KME/MKM’s assets, abilities or incentives when assessing whether the Commitments of 3 December 2018 would address the relevant competition concerns (which the Commission is not able to do for the reasons set out in recitals (849) to (865), for the reasons set out above, the Commission cannot, in any event, conclude with the requisite degree of certainty, at the time of the adoption of this Decision, that KME/MKM will fulfil the standard Purchaser criteria. Therefore the Commission cannot conclude with the requisite degree of certainty, at the time of the adoption of this Decision, that KME/MKM will be in a position to eliminate the significant impediment to effective competition as identified in Section 6 resulting from the elimination of the important competitive constraints exerted on Wieland by ARP and/or the creation of Wieland’s dominant position.

7.3.3.3. Non-horizontal concerns on raising rivals costs and concerns related to access to confidential information are not addressed at all

- (920) As explained in Section 6.9, the Commission considers that the parallel acquisition of sole control over Schwermetall deepens the negative effects of the Transaction as it allows Wieland to hinder the expansion of the important share of remaining competitors on the rolled products market, which will be even more concentrated because of the elimination of ARP. As a result, the parallel acquisition of sole control over Schwermetall further reinforces the significant impediment to effective competition in the form of price increases through the removal of an important competitive constraint and also creates additional elements that support the likely creation of a dominant position for Wieland on the rolled products market.
- (921) Similarly to the Commitments of 17 October 2018, the Commitments of 3 December 2018 do not address these issues. The supply agreements proposed by the Notifying Party only concern the divested plants in Zutphen and Stolberg and do not concern the Schwermetall supplies to third parties which compete with the Notifying Party and ARP on the rolled products market. . Should the proposed remedies be implemented, these players would find themselves in a situation of dependency vis-à-vis the market leader Wieland, which would have the possibility to hinder their expansion and raise their production costs as Wieland would control access to a key input for their rolled copper activities. Likewise, the Notifying Party would have access to commercially sensitive information of these competitors on input costs, lot sizes, and planning and would be deciding alone on the portfolio of pre-rolled strip offered to the merchant market
- (922) The Notifying Party has argued that, since Stolberg and Zutphen will in the future be supplied from other sources than Schwermetall, Wieland will have spare capacity at Schwermetall which will provide it with incentives to supply competitors such as [Competitor 1], [Competitor 2] and [Competitor 4] at low prices.
- (923) The Commission does not share the views of the Notifying Party, for the reasons set out in recitals (925) to (929).
- (924) First, during the first [...] years in which the Transitional Supply Agreements are likely to be in place, and as explained in recital (822), Schwermetall will continue to supply Stolberg and Zutphen with pre-rolled strip. There is therefore no capacity which will be freed during the first [...] year period. To the extent that any existing spare capacity at Schwermetall would solve the competition concerns related to raising rivals' costs, that capacity will not be available during the transitional period and the competition concerns will remain unsolved during that period. The continued existence of a competition concern over the first [...] years after the Transaction would be contrary to the aim and purpose of the Merger Regulation, in particular as explained in recital 25 thereof, and the Remedies Notice, in particular as explained in paragraph 14 thereof.
- (925) Second, after the expiry of the Transitional Supply Agreements, and as discussed in recitals (868) to (920) in relation to the potential Purchasers identified by the Notifying Party, all of the potential purchaser(s) of Stolberg and Zutphen have indicated that they would rely on Schwermetall, either partly or even fully, for their access to pre-rolled strip for Stolberg and Zutphen. It is therefore doubtful whether enough capacity will be made available for third parties after the transitional period.

- (926) Third, Wieland has not substantiated or proven its claim that, if the purchaser of the Divestment Business no longer relied on Schwermetall, there would be free capacity at Schwermetall. Indeed, Wieland has suggested in the Form RM⁷⁷⁶ that Schwermetall will become an integral part of the production organisation of Wieland and it may well decide to produce at Schwermetall quantities which are currently produced in Wieland's plant in Vöhringen. Wieland has claimed that, through the Transaction, it could optimize its global casting strategies and realize economies of scale through better capacity utilisation (each casting shop would be able to focus on different alloy groups, which would reduce downtimes and changeover times).⁷⁷⁷ Even if such modifications in the production organization could lead to an increase in capacity utilization and economies of scale overall, it is unclear how the transfer of quantities from other parts of Wieland's business to Schwermetall would necessarily free up capacities at Schwermetall.
- (927) Fourth, even if there were free capacity at Schwermetall and even assuming that this free capacity provides Wieland with incentives to supply competitors such as Diehl, Kemper and Messingwerk at low prices (which the Commission does not believe, as explained in Section 6.9), the Notifying Party would still have access to commercially sensitive information of its competitors concerning input costs, lot sizes, and planning and would be deciding alone on the portfolio of pre-rolled strip offered to the merchant market. This competition problem would not be solved.
- (928) Fifth, respondents to the market test have provided overall negative comments on the impact of the Transaction regarding foreclosure and access to confidential information, regardless of whether the Stolberg and Zutphen plants are sold to potential purchasers. The following quotes are clear in that respect:
- "Once Schwermetall will be integrated with Wieland, Wieland will have full control over Schwermetall. It can be expected that Schwermetall will no longer supply competitors of its parent organization at competitive prices or conditions. In addition, Wieland will obtain full transparency on the supply of its competitors by Schwermetall (i.e. prices, amounts, delivery time etc). This will have very strong negative impacts on competition since for some products, there is only one alternative supplier and for some there is no alternative source at all. Since customers rely on Schwermetall it will be extremely difficult for these dependent competitors to remain in the market for finished copper strip products and to exercise competitive pressure on Wieland."*⁷⁷⁸
- "the risk for our point of view cannot be eliminated, but today and in the last 20 years Schwermetall was independent, and with a good revenues result, so why destroy all....?"*⁷⁷⁹
- "If Wieland will fully control Schwermetall than will also have full power to influence negatively competitors to gain advantages."*⁷⁸⁰

⁷⁷⁶ Form RM submitted on December 3, 2018, paragraph 70 h).

⁷⁷⁷ Letter of the CEO of Wieland to the Commission of 24 October 2018.

⁷⁷⁸ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 1.1 ([...]).

⁷⁷⁹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 3.2 ([...]).

⁷⁸⁰ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 2.1 ([...]).

*"The share of Schwermetall was split by 50% to Wieland and 50% to Aurubis Stolberg. As this share is not included into the Divestment Business, Wieland will hold 100% and is able to influence pricing, supply and being the one big player for pre-rolled strips."*⁷⁸¹

*"Such buyer would therefore not be able to substitute Schwermetall as supplier and would not eliminate Wieland's ability and incentive to foreclose/raise costs of competitors relying on Schwermetall"*⁷⁸²

*"The sale of the Divestment Business (Aurubis Stolberg) to a buyer with similar characteristics as SofiaMed would not eliminate Wieland's future ability and incentive to foreclose or raise costs of competitors relying on Schwermetall for their access to pre-rolled strip that is active in the same high-end segments as Wieland in the EEA rolled products market because SofiaMed would not be able to substitute the 1/3 of Schwermetall's capacities of pre-rolled strip that currently are sold into the market to its current customers at fair and reasonable prices"*⁷⁸³

*"Sofia Med is currently not in a position to substitute Schwermetall's supply of pre-rolled strip according to our knowledge. It can be expected that this situation will not change for at least the coming six to seven years, since it would be necessary to build a new plant to produce pre-rolled products in Central Europe in order to maintain the supply to third parties. At least for this period a lot of competitors active on the downstream market for rolled products will rely on Wieland/Schwermetall supply of pre-rolled products. This means that Wieland will have control as well as full transparency regarding the supply of its competitors (price, amount, delivery time etc.) with pre-rolled products"*⁷⁸⁴

*"Wieland would own 100% of Schwermetall and would supply the Buyer and/or competitor with pre-rolled strips/products. Hence they would have an insight on volumes, customers."*⁷⁸⁵

- (929) The Commission concludes, therefore, that the competition concerns linked to the parallel acquisition of sole control over Schwermetall, that is the possibility for Wieland to hinder the expansion of the important remaining competitors on the rolled products market, which reinforces the significant impediment to effective competition, are not addressed by the Commitments of 3 December 2018.

7.3.4. Conclusion on the Commitments of 3 December 2018.

- (930) In the light of the above elements, the Commission considers that the Commitments of 3 December 2018 are not effective and comprehensive as they do not eliminate the significant impediment to effective competition through the elimination of the important competitive constraints exerted on Wieland by ARP and/or the creation of Wieland's dominant position (see Section 6).

⁷⁸¹ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 2.1 ([...]).

⁷⁸² Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 20.1 ([...]).

⁷⁸³ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 20.1 ([...]).

⁷⁸⁴ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 21.1 ([...]).

⁷⁸⁵ Non-confidential reply to the questionnaire sent to customers and competitors on remedies, question 21.1 ([...]).

(931) The Transaction should therefore be declared incompatible with the internal market and with the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration whereby Wieland Werke AG acquires control of the whole of Aurubis Flat Rolled Products business and the whole of Schwermetall Halbzeugwerk GmbH & Co. KG within the meaning of Article 3(1)(b) of Merger Regulation (EC) No 139/2004 is hereby declared incompatible with the internal market and with the Agreement on the European Economic Area .

Article 2

This Decision is addressed to:

Wieland Werke AG
Graf-Arco-Straße 36
89079 Ulm
Germany

The Annex is an integral part of this Decision.

Done at Brussels, 5.2.2019

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission

CASE M.8900 – Wieland/Aurubis Rolled Products/Schwermetall

Annex to the Article 8 (3) Decision

1. Rationale and objective

As stated in Section 6.2.1 of the Decision, the reliability of the market share estimates provided by the Notifying Party appeared to be questionable. In addition, the Notifying Party provided value market shares based on the overall revenues, which also include metal prices charged to the customers. As explained in Section 6.2.3 of the Decision, and in Section 3 of the present Annex, compared to overall revenues, in the context of the markets under consideration in this Decision, conversion revenues are better suited for estimating value market shares. However, given that, understandably, the Notifying Party does not have access to the conversion revenues of its competitors, it was not be in a position to provide reliable figures for market shares based on conversion revenues.¹

The Commission, therefore, undertook a market reconstruction exercise with the main objective of calculating market shares of the Parties and their competitors in the markets of pre-rolled strip and rolled copper products. For the pre-rolled strip market, the Commission reconstructed market shares in sales volume. The market shares in rolled products were reconstructed on the basis of both sales volume and sales value.

The present Annex is organised as follows: (i) Section 2 describes the methodology that the Commission employed for conducting the market reconstruction exercise for the pre-rolled strip and rolled products markets; (ii) Section 3 discusses the underlying assumptions that were used as part of the market reconstruction exercise; (iii) Section 4 sets out the Notifying Party's view on some of the aspects on the market reconstruction exercise, and the Commission's response to the Notifying Party's arguments. A classification of the relevant alloys is listed in the Appendix.

2. Market reconstruction exercise

Market reconstruction by volume – pre-rolled strip and rolled products

Market reconstructions by volume of pre-rolled strip and of rolled products were conducted in Phase I and they followed the same methodology. Therefore the description in the present section regards both pre-rolled strip and rolled products by volume.

First, on the basis of the information contained in the Form CO and in their reply to the 6(1)(c) decision, the Commission identified the Parties' most relevant competitors in both the pre-rolled strip market and the rolled products market. The Commission then contacted the market players active in each of these markets in the EEA with a request to complete a uniform template with their sales data information. These companies were instructed to report EEA sales in terms of volume sold in tonnes for the period 2015-2017. Wieland and ARP were also asked to provide sales volumes for rolled

¹ Definitions in this Annex shall have the same meaning as the corresponding terms in the main text of the Decision.

products for the years 2007-2017. In order to minimise potential misunderstandings with the market participants contacted, and thereby maximising the reliability of the data collected, the Commission interacted with a number of market participants via follow-up phone calls and via e-mails so as to ensure effective communication of the instructions for filling in the template and to clarify any doubts that market participants might have had.

The number of data providers for pre-rolled strip market reconstruction is 3, namely, KME/MKM, Schwermetall, and Sofia Med. The number of data providers for the rolled products market reconstruction exercise, including the Parties, is 19. Due to confidentiality reasons, the names of six small competitors in rolled products have been anonymised. Hence, these latter competitors are referred to as "Competitor 1", "Competitor 2", ..., "Competitor 6" in the Decision.

For both pre-rolled strips and rolled products, the Commission proposed the following classification of alloys in the templates: pure copper, brass, bronze, HPA, copper Ni and copper Al. The Commission did not include all alloys in this template, leaving the market participants the possibility to classify volumes as 'Other' whenever the specific alloy was not listed. In light of the Notifying Party's argument² that competitors included alloys which were not categorised as HPAs as "Other", the Commission contacted the market participants (including the Parties)³ and collected a more granular break-down for the volumes listed as 'Other'.⁴ In order to be consistent across all market participants, the Commission changed the alloy group assigned by the market participant whenever it was not consistent with the list provided in the Appendix to this Annex, in accordance with the approach described in the First LoF.

Based on the information gathered, the Commission aggregated all data and performed a market reconstruction exercise based on sales volume for both the pre-rolled strip merchant market and the rolled products market. The Commission reconstructed market shares according to the main classes of alloys, namely brass, bronze, high performance alloys ('HPAs') and pure copper for the years 2015-2017.

Market reconstruction by value – rolled products

For rolled products, in addition to collecting sales volume data, the Commission also requested that the market players active in rolled products in the EEA provide sales data in terms of the conversion revenue. This data was collected for the period 2015–2017 using a uniform template in order to calculate value based shares. Wieland and ARP were asked to provide data for the years 2007-2017. The Commission did not request that the companies specify conversion revenues per alloy, but rather to provide the total conversion revenue figure for the sales of all rolled products sold in the EEA.

The Commission defined the conversion revenue as the transformation fee or fabrication fee. This fee excludes metal cost and metal premium. Hence, the metal value is excluded from turnover and any other potential metal revenue is not taken into account. This definition of conversion revenue taken by

² As pointed out in the E.CA's Data Room Report, 31 October 2018 and in the E.CA's Data Room Report, 6 November 2018

³ Commission's request for information RFI 29

⁴ Commission's First LoF, Section 1

the Commission is based on invoiced charges, that is, invoiced fabrication fees to customers. This information is relevant as, generally, the cost of the metal is passed on to the customers.⁵

The Commission communicated this definition of conversion revenue to all market participants that were involved in the market reconstruction exercise. All participants confirmed that the final data used for the value market reconstruction was in accordance with the Commission's definition. Based on the information gathered, the Commission aggregated data on conversion revenues and performed a value-based market reconstruction exercise for the rolled products market.

Although the conversion revenue definition was reported to all market participants, the Commission does not reject the possibility that some companies may have provided conversion revenues based on their internal reporting. This was, for example, initially the case for ARP (the data was subsequently corrected for this company).⁶ In this scenario, on the one hand, the Commission would overestimate the shares of the companies which incorrectly reported conversion revenues (by including additional revenues resulting from handling and providing the metal), and on the other hand, would underestimate the value shares of the Parties (which would be reduced as a result of the overestimation of competitors' shares). Therefore, the Commission notes that the current market reconstruction exercise is conservative.

3. Assumptions undertaken in the market reconstruction exercise

Assumptions in pre-rolled products market reconstruction

During the market reconstruction exercise, the Commission became aware of some small quantities of pre-rolled strip which were sold in 2017 by two companies active in rolled products and which had not previously been included as active in the merchant market for pre-rolled products. The Commission did not include these sales in the market reconstruction for pre-rolled strip because it appears that these two companies are not always active in the merchant market, but they sporadically sell small quantities of pre-rolled strip. In addition, the combined sales to these customers concerned only approximately 2% of the pre-rolled strip merchant market and therefore did not change the significantly the results of the market reconstruction.

Furthermore, in response to the Notifying Party's criticism that the market reconstruction in the SO included Schwermetall's worldwide sales and in particular overstated the HPA segment share, the Commission excluded Schwermetall's volume sold outside the EEA, and recalculated the market shares in the pre-rolled strip market accordingly. As a result of this correction, Schwermetall's sales in HPA were reduced by a little over [...] tonnes when compared to the market reconstruction reported in the SO.⁷

⁵ See Decision, recital (232).

⁶ Parties' response to the Commission's request for information RFI 26.

⁷ Commission's First LoF, Section 4.

Assumptions in rolled products market reconstruction

The Commission made the following assumptions in the market reconstruction for rolled products.

First, the Commission excluded the sales volumes and conversion values related to the stamped products for two competitors. Given that stamped products require further processing and machinery, and are positioned further downstream in the copper value chain, in comparison to rolled products, the Commission believes that they belong to a different product market. Neither the Parties nor their competitors, other than the two mentioned above, sell stamped products in the EEA.

Furthermore, in the course of conducting the volume and value market reconstruction exercises for rolled products, the Commission noticed some inconsistencies in sales volume and value as submitted by the Parties. This resulted in further clarifications and amendments to the original per alloy data which was received in Phase I.⁸ ARP was not able to allocate minor volumes across alloys which constituted less than 0.05% of ARP's EEA sales. Given that such minor volumes would not change any of the segment shares and no alloy indication was provided, instead of disregarding these volumes, the Commission allocated them in the segment "Pure copper" as "Other".

Moreover, in relation to the Commission's attempts to clarify the alloys listed as "Other", as discussed in Section 2 of this Annex, two competitors with small sales quantities listed as "Other" were unable to specify the precise alloy classification. These unspecified sales constitute less than 0.2% of rolled products market in 2017 and, hence, would not have any material impact on the market reconstruction results. Therefore, the Commission concludes that the estimates of the alloy segments are robust.

Furthermore, another competitor could not specify the sales volume per specific alloy and provided aggregate values in tonnes and respective estimated shares per alloy.⁹ The Commission distributed the sales volumes based uniformly across all alloys within one alloy group where a more granular estimate was not provided. For example, following this assumption, the Commission would apply a share of 5% to three different alloys if the total share of the three alloys was noted as 15% of the sales volume.

In relation to the value based market reconstruction, after written and oral discussions with two competitors, the Commission acknowledged that they were unable to provide the conversion revenues as defined by the Commission in Section 2, because they do not track them in the requested definition in their accounting systems.¹⁰ Consequently, the Commission decided to use an internal measure for the sales of these competitors, which is defined as total turnover minus LME Metal value and some metal premium. Hence, this measure might include (part of) the metal premium charged to the customers (a metal revenue), thus resulting in a higher value than the one under Commission's definition. This leads to a potential overestimate of the competitors' value shares.

Another competitor provided rounded conversion revenues in a pdf format. The Commission used these figures as given. Moreover, the sales data of this competitor for 2015 and 2016 were not included by the Commission in the market reconstruction since the competitor could not provide the reliable and accurate information for these years.

⁸ As per Parties' Response to the Commission's request for information RFI 26, RFI 26 Annex 1 (with further corrections) including minor volumes without alloy information, based on fabrication price only.

⁹ Response to the Commission's request for information to Competitors on September 12, 2018.

¹⁰ Response to the Commission's request for information to Competitors on October 2, October 5 and October 9, 2018.

Finally, the Commission did not receive a response to the requests for information sent to another competitor on their conversion revenues in the EEA.¹¹ Consequently, the Commission assumed that their shares of the conversion revenues in EEA are equal to their shares of the sold volume in EEA and included this estimate in the value market reconstruction.¹² This assumption has only a minor impact on the results, due to the limited presence of this company, and, in any event, it overestimates the market shares of this market player, and underestimates the market shares of the Parties, because the competitor's presence in high-end products appears to be very limited.

Role of imports in rolled product market reconstruction

According to the Parties, imports into the EEA account for less than [5-10]% of the total EEA rolled product demand.¹³ The Commission took this assumption conservatively by dedicating a 5% market share to imports to the EEA in both volume and value market reconstruction exercises for rolled products. The Commission believes that it is a conservative approach because imports to the EEA are likely to be less than 5%, which would result in underestimating the Parties market share in the current market reconstruction. For robustness, the Commission compared the resulting values with those provided by other sources, including IWCC¹⁴ and CU2.¹⁵ The result of the market reconstruction appears to be consistent with external sources. This assumption is particularly conservative in estimating market shares in value. This is because imports into the EEA are primarily made of commoditised alloys, such as Cu-DHP.

As a result of the above described methodology, the Commission's estimate for EEA imports in 2017 was calculated as [...] tonnes, whilst the Parties estimated that imports account for [...] tonnes.¹⁶ Therefore, the approach taken by the Commission thus appears to be conservative as it accounts for a larger volume than the Parties, and the resulting total market size is higher.

In order to break-down the imports by alloy, the Commission contacted market participants located outside the EEA. Only two companies replied to the Commission's request and therefore the Commission allocated to each alloy the data received from these two companies. The remaining imports were allocated to each alloy group, according to the alloy group size distribution in the market.

One of the competitors outside of the EEA could not understand the Commission's request and provided data which does not match the required alloy specification template.¹⁷ Therefore, this company's reply was not taken into account for the purposes of the market reconstruction exercise.

The Commission notes that disregarding some replies of the market participants outside the EEA leads to alloys shares that are in the Parties' favour. Since the majority of imports concern pure copper, not taking into account the replies of market participants outside the EEA leads to an overestimation of the Parties' alloy share in pure copper (due to the Parties limited overlaps in this segment of the market,

¹¹ Commission's request for information to Competitors on September 26, 2018.

¹² The volume sales data was provided in the responses to volume market reconstruction requests for information to competitors on September 11 and September 17, 2018.

¹³ Form CO, table in paragraph 208.

¹⁴ Form CO, Annex 3_Q2.

¹⁵ Form CO, Annex 6.3.a.

¹⁶ Form CO, paragraph 208.

¹⁷ Response to the Commission's request for information to Competitors on September 11, 2018.

such overestimation does not have an impact on the Commission's assessment in respect of these alloys) and an underestimation of the Parties' alloy shares in other alloys such as, for example, HPA, where the Parties overlap.

The available data on imports was also taken into account when computing the Herfindahl-Hirschman Index ('HHI'). The Commission could not determine the market shares of all the importers due to lack of response, except for two companies who complied with Commission's market reconstruction exercise request. Therefore, the Commission took into account the market shares of these two market players and did not include any other market participants. This assumption does not alter the value of the HHI delta between pre- and post-Transaction, but only the pre- and post-Transaction HHI values taken singularly. This is because the market shares for these competitors do not change and, hence, they would be eliminated in HHI delta calculation. However, such non-inclusion would, in any event result in an underestimation of the HHI indices of pre- and post-Transaction to the Parties' benefit.

Notifying Party's criticism

In the Response to the SO, during the Oral Hearing and in Observations on the First and Second LoFs, the Notifying Party criticised some aspects of the market reconstruction exercise. Essentially, the Notifying Party claims that the Commission overestimated Schwermetall's market shares in pre-rolled strips;^{18 19} that it should have provided pre-rolled strip market shares also for the period 2015-2016; and that the market shares of Sofia Med in rolled products are underestimated.²⁰ The Notifying Party also argues that the definitions of the alloys, and in particular of HPA, are not objectively defined.^{21 22}

First, the Commission does not agree with the Notifying Party that Schwermetall's market share was overestimated. Recitals (606) to (608) of the Decision, explain why the Commission does not agree with the Notifying Party's claim that re-rollers that do not compete with the Parties in the rolled product markets should be discarded from the pre-rolled strip market reconstruction. In any event, the Commission also performed the market reconstruction exercise excluding those customers in question, which shows that Schwermetall would still remain the leading pre-rolled strip provider with [70-80]% market share, as shown in Table 23 in the Decision. The Commission also does not agree with the Notifying Party that two other competitors should have been included in the pre-rolled strip market reconstruction. The sales of these two companies were insignificant in terms of size, and the inclusion of these sales would not have had a significant impact on the outcome of the assessment, because: a) these sales combined concern only approximately 2% of the pre-rolled strip merchant market; and b) one of the two companies does not compete with Schwermetall in the high-end pre-rolled product segment as it only sold pre-rolled strip of Copper DHP and ETP. Also the sales of these companies are of a sporadic and disorderly nature, such that the Commission cannot conclude that the respective suppliers are credible alternatives and are capable of exerting a competitive constraint on Schwermetall.

¹⁸ Reply to the SO, Sections X.2 and X.5.

¹⁹ Response to the SO, paragraph 155.

²⁰ Response to SO, paragraph 45

²¹ E.CA's Data Room Report, 31 October 2018, E.CA's Data Room Report, 6 November 2018

²² Response to the SO, page 6; Response to the SO, Section X.2

²³ Observations on the Letter of Facts of 30 November 2018, paragraph 19

²⁴ Observations on the Letter of Facts of 30 November 2018, paragraph 19

Second, the Commission collected the sales data of pre-rolled strip sold to third parties for 2015 and 2016 from the market participants but did not include the market shares for these years as this information neither had an impact on, nor did it provide additional information pertinent for, the Commission's assessment of Schwermetall and its market position, even when taking into account potential future developments.

Third, concerning the Notifying Party's comment regarding Sofia Med's position in the market in Section 2 above, the Commission notes that the sales data for the market reconstruction exercise were collected from all market players, including Wieland and ARP, using equivalent templates and instructions to ensure that the rolled products were reported in a consistent manner by all competitors for the EEA market only. The Commission also compared the data received for the market reconstruction with data reported in response to other requests for information. For the specific case of Sofia Med, the sales figures of rolled products sold in the EEA were also confirmed in a subsequent communication with Sofia Med.²⁵

Finally, the Commission notes that the alloy classification –in particular regarding HPAs – is not based on a scientific definition, but it is rather a conventional definition widely used in this industry. While the term HPA is a marketing term not used uniformly across the industry, and may be subject to internal reclassification by market participants,²⁶ the Commission notes that none of the competitors challenged the alloy classification of the Commission during the investigation which was presented in the Commission's proposed template. The competitors reported their sales for CuFe0.1P and CuFe2P under HPA and did not inform the Commission that these alloys should have been allocated under another alloy group, further indicating the market participants' agreement with the classification proposed by the Commission.

²⁵ Commission's request for information to Competitor on 25 September 2018.

²⁶ Commission's First LoF, paragraph 7.

Appendix

The Commission's alloy classification used for market reconstruction is provided in Table 30, according to the Commission's Letter of Facts of 30 November 2018.

Table 30 Alloy classification

Alloy name	Alloy group
CuSn3Zn9	Brass
CuSn6Zn6	Brass
CuZn10	Brass
CuZn12	Brass
CuZn15	Brass
CuZn15Fe0.8	Brass
CuZn20	Brass
CuZn20Al2	Brass
CuZn23Al3Co	Brass
CuZn24Sn1	Brass
CuZn25	Brass
CuZn28	Brass
CuZn28Sn1	Brass
CuZn28Sn1As	Brass
CuZn30	Brass
CuZn30 Eco	Brass
CuZn30As	Brass
CuZn30Sn1Ni1Si	Brass
CuZn31Si1	Brass
CuZn33	Brass
CuZn35	Brass
CuZn35Ni	Brass
CuZn35P	Brass
CuZn36	Brass
CuZn36Mn2	Brass
CuZn37	Brass
CuZn37 Eco	Brass
CuZn38	Brass
CuZn38AlFeNiPb	Brass
CuZn38AlFeNiPbSn	Brass
CuZn38Pb2	Brass
CuZn38Sn1	Brass

Alloy name	Alloy group
CuZn38Sn1As	Brass
CuZn38SnAl	Brass
CuZn39Pb0.5	Brass
CuZn39Pb2	Brass
CuZn39Pb3	Brass
CuZn39Sn1	Brass
CuZn40	Brass
CuZn40Pb2	Brass
CuZn42 BlueBrass®	Brass
CuZn4Sn1	Brass
CuZn5	Brass
CuZn7	Brass
CuZn9Sn3	Brass
CuZnPb	Brass
CuSn0.5	Bronze
CuSn10	Bronze
CuSn12	Bronze
CuSn15	Bronze
CuSn2	Bronze
CuSn20	Bronze
CuSn21	Bronze
CuSn2Fe0.1P0.03	Bronze
CuSn4	Bronze
CuSn5	Bronze
CuSn5Zn1	Bronze
CuSn6	Bronze
CuSn6Zn6	Bronze
CuSn8	Bronze
CuSn9	Bronze
CuSnMg	Bronze
CuAl10Ni5Fe4	Copper Al
CuAl11Fe3	Copper Al
CuAl11Ni6Fe5	Copper Al
CuAl5Zn5Sn1*	Copper Al
CuAl5ZnSn1Fe	Copper Al
CuAl6Ni2	Copper Al
CuAl8Fe3	Copper Al

Alloy name	Alloy group
CuAl9Mn2	Copper Al
CuAl9Ni3Fe2	Copper Al
CuNi10Fe	Copper NI
CuNi10Fe1,6Mn	Copper NI
CuNi10Fe1Mn*	Copper NI
CuNi10Zn27	Copper NI
CuNi10Zx	Copper NI
CuNi12Zn24	Copper NI
CuNi12Zn25Pb1	Copper NI
CuNi13Zn24Pb(1)	Copper NI
CuNi15	Copper NI
CuNi18Zn10	Copper NI
CuNi18Zn17	Copper NI
CuNi18Zn20*	Copper NI
CuNi18Zn27	Copper NI
CuNi2.7Si	Copper NI
CuNi23Mn	Copper NI
CuNi2SiSn	Copper NI
CuNi30Mn	Copper NI
CuNi30Mn1Fe*	Copper NI
CuNi5.5Zn24	Copper NI
CuNi5Zn20	Copper NI
CuNi6	Copper NI
CuNi6Sn6Zn2	Copper NI
CuNi7Zn36Pb1	Copper NI
CuNi7Zn38Pb1	Copper NI
CuNi8Zn25Pb2	Copper NI
CuNi9Sn2	Copper NI
CuNi9Sn6	Copper NI
RM4	Copper NI
CuAg	High Performance Alloy
CuCr1Zr	High Performance Alloy
CuCrAgFe-TiSi	High Performance Alloy
CuCrSiTi	High Performance Alloy
CuCrZr	High Performance Alloy
CuFe0.1	High Performance Alloy
CuFe0.1P	High Performance Alloy

Alloy name	Alloy group
CuFe0.7MgP	High Performance Alloy
CuFe2P	High Performance Alloy
CuMg	High Performance Alloy
CuMg0.1	High Performance Alloy
CuMg0.1AgP	High Performance Alloy
CuMg0.6	High Performance Alloy
CuNi0.2	High Performance Alloy
CuNi1.5Si	High Performance Alloy
CuNi1Co1Si	High Performance Alloy
CuNi1Sn0.5	High Performance Alloy
CuNi1Sn0.9	High Performance Alloy
CuNi1ZnSi	High Performance Alloy
CuNi2Si	High Performance Alloy
CuNi3Si	High Performance Alloy
CuNi3Si1Mg	High Performance Alloy
CuNiS2.5CoSi	High Performance Alloy
CuNiSi	High Performance Alloy
CuSn0.09	High Performance Alloy
CuSn0.15	High Performance Alloy
CuSn0.2	High Performance Alloy
CuSn1CrNiTi	High Performance Alloy
CuSn2Fe0.1	High Performance Alloy
CuSnMgAg	High Performance Alloy
CuZr	High Performance Alloy
CuZr0.1	High Performance Alloy
Ag935**	Other
Cu64ZnNi3**	Other
CuAsP**	Other
CuCoNiBe**	Other
CuMn12Ni**	Other
CuMn15**	Other
CuMn7Sn2**	Other
CuNi10*	Other
CuNi18Zn17*	Other
CuNi25*	Other
CuNi5Fe*	Other
CuP**	Other

Alloy name	Alloy group
CuSi3Mn*	Other
CuSn2Zn9	Other
CuZn20Ni5*	Other
CuZn27Ni10*	Other
Zn99.975**	Other
CuAg0.035(OF)	Pure copper
CuAg0.07	Pure copper
CuAg0.10(OF)	Pure copper
CuAg0.10P	Pure copper
CuAg0.1P	Pure copper
CuCr0.2	Pure copper
Cu-DHP	Pure copper
Cu-DLP	Pure copper
Cu-ETP	Pure copper
Cu-HCP	Pure copper
Cu-OF	Pure copper
Cu-OFE	Pure copper
Cu-PHC	Pure copper
CuSn0.04	Pure copper
CuTe0.02Sn0.02	Pure copper
CuZn0.5	Pure copper

* These alloys were allocated to 'Other' in the market reconstruction for pre-rolled strip sold in the merchant market and relate to Schwermetall's sales only.

** These alloys were included in the rolled market reconstruction as "Other".