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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

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69120, Heidelberg
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150 N. Riverside Plaza
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IL 60606, Chicago
United States of America

Subject: **Case M.10529 – HEIDELBERGCEMENT / THOMA BRAVO / COMMAND ALKON**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 7 March 2022, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which

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

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

HeidelbergCement AG ('HeidelbergCement') and Thoma Bravo, L.P. ('Thoma Bravo') (HeidelbergCement and Thoma Bravo are designated hereinafter as the 'notifying parties') will acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control of Command Alkon Inc. ('Command Alkon') (the 'Transaction').[3]

1. THE PARTIES

(2) HeidelbergCement is a manufacturer of building materials offering cement, clinker and other cement additives, aggregates, ready-mixed concrete and other concrete products, screed and asphalt.

(3) Thoma Bravo is a private equity firm with a particular focus on application and infrastructure software and technology enabled services. Thoma Bravo solely controls Project Potter Parent, L.P. ('Potter'), which holds 100% of the share capital of Command Alkon. As a result, Thoma Bravo solely controls Command Alkon before the Transaction.

(4) Command Alkon consists of several software companies that deliver automation software solutions, in the U.S. and the EU. These automation solutions are used in the heavy-building materials ('HBM') industry and may be used for various purposes (e.g. pricing and quoting, order taking, scheduling and delivery, dispatching, batching, ticketing, truck tracking and truck management, quality control, recipes and production) and for the production of various materials (e.g. ready-mixed or pre-cast concrete, cement, aggregates, asphalt, etc.).

2. THE CONCENTRATION

(5) The Transaction consists in the acquisition by HeidelbergCement of a 45% shareholding from Thoma Bravo in Potter. Potter will be controlled by its General Partner ('Potter Parent'), which in turn will be co-controlled by HeidelbergCement and Thoma Bravo.

(6) Potter Parent will be managed by a board of managers, which will initially consist of ten members. Thoma Bravo will […]and HeidelbergCement will […][4] The board of managers will act by simple majority vote, provided that […].[5] In addition, HeidelbergCement and Thoma Bravo have various veto rights, […].[6] As a result, HeidelbergCement will acquire joint control over Command Alkon, alongside Thoma Bravo.

(7) Command Alkon is a pre-existing company that operates on a market and performs all the functions normally carried out by undertakings operating on the same market. Command Alkon has a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff, and assets (tangible and intangible), in order to conduct on a lasting basis its business activities. The

3 Publication in the Official Journal of the European Union No C 121, 16.3.2022, p. 4.
4 Annex 5, section 7.2.
5 Annex 5, section 7.3(b).
6 Annex 6, section 5.2. […].

foregoing will not change following the implementation of the Transaction. Post-Transaction, Command Alkon will thus be a full-function joint venture within the meaning of Article 3(4) EUMR.

3. UNION DIMENSION

(8) The Transaction has a Union Dimension pursuant to Article 1(2) of the Merger Regulation, because in 2020[7] (i) the undertakings concerned had a combined aggregate worldwide turnover of more than EUR 5 000 million (HeidelbergCement: EUR 17 606 million; Thoma Bravo:[8] EUR […]; Command Alkon: EUR […]); (ii) two of them had an individual EU-wide turnover in excess of EUR 250 million (HeidelbergCement: EUR […]; Thoma Bravo:[9] EUR […]) and (iii) HeidelbergCement and Thoma Bravo did not achieve more than two-thirds of their aggregate Union-Wide turnover within one and the same Member State.

4. MARKET DEFINITIONS

(9) There is no horizontal overlap between the Parties' activities since HeidelbergCement does not offer automation software solutions to third parties.[10] However, the Transaction gives rise to vertical relationships between Command Alkon's HBM automation software solutions (upstream) and HeidelbergCement's activities for the production of HBM (downstream).

4.1. Automation software solutions used for the production of heavy building materials (upstream)

4.1.1. Product markets

4.1.1.1. The Commission's precedents

(10) The Commission has not yet defined a market for HBM automation software solutions. However, the Commission has previously defined a separate market for automation and control ('A&C') solutions.[11] This market includes a collection of real-world machinery and electronic process control that replace human operation in industrial production.[12] Within A&C solutions, the Commission has left open further segmentations by functionality[13] and industry.[14]

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7 The turnover figures for 2021 are not yet available.

8 Excluding Command Alkon's turnover for 2020.

9 Excluding Command Alkon's turnover for 2020.

10 HeidelbergCement has developed internal automation software solutions but these are not available to third parties.

11 Commission decision of 27 April 2007 in case M.4608 – *Siemens / UGS*, para. 7.

12 Commission decision of 27 April 2007 in case M.4608 – *Siemens / UGS*, para. 13.

13 Commission decision of 29 November 2013 in case COMP/M.7005 - *Schneider / Invensys*, para. 7: the various components of process control systems can be grouped into different levels of the so-called '*automation hierarchy*'. Within each level, a further segmentation can be made between solutions used for different functionalities. See e.g.: MES which can be considered as a specific solution of the management level (Commission decision of 27 April 2007 in case M.4608 – *Siemens / UGS*, para. 13) and as a sub-segment of the market for product and lifecycle management ('PLM') solutions (Commission decision of 27 February 2017 in case M.8315 – *Siemens / Mentor Graphics*, para. 10).

4.1.1.2. The Notifying Party's views

(11) According to the Parties, the market on which Command Alkon is active should be defined as the '*market of digital solutions for the HBM industry*' without any further segmentation.

4.1.1.3. The Commission's assessment

(A) Distinction by industry

(12) The results of the market investigation confirmed the relevance of a separate market for automation software solutions used for the production of heavy building materials.

(13) ***First***, from a demand-side perspective, automation software solutions used in industries other than the HBM industry are typically not substitutable with specific HBM automation software solutions due to the specific features of the HBM industry. As one of Command Alkon's customers explains: '*there is a series of operational processes that are specific to the HBM industry, e.g. for setting prices, taking orders, scheduling deliveries, etc. It is these industry specific processes where Command Alkon's software solutions are targeted. For these tasks* [Customer] *cannot use generic software solutions like the ones offered by SAP and other ERP software suppliers*'.[15]

(14) This is also confirmed by a competitor of Command Alkon according to whom: '[s]*pecific tailoring is required when it comes to interfacing with ERP systems (e.g. SAP). These interfaces are always tailored you could say*'.[16] As another competitor explains: '*solutions are typically tailored to the specific business processes of the industry, that the solutions are deployed for.* [Competitor]*'s solution for the HBM industry provides between 100 and 150 HBM specific use cases that can not be found in any other* [Competitor] *industry solution*'.[17]

(15) ***Second***, the Parties' internal documents confirm that automation software solutions for the HBM industry need to take into account a number of constraints that are specific to this industry. By way of illustration, the below extract from one of Command Alkon's internal documents lists several constraints specific to the HBM industry that need to be taken into account when designing automation software solutions for this industry:

Figure 1 – Product market: distinction by industry

[…]

Source: Annex RFI4 Q2.6

(16) ***Third***, from a supply-side perspective, 88% of Command Alkon's competitors who participated to the market investigation explained that they are specialized in the development and supply of automation software solutions dedicated to the HBM

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14 Commission decision of 20 December 1995 in case IV/M.670 – *Elsag Bailey / Hartmann & Braun AG*, para. 9.

15 Non-confidential minutes of a call with a customer held on 29 November 2021.

16 Non-confidential response to question 2.1.1 from questionnaire Q1 (competitors).

17 Non-confidential response to question 2.1.1 from questionnaire Q1 (competitors).

industry.[18] This is also the case of Command Alkon, which is specialized in the supply of automation software solutions for the HBM industry.

(17) However, the question whether the market for automation software solutions should be further segmented by type of industry can be left open as the Transaction does not give rise to competition concerns on the HBM industry segment, which is the only segment on which Command Alkon is active. For the purpose of this case, the Commission will adopt a conservative approach and carry out its analysis under the segment for HBM automation software solutions.

(B) Distinction by end-use application

(18) The results of the market investigation confirmed the relevance of a distinction by end-use application (i.e. cement, aggregates, asphalt, ready-mix concrete, pre-cast concrete, contractors).

(19) ***First***, from a demand-side perspective, automation software solutions for different end-use applications cannot all be used across different end-use applications. In this respect, one customer of Command Alkon explained that '*Command Alkon offers various software tools tailored to specific applications, such as ready-mix concrete, pumping, fleet tracking, BI, quarry automation and aggregates*'.[19]

(20) Likewise, another customer explained that '[i]*n terms of the various product lines (aggregates, cement, ready-mix concrete, asphalt), some of Command Alkon products can be used in multiple product lines, whereas others are product specific. CommandSeries for instance is fairly interchangeable across applications as it supports ticketing, batching, truck tracking, etc. It can thus be used in connection with aggregates, cement, ready-mix concrete and asphalt. Other products however are more specialized, tailor made to meet the specific requirements of that product (e.g. asphalt)*'. In this respect, this customer stressed that '*No other provider can offer* [Customer] *the same* […] *product line coverage or customer scale*'.[20]

(21) ***Second***, the Parties' internal documents confirm that the Parties make a distinction between end-use applications in their ordinary course of business. For instance, the figure below is an extract from one of Command Alkon's internal documents in which Command Alkon explains that it holds a leading share in its core markets and distinguish in this respect, ready-mix concrete and aggregates:

Figure 2 – Product market: distinction by end-use application (Command Alkon)

[…]

Source: Annex RFI4 Q2.6

(22) ***Third***, from a supply-side perspective, the list of suppliers of HBM automation software solutions varies across end-use applications.[21] This is also confirmed by the

[18] Non-confidential responses to question 2.1 from questionnaire Q1 (competitors).

[19] Non-confidential minutes of a call with a customer held on 24 November 2021.

[20] Non-confidential minutes of a call with a customer held on 29 November 2021.

[21] Non-confidential response to question 5 from questionnaire Q1 (competitors) and non-confidential response to question 6 from questionnaire Q2 (customers).

Parties' internal documents. In a market report provided by Thoma Bravo, for instance, a distinction is made between different categories of competitors based on the end-use applications in which their automation software solutions can be used:

Figure 3 – Product market: distinction by end-use application (Thoma Bravo)

[…]

Source: Annex RFI 4 Q.2.11

(23) However, the question whether the market for HBM automation software solutions should be further segmented by end-use application can be left open, as the Transaction does not give rise to competition concerns, even when such a distinction is made, which results in higher market shares for Command Alkon. For the purpose of this case, the Commission will carry out its analysis with a distinction between aggregates, asphalt, cement, ready-mix concrete, pre-cast concrete and contractors.

(C) Distinction by functionality

(24) The results of the market investigation confirmed the relevance of a distinction by functionality (i.e. batching, dispatching, quality control, ticketing, order taking, scheduling, recipe, truck tracking, pricing and quoting, business intelligence).

(25) ***First***, from a demand-perspective, not all customers producing the same type of heavy building materials (e.g. ready-mix concrete) use the same automation software functionalities offered by Command Alkon. As one customer of Command Alkon explains: '*Customers can choose the specific range of functionalities of Command Alkon's software that best fit their needs. As a rule of thumb, big companies tend to rely on Command Alkon only for logistical and operational purposes (e.g. batching, quality, ticketing or tracking), while they continue to use ERP-based systems like SAP for the remainder of their operations (e.g. supply chain, ordering, customers project, invoicing and pricing)*'.[22]

(26) In the same vein, another customer of Command Alkon stressed that: '*Command Alkon's additional functionalities not related to the production and dispatching processes include pricing, maintenance, accounting or invoicing tools. Although* [Customer] *does not use these other functionalities, it is a choice and other players could decide to use Command Alkon's software also for these purposes. In that case, Command Alkon's software could be used as a substitute to other ERP software products*'.[23]

(27) ***Second***, this is also consistent with the Parties' internal documents, which distinguish different set of functionalities. For instance, the below figure clearly distinguishes between end-use applications (i.e. ready-mix, asphalt, aggregates, cement and contractors) and groups of functionalities (i.e. production, logistics, telematics and dispatch, business analytics, quality control and integrated core business systems):

22 Non-confidential minutes of a call with a customer held on 24 November 2021.

23 Non-confidential minutes of a call with a customer held on 18 November 2021.

Figure 4 – Product market: distinction by group of functionalities

[…]

Source: Annex RFI4 Q2.11

(28) ***Third***, from a supply-side perspective, not all HBM automation software suppliers provide the same functionalities. By way of example, the below extract from one of HeidelbergCement's internal documents lists the functionalities offered by competitors of Command Alkon with a distinction between batching, dispatching, quality control, quote-to-cash integration and telematics:

Figure 5 – Product market: distinction by individual functionalities

[…]

Source: Annex RFI4 Q.3.6

(29) However, the question whether the market for HBM automation software solutions should be further segmented by individual functionality can be left open as the Transaction does not give rise to competition concerns, even when such a distinction is made, which results in higher market shares and market power for Command Alkon. For the purpose of this case, the Commission will carry out its analysis with a distinction between individual functionalities (ticketing, order taking, scheduling, recipe, truck tracking, pricing and quoting, business intelligence).

4.1.2. Geographic markets

4.1.2.1. The Commission's precedents

(30) In previous decisions involving the automation and control software industry, the Commission considered these markets to be at least EEA-wide, while leaving the exact geographic market definition open.[24]

4.1.2.2. The Notifying Party's views

(31) According to the Parties, the market on which Command Alkon operates is EEA-wide because Command Alkon offers the same products at broadly similar prices to customers located in the EEA while it offers a broader selection of products at different prices to customers located outside the EEA, in particular in the US.[25]

4.1.2.3. The Commission's assessment

(32) On balance, the results from the market investigation suggest that the relevant geographic markets are national and possibly regional in scope.

(33) ***First***, several market participants confirmed the existence of national barriers to entry. According to one customer of Command Alkon for instance '*the software used may vary across Member States because each Member State may have a specific set of norms applicable to the production of ready-mix concrete*'.[26]

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24 Commission decision of 29 November 2013 in case COMP/M.7005 - *Schneider / Invensys*, paras. 25-30; Commission decision of 27 April 2007 in case M.4608 – *Siemens / UGS*, paras. 12 and 19.

25 Form CO, para. 170.

26 Non-confidential minutes of a call with a customer held on 18 November 2021.

Likewise, another customer explained that '*There are significant differences between automation software solutions in terms of local characteristics and requirements*'.

(34) This is also confirmed by competitors of Command Alkon. According to one of them, for instance: '*while there is a unified EU standard, EN 206 and EN12620, certain Member States have also introduced country-specific standards that apply on top of EU standards*'.[27] Likewise, another competitor of Command Alkon explained that '[s]*ervice availability and language are the main barriers*'.[28]

(35) ***Second***, the Parties' internal documents confirm the existence of national barriers to entry. For instance, according to one of HeidelbergCement's document […]:

Figure 6 – Geographic market: national barriers to entry

[…]

Source: Annex RFI4 Q.3.6

(36) ***Third***, internal documents also confirm the relevance of national market shares. By way of illustration, the below extract from one of HeidelbergCement's internal documents provide national market share estimates of Command Alkon and its competitors in France and Germany:

Figure 7 – Geographic market: national market share estimates

[…]

Source: Annex RFI4 Q.3.6.

(37) However, the exact geographic market definition can be left open as the Transaction does not give rise to competition concerns under any plausible market definition. For the purpose of this case, the Commission will carry out its analysis under national markets, which is where Command Alkon's market shares and market power are the highest.

4.2. Heavy building materials (downstream)

(38) In the EEA, HeidelbergCement offers aggregates, cement and ready-mix concrete in all Member States except Cyprus, Finland, Ireland, Luxembourg, Malta, Portugal and Slovenia. In addition, HeidelbergCement also offers pre-cast concrete in France and Germany.[29]

4.2.1. Aggregates

4.2.1.1. Product market

(A) The Commission's precedents

(39) In past decisions, the Commission has considered aggregates as a separate product market. The Commission has also considered, but ultimately left open, a further segmentation between (i) primary aggregates (crushed rock, gravel and sand) and

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27 Non-confidential minutes of a call with a competitor on 5 January 2022.

28 Non-confidential response to question 23.2 from questionnaire Q1 (competitors).

29 Annex RFI 5 Q.1.1.

(ii) secondary/recycled aggregates (such as colliery and china clay waste, slate, power station ash, slags and demolition/construction waste).

(40) Within the primary aggregates category, the Commission has also considered, but ultimately left open, a further distinction between (i) sand and gravel and (ii) crushed rock.[30]

(B) The Notifying Party's views

(41) The Notifying Party does not contest the product market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(42) In the case at hand, the market investigation confirmed the relevance of the Commission's decisional practice. In any event, plausible segmentations between primary and secondary aggregates, and within primary aggregates, between sand and gravel, on the one hand, and crushed rock, on the other hand, can be left open, as the Transaction does not give rise to competition concerns under any of these segments.

(43) For the purposes of this Decision, the analysis will be conducted on the narrowest plausible product segment, i.e. on the segments for primary aggregates and secondary aggregates, with a further segmentation within primary aggregates between sand and gravel, on the one hand, and crushed rock, on the other hand.

4.2.1.2. Geographic market

(A) The Commission's precedents

(44) From a geographic point of view, the Commission has considered the aggregates market to be local or at most national in scope and has retained a radius of 50 to 80 km depending on the particularities of the areas concerned.[31]

(B) The Notifying Party's views

(45) The Notifying Party does not contest the geographic market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(46) In the case at hand, the market investigation confirmed the relevance of the Commission's decisional practice. In any event, the question whether the market is local or national in scope can be left open, as the Transaction does not give rise to any competition concerns under any of these market definitions. For the purposes of this Decision, as explained in further detail below, the Commission will carry out its analysis on national markets.[32]

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30 Commission decision of 26 May 2016 in case M.7744 – *HeidelbergCement / Italcementi*, paras. 48-49.

31 Commission decision of 6 September 2006 in case M.4298 – *Aggregate Industries / Foster Yeoman*, para. 13; decision of 30 June 2006 in case M.4719 – *Heidelberg Cement / Hanson*; decision of 26 May 2016 in case M.7744 – *HeidelberCement / Italcementi*, paras. 52-54.

32 See section 5.2.1.2.

4.2.2. Cement

4.2.2.1. Product market

(A) The Commission's precedents

(47) In past decisions, the Commission has defined distinct product markets for white cement and grey cement.[33]

(B) The Notifying Party's views

(48) The Notifying Party does not contest the product market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(49) In the case at hand, the market investigation confirmed the relevance of the Commission's decisional practice. For the purposes of this Decision, the analysis will be carried out on the segments for white cement and grey cement separately.

4.2.2.2. Geographic market

(A) The Commission's precedents

(50) From a geographic point of view, the Commission has considered that the geographic market for grey cement consists of a group of geographic markets centred on different cement plants, overlapping with one another. The scope for the relevant geographic markets was determined by the distance from the plant at which cement may be sold. Generally, radii of 150 km or 250 km have been taken into account.[34]

(51) As for white cement, the Commission has considered this market to be at least EEA-wide while leaving open the possibility to define national markets.[35]

(B) The Notifying Party's views

(52) The Notifying Party does not contest the geographic market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(53) In the case at hand, the market investigation confirmed the relevance of the Commission's decisional practice. In any event, the market definition can be left open, as the Transaction does not give rise to competition concerns irrespective of the exact scope of the geographic market. For the purposes of this Decision, as explained in further detail below, the Commission will carry out its analysis on national markets.[36]

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33 Commission decision of 26 May 2016 in case M.7744 – *HeidelbergCement / Italcementi*, paras. 21 et seq.
34 Commission decision of 26 May 2016 in case M.7744 – *HeidelbergCement / Italcementi*, paras. 34-41.
35 Commission decision of 26 May 2016 in case M.7744 – *HeidelbergCement / Italcementi*, paras. 44-47.
36 See section 5.2.1.2.

4.2.3. Ready-mix concrete

4.2.3.1. Product market

(A) The Commission's precedents

(54) In past decisions, the Commission has consistently considered ready-mixed concrete as a single, distinct product market regardless of different ready-mixed concrete specifications and the facilities used (mobile or fixed plants).[37]

(B) The Notifying Party's views

(55) The Notifying Party does not contest the product market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(56) In the case at hand, the Commission does not see any reason to depart from its previous decisional practice. For the purposes of this Decision, the analysis will thus be conducted on a single market for ready-mixed concrete.

4.2.3.2. Geographic market

(A) The Commission's precedents

(57) The Commission has considered that the geographic market for ready-mixed concrete can be defined as catchment areas around ready-mix concrete plants with a radius of 25 km around production facilities according to the most recent decisions.[38]

(B) The Notifying Party's views

(58) The Notifying Party does not contest the geographic market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(59) In the case at hand, the market investigation confirmed the relevance of the Commission's decisional practice. In any event, the market definition can be left open, as the Transaction does not give rise to competition concerns irrespective of the exact scope of the geographic market. For the purposes of this Decision, as explained in further detail below, the Commission will carry out its analysis on national markets.[39]

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37 Commission decision of 26 May 2016 in case M.7744 – *HeidelbergCement / Italcementi*, paras. 55-57.

38 Commission decision of 26 May 2016 in case M.7744 – *HeidelbergCement / Italcementi*, paras. 58-59.

39 See section 5.2.1.2.

4.2.4. Pre-cast concrete

4.2.4.1. Product market

(A) The Commission's precedents

(60) Pre-cast concrete products are extremely diverse and comprise ready-made pillars, beams, joists, road barriers, containers, railway sleepers and blocks for house construction.[40] The Commission has previously considered that these different concrete products form part of a single product market for pre-cast concrete products.

(61) The Commission has also considered that there is a separate sub-market for concrete building blocks[41] and has considered that paving materials made of concrete, pre-cast floors and building materials for load-bearing walls (such as aerated concrete or pre-cast concrete walls) could each fall into separate product markets while ultimately leaving that question open.[42]

(B) The Notifying Party's views

(62) The Notifying Party does not contest the product market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(63) In the case at hand, the market investigation confirmed the relevance of the Commission's decisional practice. In any event, plausible segmentations for concrete building blocks, paving materials made of concrete, pre-cast floors and building materials for load-bearing walls can be left open, as the Transaction does not give rise to competition concerns under any plausible market definition.

(64) For the purposes of this Decision, the analysis will be conducted on the narrowest plausible product segments, i.e. concrete building blocks, paving materials made of concrete, pre-cast floors and building materials for load-bearing walls.

4.2.4.2. Geographic market

(A) The Commission's precedents

(65) Geographic-wise, the Commission has considered that the overall market for pre-cast concrete products was national in scope. For the sub-markets for concrete building blocks, however, while leaving the question open, the Commission has considered the definition of national or local markets.

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40 M.2317 – *Lafarge/Blue Circle (II)*, 1 March 2001; M.3713 – *Holcim/Aggregate Industries*, 14 March 2003, para. 10; M.1874 – *Lafarge/Blue Circle*, 7 April 2000, para. 11; M.4719 – *HeidelbergCement/Hanson*, 7 August 2007, para. 24.

41 M.1779 – *Anglo American/Tarmac*, 13 January 2000, paras. 19 and 24; M.3713 – *Holcim/Aggregate Industries*, 14 March 2003; M.4719 – *HeidelbergCement/Hanson*, 7 August 2007, paras. 24 and 26.

42 M.3267 - *CRH/Cementbouw*, 29 September 2003, recitals 12 to 14; M.4719 – *HeidelbergCement/Hanson*, 7 August 2007, paras. 25 and 26.

(B) The Notifying Party's views

(66) The Notifying Party does not contest the geographic market definition set out by the Commission in its precedents.

(C) The Commission's assessment

(67) In the case at hand, the market investigation confirmed the relevance of the Commission's decisional practice. In any event, the market definition can be left open, as the Transaction does not give rise to competition concerns irrespective of the exact scope of the geographic market. For the purposes of this Decision, as explained in further detail below, the Commission will carry out its analysis on national markets.[43]

5. COMPETITIVE ASSESSMENT

(68) As explained above, the Transaction gives rise to vertical relationships between Command Alkon's HBM automation software solutions (upstream) and HeidelbergCement's activities for the production of HBM (downstream):

(a) Command Alkon offers automation software solutions for the production of heavy building materials such as (i) concrete (i.e. ready-mix and pre-cast concrete), (ii) asphalt, (iii) aggregates and (iv) cement.[44] Command Alkon also sells automation software solutions to contractors who may resell them as part of broader projects. From a geographic point of view, Command Alkon is mainly active in the U.S. but also in Europe, where it generated most of its turnover for 2020 in the Netherlands (EUR […]), France (EUR […]) and Belgium (EUR […]).[45]

(b) In the EEA, HeidelbergCement mainly produces aggregates, cement, ready-mix concrete and to a lesser extent pre-cast concrete.[46] From a geographic point of view, HeidelbergCement is active in almost all Member States.[47]

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43 See section 5.2.1.2.

44 Form CO, para. 90. Command Alkon's products can be classified into six broad categories: (i) production (i.e. solutions to manage processes and equipment that produce the end material); (ii) telematics and dispatch (i.e. solutions to digitally track, manage and optimize truck dispatching, monitor real-time in-transit location, and track delivery status and driver performance); (iii) quality control (i.e. solutions to monitor, test and report on concrete product quality during production, in-transit to job sites and on-site prior to placement), (iv) business systems (i.e. solutions used for 'quote to cash' management with connectivity through sales / ordering to accounts receivable); (v) business analytics (i.e. solutions for reporting and insights driven by integrated operational and financial data from across the business); (vi) the CONNEX platform (i.e. a cloud-based data and software platform that increases collaboration between contractors and project owners on one side, and their heavy material producers, suppliers and haulers on the other hand). The CONNEX platform is not yet available in the EEA but Command Alkon […] (Form CO, para. 288).

45 Command Alkon also has activities in Finland (EUR […]), Ireland (EUR […]), Romania (EUR […]), Italy (EUR […]), Luxembourg (EUR […]), Germany (EUR […]) and Greece (EUR […]).

46 HeidelbergCement does not sell asphalt in the EEA.

47 With the exception of Cyprus, Finland, Ireland, Luxembourg, Malta, Portugal and Slovenia.

5.1. Legal framework

(69) Pursuant to Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position.[48] In this respect, a merger can entail horizontal and/or non-horizontal effects.

(70) With particular regard to non-horizontal effects, a merger can entail such effects when it involves companies operating at different levels of the same value chain or in closely related markets.

(71) In assessing potential vertical effects of a merger, the Commission analyses, among others, whether the merger results in foreclosure so that actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing those companies' ability and/or incentive to compete.[49] Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus 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. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of their competitors as well — are as a result able to profitably increase the price charged to consumers.

(72) The Non-Horizontal Merger Guidelines distinguish between two forms of foreclosure: (i) input foreclosure, when access of downstream rivals to supplies is hampered;[50] and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered.[51]

(73) In assessing both types of foreclosure, the Commission assesses whether the merged entity (i) would have the ability to engage in foreclosure, (ii) whether it would have the incentive to do so, and (iii) what would be the overall impact on effective competition in the affected markets.

(74) The present Section 5 assesses whether the Transaction is likely to raise vertical non-coordinated effects on the markets examined in Section 4.

5.2. Assessment

5.2.1. Market shares

5.2.1.1. Command Alkon (upstream)

(75) Command Alkon's products may serve different functionalities (e.g. batching, fleet tracking, pricing and quoting, dispatching, etc.) which may be grouped into macro-categories (i.e. production, telematics and dispatch, business systems, quality control and business analytics). Within these macro-categories, Command Alkon's market share exceeds 30% only with respect to ready-mix concrete applications, for

48 For specific rules concerning the EEA, see Annex XIV to the EEA Agreement.
49 Non-Horizontal Merger Guidelines, paras. 20-29.
50 Non-Horizontal Merger Guidelines, para. 31.
51 Non-Horizontal Merger Guidelines, para. 58.

batching (Netherlands, France and Belgium), dispatching (Netherlands) and quality control (Netherlands):[52]

Table 1 – Command Alkon's market shares by functionality and end-application (2019-2021)[53]

2021	Functionality	End application	Command Alkon	Competitors		
Netherlands	Batching	*Ready-mix*	[60-70]%	Jonker: [20-30]%	Dorner: [0-5]%	Sauter: [0-5]%
	Dispatching	*Ready-mix*	[40-50]%	Jonker: [10-20]%	Dorner: [0-5]%	ACMS: [0-5]%
	Quality control	*Ready-mix*	[60-70]%	Jonker: [20-30]%	Sauter: [0-5]%	ACMS: [0-5]%
France	Batching	*Ready-mix*	[30-40]%	RSAI: [30-40]%	Marcotte: [5-10]%	Not available
Belgium	Batching	*Ready-mix*	[30-40]%	Dorner: [0-5]%	TH: [0-5]%	Jonker: [0-5]%

2020	Functionality	End application	Command Alkon	Competitors		
Netherlands	Batching	*Ready-mix*	[60-70]%	Jonker: [20-30]%	Dorner: [0-5]%	Sauter: [0-5]%
	Dispatching	*Ready-mix*	[40-50]%	Jonker: [10-20]%	Dorner: [0-5]%	ACMS: [0-5]%
	Quality control	*Ready-mix*	[50-60]%	Jonker [20-30]%	Sauter: [0-5]%	ACMS: [0-5]%
France	Batching	*Ready-mix*	N/A	RSAI: [30-40]%	Marcotte: [5-10]%	Not available
Belgium	Batching	*Ready-mix*	[30-40]%	Dorner: [0-5]%	TH: [0-5]%	Jonker: [0-5]%

2019	Functionality	End application	Command Alkon	Competitors		
Netherlands	Batching	*Ready-mix*	[60-70]%	Jonker: [20-30]%	Dorner: [0-5]%	Sauter: [0-5]%
	Dispatching	*Ready-mix*	[40-50]%	Jonker: [10-20]%	Dorner: [0-5]%	ACMS: [0-5]%
	Quality control	*Ready-mix*	[50-60]%	Jonker: [20-30]%	Sauter: [0-5]%	ACMS: [0-5]%
France	Batching	*Ready-mix*	[20-30]%[54]	RSAI: [30-40]%	Marcotte: [5-10]%	Not available
Belgium	Batching	*Ready-mix*	[30-40]%	Dorner: [0-5]%	TH: [0-5]%	Jonker: [0-5]%

Source: Annex RFI 4 Q.17.1

52 The Parties confirmed that Command Alkon's market share would remain below 30% under any other plausible product and geographic market definition (Form CO, para. 247).

53 These market shares are based on the number of plants in which Command Alkon's automation software solutions are used.

54 Despite the fact that Command Alkon's market share was lower than 30% on this market in 2019, this market is affected as Command Alkon's market share in 2021 was above 30%.

5.2.1.2. HeidelbergCement (downstream)

(76) The Parties were not able to provide market share estimates at catchment area level but explained that HeidelbergCement's market shares at national level reflect those at catchment area level.[55] In any event, all catchment areas are vertically affected due to Command Alkon's upstream market shares and HeidelbergCement's market shares at catchment area level would not affect the outcome of the assessment.

(77) Indeed, with respect to customer foreclosure, Command Alkon's competitors are active nationally in the Member States where they operate[56], so HeidelbergCement's market shares at national level better reflect the ability of the merged entity to engage in customer foreclosure.

(78) As for input foreclosure, HeidelbergCement's downstream market shares are relevant for the assessment of the incentive to engage in input foreclosure[57], which must also take account of the closeness of competition between the merged entity and its downstream rivals.[58]

(79) In the case at hand, the market investigation confirmed that HeidelbergCement's closest competitors are multinational companies active across a number of catchment areas in the Member States where they operate.[59] If HeidelbergCement were to foreclose these downstream competitors, the latter could retaliate across catchment areas (i.e. at national level). Accordingly, national market shares better reflect HeidelbergCement's incentive to engage in input foreclosure.[60]

(80) Against this background, the table below provides HeidelbergCement's market shares on downstream markets for aggregates, cement, ready-mix and pre-cast concrete at EEA and national levels (in Member States where Command Alkon is active):

55 Form CO, para. 262.

56 Annex RFI 4 Q.3.6.

57 Non-Horizontal Guidelines, para. 43.

58 i.e., the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated firm can capture (Non-Horizontal Guidelines, para. 42).

59 These are the competitors that HeidelbergCement would have a strong interest to foreclose since they compete with HeidelbergCement across several catchment areas, so their exit would entail higher demand diversion within the meaning of para. 42 of the Non-Horizontal Guidelines.

60 This is consistent with the market investigation which confirmed that HeidelbergCement would have little incentive to foreclose local players (Non-confidential minutes of a call with a customer held on 24 November 2021) and that switching costs are higher for customers with broader geographic footprints (Non-confidential response to question 21.1 from questionnaire Q2 (customers)).

Table 2 – HeidelbergCement's market shares

2020[61]	Aggregates		Cement		Ready-mix concrete	Pre-cast concrete[62]	
	Primary[63]	Secondary	White	Grey		Load bearing walls and ceilings	Paving, landscaping and gardening
EEA-wide	[0-5]%	[0-5]%	[10-20]-[10-20]%	[20-30]-[20-30]%	[5-10]-[10-20]%	[0-5]%	[0-5]%
Belgium	[10-20]-[20-30]%	[0-5]%	N/A	[30-40]-[40-50]%	[10-20]-[20-30]%	N/A	N/A
France	[5-10]-[10-20]%	[0-5]%	N/A	[20-30]%	[10-20]-[10-20]%	N/A	[0-5]%
Germany	[0-5]%	[0-5]%	N/A	[20-30]-[20-30]%	[5-10]-[10-20]%	[0-5]%	[5-10]-[10-20]%
Greece	N/A	N/A	N/A	[10-20]-[10-20]%	N/A	N/A	N/A
Italy	[0-5]%	[0-5]%	N/A	[20-30]%	[5-10]-[10-20]%	N/A	N/A
Latvia	[5-10]-[10-20]%	[0-5]%	N/A	[10-20]-[20-30]%	[10-20]-[10-20]%	N/A	N/A
Netherlands	[5-10]-[10-20]%	[0-5]%	N/A	[40-50]-[50-60]%	[20-30]-[20-30]%	N/A	N/A
Romania	[0-5]%	[0-5]%	N/A	[20-30]%	[0-5]%	N/A	N/A

Source: Annex RFI 5 Q.1.1

5.2.2. Input foreclosure

5.2.2.1. Ability

(81) The results of the market investigation confirm that Command Alkon will have the ability to engage in input foreclosure post-Transaction.

(82) ***First***, the market shares of Command Alkon in the Netherlands for HBM automation software solutions used in the production of ready-mix concrete exceeds, or comes close to, [50-60]% on the segments for batching ([60-70]%), dispatching ([40-50]%) and quality control ([60-70]%).[64] These market shares are consistent with the responses received in the course of the market investigation[65] and suggest the existence of a significant degree of market power.[66]

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61 HeidelbergCement confirmed that there have been no material changes over the past three years to the share estimates provided in this table (see response to RFI 9, question 1).

62 HeidelbergCement confirmed that its market shares on segments for (i) pre-cast concrete building blocks, (ii) pre-cast concrete for paving materials, (iii) pre-cast concrete floors and (iv) pre-cast concrete building materials for load-bearing walls are below 30% at both EEA level and national level in all of the listed Member States where Command Alkon is active (Annex RFI 8.4).

63 HeidelbergCement confirmed that its market shares on segments for (i) sand and gravel and (ii) crushed rock are below 30% at both EEA level and national level in all of the listed Member States where Command Alkon is active (Annex RFI 8.4).

64 In addition, Command Alkon's market share exceeds 30% in France and Belgium, on the ready-mix segment and for batching functionalities (with market shares of respectively [30-40]% and [30-40]%).

65 Non-confidential minutes of a call with a competitor held on 5 January 2022 ('*In the Netherlands, the Company estimates that Command Alkon* […] *has a market share of 80%*'). In the meantime, a customer of Command Alkon in the Netherlands explained that '*In the upstream market for the provision of software services to the ready-mix industry*, [Customer] *estimates that Command Alkon is likely used in*

(83) ***Second***, Command Alkon's solutions are critical for current customers of Command Alkon[67] who appear to be locked-in as a result of (i) the high level of integration of Command Alkon's solutions in their production process and (ii) the high switching costs that they face. Consequently, if Command Alkon were to restrict the access of these customers to its automation solutions[68], the latter would have to stop production for a long period of time and to make significant investments in order to change supplier.

(84) In the first place, the market investigation confirmed that Command Alkon's solutions are critical because of their high level of integration in the production process of customers. As one customer explains: '*Les centrales ne peuvent pas fonctionner sans un logiciel d'automation et un automate*'.[69] Likewise, another customer expressly confirmed that '*Command Alkon* […] *is a critical software supplier*'.[70]

(85) This is also confirmed by the Parties' internal documents. For instance, according to a market report made at the request of HeidelbergCement, Command Alkon's software solutions are '[…]' and customers are '[…]', because this would entail: '[…]'.

Figure 8 – Input foreclosure: mission-critical software

[…]

Source: Annex RFI4 Q.3.6

(86) According to the same document, "[…]" offered by Command Alkon are critical […]:

Figure 9 – Input foreclosure: expected dis-synergies

[…]

Source: Annex RFI 4 Q.3.6

(87) This is consistent with another market report made at the request of Thoma Bravo when it acquired Command Alkon in 2019 and according to which […] are the most '[…]' functionalities offered by Command Alkon:

Figure 10 – Input foreclosure: mission critical functionalities

[…]

Source: Annex RFI4 Q2.11

25-30% as dispatching system in the Netherlands (incl. those of [Customer], *Heidelberg and Cementbow). In terms of volumes of ready-mix concrete produced using Command Alkon's software, however, this market share could reach up to 40-50%*' (Non-confidential minutes of a call with a customer held on 24 November 2021).

66 Non-Horizontal Guidelines, para. 34 ('*For an input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power*').

67 Non-Horizontal Guidelines, para. 34.

68 e.g. by refusing to renew their licenses, to give them access to updates or by increasing the price of ancillary services for installation or maintenance

69 Non-confidential response to question 15.1 from questionnaire Q2 (customers).

70 Non-confidential minutes of a call with a customer held on 29 November 2021.

(88) This critical nature of Command Alkon's solutions is further confirmed by the fact that a majority of customers consider these solutions necessary to compete effectively downstream.[71]

(89) In the second place, the market investigation also confirmed the existence of particularly high switching costs for current customers of Command Alkon.[72] According to one customer: '*HeidelbergCement's involvement in Command Alkon, may lead to* [Customer] *having to migrate away from Command's products, something which would be very costly and would ultimately affect their competitiveness. This could be for a variety of reasons including restricting access to products or new developments, increasing prices or accessing* [Customer]*'s information*'.[73]

(90) In the same vein, another customer explained that if it were to switch supplier '[p]*roduction would completely stop. Direct cost due to production stop estimated at one year of profit loss and one year of fixed costs, investment cost and serious reputation damage*'.[74]

(91) Command Alkon's competitors also confirmed that switching costs are high, especially for large customers that generally mix and match between the products of HBM automation software suppliers and other Enterprise Resource Planning ('ERP') software solutions. According to one competitor, for example: '*some customers have an ERP software already installed (e.g. an SAP-like invoicing system) and do not want to change it. Therefore, the Company has to integrate its software into the existing ERP system, which can be very time-consuming. This is usually the case with large customers like HeidelbergCement, who need SAP for their business*'.[75]

(92) This is also confirmed by the Parties' internal documents. By way of illustration, the below extract from one of Command Alkon's internal documents confirms that [a majority] of its customers are '*unlikely to switch solutions*':

Figure 11 – High switching costs (Command Alkon's internal document)

[…]

Source: Annex RFI4 Q2.6

(93) Likewise, the market report made at the request of HeidelbergCement quotes one customer of Command Alkon according to which: '[…]'.

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71 63% of Command Alkon's customers explained that Command Alkon's automation software solutions are necessary for their companies to compete effectively (non-confidential responses to question 15 from questionnaire Q2 (customers)). As one customer explains: '*We think that the Command Alkon automation software helps us to produce and deliver our products efficiently*' (Non-confidential response to question 15.1 from questionnaire Q2 (customers)).

72 Non-Horizontal Guidelines, para. 34 ('*Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance* […] *it may* […] *be that the cost of switching to alternative inputs is relatively high*').

73 Non-confidential minutes of a call with a customer held on 29 November 2021.

74 Non-confidential response to question 23 from questionnaire Q2 (customers).

75 Non-confidential minutes of a call with a competitor held on 5 January 2022.

(94) In light of these high switching costs, current customers of Command Alkon are locked-in and competing automation software solutions do not constitute credible alternatives. As a result, the new entity will have the ability to foreclose HeidelbergCement's competitors that are current customers of Command Alkon.

(95) This conclusion is not put into question by the arguments of the Parties, according to which (i) HeidelbergCement will only acquire joint control over Command Alkon, (ii) Command Alkon's software is not a critical component or a significant source of product differentiation for HBM production and (iii) Command Alkon's software represents a negligible cost factor relative to the price of HBM.[76]

(96) As for the first argument, the ownership structure of Command Alkon is irrelevant for the purposes of determining whether the merged entity will have the ability to engage in input foreclosure. However, as set out in the Non-Horizontal Guidelines and as explained in further detail below, the ownership structure of Command Alkon may be relevant for assessing the incentive of Command Alkon to foreclose HeidelbergCement's downstream competitors post-Transaction.

(97) As for the other arguments, as explained in the Non-Horizontal Guidelines, irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market.[77] Accordingly, there is no need for Command Alkon's software to represent a significant cost factor or a significant source of product differentiation for this software to be a critical component. As explained above, it is because Command Alkon's customers could not longer produce HBM materials without Command Alkon's software that this product can be regarded as a critical input.

(98) The Commission thus takes the view that the new entity will have the ability to engage in input foreclosure, which makes it necessary to examine the incentive of the new entity to engage in such strategy post-Transaction.

5.2.2.2. Incentive

(99) According to the Parties, Command Alkon would have no incentive to foreclose HeidelbergCement's competitors post-Transaction because: (i) an increase in the price of Command Alkon's software would not induce a material increase of the costs incurred by downstream rivals, (ii) Command Alkon's customers are multinational customers which, in response to an increase in price in one Member States (e.g. the Netherlands), would be able to retaliate in other Member States and (iii) one of the key rationales of HeidelbergCement's investment in Command Alkon is the plan to accelerate Command Alkon's expansion in Europe […].[78]

(100) These arguments do not rule out the existence of an incentive, on the part of Command Alkon and at HeidelbergCement's push, to foreclose HeidelbergCement's competitors. Indeed, the costs that Command Alkon's software solutions represent for HeidelbergCement's competitors are relevant for assessing the ability to foreclose downstream rivals, not Command Alkon's incentive to do so. In any event,

76 Form CO, para. 193.
77 Non-Horizontal Guidelines, para. 34.
78 Form CO, para. 194.

the fact that Command Alkon's software solutions represent a small proportion of the costs of downstream rivals is insufficient to conclude that these products do not constitute an important input.[79]

(101) Besides, the results of the market investigation confirmed that Command Alkon's customers include purely national players that rely on Command Alkon's software solutions. If Command Alkon were to increase the price of its software solutions in national markets where it has significant market shares, these customers would not be able to retaliate in other Member States.[80] In addition, given the critical nature of Command Alkon's software solutions and the high switching costs that downstream rivals face, including in Member States where Command Alkon's market share is limited, the risk of retaliation by multinational customers in other national markets is unlikely.

(102) Finally, the alleged intent of HeidelbergCement to accelerate Command Alkon's overall expansion in Europe is of limited relevance if it had the incentive to engage locally in input foreclosure.

(103) Notwithstanding the above, Command Alkon's ownership structure must be taken into account and the fact that HeidelbergCement will only acquire a co-controlling minority shareholding in Command Alkon limits the latter's incentive to foreclose HeidelbergCement's rivals.[81] Indeed, Thoma Bravo will keep a co-controlling interest in Command Alkon and is not active in the production of heavy-building materials. Overall, this point was confirmed by the results of the market investigation.

(104) ***First***, the data collected in the course of the market investigation shows that the closest competitors of HeidelbergCement (i.e. large competitors active across several Member States) together represent at least [30-40]% of Command Alkon's EEA revenues.[82] If Command Alkon were to foreclose these downstream rivals, any retaliation from the latter could entail a loss of [30-40]% of Command Alkon's turnover upstream. This would significantly jeopardize Command Alkon's activities to the detriment of Thoma Bravo.

(105) ***Second***, the only customer who expressed input foreclosure concerns in the course of the market investigation stressed that this was because, among other things: '*HeidelbergCement may further increase its interest in Command Alkon*'.[83] This is consistent with the fact that a joint control may not be sufficient to give Command Alkon an incentive to foreclose HeidelbergCement's rivals. If HeidelbergCement acquires sole control over Command Alkon in the future, this would be a different concentration, which would be subject to a subsequent assessment.

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79 Non-Horizontal Guidelines, para. 34.

80 Unlike customers active across several Member States who could, in principle, respond by switching supplier (or turning to an in-house solution), not only for the markets where Command Alkon has a high market share, but across all locations where they use Command Alkon's solutions.

81 Non-Horizontal Guidelines, para. 45.

82 Annex RFI 8.6.

83 Non-confidential minutes of a call with a customer held on 29 November 2021.

(106) ***Third***, the majority of customers of Command Alkon also did not express any input foreclosure concerns with respect to the Transaction.[84]

(107) ***Fourth***, the Parties' internal documents show that Command Alkon's strategy focuses on the […][85].[86] They also confirm HeidelbergCement's intention to limit potential dis-synergies arising from the Transaction.[87] For the reasons above, such a strategy would be significantly affected and is thus incompatible with an input foreclosure strategy post-Transaction.

(108) On balance, the Commission thus concludes that Command Alkon will lack the incentive to foreclose HeidelbergCement's downstream rivals post-Transaction.

5.2.2.3. Impact

(109) According to the Parties, if Command Alkon were to engage in an input foreclosure strategy post-Transaction, such strategy would not cause anticompetitive effects because: (i) Command Alkon's software represent a small part of customers downstream, (ii) credible alternative software suppliers will remain active on the market, (iii) HeidelbergCement's most important rivals are multinational players active across several segments downstream and (iv) downstream rivals would keep the possibility to develop internal in-house solutions.

(110) The market investigation elicited mixed results as to the impact of a potential input foreclosure strategy on the market. On the one hand, the majority of customers explained that the development of alternative in-house solutions would require time, significant investments and know-how, so this would not constitute a credible alternative.[88] Furthermore, as explained above, Command Alkon's software is a critical input for customers and switching costs are significant, so alternative software suppliers do not constitute credible alternatives for current customers.[89]

(111) On the other hand, a number of downstream rivals are unlikely to be affected if Command Alkon were to engage in input foreclosure.[90] For instance, downstream rivals that do not currently use Command Alkon's solutions could continue to use alternative solutions. Likewise, Command Alkon's customers that are active across several Member States would be able to retaliate in response to an input foreclosure strategy and are thus unlikely to be foreclosed.

(112) However, for the reasons explained above, the question of the impact can be left open as Command Alkon will lack the incentive to engage in input foreclosure post-Transaction.

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84 Non-confidential response to question 8.1 from questionnaire Q2 (customers). See also: non-confidential minutes of a call with a customer held on 18 November 2021; non-confidential minutes of a call with a customer held on 24 November 2021.

85 See e.g. Annex RFI 4 Q2.6 (p.28).

86 See e.g. Annex RFI 4 Q.3.6 (p.46) and Annex RFI 4 Q.2.11 (p.62).

87 Annex RFI 4 Q3.6.

88 Non-confidential replies to question 7.1 from questionnaire Q2 (customers). See also: non-confidential minutes of a call with a customer held on 29 November 2021; Non-confidential minutes of a call with a competitor held on 5 January 2022.

89 See section 5.2.2.1.

90 Non-Horizontal Guidelines, para. 50.

5.2.3. Customer foreclosure

5.2.3.1. Ability

(113) The Parties argue that the new entity will not have the ability to foreclose Command Alkon's competitors since HeidelbergCement is not an essential customer. Overall, the results of the market investigation confirmed this point.

(114) ***First***, in accordance with the Non-Horizontal Guidelines, for customer foreclosure to be a concern, it must be the case that the vertical merger involves a company, which is an important customer with a significant degree of market power in the downstream market.[91]

(115) In the case at hand, HeidelbergCement's downstream market share at national level exceeds 30% only on the segment for cement in Belgium (30-40%) and the Netherlands (40-50%). Such levels of market shares leave sufficient room for Command Alkon's upstream competitors to compete for a considerable part of the market. Since there are no other indications pointing at the existence of market power, it can be concluded that HeidelbergCement will not have sufficient market power downstream for customer foreclosure to be a concern.

(116) ***Second***, all the competitors of Command Alkon who participated in the market investigation confirmed that HeidelbergCement represents less than 30% of their EEA revenues.[92]

(117) In view of the foregoing, the Commission thus concludes that Command Alkon will lack the ability to foreclose Command Alkon's upstream competitors.

5.2.3.2. Incentive

(118) The Commission also considers that the merged entity will lack the incentive to engage in customer foreclosure, as HeidelbergCement will only acquire a minority co-controlling shareholding in Command Alkon. This will limit its incentive to foreclose competitors upstream, as HeidelbergCement would bear all of the associated costs but would be entitled to only part of the gains.[93]

(119) Accordingly, the Commission finds that the new entity will lack the ability and incentive to engage in customer foreclosure so there is no need to consider the effect of any such strategy.

5.2.4. Information exchange

(120) Some respondents to the market investigation expressed concerns that HeidelbergCement may get access to commercially strategic information on its competitors via Command Alkon post-Transaction. By way of illustration, one

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91 Non-Horizontal Guidelines, para. 61.

92 Non-confidential replies to question 8.1 from questionnaire Q1 (competitors). This figure may for Command Alkon's competitors that are active across several segments, depending on the segment concerned. For these competitors, however, this figure confirms that HeidelbergCement is not a critical customer, either because it is not a significant customer on any of the segments on which they operate or because these competitors are active on different markets where HeidelbergCement is not a customer and to which their access will remain unchanged (Non-Horizontal Guidelines, para. 66).

93 See above, para. 104.

customer explained that '*HeidelbergCement could gain access to [Company X]'s data, without their knowledge and consent, especially when the information contained within Command Alkon's solutions contains* [Company]*'s most sensitive commercial information including customers, sites, prices, product mixes, volumes, etc.*'.[94]

(121) However, the information gathered by the Commission in the course of the market investigation confirms that HeidelbergCement will lack the ability and incentive to access competitively sensitive data on its competitors via Command Alkon.

(122) ***First***, the transaction documents expressly prohibit such access to competitively sensitive information that Command Alkon may have on HeidelbergCement's competitors. Indeed, the Limited Partnership Agreement prevents HeidelbergCement from accessing its competitors' commercially strategic information via Command Alkon.[95] Any such access would give rise to possible remedies, including injunctive relief, to the benefit of Thoma Bravo.[96]

(123) Likewise, according to the Limited Liability Company ('LLC') Agreement: […].[97]

(124) ***Second***, Command Alkon's customers are contractually protected against the improper use of their data by Command Alkon. By way of illustration, the contracts entered into between Command Alkon and its customers provide in clause 15(iii) that such confidential information will be disclosed only to Command Alkon's employees or other representatives who are subject to a duty of confidentiality to Command Alkon and have a need to know, and only to the extent necessary for Command Alkon to exercise its rights or obligations under the contract.[98]

(125) In this respect, the Parties expressly confirmed that '[n]*o commercially strategic information will be technically accessible to HeidelbergCement following the Proposed Transaction*' and that '*Command Alkon's shareholders or investors (including HeidelbergCement post-transaction) do not have access to Command Alkon's customer data. This includes (i) customer data stored in Command Alkon's products (which can include information such as pricing data, sales volumes, concrete mix designs, and order history); and (ii) data regarding the customers' commercial relationship with Command Alkon*'.[99]

(126) In these circumstances, Thoma Bravo would be aware if HeidelbergCement would get access to such competitively strategic information. Yet, Thoma Bravo would have no incentive to give HeidelbergCement access to such information, as this could be detrimental to Command Alkon's reputation and thus to the value of Thoma Bravo's investment.

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94 Non-confidential minutes of a call with a customer held on 29 November 2021. See also: non-confidential response to question 30 from questionnaire Q2 (customers).

95 Form CO, Annex 3.1.4 (section 13.4).

96 *Ibid*.

97 Form CO, Annex 3.1.3.

98 Form CO, Annex RFI 1 28.4.

99 Response to the (phase 1) request for information No. 7, question 1.

(127) ***Third***, this is consistent with the fact that the vast majority of customers who participated in the market investigation did not express concerns in this respect.[100] Likewise, a competitor of Command Alkon explained that "[it] *considers unlikely that HeidelbergCement would want access to confidential information of its competitors via Command Alkon products. This would be technically possible, but unthinkable for the image of Command Alkon. Command Alkon customers outside HeidelbergCement will most likely also protect themselves contractually*".[101] This is also consistent with the Parties' internal documents.[102]

(128) Accordingly, the Commission takes the view that HeidelbergCement will lack the ability and incentive to access to competitively sensitive information via Command Alkon post-Transaction.

6. CONCLUSION

(129) For the above reasons, the European Commission has decided not to oppose the notified concentration and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

[100] According to 80% of the non-confidential opinions expressed by customers, HeidelbergCement will not get access to competitively strategic information on its competitors post-Transaction (Non-confidential response to question 28 from questionnaire Q2 (customers)).

[101] Non-confidential minutes of a call with a competitor held on 5 January 2022.

[102] Annex RFI 4 Q.3.6 (slides 27-28).