Summary of Commission Decision

of 5 April 2017

declaring a concentration incompatible with the internal market and the functioning of the EEA Agreement

(Case M.7878 — HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia)

(notified under document C(2017) 1650)

(Only the English version is authentic)

(Text with EEA relevance)

(2017/C 440/09)

On 5 April 2017 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ([1]), and in particular Article 8(3) of that Regulation. A non-confidential version of the full Decision, as the case may be in the form of a provisional version, can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html

I. THE PARTIES AND THE OPERATION

(1) On 5 September 2016 the Commission received a notification ([2]) of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertakings HeidelbergCement AG ('HeidelbergCement', Germany) and Schwenk Zement KG ('Schwenk', Germany) acquire, through their jointly controlled joint venture company Duna-Dráva Cement Kft. ('DDC'), joint control within the meaning of Article 3(1)(b) of the Merger Regulation of the whole of the undertakings Cemex Hungária Építőanyagok Kft ('Cemex Hungary') and Cemex Hrvatska dd ('Cemex Croatia'), both part of Cemex, S.A.B. de C.V ('Cemex Group'), by way of purchase of shares ('the Transaction') ([3]).

(2) The seller, the target companies and the buyers are all active in the production and distribution of building materials, in particular cement, aggregates, ready-mixed concrete and other related products.

(3) HeidelbergCement is a German producer but carries out its commercial activities globally in more than 40 countries.

(4) Schwenk is a family-held limited partnership whose business is focused on Germany but it also has activities in Central and Eastern Europe.

(5) DDC is a full-function joint venture company equally owned and jointly controlled by HeidelbergCement and Schwenk, which is active in Hungary, Croatia and in parts of the Western Balkans (i.e. Bosnia-Herzegovina, Serbia, Macedonia, Montenegro and Albania, all together referred to as 'the Broader Region'). Outside of Hungary, DDC operates one cement plant and 11 ready-mix concrete plants.

(6) Cemex group is a global building materials company headquartered in Mexico with operations worldwide. Cemex Hungary is mainly active in the production and sale of ready-mix concrete which is only sold in Hungary. Cemex Croatia is active in the production and distribution of grey cement, ready-mix concrete, clinker, and aggregates. Besides its exports to North Africa and the Middle East, Cemex Croatia's activities mainly focus on Croatia and the Broader Region but it also supplies to Italy, Slovenia and Malta. Cemex Croatia has three cement plants and operates four sales terminals in Croatia.

(7) Against the background of a framework agreement with Rohrdorfer Baustoffe Austria AG (which was to acquire Cemex Austria, the mother company of Cemex Hungary), HeidelbergCement and Schwenk acquire, through DDC, the companies Cemex Hungary and Cemex Croatia:

(8) Pursuant to a sale and purchase agreement signed on 11 August 2015, DDC would acquire from Cemex 100 % of the shares in Cemex Croatia.

(9) In a parallel transaction, DDC would acquire 100 % of the shares in Cemex Hungary from Rohrdorfer Baustoffe Austria AG.

([1]) OJ L 24, 29.1.2004, p. 1.
([2]) OJ C 337, 14.9.2016, p. 7.
([3]) For simplicity and unless otherwise specified, in the following HeidelbergCement, Schwenk, DDC, Cemex Hungary and Cemex Croatia are jointly referred to as the 'the Parties'. HeidelbergCement and Schwenk are referred to as 'the Notifying Parties'.

(10) The acquisition of Cemex Croatia and Cemex Hungary by DDC should be considered as a single concentration within the meaning of the Merger Regulation. The economic reality of the agreements is that DDC acquires control of Cemex Hungary and Cemex Croatia. The acquisitions of Cemex Hungary and Cemex Croatia by DDC were pursued at the same time and are linked through the framework agreement between Rohrdorfer and DDC.

(11) The Transaction thus involves the acquisition of joint control of Cemex Hungary and Cemex Croatia by HeidelbergCement and Schwenk (through DDC) by means of purchase of shares. The Transaction constitutes therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

II. **PROCEDURE**

(12) The Transaction was announced on 12 August 2015 and notified to the Commission on 5 September 2016.

(13) Before notification, on 22 June 2016, the Commission referred the assessment of the effects on the relevant markets in Hungary to be examined by the Hungarian Competition Authority, pursuant to Article 4(4) of the Merger Regulation. The referral followed a reasoned submission by the Notifying Parties of 25 May 2016, by means of which the Parties requested a partial referral to Hungary. No request was received by either the Notifying Parties or any Member State to refer any other part of the Transaction pursuant to Article 4 or Article 9 of the Merger Regulation.

(14) After the phase I investigation, the Commission concluded that the Transaction raised serious doubts as to its compatibility with the internal market and on 10 October 2016 adopted a decision to initiate phase II proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

(15) Based on the phase II investigation which supplemented the findings of the initial investigation, the Commission issued a Statement of Objections on 12 December 2016.

(16) On 26 January 2017, the Notifying Parties offered commitments pursuant to Article 8(2) of the Merger Regulation in order to dispel the significant impediment to effective competition raised by the Transaction.

(17) The Advisory Committee on Concentrations discussed the draft of the Decision on 21 March 2017 and issued a favourable opinion. The Hearing Officer provided his favourable opinion on the proceedings in his report which was submitted on 30 March 2017.

III. **EU DIMENSION**

(18) Although the Transaction is implemented through DDC, a full-function joint venture, the Commission concluded that because of their significant involvement in the initiation, organisation and financing of the Transaction, HeidelbergCement and Schwenk are the real players behind the Transaction and thus the 'undertakings concerned' on the acquirer's side.

(19) The legal standard applied is set out in paragraph 147 of the Commission Consolidated Jurisdictional Notice [1]:

> '146. Where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture's parent companies).
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> 147. Conversely, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, where an existing joint venture has no full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. In those cases, the parent companies are regarded as undertakings concerned.'

(20) On the basis of an analysis of the Parties' submissions and internal documents, the Commission made the following findings:

(21) The Transaction was initiated by HeidelbergCement and Schwenk, which identified the Transaction as an attractive business opportunity and decided that DDC should be the acquiring entity.

[1] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1).

(22) On 5 May 2015, HeidelbergCement and Cemex initiated high level contacts. An initial discussion concerning the Transaction took place the following day between HeidelbergCement and Cemex representatives. By 6 May 2015, HeidelbergCement had already decided that it would submit an indicative offer and had sought for and obtained Schwenk's agreement to proceed. On that date a meeting -attended exclusively by HeidelbergCement's employees- was held and it was decided that a steering committee would be established and chaired by a HeidelbergCement employee and would include two DDC employees as members. The project manager for the Transaction with overall responsibility for its planning and execution was also nominated and chosen among HeidelbergCement's employees. Subsequently, on 7 May 2015, HeidelbergCement informed DDC about the various decisions it had taken regarding the planning of the Transaction.

(23) HeidelbergCement organised the Transaction, including developing the business case and the transaction structure, preparing the deal valuation and leading the final negotiations with Cemex. Schwenk was kept informed regularly about the organisation of the Transaction by HeidelbergCement and never sought to oppose HeidelbergCement's role in any way while DDC strictly adhered to decisions taken by HeidelbergCement.

(24) HeidelbergCement and Schwenk designed the financing and related corporate structure of the Transaction. HeidelbergCement decided which entity should take loans, whether a new entity should be established for these purposes, which company should be the direct acquirer, which companies' capital should be increased and whether HeidelbergCement through its subsidiary holding DDC would need to inject more funding. Schwenk indicated its willingness to grant a unilateral loan to avoid issuing guarantees towards the banks to secure the financing by DDC. Furthermore, HeidelbergCement selected banks that should be contacted, engaged consultancy firms for the financial due diligence and took decisions on the allocation of debt levels. HeidelbergCement also agreed with Cemex on the final purchase price.

(25) Schwenk's involvement in the Transaction was not limited to the role of a shareholder exercising its mandatory rights in a joint-venture. It agreed to the Transaction, sought and received updates about its progress on a weekly basis and was involved in matters of general strategic importance as well as in the details of the implementation of the Transaction, including membership of a steering committee for the integration of the Transaction. The Commission considers that it is legally irrelevant whether Schwenk may have been involved to a different degree than HeidelbergCement in the Transaction since two parents of a joint venture may have a significant, albeit different, involvement in a concentration.

(26) It follows that the Transaction has a Union dimension within the meaning of Article 1 of the Merger Regulation since the undertakings concerned, HeidelbergCement, Schwenk, Cemex Hungary and Cemex Croatia, have a combined aggregate worldwide turnover of more than EUR 5 000 million and HeidelbergCement and Schwenk each have a Union-wide turnover in excess of EUR 250 million without achieving more than two thirds of their aggregate Union-wide turnover within one and the same Member State.

IV. **THE RELEVANT MARKETS**

(27) The Commission has raised objections as regards the effects of the Transaction with respect to the supply of grey cement in the circular and modified 250 km catchment areas around Cemex Croatia's plant in Split. The relevant product and geographic markets are defined as follows:

a. **Product market: Grey cement**

(28) The Commission considers that the exact sub-segmentation of the grey cement market (bagged versus bulk cement, between different cement types and grades) can be left open since the Transaction will lead to a significant impediment of effective competition under all plausible product market definitions.

(29) The competitive assessment, however, takes into account: (i) the fact that bulk cement represents 70 % of sales in Croatia; (ii) the fact that some suppliers are able only to supply bagged cement for logistical reasons; (iii) the differentiation of suppliers in terms of cement classes; and (iv) the particular relevance of cement type CEM II in Croatia.

b. **Geographic market: Circular and modified catchment areas around the Parties' cement plants**

(30) Grey cement is a heavy and bulky but rather low-value product which limits the distances to which it can economically be transported. Accordingly, competitive conditions will change gradually for customers in different locations. The Commission has in the past defined the relevant geographic markets as circular catchment areas around production plants.

(31) The Commission considers that in the case at hand the appropriate radius for the circular catchment areas around the Parties' plants should be 250 km geodesic distance. This conclusion is based on the data of the Parties and other suppliers regarding delivery distances by rail and road in Croatia. The Commission has also further refined the 250 km catchment area around Cemex' plant in Split to reflect the specific delivery distances to individual customers and the actual road network conditions in different parts of the catchment areas. Under that modified approach, the catchment area around the Split plant is defined as the area reached by travelling 359 road km and results in excluding mainly Slavonia (in north-eastern Croatia) where Cemex makes limited sales due to the distance to be travelled.

(32) The Commission has reached the conclusion that it can be left open whether the relevant market should be defined as: (i) circular catchment areas of 250 km around the Parties' plants; or (ii) modified 250 km catchment areas around the Parties' plants given that the Transaction would significantly impede effective competition under both alternative market definitions. The Commission has also reached the conclusion that it can be left open whether those two alternative market definitions should include non-EEA territory (in particular Bosnia-Herzegovina) as in any event, the competitive assessment focusses only on the parts of the relevant markets in the EEA.

V. **COMPETITIVE ASSESSMENT**

(33) The Commission has reached the conclusion that the Transaction will significantly impede effective competition through non-coordinated effects, which could amount in particular to the creation of a dominant position, in the circular and modified catchment areas of 250 km around Cemex Croatia's plant in Split.

(34) This conclusion is based on the following elements:

a. **The combined market shares of the Parties and the market share increments in the markets will be high**

(35) Combined sales market shares of the Parties amount to [50-60] % for the modified Split catchment (Cemex: [20-30]-[40-50] %; DDC: [10-20]-[20-30] %; ITC ([part of HeidelbergCement):]: [0-5] %) and to [40-50] % for the circular 250 km catchment area (Cemex: [20-30]-[30-40] %, DDC: [10-20]-[20-30] %, ITC: [0-5] %). In the overlap lens of those markets with DDC's Kakanj plant, combined market shares amount to [40-50]-[60-70] % (Cemex: [20-30]-[40-50] %; DDC: [10-20]-[20-30] %; ITC: [0-5] %). The largest remaining competitor, LafargeHolcim, accounted for [10-20]-[20-30] % while Nexe, the remaining domestic producer, accounted for [5-10] %.

(36) Combined capacity shares ranged between [40-50] % and [50-60] % (Cemex: [30-40] %; DDC: [5-10]-[10-20] %; ITC: [0-5] %). In the overlap lens of the markets with DDC's Kakanj plant, combined market shares equally amounted to [40-50]-[50-60] % (Cemex: [20-30]-[40-50] %; DDC: [10-20]-[20-30] %; ITC: [0-5] %). The largest remaining competitor, LafargeHolcim, accounted for [10-20]-[20-30] %, whereas Nexe, the remaining domestic producer, accounted for [5-10] %.

(37) Because of geographic variations within the relevant catchment areas, the market share of the merged entity in the southern region of Croatia, Dalmatia, is significantly higher at [70-80]-[80-90] %. The largest remaining competitor, LafargeHolcim, accounted for [10-20]-[20-30] %, whereas Titan, an importer from Serbia, amounted to [5-10]-[10-20] %.

b. **The Parties are close competitors**

(38) Cemex Croatia is the largest supplier in Croatia whereas HeidelbergCement (via DDC's plants in Kakanj/Bosnia-Herzegovina, and Beremend/Hungary and via Italcementi's plant in Trieste/Italy) has been by far the largest importer into Croatia accounting for [50-60] % of the overall import volume.

(39) DDC is a close competitor of Cemex Croatia. Its plant in Bosnia is geographically the closest plant to Cemex Croatia in Split and DDC has been aggressively targeting Cemex's customers. Moreover, the Parties are each other's closest competitors south-east of Split, where domestic producer LafargeHolcim is active to a limited extent with only a few customers due to high transport costs.

(40) DDC is an important competitive force in Croatia because of its policy to increase sales volume and to further expand into Croatia, in particular Dalmatia. The Transaction would see DDC transform from an expanding importer in Croatia into the largest Croatian incumbent, and customers could no longer benefit from the competitive pressure from those imports.

(41) The Transaction will also entail loss of competitive constraint from Italcementi -now controlled by HeidelbergCement. Italcementi is an important competitive force in western Croatia where DDC's presence is more limited.

c. **Current domestic suppliers and importers will not sufficiently constrain the Parties**

(42) Apart from the Parties, the main suppliers of grey cement in the relevant catchment areas are domestic suppliers LafargeHolcim, which operates one cement plant in Koromačno (western coastal Croatia), and Nexe, a local supplier headquartered in Našice (Slavonia), and importers by land which include Asamer (plant located in Lukavac in Bosnia-Herzegovina), Titan (plant located in Kosjerić, Serbia), W&P, (plant in Anhovo, Slovenia), and Colacem (plants in Italy and Albania).

(43) The distance to reach the customers concerned by the Parties' overlap entails both higher transport costs and a lower degree of security of supply of cement. This puts more remote suppliers, be it domestic suppliers or importers, at a competitive disadvantage compared to the Parties, which have their production facilities located closest to each other's catchment area.

(44) Other factors such as lower market acceptance for imported cement from certain production countries, and reduced ability to engage into barter trading and to assess the creditworthiness of customer also affect negatively potential entrants or importers.

(45) On the basis of a detailed analysis of each of the competitors (domestic suppliers and importers by land), viewed individually and collectively, the Commission has reached the conclusion that the remaining competitors will not sufficiently constrain the merged entity after the Transaction. In particular, LafargeHolcim's cement terminal in Dalmatia is capacity constrained and the remaining competitors do not have sufficient incentives to expand supply after the Transaction. The remaining competitors are not currently active in the markets to a significant extent, including in its most concentrated parts in Dalmatia, and have also not expanded in neighbouring regions which are closer to their production plants, despite the opportunity to gain higher margins than currently achievable in the relevant markets in Croatia.

(46) Sea-based imports do not currently constrain the Parties and will not sufficiently constrain the merged entity after the Transaction due to transport costs and security of supply disadvantages and since no terminals are available on the Croatian coast for the import of bulk cement.

d. **There are no potential competitors whose market entry would be sufficiently likely, timely and sufficient**

(47) Other potential land-based importers, such as Turkish companies Cimsa and Limak, will not be able to deliver cement in the relevant market due to the high transport costs entailed by the road distance between its production facilities and Croatia. Furthermore, while an Italian cement producer has considered the possibility of building a production plant in Croatia, that potential project is unlikely to grow into an effective competitive force within a sufficiently short period of time.

e. **The threat of reactions from the merged entity will deter entry and expansion in the relevant market**

(48) The incentives of actual or potential competitors to expand or enter the supply of grey cement in the relevant market is curbed by possible future actions by the merged entity concerning (i) the targeting of specific customer groups of the would-be entrant or (ii) litigation strategies aimed in particular at importers. Past behaviour suggests that both Cemex Croatia and DDC have often considered and resorted to reactions to deter the threat of competitive entry by making such entry less profitable and more difficult.

f. **The Transaction is likely to result in quantifiable price increases**

(49) The Commission found that contemporaneous documents prepared by top management of DDC *in tempore non suspecto* indicate that the Transaction will lead to price increases for grey cement.

g. **Substantial part of the internal market**

(50) The circular and modified catchment areas of 250 km around Cemex Croatia's plant in Split constitute a substantial part of the internal market because they are sizable in terms of surface (exceeding 30 000 km^2) and inhabitants (more than 2 million inhabitants), their annual cement consumption respectively represents 58-66 % of Croatian cement consumption and they are characterised by cross-border trade.

VI. **COMMITMENTS**

(51) On 26 January 2017, the Notifying Parties submitted commitments to address the competition concerns identified in the Statement of Objections.

a. **Description of the commitments**

(52) The commitments aim at facilitating market entry of a competitor by granting access to a cement terminal in Metković in Dalmatia.

(53) The terminal – which is a storage facility for bulk and bagged cement with truck, vessel and (potentially in the future) rail access – is owned by the Croatian state, operated by the port of Ploče and currently leased by Cemex Croatia, but currently used only for sporadic sales. The current lease has a […]-year duration that still runs until the end of […] and a rental fee of around EUR […]. Pursuant to the commitments, the terminal would be leased by a competitor ('new lessee') who could start selling cement through the terminal.

(54) More specifically, the Parties have undertaken the following commitments:

(55) First, to terminate the lease by Cemex Croatia and waive Cemex Croatia's […].

(56) Second, to find a suitable new lessee with the ability and incentive to effectively compete on a long-term basis with DDC in Southern Croatia and ensure the conclusion of a new lease agreement for at least […] years at terms which are substantially similar to the terms of the existing lease.

(57) Third, to procure that DDC provides the new lessee support in a number of matters. DDC will provide the new lessee with all customer records for certain Croatian customers of DDC. DDC will also provide logistic support to the new lessee by providing the contact details of transport companies used by Cemex Croatia and, at the option of the new lessee, […]. Finally, DDC will maintain, at the option of the new lessee, a back-up facility of cement per year for the benefit of the new lessee at the Split plant which the lessee can use (i) at any time after giving at least a certain number of days prior notice and (ii) at a price set after following a specific process, approved by the Trustee.

(58) Fourth, not to implement the Transaction before the new lessee and the port have entered into a final binding new lease agreement and the Commission has approved the new lessee and the terms of the new lease agreement.

b. **Assessment of the undertakings submitted**

(59) The Commission has come to the conclusion that the Commitments are insufficient to render the concentration compatible with the internal market.

(60) First, the Commitments have severe structural deficits so that the competition concerns are not eliminated entirely and there are uncertainties and risks as to their effective and timely implementation. The Commitments leave the merged entity's market position nearly unchanged, combining their entire cement production capacity in the relevant market and leading to a significant increase in their joint production capacity. The Commitments do not concern the divestiture of a viable business but offer a mere business opportunity to the new lessee to start its own cement business in Dalmatia from scratch. That mere opportunity involves high uncertainty and does not have an equivalent effect as a divestiture.

(61) Second, there is a low likelihood of finding a suitable lessee.

(62) In the first place, there is considerable uncertainty that any new lessee – including the companies Titan and Asamer which the Parties have presented to the Commission as the best placed potential lessees – would likely and timely grow into a viable competitor that could compete effectively with the merged entity on a lasting basis. This is because all potential lessees suggested by the Parties are likely to be significantly less competitive than DDC. Furthermore, Titan has decided not to pursue the negotiation of the lease further after learning about the details of the business proposition.

(63) In the second place, the Commission cannot conclude with the requisite degree of certainty that Asamer -who has signed a lease agreement for the Metković terminal with the Port of Ploče on 13 March 2017 (conditional among other things on the clearance of the Transaction by the Commission)- is able to develop its grey cement business in the relevant markets as a viable competitive force that could compete effectively with the merged entity on a lasting basis: (i) Asamer faces significant cost-to-market disadvantages compared to DDC, (ii) it is not clear how Asamer intends to overcome likely difficulties in refilling the terminal by truck or by rail to a sufficient extent, (iii) the Commission cannot enforce any investments in infrastructure of the Metković terminal to ensure that Asamer would reach sufficient sales volumes, and (iv) Asamer has in the past shown a lack of aggressiveness in competing with the Parties.

(64) Third, the remedy appears insufficient in scale. The capacity at the Metković terminal is likely to be insufficient for any new lessee to grow into a viable competitive force that could compete effectively with the merged entity on a lasting basis. This is because the seasonality of demand in the area as well as the logistical challenges in supplying cement to the terminal limit its effective capacity. Furthermore, due to the vicinity of the Metković terminal to Bosnia and Montenegro, it is unlikely that the capacity of the terminal would be exclusively allocated to Croatia. Finally, additional spare capacity would be required at the Metković terminal to enable the New Lessee to compete effectively.

(65) Fourth, there are shortcomings in the modalities of the commitments' implementation. There are no clauses in the commitments that provide a safeguard in case the lessor, the Port of Ploče, does not agree to the potential new lessee or the Notifying Parties do not find a suitable potential new lessee. In addition, there are no clauses stipulating that the Parties will be deemed not to have complied with the commitments if no suitable lessee has been approved within the deadline. There is thus a risk that there would be an indefinite period of finding a suitable lessee, potentially negatively affecting the Cemex Croatia business.

VII. **CONCLUSION**

(66) For the reasons mentioned above, the decision concludes that the proposed concentration will significantly impede effective competition through non-coordinated effects, which could amount in particular to the creation of a dominant position, in the circular and modified catchment areas of 250 km around Cemex Croatia's plant in Split.

(67) Consequently the concentration was declared incompatible with the internal market and the functioning of the EEA Agreement, in accordance with Articles 2(3) and Article 8(3) of the Merger Regulation.