

## COMMISSION DECISION

of 19 July 2006

declaring a concentration compatible with the common market and the functioning of the EEA Agreement

(Case COMP/M.3796 — OMYA/J.M. HUBER PCC)

(notified under document number C(2006) 3163)

(Only the English version is authentic)

(Text with EEA relevance)

(2007/164/EC)

On 19 July 2006 the Commission adopted a Decision in a merger case pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>(1)</sup>, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the on the website of the Directorate-General for Competition, at the following address: [http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html)

## I. SUMMARY

(1) On 4 April 2005, the Commission received a request for referral pursuant to Article 22(1) of Regulation (EC) No 139/2004 (the Merger Regulation) from the Finnish Competition Authority, subsequently joined by the competent authorities of Sweden on 22 April 2005, Austria on 26 April 2005, and France on 28 April 2005, to examine the transaction.

(2) The Commission found that the proposed operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation and that the request met the requirements laid down in Article 22(3) of the Merger Regulation. Therefore, the Commission decided to examine the concentration and, on 18 May 2005, adopted decisions pursuant to Article 22(3) of the Merger Regulation addressed to Finland, Sweden, Austria and France to that effect. The referring Member States submitted to the Commission the documentation at their disposal. This information was completed by Omya submitting a notification on 4 August 2005.

(3) The Commission opened proceedings in this case on 23 September 2005. The Commission's statement of objections was sent to the notifying party on 2 May 2006. Omya submitted a reply on 16 May 2006. A non-confidential version of the Commission's statement of objections was made available to two interested parties, SMI and Imerys, who submitted written comments.

(4) An oral hearing in the present case was held on 18 May 2006.

(5) For the purpose of affording sufficient time for Omya to consider remedies an Article 10(3) decision addressed to the notifying party was adopted on 17 May 2006, which extended the deadline for submission of remedies by two working days.

(6) Following an in-depth investigation, the Commission concluded that the notified operation raises concerns as to its compatibility with the common market.

(7) In order to remove horizontal competition concerns in the market for coating calcium carbonates, Omya and J.M. Huber Corporation submitted on 23 May 2006 (improved on 3 July 2006), a package of commitments to the Commission which was considered sufficient to address the competition concerns raised by this concentration.

(8) Therefore, it was proposed to clear the notified transaction subject to conditions and obligations pursuant to Article 8(2) of the Merger Regulation.

## II. THE PARTIES AND THE OPERATION

(9) Omya AG (Omya) is a Swiss family-owned company active in the production and sale of industrial minerals<sup>(2)</sup>, including calcium carbonates<sup>(3)</sup>, used in a variety of industries, i.e. paper, paints, plastic, steel, glass, and agriculture. Sales to the paper industry account for a large proportion of Omya's revenues.

<sup>(1)</sup> Industrial minerals include PCC (precipitated calcium carbonate), GCC (ground calcium carbonate), kaolin, talc and dolomite.

<sup>(2)</sup> The term 'carbonates' encompasses both PCC and GCC.

(10) In the EEA, the US company J.M. Huber Corporation is active in the supply of kaolin, PCC, precipitated silicas and silicates (PSS). The Huber subsidiaries which are the subject of this transaction comprise the worldwide business of J.M. Huber Corporation (Huber PCC) in the field of production and supply of on-site filler PCC to the paper industry. The acquired business consists of 12 PCC on-site plants world-wide, six of which are located in the EEA. Huber's PCC plants in the EEA are situated in Finland (three plants) and in Sweden, France and Portugal (each with one plant).

### III. RELEVANT MARKET

#### A. Relevant product market

(11) The proposed transaction affects the supply of:

(i) merchant filling GCC;

(ii) merchant coating GCC;

(iii) merchant filling PCC;

(iv) on-site filling PCC; and

(v) merchant coating PCC.

(12) For the purposes of assessing the present transaction, the Commission has come to the conclusion that, within the production and supply of industrial minerals to the paper industry, calcium carbonates for filling applications (PCC, GCC and GCC/PCC blends) and calcium carbonates for coating applications (PCC, GCC and GCC/PCC blends) constitute two distinct relevant product markets.

#### B. Relevant geographic markets

(13) The Commission concluded that for the purposes of assessing the present transaction, the relevant geographic markets are defined by identifying paper mills with similar realistic sets of supply alternatives. Production plants are considered as being realistic supply alternatives for a paper mill depending on their logistics and how far they are located from this paper mill. The distance beyond which a given mineral plant cannot be considered as a realistic supply alternative depends on the past shipments experience of each plant, on the available modes of transportation (road, rail, ship or a combination thereof) and on the type of calcium carbonate produced (PCC, GCC).

(14) The relevant geographic markets are as follows:

(a) for merchant filling calcium carbonates, the relevant geographic market is determined by the distance between the mineral plant and the location of the customer served, which will vary between 400 km and up to a maximum of 2 000 km depending on the plant, the product, the mode of transport;

(b) for merchant coating calcium carbonates, the relevant geographic market is determined using the same methodology as for the fillers, with distances between 400 km and 3 000 km; and

(c) for customers that have the possibility of an on-site calcium carbonate solutions, the geographic scope is at least EEA wide.

### IV. COMPETITIVE ASSESSMENT

#### 1. Calcium carbonates for filling applications

(15) The Commission considers that competitive pricing of carbonates for paper filling applications hinges upon the location of each customer's next best alternative.

(16) When the merging parties have competing plants with overlapping sales areas, the merger may cause prices to rise. When one of the merging parties' customers' next-best alternative is one of the other merging party's mineral plant, the merging parties will have the ability and the incentive to raise prices. However, when a rival plant to the merging parties is sufficiently close to the customer location, the presence of this alternative is likely to provide sufficient competitive constraint such that the price effect will not materialise. For some paper mills, the competitive analysis is affected by the possibility of hosting an on-site filling PCC plant. However, in the present case the competitive impact is not materially affected by whether or not the Commission considers that on-site filling PCC is another realistic alternative that constrains the merchant supplies of filling PCC or GCC.

(17) The Commission identified two broad categories of customers. The first category consisted of paper mills that are currently supplied by an on-site filling PCC plant. The second category consisted of paper mills that are supplied on a merchant basis. The Commission focused its competitive assessment on the actual customers of the merging parties.

(18) The Commission identified for each customer a set of realistic alternative mineral plants based on maximum transport distances each production plant can ship. These distances were derived from the extensive database established by the Commission. Using shipment data for PCC and GCC for the year 2004 (1), the Commission also conducted an econometric study (discrete choice model) to predict the probability that a customer would select another mineral plant should its current supplier raise its prices. The results allowed the Commission to determine the substitution patterns between the various producers of calcium carbonate for the paper industry.

*Current merchant customers*

(21) For customers who are supplied on a merchant basis, and even if they have the option of relying upon on-site filling PCC, the Commission considered that a mineral plant located within a certain distance of a paper mill constitutes a realistic option for either filling PCC or filling GCC. Having examined the options of the current merchant filling PCC customers of Omya, the Commission has come to the conclusion that these customers are unlikely to be adversely affected by the transaction because, in each case, these customers had other realistic PCC alternatives. Therefore, it is unlikely that the removal of Huber as a competitor would significantly impede competition for Omya's filling PCC customers.

*On-site customers*

(19) As regards the current on-site supply of filling PCC, irrespective of whether the provider is Huber or Omya, the transaction was found not to have any immediate effect. On-site filling PCC suppliers have exclusive long term contracts with the host paper mills (in general for seven to 10 years), which guarantee a minimum volume for the PCC plant. A price formula with a base price negotiated at the beginning of each contract determines the annual price change over the entire contract duration. The formula usually depends on cost factors, such as the costs of limestone, electricity, wages and inflation, which are not affected by the transaction. At issue was whether the transaction would have an adverse effect on these customers when the long term contract expires. The investigation showed that the transaction is very unlikely to have a significant impact on the renewal of current on-site filling PCC contracts.

(22) In addition, for filling GCC customers of Omya, it is not likely that Huber constitutes the next-best alternative. These customers have either an alternative filling GCC option and/or other filling PCC alternatives which do not appear to have any competitive disadvantage compared to Huber's filling PCC plants. Moreover, the results of the econometric study show that Huber is, on average, not the next-best alternative. Therefore, it is unlikely that the removal of Huber as a competitor would significantly impede competition for Omya's filling GCC customers.

(20) For future on-site customers, the transaction removes one supplier with a proven ability to manage and run projects for the on-site supply of filling PCC in the EEA. Nevertheless, the investigation indicated that the transaction would not lead to significant changes in prices for these customers, as the number of credible suppliers of on-site filling PCC solutions would be sufficient to exert competitive pressure. This also holds for coating on-site solutions.

(23) For Huber's merchant PCC customers, different Omya filling GCC plants appear to be realistic alternatives. However, Imerys is present in Sweden, both in the production of filling PCC, at Husum, and of filling GCC, at Tunadal. Moreover, SMI's filling PCC plants are present in Finland, at Lappeenranta, Myllykoski and Äänekoski. All these alternative solutions do not appear to hold any competitive disadvantages when compared to Huber's filling PCC on-site plants located at in Sweden and in Finland. Moreover, the econometric study shows that the competitive constraint exerted by merchant filling GCC suppliers is likely to be less than that exerted by merchant filling PCC suppliers on other merchant filling suppliers. Therefore, it is unlikely that the removal of Omya as a competitor would significantly impede competition for Huber's filling PCC customers.

(1) The Commission constructed an extensive mineral shipment database which included all major competitors' annual shipments of PCC and GCC for paper filling and coating purposes for the EEA for the years 2002, 2003 and 2004 (data by mineral type, originating mineral plant, destination paper mill, paper type, distance shipped, shipment volumes, price per dry metric tonne, transportation mode and cost).

## 2. Calcium carbonates for coating applications

(24) In the notification of the proposed transaction Omya took the position that the market for paper coating would not be affected by this transaction because Huber was currently not active in this market. However, the Commission's market investigation revealed that Huber has been developing a suitable PCC for use in GCC/PCC coating blends and had made offers to supply PCC coating products.

(25) Consequently, the Commission considers Huber as a potential competitor in the market for calcium carbonates for paper coating applications, who, absent the transaction, would very likely become an effective competitive force on the market for coating calcium carbonates.

(26) Therefore, the Commission concludes that the proposed transaction would significantly impede competition, in particular through the strengthening of Omya's dominant position in the markets for coating calcium carbonates for affected customers in the south of Finland.

(27) The Commission's conclusion is based on the following arguments.

(28) Firstly, Omya is already the dominant supplier of coating grade calcium carbonates for most customers in Europe and Finland. Omya supplied a very large proportion of all coating calcium carbonates to the paper industry in the EEA in 2004. It owns or controls the access to a very large portion of the EEA reserves of the raw materials necessary for the production of coating grade GCC and can supply paper mills all over the EEA. Given its dominant position and its control on raw material supplies, Omya is an unavoidable trading partner for paper mills which need to purchase coating calcium carbonates in Europe, and in particular in Finland.

(29) Secondly, Huber has the ability to enter the paper coating market with its coating PCC Additives technology. The Commission assessed in particular to what extent (i) Huber's PCC additives technology was ready for commercialisation, (ii) Huber believed in the commercial viability of its proposition on a larger scale, and (iii) Huber could make sufficient production capacity available at the

Kuusankoski on-site PCC plant to enter the market. The Commission's analysis also considered (iv) Huber's sunk costs to enter the market for calcium coating carbonates. The Commission took the view, that prior to engaging in merger negotiations with Omya, Huber was planning to enter the paper coating market in a significant way and would have done so with its coating PCC Additives technology in a timely manner.

(30) The location of the Kuusankoski plant would enable Huber to also supply a number of other Omya customers located in the south of Finland. These customers, who currently source their coating calcium carbonate supply from Omya, may consider arranging at least part of their supply from Huber's Kuusankoski plant. The Commission identified a number of customers for which Huber's Kuusankoski plant would be significantly closer than the next plant of SMI or Imerys (affected customers).

(31) Thirdly, Huber would be an effective competitive force that is very likely to significantly constrain Omya's behaviour on the market for paper coating calcium carbonates. Given the structure of the market in Finland and the fact that the only other competitor, SMI, remains small in terms of market share and has locational disadvantages, the Commission considers it to be very likely that Huber's capacity at Kuusankoski would significantly constrain Omya's calcium carbonates coating offering for the identified Finnish customers. The Commission also finds that there are no other potential competitors that could maintain sufficient competitive pressure in the south of Finland.

(32) For the above reasons, the Commission has come to the conclusion that the proposed transaction would significantly impede competition, in particular through the strengthening of Omya's dominant position in the markets for coating calcium carbonates for affected customers in the south of Finland.

## 3. No coordinated or conglomerate effects

(33) Finally, the Commission concludes that the present transaction is unlikely to give rise to conglomerate concerns or increase the likelihood that firms are able to coordinate their behaviour with the effect of raising prices above competitive levels.

## V. COMMITMENTS

(34) To remove the abovementioned horizontal competition concerns on the market for coating calcium carbonates, Omya and J.M. Huber Corporation submitted on 23 May 2006 a package of commitments to the Commission. The package contained two alternative proposals for commitments, the first comprising of the divestiture of the Kuusankoski PCC on-site plant and the coating and additive technology and the second only the divestiture of the technology.

(35) The Commission decided to market test the first alternative commitment proposal (divestment of the on-site PCC plant in Kuusankoski, Finland and the PCC coating and additive technology of Huber). The market test was sent to a total of 11 customers and four competitors that have been involved in investigation of this transaction and a response was received from all of them<sup>(1)</sup>. The response to the market test was mixed. Whereas customers largely considered the commitment as being able to remove the competition concerns identified by the Commission, competitors expressed reservations as to the scope of the proposed remedy and suggested improvements for the commitment to sufficiently resolve the competition concerns raised by the Commission<sup>(2)</sup>.

(36) With regard to the first alternative commitment, the Commission evaluated whether the divestiture of the on-site PCC filler plant at Kuusankoski together with the technology offered would enable a suitable purchaser of the divestiture package to acquire the potential of the competitive force in the market for PCC coating carbonates comparable to that which Huber would have had absent the present transaction.

(37) The Commission concluded that the first alternative commitment (divestiture of the Kuusankoski on-site PCC plant and the technology) whereby the suitable purchaser has access to both spare production capacity, the necessary technology and the close cooperation with the host mill, places the purchaser in a similar position to that which Huber currently possess, including the

advantage of an incumbent supplier who will not need to build a new facility in the event it is successful in bidding for a renewal contract. Therefore, this alternative would best ensure the viability of the divestiture and the launch of a credible competing product in the market for coating calcium carbonates.

(38) The Commission further considered that in assessing the ability and incentive of the Kuusankoski on-site PCC plant and the divested technology to continue to act as a competitive force and restore competition on the market in competition with Omya and other competitors largely depends on the identity of the purchaser. Therefore, a suitable purchaser in the present case would be an industrial purchaser that already has the financial resources and proven expertise.

(39) Consequently, the Commission concludes that the proposed first alternative commitment, the divestiture of the Kuusankoski on-site PCC plant together with the divestiture of Huber's coating technology (given the improvements proposed by the parties on 3 July 2006) would restore effective competition in the market for coating calcium carbonates for the affected customers in the south of Finland by re-establishing the competitive constraint to Omya's coating calcium carbonates coming from Huber's PCC additive technology which would otherwise be lost due to the concentration, as originally notified.

## VI. CONCLUSION

(40) For above mentioned reasons, considered individually or together, the Commission has come to the conclusion that the commitments submitted by Omya and J.M. Huber are sufficient to address the competition concerns raised by this concentration.

(41) The Commission's decision therefore declares the notified transaction compatible with the common market and the functioning of the EEA Agreement pursuant to Article 8(2) of the Merger Regulation.

<sup>(1)</sup> In addition, the Finnish Competition Authority submitted a response.

<sup>(2)</sup> As regards the second alternative commitment containing only the divestiture of the technology, the Commission assessed the proposed remedy and considered that it does not address the competition concerns raised by the Commission and therefore it was not made subject to a market test.