

Official Journal

of the European Union

L 72

Volume 50

13 March 2007

English edition

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★ **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) ⁽¹⁾** 24



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I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COUNCIL REGULATION (EC) No 260/2007

of 9 March 2007

imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain tungsten electrodes originating in the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

B. SUBSEQUENT PROCEDURE

Having regard to the Treaty establishing the European Community,

- (3) Following the imposition of a provisional anti-dumping duty on imports of certain tungsten electrodes originating in the PRC, some interested parties submitted comments in writing. The parties, who so requested, were also granted an opportunity to be heard orally.

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community⁽¹⁾ (the basic Regulation), and in particular Article 9 thereof,

- (4) The Commission continued to seek and verify all information it deemed necessary for its definitive findings. The oral and written comments submitted by the parties were examined and, where considered appropriate, the provisional findings were modified accordingly. To this end, the Commission carried out further verification visits at the premises of the following companies:

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

(a) *Unrelated importer in the Community:*

Whereas:

— Comptoir Lyonnais de Soudage SA, Lyon, France;

A. PROVISIONAL MEASURES

- (1) The Commission, by Regulation (EC) No 1350/2006⁽²⁾ (the provisional Regulation) imposed a provisional anti-dumping duty on imports of certain tungsten electrodes, currently classifiable within CN codes ex 8101 99 10 and ex 8515 90 00 (CN codes since 1 January 2007), originating in the People's Republic of China (PRC).

(b) *Related companies in the Community:*

— Alexander Binzel Schweißtechnik GmbH & Co., KG, Buseck, Germany,

- (2) It is recalled that the investigation of dumping and injury covered the period from 1 January 2005 to 31 December 2005 (investigation period or IP). With respect to the trends relevant for the injury assessment, the Commission analysed data covering the period from 1 January 2001 to the end of the investigation period (period considered).

— Binzel France Sarl, Strasbourg, France.

- (5) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive anti-dumping duty on imports of certain tungsten electrodes originating in the PRC and the definitive collection of the amounts secured by way of the provisional duty. They were also granted a period within which they could make representations subsequent to this disclosure.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17).

⁽²⁾ OJ L 250, 14.9.2006, p. 10.

- (6) The oral and written comments submitted by the parties were considered, and, where appropriate, the findings have been modified accordingly.

C. PRODUCT CONCERNED AND LIKE PRODUCT

- (7) The product concerned is tungsten welding electrodes (TE), including tungsten bars and rods for welding electrodes, containing 94 % or more by weight of tungsten, other than those obtained simply by sintering, whether of not cut to length. It is currently classifiable within CN codes ex 8101 99 10 and ex 8515 90 00 (CN codes since 1 January 2007). The product concerned is used in welding and similar processes, including tungsten inert gas shielded arc welding, plasma arc welding and cutting and thermal spraying.

- (8) One importer argued against the conclusion drawn in recital 13 of the provisional Regulation that all TE are considered to constitute a single product for the purpose of this proceeding. This importer emphasised the varying properties of different types of TE and in particular one patented type developed by the importer himself.

- (9) However, since the beginning of the investigation, the Commission has been aware that there are several types of TE. As well as being sold in different lengths and thicknesses, TE can be made either from pure tungsten or alloyed with a small percentage of a metal such as thorium, lanthanum, cerium, zirconium, or a combination of those. This alloying affects the properties of the electrodes namely in terms of ignitability, stability and durability, allowing them to be better tailored for specific applications. Despite the variations in technical features of the different types of TE, it is considered that their common basic physical characteristics and degree of substitutability are sufficient to consider them as a single product for the purpose of this proceeding as they share the same basic physical and chemical characteristics.

- (10) It should be noted, however, that the different types of TE as mentioned above have been taken into consideration for the purpose of calculating the dumping and injury margins.

- (11) The importer referred to in recital 8, also pointed to the differences in the production processes between the European and Chinese producers, and claimed that these lead to a higher quality of the Chinese TE. Furthermore, an exporting producer claimed that its elec-

trodes are of better quality than those of its competitors and in any event better tailored for the main product manufactured by the group, the TIG welding torch. Regarding the latter claim, it should be stressed that according to the available evidence, any quality differences are not such as to prevent the use of electrodes produced by other producers in this specific application, even if they would not provide the optimal fitting to the torches. As for the alleged general quality differences, as pointed out by the importer, between the TE produced and sold by the Community industry in the Community and the TE imported into the Community from the PRC, there was no objective information available to corroborate or quantify such a perceived general quality difference. Therefore the TE produced and sold by the Community industry in the Community and the TE imported into the Community from the PRC have been considered alike within the meaning of Article 1(4) of the basic Regulation, and no adjustment was made in this respect in the injury calculations.

- (12) In the absence of any other comments concerning the product concerned and the like product, recitals 12 to 15 of the provisional Regulation are hereby confirmed.

D. DUMPING

1. Market economy treatment (MET)

- (13) The exporting producer for which MET was rejected, since it did not fulfil the second MET criterion as set out in Article 2(7)(c) of the basic Regulation, argued that the discrepancies found in its accounting system concerned only a few cases and that in the meantime its system had been improved in order to meet the international accounting standards. The company, however, did not substantiate this claim or provide any evidence. Moreover, from the evidence gathered during the on-the-spot verification it is clear that the practices found were in clear violation of IAS as well as Chinese accounting rules, even if they would have been corrected after the IP.

- (14) In the absence of any other arguments regarding the granting of MET, the findings as set out in recitals 16 to 21 of the provisional Regulation are hereby confirmed.

2. Individual treatment (IT)

- (15) Following the provisional disclosure, the Community industry contested the granting of IT to the exporting producer referred to above in recital 13, since discrepancies were found in the company's accounts also

with regard to the recording of export sales. In this respect it should be noted that the company fulfilled all criteria set out in Article 9(5) of the basic Regulation and therefore there was no reason to reject its IT claim. Moreover, all evidence related to the company's very few export transactions to the Community in the IP could be obtained during the on-the-spot verification of the main anti-dumping questionnaire, and a single necessary correction to its export data could be made immediately. Therefore the claim of the Community industry was rejected.

- (16) In the absence of any other comments in this respect, the findings concerning IT as set out in recitals 22 to 25 of the provisional Regulation are hereby confirmed.

3. Normal value

(a) Determination of normal value for the exporting producer in the PRC granted MET

- (17) Following the provisional disclosure, the exporting producer concerned presented a monthly normal value by linking the verified, average normal value of the IP to the price development of the main raw material, ammonium paratungstate (APT), in order to demonstrate that when comparing with the monthly export prices there was no more dumping towards the end of the IP. Moreover, this monthly normal value suggested that the provisional finding of dumping was essentially caused by the dramatic price increase of APT, to which the company did not react immediately by increasing its export sales prices, but only at the end of the IP. The company asked the Commission to take this development into account and to consider calculating the dumping margin based on the last six months or last quarter of the IP solely. This claim, however, had to be rejected, as differing from the IP would be discriminatory towards all other companies investigated, which were affected in the same way by that general price increase of APT. The request is also in conflict with the concept of an investigation period. Indeed, it amounts to selectively choosing data from part of the investigation period and puts thus into question the representativity of the findings.

- (18) In that context, further to the provisional disclosure, the Community industry claimed that an adjustment should be made to the raw material costs used for the construction of the normal value of the company granted MET. In the view of the Community industry such an adjustment would be justified pursuant to Articles 2(3) and 2(5) of the basic Regulation, as the Chinese tungsten market is subject to State interference at the macroeconomic level and hence the domestic

prices of the main raw material, APT, have remained consistently lower than the export prices of APT.

- (19) The above claim was examined by analysing the effects of the Chinese government's policies at the macroeconomic level, which might lead to different price levels of APT between the domestic and export markets. The investigation showed that the Chinese VAT export refund policy discourages to a certain extent the export of tungsten and related products such as APT as exporters are refunded for only part of the VAT paid on the domestically sourced raw material. This also implies that producers of TE incur an additional cost when exporting. Therefore, an adjustment was made to the normal value, pursuant to Article 2(10)(b) of the basic Regulation, to reflect the total cost incurred as a result of the abovementioned VAT scheme. It is not considered that any further adjustment is required.

- (20) Apart from the abovementioned adjustment to the normal value, the general methodology as set out in recitals 26 to 33 of the provisional Regulation is hereby confirmed.

(b) Determination of normal value for the exporting producers in the PRC not granted MET

(i) Analogue country

- (21) In the absence of any relevant comments regarding the use of the USA as an analogue country, recitals 34 to 38 of the provisional Regulation are confirmed.

(ii) Normal value

- (22) In the absence of any comments with regard to the determination of the normal value for the exporting producers not granted MET, recitals 39 to 46 of the provisional Regulation are definitively confirmed.

4. Export prices

- (23) Regarding the export prices of one company granted IT as well as the cooperating company not granted MET/IT, whose dumping margin served as the basis for the country-wide dumping margin, as explained in recitals 54 to 56 of the provisional Regulation, export prices were revised by excluding two transactions falling outside the IP.

- (24) Following the provisional disclosure, the exporting producer granted MET, whose export sales to the Community were made via a related importer and subsequently resold to related and unrelated companies in the Community, claimed that the SG&A costs of its related companies, used for the construction of the export price pursuant to Article 2(9) of the basic Regulation, were overestimated and did not reflect the costs generated by the sales of TE. The exporting producer requested the Commission to use the original SG&A presented in the questionnaire replies of the related distributors, which could not be accepted initially in the absence of evidence regarding the cost allocation method. The company presented supporting evidence for the allocation method used originally, which was based on an internal standard, used by the companies historically. The evidence provided was subsequently verified on the spot and it was found that the original allocation method corresponded to the costs associated with the sales of TE. Hence, the claim was accepted and the SG&A costs of the related distributors were adjusted accordingly.
- (25) With regard to the profit margin of the two unrelated importers, one of which was provisionally used for the constructed export price of the abovementioned exporting producer, it was found that those profit margins should not be used since their business activities are not sufficiently comparable to that of the related importer concerned. Indeed, the majority of the TE imported by this related importer are further integrated into the main product produced by the group, the welding torch. It should also be noted that the TE are of minor value compared to the end-product. On this basis it was concluded that the related importer's own profit margin would constitute a more accurate basis for a profit margin to construct the export price.
- (26) No other comments were received with regard to export prices, and hence the general methodology as set out in recitals 47 and 48 of the provisional Regulation, with the exception of the use of the related importer's own profit margin for the constructed export price of the producer granted MET, as described above, is hereby confirmed.

5. Comparison

- (27) The normal values, as described above in recitals 17 to 20 and 22 and the export prices, revised as explained above in recitals 23 to 26 were compared on an ex-works basis. In order to ensure a fair comparison between the normal value and the export price, account was taken, in accordance with Article 2(10) of the basic Regulation, of differences in factors which were claimed and demonstrated to affect prices and price comparability. The factors for which adjustments were accepted were indirect taxes as described in recital 19, transport, insurance, handling and ancillary costs, packing, credit, and bank charges.

6. Dumping margin

(a) *For the cooperating exporting producer granted MET*

- (28) In the light of the above, the definitive dumping margin, expressed as a percentage of the cif Community frontier price, duty unpaid, is as follows:

Company	Definitive dumping margin
Shandong Weldstone Tungsten Industry Co., Ltd	17 %

(b) *For the cooperating exporting producers granted IT*

- (29) Following the adjustment to the export price of the other company granted IT, the definitive dumping margins, expressed as a percentage of the cif Community frontier price, duty unpaid, are as follows:

Company	Definitive dumping margin
Shaanxi Yuheng Tungsten & Molybdenum Industrial Co., Ltd	107,3 %
Beijing Advanced Metal Materials Co., Ltd	128,4 %

(c) *For all other exporting producers*

- (30) Following the adjustment to the export price of the cooperating exporting producer not granted MET/IT, the definitive country-wide level of dumping is established at 160,2 % of the cif Community frontier price, duty unpaid.

E. INJURY

1. Community production

- (31) In the absence of comments concerning Community production, recitals 57 and 58 of the provisional Regulation are hereby confirmed.

2. Definition of the Community industry

- (32) In the absence of comments concerning the definition of the Community industry, recital 59 of the provisional Regulation is hereby confirmed.

3. Community consumption

- (33) In the absence of comments concerning the Community consumption, recital 60 of the provisional Regulation is hereby confirmed.

4. Imports into the Community from the country concerned

- (34) In the absence of any comments concerning the imports from the country concerned, recitals 61 to 66 of the provisional Regulation are hereby confirmed.

5. Situation of the Community industry

- (35) In the absence of comments concerning the situation of the Community industry, recitals 67 to 93 of the provisional Regulation are hereby confirmed.

F. CAUSATION

- (36) In the absence of any new and substantiated information or argument in this respect, recitals 94 to 114 of the provisional Regulation are hereby confirmed.

G. COMMUNITY INTEREST

- (37) Three exporters, one exporters' association and one importer reiterated their concern that that the provisional duties would exclude the Chinese exporters from the Community market. Given that there are only two Community producers and virtually no imports from other countries, this would allegedly eliminate competition from the Community market, to the detriment of users. Furthermore, it has been alleged that the two Community producers have a history of controlling the prices in the Community market through anti-competitive practices. However, these parties did not provide any additional evidence to substantiate their claims nor has any indication been found in the course of the investigation which would point to such practices.

- (38) As stated in the provisional Regulation, the purpose of any anti-dumping measure is not to stop access to the Community market for exporters in third countries, but rather to restore a level playing field that had been distorted by unfair trade practices.

- (39) No evidence for the alleged anti-competitive behaviour was found during the investigation, nor has the Community industry enjoyed abnormally high profits, even before the Chinese imports gained a substantial

foothold in the Community market. Besides the two existing Community producers, the level of measures imposed should allow at least some exporting producers from the PRC to continue selling the product concerned in the Community market. Indeed, the purpose of the duties, when based on injury, is merely to raise the import prices to a level which allow the Community industry to achieve a normal profit.

- (40) One importer further claimed that the duties would threaten the existence of his company. Moreover, this importer markets a unique type of high-quality electrode and if he were to go out of business, he claims, end-users of TE would suffer in terms of innovation and quality of service.

- (41) However, as stated in the provisional Regulation, the general effect on importers of any increase in the prices of imports of the product concerned should be to restore fair competition with Community producers and should not prevent the importers from selling the product concerned. Moreover, the high profit margins found at the level of the cooperating importers make it unlikely that they will be driven out of business even if the volume of imports decreases with the imposition of measures. The distributor/dealer's role in the welding electrode market is an essential one because it offers the end-user the benefits of a one-stop shop for all the latter's needs regarding welding. Therefore, it is highly likely that those agents will remain an important feature of the market even after measures are imposed.

- (42) It was also argued by one party that the TE imported by their group are complementary to the welding torches manufactured by the same company. If the users were induced as a consequence of the anti-dumping measures to switch to cheaper electrodes from other suppliers, the performance and durability of the company's torches would suffer, with an adverse impact on their whole business. However it is considered that, even if the customers of these users were unaware of such adverse technical consequences, the relatively low level of the duties proposed for this exporter is not likely to provide an incentive for them to switch to other sources of supply. Furthermore, no evidence of the alleged negative consequences was submitted.

- (43) In the absence of substantially new information or argument in this particular respect, recitals 115 to 132 of the provisional Regulation are hereby confirmed.

H. DEFINITIVE ANTI-DUMPING MEASURES

1. Injury elimination level

(44) Further to the disclosure of provisional findings, the Community industry claimed that the adjustment mentioned in recital 136 of the provisional Regulation, for the functions of importers, was excessive, for two reasons:

— not all importers would perform all the functions mentioned in that recital, namely packaging, stocking, quality control, branding, and in some cases a physical processing of the electrodes. In some cases, the electrodes would be exported from the PRC in a condition that does not require most of these operations to be performed by the importer,

— even if such functions were to be performed by a given importer, its costs, according to the Community industry's estimates, would be significantly smaller than the amount of the adjustment provisionally established by the Commission.

(45) The Commission has further investigated this issue by, among others, obtaining detailed information from an additional unrelated importer. The investigation has shown that both the Community-produced and imported electrodes are sold through a wide variety of channels, and are often re-sold several times between the producer and the end-user. The players involved in this market perform, to different extents, functions such as quality control, storage and logistics, re-packaging, marketing and after-sales support. Having examined all the available information, it was considered a more systematic and uniform way to take into account the functions of importers to make a comparison of import prices and Community industry prices adjusted to a common level of trade.

(46) For this purpose, the sales of the like product by the Community industry in the Community market were used as a basis to estimate the differences in prices resulting from different levels of trade, i.e. traders, retailers, end-users and original equipment manufacturers. This adjustment for level of trade was therefore applied instead of the adjustment mentioned in recital 136 of the provisional Regulation.

(47) One exporter pointed out a mistake in the sales data used for the calculation of his injury margin. Other clerical errors in the data used for the injury margins were also corrected. As a result of these corrections, the injury margin of one exporter and the country-wide injury margin have been reduced.

(48) It was also found that due to the infrequent time pattern of exports of some PRC exporters, and the evolution the USD/EUR exchange rate during the IP, the use of monthly exchange rates gave a significantly more accurate result than the use of a single annual rate. The calculations for all exporters were revised accordingly.

(49) One exporter and one exporters' association argued that the lead time between the purchase of the raw material to the sale of a finished tungsten electrode to a dealer is significantly higher for the PRC exporters than for the Community industry, due to longer transport time and custom procedures. This would mean that the prices of the PRC exporters naturally take a longer time to react to the raw material price increases than those of the Community industry and, the importer claimed, this should be taken into account in the injury calculation.

(50) While it is recognised that the time lag between the product being manufactured and delivery at the customer is greater for Chinese exporters, this is not considered to be a relevant factor for the injury determination. The data used in the investigation are defined by invoice date, which normally corresponds to the date on which the goods have been shipped from the factory. There is also a time lag between the time the price is negotiated on the basis on the current levels of raw material prices and the shipping date, but there is no reason to assume that this would be greater for Chinese producers than for those in the Community. Therefore, this argument has to be rejected.

(51) Accordingly, the definitive weighted average injury margins for companies granted either IT or MET are:

Company	Definitive injury margin
Shandong Weldstone Tungsten Industry Co., Ltd	22,7 %
Shaanxi Yuheng Tungsten & Molybdenum Industrial Co., Ltd	41,0 %
Beijing Advanced Metal Materials Co., Ltd	38,8 %
All other companies	63,5 %

2. Form and level of the duties

(52) In the light of the foregoing and in accordance with Article 9(4) of the basic Regulation, a definitive anti-dumping duty should be imposed at the level sufficient to eliminate the injury caused by the imports without exceeding the dumping margin found.

- (53) On the basis of the above, the definitive duties are as follows:

Company	Definitive duty
Shandong Weldstone Tungsten Industry Co., Ltd	17,0 %
Shaanxi Yuheng Tungsten & Molybdenum Industrial Co., Ltd.	41,0 %
Beijing Advanced Metal Materials Co., Ltd.	38,8 %
All other companies	63,5 %

- (54) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the country-wide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the country concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

- (55) Any claim requesting the application of these individual company anti-dumping duty rates (e.g. following a change in the name of the entity or following the setting up of new production or sales entities) should be addressed to the Commission ⁽¹⁾ forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with, for example, that name change or that change in the production and sales entities. If appropriate, the Regulation will then be amended accordingly by updating the list of companies benefiting from individual duty rates.

- (56) In order to ensure a proper enforcement of the anti-dumping duty, the residual duty level should not only apply to the non-cooperating exporters, but also to those companies which did not have any exports during the IP. However, the latter companies are invited, when they fulfil the requirements of Article 11(4) of the basic Regulation, second paragraph, to present a request for a review pursuant to that Article in order to have their situation examined individually.

⁽¹⁾ European Commission
Directorate-General for Trade
Direction H, office J-79 5/16
B-1049 Brussels

3. Undertakings

- (57) Following the disclosure of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties, two exporting producers in the PRC offered price undertakings in accordance with Article 8(1) of the basic Regulation.

- (58) The product concerned is characterised by a considerable number of product types with significant price variations between them. The two exporting producers offered only one minimum import price (MIP) for all product types at a level which would not have guaranteed the elimination of injurious dumping for all products. It also needs to be noted that the high number of product types makes it virtually impossible to establish meaningful MIPs for each product type which could be properly monitored by the Commission even if the exporting producers had offered different MIPs for each of them.

- (59) Moreover during the IP the product concerned showed a considerable volatility in prices and therefore it is not suitable for a fixed price undertaking. In order to overcome this problem both companies offered to index the MIP on the basis of the volatility of the APT prices. However, as no close correlation between the volatility of APT prices and the volatility of TE prices could be established during the IP for one of the exporting producers, the indexation of the MIP on basis of the APT prices was not feasible for this particular exporting producer.

- (60) Furthermore one of the exporting producers has several related companies in the EC and these related companies also sell other products to the same customers. This complex sales structure raises the risk of circumvention.

- (61) On the basis of the above, it was concluded that these undertaking offers had to be rejected.

4. Definitive collection of provisional duties and special monitoring

- (62) In view of the magnitude of the dumping margins found and in the light of the level of the injury caused to the Community industry, it is considered necessary that the amounts secured by way of the provisional anti-dumping duty, imposed by the provisional Regulation, i.e. Regulation (EC) No 1350/2006, should be definitively collected to the extent of the amount of the definitive duties imposed. Where the definitive duties are lower than the provisional duties, amounts provisionally secured in excess of the definitive rate of anti-dumping duties shall be released. Where the definitive duties are higher than the provisional duties, only the amounts secured at the level of the provisional duties shall be definitively collected.

- (63) In order to minimise the risks of circumvention due to the high difference in the duty rates, it is considered that special measures are needed in this case to ensure the proper application of the anti-dumping duties. These special measures, which only apply to companies for which an individual duty rate is introduced, include the following: the presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Annex to this Regulation. Imports not accompanied by such an invoice shall be made subject to the residual anti-dumping duty applicable to all other exporters.
- (64) Moreover it is recalled that should the exports by the companies benefiting from lower individual duty rates increase significantly in volume after the imposition of the anti-dumping measures, such an increase in volume could be considered as constituting in itself a change in the pattern of trade due to the imposition of measures within the meaning of Article 13(1) of the basic Regulation. In such circumstances, and provided the conditions are met, an anti-circumvention investigation may be initiated. This investigation may, *inter alia*, examine the need for the removal of individual duty rates and the consequent imposition of a country-wide duty,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of tungsten welding electrodes, including tungsten bars and rods for welding electrodes, containing 94 % or more by weight of tungsten, other than those obtained simply by sintering, whether or not cut to length, falling within CN codes ex 8101 99 10 and ex 8515 90 00 (TARIC codes 8101 99 10 10 and 8515 90 00 10) and originating in the People's Republic of China.

2. The rate of the definitive anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, of the products manufactured by the companies listed below shall be as follows:

Company	Anti-Dumping Duty	TARIC Additional Code
Shandong Weldstone Tungsten Industry Co., Ltd	17,0 %	A754
Shaanxi Yuheng Tungsten & Molybdenum Industrial Co., Ltd	41,0 %	A755
Beijing Advanced Metal Materials Co., Ltd	38,8 %	A756
All other companies	63,5 %	A999

3. The application of the individual duty rates specified for the companies mentioned in paragraph 2 shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Annex. If no such invoice is presented, the duty rate applicable to all other companies shall apply.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

Amounts secured by way of provisional anti-dumping duties pursuant to Regulation (EC) No 1350/2006 on imports of certain tungsten electrodes, including tungsten bars and rods for welding electrodes, containing 94 % or more by weight of tungsten, other than those obtained simply by sintering, whether or not cut to length, falling within CN codes ex 8101 99 10 and ex 8515 90 00 (TARIC codes 8101 99 10 10 and 8515 90 00 10) and originating in the People's Republic of China shall be definitively collected. The amounts secured in excess of the amount of the definitive anti-dumping duties shall be released. Where the definitive duties are higher than the provisional duties, only the amounts secured at the level of the provisional duties shall be definitely collected.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 9 March 2007.

For the Council
The President
F.-W. STEINMEIER

ANNEX

The valid commercial invoice referred to in Article 1(3) of this Regulation must include a declaration signed by an official of the company, in the following format:

1. The name and function of the official of the company which has issued the commercial invoice.
2. The following declaration 'I, the undersigned, certify that the [volume] of tungsten electrodes sold for export to the European Community covered by this invoice was manufactured by (company name and address) (TARIC additional code) in (country concerned). I declare that the information provided in this invoice is complete and correct.'

COMMISSION REGULATION (EC) No 261/2007**of 12 March 2007****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables ⁽¹⁾, and in particular Article 4(1) thereof,

Whereas:

- (1) Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the

standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

- (2) In compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 13 March 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 March 2007.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 337, 24.12.1994, p. 66. Regulation as last amended by Regulation (EC) No 386/2005 (OJ L 62, 9.3.2005, p. 3).

ANNEX

to Commission Regulation of 12 March 2007 establishing the standard import values for determining the entry price of certain fruit and vegetables

<i>(EUR/100 kg)</i>		
CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	IL	111,0
	MA	70,1
	TN	143,7
	TR	124,1
	ZZ	112,2
0707 00 05	JO	171,8
	MA	96,3
	TR	181,9
	ZZ	150,0
0709 90 70	MA	76,4
	TR	108,7
	ZZ	92,6
0709 90 80	EG	223,0
	IL	119,7
	ZZ	176,4
0805 10 20	CU	36,7
	EG	49,0
	IL	53,9
	MA	46,0
	TN	49,5
	TR	64,6
	ZZ	50,0
0805 50 10	EG	58,9
	IL	61,6
	TR	52,3
	ZZ	57,6
0808 10 80	AR	86,1
	BR	78,9
	CA	81,5
	CL	109,6
	CN	93,8
	US	110,5
	UY	80,5
	ZA	90,3
ZZ	91,4	
0808 20 50	AR	73,8
	CL	84,3
	CN	75,5
	US	110,6
	ZA	76,7
	ZZ	84,2

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 262/2007**of 12 March 2007****amending the representative prices and additional duties for the import of certain products in the sugar sector fixed by Regulation (EC) No 1002/2006 for the 2006/2007 marketing year**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector ⁽¹⁾,

Having regard to Commission Regulation (EC) No 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector ⁽²⁾, and in particular of the Article 36,

Whereas:

- (1) The representative prices and additional duties applicable to imports of white sugar, raw sugar and certain syrups

for the 2006/2007 marketing year are fixed by Commission Regulation (EC) No 1002/2006 ⁽³⁾. These prices and duties have been last amended by Commission Regulation (EC) No 237/2007 ⁽⁴⁾.

- (2) The data currently available to the Commission indicate that the said amounts should be changed in accordance with the rules and procedures laid down in Regulation (EC) No 951/2006,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties on imports of the products referred to in Article 36 of Regulation (EC) No 951/2006, as fixed by Regulation (EC) No 1002/2006 for the 2006/2007 marketing year are hereby amended as set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on 13 March 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 March 2007.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 58, 28.2.2006, p. 1. Regulation as last amended by Commission Regulation (EC) No 2011/2006 (OJ L 384, 29.12.2006, p. 1).

⁽²⁾ OJ L 178, 1.7.2006, p. 24. Regulation as amended by Regulation (EC) No 2031/2006 (OJ L 414, 30.12.2006, p. 43).

⁽³⁾ OJ L 179, 1.7.2006, p. 36.

⁽⁴⁾ OJ L 66, 6.3.2007, p. 17.

ANNEX

Amended representative prices and additional duties applicable to imports of white sugar, raw sugar and products covered by CN code 1702 90 99 applicable from 13 March 2007

(EUR)

CN code	Representative price per 100 kg of the product concerned	Additional duty per 100 kg of the product concerned
1701 11 10 ⁽¹⁾	21,39	5,61
1701 11 90 ⁽¹⁾	21,39	10,97
1701 12 10 ⁽¹⁾	21,39	5,42
1701 12 90 ⁽¹⁾	21,39	10,46
1701 91 00 ⁽²⁾	26,55	11,96
1701 99 10 ⁽²⁾	26,55	7,44
1701 99 90 ⁽²⁾	26,55	7,44
1702 90 99 ⁽³⁾	0,27	0,38

⁽¹⁾ Fixed for the standard quality defined in Annex I.III to Council Regulation (EC) No 318/2006 (OJ L 58, 28.2.2006, p. 1).

⁽²⁾ Fixed for the standard quality defined in Annex I.II to Regulation (EC) No 318/2006.

⁽³⁾ Fixed per 1 % sucrose content.

COMMISSION REGULATION (EC) No 263/2007**of 12 March 2007****fixing the definitive rate of refund and the percentage of system B export licences to be issued in the fruit and vegetables sector (tomatoes, oranges, lemons, table grapes and apples)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables ⁽¹⁾,

Having regard to Commission Regulation (EC) No 1961/2001 of 8 October 2001 on detailed rules for implementing Council Regulation (EC) No 2200/96 as regards export refunds on fruit and vegetables ⁽²⁾, and in particular Article 6(7) thereof,

Whereas:

(1) Commission Regulation (EC) No 1510/2006 ⁽³⁾ fixed the indicative quantities for the issue of B system export licences.

(2) The definitive rate of refund for tomatoes, oranges, lemons, table grapes and apples covered by licences applied for under system B between 1 November 2006 and 28 February 2007 should be fixed at the indicative rate, and the percentage of licences to be issued for the quantities applied for should be laid down,

HAS ADOPTED THIS REGULATION:

Article 1

For applications for system B export licences submitted pursuant to Article 1 of Regulation (EC) No 1510/2006 between 1 November 2006 and 28 February 2007, the percentages of licences to be issued and the rates of refund applicable are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 13 March 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 March 2007.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 297, 21.11.1996, p. 1. Regulation as last amended by Commission Regulation (EC) No 47/2003 (OJ L 7, 11.1.2003, p. 64).

⁽²⁾ OJ L 268, 9.10.2001, p. 8. Regulation as last amended by Regulation (EC) No 386/2005 (OJ L 62, 9.3.2005, p. 3).

⁽³⁾ OJ L 280, 12.10.2006, p. 16.

ANNEX

Percentages for the issuing of licences and rates of refund applicable to system B licences applied for between 1 November 2006 to 28 February 2007 (tomatoes, oranges, lemons, table grapes and apples)

Product	Rate of refund (EUR/t net)	Percentages of licences to be issued for the quantities applied for
Tomatoes	20	100 %
Oranges	29	100 %
Lemons	50	100 %
Table grapes	13	100 %
Apples	23	100 %

COMMISSION REGULATION (EC) No 264/2007**of 9 March 2007****establishing a prohibition of fishing for anglerfish in ICES zone VIIIc, IX and X; EC waters of CECAF 34.1.1 by vessels flying the flag of France**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy ⁽¹⁾, and in particular Article 26(4) thereof,Having regard to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to common fisheries policy ⁽²⁾, and in particular Article 21(3) thereof,

Whereas:

- (1) Council Regulation (EC) No 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in Community waters and for Community vessels, in waters where catch limitations are required ⁽³⁾, lays down quotas for 2007.
- (2) According to the information received by the Commission, catches of the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein have exhausted the quota allocated for 2007.

- (3) It is therefore necessary to prohibit fishing for that stock and its retention on board, transhipment and landing,

HAS ADOPTED THIS REGULATION:

*Article 1***Quota exhaustion**

The fishing quota allocated to the Member State referred to in the Annex to this Regulation for the stock referred to therein for 2007 shall be deemed to be exhausted from the date set out in that Annex.

*Article 2***Prohibitions**

Fishing for the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein shall be prohibited from the date set out in that Annex. It shall be prohibited to retain on board, tranship or land such stock caught by those vessels after that date.

*Article 3***Entry into force**

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 9 March 2007.

For the Commission

Fokion FOTIADIS

Director-General for Fisheries and Maritime Affairs

⁽¹⁾ OJ L 358, 31.12.2002, p. 59.

⁽²⁾ OJ L 261, 20.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 1967/2006 (OJ L 409, 30.12.2006, p. 11), as corrected by OJ L 36, 8.2.2007, p. 6).

⁽³⁾ OJ L 15, 20.1.2007, p. 1.

ANNEX

No	01
Member State	FRANCE
Stock	ANF/8C3411
Species	Anglerfish (<i>Lophiidae</i>)
Zone	VIIIc, IX and X; EC waters of CECAF 34.1.1
Date	7 February 2007

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 10 July 2006

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

(Case COMP/M.4000 — Inco/Falconbridge)

(notified under document number C(2006) 3052)

(Only the English version is authentic)

(Text with EEA relevance)

(2007/163/EC)

On 4 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 ⁽¹⁾, 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 case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html

I. SUMMARY

- (1) This case concerns the acquisition by Inco Ltd (Inco, Canada) of Falconbridge Ltd (Falconbridge, Canada). Both companies are active worldwide in the mining, processing, refining and sale of various nickel products, copper, cobalt and precious metals.
- (2) Inco is an international mining company principally active in the mining, processing, refining and sale of various nickel products, copper, cobalt and precious metals as well as sulphur products. Inco's worldwide sales in 2004 were EUR 3 439 million. Inco's activities are mainly focused on nickel, which accounted for 83 % of its total sales while copper accounted for 9 %, cobalt for 1 % and precious metals for 5 %.
- (3) Falconbridge is an international mining company principally active in the mining, processing, refining and sale of various nickel products, copper, cobalt, lead, zinc, aluminium and precious metals as well as sulphur

products. Falconbridge generated in 2004 worldwide sales of EUR 5 610 million. Half of its sales related to copper, 26 % to nickel, 14 % to aluminium, 6 % to zinc and 2 % to cobalt.

- (4) On 11 October 2005, Inco announced its intention to acquire, by way of a public bid, all of the outstanding shares of Falconbridge. Under the proposed transaction, Inco will acquire sole control over Falconbridge. It therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation. The notified operation is therefore a concentration.
- (5) The market investigation has revealed that the transaction, as notified, would significantly impede effective competition on the market for the supply of nickel to the plating and electroforming industry in the EEA, and on the global markets for the supply of high-purity nickel for the production of super alloys/super alloys used in safety critical parts and for the supply of high-purity cobalt for the production of super alloys used in safety critical parts. Post merger, the new entity would have become by far the largest supplier in the EEA of

⁽¹⁾ OJ L 24, 29.1.2004, p. 1.

nickel products to the plating and electroforming industry and the almost monopolistic supplier of high-purity nickel used in super alloys and of high-purity cobalt for super alloys used in safety-critical applications. The investigation has indicated that the new entity would have had the ability and incentive to increase prices on these markets in the absence of any significant competitive constraint. It was also discovered that the efficiency gains brought about by the proposed transaction would most likely not benefit directly consumers and would thus not counteract the adverse effects on competition.

(6) In order to remove the competition concerns identified during the procedure, the parties submitted on 16 March 2006 a package of commitments. After extensive discussions with the Commission, the parties subsequently submitted a revised remedy package on 5 April 2006. The revised remedy package was the subject of a market test with third parties. On 7 June 2006, the parties submitted a revised remedy package. These commitments were slightly amended thereafter. A final version was submitted by the parties on 26 June 2006.

(7) In the final commitments submitted by the parties, the parties undertake to divest the Falconbridge's Nikkelverk refinery in Norway together with related assets (divested business) to a company active in metal mining and/or processing with sufficient nickel resources to sustain the viability of the refinery. In addition, on 7 June 2006, Falconbridge entered into a binding agreement with LionOre Mining International Ltd (LionOre) for the sale of the divested business. On 7 June 2006, the parties requested the Commission to approve LionOre as a suitable purchaser for the divested business. The Commission believes that the undertakings are sufficient to remove the anticompetitive concerns stemming from the transaction and that LionOre is a suitable purchaser for the divested business.

(8) A clearance decision with conditions and obligations pursuant to Article 8(2) of the Merger Regulation is therefore proposed for adoption.

II. EXPLANATORY MEMORANDUM

1. The relevant product markets

(9) The proposed transaction concerns the nickel and cobalt sectors. The parties claim that the relevant product markets are the supply of nickel and the supply of cobalt. However, the market investigation has clearly shown that it is appropriate to define the relevant nickel and cobalt product markets according to end

applications. First, demand patterns differ significantly between end applications, in particular in terms of purity, size and shape of the products, delivery requirements and structure of the demand; secondly, nickel producers are to a large extent specialised in supplying certain end applications; and thirdly, finished nickel product prices appear to differ according to the application.

(10) The market investigation confirmed that relevant product markets are the following:

(i) the supply of nickel to the plating and electroforming industry;

(ii) the supply of high-purity nickel for the production of super alloys/super alloys used in safety critical parts;

(iii) the supply of high-purity cobalt for the production of super alloys used in safety-critical parts.

A. *The supply of nickel to the plating and electroforming industry*

(11) The plating process is used to coat an object in the desired metal by passing electric current through a suitable solution (the electrolyte). Electroforming allows covering various types of moulds with shapes or thin metal deposits.

(12) The market investigation has shown that only specific finished nickel products can be used for plating and electroforming. Plating customers have specific requirements in terms of purity, shape, size and packaging. Sales of nickel products for plating and electroforming are usually made via distributors. The market investigation has shown that the fragmented structure of the demand implies the need for a nickel supplier to develop and maintain a sales network of distributors.

(13) From the supply-side perspective, not all nickel suppliers are capable of supplying nickel products to the plating and electroforming industry and certain producers, in particular the parties, have developed specific products for this end application. A nickel supplier not yet active in the business would need to make significant investments to be able to supply the wide range of nickel products used in the plating and electroforming applications.

- (14) In addition, the parties' internal documents also point to the existence of a distinct product market with distinct pricing and marketing policies from other applications of nickel.

B. The supply of high-purity nickel for the production of super alloys/super alloys used in safety-critical parts

- (15) Super alloys are used in applications requiring operation in high-temperature and high-stress environments. Such applications include, in particular, the aerospace, power generation and medical industries. A specific category of super alloys are super alloys used in safety-critical rotating parts, for example turbine engine blades and discs for jet aircrafts.
- (16) The market investigation has shown that not all finished nickel products from any supplier can be used interchangeably for the production of super alloys, and even less so as regards super alloys used in safety critical parts due to the high purity of nickel required (very low level of impurities and trace elements) and the need for certification and traceability.

- (17) As regards supply-side substitutability, not all nickel producers can produce high-purity nickel suitable to manufacture super alloys/super alloys used in safety-critical parts. The comparison of the specifications of the finished nickel products of a range of nickel suppliers and the specifications required by a range of super alloy producers shows that only very few suppliers, including the parties, are able to produce finished nickel products with a sufficient purity to meet the specifications of super alloy producers. The market investigation has also revealed that there were high barriers to entry in this product market.

C. The supply of high-purity cobalt for the production of super alloys used in safety critical parts

- (18) A particular end application of cobalt is the production of super alloys, a specific category of which are super alloys used in safety-critical applications. Super alloys are one of the major end-use applications of cobalt, accounting for 20 % to 25 % of total cobalt demand.
- (19) The market investigation has indicated that not all cobalt products suitable for use in super alloys meet the specifications for high-purity cobalt for super alloys used in safety-critical applications. There is a very specific demand for high-purity cobalt — defined by its precise chemical composition and low impurity levels — used

for the production of super alloys used in critical applications. Producers of super alloys used in critical applications cannot substitute any other cobalt product with a lower quality and/or different chemical composition.

2. The relevant geographic markets

- (20) The market investigation confirmed that relevant geographic markets are the following:
- (i) the market for the supply of nickel products to the plating and electroforming industry has a regional geographic dimension (EEA wide);
 - (ii) the market for the supply of high-purity nickel for the production of super alloys/super alloys used in safety-critical parts has a worldwide geographic dimension;
 - (iii) the market for the supply of high-purity cobalt for the production of super alloys used in safety critical parts has a worldwide geographic dimension.

3. Affected markets

A. Supply of nickel to the plating and electroforming industry

- (21) After the transaction, New Inco will become by far the largest supplier of nickel products to the plating and electroforming industry, with a combined EEA-wide market share of 70 % to 80 % and sales more than five times as high as its closest competitor ⁽¹⁾.
- (22) The market investigation has shown that the other producers of nickel for plating and electroforming cannot exercise competitive constraints on New Inco, either because they lack sufficient capacity and suitable technology, or either because they are not active in the EEA. Distributors and customers have confirmed that OMG would be the only real alternative supplier to New Inco. However, OMG's difficulties in sourcing intermediate products (feed) and its tolling agreement with Inco considerably reduce the competitive constraint that OMG could exercise on New Inco.
- (23) Internal documents provided by the parties also indicate that Inco and Falconbridge are the closest competitors for the supply of nickel products used in the plating and electroforming industry. Furthermore, these documents also confirm that the parties are the market drivers, having the greatest range of nickel products for plating and electroforming (different shapes and sizes) and brands with exceptional reputation in the market ('must have' brands).

⁽¹⁾ In the EEA, the parties currently face very limited competition from OMG (14 %), Eramet (5 %) and to a lesser extent Anglo American (2 %).

(24) New Inco will thus become the only supplier capable of offering a unique range of products to the plating and electroforming industry. Following the transaction, New Inco will therefore have the power to increase unilaterally prices for nickel products, while facing limited competitive pressure from any other existing or potential suppliers of nickel products to the plating and electroforming industry.

B. Supply of high-purity nickel for the production of super alloys/super alloys used in safety-critical parts

(25) New Inco will become by far the largest and almost monopolistic supplier of high-purity nickel used in super alloys, with a market share of 80 % to 95 % globally. Competition in the super alloy market has been basically driven by the rivalry between Inco and Falconbridge. The position of New Inco will be very strong as no other nickel supplier is or will be able to match the unique strengths of New Inco in terms of product quality, production capacity and reputation on the market for the supply of high-purity nickel used for the production of super alloys/super alloys used in safety-critical parts. Most super alloy manufacturers and customers expressed concerns about the transaction, which will reduce the number of suppliers of high-purity nickel from three to two, leaving New Inco facing mostly Eramet only.

(26) Given the significance of barriers to entry in the high-purity nickel market (notably borne out by the absence of entry at least during the past 10 years), constraints on the future behaviour of New Inco by potential competition are likely to be minimal. As a result of the merger, New Inco will be able to increase unilaterally prices for high-purity nickel. This is particularly so in a context where the demand for high-purity nickel is strongly increasing and high-purity nickel supply is extremely tight, due to capacity constraints faced by other suppliers.

C. Supply of high-purity cobalt for the production of super alloys used in safety-critical parts

(27) New Inco will become the almost monopolistic supplier of high-purity cobalt for super alloys used in safety-critical applications. As in the market of the supply of high-purity nickel, competition on the market for the supply of high-purity cobalt used in super alloys for safety-critical parts is driven by the rivalry between Inco and Falconbridge.

(28) New Inco's position will be very strong as very few suppliers produce high-purity cobalt meeting the strict specifications of manufacturers of super alloys used in

safety-critical applications. The market investigation has revealed that no other cobalt producer is and will be able to match the unique strengths of New Inco in terms of high purity and consistent quality of its cobalt production, its production capacity, and excellent reputation on the market for the supply of high-purity cobalt for the production of super alloys used in safety-critical parts. Therefore, no other cobalt producer will be able to exercise any significant competitive constraint on New Inco.

(29) There are significant barriers to entry into the market for the supply of high-purity cobalt suitable for the production of super alloys used in critical applications. Given the importance of these barriers, constraints on the future behaviour of New Inco by potential competition are likely to be minimal. Thus, as a result of the merger, New Inco will be able to increase unilaterally prices for high-purity cobalt products required for super alloys used in critical applications.

D. Restriction of global nickel supply

(30) Certain third parties contended that New Inco would have the ability and incentive to delay part of its nickel-mining projects, in particular the Koniambo project and that this would have an impact on nickel LME prices. However, the market investigation has shown that New Inco would neither have an economic interest in delaying a mining project at an advanced stage of development (ramp up or committed) due to the significant financial cost incurred nor to delay an early stage mining project (potential) as the benefits of such announcement, in terms of higher LME prices, are highly speculative and certainly very limited in time.

E. Efficiencies

(31) The parties submit that the proposed transaction would generate efficiency gains arising primarily from the close proximity of their respective mines/processing facilities in the Sudbury basin, which would help them to optimise their mining and processing operations. This would allegedly result in increased production at lower cost and would benefit all nickel customers. However, the parties have failed to demonstrate that the efficiencies brought about by the proposed transaction are not attainable with a less anti-competitive alternative and would directly benefit end customers in the three relevant product markets where competition concerns have been identified. For these reasons, the efficiencies presented by the parties cannot be considered to offset the adverse effect of the proposed transaction on competition.

F. Conclusion

- (32) The attached Decision, therefore, concludes that the notified concentration is likely to significantly impede effective competition, in particular as a result of the creation of a dominant position, and appears incompatible with the Common Market and the functioning of the EEA Agreement as regards each of the three relevant markets.

4. Commitments offered by the Parties

- (33) In order to address the aforementioned competition concerns in the markets for the supply of nickel to the plating and electroforming industry in the EEA, for the supply of high-purity nickel for super alloys/super alloys used in safety-critical parts worldwide, and for the supply of high-purity cobalt for super alloys used in safety-critical parts worldwide, the Parties have submitted the undertakings described below.
- (34) Under the undertakings, the parties commit to divest Falconbridge's sole refinery, the Nikkelverk refinery in Norway, together with the related feed procurement entity and existing third-party feed supply agreements, related marketing organisations and existing customer contracts, Falconbridge's proprietary refining technology and trademarks (the divested business) to a suitable purchaser, having access to sufficient feed resources to sustain the economic viability of Nikkelverk. In addition, the parties undertake to offer the purchaser to enter into a 10-year flexible feed supply agreement, covering a substantial part of Nikkelverk's feed requirements.
- (35) In addition, Falconbridge entered into a binding agreement with a third party company, LionOre, for the sale of the divested business. The parties requested the Commission to approve LionOre as a suitable purchaser for the divested business.

5. Assessment of the commitments submitted

- (36) Nikkelverk is Falconbridge's only refinery and produces all the nickel products supplied by Falconbridge to the plating and electroforming industry, all the high-purity nickel products sold by Falconbridge for the production of super alloys and all the high-purity cobalt products supplied by Falconbridge for the production of super alloys used in safety-critical parts. In addition, the divested business includes all the Falconbridge entities in charge of the marketing and the sale of these nickel and cobalt products.

- (37) The proposed remedy therefore removes the entire quantitative overlap between Inco and Falconbridge on the three markets where competition concerns have been identified. Provided that the divested business will operate as a viable and competitive entity, it will thus take over Falconbridge's market position in the three relevant markets and restore the effective competition prevailing thereon prior to the proposed transaction.
- (38) The investigation has, however, shown that the essential issue for the assessment of the proposed remedy is the ability of the divested business to secure a long-term source of nickel feed suitable for the production of high-purity nickel on a consistent basis, at economically attractive conditions. If this condition is not satisfied, it is likely that the divested business will be a weak and vulnerable competitor on the relevant markets, unable to effectively compete with New Inco.
- (39) The assessment of the current structure of the nickel industry has shown that the vertical integration of mining, processing and refining facilities was the predominant business model. There is currently no stand-alone refinery in the nickel industry and the few refineries that source third-party feeds also own interests in mining and processing facilities. This situation is not expected to change significantly by 2015 as the vertically integrated business model is an efficient response to the need for refineries to secure stable feed sources in the long term.
- (40) Therefore only a purchaser, with experience in mining and processing of nickel and access to mines and sufficient intermediate nickel products, could bring sufficient comfort as to ability and incentive of a purchaser for the divested business to restore competition in the long term. This is strongly supported by the results from the market investigation on the remedies carried out by the Commission.
- (41) As regards cobalt, contrary to the nickel industry, vertical integration is not the prevailing business model in the cobalt industry, with significant trading of cobalt intermediates. Over 50 % of Nikkelverk's cobalt production is sourced from third parties. Falconbridge refines custom feed, including cobalt contained in the matte purchased from BCL, and cobalt intermediates from Australia and Africa, under both feed-purchase and toll-refining arrangements. In addition, for a period up to 10 years, New Inco has committed to supply the divested business with similar quantities of cobalt feed as those currently supplied by Falconbridge to Nikkelverk.

- (42) The final commitments provide that the divested business will be sold only to a company active in metals mining and/or processing with sufficient nickel resources to sustain the economic viability of the divested business upon the expiry of the Matte Supply Agreement with New Inco. The level of 55 000 MT per year, which Falconbridge currently supplies to Nikkelverk, is mentioned by Inco as a relevant benchmark.
- (43) This provision fully addresses the Commission's concerns as regards the viability and the competitiveness of the divested business as it clearly provided for sufficient assurance as to the divested business nickel feed supply. The Commitments are therefore suitable to entirely remove all the competitive concerns identified above.
- (44) In addition, the conditions of the 10-year flexible feed supply and the pricing mechanism proposed in the final version of the Commitments have been found to be sufficient to protect the viability and competitiveness of the divested business if it is sold to a company already active in metal mining.

6. Suitability of the proposed purchaser

- (45) LionOre Mining International Ltd (LionOre) is a mid-sized producer of nickel with operating mines in Botswana, South Africa, and Australia and in several mining projects in these regions. LionOre's current mines and mining projects are all sulphide mines. The company has been in the nickel business since 1996, producing about 29 000 MT of nickel in 2005, and is the 10th largest nickel producer in the world.
- (46) LionOre has ownership interests in four producing nickel mines and one gold mine. In Africa, the company controls an 85 % interest in Tati Nickel in Botswana and a 50 % interest in the Nkomati nickel mine in South Africa. In Western Australia, LionOre has a 100 % interest in the Lake Johnston nickel operations, an 80 % interest in the Black Swan nickel operations, and a 100 % interest in the Thunderbox gold mine. In addition, LionOre has plans to develop the Honeymoon Well deposit in Western Australia. While the company is

working towards becoming a fully integrated nickel producer through its Activox technology, LionOre currently only produces nickel concentrate⁽¹⁾, and does not have any refining capabilities. The total proven nickel resource base of LionOre amounted to 2,3 million MT at the end of 2005.

- (47) In line with general principles and with the criteria set in the commitments, it must be assessed whether, after the acquisition of the divested business, LionOre will become an independent competitive force on the markets where competition concerns have been identified. In particular, an assessment was made of whether LionOre is/will remain independent of Inco/New Inco and has sufficient financial resources to acquire the divested business. This implies focusing on how LionOre could integrate its existing and future-nickel mining operations with Nikkelverk and on whether LionOre could supply sufficient quantities of feed to Nikkelverk to sustain the economic viability of the divested business at the expiry of the Matte Supply Agreement, as provided for in the commitments.
- (48) LionOre meets all the criteria in the commitments for the suitability of the purchaser and the generic conditions set by the Commission for the suitability of the purchaser in a divestiture remedy. It is therefore concluded that LionOre is a suitable purchaser for the divested business and that it will ensure the independence, viability, and competitiveness of the divested business in the long term. LionOre combines a number of characteristics that were identified as crucial to meet these conditions: (i) extensive experience and knowledge of the nickel industry; (ii) ownership of mines and mining projects that already/will produce suitable feed for Nikkelverk, and (iii) knowledge of the Nikkelverk refinery process and output.

7. Conclusion

- (49) For the abovementioned reasons, the commitments submitted by the parties are sufficient to address the competition concerns raised by this concentration.
- (50) The draft decision therefore proposes declaring the notified transaction compatible with the common market and the functioning of the EEA Agreement pursuant to Article 8(2) of the Merger Regulation.

⁽¹⁾ LionOre also has a 20 % interest in the Botswana-based BCL smelter (nickel processing).

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 ⁽¹⁾, 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/competiton/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 ⁽²⁾, including calcium carbonates ⁽³⁾, 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.

⁽¹⁾ OJ L 24, 29.1.2004, p. 1.

⁽²⁾ Industrial minerals include PCC (precipitated calcium carbonate), GCC (ground calcium carbonate), kaolin talc and dolomite.

⁽³⁾ 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.

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.

(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.

⁽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).

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.

(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.

(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.

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 ⁽¹⁾. 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 ⁽²⁾.
- (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.

⁽¹⁾ In addition, the Finnish Competition Authority submitted a response.

⁽²⁾ 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.