COMMISSION DECISION

of 21 February 2002

declaring a concentration to be compatible with the common market and the EEA Agreement

(Case COMP/M.2495 — Haniel/Fels)

(notified under document number C(2002) 554)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/260/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) No 1310/97 [2], and in particular Article 8(2) thereof,

Having regard to the Commission decision of 17 October 2001 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations [3],

Having regard to the final report of the Hearing Officer in this case [4],

Whereas:

(1) On 4 September 2001, Haniel Baustoff-Industrie Zuschlagsstoffe GmbH ('HBI') notified the Commission under Article 4 of Council Regulation (EEC) No 4064/89 ('the Merger Regulation') of a planned concentration whereby Haniel was, by share acquisition, to acquire sole control of Fels-Werke GmbH ('Fels').

(2) The Commission examined the notification and initially found that the notified transaction fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and the EEA Agreement.

(3) On 17 October 2001 the Commission therefore decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation. In so far as the proposed concentration concerned Germany, the Commission adopted a decision on the same day referring the case to the competent authorities of Germany under Article 9(3) of the Merger Regulation.

(4) Following a detailed investigation of the case, the Commission has now come to the conclusion that the proposed concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market.

I. THE PARTIES AND THE TRANSACTION

(5) HBI is a direct subsidiary of Franz Haniel & Cie GmbH ('Haniel'), a diversified German holding company. In the construction materials industry Haniel is active in the manufacture and sale of wall-building materials such as sand-lime bricks, aerated concrete and ready-mixed concrete. Haniel's main centre of activities is Germany, but it is also active in the Netherlands through its indirect stake in the Dutch cooperative undertaking Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten ('CVK'). Haniel has a stake in around 30 sand-lime brick factories in Germany, eight in the Netherlands, one in Belgium and two in Poland. It also operates a sand-lime facing brick factory in Denmark and has a stake in three ready-mixed concrete plants in France.

(6) On 16 October 2001 Haniel notified as a concentration its acquisition of Ytong Holding AG ('Ytong'), a subsidiary of Rheinisch-Westfälische Kalkwerke AG, which in turn is controlled by the British firm RMC plc. (Case COMP/M.2568 — Haniel/Ytong). The notification is still pending. On 30 November 2001 the Commission

[1] OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 97, 24.4.2003.
[4] OJ C 97, 24.4.2003.

referred that part of the case relating to Germany to the competent German authorities under Article 9 of the Merger Regulation and initiated proceedings under Article 6(1)(c) of the Merger Regulation with regard to remaining aspects of the concentration.

(7) Fels, a subsidiary of the German firm Preussag AG ('Preussag'), manufactures and sells — either itself or through its subsidiary Hebel AG ('Hebel') — building materials such as aerated concrete, lime products, plaster fibre plates and dry mortar. The firm is also active in the manufacture and sale of prefabricated houses made of aerated concrete and in the planning and construction of aerated concrete production plants.

Haniel intends to acquire all Preussag's business shares in Fels.

II. THE CONCENTRATION

(8) Under the terms of the proposed transaction, Haniel will acquire sole control of Fels. This would give rise to a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

(9) The undertakings concerned have an aggregate world-wide turnover of over EUR 5 billion (Haniel: EUR 18,7 billion, Fels: EUR 0,8 billion) ([5]). Both Haniel and Fels have a Community-wide turnover of over EUR 250 million (Haniel: EUR 17,5 billion, Fels: EUR 0,7 billion). Fels achieves more than two thirds of its aggregate Community-wide turnover in Germany, but this is not the case for Haniel. The notified concentration therefore has a Community dimension.

IV. PROCEDURE

(10) On 28 September 2001, the Commission received a request from the competent German competition authority, the Bundeskartellamt, to refer the planned concentration to the German competition authorities in so far as it concerned Germany. The request for referral concerns the market in wall-building materials for rising back-up masonry in Germany, but not the markets in wall-building materials outside Germany. By decision of 17 October 2001 the Commission referred the part of the case relating to Germany to the competent German authorities.

(11) Also on 17 October 2001, the Commission decided under Article 6(1)(c) of the Merger Regulation to initiate proceedings in respect of that part of the case not referred to the German authorities.

V. COMPATIBILITY WITH THE COMMON MARKET

A. *THE RELEVANT PRODUCT MARKETS*

(12) The parties' operations overlap in the production and sale of wall-building materials. Haniel produces and sells sand-lime bricks and sand-lime blocks in the Netherlands via the cooperative CVK. Fels sells aerated concrete and gypsum products. Besides sand-lime, aerated concrete and gypsum products, concrete products and clay bricks are also used in wall-building, as are, to a limited extent, steel plates and wooden panels.

1. THE PRODUCTS

(13) Sand-lime bricks are masonry units prepared from lime and sand by adding water and then compressing and hardening them under steam pressure. The bricks are used exclusively for building walls. They are generally rendered, filled in with thin plaster or hidden from view by a facing wall. When sand-lime masonry is visible, it generally consists of facing bricks, which are produced only in small formats ([6]). These form a separate market, which will not be discussed in detail here, as the parties produce such facing bricks only in small quantities. Besides sand-lime bricks, other, larger sand-lime walling units are used (usually measuring up to 900 mm × 625 mm × 300 mm in the Netherlands).

(14) Aerated concrete is a building material made from sand, lime and cement, to which aluminium powder is added during the manufacturing process. The powder reacts with water to form a fine porous structure. Aerated concrete products (blocks and other units) are used mainly in the construction of buildings. They can be used for both load-bearing walls — particularly in the case of blocks and very dense units — and non-load-bearing walls.

([5]) Turnover calculated in accordance with Article 5(1) of the Merger Regulation and with the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25). Turnover achieved before 1 January 1999 has been calculated in accordance with the average ECU exchange rate and converted into euro at a rate of 1:1.

([6]) Maximum size: 240 mm × 175 mm × 113 mm.

(15) Gypsum is a light wall-building material used only for non-load-bearing walls, as it has a very low load-bearing capacity. It is used in the form of gypsum plasterboards and planks.

(16) Concrete is another widely used wall-building material. Concrete walls can be made by pouring mixed concrete on site (in situ concrete) or by using precast concrete walling units. A third form of concrete comes in small-format concrete blocks. Concrete walls are built only as load-bearing walls.

(17) In situ concrete can be cast either by the traditional method of using formworks specially made on site or by 'tunnel forming' ('tunnelgietbouw' in Dutch) using prefabricated tunnel formworks, whereby walls and ceilings are cast in a single process. Tunnel forming entails high fixed costs and is therefore profitable for construction firms only in projects where a large number of identical, rectangular storeys are to be built. It is not a suitable alternative for smaller construction projects or those not involving rectangular shapes or repeated applications.

(18) Precast concrete walling units are produced in factories to precise specifications, then transported on site and built into the building for which they are intended. They generally constitute entire walls and are thus considerably larger than the sand-lime bricks or blocks predominantly used in masonry work, and require heavy equipment. Precast concrete walling units are therefore used primarily for larger projects, chiefly in non-residential construction ('utiliteitsbouw', abbreviated to 'u-bouw' in Dutch) rather than residential construction ('woningbouw', abbreviated to 'w-bouw').

(19) Brick, the classic masonry material, is manufactured from a mixture of clay and water by firing at temperatures of over 1 000 °C. However, the size of individual bricks is limited, as the firing process causes deformations such as shrinkage and warpage. Jointing is therefore necessary when working with these products, in order to offset these deformations. This makes the use of bricks time consuming and labour intensive.

(20) Steel plates are used mainly in non-residential construction, and to a lesser extent in residential construction. For example, they are used to fill in wall space in load-bearing concrete or steel structures. In such cases the wall usually consists of two steel plates with insulating material between them (metal sandwich plates).

(21) Wooden panels are employed in industrial and residential construction, mainly in the form of prefabricated walling units used to close off the building on the outside where there are no load-bearing walls. In the Netherlands wood is used for load-bearing walls only in exceptional cases.

2. DEFINITION OF THE RELEVANT PRODUCT MARKET

(22) In determining the extent of a relevant market, the Commission has to consider various product market definitions. In so doing, it has to be borne in mind that the use and exchangeability of various wall-building materials depend to a not inconsiderable extent on national building practices and traditions and are thus in some respects very different in some EEA States. In its investigation, the Commission has focused essentially on conditions in the Netherlands since it is only in that Member State that the concentration leads to additional market shares which are significant from a competition point of view.

(a) *Market definition of the notifying party (wall-building materials)*

(23) Haniel claims there is a single market in wall-building materials, given the existing conditions of competition, in particular the lack of any price difference based on use and the fact that they are invariably sold via the building materials trade. This market includes all products which are used in the construction of walls: clay bricks, concrete blocks, sand-lime bricks, aerated concrete blocks, precast concrete walling units, other sand-lime and aerated concrete units, masonry mortar, in situ concrete, steel plates, gypsum plasterboards and planks, and wooden panels. Haniel argues that, when a building is designed, there is generally a choice of various solutions for constructing the walls.

(24) Haniel states that the architect or project developer generally defines the requirements to be met in relation to the building's load-bearing capacity, age resistance, ease of maintenance, thermal insulation, fire protection and noise insulation. In some cases the architect also makes a selection of building materials in the building's specifications, but, according to Haniel, these specifications leave ample room for alternative solutions. Building contractors have a free choice of building materials, provided that the specifications are met. In the project proposal they can opt for a specific building material or put forward several possible solutions.

(25) Haniel does concede, however, that the various wall-building materials are not entirely interchangeable for every purpose. In view of the considerable differences in the demands made on building materials, depending on whether they are used for load-bearing or non-load-bearing walls, Haniel considers that there is a case for dividing the market in wall-building materials into materials for load-bearing and for non-load-bearing walls.

(b) ***Previous Commission practice (masonry/load-bearing masonry)***

(26) In its decision on Preussag/Hebel ([7]), the Commission looked at two alternative product market definitions, but without adopting any firm position. On the one hand it considered the possibility of a market for all materials that can be used to build up walls by the 'brick-on-brick' method (masonry), including clay bricks, sand-lime bricks, aerated concrete blocks and pumice blocks. Its investigations at that time suggested that these products were interchangeable at the building planning stage. Within this market definition, the Commission also considered that a further distinction could be made between load-bearing and non-load-bearing walls (load-bearing masonry). It took no account of precast concrete walling units or in situ concrete.

(c) ***Practice of the German Bundeskartellamt (masonry)***

(27) The Bundeskartellamt has consistently defined the relevant market in wall-building materials in a similar manner to the Commission in its decision on Preussag/Hebel. The Bundeskartellamt assumes the existence of a market in building materials for rising back-up masonry which takes in aerated concrete products, sand-lime products, bricks, pumice blocks and concrete blocks. The Bundeskartellamt does not distinguish between load-bearing and non-load-bearing walls. As far as the Bundeskartellamt is aware, the materials used in Germany for both types of wall are essentially the same.

(d) ***Practice of the Dutch competition authority, NMa (building materials for load-bearing walls)***

(28) By contrast, the Nederlandse Mededingingsautoriteit (NMa — the Dutch competition authority) draws a distinction between load-bearing and non-load-bearing walls because, to its knowledge, different materials are used for each type of wall in the Netherlands ([8]). Because of this difference in uses, sand-lime bricks, which are used for both types of wall, are in competition with different materials in each case. The NMa has included all wall-building materials used for load-bearing walls in its definition of the market in wall-building materials for load-bearing materials. This covers not only the abovementioned wall-building materials for masonry (the 'brick-on-brick' method), but also precast concrete units and in situ concrete. However, it should also be pointed out that, in a subsequent decision, the NMa opened up the possibility of a distinction between in situ concrete and other wall-building materials ([9]).

3. ASSESSMENT

(29) On the basis of the information available to it and, in particular, the market investigation carried out by it in the case, the Commission, like the NMa, concludes that there is a relevant product market in the Netherlands for building materials for load-bearing walls and a separate one for building materials for non-load-bearing walls, but that within these markets a further subdivision into masonry building materials and other materials (concrete products in particular) is not appropriate. The market in wall-building materials for load-bearing walls includes all building materials used for load-bearing walls, such as clay bricks, sand-lime bricks, aerated concrete, concrete blocks, precast concrete wall units and, possibly, in situ concrete. The result of the market investigation suggests that in situ concrete, in particular that cast by tunnel forming, should be excluded; however, it is not necessary to settle this matter conclusively since it does not affect the assessment of the concentration. Likewise, the market for building materials for non-load-bearing walls thus covers all building materials used for non-load-bearing walls, such as sand-lime bricks, aerated concrete, gypsum plasterboards and planks, steel sheets and wood. This result was based on the following key factors.

(30) All the building materials included by Haniel in its proposed market definition are suitable for the building of walls and are actually used for this purpose. The Commission's market investigation in the Netherlands has shown, however, that not all of these materials are in competition with one another.

([7]) Case COMP/M.1866 — Preussag/Hebel, decision of 29 March 2000.

([8]) NMa, decision of 20 October 1998 in Case 124/CVK — Kalkzandsteen.

([9]) NMa, decision of 29 February 2000 in Case 2427/NCD — Fernhout.

(a) ***Properties of the various wall-building materials***

(31) Each of the abovementioned wall-building materials has specific properties that are taken into account in the selection of a specific wall-building material for a specific building project.

(32) Sand-lime bricks are a cheap building material which, though they cannot achieve the size of aerated concrete precast products, nevertheless, with dimensions of up to 900 mm × 625 mm × 300 mm, are larger than traditional bricks. Furthermore, sand-lime bricks, like aerated concrete, have a smooth surface that does not have to be evened out by jointing. The units can be cemented together. In addition, sand-lime products can be cut to shape at the factory in accordance with the building plans, so that units forming the gable or window openings can be pre-prepared. All these factors mean that less time and less expenditure on wage costs are needed than in the case of, for example, ordinary bricks. At the same time, sand-lime bricks do not require any large-scale investment in heavy cranes, as in the case of precast concrete wall units, or casting moulds, as in the case of in situ concrete. In the Netherlands, because of their excellent load-bearing properties, sand-lime bricks are used for load-bearing walls and, to a lesser extent, also for non-load-bearing walls. In the Netherlands, some [60 to 80] to [< 80]* (*) % of sand-lime bricks are used in load-bearing walls. When they are used in non-load-bearing walls, sand-lime bricks have the disadvantage of being relatively heavy (about twice as heavy as aerated concrete). However, the material does have good sound-insulating properties and is suitable in particular for high, non-load-bearing walls, such as those often required in non-residential construction. Sand-lime bricks are the traditional and most popular wall-building material in the Netherlands.

(33) Precast concrete sections do not require masonry work as they are already the size of the wall to be produced. Concrete as a product can be produced from relatively simple raw materials. However, large-scale resources such as cranes must be used in erecting them, and this in its turn involves some investment costs. In the case of medium-sized projects involving 10 or more units, this can lead to cost savings, since the wall is produced at the factory and erection at the building site requires relatively little labour and takes relatively little time. The bigger the project, the lower the costs for the precast wall.

(34) In situ concrete requires the largest amount of on-site investment in its use, particularly in situ concrete used in tunnel forming. The manufacture and use of the frameworks required for repeated casting in the tunnel forming method are so costly that this method is worthwhile only if there is a minimum of 30 to 50 residential units and only if the latter are identical in form and size. There is therefore little flexibility as to form and size in construction using in situ concrete in the tunnel forming method. However, flexibility is an important criterion in the Netherlands, even in the case of fairly large projects, so as to avoid uniformity. In situ concrete is used in the construction both of individual houses and of high-rises, if their load-bearing capacity is ensured by means of a cast concrete skeleton to which non-load-bearing wall-building materials are attached.

(35) Aerated concrete is an expensive wall-building material. It is produced from high-grade, expensive basic materials with high energy costs. Large sections must be reinforced with steel, which further increases the price, since reinforced sections entail significant costs in the manufacture of the reinforcing elements. In contrast to steel reinforcement in the case of ordinary concrete, the steel used for reinforcement here has to be coated in order to protect against corrosion. The constructional properties of aerated concrete are somewhat more limited than those of sand-lime bricks, but it is possible to use it to build up to two stories with load-bearing walls. Aerated concrete does, however, have excellent thermal insulation properties. In Germany, some 80 % of the aerated concrete products used in wall-building is used for load-bearing walls, while only 20 % is used in non-load-bearing walls. In the Netherlands, however, the ratio is the reverse: some 80 to 85 % of aerated concrete is used in non-load-bearing walls.

(36) Gypsum is a light, thin material. Because of this property, it is very well suited to non-load-bearing walls. The load-bearing demands placed on floors are small, and space is saved. Because of its lack of load-bearing capacity, plaster is used only for non-load-bearing walls.

(37) Bricks are relatively small wall-building materials, and because of their uneven surface they have to be jointed. Their use thus entails relatively high labour costs and is relatively time consuming, and this makes bricks unsuitable for industrial construction.

(b) ***The distinction between wall-building materials for load-bearing and non-load-bearing walls***

(38) The market investigation showed that the decision as to which building material to use for a specific project is influenced both by the client and the architect and by the building contractor. Exactly how much influence on the choice of wall-building material is exercised by each of these three groups of persons varies from case to case.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(39) The client's precise preferences regarding, for example, aesthetics and buildings costs are factors here, as are the architect's specifications. Criteria which are of relevance in the selection of the various wall-building materials are quality, constructional properties, flexibility of use, appearance, the purchase price of the material and the costs involved in using it. The special requirements of the building project must be taken into account in this respect, as must the use to which the building is to be put, the necessary load-bearing capacity, resistance to ageing, fire protection, sound insulating properties, other technical capabilities, timetable and the overall costs of the project. The building contractor's main criteria, in so far as he has any options regarding the choice of wall-building materials, are costs and building speed. These in turn are influenced by his experience with specific building materials and the resources and facilities (e.g. cranes) available to him. As far as the cost factor is concerned, it must be borne in mind that the cost of materials is always just one part of the overall costs of erecting a wall.

(40) In its market investigation, therefore, the Commission surveyed all these decision-makers to determine the basis of their conduct in selecting wall-building materials. Similarly, the manufacturers of the various building materials were asked to provide information. In the Netherlands, the survey showed that, in selecting building materials, a fundamental distinction was made between the choice of building materials for load-bearing walls and building materials for non-load-bearing walls.

(41) The difference between load-bearing and non-load-bearing walls, as the terms already suggest, is the load-bearing function of the relevant wall-building material. Load-bearing walls ensure the stability of a building. The relevant walls are often external walls. However, internal walls too may perform a load-bearing function. Such walls must be distinguished from walls which do not have any function in supporting the building, but merely divide up the space or fill gaps inside a load-bearing framework (external or internal walls). Building materials used in load-bearing walls must meet certain requirements as to resistance to pressure, load-bearing capacity and stiffness. Building materials used in non-load-bearing walls, by contrast, must meet other, possibly contrary requirements. Lighter, non-load-bearing walls, for example, have the advantage of making fewer demands on the load-bearing capacity of the ceilings. Thin non-load-bearing walls for their part save space.

(42) These varying requirements in respect of load-bearing and non-load-bearing walls result, in the Netherlands, in different building materials being selected for these different purposes. In the Netherlands, the main material used in load-bearing walls is sand-lime bricks. Sand-lime bricks are used in [50 to 60]* % of all load-bearing walls. Concrete is the next largest building materials category. In situ concrete is used in 12 % of all load-bearing walls. At least two-fifths of this building material is used in tunnel forming ([10]). A total of 8 % is accounted for by load-bearing walls made from precast concrete wall units. Aerated concrete and bricks, accounting for proportions of 2 % and 5 % respectively, play a very minor role.

(43) In the case of non-load-bearing walls, by contrast, gypsum products are the main materials used. They account for 44 % of the materials used in non-load-bearing walls. Next comes aerated concrete with 20 %, followed by sand-lime bricks with [15 to 20]* %.

(44) This demand-side pattern is typical of the Netherlands and differs fundamentally from that in other countries, such as Germany. In Germany, the proportions in the use of aerated concrete for load-bearing and non-load-bearing walls are just the reverse of those in the Netherlands. Whereas in Germany 80 % of all aerated concrete products are used to construct load-bearing walls, in the Netherlands 85 to 90 % of all aerated concrete products are used in non-load-bearing walls. In Germany, concrete plays a minor role in load-bearing walls in residential construction, while bricks and other masonry units feature prominently. In Belgium, by contrast, concrete blocks appear to be much more widespread than in the Netherlands and are the most common wall-building material. The use of in situ concrete in tunnel forming is much less widespread in Germany and Belgium than in the Netherlands.

(45) The reasons for these differences in demand-side behaviour stem, firstly, from differences in building traditions and aesthetic approaches and, secondly, from the advanced industrialised building methods used in the Netherlands.

(46) In the Netherlands, building and construction activity is based on large-scale projects even in the residential sector. Less than 20 % of all new residential building relates to individual house building. In Germany, by contrast, the figure is more than 90 %. In the Netherlands, large areas are released by the Government for building purposes, and on such areas the building and construction industry erects as much as several thousand residential units (e.g. 'VINEX locaties'). In building projects on this scale, building materials that require high investment but involve lower wage costs, such as in situ concrete using the tunnel-forming method, are profitable. Consequently, bricks, which are labour-intensive at the building site (small size and need for jointing) and hence entail higher wage costs and are more time consuming, are used to only a minor extent.

([10]) According to the information provided by the parties, in situ concrete accounts for 40 % of the materials used in tunnel forming; the market investigation suggested that the proportion might be even higher than that.

(47) Sand-lime bricks are the traditional building material in the Netherlands, since they are very cheap to produce and can be used with great flexibility, speed and on favourable cost terms in the building process (large units, cut to the required shape in the factory, no jointing necessary).

(48) Aerated concrete, which is very widely used in Germany in load-bearing walls because of its good heat-insulating properties, is, despite this advantage, not so widely used in the Netherlands because of its substantially higher price compared to sand-lime. In Germany, 30 cm-thick aerated concrete units are used for load-bearing walls. These have then only to be plastered and painted to produce a complete wall that meets high heat-insulation requirements. There are no costs for facing masonry and additional insulation. In the Netherlands, by contrast, smooth, plastered external walls are not customary. The preference there is for facades which give the impression of brickwork. This is done by means of brickwork facing in front of the load-bearing wall. This means that the cost advantage of aerated concrete, which does not need insulation and facing, is forfeited and hence that aerated concrete is a much more expensive building material than sand-lime. Consequently, aerated concrete is used only occasionally in the Netherlands for load-bearing walls in residential construction.

(49) However, since aerated concrete costs about the same as gypsum walls, is relatively light, but affords better heat insulation, aerated concrete products are used in the Netherlands for non-load-bearing walls. Sand-lime is also used here. This is because it has very good sound-insulating properties which may, in some cases, offset its disadvantages as a heavy building material. In addition, because of its constructional properties, it is particularly suitable for high, non-load-bearing walls, such as are required primarily in non-residential construction.

(50) There is therefore only limited competition in the Netherlands between, on the one hand, products used in load-bearing walls and, on the other, those used in non-load-bearing walls. This prompts the Commission to draw a distinction in the Netherlands between a relevant product market in load-bearing walls and one in non-load-bearing walls. This is despite the fact that some wall-building materials that are suitable for load-bearing walls may also be used in non-load-bearing walls and vice-versa. This is the case in particular with sand-lime, which is the only wall-building material which is used to any significant extent equally in load-bearing and non-load-bearing walls. Firms which make products suitable for both types of wall are, in the market in load-bearing walls, in competition with a largely different set of competitors and faced with different competitive conditions than in the market in non-load-bearing walls.

(51) In setting its prices for products used in load-bearing walls, CVK, as the only sand-lime brick producer in the Netherlands, is not restricted by prices charged on the market in products intended for non-load-bearing walls. The Commission's market investigation shows that CVK often knows the specific use of its products ([11]) and might therefore be in a position to determine its prices on the basis of whether its sand-lime products are being used in load-bearing or non-load-bearing walls. If this is not the case, it is to be assumed that CVK tailors its pricing strategy primarily to the requirements of the market in load-bearing walls, since it sells [> 80]* % of its products on that market. The share of CVK's total sales accounted for by sand-lime products sold for non-load-bearing walls, at 10 %, is too small for it to be assumed that it has any significant influence on CVK's pricing of its products intended for load-bearing walls.

(52) The results of the market investigation raise the question of whether and to what extent in situ concrete is also to be included in the market in wall-building materials for load-bearing walls. This applies in particular to in situ concrete used in tunnel forming. As already explained above, this technique involves high fixed investment costs which become worthwhile only if at least some 30 to 50 residential units of identical form and size are to be built. This means that this method does not represent an alternative, not only in the case of small projects, but also in the case of large projects in which, for aesthetic and social reasons, a repetitive building style is to be avoided. Furthermore, as already explained, the tunnel forming method allows not only walls but also, as part of the same process, ceilings to be produced. For these reasons, a decision to opt for the tunnel-forming method is not so much a price decision as a decision in favour of a particular system. However, the question of the inclusion of in situ concrete and, in particular, in situ concrete used in tunnel forming, in the market in wall-building materials for load-bearing walls can be left open, as it does not affect the result of the assessment.

4. CONCLUSION CONCERNING THE RELEVANT PRODUCT MARKETS

(53) On the basis of the considerations set out in recitals 29 to 52 in particular, the Commission takes the view that, for the purposes of assessing the notified concentration, a distinction has to be made in the Netherlands between a market in building materials for load-bearing walls and a market in building materials for non-load-bearing walls. As far as the market in building materials for load-bearing walls is concerned, the question of whether in situ concrete, in particular that used in tunnel forming, is to be included in this market, may be left open.

([11]) In particular for elements cut for a specific use or for specific deliveries; see paragraph 32. Haniel has also indicated that, generally, it must be assumed that, above a given wall strength, the product is used for load-bearing walls.

(54) In so far as there is an overlap between the activities of Haniel and Fels in other Member States which, after part-referral of the case to the Bundeskartellamt, are still subject to examination by the Commission, the question of the precise definition of the relevant product market may be left open since there would not be any competition concerns whichever definition is taken into account.

B. *RELEVANT GEOGRAPHIC MARKETS*

(55) Leaving aside Germany, the activities of Haniel and Fels overlap in the Netherlands, Belgium and, possibly, France. As regards the part of the merger not referred to the *Bundeskartellamt*, the merger results in additions of market shares that are significant from a competition law point of view only in the Netherlands.

(56) Haniel defines the relevant geographic market with regard to the Netherlands as national. Although a few firms involved in the building-materials trade tended to operate on a regional basis, it argues, transport costs in the Netherlands were not of such significance that building materials could not be supplied throughout the entire territory of the Netherlands. Wall-building materials were transported by lorry, usually from the production site direct to the building site.

(57) The investigations have confirmed that the Dutch market is national. The market investigation has shown that the prices charged for most wall-building materials are calculated free at production site for delivery throughout the Netherlands, even though transport costs represent a not insignificant cost factor. CVK, as the only producer and supplier of sand-lime, can moreover supply any building site in the Netherlands direct from the nearest sand-lime works.

(58) Although in the Dutch border areas there are evidently imports of wall-building materials from Belgium and Germany into the Netherlands, these are marginal and do not justify the inclusion of parts of Belgium and Germany in the relevant geographic markets. The market investigation has revealed the existence of barriers to market entry based, in particular, on building and industrial safety regulations. For example, bricks laid manually may not weigh more than 18 kg in the Netherlands which is not the case in other Member States. On the other hand, building standards in Germany dictate that comparable wall thicknesses must be stronger and, given the extra materials that requires, more expensive than in the Netherlands. All the important undertakings that operate on the Dutch market in wall-building materials are also established in the Netherlands. Belgian and German producers operating in the Netherlands also do so via Dutch subsidiaries.

(59) On the basis of the above considerations, the Commission takes the view that the relevant geographic market, as far as the Netherlands is concerned is, for the purposes of this Decision, national.

C. *COMPETITIVE ASSESSMENT*

(60) The concentration involved in this case does not create or strengthen, on any of the relevant product and geographical markets within the meaning of Article 2(2) of the Merger Regulation, a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market.

(61) Leaving Germany aside, given that its market is not being examined by the Commission in these proceedings, the activities of Haniel and Fels overlap in the Netherlands and, to a limited extent, Belgium, and possibly also in France.

1. THE NETHERLANDS

(a) ***Control of CVK by Haniel***

(62) The assessment of the merger in the Netherlands in the light of competition law depends on whether the market shares of the CVK cooperative, in which Haniel has an indirect shareholding of 50 %, are to be ascribed to Haniel.

(63) In the Netherlands there are altogether 11 sand-lime brickworks, all of which are members of the CVK cooperative. Of these brickworks, five are wholly owned by Haniel, three are wholly owned by the Dutch building-materials group Cementbouw and the remaining three are owned 50/50 by Haniel and Cementbouw. The shares in the CVK cooperative are apportioned among the 11 sand-lime brickworks that make it up in such a way that the wholly owned subsidiaries of Haniel and the wholly owned subsidiaries of Cementbouw together have equal-sized shareholdings in CVK, with the result that overall Haniel and Cementbouw each indirectly have a 50 % stake in CVK.

(64) CVK, which was originally set up to carry out joint marketing on behalf of its members, was made subject by a pooling agreement in 1999 to management by those members. In the pooling agreement and in the statutes (*statuten*) of CVK it is stipulated that CVK members are to be bound by CVK's instructions, that the executive bodies may to only a limited extent comprise representatives of the parent companies and that the members must include a CVK representative in their management. It was also agreed that the members may appoint only one member of their shareholders to their management.

(65) Strategic decisions concerning CVK are taken by its managing board (*Raad van Bestuur*) by a simple majority. Members of the *Raad van Bestuur* and of the supervisory board (*Raad van Commissarissen*) are appointed and removed by the members' meeting. Pursuant to the pooling agreement and the statutes, no member of the *Raad van Bestuur* may perform any function in one of the parent companies of the CVK members (Haniel and Cementbouw), and no persons who perform any function in Haniel or Cementbouw may form a majority on the *Raad van Commissarissen*. The day-to-day management of CVK and its members is in the hands of the *Raad van Bestuur*; the *Raad van Commissarissen* exercises the supervisory powers normally vested in such an organ under Dutch company law without being able to exert a direct influence over strategic corporate decisions.

(66) Haniel takes the view that, owing to CVK's corporate structure as described above, the cooperative is, despite the 50 % indirect interest which Haniel and Cementbouw each have in it, controlled exclusively by itself and not by its member companies and/or their shareholders.

(67) Pursuant to Article 3(3) of the Merger Regulation, the control of an undertaking consists in the possibility of exercising decisive influence on it. The question is whether the person or persons exercising control are in a position, alone or jointly, to determine the undertaking's strategic decisions. The decisive factor here as a rule is the composition and decision-making procedures of the body responsible for appointing and removing the management and approving any other strategic decisions.

(68) In CVK's case, strategic corporate decision-making is a matter solely for the *Raad van Bestuur*. Whoever determines the composition of the *Raad van Bestuur* is therefore in a position to control the undertaking, for it is to be expected that, when taking strategic decisions, the members of the *Raad van Bestuur* take into account the interests of the person or persons who decide whether to appoint or remove them. Since the members of the *Raad van Bestuur* are appointed by the CVK members' meeting by a simple majority, and since in the members' meeting the representatives of the member undertakings in which Haniel holds the entire share capital and the representatives of the member undertakings in which Cementbouw holds the entire share capital each have the same number of votes and hence the representatives of those member undertakings in which Haniel and Cementbouw each have a 50 % share have a casting vote, both Haniel and Cementbouw can indirectly block the appointment and removal of members of the *Raad van Bestuur*. Their joint agreement is accordingly needed for every appointment or removal of a member of the *Raad van Bestuur*.

(69) This means that Haniel and Cementbouw jointly control CVK within the meaning of Article 3(3) of the Merger Regulation.

(70) The Commission is therefore of the opinion that CVK's market shares must be assigned to Haniel for the purposes of this Decision.

(b) ***The market in wall-building materials for load-bearing walls***

(71) In the Netherlands, Haniel already occupies, through its indirect shareholding in CVK, the only sand-lime brick manufacturer, a dominant position on the market in wall-building materials used in load-bearing walls. However, this dominant position will not be significantly strengthened by the acquisition of Fels. This conclusion is based on the following reasons.

(aa) **Structure of the market**

(72) In 2000, the Dutch market in wall-building materials for load-bearing walls had a volume of 2,1 million m^3 and was worth EUR 356 million. If in situ concrete is excluded from the load-bearing walls' market, the latter's volume shrinks to 1,8 million m^3 and its value to EUR 276 million. If only in situ concrete cast by the tunnel-forming method is excluded, the market has a volume of 1,9 million m^3 and is worth EUR 322 million [12].

[12] On the assumption that 40 % of the in situ concrete used in the Netherlands is cast using the tunnel-forming method; see footnote 10.

(73) Below are the market shares (by volume) of the parties and of their main competitors including all load-bearing wall-building materials and, alternatively, excluding in situ concrete and in situ concrete cast by the tunnel-forming method ([13]):

Company	Building material	Market share in %		
		Load-bearing wall-building materials, including in situ concrete	Load-bearing wall-building materials, excluding in situ concrete used in tunnel forming	Load-bearing wall-building materials, excluding in situ concrete
CVK (Haniel/ Cementbouw)	Sand-lime bricks	[50-60]*	[50-60]*	[60-70]*
Fels	Aerated concrete	[0-2]*	[0-2]*	[0-2]*
CVK + Fels		[50-60]*	[50-60]*	[60-70]*
Cementbouw	Precast concrete walling units In situ concrete	[2-5]*	[2-5]*	[2-5]*
Mebin	In situ concrete	[2-5]*	[2-5]*	0,0
NCD	In situ concrete	[0-2]*	[0-2]*	0,0
Ytong	Aerated concrete	[0-2]*	[0-2]*	[0-2]*
Wienerberger	Clay bricks	[0-2]*	[0-2]*	[0-2]*
Hanson (Pioneer)	Clay bricks In situ concrete	[0-2]*	[0-2]*	[0-2]*
Oudenallen	Precast concrete walling units	[0-2]*	[0-2]*	[0-2]*
CRH	Clay bricks	[0-2]*	[0-2]*	[0-2]*

([13]) The calculation is based on estimates made by the parties on the shares of the various building materials in the consumption of wall-building materials as a whole and broken down as between load-bearing and non-load-bearing walls. Inasmuch as wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is estimated to be used in load-bearing walls was taken into account. On the basis of its market investigation, the Commission considers these estimates to be basically accurate; however, precise statistical data are not available.

(bb) **Existing dominant position of CVK (Haniel)**

(74) The Commission considers that, through its holding in CVK, Haniel has a dominant position on the Dutch market in wall-building materials for load-bearing walls. This applies regardless of whether or not in situ concrete should be included in this market.

(75) The Court of Justice has defined a dominant position as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

(76) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among which the existence of very large market shares is highly important. Important evidence of the existence of a dominant position is, moreover, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest ([14]).

(77) Haniel (CVK) has a share of more than [50 to 60]* % of the market in wall-building materials for load-bearing walls. Its main competitor is Cementbouw ([15]), with a market share of just under [2 to 5]* %. This figure does not take account of Cementbouw's stake in CVK, which for the purposes of this assessment is assigned in its entirety to Haniel. Cementbouw's market share of approximately [2 to 5]* % is based solely on its precast concrete walling unit and in situ concrete activities. The next-largest competitor is the in situ concrete manufacturer Mebin, with a market share of around [2 to 5]* %. Other competitors have market shares of 2 % or less.

(78) The market share of Haniel (CVK) is therefore more than 10 times bigger than that of the leading competitor. In view, however, of the close structural links between, and common interests of, Haniel and Cementbouw in CVK, it is by no means clear how far Cementbouw and Haniel are in competition with one another. The largest competitor with no links with Haniel is, with its [2 to 5]* % or so market share, much smaller, Haniel being [10 to 15]* times bigger than this competitor.

(79) If in situ concrete were not to be included in the definition of the market in wall-building materials for load-bearing walls, the market share of Haniel (CVK) would be [60 to 70]* % as Haniel (CVK) does not supply in situ concrete. Furthermore, the largest independent competitor, Mebin, would then not be active in the relevant product market. This would leave only a limited number of much smaller competitors whose market shares do not exceed [0 to 2]* %, or much less, even, in some cases. If only in situ concrete cast by the tunnel forming method is excluded from the market definition, the market share of Haniel (CVK) would be [50 to 60]* %.

(80) None of the competitors of Haniel (CVK) in the Netherlands is active in the sand-lime brick sector. CVK is the only producer and supplier of this building material in the Netherlands. In that country, sand-lime bricks are, however, for the reasons given above, the traditional and, what is more, most popular wall-building material. Furthermore, they are the only wall-building material to be used to a significant extent in both load-bearing and non-load-bearing walls.

(81) Substantial market entry barriers exist. CVK controls all the sand-lime brick works in the Netherlands and hence the production of by far the most important wall-building material assignable to the relevant product market. The Commission's market investigation has shown that it would be possible for manufacturers of other wall-building materials to undertake the manufacture of sand-lime brick products only at great expense in terms of time and investment; the same is also true of other wall-building materials such as aerated concrete. The production processes and hence the production plants are different for each wall-building material. A switch to production of sand-lime bricks would also depend on the acquisition of the necessary official authorisations for the working of lime deposits. For these reasons, a switch of production by competitors is not considered a serious possibility.

([14]) Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 39; see also Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 201 and 202.

([15]) Until mid-2001, Cementbouw was a subsidiary of the Dutch building group NBM Amstelland NV. At the beginning of the year, the Cementbouw group was sold to CVC Capital Inc., a venture capital firm.

(82) The customers of CVK (Haniel) have no buyer power. No one customer is potentially the buyer of a substantial part of CVK's output. In the case of sand-lime bricks, which are by far the most important of all the wall-building materials assignable to the relevant product market, there are no alternative suppliers.

(83) Haniel's market position can thus be summed up as follows: Haniel (CVK) has, at well over [50 to 60]* %, by far the biggest market share and is linked to the next-largest competitor, which is 10 times smaller, through CVK. The remaining market volume is fragmented and divided among competitors with market shares of just a few percent. Haniel controls, moreover, in the form of CVK, the only Dutch supplier of the most important building material in the Netherlands. The market power available to Haniel (CVK) is not offset by buyer power on the other side of the market. The combination of all these factors gives Haniel (CVK) a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

(cc) **The concentration will not strengthen the dominant position of Haniel (CVK)**

(84) However, the Commission is of the opinion that the concentration will not strengthen the dominant position of Haniel (CVK) on the Dutch market in wall-building materials for load-bearing walls. The main reasons for this are as follows.

(85) As a result of the concentration, the market share of Haniel (CVK) will be increased by only [0 to 2]* % to [50 to 60]* %. If in situ concrete were deemed not to form part of the market in wall-building materials for load-bearing walls, the market share of Haniel (CVK) would be increased by [0 to 2]* % to [60 to 70]* %; and if only in situ concrete cast by the tunnel forming method were to be excluded from the relevant market, the increase would be [0 to 2]* % and the joint market share [50 to 60]* %.

(86) A possible strengthening of the existing dominant position of Haniel (CVK) cannot be assessed on the basis of the size of the increase in market share alone. This is particularly because the Dutch market in wall-building materials for load-bearing walls is already so rigidly carved up that very little in the way of competition takes place there and consequently even a small increase in Haniel's market position may remove the few remaining opportunities still open to competitors. In particular, the consolidation of the market position of the dominant undertaking through an increase in existing market entry barriers or the creation of new ones or some other extension in the room for manœuvre of the dominant undertaking as a result of which competitors' existing scope is restricted (e.g. through an extension in the product range) may, depending on the circumstances of the case, constitute a strengthening of a dominant position within the meaning of Article 2(2) of the Merger Regulation.

(87) In the present case, however, the Commission's market investigation has shown that the takeover of Fels by Haniel will not lead to this kind of consolidation and strengthening of the existing market position of Haniel (CVK).

(88) It is true that Haniel will, through the takeover of Fels, extend its product range. Before the merger, Haniel (CVK) can supply only one wall-building material — sand-lime bricks — which, despite being by far the most important wall-building material for load-bearing walls, is, in the case of non-load-bearing walls, with a market share of [15 to 20]* %, in no stronger a position that gypsum and aerated concrete. These two products are, however, manufactured by Fels. Following the merger, Haniel (CVK) plus Fels would be in a position to supply all three products and hence cover the bulk of demand for wall-building materials for load-bearing and non-load-bearing walls.

(89) However, Fels is not one of the leading suppliers in the Netherlands of either gypsum or aerated concrete. In the case of aerated concrete, which can also be used in load-bearing walls, Ytong is the leading supplier. Accordingly, on the neighbouring market in wall-building materials for non-load-bearing walls, on which aerated concrete plays a greater role than on the market in wall-building materials for load-bearing walls under discussion here, Fels has a market share of only [5 to 10]* %, as against [15 to 20]* % for Ytong. The market investigation has shown that Ytong is well established in particular as a supplier to the leading Dutch building-materials trading groups and Fels therefore has difficulties supplying them as well. Fels is consequently currently reliant on the 'independent dealers', who make fewer sales and are less strong financially. Furthermore, Fels does not have its own production plant in the Netherlands, but operates on the market only through imports. It cannot therefore be anticipated with sufficient certainty that, solely through the takeover of Fels, Haniel will be placed in a position to induce customers to a significant extent to obtain all their required wall-building materials from itself and thus to further restrict the scope of other suppliers. Although customers surveyed during the market investigation referred to the extension of the product range offered by Haniel, they also stated that they did not fear any significant price increases so long as Ytong remained on the market as an independent supplier of aerated concrete.

(90) In these circumstances, the disappearance of Fels as an independent competitor is, on the basis of the facts known to the Commission, even taking account of the already substantially reduced level of competition, not such as to result in a strengthening of the existing dominant position of Haniel (CVK).

(c) ***The market in wall-building materials for non-load-bearing walls***

(91) In 2000 the Dutch market in wall-building materials for non-load-bearing walls had a volume of 1,7 million m^3 and was worth EUR 282 million. The following table shows the market shares (by volume) of the parties and of their main competitors including all non-load-bearing wall-building materials being included ([16]):

Company	Building material	Market share in %
		Non-load-bearing wall-building materials
CVK (Haniel/ Cementbouw)	Sand-lime bricks	[15-20]*
Fels	Aerated concrete, gypsum	[5-10]*
CVK + Fels		[20-30]*
Ytong	Aerated concrete	[15-20]*
GIBO	Gypsum plasterboards and planks	[10-15]*
Lafarge	Gypsum plasterboards and planks	[10-15]*
Gyproc	Gypsum plasterboards and planks	[5-10]*
Wienerberger	Clay bricks	[0-2]*
Hanson (Pioneer)	Clay bricks	[0-2]*
CRH	Clay bricks	[0-2]*

(92) Haniel (CVK) is thus, with a market share of [15 to 20]* %, the market leader on the market in wall-building materials for non-load-bearing walls and, as already stated, the only supplier of sand-lime bricks, the main building material for load-bearing and for non-load-bearing walls. However, as the leading aerated concrete producer for non-load-bearing walls, Ytong, with a [15 to 20]* % market share, is very close to the market position of Haniel (CVK), and the three main gypsum producers, GIBO, Lafarge and Gyproc, have substantial market shares of between [5 to 10]* and [10 to 15]* %. Given this market structure, the possibility of Haniel (CVK) having a dominant position can be ruled out.

(93) As a result of the merger with Fels — a supplier of aerated concrete and gypsum with a not insignificant, but at [5 to 10]* %, much smaller market share than Ytong and the above-mentioned gypsum producers and without its own production plant in the Netherlands — Haniel's market share will increase to [20 to 30]* %, thus widening the gap between it and its next-largest competitors. Haniel will extend its product range to include gypsum and aerated concrete, which are both important products for non-load-bearing walls. However, given the existence of strong competitors, it is not to be anticipated that, as a result of the takeover of Fels, Haniel will be able to extend its competitive room for manœuvre to such an extent that a dominant position would be created by the concentration.

(d) ***Finding***

(94) The Commission accordingly finds that the concentration will not create or strengthen a dominant position on any of the relevant product markets in the Netherlands.

2. OTHER NATIONAL MARKETS

(95) Apart from in Germany, whose markets are not being examined by the Commission in these proceedings, and the Netherlands, the concentration will also lead to additions of market shares in Belgium and possibly in France.

(96) In Belgium, Haniel has one sand-lime brick factory. Fels (Hebel) sells wall-building materials in Belgium, but does not have its own production facilities there. The combined share of Haniel and Fels in the sale of wall-building materials is [2 to 5]* % and, if all wall-building materials are included (including concrete precast products and in situ concrete), less than [2 to 5]* %. Even if a distinction were made between building materials for load-bearing and non-load-bearing walls, the possibility of the market shares reaching competitively critical thresholds can be ruled out.

([16]) In asmuchas wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is used in non-load-bearing walls was taken into account.

(97) In France, Haniel has a stake in ready-mixed concrete plants; Fels (Hebel) operates in France through three aerated concrete plants. Market share additions will arise only if one assumes a larger market for wall-building materials that includes concrete precast products and in situ concrete. In that case, the combined market share amounts to about [0 to 2]* %. The possibility of market shares that reach competitively critical levels arising can be ruled out even if a distinction is made between building materials for load-bearing and non-load-bearing walls and/or if a possible regional market definition is applied.

(98) The concentration will not therefore create or strengthen a dominant position in Belgium and France.

VI. **CONCLUSION**

(99) For the reasons set out above, it can be assumed that the proposed concentration will not lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

Pursuant to Article 2(2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement, the concentration is therefore to be declared compatible with the common market and with the operation of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration, through which Haniel Baustoff-Industrie Zuschlagsstoffe GmbH will acquire sole control of Fels-Werke GmbH within the meaning of Article 3(1)(b) of the Merger Regulation, is hereby declared compatible with the common market and with the operation of the EEA Agreement.

Article 2

This Decision is addressed to:

Haniel Baustoff-Industrie Zuschlagsstoffe GmbH
Franz-Haniel-Platz 6-8
D-47119 Duisburg-Ruhrort

Done at Brussels, 21 February 2002.

For the Commission

Mario MONTI

Member of the Commission