

**Europe****Almunia: Phase II a certainty for cement deal**

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The merger of cement heavyweights Lafarge and Holcim will need to be subjected to an in-depth EU review, Competition Commissioner Joaquín Almunia said today.



Almunia made the remarks in Athens today

“Given the size of the two companies, given that they are the two main players in the European market, yes, it’s clearly a Phase II analysis,” Almunia told reporters at the European Competition Day in Athens.

“Last week the parties informed us of their intention [to merge] but with very general information, before the operation was known by the media. Now we will receive more detailed information because this should of course be analysed at our level.”

The remarks confirm suspicions that the European competition enforcer will be the toughest obstacle to the combining of the world’s two-largest cement companies, which was officially announced on Monday.

Lafarge and Holcim have significant overlaps in several European markets, including Spain, Germany and France, where they account for a combined 60 per cent of the market.

The companies have said they are prepared to make divestments to appease enforcers. According to press reports these would be mostly in Europe and would amount to around 15 per cent of their combined earnings.

Almunia’s decision to confirm an in-depth review at this stage is unusual, and for some commentators troubling.

One Brussels-based lawyer, who spoke on the condition of anonymity, said the commissioner’s statement raises serious concerns that the agency’s objectivity towards the deal will be compromised from the offset. Almunia took a similar stance over NYSE/Deutsche Boerse, he says, and was heavily criticised for this within the commission.

“It is entirely inappropriate for a commissioner with decision-making responsibilities to be taking a public position on a case in this way,” the source

says. "This is without doubt a challenging merger given the relatively small number of players and history of collusive activity within the industry, but companies are entitled to a fundamentally objective review and not one in which [the] regulator starts out with its mind made up."

If the companies were intending to put forward commitments in Phase I, says the lawyer, they will now be doing so in the knowledge that divestments are unlikely to be accepted at the first review stage.

But Assimakis Komninos, at White & Case in Brussels, says Almunia's openness is to be welcomed.

"This statement at such a time may come as a surprise to some but honestly I am not shocked," he says. "If anything it also shows frankness. The real question is how the commission will analyse the remedies, and I think it will certainly make a proper analysis."

Cal Goldman, at Goodmans in Toronto and former Commissioner of the Canadian Competition Bureau, the parties have been sensible to put forward divestments early, as this is all part of facilitating a smooth and consistent review process.

"One of the objectives of any counsel working on a trans-border deal is to avoid ever seeing another GE Honeywell, where one major jurisdiction come out one way and another in a diametrically opposite manner," he says. "Proactively offering divestments to all agencies can be an sensible way to expedite the review process and minimise surprises."

William Vigdor, at Vinson and Elkins in Washington, DC says 'fix it first' solutions are an accepted tool used by counsel to speed up an agency's work and offer complete cooperation from the reviews' outset.

"But no agency that I've ever dealt with will ever simply accept the a divestment that is offered up," he says. "They will feel obliged to go about the review diligently until they conclude there is a legitimate reason to take a remedy."

"The agencies need to make sure they have identified all the issues before concluding the review. After all, parties might be telling the agency the issues are A, B, C but the agencies need to make sure there is no problem with other areas like X, Y, Z."

Moreover, says Vigdor, there is always a chance that a jurisdiction the parties did not expect to prove problematic suddenly finds competition concerns.

Lafarge and Holcim will need their merger to be cleared in 15 antitrust authorities, ranging from the US, Brazil and China and less-established jurisdictions such as Sri Lanka and Indonesia.

A lawyer, who asked not to be named, said while China is commonly viewed as the most challenging place to file a merger, other review processes may prove more cumbersome.

“The biggest problem with China is timing,” he says. “Your file sits somewhere for four to six weeks and no one looks at it, and this can really mess up timing of the whole review. But the EU is much worse than China in the sense that their analysis takes months and months and they give you endless amounts of detailed questions.”

Indonesia, he says, may also pose issues for the cement companies’ counsel, as the country’s competition authority typically demands a large volume of information from merging parties.

The cement merger will be analysed in terms of local markets, which will need to be exhaustively analysed.

“Cement doesn’t travel that well – it can be transported a couple of hundred miles at best,” says Vigdor. “So when you see apparent market shares of 30 per cent in the US or 60 per cent in France that might not be a reliable indicator of anything, as we don’t know how much competition the companies will be facing in each local market.”

Lafarge and Holcim say they hope the merger will be completed within the first half of next year, a presumption Vigdor describes as “optimistic”.

#### Counsel to Lafarge

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