

Anticipated acquisition by Mueller Europe Limited of certain assets of KME Yorkshire Limited

ME/6332/13

The OFT's decision on reference under section 33(1) given on 11 February 2014. Full text of decision published 19 March 2014.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. Mueller Europe Limited (**MEL**) is a wholly owned subsidiary of Mueller Industries Inc (**MII**), a multinational manufacturer of metal products and fittings, listed on the New York Stock Exchange and headquartered in Memphis, USA. MEL manufactures copper tubes for plumbing and heating applications. Its products also include plain and plastic coated tubes in different tempers. It supplies customers throughout the EEA and further afield from its factory in the West Midlands.
2. MEL's UK turnover for the year ended 31 December 2012 was £90 million. MII's group turnover was US\$2.2 billion (approximately £1.4 billion).
3. KME Yorkshire Limited (**KME**) is a UK subsidiary of the KME Group, a global producer of semi-finished copper and alloy products, which is ultimately owned by Intek Group SpA, located in Italy. Yorkshire Copper Tube (**YCT**) is a trading division of KME. YCT manufactures, purchases and sells copper tube for supply to the construction industry. YCT manufactures tube in its factory in Kirkby, Liverpool.
4. The worldwide turnover of YCT for the financial year ended 31 December 2012 was £[]. Its UK turnover for the same period was £[].

TRANSACTION

5. On 18 October 2013, MEL and KME (together, 'the parties') signed a sale and purchase agreement under which MII will purchase, through MEL, from KME its UK copper tube business and certain assets (described below) by way of an asset purchase.
6. The business to be acquired consists of the copper tube business of YCT carried out in the UK including the goodwill and customer records¹ associated with YCT's export business. Under the transaction, MEL will acquire [].² The proposed transaction excludes [].
7. The consideration for the business and assets (including goodwill) is £18 million. The proposed transaction is conditional on UK merger control approval, and on [].

JURISDICTION

8. The assets purchased constitute an enterprise and the UK turnover of YCT for the financial year ended 31 December 2012 was £[].
9. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation meeting the criteria in section 23(1) of the Enterprise Act 2002 (the **Act**). Accordingly, the OFT has jurisdiction to investigate the proposed transaction.

COUNTERFACTUAL

10. The parties submitted that, absent the proposed transaction, the KME Group's preferred option would be [], and that the transaction should be considered against this counterfactual.
11. []
12. []
13. The OFT will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that the prospect

¹ The OFT will have specific regard to factors including the transfer of customer records and goodwill when determining whether assets transfer constitute an enterprise; see OFT *Jurisdictional and Procedural Guidance*, paragraphs 3.10 and 3.11

² *Jurisdictional and Procedural Guidance*, paragraph 3.10

of prevailing conditions continuing is not realistic (for example, because the OFT believes that one of the merger firms would inevitably have exited from the market) or where there is a realistic prospect of a counterfactual that is more competitive than prevailing conditions.³

14. The parties submitted that the preferred outcome for the KME Group absent the transaction would be []. However, the OFT was not provided with any internal documents which supported this assertion to the requisite standard. []
15. []
16. Therefore, the OFT has assessed the merger against the pre-merger conditions.

FRAME OF REFERENCE

17. The parties overlap in the manufacture and supply of copper water tubes⁴ within the UK. Both MEL and YCT also export to the EEA and the rest of the world. KME Group, the vendor, will continue to produce copper water tube post merger and compete to supply it in Europe with the exception of the UK.
18. MEL produces copper water tubes ranging in diameter from 6mm to 159mm.^[Endnote 1] YCT produces copper water tubes with a diameter from 6mm to 76mm, which are manufactured at its facility in Kirkby, and represent [] of its total sales. Large diameter tube up to 159mm is bought in from other group companies, or from external suppliers.

Product scope

Substitutability of plastic and other materials

19. In *Boliden/Outukumpu* the European Commission found that copper water tube constituted a separate market from plastic.⁵ The parties submitted that there is considerable demand-side substitutability between water tube made of copper and water tube made of other materials, including steel, plastics and composite.

³ OFT and Competition Commission, *Joint Merger Assessment Guidelines*, paragraph 4.3.5

⁴ Also called sanitary tubes, plumbing tubes or installation tubes. They are used for water, oil, gas and heating installations in the construction industry.

⁵ *Boliden/Outukumpu*, Case No COMP/M.3284 of 8 December 2003.

20. The parties supplied the OFT with internal monthly sales reports from both companies. These contained coverage of how the companies had fared against competitors. Within these reports, the OFT can see no evidence of a significant constraint of substitution to plastic. All references to competitors refer to other copper water tube suppliers.
21. Whilst third parties were aware of the shift to plastic and other materials, few merchants indicated that they or their customers would shift a significant proportion of their demand away from copper in response to a SSNIP.⁶ Third parties told the OFT that:
- The LME copper price varies significantly and five per cent rises can happen regularly without triggering switching.
 - The UK has been much slower to adopt plastic and other tubes and has shown considerable loyalty to copper.
 - A number of submissions described copper water tube as a higher quality product to the cheaper alternatives, such as plastic. The OFT was told that for some pieces of work, for example on the tube immediately exiting a boiler, copper is required due to fears that plastics may melt.
22. The OFT therefore considers that it does not have sufficient evidence to include water tubes made from other materials within the frame of reference. Where appropriate, it has taken the constraint posed from tubes made of other materials and the overall decline of copper into account in the competitive assessment.

Segmentation by tube size or thickness

23. Copper water tubes vary in their diameter (size) and wall thickness according to specification and end use. The parties submitted that the narrowest conceivable frame of reference is the supply of copper water tube. Nonetheless, the OFT considered whether it would be appropriate to segment the market by the size and thickness of tube.
24. No customers suggested that the market differed substantially depending upon the size of the tube, and competitors did not identify any differences in the competitive dynamics for a particular size.

⁶ Small but significant non-transitory increase in price. *Merger Assessment Guidelines*, paragraphs 5.2.10 to 5.2.20.

25. The OFT notes that there may not be demand side substitution between copper water tubes of different sizes, as the end user of the tube, such as a plumber or installer, will use different sizes for different jobs. One merchant told the OFT that smaller diameter tubes tend to be used as part of central heating systems, whereas larger tubes are used in energy and drinking water distribution.
26. However, the relevant market will not necessarily be the narrowest market that meets the hypothetical monopolist test due to supply-side factors.⁷ In this case, it may not be appropriate to define markets with reference to individual tube sizes or thicknesses. Third parties who responded to the OFT's market investigation indicated that:
- Customers will often purchase a bundle of products in a single transaction, for example tubes of a number of sizes, so products will be in joint demand. Merchants generally use between one to three suppliers for their requirements and do not split their requirements by size.
 - Copper water tube suppliers typically supply a wide range of tubes and thicknesses.
 - There are only two different technologies needed to produce all sizes of tube, and the parties submitted that, to the best of their knowledge, all manufacturers of copper water tube have both.
 - There is no key size which drives searching or switching behaviour.
27. The OFT has therefore not segregated the market by size or thickness of the tube.

Segmentation by branding or quality

28. Third parties who replied to the OFT's market investigation considered copper water tube as an unbranded, homogeneous product. The few third parties who did recognise any value in a branded product identified that value as small and indicated that they would switch to a non-branded product in the event of a small rise in price.

⁷ *Merger Assessment Guidelines*, paragraph 5.2.17

29. However, the quality of copper tube is very important to customers. The importance of the BSI kitemark accreditation⁸ was echoed by almost every third party. Customers within the UK which responded to the market investigation told the OFT they would be very unlikely to switch to non-accredited copper water tube in the event of a SSNIP in BSI accredited copper water tube.
30. The parties submitted that the total costs and time involved in the accreditation process were small. However, the OFT was not provided with evidence that other non-accredited suppliers would have the ability and incentive to quickly switch production to accredited copper water tube. In particular, some third parties indicated that some non-accredited suppliers do not provide quality tube. The OFT considers there is no guarantee that these suppliers would make the necessary quality grades if they applied for accreditation.
31. On the basis of the evidence put before it, the OFT has focused on the supply of BSI accredited copper water tube.

Copper industrial tube

32. The parties argued that manufacturers of copper industrial tube are able to switch production to supply copper water tube. When considering whether to aggregate markets, the OFT will consider if production assets can be used by firms to supply a range of different products that are not demand-side substitutes, and the firms have the ability and incentive quickly (generally within a year) to shift capacity between these different products depending on demand for each.⁹
33. Industrial copper tubes are copper tubes produced for use inside boilers and gas heating systems, conductors of coaxial cables, district heating and air conditioning systems. They are ordered on a bespoke basis and mainly purchased by Original Equipment Manufacturers (OEMs) as an intermediate product to be incorporated into a wider unit.
34. The parties submitted that, despite the disparate nature of industrial tube, a producer of industrial tube has all the core manufacturing processes to

⁸ A kitemark is a UK product and service quality certification mark owned and operated by The British Standards Institution.

⁹ *Merger Assessment Guidelines*, Paragraph 5.2.17

produce water tube. A company would need to gain accreditation from the BSI which would cost less than £10,000 and take three to four months.

35. Third party competitors who replied to the OFT's market investigation considered that the manufacturing processes between industrial and water tubes are similar. However, they said they would not shift from industrial tube to water tube in response to a SSNIP, as margins on industrial tube are higher.
36. The OFT considers that the appropriate frame of reference is the production of copper water tube. Where appropriate, it has taken the constraint posed from producers of copper industrial tube into account in the competitive assessment.

Segmentation by customer type

37. The parties considered that all customers were part of the same market. However, a number of third parties identified a difference in the market for copper water tubes between (i) national plumbing and building merchants and (ii) independent plumbing and building merchants. The OFT considered whether it was appropriate to define separate frames of reference for these groups.
38. Third parties who replied to the OFT's market investigation said that the negotiating positions and contractual arrangements between national and independent merchants differ substantially. National merchants procure significantly more volume of copper water tube per year than independents, and use approved suppliers on a contract basis. Third parties further submitted that the competition for national merchants typically takes place periodically rather than on an ongoing basis. Supplier agreements submitted to the OFT by the parties showed rebate and volume discounts applicable to orders depending upon the overall size of the order.
39. In contrast, independent merchants typically do not have supply agreements in place, and where they do, the OFT's market testing showed that they are generally not as advantageous as those for national customers. For example, there will typically not be rebate or volume discounts in place, even for those that have joined together to form buying groups. The OFT considers national merchants would have little interest in assisting independent merchants in achieving substantially lower prices, as they compete downstream with the independent merchants.

40. Further, whilst some national merchants did not consider some of the smaller distributors as viable for them, they were more able and willing to source directly from continental Europe. Very few independent merchants expressed such an ability and most expressly ruled it out as non-competitive.
41. National DIY chains, such as B&Q, also procure copper water tube. There is some evidence that DIY chains contract for copper water tube through the use of supplier agreements in a similar way to national merchants. However, due to the lower volumes purchased and a lack of ability to directly import from Europe or elsewhere, the OFT considers that the DIY chains most closely resemble independent merchants.
42. On the basis of the evidence it has found, the OFT considers it is appropriate to assess the effect of the merger on national merchants and independent merchants (including DIY chains and buying groups) separately.
43. However, as no competition concerns arise even on the narrowest segmentation, it is not necessary to definitively conclude on the product scope.

Geographic scope

44. The European Commission has previously considered that the relevant geographic market was at least regional across continental Europe,¹⁰ although it left the exact market definition open. The parties submitted that the market for copper water tube is at least EEA wide, and possibly even wider. To support this argument, they claimed that:
 - most producers sell across Europe
 - transport costs are negligible and below five per cent (the parties estimated they are typically [] per cent to [] per cent)
 - there are significant trade flows within the community, and
 - barriers to entry and expansion are low in Europe from a manufacturing and distribution perspective.
45. The parties did not make specific submissions on a frame of reference wider than the EEA. Customers which responded to the OFT did not indicate they would switch to suppliers based outside of the EEA in the

¹⁰ *Boliden/Outokumpu para. 39*

event of a SSNIP. However, during the course of its investigation, the OFT was told by some customers that there are producers outside the EEA, namely in Serbia, China and South Korea, who are able to produce copper water tube of the required quality.

Level of imports

46. The parties provided data for the level of demand and imports of copper tube) imported into different EU member states, which showed that there are significant cross-border trade flows for copper tube. The data did not distinguish between industrial tube and water tube. Given that there are no domestic copper industrial tube producers in the UK, the OFT considers that the data may therefore overstate the proportion of demand for copper water tube that is imported.
47. However, from the parties' share of supply data, it is possible to deduce that around [] per cent of copper water tube sold in the UK is imported, even with two non capacity constrained domestic manufacturers, Mueller and KME.

Prices across Europe and transport costs

48. The parties submitted that transport costs across Europe are relatively uniform and that these transport costs are small in relation to the end price of copper water tube, around [] per cent to [] per cent on average. Data provided by the parties showed that the price of copper water tube is not constant but does not vary substantially across Europe, even in the face of different demand shocks. However, for smaller orders of copper water tube, transport costs to continental Europe are significantly different from transport costs within the UK. This is in contrast to larger orders. For orders above 10 tonnes, the difference becomes small, especially relative to the overall selling price of around £5,000 to £6,000 per tonne.
49. Only one third party told the OFT that location of supplier was an important factor. However, some independent merchants which responded to the OFT's market investigation told the OFT that transport costs per tonne would be restrictively high for smaller orders (below 10 tonnes). The OFT notes that even for small orders, based on its analysis the transport costs account for less than five per cent of the total cost of the tube.

National merchants

50. As part of its market investigation, the OFT sought to assess the current level of imports undertaken by customers and the extent to which customers would switch to suppliers based outside of the UK in the event of a SSNIP.
51. Three responses were received from national merchants. Two said that they would switch to direct imports in response to a SSNIP, and that it was easy to import copper water tube from within the EEA. One told the OFT that they had done so previously. Third party competitors who replied to the market investigation told the OFT that another national merchant has also purchased directly from copper water tube producers in Europe.
52. One national merchant said it would be unlikely to switch to purchasing directly outside of the UK in response to a SSNIP, based on its past experience. However, it identified a number of options for direct imports and submitted that direct imports would be relatively straightforward within the EEA.
53. The OFT considers that the evidence it has received indicates that the geographic market for national merchants is wider than the UK. Given the evidence of European-wide trade flows and some evidence that trade flows are even wider, the OFT considers an assessment on an EEA wide level is a reasonable approximation. However, as the OFT does not consider there is a realistic prospect of an SLC even on the narrowest frame of reference, it is not necessary to conclude definitively on the exact geographic scope.

Independents

54. Unlike national merchants, the vast majority of independent merchants who replied to the OFT's market investigation said that they would not consider importing directly in the event of a SSNIP. Whilst the OFT found that independent merchants do purchase non-UK manufactured tube, it is almost entirely through a UK distributor such as Lawton Tube. These merchants said that:
 - transport costs per tonne would be restrictively high
 - the volatile nature of the copper price makes holding large quantities of copper water tube risky, which in turn reduces the ability to manage transport costs
 - importing involved exposure to currency conversion risks, and

- the lead times for imports are longer, restricting the ability for wholesalers to react quickly to customer demand.
55. Notwithstanding independents' limited ability to directly import from Europe, the OFT considered whether there would be scope for widening the geographic market for independents on the basis that European manufacturers could easily switch to supplying within the UK.
56. Competitors who replied to the OFT's market investigation considered that for a successful distribution model only a warehouse, a means of distribution and a sales team would be required. No third party considered that it was costly or difficult to enter as a distributor.
57. European manufacturers who replied to the OFT's market investigation said they either already imported to the UK through a distributor, such as Lawton, or considered that such distributors would be the most likely method of entry. The parties submitted that Metal Agencies acts as an exclusive UK distributor for the Greek manufacturer Halcor and that there is no reason to think that other European producers could not follow a similar model.
58. However, the OFT notes that the independent merchant market in the UK accounts for only [] per cent of demand based on OFT analysis of the parties' share of supply data, and that there may therefore be a limited incentive to enter, given the low margins and existing ability to import to national merchants directly.
59. Therefore, on a cautious basis, the OFT has assessed the effect of the merger on independent merchants against a UK geographic scope. The OFT has taken the effect of European overcapacity and potentially low barriers to entry into account in the competitive analysis.

Conclusion on frame of reference

60. The OFT has assessed the merger for:
- the supply of BSI accredited copper water tube to national plumbing and builders merchants based on a geographic market wider than the UK, using an EEA wide level as a reasonable approximation, and
 - the supply of BSI accredited copper water tube to independent plumbing and builders merchants (including buying groups and DIY chains) in the UK.

HORIZONTAL ISSUES

61. The OFT has examined the possibility that the merged entity could unilaterally impose prices above the pre-merger level or otherwise reduce its competitive offering. Where products are relatively undifferentiated, unilateral effects are more likely where the market is concentrated, there are few firms post-merger, the merger results in a firm with a large market share and there is no strong competitive fringe of firms. Unilateral effects are also more likely in such markets where customers have little choice of alternative supplier.¹¹

Shares of supply

62. UK shares of supply for manufacturers are displayed in the table below.

Table 1 Estimated shares by producer for all copper water tube sold to national merchants in the UK in 2012

Supplier	Tonnes	Share
MEL	[]	[50-60]
YCT	[]	[35-45]
COMBINED	[]	[85-95]
Lawton Tube	[]	[0-10]
Other	[]	[< 1]
Total	[]	100.0%

Source: Parties

63. Shares of supply based solely on the UK appear high. However, the OFT considers that the appropriate geographic market for these customers is wider than the UK, and that an EEA-wide basis is a reasonable approximation. The parties did not provide figures disaggregated by customers on a EEA-wide basis, but provided the following data:

¹¹ *Merger Assessment Guidelines*, paragraphs 5.4.4 to 5.4.5

Table 2 Estimated shares by producer for all copper water tube sold in the EEA in 2012

	EEA-wide	
Manufacturer	Volume (000's tonnes)	Share (%)
MEL	[]	[5-15]
KME Group (including YCT)	[]	[30-40]
Combined Business	[]	[35-45]
KME Group (Post Transaction)	[]	[20-30]
Wieland-Werke AG	[]	[10-20]
Feinrohren SpA	[]	[0-10]
Forma Spa	[]	[0-10]
Silmet Spa	[]	[0-10]
HALCOR Group	[]	[10-20]
MKM Mansfelder Kuper und Messing	[]	[0-10]
La Farga Tub SL	[]	[0-10]
Cupori Group Oy	[]	[0-10]
Others	[]	[0-10]
Total	[]	100%

Source: Parties

64. On an EEA basis, the merged entity will have a much lower share of supply to all customers of [15-25] per cent, and will face a number of sizeable competitors. The parties submitted there was substantial spare capacity within the EEA, which was confirmed by all third parties who responded to the OFT's market investigation. In one case, a competitor indicated it had

more spare capacity than the parties had estimated. Given this overcapacity, the OFT considers that market shares may not represent the full extent of the competitive conditions in the EEA. Further, due to this spare capacity, market shares calculated on a UK basis are likely to understate the competitive constraint from Lawton and Metal Agencies. The three national suppliers who responded to the OFT's investigation considered that [].

Strength of competitive constraint and alternative suppliers

65. The parties submitted that Lawton Tube (Lawton), a distributor, was the parties' closest competitor. []
66. Third parties who responded to the OFT's market investigation provided a mixed view on competition in the market. All three national merchants who responded considered that the parties were competitors. However, two customers' responses suggested that due to recent pricing they are not as close competitors as they once were. Further, none of the three national merchants were concerned about the merger. One national merchant told the OFT that they were unconcerned because in their view, YCT does not compete effectively against MEL and Lawton. The customer listed a number of credible options that they considered would be available to them, including Lawton, Wieland in Germany, a UK based agent for a Turkish manufacturer, Halcor in Greece (with Metal Agencies as a UK distributor) as well as Indian and Far East manufacturers.
67. Another customer agreed that there were a number of competitive options open to them. These included UK distributor Cubralco, which the customer considered would be able to meet their needs on most products and service requirements. Cubralco []. The customer also mentioned two European manufacturers, Foma and Fienrohen SpA, as viable options, but said that they would need to consider distribution. These competitors did not respond to the OFT's market investigation.
68. The third national customer who responded to the OFT's investigation was also unconcerned by the merger. It did not consider that KME was particularly efficient, and suggested that extra business would make Mueller more efficient and competitive. The customer also listed a number of options open to them post merger, including Wieland in Germany and Halcor in Greece (through Metal Agencies).

69. The parties submitted that there are at least 13 overseas suppliers who have the BSI accreditation for copper water tube, and provided estimates of their spare capacity. The OFT did not receive responses from all of these suppliers. Nonetheless, two European manufacturers confirmed to the OFT that they would be able to expand production quickly and easily due to significant overcapacity (which in one case was higher than the parties had estimated).
70. Within the UK, the OFT notes that []. Lawton and Metal Agencies submitted that they were not capacity constrained. []. All three national merchants who responded to the OFT considered that Lawton or Metal would be able to meet their requirements. [] Based on this, the OFT considers they could expand their supply in the event that the merged entity attempted to increase prices. In addition, third parties who replied to the OFT's market investigation named two other UK distributors as potential suppliers, Cubralco and Techno Commerce.

Conclusion on unilateral effects for national merchants

71. Given the evidence set out above, the OFT considers that there is no realistic prospect of the merger giving rise to unilateral effects in the supply of copper water tubes to national merchants.

Unilateral effects in the supply of copper water tubes to independent merchants

Shares of supply

72. The parties provided share of supply data for independent merchants in the UK. The shares of supply for 2012 are shown in the table below.

Table 3 UK copper water tube share by supplier for independent merchants (including buying groups and DIY stores)

Company	Volume (tonnes)	Share of supply (per cent)
MEL	[]	[10-20]
YCT	[]	[5-15]
COMBINED	[]	[15-25]
Lawton Tube	[]	[70-80]
Other	[]	[0-10]
Total	[]	100.0

Source: Parties

73. The parties' share of supply for this segment is [15-25] per cent. The merger will result in the amalgamation of the second and third leading suppliers to independent merchants.

Strength of competitive constraint

74. MEL is the second largest supplier of copper water tube to independent merchants in the UK. The sales reports provided by the parties contain several mentions of [].
75. Some independent merchants told the OFT that MEL has not been offering competitive pricing compared to YCT and other suppliers recently and has therefore not been exerting a strong constraint on YCT for a number of independent customers. These independents told the OFT that they felt MEL prioritised its efforts on winning business from national merchants.^[Endnote 2] Some told the OFT that they have moved demand from MEL to now source from Lawton due to price. On the basis of the evidence it has found, the OFT considers that MEL is not currently providing a strong competitive constraint for some customers. On the whole, the OFT considers that the parties are not each other's closest competitors for independent merchants.

Constraints from competitors

76. According to the parties, [].
77. The share of supply data shows that Lawton is currently the market leader for independent merchants in the UK. It is predominantly a distributor of copper tube, importing mainly from Europe and then selling to customers within the UK. []
78. The parties provided internal emails which contained examples of several customers switching away from MEL [].
79. Third party responses also strongly supported the significant competitive constraint that Lawton would impose on the merged entity. Some third parties were supportive of the merger on the grounds that it would allow MEL to become more efficient and compete more effectively against Lawton.
80. The parties told the OFT that there were a number of other distributors active within the UK, such as Metal Agencies, Cubralco and Navigator.

81. The internal emails provided by the parties identified several instances [].
82. Metal Agencies is a UK trading subsidiary of Viohalco Group, which comprises a number of manufacturing companies in Europe. One of these companies is Halcor S.A. which is a Greek manufacturer of copper tubes. Metal Agencies acts as a marketing, sales and distribution arm for all Halcor and Viohalco products in the UK and Republic of Ireland.
83. The emails supplied by the parties provide evidence of the competitive constraint provided by Metal Agencies. [].
84. Two independent merchants who replied to the OFT's market investigation specifically identified Metal Agencies (or Halcor) as a credible alternative for the supply of copper water tube. They claimed that they were competitive on price and quality. No third party identified any reason why Metal Agencies would not be a viable supplier for them post merger. Metal Agencies told the OFT that []. Cubralco is a distributor of plumbing and other related products. It does not manufacture copper water tube. The internal emails provided by the parties show instances of []. Cubralco told the OFT that []. One independent merchant told the OFT that it has been using Cubralco for a significant portion of its spend on copper water tubes in the last few months. Two others mentioned Cubralco as a viable supplier. The views of other independent merchants were mixed, either having not heard of Cubralco or sometimes being uncompetitive in price. Two other competitors were mentioned by independent merchants, F&P wholesale (mentioned by two) and the Becks Group (mentioned by one merchant). Merchants noted that whilst these suppliers were occasionally competitive, they were generally slightly more expensive than other providers, such as Lawton.
85. In total, five independent merchants who responded to the OFT had no concerns about the merger, submitting that enough choice would remain in the market. However, five merchants [] expressed some concerns about the proposed transaction.
86. Three of these concerns came from merchants who were purchasing from []. All three suggested that MEL had not been competitive in recent times, and one explained that they were concerned that MEL might continue to be uncompetitive in pricing post merger, leaving them with no choice other than Lawton. This concern was also raised by [].

87. One merchant told the OFT that they thought prices would rise as a result of the transaction. They had not heard of Metal Agencies and Cubralco. This merchant also told the OFT that they had not dealt with KME and that they were not sure if they would be a credible supplier.
88. Another independent merchant told the OFT that, whilst there would be a loss of competition, they did not think MEL would be able to raise prices post merger as it would lose too much volume. If MEL raised prices they considered they would either source product from outside the UK or switch to Lawton.
89. Another merchant was concerned that the only competitors left in the market would be distributors such as Lawton and Metal Agencies. This third party expressed a preference to dealing with manufacturers, but also considered that both Lawton and Metal Agencies would provide a credible option at a competitive price.
90. Generally, on the basis of the evidence it found, the OFT considers there are other options available for independent merchants beyond Lawton and the parties. The majority of the third parties who replied to the OFT's market investigation said that it was easy to switch between suppliers of copper water tube and that they were very sensitive to changes in price. One third party explained that, since the price of copper is publicly available, customers know the level of prices to expect due to their knowledge of the cost of converting the copper to tubing. As such, they know if they are getting a competitive price or not and can quickly and easily change supplier.
91. In addition to the constraint imposed by distributors already active in the UK, the OFT considers that some constraint will be felt on the parties from the ability of European suppliers to set up their own distribution models within the UK in the event that current distributors were unable or unwilling to take volumes from them, as discussed at paragraph 56.

Conclusion on unilateral effects for independent merchants

92. Based on the evidence set out above, the OFT considers that there is no realistic prospect of the merger giving rise to unilateral effects in the supply of copper water tubes to independent merchants.

CO-ORDINATED EFFECTS

93. The OFT also considered whether the transaction is likely to give rise to a substantial lessening of competition through co-ordinated effects. Co-ordination takes place either on the tacit or explicit understanding that competition will be softened for certain terms, such as prices, quality or customers. When assessing whether a merger is likely to give rise to a substantial lessening of competition through co-ordinated effects, the OFT will consider the following factors:

- Evidence of pre-existing co-ordination.
- The ability of firms to reach and monitor the terms of co-ordination.
- The internal sustainability of co-ordination.
- The external sustainability of co-ordination.¹²

94. The OFT considered the possibility of co-ordination both at a European and UK level.

European level co-ordination

95. The European copper water tube market was found by the European Commission to have been involved in a cartel between June 1988 and March 2001.¹³ Both parties to the merger were involved in the cartel, which involved the majority of the European producers of copper water tube. The parties submitted the transaction would not make co-ordination more likely, as pricing negotiations are carried out bilaterally, other suppliers have no incentive to co-ordinate and suppliers outside Europe could easily destabilise co-ordination.

96. The OFT is not aware of any evidence that would indicate that there is currently any pre-existing co-ordination between the parties or other producers in Europe, whether in the form of a cartel or tacit forms of co-ordination. No third party raised any concerns about coordinated behaviour.

97. The OFT does not consider that firms in the industry will easily be able to reach and monitor the terms of co-ordination. While the copper water tube industry is characterised by transparent pricing, due to the differing specifications across countries it is difficult to compare products on a like-

¹² *Merger Assessment Guidelines*, Section 5.5

¹³ 38069 PO *Copper plumbing tubes*,

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38069

for-like basis. The volatile and declining nature of demand is also likely to make it difficult for firms to monitor customer allocation.

98. Whilst at a European level the merger will increase symmetry between MEL and KME, because the KME group will also be active in Europe post merger, there will not be a reduction in the number of firms active across Europe as a result of the transaction.
99. The disparate speed of decline across Europe is also likely to make coordination difficult. The OFT considers that firms in one country would face clear incentives to expand their market shares given sudden domestic demand reduction.
100. Further, co-ordination could potentially be destabilised by other players outside the co-ordinating group. As noted above at paragraph 45, some customers considered that producers outside the EEA are able to produce copper water tube of the required quality. These suppliers may be able to take advantage of any coordinated behaviour within Europe.
101. Therefore, the OFT considers that there is not a realistic prospect of EEA wide co-ordinated effects giving rise to a substantial lessening of competition.

UK level co-ordination

102. The OFT did not find any evidence that pre-existing co-ordination is present in the UK. Third parties did not raise any concerns about co-ordinated behaviour.
103. The ability to monitor the terms of co-ordination is likely to be easier within the UK than in Europe due to the more homogenised nature of the products and the smaller number of active firms. In this case, the merger will result in a reduction in the number of active firms. Nonetheless, there will still be four active firms post merger.
104. The market for supply into the UK is currently asymmetrically distributed between the main suppliers. This is likely to provide little incentive for firms to accept a co-ordinated outcome, especially in the case of Lawton.
105. Most significantly, the threat to any UK based co-ordination from entry or disruption from Europe is large. Given the significant overcapacity in European producers, coordinated behaviour which raised the prices charged

to UK customers would provide a clear incentive for other European manufacturers to enter and gain market share, or for another company to enter as a distributor.

106. The OFT therefore considers that there is no realistic prospect of an SLC arising in the UK based on co-ordinated effects.

COUNTERVAILING FACTORS

Barriers to entry and expansion

107. The parties submitted that barriers to entry are relatively low. However, the OFT considers that there are a number of significant barriers to entry for a prospective new manufacturer of copper water tube. Not least, the substantial exit costs associated with environmental clean-up are likely to represent a large sunk cost to any potential entrant.

108. The parties and some competitors told the OFT that there are very few barriers to setting up a distribution business for copper water tube. Third parties considered there would be competitively priced tube on the market due to overcapacity, a small warehouse and sales team should be easily attainable, and there are already distribution logistics companies that could be used to deliver products. For example, the parties currently outsource their distribution. Prior to purchasing the Kirkby plant in 2002, the KME group supplied copper water tube to the UK via a warehouse []. [].

109. The overall evidence the OFT found on entry and expansion is mixed. It appears considerably easier to establish a distribution network than commence operations as a manufacturer. However, given the outcome of the OFT's assessment, the OFT has not found it necessary to conclude on whether barriers to entry and expansion to the supply of copper water tubes are high.

Buyer power

110. The OFT notes that the national merchants who purchase copper water tube account for a significant proportion of the output from the merging parties. The parties submitted that they will be in a strong negotiating position post merger, and will be able to exploit the choice still available to them from UK distributors and direct imports from other European players to keep prices down.

111. Independent merchants are less likely to benefit from a strong negotiating position, due to their smaller volumes. Furthermore, due to the ability for suppliers to discriminate between different purchasers, the OFT does not consider they would benefit from any buyer power held by national merchants.

112. The OFT was told that some independents have joined together to form buying groups and considers that this may provide stronger leverage for some independents when negotiating with suppliers.

113. However, given the conclusions elsewhere it has not been necessary to conclude on the extent of buyer power in this case.

THIRD PARTY COMMENTS

114. Third party comments have been reflected where relevant throughout the decision.

115. The majority of third parties were not concerned. The OFT did hear from a number of concerned third parties, mainly independent merchants. These concerns are addressed above. The OFT also heard from a number of independent merchants who were not concerned about the merger. Competitors and national merchants were not concerned about the merger.

116. Half of the concerns received centred on a concern that MEL is currently not pricing competitively for independent merchants' orders and a fear that MEL would continue this policy having acquired YCT's business.^[Endnote 2] All of these merchants noted Lawton as a competitive alternative. This concern is addressed above in the competitive assessment.

ASSESSMENT

117. Mueller Europe Ltd (MEL) and KME Yorkshire (YCT) overlap in the supply of copper water tubes used by plumbers and builders as part of the installation of plumbing and heating systems. The customers of the parties are plumbers and builders merchants, either national merchants or independent regional merchants.

118. The parties argued that the market for copper water tubes could be widened to include water tubes made from other materials (such as plastic or composites) on the demand side, and to include copper industrial tube on the supply side. Third party replies to the OFT's market investigation

indicated that whilst there has been a marked shift from copper to plastic over time, plumbers and installers would be unlikely to shift in response to a SSNIP. The OFT also found insufficient evidence to indicate that suppliers of industrial copper tube would have the incentive to quickly switch production to copper water tubes. The OFT assessed the merger on the basis of a product scope of BSI accredited copper water tube.

119. The OFT considered that the supply of copper water tube can be segmented by customer type. National merchants are typically significantly larger than independent merchants, purchase their copper water tube through annual agreements with rebates and have access to direct imports from Europe. The OFT considered the geographic scope for national merchants to be wider than the UK, and has used the EEA as a reasonable approximation, but has left the exact scope open in this case.

120. By contrast, independent merchants do not contract for their volumes and, due to lower volumes, do not consider direct importation to be attractive. For independent merchants, the OFT used the UK as the appropriate geographic frame of reference.

121. The OFT considered the following theories of harm:

- unilateral effects in the supply of copper water tubes to national merchants
- unilateral effects in the supply of copper water tubes to independent merchants (including buying groups and DIY chains)
- co-ordinated effects in the supply of copper water tubes at a European or UK level.

122. On an EEA-wide basis the combined entity will have a market share of [20-30] per cent. There is also evidence of considerable over-capacity within Europe and a number of credible UK suppliers, with Lawton Tube in particular having grown significantly in recent years. No national merchant raised any concerns with the OFT about the merger, and some were supportive of the merger on the basis that YCT is not currently competitive. Based on the evidence it received, the OFT considers there is no realistic prospect of the merger giving rise to unilateral effects in the supply of copper water tubes to national merchants.

123. The combined market shares of the parties in the supply to independent merchants in the UK is [15-25] per cent. The market leader for this

segment is Lawton Tube with [70-80] per cent. Third parties suggested that, for at least some customers, the parties are not currently competing closely for independent merchants. There is also evidence of active competitors with access to the substantial overcapacity in Europe, who are likely to have the ability and incentive to compete against the merged entity. Based on the evidence it received, the OFT considers there is no realistic prospect of the merger giving rise to unilateral effects in the supply of copper water tubes to independent merchants.

124. The OFT considered whether the transaction was likely to give rise to coordinated effects either on a European or UK level.

125. The transaction will not reduce the number of suppliers active at a European level since KME will remain active through its other plants post merger. Further, given the substantial number of players active at a European level and the diverging trends in demand across different countries, the OFT does not consider there is a realistic prospect that the merger will give rise to coordinated effects at a European level.

126. Within the UK, there is some evidence that prices are transparent within the industry. However, there are other active suppliers within the UK who would have a clear incentive to expand their market shares. The declining nature of demand for copper water tube and the volatility of the price for copper also leads to doubts about the internal sustainability of coordination.

127. In addition, given the existence of other credible suppliers and the overcapacity in Europe, the OFT considers that coordination is unlikely to be externally sustainable. The OFT considers there is no realistic prospect of the merger giving rise to coordinated effects at a UK level.

DECISION

128. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.

Endnote 1: In relation to paragraph 18, MEL produces copper water tubes ranging in diameter from 6mm to 108mm.

Endnote 2: MEL disagrees with this third party comment and submits that it does not prioritise any customer group over another.