

# Completed acquisition by Universal Sealants (U.K.) Limited of Ekspan Holdings Limited

## Decision on relevant merger situation and substantial lessening of competition

**ME/6722/17**

The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 given on 26 February 2018. Full text of the decision published on 23 March 2018.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

### SUMMARY

1. On 27 October 2017, Universal Sealants (U.K.) Limited (**Universal Sealants**) acquired Ekspan Holdings Limited (**Ekspan**) (the **Merger**). Universal Sealants and Ekspan are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that the Parties' enterprises have ceased to be distinct and that the share of supply test is met. The four-month period for a decision, as extended, has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
3. In the UK, the Parties overlap in the supply of expansion joints. Expansion joints are divided into different types (Types 1 to 7) depending mainly on the movement range they accommodate. The Parties overlap in the supply and installation of expansion joints of Types 5 and 6. The Parties and their competitors all cover the whole of the UK. The CMA found that there is limited demand side substitutability, but some level of supply side substitution between the different types of expansion joints. Without concluding on the exact definition of the product frame of reference, the CMA assessed the impact of the Merger in:
  - (a) the supply of Type 5 expansion joints in the UK;

(b) the supply of Type 6 expansion joints in the UK; and

(c) the supply of both Type 5 and 6 expansion joints in the UK.

4. The CMA found that the Parties' combined share in the supply of Type 6 expansion joints and in the supply of both Type 5 and 6 expansion joints in the UK was below 40%. The CMA found that the Type 6 expansion joints supplied by the Parties are differentiated and the Parties are not each other's closest competitor. The CMA found that other competitors will continue to provide a sufficient constraint on the Parties post-Merger. Therefore, the CMA concluded that the Merger does not give rise to a realistic prospect of a substantial lessening of competition (SLC) as a result of horizontal unilateral effects either in the supply of Type 6 expansion joints in the UK or in the supply of both Type 5 and 6 expansion joints in the UK.
5. The CMA found that the Parties' combined share in Type 5 expansion joints was high, with a significant increment resulting from the Merger. The Parties are close competitors in the supply of this type of expansion joint, and the CMA could not be confident that the remaining competition would be sufficient to constrain the Parties after the Merger. On this basis, the CMA found that there was a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of Type 5 expansion joints in the UK. However, pursuant to section 22(2)(a) of the Act, the CMA believes that the market concerned is not of sufficient importance to justify the making of a reference.

## **ASSESSMENT**

### **Parties**

6. Universal Sealants is a UK company wholly-owned by the US-headquartered RPM International Inc. (RPM). Universal Sealants is a specialist civil engineering company offering a range of goods and services associated with building and maintaining bridges, tunnels, car parks and elevated structures. The turnover of Universal Sealants in the financial year ended 31 May 2017 was approximately £[REDACTED] million in the UK.
7. Ekspan is a UK structural engineering company that provides mechanical bearings, movement control solutions and expansion joints. The turnover of Ekspan in the financial year ended 30 June 2017 was approximately £8.85 million, [REDACTED].

## Transaction

8. Universal Sealants purchased the entire share capital of Ekspan by way of a Stock Purchase Agreement on 27 October 2017.
9. Universal Sealants' stated rationale for the Merger was to add additional products and services to United Sealants' offering, in particular Ekspan's mechanical bearings and movement control solutions, [X]. In addition, the Parties stated that the Merger should enable Ekspan to increase its international sales by taking advantage of Universal Sealants' and RPM's international customer base.
10. The Merger has not been notified to competition authorities in any other jurisdictions.

## Procedure

11. The CMA's mergers intelligence function identified this transaction as warranting an investigation.<sup>1</sup>

## Jurisdiction

12. As a result of the Merger, the enterprises of RPM and Ekspan have ceased to be distinct.
13. The Parties overlap in the supply of expansion joints, in particular in the supply of expansion joints of (i) Type 5 and (ii) Type 6, with estimated combined shares of supply by value of [60-70]% (increment [20-30]%) and [20-30]% (increment [10-20]%), respectively (see paragraphs 55-59 and 73-77). The CMA therefore believes that the share of supply test in section 23 of the Act is met.
14. The Merger completed on 27 October 2017 and was first made public on 30 October 2017. The four month deadline for a decision under section 24 of the Act is 26 March 2018, following extension under section 25(2) of the Act.
15. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

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<sup>1</sup> See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, paragraphs 6.9-6.19 and 6.59-60.

16. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 11 January 2018 and the statutory 40 working day deadline for a decision is therefore 7 March 2018.

## Counterfactual

17. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.<sup>2</sup>
18. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA believes the pre-Merger conditions of competition to be the relevant counterfactual.

## Background

19. As mentioned above, the Parties overlap in the supply and installation of expansion joints. An expansion joint is a product primarily used in bridges to join two parts of a structure together while accommodating movement caused by the expansion and contraction of construction materials due to changes in temperature.
20. Different types of expansion joints are used depending on the movement ranges required (see paragraphs 30-32). Highways England divides expansion joints into seven categories (Types 1 to 7) based on different designs and their movement range. New expansion joints need to be submitted to Highways England for regulatory approval before being used on the Highways England road network.
21. The supply chain of these product includes three activities:
  - a) the manufacture of expansion joints;

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<sup>2</sup> *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

- b) the supply of expansion joints, including registering and gaining Highways England approval for expansion joints; and
  - c) the installation of expansion joints.
22. Suppliers of expansion joints operate under a number of different business models: For example, (i) some firms, like the Parties, do not manufacture expansion joints, but purchase them from third party manufacturers, supplying and directly installing them for the end-customer; (ii) other firms both manufacture and supply expansion joints, but rely on ‘approved applicators’ to carry out installation; (iii) some firms manufacture, supply and install; and (iv) some firms are installers only.
23. The customers of expansion joints are, directly and indirectly, Highways England<sup>3</sup>, Transport Scotland, local authorities, companies in the railway sector and construction contractors.<sup>4</sup>

## Frame of reference

24. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.<sup>5</sup>
25. As noted above, the Parties mainly overlap in the supply of Type 5 and 6 expansion joints. The Parties also overlap to a limited extent in the supply of Type 4 expansion joints; however, Ekspan’s Type 4 expansion joints do not have Highways England registration, which severely limits their use. Ekspan supplied Type 4 expansion joints in only [%] projects over the past four years and the Parties estimate that, in 2017, Ekspan’s share in the supply of this type of joint was around [0-5]%. Given the limited presence of Ekspan in the supply of Type 4 expansion joints, as well as evidence indicating that the

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<sup>3</sup> Highways England divides its highways networks into 14 areas for the purpose of managing highway maintenance (Highways England Areas). In most areas, Highways England contracts a construction contractor as a managing agent and this contractor subcontracts to expansion joint suppliers for expansion joint requirements, but in some areas Highways England manages the area directly, where it contracts expansion joint suppliers for expansion joint requirements. Transport Scotland uses a similar division of areas, but all four of the areas are managed by managing agents.

<sup>4</sup> Construction contractors may be contracted for either regular maintenance of roads and bridges or for one-off major works – building new structures or refurbishing existing structures.

<sup>5</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2.

Parties are not close competitors in the supply of this type of expansion joint and are constrained by a number of other suppliers, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC in relation to the supply of Type 4 expansion joints in the UK. The CMA has therefore not considered these activities further.

26. The Parties also have a small overlap in the supply of sub-surface drainage products. These are drainage products used in bridges to collect groundwater below the surfacing and disperse it. Given Ekspan's small sales in this sub-surface drainage sector (£[redacted] in financial year ended 2017) and the existence of at least a few significantly larger competitors, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC in relation to the supply of sub-surface drainage products in the UK. The CMA has therefore not considered these activities further.

### ***Product scope***

27. The CMA focused its competition assessment on the supply of Type 5 and 6 expansion joints. It considered whether the supply of expansion joints can be segmented by: (i) type of expansion joint; (ii) type of customer; and/or (iii) the different levels in the supply chain.

### ***Type of expansion joint***

28. The CMA considered whether each type of expansion joint in which the Parties overlap (Type 5 and 6) constitutes a separate frame of reference.
29. The Parties submitted that the appropriate frame of reference is either: (i) all expansion joints, as there is a chain of substitution between all expansion joints, or (ii) expansion joints Types 5 to 7, based on the movement range they accommodated.

### ***Demand-side substitution***

30. The Highways England design manual for roads and bridges specifies that Types 1 to 4 have a maximum movement of up to 40 mm, whereas higher movement ranges are possible for Types 5 to 7.
31. Third parties told the CMA that, while Types 5 to 7 can be used in lower movement ranges, Types 1 to 4 are more economical so Types 5 to 7 are only used for lower ranges when Types 1 to 4 are not available.

32. Third parties also told the CMA that Types 1 to 4 are not technically substitutable for the majority of situations in which expansion joints of Types 5 to 7 are used because their movement range is insufficient.
33. The CMA then considered whether Type 5, 6 and 7 are substitutable for each other.
- (a) Third parties submitted that Type 5 and Type 6 expansion joints could, in some situations, be considered as technical substitutes.<sup>6</sup> However, most customers said they would not switch between Type 5 and 6 expansion joints in response to a 5% price increase. Tender data, submitted by the Parties, also shows that the Parties usually offered the same type of expansion joint for the same project.<sup>7</sup>
- (b) Type 7 expansion joints are only used for specific projects that require specialised high movement joints. No customer considered Type 7 expansion joints to be technically substitutable for Type 5 or 6 expansion joints.
34. This evidence indicated that other types of expansion joints are not a technical substitute for Type 5 and Type 6 expansion joints, and that there is only limited demand-side substitution between Type 5 and Type 6 expansion joints.

#### *Supply-side substitution*

35. The Parties and some competitors supply and install both Type 5 and Type 6 expansion joints.
36. At installation level, the evidence received by the CMA suggests that a firm which installs Type 5 joints would be able to install Type 6 joints, and vice versa. An installer can easily become an approved installer for a different type of joint for a supplier which already has a UK registration for that type of joint.
37. However, both Universal Sealants and third parties told the CMA that for a supplier to offer an additional type of joint requires significant time and investment, due to the need to acquire a Highways England registration for the new product, which involves a year-long trial at a test site.

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<sup>6</sup> The Parties submitted that factors such as noise control, speed of installation and trip hazards may influence the customer's decision over type of joint (eg while Type 6 expansion joints are cheaper and quicker to install, Type 5 expansion joints generate less noise when traffic passes over them and do not create trip hazards, which must be considered when pedestrians use the bridge).

<sup>7</sup> In [§] of the [§] contracts in which the Parties bid against one another, Universal Sealants offered a Type 6 expansion joint and Ekspan a Type 5 expansion joint.

38. Given the mixed evidence on supply-side substitution and the evidence that that there is limited demand-side substitution between Type 5 and Type 6 expansion joints, the CMA assessed the Merger on a cautious basis by considering separate product frames of reference for the supply of Type 5 and Type 6 expansion joints and a product frame of reference for both types together. However, the CMA did not have to reach a conclusion on the appropriate product frame of reference since, as set out below, the conclusion of the CMA's decision on whether to refer this Merger to a Phase 2 investigation did not differ depending on the definition adopted.

#### *Type of customer*

39. The CMA considered whether competition to supply expansion joints for Highways England or Transport Scotland Area maintenance contracts ('Highways Area contracts') is different from competition to supply other types of customer.
40. Contractors on Highways Area contracts use a tender process to select one or more 'preferred supply chain partners' for expansion joints. These agreements then typically last for five years, with a possibility of a two year extension. Only preferred supply chain partners can bid to supply expansion joints in the relevant Areas. The CMA found that suppliers which serve Highways Area contracts can and do serve other customers.
41. Universal Sealants competes for Highways Area contracts and they account for [40-50]% of its sales. Ekspan does not compete for these contracts. Universal Sealants submitted that this is because Ekspan, as a smaller organisation, [redacted]. Universal Sealants submitted that, for Ekspan to start competing for these contracts, [redacted].
42. A number of other competitors also do not compete for these contracts, such as [redacted], [redacted] and [redacted].
43. Due to the different competitor set and the barriers to supply-side substitution, the CMA noted that Highways Area contracts may form a separate product segment distinct from sales to other customers. Therefore, in its analysis, the CMA considered the competitive effects of the Merger for non-Highways Area contracts (in which the Parties overlap) as well as for all customers. The CMA found that the results for non-Highways Area contracts were the same as for all customers for each relevant product. Therefore, the CMA did not have to reach a conclusion on whether the appropriate product frame of reference should distinguish between Highways Area contracts and other customers since the results of the assessment did not differ depending on this segmentation.



### *Different levels in the supply chain*

44. The Parties' customers told the CMA that all types of supplier are credible competitors to the Parties, including firms that are present at the supply level but outsource the installation and firms that only operate at the installation level.
45. Therefore, the CMA has not considered separate product frames of reference for the manufacture, supply and installation of expansion joints. References in this decision to supply therefore also include manufacture and installation, unless stated otherwise.

### *Conclusion on product frame of reference*

46. For the reasons set out above, on a cautious basis the CMA has considered the impact of the Merger in the following product frames of reference:
  - (a) the supply of Type 5 expansion joints;
  - (b) the supply of Type 6 expansion joints; and
  - (c) the supply of Type 5 and 6 expansion joints.

However, the CMA did not have to reach a conclusion on the appropriate product frame of reference since, as set out below, the conclusion of the CMA's decision on whether to refer this Merger to a Phase 2 investigation did not differ depending on the definition adopted.

### ***Geographic scope***

47. Universal Sealants submitted that competition takes place on a national basis, with installers requiring a UK presence.
48. Universal Sealants stated that the geographic scope for the supply of expansion joints is not narrower than national, because:
  - (a) freight charges represent less than 1% of the cost of a project and therefore distance is not an important factor in supplying and installing expansion joints;
  - (b) all major competitors have a national presence;
  - (c) there are no advantages in having a local or regional presence in the vicinity of a project, and

(d) in the Parties' experience, having a local presence has never been a criterion in tenders.

49. Each of the Parties supplies customers throughout the UK. Ekspan supplies from a single site in Sheffield, and Universal Sealants supplies from sites in Tyne & Wear and Sheffield.
50. All of the Parties' competitors who responded to the CMA's investigation stated that the scope of their operations was national or broader than national.
51. Therefore, on the basis of this evidence, the CMA has considered the impact of the Merger for each product frame of reference on a UK-wide basis.

### ***Conclusion on frame of reference***

52. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
  - (a) the supply of Type 5 expansion joints in the UK;
  - (b) the supply of Type 6 expansion joints in the UK; and
  - (c) the supply of Type 5 and 6 expansion joints in the UK.

## **Competitive assessment**

### ***Horizontal unilateral effects***

53. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.<sup>8</sup> Horizontal unilateral effects are more likely when the merging parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects in each of the frames of reference listed above.
54. In its assessment, the CMA considered:
  - (a) the Parties' shares of supply;
  - (b) closeness of competition between the Parties; and

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<sup>8</sup> [Merger Assessment Guidelines](#), from paragraph 5.4.1.

(c) constraints from other competitors.

### *Supply of Type 5 expansion joints*

#### *Shares of supply*

55. The Parties provided an estimate of their shares of supply by value for Type 5 expansion joints based on their own estimate of the market size. Taking the Parties' estimated shares of supply as a starting point, the CMA supplemented this data with actual sales values provided by some competitors. Table 1 presents the results.

Table 1: Shares of supply for Type 5 expansion joints

<i>Supplier</i>	<i>Sales FY17</i>	<i>Share</i>
Universal Sealants	[REDACTED]	[30-40]%
Ekspan	[REDACTED]	[20-30]%
Parties Combined	[REDACTED]	[60-70]%
Route One	[REDACTED]	[10-20]%
Stirling Lloyd (GCP)	[REDACTED]	[5 -10]%
Aquaflame	[REDACTED]	[0-5]%
Freyssinet	[REDACTED]	[0-5]%
Others	[REDACTED]	[0-5]%
Total	[REDACTED]	100%

Source: Parties' estimates and competitors' sales figures

56. The CMA found that the merged entity would be the largest supplier of Type 5 expansion joints and would be significantly larger than any competitor. There are only two other competitors (Route One, Stirling Lloyd) with a share of supply higher than 5%.

57. Universal Sealants submitted that these figures overestimate the Parties' shares of supply as the market sizes do not include customers in the railways segment. However, the information received from almost all competitors identified by the Parties indicated that the Parties had not underestimated the total market size.

58. Universal Sealants also submitted that Ekspan's sales of this type of expansion joint were exceptionally high in the last financial year (ie [REDACTED]). The CMA therefore considered Ekspan's revenue over the last three years and

found that Ekspan’s share of supply in Type 5 expansion joints grew substantially year by year in the last three years.

59. The CMA found that the shares of the Parties in non-Highways Area contracts (for which they overlap) did not differ substantially from the shares set out above.<sup>9</sup>

*Closeness of competition*

60. Universal Sealants submitted that the Parties are not close competitors with regards to Type 5 expansion joints, mainly because the Parties do not manufacture these products, and because these expansion joints are easily and widely available. See endnote below.

- *Tender data*

61. The Parties submitted that they do not often bid on the same tenders, indicating that they are not close competitors.
62. The CMA examined the Parties’ tender data for 2016. Table 2 summarises the frequency with which the Parties bid against each other on Type 5 expansion joint tenders, and the value of these tenders as a proportion of the total value of the Type 5 tenders on which each Party bid.

Table 2: Parties’ Type 5 tender participation

<b>Party</b>	<b>No. tenders</b>	<b>Value of tenders</b>	<b>Tenders other Party bid for</b>	<b>% other Party bid for</b>	<b>% by value other Party bid for</b>
Universal Sealants’ tenders	[X]	[X]	[X]	[X]	[X]
Ekspan’s tenders	[X]	[X]	[X]	[X]	[X]

63. Although Ekspan bid on only a small proportion of the Type 5 tenders on which Universal Sealants bid, the tenders it did bid for were among the largest for which Universal Sealants bid. Universal Sealants bid for a significant proportion of the Type 5 tenders on which Ekspan bid in terms of both number and value.
64. Table 3 summarises how often each Party lost tenders to the other Party, as a proportion of all of the Type 5 tenders it lost.

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<sup>9</sup> The CMA estimated that the Parties would have a combined share of [70-80]% in the supply of Type 5 expansion joints to customers other than Highways Area contracts.

Table 3: Parties' Type 5 tender losses

<i>Party</i>	<i>No. tenders lost</i>	<i>Value of lost tenders</i>	<i>% other Party bid for</i>	<i>% by value other Party bid for</i>
Universal Sealants' tenders	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Ekspan's tenders	[REDACTED]*	[REDACTED]	[REDACTED]	[REDACTED]

\*Excludes one tender marked as 'Not awarded'.

65. This data shows that Ekspan won only a small proportion of the tenders Universal Sealants lost, and Universal Sealants won only [REDACTED] of the tenders that Ekspan lost, though it won the more valuable tenders.

66. Overall, the tender data suggests that Ekspan is constrained by Universal Sealants in the supply of Type 5 expansion joints, though Universal Sealants is much less significantly constrained by Ekspan.

- *Third party responses*

67. The vast majority of competitors told the CMA that Universal Sealants is their strongest competitor in the supply of Type 5 expansion joints. Some third parties listed Ekspan as the second main competitor after Universal Sealants. The majority of third parties rated Ekspan as highly, or nearly as highly, as Universal Sealants in all dimensions of competition for Type 5 expansion joints.

*Competitive constraints*

68. Universal Sealants submitted that the Parties have many credible competitors for the supply of Type 5 expansion joints and that customers can choose from a wide range of installers.

69. Sales data of other suppliers of Type 5 expansion joints shows that only [REDACTED] and [REDACTED] had a value of sales relatively similar to Ekspan. [REDACTED].

70. Customer responses to the CMA's investigation indicated that other suppliers of Type 5 expansion joints are considered weaker alternatives to the Parties. In addition, [REDACTED] does not install Type 5 expansion joints so any constraint it exerts on the Parties is likely to be channelled through installers. One competitor was concerned that it would no longer be able to use Ekspan as a supply chain partner for the installation of Type 5 expansion joints, which it offers as part of its overall package, which could limit its ability to compete.

71. On the basis of this evidence, the CMA found that other suppliers will not sufficiently constrain the Parties post-Merger.

### *Conclusion on horizontal unilateral effects for Type 5 expansion joints*

72. The CMA found that the Parties' combined share in Type 5 expansion joints was high, with a significant increment resulting from the Merger. The Parties are close competitors in the supply of this type of expansion joint and the CMA could not be confident that the remaining competition would be sufficient to constrain the Parties after the Merger. On this basis, the CMA concluded that there was a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of Type 5 expansion joints in the UK.

### *Supply of Type 6 expansion joints*

#### *Shares of supply*

73. As with Type 5 expansion joints, taking the Parties' estimated shares of supply as a starting point, the CMA supplemented this data with actual sales values provided by some competitors. Table 4 presents the results.

Table 4: Shares of supply for Type 6 expansion joints

<b>Supplier</b>	<b>Sales FY17</b>	<b>Share</b>
Universal Sealants	[ <del>£</del> ]	[10-20]%
Ekspan	[ <del>£</del> ]	[10-20]%
<b>Parties Combined</b>	[ <del>£</del> ]	<b>[20-30]%</b>
Maurer UK	[ <del>£</del> ]	[10-20]%
VolkerLaser	[ <del>£</del> ]	[5-10]%
Freyssinet	[ <del>£</del> ]	[5-10]%
Route One	[ <del>£</del> ]	[5-10]%
Stirling Lloyd (GCP)	[ <del>£</del> ]	[0-5]%
Mageba	[ <del>£</del> ]	[0-5]%
Others	[ <del>£</del> ]	[20-30]%
<b>Total</b>	[ <del>£</del> ]	<b>100%</b>

Source: Parties' estimates and competitors' sales figures

74. As for Type 5 expansion joints, Universal Sealants submitted that the Parties' shares of supply are overestimated, and that the most recent financial year was an exceptionally strong year for Ekspan.
75. The CMA found that, even on the basis of Ekspan's high level of sales in 2017, the combined share of the Parties in the supply of Type 6 expansion

joints in the UK is modest (not higher than 30%, with an increment of [10-20]%).

76. The CMA noted that there are other competitors with a share similar to Ekspan, such as [X] and [X].
77. The CMA found that the shares of the Parties in non-Highways Area contracts (for which they overlap) did not differ substantially from the shares set out above.<sup>10</sup>

*Closeness of competition*

- *Product differentiation*

78. Universal Sealants submitted that the Parties are not close competitors for Type 6 expansion joints as their products are very different. In particular, Ekspan’s T MAT expansion joints, which accounted for approximately [60-70]% of Ekspan’s Type 6 sales in 2017, differ from Universal Sealants Type 6 products as they do not present a trip hazard and provide particular advantages for rail bridges, though they are less likely to be used for Highways England roads. Universal Sealants added that they are also significantly more expensive than other Type 6 expansion joints and take longer to install.

- *Tender data*

79. The CMA examined the Parties’ tender data for 2016. Table 5 summarises the frequency with which the Parties bid against each other for Type 6 expansion joints, and the value of these tenders as a proportion of the total value of the Type 6 tenders on which each Party bid.

Table 5: Parties’ Type 6 expansion joints tender participation

<b>Party</b>	<b>No. tenders</b>	<b>Value of tenders</b>	<b>Tenders other Party bid for</b>	<b>% other Party bid for</b>	<b>% by value other Party bid for</b>
Universal Sealants’ tenders	[X]	[X]	[X]	[X]	[X]
Ekspan’s tenders	[X]	[X]	[X]	[X]	[X]

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<sup>10</sup> The CMA estimated that the Parties would have a combined share of [20-30]% in the supply of Type 6 joints to customers other than Highways Area contracts.

80. Each of the Parties bid on a very small proportion of the other party's tenders, although these tended to be the more valuable tenders.
81. Table 6 summarises how often each Party lost tenders to the other Party, as a proportion of all of the Type 6 tenders it lost.

Table 6: Parties' Type 6 tender losses

<b>Party</b>	<b>No. tenders lost</b>	<b>Value of lost tenders</b>	<b>% other Party bid for</b>	<b>% by value other Party bid for</b>
Universal Sealants' tenders	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Ekspan's tenders	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

\*Excludes one tender marked as 'Not awarded'.

82. For both of the Parties, the large majority of the tenders they lost were not won by the other Party. The CMA noted that, although Ekspan won [REDACTED]% by value of the tenders lost by Universal Sealants, this was driven by one large tender.
83. Overall, the tender data suggests that, although the Parties bid against each other in a limited number of large contracts, the Parties largely bid for different contracts, indicating that they only constrain each other to a moderate extent.

- *Third party responses*

84. Customer responses, in which they ranked alternative suppliers of Type 6 expansion joints, did not suggest that the Parties are considered close competitors.
85. Most competitors who supply Type 6 expansion joints told the CMA that Universal Sealants was their strongest, or one of their strongest, competitors, but only one competitor listed Ekspan among their strongest competitors.

*Competitive constraints*

86. Universal Sealants submitted that there are many credible alternative suppliers of Type 6 expansion joints.
87. The CMA's investigation, including its share of supply and tender data analysis and evidence from third parties, confirmed that the merged entity will remain constrained by three main competitors ([REDACTED], [REDACTED] and [REDACTED]) and a number of other smaller suppliers.



### *Types 5 and 6 expansion joints combined*

88. The CMA estimated combined Type 5 and Type 6 shares of supply using the same approach as set out above, ie taking the Parties' estimated shares of supply as a starting point and supplementing this data with actual sales values provided by some competitors. Table 7 presents the results.

Table 7: Shares of supply for Type 5 and Type 6 expansion joints (combined)

<b>Supplier</b>	<b>Sales FY17</b>	<b>Share</b>
Universal Sealants	[£]	[20-30]%
Ekspan	[£]	[10-20]%
<b>Parties Combined</b>	[£]	<b>[30-40]%</b>
Maurer UK	[£]	[10-20]%
Route One	[£]	[5-10]%
Freyssinet	[£]	[5-10]%
VolkerLaser	[£]	[5-10]%
Stirling Lloyd (GCP)	[£]	[5-10]%
Mageba	[£]	[0-5]%
Others	[£]	[20-30]%
<b>Total</b>	[£]	<b>100%</b>

Source: Parties' estimates and competitors' sales figures

89. The CMA found that the Parties would have a share of supply of around [30 – 40]% (using 2017 data). However, this share was significantly lower in previous years when Ekspan's sales were much smaller (£[£] in 2017; £[£] in 2016; and £[£] in 2015).
90. The CMA considered if there was any reason to believe that Ekspan's growth in Type 5 and Type 6 expansion joints would continue such that it could be expected to provide an even greater constraint on Universal Sealants in the future. However, the CMA found no evidence to indicate that this was the case. Rather, the CMA found that sales contracts were lumpy and often large and there was no reason to believe that Ekspan's recent increase in sales (in 2017) would necessarily be sustained. The Parties provided evidence to suggest that Ekspan's sales of Type 5 and Type 6 expansion joints in 2018 were likely to be lower than in 2017.
91. The CMA noted that several other suppliers of Type 5 and Type 6 expansion joints operated at a similar size to Ekspan's average size over the last three years.
92. The CMA found that the shares of the Parties in non-Highways Area contracts (for which they overlap) did not differ substantially from the shares set out above.

### *Closeness of competition and competitive constraints*

93. Type 6 expansion joints represent [70-90]% of sales in a combined Type 5 and Type 6 frame of reference. Therefore, in considering the closeness of competition and competitive constraints relevant to this combined frame of reference, the CMA refers to the evidence relevant to the Type 6 frame of reference in paragraphs 78 to 87 above.

### *Conclusion on horizontal unilateral effects for the supply of Type 6 expansion joints and for the supply of Type 5 and Type 6 expansion joints combined*

94. The CMA found that the Parties' combined share in the supply of Type 6 expansion joints and in the supply of both Type 5 and 6 expansion joints in the UK was below 40%. The CMA found that the Type 6 expansion joints supplied by the Parties are differentiated and the Parties are not each other's closest competitor. The CMA found that other competitors will continue to provide a sufficient constraint on the Parties post-Merger. Therefore, the CMA concluded that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects either in the supply of Type 6 expansion joints in the UK or in the supply of both Type 5 and Type 6 expansion joints in the UK.

## **Entry and expansion**

95. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.<sup>11</sup>
96. In relation to Type 6 expansion joints, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns in relation to this product.
97. The CMA considered whether entry or expansion in the supply of Type 5 expansion joints might be timely, likely and sufficient to prevent an SLC.
98. Third parties indicated that the primary barrier to entry and expansion is the need to take new products through the Highways England approval process.
99. The Parties submitted that for a new entrant, gaining a 10% share as a supplier of rebranded third-party expansion joints would take 3 years and cost

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<sup>11</sup> [Merger Assessment Guidelines](#), from paragraph 5.8.1.

around £200,000, while gaining a 10% share as an installer would take 2 years and cost around £100,000.

100. Third Parties indicated that, for a current supplier of other expansion joints, starting to supply Type 5 expansion joints would take a year or less, and cost around £250,000.
101. The CMA found only one supplier of other expansion joints which was interested in possibly expanding into the supply of Type 5 expansion joints, but this possibility was mentioned in vague terms, without reference to any timeline or expected growth. The CMA, therefore, did not find that the entry of this supplier would impose a sufficient competitive constraint on the merged entity to prevent an SLC.
102. For the reasons set out above, the CMA believes that entry or expansion would not be timely, likely or sufficient to prevent a realistic prospect of an SLC as a result of the Merger in the supply of Type 5 expansion joints in the UK.

### **Third party views**

103. The CMA contacted customers, competitors of the Parties and Highways England. Third party comments have been taken into account where appropriate in the competitive assessment above.
104. One customer raised non merger-specific concerns regarding the extent of concentration at the manufacturing level. Some competitors expressed concerns with RPM becoming an even larger company in the structural engineering sector in general.

### **Conclusion on substantial lessening of competition**

105. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in the supply of Type 5 expansion joints in the UK.

### **Exceptions to the duty to refer**

106. Where the CMA's duty to refer is engaged, the CMA may, pursuant to section 22(2)(a) of the Act, decide not to refer the merger for a Phase 2 investigation on the basis that the market(s) concerned is/are not of sufficient importance to justify the making of a reference (the *de minimis* exception).

107. The CMA considered whether it was appropriate to apply the *de minimis* exception in the present case.

### ***Markets of insufficient importance***

108. In considering whether to apply the *de minimis* exception, the CMA will consider, in broad terms, whether the costs involved in a reference would be disproportionate to the size of the market(s) concerned, considering also the likelihood that harm will arise, the magnitude of competition potentially lost and the duration of such effects.<sup>12</sup>

### ***'In principle' availability of undertakings in lieu***

109. The CMA's general policy, regardless of the size of the affected market, is not to apply the *de minimis* exception where clear-cut undertakings in lieu of a reference could, in principle, be offered by the parties to resolve the concerns identified.<sup>13</sup> In most cases, a clear-cut undertaking in lieu will involve a structural divestment.

110. The CMA considered whether the Type 5 expansion joint business of one of the Parties, or one of their entire expansion joints businesses, could be divested to provide a clear-cut remedy to the competition concerns identified.

111. The CMA found that neither Ekspan nor Universal Sealants has a separable Type 5 expansion joints business, or a separable all expansion joints business, as in both cases this forms part of their broader bridgework businesses. The CMA found that, for this reason, there was no clear-cut package of assets or business which could be sold to a third party purchaser to remedy the competition concerns.

112. The CMA has not formed a view that the challenges to finding a suitable divestment package would necessarily be insurmountable, but the CMA takes a conservative approach in assessing whether undertakings in lieu are 'in principle' available in the context of the *de minimis* assessment.<sup>14</sup> To the extent that there is any doubt as to whether undertakings in lieu would meet the 'clear-cut' standard, as is the case here, they will not be included in the 'in principle' assessment.<sup>15</sup>

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<sup>12</sup> [Mergers: Exception to the duty to refer in markets of insufficient importance](#) (CMA64), 16 June 2017.

<sup>13</sup> [Mergers: Exception to the duty to refer in markets of insufficient importance](#), paragraph 21.

<sup>14</sup> See [Reckitt Benckiser/K-Y](#) (CMA, Phase 1 decision, 2014), [Towers Watson/EMB Group](#) (OFT 2010), [Ordnance Survey/LGID](#) (OFT 2010), [Atlas Copco/ Medical gas division of Penlon](#) (OFT 2011), [Capita Group/OBS OPENSystems](#) (OFT, 2008).

<sup>15</sup> [Mergers: Exception to the duty to refer in markets of insufficient importance](#), paragraph 27.

113. The CMA considered if the Parties might divest either Ekspan's or Universal Sealants' entire structural engineering business (ie beyond the expansion joints business in which the Parties overlap), but found that such a divestment would be wholly disproportionate to the concerns identified in Type 5 expansion joints only.<sup>16</sup>
114. Accordingly, the CMA does not consider that an 'in principle' clear-cut undertaking in lieu is available in this case.

#### *Relevant factors*

115. The CMA considers the likely level of consumer harm by reference to a number of factors when deciding whether or not to apply the *de minimis* exception: the size of the market, the strength of the CMA's concerns that harm will occur as a result of the merger, the magnitude of competition that would be lost by the merger, and the likely durability of the merger's impact.<sup>17</sup> The CMA will also consider the wider implications of a *de minimis* decision.<sup>18</sup>

#### *Market size<sup>19</sup>*

116. The market concerned is the market for the supply of Type 5 expansion joints in the UK. The size of this market, based on the CMA's estimates using sales data provided by the Parties and competitors, was around £4 million in 2017.
117. The fact that the size of the market is below £5 million is a strong factor in favour of applying the *de minimis* exception. The CMA also notes that the size of the market is even smaller if only non-Highways Area contracts (for which the Parties overlap) are included (around £1 million).

#### *Strength of the CMA's concerns and magnitude of competition lost*

118. The CMA believes that the Merger might give rise to a realistic prospect of an SLC in the supply of Type 5 expansion joints in the UK. However, the CMA notes that at least two other competitors of relatively similar size to Ekspan will continue to provide some competitive constraint on the merged entity.

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<sup>16</sup> See further [Mergers: Exception to the duty to refer in markets of insufficient importance](#), paragraph 26. For clarity, this does not mean that it would be disproportionate to accept such undertakings in lieu if offered by parties subsequent to a phase 1 decision showing that the duty to refer arises.

<sup>17</sup> [Mergers: Exception to the duty to refer in markets of insufficient importance](#), paragraph 28.

<sup>18</sup> [Mergers: Exception to the duty to refer in markets of insufficient importance](#), paragraphs 40-44.

<sup>19</sup> [Mergers: Exception to the duty to refer in markets of insufficient importance](#), paragraph 30.

119. The Parties supply different customer segments. Universal Sealants' main sales are for Highway Area contracts, whereas Ekspan does not bid for these contracts.
120. These factors lead the CMA to conclude that the strength of its concerns is not an aggravating factor for the purposes of its *de minimis* assessment.

#### *Durability*

121. Over time, the CMA would expect entry and expansion to mitigate the SLC, in particular through supply-side substitution between Type 5 and Type 6 expansion joints. Although the evidence available to the CMA does not suggest that entry or expansion will be timely, likely and sufficient to prevent an SLC, there is no reason to believe that any harm arising from the Merger will be particularly durable.

#### *Replicability*

122. The CMA is not aware of any similar mergers involving the supply of expansion joints and has seen no evidence to suggest that the Merger is one of a number of similar mergers that could be replicated across the sector. Moreover, there do not appear to be any cross-cutting factors relevant for other markets.

#### *Conclusion on the application of the de minimis exception*

123. Taking all the above factors into consideration, the CMA believes that the market concerned in this case is not of sufficient importance to justify the making of a reference. As such, the CMA believes that it is appropriate for it to exercise its discretion to apply the *de minimis* exception.
124. The Parties agreed to waive their procedural rights to a full phase 1 investigation, including the receipt of an Issues Letter and an Issues Meeting, in the event that the CMA would exercise its discretion to apply the *de minimis* exception.<sup>20</sup>

### **Decision**

125. Consequently, the CMA believes that it is or may be the case that (i) a relevant merger situation has been created; and (ii) the creation of that situation has resulted, or may be expected to result, in an SLC within a market

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<sup>20</sup> This procedural approach is in line with [Mergers: Exception to the duty to refer in markets of insufficient importance](#), paragraph 54.

or markets in the UK. However, pursuant to section 22(2)(a) of the Act, the CMA believes that the market concerned is not of sufficient importance to justify the making of a reference.

126. The Merger will therefore **not be referred** under section 22 of the Act.

**Andrew Wright**  
**Director, Mergers**  
**Competition and Markets Authority**  
**26 February 2018**

### **Endnote**

Paragraph 60 should read: 'Universal Sealants submitted that the Parties are not close competitors with regards to Type 5 expansion joints, mainly because the the Parties do not typically bid against one another for Type 5 expansion joints.'