

Official Journal

of the European Union

ISSN 1725-2555

L 103

Volume 46

24 April 2003

English edition

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COMMISSION

COMMISSION DECISION

of 20 December 2001

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

(Case COMP/M.2530 — Südzucker/Saint Louis Sucre)

(notified under document number C(2001) 4524)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/259/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

Having regard to the Commission's decision of 23 August 2001 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

After consulting the Advisory Committee on Concentrations ⁽³⁾,

Having regard to the final report of the Hearing Officer in this case ⁽⁴⁾,

Whereas:

- (1) On 20 July 2001 Südzucker AG, Mannheim/Ochsenfurt (Südzucker), notified the Commission under Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation) of a planned transaction whereby Südzucker was to acquire sole control of the whole of Saint Louis Sucre SA, Paris (SLS).
- (2) The Commission examined the notification, and found that the notified transaction fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market.
- (3) After a thorough investigation of the case the Commission has now come to the conclusion that in itself the notified merger proposal is indeed likely to strengthen dominant positions as a result of which effective competition would be significantly impeded in a substantial part of the common market. But the commitments Südzucker has entered into remove the competition concerns that it raises.

⁽¹⁾ OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.

⁽²⁾ OJ L 180, 9.7.1997, p. 1; corrigendum OJ L 40, 13.2.1998, p. 17.

⁽³⁾ OJ C 97, 24.4.2003.

⁽⁴⁾ OJ C 97, 24.4.2003.

I. THE PARTIES

- (4) The German Südzucker group is one of the biggest sugar manufacturers in the world. It manufactures and distributes sugar, sweeteners, food additives, starch, molasses, agricultural products (and related services), ices and deep-frozen foods. It operates mainly in Germany, especially the south and east, and in Belgium, Austria and eastern Europe. Südzucker controls a number of subsidiaries, including the Belgian Raffinerie Tirlemontoise SA, Brussels, and the Austrian Agrana Zucker und Stärke AG (Agrana), Vienna, which likewise manufacture and distribute sugar, sweeteners, food additives and molasses.

- (5) SLS is the second-biggest sugar manufacturer in France, and the seventh-biggest in Europe. It manufactures and distributes sugar, spirits, and molasses. It operates mainly in France and eastern Europe. It is controlled by a holding company, Financière Franklin Roosevelt SAS, Paris, which holds 99,7 % of its shares. SLS itself has a 13,8 % holding in the biggest sugar manufacturer in Spain, Ebro Puleva SA (Ebro Puleva). It also has a minority holding of 44,5 % in the French sugar manufacturer Sucrerie Distillerie des Ouvré Fils SA (Souppes-Ouvré).

II. THE TRANSACTION

- (6) By the transaction notified, RT would acquire the entire share capital of Financière Franklin Roosevelt SAS.

III. CONCENTRATION

- (7) As a result of the transaction Südzucker would acquire sole control of SLS. There would thus be a 'concentration' within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

- (8) The combined aggregate worldwide turnover of the companies concerned is over EUR 5 billion⁽⁵⁾ (Südzucker EUR 4,664 billion in the financial year ending on

28 February 2001, and SLS EUR [...]*) billion in the financial year ending on 30 September 2000). Südzucker and SLS each have an aggregate Community-wide turnover of more than EUR 250 million (Südzucker EUR 3,711 billion in the financial year ending on 28 February 2001, and SLS EUR [...]*) million in the financial year ending on 30 September 2000). Südzucker does not achieve more than two thirds of its aggregate Community-wide turnover within one and the same Member State. The notified concentration consequently has a Community dimension.

V. PROCEDURE

- (9) On 23 August 2001 the Commission decided pursuant to Article 6(1)(c) of the Merger Regulation to initiate proceedings in this case.
- (10) On 9 October 2001 Südzucker was sent a statement of objections, on which it commented on 24 October 2001 in a written reply⁽⁶⁾. At Südzucker's request, on 26 October 2001 a formal oral hearing was held in Brussels pursuant to Article 14 of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings⁽⁷⁾; the hearing was also attended by SLS and various third parties.
- (11) On 22 November 2001 Südzucker submitted undertakings to the Commission, a number of technical details of which were improved upon on 6 December 2001. On 14 December 2001 the Commission informed Südzucker in accordance with its notice on remedies⁽⁸⁾ that the resolution of competition concerns in this case does not depend on Südzucker's commitments as to the group's future relationship with the Spanish group Ebro Puleva. Südzucker thereupon withdrew this part of its commitments. The remaining commitments are described in greater detail in recitals 151 to 152 and assessed in recitals 153 et seq.

⁽⁵⁾ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and with the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25).

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

⁽⁶⁾ The parties also commented in writing after the hearing, notably by Südzucker's memoranda of 5 and 6 November 2001 and SLS's memoranda of 5 and 9 November 2001.

⁽⁷⁾ OJ L 61, 2.3.1988, p. 1.

⁽⁸⁾ See the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 4, recital 13.

VI. COMPETITIVE ASSESSMENT OF THE TRANSACTION AS IT WAS NOTIFIED

- (12) The proposed transaction would have effects on all sugar markets in Germany, Belgium and France. In the form in which it was notified the transaction raised competition concerns in connection with the sugar markets in southern Germany and Belgium.

A. THE RELEVANT PRODUCT MARKETS

- (13) The proposed transaction concerns the production and distribution of sugar, which the parties submit, can be divided into three relevant product markets, namely industrial sugar, retail sugar, and sugar for distributors' private labels.

1. INDUSTRIAL SUGAR

- (14) Industrial sugar is sold either in bulk, and stored in silos, or in bags of over 5 kg weight. The buyers are mainly processing firms in the food and drink industry.

2. RETAIL SUGAR

- (15) Retail sugar is sold in small packages of up to 5 kg under the manufacturer's brand, and is used mainly by final consumers within the home or by the catering trade. It is distributed wholesale and retail.
- (16) The distinction between industrial and retail sugar is one which the Commission has repeatedly made in its decisions⁽⁹⁾. The two markets have overlapping characteristics: both involve the same basic product, and the total supply of both is governed by Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector⁽¹⁰⁾ (common organisation of the market in sugar). But throughout the Community the differences in the packaging, distribution and customer profiles for industrial and retail sugar lead to different pricing structures, and justify a division into separate product markets.

3. SUGAR FOR DISTRIBUTORS' PRIVATE LABELS

- (17) There is another market that has to be distinguished from those in industrial sugar and retail sugar, namely the market in the supply of sugar for distributors' private labels. Distributors who sell retail sugar under their private labels, especially large retail chains, are supplied by the sugar manufacturers. The manufacturers package the product in packages prepared by or specially made up for the distributor and carrying only the distributor's brand name.
- (18) The supply of sugar for distributors' private labels constitutes a separate product market. From the point of view of the buyer, that is to say the distributor, there are vital differences between products that are to be sold under the distributor's private label and products to be sold under the label of the sugar manufacturer⁽¹¹⁾.
- (19) The factors that guide the distributor's choice of products carrying a manufacturer's brand are primarily those that affect the market position of the product on the downstream retail market, that is to say customer loyalty, price, and the way in which the product is promoted. When selecting products to be sold under manufacturers' brands, the distributor can realistically choose only among products whose sales are promoted in some measure by means of advertising in the area. The number of possible suppliers is therefore limited.
- (20) Where the goods being supplied to a distributor are to be sold on under the distributor's private label, however, these considerations are of no importance. It is the distributor who determines the quality, the volume and the other specifications of the goods to be supplied. The manufacturer supplies the goods to order. Marketing and advertising are a matter for the distributor, who also decides such things as the presentation or packaging of the product. This makes it a great deal easier for the distributor to switch to another supplier than it is in the case of goods carrying a manufacturer's brand; the distributor chooses suppliers on the basis of the economically most advantageous offer. The order is placed on the basis of price, quality, available capacity and reliable delivery.
- (21) To say that there are separate markets for the supply of products to be sold under a distributor's private label and products to be sold under the manufacturer's label is not to deny that in sales to the ultimate consumer,

⁽⁹⁾ See Commission Decision 97/624/EC of 14 May 1997 in Case IV/F-3/M.34.621 *Irish Sugar*, OJ L 258, 22.9.1997, p. 1, recital 90, and Commission Decision 1999/210/EC of 14 October 1998 in Case IV/F-3/33.708 *British Sugar*, OJ L 76, 22.3.1999, p. 1, recital 59.

⁽¹⁰⁾ OJ L 178, 30.6.2001, p. 1.

⁽¹¹⁾ On this point and the argument that follows see Commission Decision of 31 January 2001 in Case COMP/M.2097 — *SCA/Metsä Tissue*, recitals 23 et seq., and Commission Decision of 27 July 2001 in Case COMP/M.2337 — *Nestlé/Ralston Purina*, recitals 15 et seq.

and thus essentially in retail shops, distributors' labels and manufacturers' labels may be in competition with one another, and thus form a single market at that stage. In the present case there is a single downstream retail market, but the distributor buys the two products on separate upstream markets.

4. FINDINGS OF MARKET STUDY

- (22) The market study carried out by the Commission confirms the distinction between industrial sugar and retail sugar. In the case of Germany the study also confirms the existence of a separate market in sugar for distributors' private labels. This is despite the fact that the distinction is less familiar among businesses in other Member States, in France for example, where on the downstream retail market very little sugar is sold under distributors' private labels. At least in the case of those Member States where the notified transaction gives rise to competition concerns, the distinction is a proper one.

5. TO SUM UP IN RELATION TO THE RELEVANT PRODUCT MARKETS

- (23) The Commission therefore agrees with the parties that in order to assess the notified transaction three relevant product markets have to be distinguished:

- industrial sugar,
- retail sugar, and
- sugar for distributors' private labels.

B. THE RELEVANT GEOGRAPHIC MARKETS

- (24) The parties submit that sugar markets are Europe-wide, or at least that they can reasonably be expected to become so. This applies especially in the case of sugar which is to be sold under distributors' private labels, where distributors have very wide freedom to choose their suppliers. In industrial and retail sugar, too, it is doubtful whether national or regional markets can be distinguished; but here the definition of the relevant geographic markets can remain open.

1. INDUSTRIAL SUGAR AND RETAIL SUGAR

- (25) As far as the markets in industrial sugar and retail sugar are concerned, the Commission would point out, first of all, that under the common organisation of the market in sugar a stated sugar quota is allocated to every Member State. This has a significant influence on the production and sale of sugar in the Community, and helps to consolidate a partitioning of national markets⁽¹²⁾. The sales territories of the main European sugar manufacturers are consequently quite distinct, and this is reflected in the very different market shares they hold in the separate Member States (see below, Tables 2 and 3). In its most recent decisions under Articles 81 and 82 of the EC Treaty, therefore, the Commission has taken the view that the relevant geographic markets for industrial and retail sugar are at most national⁽¹³⁾.
- (26) As long ago as its decision in the European sugar industry case, however, the Commission took the view that southern Germany constituted a relevant geographic market smaller than a Member State⁽¹⁴⁾. Contrary to the view taken by the parties, the Commission considers that for the assessment of this transaction too sugar markets in Germany should be divided on a regional basis. The regional markets to be distinguished here can be defined in terms of groups of German *Länder*. This approach can be regarded as providing the best approximation possible, especially from the point of view of the practicability of the examination of the proposed concentration: the investigation of the market, for example, will require a study of market shares. The division into regions is justified by the following features of the German sugar market.
- (27) First, Germany differs from countries such as France, for example, in that the production plants of the three largest sugar manufacturers — Südzucker, Nordzucker and Pfeifer & Langen — are located in different regions (see map in Annex I). Südzucker's plants are mainly in

⁽¹²⁾ See also Court of Justice in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* [1975] ECR 1663, paragraphs 16, 17 and 24.

⁽¹³⁾ See Commission Decision 97/624/EC of 14 May 1997 in Case IV/F-3/M.34.621 *Irish Sugar*, OJ L 258, 22.9.1997, p. 1, recital 98, and Commission Decision 1999/210/EC of 14 October 1998 in Case IV/F-3/33.708 *British Sugar*, OJ L 76, 22.3.1999, p. 1, recital 65.

⁽¹⁴⁾ Commission Decision 73/109/EEC of 2 January 1973 in Case IV/26.918 *European sugar industry*, OJ L 140, 26.5.1973, p. 17.

Bavaria, Baden-Württemberg, Hessen and Rheinland-Pfalz. Nordzucker manufactures mainly in Schleswig-Holstein and Lower Saxony, and Pfeifer & Langen's plants are concentrated in North Rhine-Westphalia. In the new *Länder* ⁽¹⁵⁾ the three all have plants of comparable capacity.

(28) In addition, sugar is a homogeneous bulk product for which competition operates primarily in terms of price. Transport costs are usually a major factor in costs, and thus a decisive factor in prices too. Because production plants are spread throughout the German regions, by contrast with countries such as France, where the production plants of the biggest sugar manufacturers are concentrated in the north and north-east of the country, competitors with the local manufacturer in each region have longer distances to cover, and hence face additional costs.

(29) The regional segmentation of the German markets is strengthened by the conduct of the German sugar manufacturers. In the course of the market study carried out by the Commission, most of the manufacturers' customers confirmed that in Germany proximity between the customer and the supplier has important implications for the decision to supply. German manufacturers will usually deliver free at customer's premises only within a certain distance of the place of manufacture. Outside that area they generally either refuse altogether to supply, or else increase their prices substantially, on grounds of additional cost, and in that case the price they offer is not usually competitive with that offered by a manufacturer based in the region.

(30) The market study carried out by the Commission confirms that a market structure has consequently developed in Germany in respect of industrial sugar and retail sugar in which the three big sugar manufacturers each have a dominant or at least a very strong position in the regions around their own plants. In the 1999/2000 marketing year, for example ⁽¹⁶⁾, and in previous years too, Südzucker had very high market shares in both product markets in the southern *Länder* Bavaria, Baden-Württemberg, Saarland, Hessen and Rheinland-Pfalz: Südzucker's market share in these regions together was about [over 80]* %. The same applies to Nordzucker in Schleswig-Holstein, Hamburg, Bremen and Lower

Saxony, and also, though to a lesser extent, to Pfeifer & Langen in North Rhine-Westphalia. Only in eastern Germany have all three big manufacturers got similar market shares.

(31) For this reason separate sugar markets have grown up for industrial sugar and retail sugar in southern Germany, western Germany, northern Germany and eastern Germany, reflecting the main sales territories of the three big manufacturers. In the course of the market study this regional segmentation was confirmed by the parties' competitors and customers.

Response to Südzucker's reply

(32) Südzucker stated in its reply to the Commission's statement of objections ⁽¹⁷⁾ that the common organisation of the market in sugar made for largely homogeneous competitive conditions across the Community, especially with regard to prices. There was a basic contradiction to be seen in the fact that, when acting as legislator, the Community adopted the common organisation of the market in sugar in order to regulate the European sugar market while, when acting as merger control authority, it denied the very existence of that market.

(33) In Südzucker's view, southern Germany should not be defined as a separate market for industrial sugar and retail sugar. The fact that the German sugar manufacturers had different geographic emphases did not mean, for instance, that they could operate basically independently of, and without regard to, one another in their respective territories, as would have been the case with separate geographic markets. The areas of southern, western and northern Germany could not be sharply delineated, with the result that there were extensive areas of overlap where either all three or at least the two neighbouring sugar manufacturers were equally active. The German sugar manufacturers could not pursue a different marketing strategy in these areas of overlap from that which they pursued in the core areas in which they may have had to face less competition. This was borne out by the fact that essentially the same price levels prevailed in Germany, more so than in other Member States.

⁽¹⁵⁾ Thuringia, Saxony, Saxony-Anhalt, Mecklenburg-Western Pomerania, Berlin and Brandenburg.

⁽¹⁶⁾ The sugar 'season' is the period in which sugar is produced in Europe, and stretches from October to December. The 'marketing year' therefore begins on 1 October, and ends on 30 September of the following year.

⁽¹⁷⁾ Points 64 et seq. of the reply.

- (34) After considering Südzucker's submissions, the Commission stands by its definition of the geographic markets in industrial sugar and retail sugar. The fact that there are Community rules governing a particular sector does not necessarily mean that a Community-wide relevant geographic market has to be taken as a basis for the competitive assessment of a merger. Rather, the very existence of the common organisation of the market in sugar prevents, owing to the national quotas provided for thereunder, the creation of European market structures in the sugar industry ⁽¹⁸⁾.
- (35) As for the areas of overlap to which Südzucker refers, the Commission does not deny that there may be some overlapping on the fringes between the sugar manufacturers' main sales territories, because customers there are just as far from the factory of one manufacturer as they are from that of another. The competitive conditions in such areas of overlap cannot, however, be extrapolated to the core areas of the respective sales territories because a sugar manufacturer is not under the same competitive pressure in its core area as it is on the fringes between its sales territory and that of another supplier; the higher transport costs involved make entry by competitors into a manufacturer's core area less attractive than entry into overlapping areas on the fringes between sales territories.
- (36) A more precise definition of the relevant geographic markets with the aid of concentric circles around each production plant and supply depot would, moreover, run into practical difficulties. The concentration on the borders between the German *Länder* on which this Decision is based does, however, yield a useable approximate value. Ultimately, the competitive assessment of the proposed merger would not be much different in the event of a market definition based on concentric circles as this method would also necessarily reveal the existence of main sales territories of the various sugar manufacturers.

2. SUGAR FOR DISTRIBUTORS' PRIVATE LABELS

- (37) In its statement of objections the Commission also defined the relevant geographic market for the supply of sugar for distributors' private labels as being southern Germany ⁽¹⁹⁾.

⁽¹⁸⁾ See also Court of Justice in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* [1975] ECR 1663, paragraphs 16, 17 and 24.

⁽¹⁹⁾ Points 21 to 29 of the statement of objections.

Response to Südzucker's reply

- (38) Südzucker contested this geographic market definition in its reply to the Commission's statement of objections ⁽²⁰⁾. Even if the markets in industrial sugar and retail sugar in Germany were divided on a regional basis, this could on no account apply to the supply of sugar for distributors' private labels. What was involved here was a clearly European market, a national German market being the least there could be said to be. The market structures were fundamentally different from what they were in the two product markets mentioned above; in particular, the choice of supplier was much freer, service played no part, there were only a few large retail chains acting as customers, and transactions were only ever concluded centrally — with these customers procuring their sugar through a central buyer — and, indeed, not only regionally or nationally but also internationally. [...] ^{*} was a good example of this.
- (39) After a thorough examination of Südzucker's submissions, the Commission has now also come to the conclusion that the relevant geographic market for the supply of sugar for distributors' private labels cannot be limited to southern Germany. Although the findings of the market study do not point to there being any generalised central buying of sugar on the part of large retail chains, it is a fact that, compared with the markets in industrial sugar and retail sugar, this product market has essential characteristics which justify its being treated differently. In the Commission's view, the following aspects in particular should be highlighted:
- (40) In contrast to retail sugar, when sugar is supplied for products that are to be sold under a distributor's private label customer brand loyalty is not a factor. And in contrast to industrial sugar, which is also supplied to smaller firms, the retail chains which buy sugar for private label products are all large customers and have correspondingly bigger market power.
- (41) It is also true that, in the area of the supply of sugar for distributors' private labels, Südzucker's main sales territory has been penetrated much more by the products of German and foreign competitors than is the case with the markets in industrial and retail sugar. Accordingly, the share of a putative southern German market accounted for by imports is, at over 50 %, so high, and the market share of Südzucker, at less than 50 %, so low that a broadening of the geographic market definition is

⁽²⁰⁾ Points 64 et seq. of the reply.

justified. This finding is also in harmony with recent Commission decisions in other cases involving the supply of products for distributors' private labels⁽²¹⁾.

3. TO SUM UP IN RELATION TO THE RELEVANT GEOGRAPHIC MARKETS

(a) *Industrial sugar and retail sugar*

- (42) The Commission accordingly considers that the relevant geographic markets in industrial sugar and retail sugar are in general national. And contrary to the view taken by the parties, Germany has to be segmented further, as a result of the structure of the markets there. Southern Germany in particular⁽²²⁾ forms a separate geographic market. For the assessment of the transaction contemplated, therefore, Belgium and southern Germany are relevant geographic markets.

(b) *Sugar for distributors' private labels*

- (43) As far as the supply of sugar for distributors' private labels is concerned, the relevant geographic market cannot be limited to southern Germany. The question of the definition of the relevant geographic markets can, however, otherwise be left open as the proposed merger gives rise to objections from a competition law point of view on the basis neither of a Germany-wide nor of a Community-wide market.

C. A SUBSTANTIAL PART OF THE COMMON MARKET

- (44) Southern Germany has a population of some 33,8 million; it consumed about one million tonnes of sugar in the 1999/2000 marketing year, and is centrally located geographically; all this makes it 'a substantial part of the common market'. The same applies to Belgium, which has a population of 10,1 million, and consumed about 540 000 tonnes of sugar in 1999/2000⁽²³⁾.

D. LEGAL CONTEXT

1. THE COMMON ORGANISATION OF THE MARKET IN SUGAR

- (45) The sugar market organisation under the Common Agricultural Policy is designed to support and protect the production of sugar within the Community. There are basically three mechanisms in place for achieving this goal⁽²⁴⁾:
- the production of sugar destined for the Community market from beet and cane harvested in the Community is restricted by means of national quotas ('A' and 'B' quotas), which are decided by the Council. The quota allocated to each country is then divided amongst the national sugar manufacturers and their production plants by the government in question,
 - a system of price support exists whereby an intervention price is set for A/B quota sugar, guaranteeing a minimum sales price,
 - a guaranteed minimum price is also set for sugar beet required to produce A/B quota sugar.
- (46) The sugar quotas apply to production during 'marketing years', which last from October to September of the following year.
- (47) In addition to the scheme for A/B quota sugar, a number of agreements exist between the Community and non-Community countries, such as India and the ACP States⁽²⁵⁾, whereby the non-Community countries benefit from preferential export arrangements for sugar. The prices involved are comparable to the prices of quota sugar. In the context of the common organisation of the sugar market, these imports can be considered to be 'quota-equivalent imports'.
- (48) Any sugar produced by Community undertakings in addition to their A/B quota and quota-equivalent imports is referred to as 'C' sugar, and must be either sold on the world market, that is, to non-Community countries, without support, or stored for at least 12 months and used as part of the following years' A/B sugar.

⁽²¹⁾ See the Commission Decisions of 31 January 2001 in Case COMP/M.2097 — SCA/Metsä Tissue (recitals 60 et seq.) and 27 July 2001 in Case COMP/M.2337 — Nestlé/Ralston Purina (recitals 32 et seq.).

⁽²²⁾ As used here, 'southern Germany' refers to the *Länder* of Bavaria, Baden-Württemberg, Saarland, Hessen and Rheinland-Pfalz.

⁽²³⁾ Already, an area the size of the *Land* of Rheinland-Pfalz, with a surface area of some 20 000 square kilometres and some four million inhabitants, is, according to the case law of the Court of Justice, to be considered a substantial part of the common market (judgment of 25 October 2001 in Case C-475/99 *Ambulanz Glöckner*, not yet reported, paragraph 38).

⁽²⁴⁾ See also Commission Decision 1999/210/EC of 14 October 1998 in Case IV/F-3/33.708 *British Sugar*, OJ L 76, 22.3.1999, p. 1, recital 4.

⁽²⁵⁾ African, Caribbean and Pacific States. See Article 36(4) of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, and Article 13 of Annex V to that Agreement, OJ L 317, 15.12.2000, p. 3; those provisions confirm Protocol 3 on ACP sugar annexed to the Lomé Convention signed on 28 February 1975, OJ L 25, 30.1.1976, p. 114.

- (49) The overall market situation for the 1999/2000 marketing year, broken down by Member State, can be summarised as follows:

Table 1

Market statistics for 1999/2000

EU sugar balance for 1999/2000 marketing year

(in thousand tonnes)

	A/B sugar quota	Pro-duction of A/B sugar 1999/2000	Quantity carried over into 2000/2001	Quantity carried over from 1998/1999	Total A/B sugar 1999/2000	(quota-equivalent) EU imports under agreements	Quota sugar available 1999/2000	Con-sumption	Surplus prod-uction	C sugar pro-duction for export
France	3 802	3 603	- 509	506	3 600	119	3 719	2 177	1 542	1 200
Germany	3 449	3 523	- 220	147	3 450	38	3 488	2 752	736	878
Netherlands	872	952	- 80	—	872	55	927	642	285	165
Belgium/ Luxembourg	826	885	- 82	23	826	8	834	544	290	206
Italy	1 568	1 614	- 261	215	1 568	21	1 589	1 411	178	91
Denmark	425	426	- 43	42	425	—	425	245	180	127
Austria	390	391	- 63	63	391	1	392	309	83	110
Ireland	200	200	- 18	18	200	—	200	135	65	16
United Kingdom	1 144	1 144	- 115	115	1 144	1 077	2 221	2 187	34	402
Portugal	70	75	- 5	—	70	277	347	327	20	—
Sweden	370	370	- 37	37	370	—	370	375	- 5	60
Finland	147	165	- 18	—	147	52	199	223	- 24	2
Greece	319	232	—	—	232	19	251	306	- 55	—
Spain	1 000	978	- 152	174	1 000	71	1 071	1 268	- 197	127
Total EU	14 582	14 558	- 1 603	1 340	14 295	1 738	16 033	12 901	3 132	3 384

Source: European Commission sugar balance.

2. THE APPLICABILITY OF THE COMPETITION RULES TO THE SUGAR MARKET

- (50) Pursuant to Article 32(3), read in conjunction with Annex I, Chapter 17, of the EC Treaty, the Common Agricultural Policy applies to sugar. By Article 36(1) of the Treaty, read in conjunction with Article 1 of Council Regulation No 26 of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products ⁽²⁶⁾, as last amended by Regulation No 49 ⁽²⁷⁾, Articles 85 to 90 (now Articles 81 to 86) of the Treaty and the provisions adopted with a view to their application, including in particular the Merger Regulation, are declared applicable to this sphere ⁽²⁸⁾. In its judgment in *Suiker Unie* ⁽²⁹⁾, the Court of Justice confirmed that the Community competition rules applied to the market in sugar, even in the context of the common organisation of that market:

'Whatever criticisms may be made of a system, which is designed to consolidate a partitioning of national markets by means of national quotas ... the fact remains that if it leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition.'

- (51) Article 2(3) of the Merger Regulation stipulates that concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it are to be declared incompatible with the common market.

3. THE FINDINGS OF THE MARKET STUDY WITH REGARD TO CURRENT CONDITIONS ON THE SUGAR MARKET

- (52) As mentioned above (recital 29), numerous customers of the sugar industry taking part in the market study confirmed that the markets, especially within Germany, were strictly divided between the individual sugar manufacturers into regional spheres of influence and that competition was therefore practically non-existent within a Member State. They also stated that competition essentially came into play only as a result of exports by foreign sugar manufacturers with production plants located near the border.
- (53) The prevailing price level on the European sugar markets can be taken as a clear indication that competition is very restricted. Despite considerable overcapacity in Europe's sugar industry, European sugar manufacturers are able to obtain a price for the sale of their sugar that is not only more than double the price on the world market but is also 10 % to 20 % above the EU intervention price.

Response to Südzucker's reply

- (54) In its reply to the Commission's statement of objections ⁽³⁰⁾, Südzucker states that no more sugar flows into southern Germany from France than it does from other parts of Germany. According to statistics compiled by the WVZ, in the 1999/2000 marketing year some 195 000 tonnes were exported from France to Germany, including, according to Südzucker estimates, some 100 000 tonnes bound for southern Germany, while during the same period some 108 000 tonnes flowed from northern and western Germany into southern Germany.

⁽²⁶⁾ OJ 30, 20.4.1962, p. 993/62.

⁽²⁷⁾ OJ 53, 1.7.1962, p. 1571/62.

⁽²⁸⁾ Südzucker expressly agrees with this in point 6 of its reply to the statement of objections.

⁽²⁹⁾ Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 [1975] ECR 1663, paragraph 24.

⁽³⁰⁾ Point 93 of the reply.

- (55) After examining Südzucker's submissions the Commission finds that competition within Germany is highly restricted and that foreign suppliers are a major balancing factor for the southern German and Belgian markets. Supplies from northern and western Germany are thus essentially directed, not at the core areas of Südzucker's home market, but mainly at the border area between the relevant geographic markets. The market study also revealed that the sugar prices charged by foreign suppliers for supplies to southern German customers are markedly lower than those charged by Südzucker and the other German sugar manufacturers. Lastly, deliveries by French manufacturers to Germany increased markedly during the period 1996/97 to 1999/2000 (see below, recital 95), whereas, according to the information in the Commission's possession, intra-German deliveries stagnated during that period.

E. COMPATIBILITY OF THE MERGER WITH THE COMMON MARKET

1. INTRODUCTION

(a) *The market positions of the largest European sugar manufacturers*

- (56) Even without the merger, the Südzucker group is already one the largest sugar manufacturers in the world; its share of the Community A/B sugar quota in relation to that of its competitors is shown below:

Table 2

Shares of quota for 1999/2000

Company/group	Share of the A/B sugar quota in the EC	Main markets
Südzucker	16,4 %	southern Germany, eastern Germany, Belgium, Austria
Béghin-Say	13,3 %	France, Italy
British Sugar	7,7 %	United Kingdom
Nordzucker	7,1 %	Northern Germany
Danisco	7,0 %	Denmark, Sweden, Finland
Ebro Puleva	5,4 %	Spain
SLS	5,1 %	France

Source: parties and competitors.

- (57) The Südzucker group is therefore already a market leader in Europe, even without the merger. With the merger, its share of the quota for Community-wide production of A/B sugar would increase from 16,4 % to 21,5 %.

(b) *Affected markets*

(58) The following markets would be affected by the proposed merger between Südzucker and SLS:

Table 3

Market shares for 1999/2000, based on quantities sold ⁽³¹⁾

Relevant product market	Relevant geographic market	Quantity (in 1 000 t)	Südzucker	Saint Louis Sucre (SLS)	Competitor 1	Competitor 2
Industrial sugar	France	1 660	[0-10 %]*	[10-20 %]*	[20-30 %]* (Béghin-Say)	[10-20 %]* (Sucre Union)
	Italy	891	[10-20 %]*	[0-10 %]*	[35-45 %]* (Béghin-Say)	[10-20 %]* (SFIR) ⁽³²⁾
	Belgium	502	[60-70 %]*	[0-10 %]*	[15-25 %]* (Groupe Sucrier)	[0-10 %]* (Cosucra)
	Southern Germany	878	[75-85 %]*	[0-10 %]*	[0-10 %]* (Pfeifer & Langen)	[0-10 %]* (Béghin-Say) ⁽³³⁾
	Germany	2 045	[30-40 %]*	[0-10 %]*	[25-35 %]* (Nordzucker)	[15-25 %]* (Pfeifer & Langen)
	EU	10 055	[10-20 %]*	[0-10 %]*	No precise data available	No precise data available
Retail sugar	France	510	[0-10 %]*	[20-30 %]*	[20-30 %]* (Béghin-Say)	[5-15 %]* (Union SDA)
	Belgium	59	[85-95 %]*	[0-10 %]*	No precise data available	No precise data available
	Southern Germany	180	[80-90 %]*	[0-10 %]*	[10-20 %]* (Pfeifer & Langen)	[0-10 %]* (Nordzucker)
	Germany	497	[30-40 %]*	[0-10 %]*	[20-30 %]* (Nordzucker)	[19,0 %]* (Pfeifer & Langen)
Sugar for private labels	Germany	152	[15-25 %]*	[5-15 %]*	[40-50 %]* (Nordzucker)	[20-30 %]* (Pfeifer & Langen)

Source: notifying parties, competitors and customers.

⁽³¹⁾ Data on sugar sales by Saint Louis and Béghin-Say in southern Germany were available only for the calendar year 2000. In calculating the market shares, these figures were related to total sales in southern Germany for the marketing year 1999/2000. Since the total volumes for the calendar year 2000 do not differ significantly from those for the marketing year 1999/2000, this procedure was felt to be acceptable.

⁽³²⁾ Società Fondiaria Industriale Romagnola SpA (SFIR).

⁽³³⁾ Béghin-Say's sugar was sold almost exclusively via a German wholesaler.

- (59) The merger raises competition concerns only on the sugar markets in southern Germany and Belgium, since it would lead there to a strengthening of Südzucker's dominant positions on the markets in industrial and retail sugar. The merger would not give the group a dominant position on the French and Italian markets in sugar. Nor would it strengthen its existing dominant position (market shares of close on [over 90 %]* of all sugar markets) in Austria.

2. SÜDZUCKER'S DOMINANT POSITION

- (60) The merger would strengthen dominant positions for Südzucker on the southern German and Belgian markets in industrial sugar and retail sugar.

- (61) The industrial sugar segment is of particular importance in this connection, accounting for some 80 % of sugar sales volumes across the Community, and, for Südzucker, as much as [...] % of the group's sales volumes in the three relevant product markets in the 1999/2000 marketing year ([...] % for SLS). The following comments accordingly focus on this product market, with reference to both southern Germany and Belgium. However, the competitive assessment can also essentially be applied to the markets in retail sugar in southern Germany and Belgium, where sales volumes are comparatively lower. The effects of the merger will therefore be dealt with in what follows using the example of the southern German market in industrial sugar, with the specific aspects of the market in retail sugar in southern Germany and the sugar markets in Belgium being referred to where appropriate.

(a) *Südzucker's dominant position on the markets in industrial sugar and retail sugar in southern Germany and Belgium*

- (62) The Court of Justice has defined a dominant position as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.
- (63) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among these factors a highly important one is the existence of very large market shares. The relationship between the market shares of the parties and their competitors, especially those of their nearest competitor, is relevant evidence of the existence of a dominant position⁽³⁴⁾.
- (64) Südzucker currently has an approximately [75-85]* % share of the industrial sugar market in southern Germany, while the market shares of other sugar manufacturers on this geographical market are comparatively low (see Table 3). As far as the Commission knows, there has been little change in this distribution pattern in the last five years, a point which the parties did not challenge either in their reply to the Commission's statement of objections or at the hearing.

⁽³⁴⁾ See Court of Justice in Case 85/76 *Hoffman - La Roche* [1979] ECR 461, paragraph 39, and Court of First Instance in Case T-102/96 *Gencor* [1999] ECR II-753, paragraphs 201 and 202.

- (65) However, Südzucker's strong position in southern Germany is evident not only from the marked disparity between its market shares and those of the other sugar manufacturers. Rather, it is also linked to the concentration of Südzucker production and distribution plants there; Nordzucker and Pfeifer & Langen, as explained above, have similar concentrations in other parts of Germany (recital 27).
- (66) The market study also confirmed that the sugar markets within Germany were divided between the individual sugar manufacturers into regional spheres of influence. Many customers of the sugar industry indicated that competition in Germany was already severely restricted for this reason. The restriction of competition is also reflected in the fact that the sugar price is not only more than double the world market price, but also 10 % to 20 % higher than the Community intervention price, despite overproduction and marked overcapacity in the European industry, especially in Germany.
- (67) Faced with this de facto division of the German sugar market into regional spheres of influence belonging to the respective local sugar manufacturers, the manufacturers have little incentive to penetrate each other's main markets. Given the additional transport costs and the customer relations built up over the medium to long term that were mentioned in numerous replies to the Commission's market study, it would seem more worthwhile for manufacturers to consolidate their position in their own main market and to use their production quota primarily to satisfy the needs of their own customers. This is all the more true if a sugar manufacturer saw an immediate danger of reprisals were it to penetrate the main market of a competitor. Such reprisals are particularly easy in the sugar industry, since sugar is a homogenous bulk product and production quotas and intervention prices make the markets transparent.
- (68) Customers of the sugar industry questioned by the Commission as part of its market study confirmed that competition in Germany essentially came only from exports by foreign sugar manufacturers with production plants near to the border.
- (69) For the above reasons, the Commission has reached the conclusion that the Südzucker group already enjoys a position of economic strength in southern Germany that allows it to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. Even without the merger, Südzucker already enjoys a dominant position on the southern German market, which is a substantial part of the common market.
- (70) The above comments can also essentially be applied to the market for retail sugar in southern Germany. There too, the Südzucker group's market share of [80 to 90]* % displays a marked disparity in relation to those of its main competitors. Recitals 65 to 69 apply *mutatis mutandis*.
- (71) It is also in a dominant position on the markets for industrial and retail sugar in Belgium, with market shares of [60 to 70]* % and [85 to 95]* % respectively. The above comments also apply *mutatis mutandis*.

Response to Südzucker's reply

- (72) In its reply to the Commission's statement of objections ⁽³⁵⁾ Südzucker contested the 'picture of a lack of competition' drawn by the Commission for southern Germany and Belgium. Südzucker's prices were lower than elsewhere in Europe, while the service it provided was above average compared with its European competitors. The smallness of the advance by other sugar manufacturers into Südzucker's main sales territory was due to the fact that it was not possible in a commercially meaningful way for those competitors to challenge Südzucker's competitive position. If the picture that had emerged in Germany was one of home markets surrounding each sugar factory, this was a natural market trend and not a sign of a lack of competition.

⁽³⁵⁾ Points 90 to 94 of the reply.

- (73) After examining Südzucker's submissions the Commission stands by its assessment of the market situation in southern Germany and Belgium in regard to industrial sugar and retail sugar. It agrees with the parties that in its main sales territory Südzucker is not exposed to any significant assaults from other German sugar manufacturers. This is due, however, not to there being a sufficient degree of competition between those companies but, on the contrary, to the abovementioned de facto division of the German sugar market into main sales territories and regional spheres of influence.

(b) ***No dominant position in the supply of sugar for distributors' private labels***

(aa) **Southern Germany**

- (74) In its statement of objections the Commission assumed with regard to the supply of sugar for distributors' private labels that, with a market share of [40 to 50]* %, Südzucker is on the threshold of dominance in southern Germany and that following a merger with SLS this position might increase by a further [20 to 30]* percentage points to a total of [60 to 80]* %. The Commission concluded from this in its statement of objections that the proposed merger would lead either to the creation or to a strengthening of a dominant position for Südzucker in southern Germany ⁽³⁶⁾.
- (75) The above estimate can no longer be upheld in view of the different conclusions that are now drawn regarding the geographic scope of this market (see recitals 37 et seq. above). Thus, taking as a basis, say, the whole of Germany the market shares of Südzucker and SLS come to only [15 to 25]* % and [5 to 15]* % (giving a total of [20 to 40]* %), whereas Nordzucker alone already has a [40 to 50]* % share of the German market. Consequently, the view cannot be taken that the merger would give rise to the creation or strengthening of a dominant position in the supply of sugar for distributors' private labels in Germany.
- (76) This does not, however, change the overall assessment of the notified transaction. In terms of its extent and importance, the supply of sugar for distributors' private labels lags far behind industrial sugar, which played the decisive role from the outset when it came to the competitive assessment of the proposed merger by the Commission (see recital 61 above) ⁽³⁷⁾.

(bb) **Belgium**

- (77) In Belgium no significant activities on the part of the Südzucker group in the supply of sugar for distributors' private labels could be established, so that here, too, no dominant position can be said to exist ⁽³⁸⁾.

3. STRENGTHENING OF DOMINANT POSITIONS HELD BY SÜDZUCKER ON THE MARKETS IN INDUSTRIAL SUGAR AND RETAIL SUGAR

- (78) There is a danger that the proposed merger would strengthen dominant positions held by Südzucker on the markets in industrial sugar and retail sugar in southern Germany and Belgium and consolidate prices at a level that is appreciably higher than the intervention price.
- (79) In the Commission's view, the following three factors would result in a strengthening of Südzucker's dominant position:
- firstly, the merger would critically reduce potential competition on the southern German and Belgian markets,

⁽³⁶⁾ See, in particular, points 54 and 57 of the statement of objections.

⁽³⁷⁾ See also point 45 of the statement of objections.

⁽³⁸⁾ See also point 55 of the statement of objections.

- secondly, the acquisition of the second-largest French sugar manufacturer would give Südzucker a potential for retaliation which it hardly enjoyed before, affording it greater protection against foreign competition in its main sales territory of southern Germany and in Belgium. The group would then be in a position to take effective retaliatory action on the French sugar market, thereby deterring any French competitors from entering the southern German and Belgian markets,
- thirdly, the merger would put Südzucker in the unique position — compared with its rivals — of being able to supply sugar to large industrial customers across national borders through 'pan-European deals'.

(a) ***Elimination of SLS as a potential competitor***

- (80) By eliminating SLS as a potential competitor, the proposed merger would strengthen Südzucker's dominant position on the sugar markets in southern Germany and Belgium.
- (81) From the point of view of competition law, the existence of potential competition generally plays a crucial role in the regulation of markets that are exposed to very little competition. Such potential competition helps protect customers from a situation where the marginal degree of competition results in prices that would otherwise arise only in a monopoly. This requires the presence of as many potential competitors as possible who — by dint of their stature and financial standing — are well placed to enter neighbouring markets where certain market players enjoy a dominant position.
- (82) It can be assumed here that the importance of potential competition is all the greater,
- the less competition there is on the market,
 - the higher the degree of market regulation,
 - the greater the dependency of customers, i.e. the more difficult it is to replace upstream products or services that are absolutely vital with other products or services, and
 - the greater the market strength of the market player whom companies from neighbouring markets will have to face as potential competitors.

If one or more of these factors plays a strong role in a particular market, the elimination of a significant potential competitor represents a critical deterioration in the competitive structure.

- (83) The description given above clearly shows that these factors play a very strong role in the sugar markets in southern Germany and Belgium, so that potential competition from neighbouring markets is of crucial importance.
- (84) As transport costs are a key factor in the sugar market, cross-border competition is efficient only between neighbouring States. In Belgium competition is feasible from neighbouring regions of the Netherlands, France and Germany. In southern Germany cross-border competition can be expected only from the neighbouring parts of France, as the market is shielded on the southern flank by the monopoly position of Südzucker's Austrian subsidiary Agrana (which has market shares of around [over 90]* % on all sugar markets). So, in the context of the merger, French sugar manufacturers play a crucial role as potential competitors.

- (85) To be a potential competitor, a company must have both an incentive and the potential to enter the neighbouring market. SLS is particularly well qualified to meet both of these conditions.

(aa) **Incentives for French sugar manufacturers to enter the southern German and Belgian markets**

- (86) In practical terms, the main reasons why French sugar manufacturers may have an incentive to operate on the southern German and Belgian markets are: the high productivity of French sugar manufacturers, the location of French production plants, France's high sugar production surplus, dwindling export opportunities to non-Community countries, and higher profit margins for sugar sales within the Community compared with exports to non-Community countries.
- (87) French sugar manufacturers have the most efficient sugar-growing area in Europe (highest percentage of beet per hectare, high sugar content of beet) and therefore enjoy crucial competitive advantages over all foreign competitors because of much lower costs for transporting beet to production plants. This leads to higher productivity and hence to obvious cost advantages.
- (88) French sugar production plants are concentrated in the north and north-east of the country, i.e. closer to Südzucker's main sales territory in southern Germany and Belgium than those of any other foreign competitors.
- (89) France has by far the biggest production surplus of A/B quota sugar of all Member States. In the 1999/2000 marketing year the surplus was 1,5 million tonnes — nearly twice as high as that in Germany (and over five times higher than Belgium's surplus). France's production surplus was equivalent to 56 % of total German sugar consumption (and nearly 300 % of total Belgian sugar consumption).
- (90) Under the common organisation of the market in sugar, part of the surplus sugar produced by Member States who are net exporters should cover the needs of Member States whose own production is insufficient to meet their requirements. Spain is the only Member State where there is any notable shortfall in the production of quota sugar or in quota-equivalent sugar imported into the Community (197 000 tonnes in the 1999/2000 marketing year). But, as we have seen, this net shortfall in Spain falls well below the surplus produced each year in France alone.
- (91) Member States have in principle two options for disposing of the remainder of their surplus quota sugar:
- subsidised exports to non-Community countries under the common organisation of the market in sugar, or
 - exports to other Member States.

- (92) For a Community sugar manufacturer, exporting A/B quota sugar to non-Community countries is far less profitable than exporting it within the Community. On exports to non-Community countries the common organisation of the market merely provides for compensation for the difference between the sales price (world market price) and the intervention price. By contrast, the price level within the Community is 10 % to 20 % higher than the intervention price. Transport costs are also much higher for exports to non-Community countries.
- (93) Another major difficulty in exporting quota sugar to non-Community countries is the restriction on subsidised exports under the GATT. In the last GATT trade round, the Community committed itself to reducing the amount of subsidised sugar exports and in the amount of subsidies in absolute terms ⁽³⁹⁾. In accordance with the GATT, the permitted volume of subsidised Community exports was reduced by around 14,5 % to 1 329 900 tonnes between 1995 and 2000. Over the same period the total subsidies allowed were cut by 25,5 % to EUR 545,9 million. Meanwhile annual imports of quota-equivalent sugar are rising steadily.
- (94) By contrast, the only notable barrier to market entry for sugar supplies between Member States is the high cost of transport. Yet transport costs are less significant for French suppliers than for their German counterparts, as distances in France are longer anyway. As mentioned above (see recitals 27 and 88), French production plants are located predominantly in the north and north-east of the country. There is virtually no sugar production in south-western France. As a result, distances to southern Germany and Belgium are often shorter than those to certain destinations within France itself.
- (95) The incentive for French sugar manufacturers to step up their activities on the German market is also borne out by recent trends in German sugar imports. Between the 1996/1997 and 1999/2000 marketing years, total German sugar imports rose by 46 % to 267 000 tonnes, equivalent to around 10 % of total German sugar consumption. The lion's share of this increase can be put down to the growth of sugar exports from France to Germany, which rose from around 140 000 tonnes in 1997 to around 187 000 tonnes in 2000. As a result of this disproportionate increase, the share of imports from France in Germany's total sugar imports rose to 70 % ⁽⁴⁰⁾. The Commission has no reliable statistics for the situation in Belgium, but the market study pointed to a similar trend of increasing imports from France to Belgium.
- (96) There are somewhat higher barriers to entry to the southern German and Belgian markets in retail sugar; the marketing costs for penetration of a new geographical market are higher, for example; and so the factors mentioned above apply slightly less strongly. In practical terms this means that the negative effect on prices caused by a dominant market position must be correspondingly higher. Subject to this qualification, however, there is also an incentive for potential competitors to enter the market in retail sugar.

⁽³⁹⁾ See in particular Articles 8 and 9 of the Agreement on Agriculture concluded in 1994 in the framework of the WTO, OJ L 336, 23.12.1994, p. 22.

⁽⁴⁰⁾ No meaningful statistics are kept for the southern German market. However, the market study findings suggest that the trend for Germany as a whole can be extrapolated for southern Germany.

Response to the parties' reply

- (97) In its reply to the statement of objections ⁽⁴¹⁾, Südzucker said it doubted whether the increase in sugar exports from France to Germany to which the Commission referred had actually taken place. In the 2000/2001 marketing year a slight decrease had even been recorded. There could be no justification for taking an isolated increase over a relatively short space of time and turning it into a general trend. Looked at in a European context, that increase was comparatively small. What is more, the figures the Commission used did not distinguish between industrial sugar, retail sugar and sugar for distributors' private labels.
- (98) The parties likewise called into question the attractiveness of increased exports from France to Germany compared with exports to non-Community countries ⁽⁴²⁾. They contended that a 'switching' by French sugar manufacturers from non-Community exports to exports to other Member States, in particular Germany and Belgium, was 'entirely unrealistic' and would call for a huge marketing effort and lead to a drastic drop in prices there.
- (99) After examining the parties' submissions the Commission stands by its assessment. With regard to the quality of the statistical evidence, it should be pointed out that the export data on which the Commission relied in its statement of objections were obtained from the German Federal Statistical Office. Although the data are not broken down by individual sugar market, the market study findings suggest that, quantitatively, the bulk of the export growth took place in the industrial sugar sector. In the Commission's view, a four-year observation period is a sufficient basis on which to detect a trend, at least in the medium term.
- (100) The marketing effort required to switch from non-Community exports to exports to southern Germany and Belgium could be made by sugar wholesalers. This is already the channel chosen by French sugar manufacturers for their exports to German markets. Such a switch could therefore be made quickly and would not give rise initially to the need for any investment in a separate local distribution network. Nor, in the Commission's view, is a drastic drop in prices in southern Germany to be expected as the large-scale export of bigger quantities is likely to take place only if Südzucker uses its dominant position in order to raise prices significantly. For that eventuality, the potential competition constitutes a key corrective factor for southern Germany and Belgium.
- (101) As indicated in recital 82, this corrective factor is all the more important as
- there is only very limited competition on the European sugar markets,
 - the sugar markets are highly regulated,
 - the raw material sugar is substitutable to only a very small extent as far as customers of the sugar industry are concerned, and
 - a large number of companies have dominant positions on the various European sugar markets.

⁽⁴¹⁾ Points 105 et seq. of the reply.

⁽⁴²⁾ Points 109 et seq. of Südzucker's reply; statement made by SLS at the hearing on 26 October 2001 and letters from SLS dated 5, 9 and 23 November 2001.

Conclusions regarding the incentives for French sugar manufacturers to enter the southern German and Belgian markets

- (102) To sum up, the Commission finds that there is decisive evidence of incentives for French sugar manufacturers to enter the southern German and Belgian markets. At all events, French sugar manufacturers possess by far the strongest competitive potential for entering the southern German and Belgian sugar markets. All other sugar manufacturers located in the vicinity of these markets are, as far as their competitive potential is concerned, of only secondary importance either in view of their competitive conduct (German sugar manufacturers, see in particular recital 67) or in view of the small quantities available for export (Dutch and Italian manufacturers).

(bb) SLS's potential to compete

- (103) SLS's potential to compete is considerable, both in Belgium and in southern Germany, given its production quota and existing French production plants and delivery centres. The A/B sugar quota assigned to SLS is nearly as high as that of the entire Netherlands. Furthermore, apart from a large refinery in Marseille (for quota-equivalent sugar imports and Community quota sugar grown outside Europe, e.g. in Réunion), SLS's production plants and delivery centres are mainly located in northern and north-eastern France (near the Belgian and German borders). Compared with those of its French competitors, SLS's production plants are well placed in competitive terms for targeting southern Germany and Belgium. Varying distances and a possible increase in the proportion of transport costs as a result can be regarded as marginal factors.

- (104) In absolute figures, SLS had a total of [...] tonnes of quota sugar or quota-equivalent imported sugar available for marketing in the 2000/2001 marketing year. This total can be broken down as follows:

- [...] tonnes A/B quota sugar,
- [...] tonnes A/B quota sugar grown outside Europe and quota-equivalent imported sugar,
- [...] tonnes A/B quota sugar bought in by SLS from other sugar manufacturers and sold on. Most of this consisted of sugar supplies from Souppes-Ouvré, in which, as already mentioned, SLS has a minority holding of 44,5 % (see recital 5 above) and whose entire production is marketed by SLS.

- (105) According to its own statements, SLS's business strategy is geared to using over [...] % of this quota sugar to cover needs arising from long and medium-term business dealings, mainly on the French sugar market. The remaining quota sugar is therefore available for export either to other Member States or to non-Community countries. Assuming that SLS abides by its strategy, this remainder is big enough to provide substantial competitive potential on the markets of southern Germany and Belgium.

- (106) As already mentioned, prices on the sugar markets in southern Germany and Belgium are around 10 % to 20 % higher than the intervention price obtained on exports to non-Community countries. Were it to switch at least partly from exporting quota sugar to non-Community countries ([...] tonnes) to exporting within the Community, SLS's potential additional earnings would therefore be significant.

- (107) SLS has drawn the Commission's attention to what it describes as heavy investment in infrastructure for sugar exports to non-Community countries. In particular, it has contributed to the cost of investing in sugar transport vessels and port installations. In return for these contributions, the other partner involved in funding the infrastructure investment, sugar wholesaler [...]*, is required to buy from SLS [...]* tonnes per year, which are earmarked for export to non-Community countries using the infrastructure. However, SLS does not have to expend any quota sugar in order to make full use of [...]*'s purchase obligation, as it produces — or buys — enough C sugar each year (e.g. [...]* tonnes in the 2000/2001 marketing year plus [...]* tonnes of bought C sugar).
- (108) Moreover, the cost of writing off these investments is marginal compared with the potential extra earnings mentioned above, which could be achieved by shifting the focus of its quota sugar operations more to the Community.
- (109) SLS has also drawn the Commission's attention to the current limitations of its distribution mechanisms for the export of sugar to Germany. In the Commission's view, however, this problem could be circumvented in the short term by using wholesalers. In the medium term the cost of strategically retargeting its distribution mechanisms could be regarded as marginal compared with the extra earning opportunities mentioned above.
- (110) Finally, SLS has pointed out to the Commission that a switch from exports to non-Community countries to exports to Member States would entail additional storage costs. The Commission is unconvinced by the arguments put forward here. In any case, the supposed additional storage costs would represent a mere fraction of the additional earning potential opened up by a refocusing of its business activities.

Response to the parties' reply

- (111) In its reply to the Commission's statement of objections⁽⁴³⁾, Südzucker argued that any sales opportunities for French sugar manufacturers in Germany could equally be taken up by other French sugar manufacturers without any restriction. Likewise, during the oral hearing⁽⁴⁴⁾, SLS presented itself as only one of many potential competitors on the southern German and Belgian markets. In its view, the Commission, in its statement of objections, considered French sugar manufacturers only as potential competitors and did not consider the competitive potential of German, Dutch and Italian rivals. The removal of SLS as a potential competitor would therefore, it argued, have no influence on competition in Südzucker's main sales territories, since even after the merger Südzucker would continue to face numerous potential competitors on the Belgian and southern German markets.
- (112) The Commission thoroughly examined these submissions by the parties. Given the fact that, on sugar markets, the issues of potential competition and retaliation overlap, they will be treated together in recitals 130 and following.

Response to SLS's reply

- (113) During the oral hearing⁽⁴⁵⁾, SLS argued that a switch from exports to non-Community countries to exports to other Member States, especially Germany and Belgium, made no business sense for the company and was therefore unlikely. Its calculations are summarised in Table 4.

⁽⁴³⁾ Points 120 et seq. of the reply.

⁽⁴⁴⁾ Confirmed in writing on 5, 9 and 23 November 2001.

⁽⁴⁵⁾ Confirmed in writing on 5, 9 and 23 November 2001.

Table 4

Calculations by SLS (at the hearing and in writing on 5 and 9 November 2001) designed to prove that exports to non-Community countries are more valuable to the company than exports to southern Germany

(in EUR per 1 000 tonnes)			
Calculations by SLS	Exports to non-Community countries before 6/2001	Exports to southern Germany	Difference
End user price	631,00	[...]* ⁽⁴⁶⁾	
Community logistics charge	+50,00	n/a	
Community storage charge	+20,00	n/a	
[...]*	[...]*	[...]*	
[...]*	[...]*	[...]*	
[...]*	[...]*	[...]*	
Storage costs	[...]*	[...]*	
Community storage cost reimbursement	[...]*	[...]*	
Net price ex works	[...]*	[...]*	[...]*
Distribution network	n/a	[...]*	
New investments in storage	n/a	[...]*	
Savings on renting storage	n/a	[...]*	
Quality improvement	n/a	[...]*	
[...]* % price drop in southern Germany	n/a	[...]*	
Comparable net price	[...]*	[...]*	[...]*

⁽⁴⁶⁾ The figure of EUR [...] is the price which SLS charges [to ...].

(114) According to the calculations by SLS, the net proceeds that can be obtained from exports of sugar to southern Germany are at present EUR [...] per 1 000 tonnes higher than the net proceeds that can be obtained from exports to non-Community countries. However, SLS takes the view that any exports to southern Germany or Belgium of greater volumes of sugar would require additional investment. This, together with the acceptance of a general drop in the price in southern Germany, would lead to a lowering in proceeds by EUR [...] per 1 000 tonnes by comparison with the more attractive, according to SLS, exports outside the Community.

(115) Having examined SLS's submissions, the Commission stands by its assessment.

- (116) Firstly, the reform of the common organisation of the market in sugar, which will take effect from the 2001/2002 marketing year, includes the removal of the storage charge (EUR 20 per 1 000 tonnes), and thus of a determining component of the proceeds from exports to non-Community countries. However, since the storage cost reimbursement will also be eliminated, profitability will not fall arithmetically by the entire EUR 20 ⁽⁴⁷⁾. This removal of both the storage charge for exports outside the Community and the Community storage cost reimbursement increases the added value per 1 000 tonnes of exports to southern Germany compared with exports outside the Community from EUR [...] to EUR [...]*. The calculations on which this assessment is based are set out below (Table 5):

Table 5

Commission calculations comparing exports by SLS to non-Community countries and to southern Germany

(in EUR per 1 000 tonnes)

Calculations by the Commission	Exports to non-Community countries after 6/2001	Exports to southern Germany	Difference
End user price	631,00	[...]* ⁽⁴⁸⁾	
Community logistics charge	+50,00	n/a	
Community storage charge	n/a	n/a	
[...]*	[...]*	n/a	
[...]*	[...]*	n/a	
[...]*	[...]*	[...]*	
Storage costs	[...]*	[...]*	
Community storage cost reimbursement	n/a	n/a	
Net price ex works	[...]*	[...]*	[...]*

⁽⁴⁸⁾ The figure of EUR [...] is the price which SLS charges [to ...]*.

- (117) Secondly, the necessary amount given by SLS in Table 4 for investment in increasing exports to the southern German market is not plausible. Establishing its own distribution network is not necessary, since the distribution of larger volumes in Germany or Belgium can also be done via a sugar wholesaler and thus would not entail any investment costs. This distribution channel is the most usual for sugar manufacturers that wish to penetrate neighbouring sugar markets. Nor is the account taken of new investment in sugar warehouses conclusive. This would involve counting storage costs twice, since higher storage costs for export within the Community were also counted

⁽⁴⁷⁾ The storage cost reimbursement was EUR 3,3 per month. Data from SLS shows the average storage time of [...] months for sugar for export to non-EU countries to be much lower than the average six-month storage time for sugar destined for the Community market. According to SLS, this difference stems from the fact that exports to non-EU countries are carried out during the marketing period, in order to keep storage costs as low as possible. On the basis of this difference in storage time, the loss of the storage cost reimbursement gives an average loss in proceeds per 1 000 tonnes of quota sugar for exports to non-EU countries of EUR [...] ([...]* × 3,3 = [...]*), which is lower than that for exports within the Community (EUR [...]*, corresponding to [...] × [...]*).

in the comparison of profitability. The approach to the cost of improving quality also appears unreliable, since this would give SLS the opportunity to obtain higher sales prices, at least in the same amount. Lastly, the price drop seems very unlikely since SLS's calculation of EUR [...] per 1 000 tonnes ⁽⁴⁹⁾ is already well below the southern German price.

- (118) Thirdly, exports to non-Community countries involve a considerable element of uncertainty, since the amounts set aside are distributed by the Commission to European sugar manufacturers on the basis of tender procedures and SLS is thus in competition with the rest of the European sugar sector.

Conclusion regarding SLS's competitive potential

- (119) Taking into account all the considerations raised, SLS can be regarded as having considerable potential to compete in southern Germany and in Belgium. Furthermore, exports to other Member States will become even more attractive after the withdrawal of the Community storage cost rules.

(cc) Repercussions of SLS's removal from the scene

- (120) SLS and its French rivals, Sucre Union and Béghin-Say, are the only foreign competitors which already have a significant presence in the southern German markets. Indeed in the sugar for private labels sector, SLS and Sucre Union have substantially expanded their market shares in southern Germany in recent years (SLS to [20 to 30]* % and Sucre Union to around [10 to 20]* %). In Germany, Béghin-Say's main business is in industrial sugar and it offers its products mainly in northern and western Germany.

- (121) SLS operates in German sugar markets mainly through the [...] group, whereby [...] buys SLS sugar ex works and transports it at its own expense to individual production plants (industrial sugar) or retail outlets (sugar for private labels) in western and southern Germany. In recent years (from 1997 to 2000) business links between SLS and [...] have clearly been stepped up.

- (122) SLS has been able to step up its business with [...] in particular by substantially reducing its price estimates for sugar in Germany (down [...] % in 2001 compared with 1999). Thus, SLS offers its sugar in Germany at a much cheaper price than its German rivals (in 2001 around [...] % less for industrial sugar and around [...] % less for sugar for private labels), with the price advantage clearly outweighing the rather higher transport costs (according to customers, the extra cost is around 3 % to 5 %). It is worth mentioning here that SLS offers sugar to its German customers at a much cheaper price than to its customers in France. The same applies to Südzucker's prices for its French customers.

- (123) It can be assumed that, as a result of the merger, the trend towards more intense competition between French and German sugar suppliers will be reversed, as the merger will not only remove the limited existing competition, but also substantially reduce potential competition in southern Germany. As the second-largest French sugar producer, SLS itself has great potential to compete — because of its existing market presence in southern Germany — which could be harnessed without any lead-in period and thus be used directly to strengthen an existing market position in southern Germany.

⁽⁴⁹⁾ The figure of EUR [...] is the price which SLS charges [to ...].

- (124) This reduction in potential competition is all the more crucial if one considers the present territorial compartmentalisation of the German market between German sugar manufacturers (see recital 29 above), as confirmed by most customers of the German sugar industry in the market study. Many customers pointed to the fact that cross-border trade can be regarded as the only existing form of competition on the sugar market at present. These customers also fear that a merger of this size would considerably reduce scope for such competition.
- (125) The removal of SLS's potential to compete would also significantly strengthen Südzucker's dominant market position on the Belgian sugar markets because of the proximity of its production plants to those markets.

(b) *Giving Südzucker a potential for retaliation*

- (126) Besides eliminating SLS as a potential competitor, the proposed transaction would give Südzucker a potential for retaliation which it hardly had before, in that the group would now have made a major inroad into the home market of its other potential French competitors, and would occupy a significant position there in future.
- (127) As already indicated (see recital 5 above), SLS is currently the second-largest French sugar producer. As a result of the merger the Südzucker group would gain in France a share of [20 to 30]* % of the retail sugar market and [10 to 20]* % of the industrial sugar market (see Table 3 above). The corresponding figures for the market leader, Béghin-Say, are [20 to 30]* % (retail sugar) and [20 to 30]* % (industrial sugar), while the next largest competitors' shares come to [5 to 15]* % (Union SDA for retail sugar) and [10 to 20]* % (Sucre Union for industrial sugar). On the French market in retail sugar the Südzucker group would accordingly be just behind the market leader and on the market in industrial sugar it would be more or less on a par with the third largest producer.
- (128) Compared with now, the acquisition of this significant position on the French market would represent a substantial improvement in Südzucker's competitive position, not only on the French market, but also and not least on its home market of southern Germany and in Belgium. As explained above (see recitals 67 and 84 et seq.), as far as southern Germany and Belgium are concerned it is precisely from France that potential competition is mainly to be expected. The Südzucker group's future presence in France would, however, enable it effectively to stop any advance by other French producers into southern Germany and Belgium by taking retaliatory measures on their own home markets in France, which it could do by reducing the prices of its future subsidiary SLS. Such retaliatory measures would, moreover, be that much easier to take in that, firstly, the price level in France is and has been for some time well above the intervention price and, secondly, at approximately [...] (50), SLS's profit margins allow clear scope for price cuts.

Response to the parties' reply

- (129) In its reply to the Commission's statement of objections⁽⁵¹⁾, Südzucker argued that, after the merger, such retaliatory measures would be counter-productive for the group, since they would reduce prices in France to the detriment of Südzucker's future subsidiary SLS and thus harm the Südzucker group. Rather, it would be in Südzucker's interest after the merger to avoid any such retaliation, since the consequences for SLS would also affect Südzucker itself. It also argued that the image of attack and retaliation has from the outset been of much less significance in the sugar industry than in unregulated markets, since the production capacities of European sugar manufacturers are fixed by the quota system and cannot be extended.

⁽⁵⁰⁾ According to data provided by SLS itself, the company's profit margin comes, on a full cost basis, to [...] in the case of industrial sugar and to [...] in that of retail sugar. It must be borne in mind, however, that the profit margin is distinctly bigger when based on variable costs; this measure is much more significant for purposes of analysing market power. The supply of sugar for private labels is of no significance on the French market, the only one with which we are concerned at this point.

⁽⁵¹⁾ Points 128 et seq of the reply.

- (130) Having examined Südzucker's arguments, the Commission stands by its assessment. First, it would in any event not expect those concerned to become involved in a general price war harmful to all sides. Second, a general reduction in price levels in France as a result of any retaliatory measures is also not to be expected given that such measures, by their nature, are only ever practised selectively in respect of individual, strategic customers of targeted competitors. Since sugar manufacturers, to the extent that they are not in a dominant position, are in no way required to offer their customers the same terms for equivalent services, targeted price cuts aimed at individual, strategic customers of competitors are quite possible and even common in the sector.
- (131) In view of the fact that, on sugar markets, the issues of potential competition and retaliation overlap, they will be treated together in what follows.
- (132) As already mentioned in recitals 29 and 124 above, numerous customers of the German sugar manufacturers are of the opinion that sugar markets in Germany are geographically compartmentalised between individual sugar producers. This geographical compartmentalisation can be explained in particular by the potential for retaliation that German sugar manufacturers possess vis-à-vis each of their German competitors (see recital 67 above). For this reason, German sugar manufacturers barely rank as potential competitors for Südzucker. At the same time, the sugar surpluses on the Scandinavian, UK and Italian markets are too small to constitute significant competitive potential (see Table 1).
- (133) This means that on the southern German sugar markets, French sugar manufacturers represent the only serious potential competition. At 1,54 million tonnes, their sugar surpluses are by far the biggest, while the German sugar manufacturers produce a surplus only half as large at 736 000 tonnes (see Table 1). At the same time, transport distances are less important for French manufacturers than for German, since the distances covered in France are already regularly greater than those covered in Germany, and the distances to certain destinations in southern Germany and Belgium are less for French manufacturers than to certain destinations within France (see recital 94 above).
- (134) In Belgium, only French and Dutch sugar manufacturers can be considered potential competitors of any significance. However, even the opportunities of Dutch manufacturers in this respect are severely limited by the much smaller size of the sugar surpluses (only 285 000 tonnes).
- (135) Furthermore, the merger will, for the first time, give Südzucker the opportunity to take targeted retaliatory action in several Member States. Especially in France, this new, previously non-existent potential for retaliation will prevent other potential competitors in France from penetrating Südzucker's main sales territories. On the basis of its dominant market position or market power, Südzucker can take targeted and selective retaliatory action on numerous sugar markets against competitors that intend to penetrate its main sales territories. Such action would be short-term and selective and would serve in the medium-term to safeguard or even to consolidate Südzucker's dominant market positions.

Conclusion as regards giving Südzucker a potential for retaliation

- (136) Against this background the Commission has come to the conclusion that Südzucker's position on the markets in industrial sugar and retail sugar in southern Germany and Belgium would be strengthened by the merger inasmuch as an increase in the group's retaliatory potential would afford it better protection than before against any advance by French competitors into southern Germany and Belgium.

(c) ***Competitive advantage stemming from the scope for supplying large customers across borders (primarily concerns industrial sugar)***

- (137) Lastly, the merger with SLS would place the Südzucker group in the unique position of being able, unlike its main rivals, to supply sugar to large industrial customers across borders, thereby enabling it to strengthen its position in southern Germany and Belgium where a number of large customers in the sugar industry have production plants with considerable raw material requirements.

Increasing importance to large industrial customers of group-wide and Europe-wide supply

- (138) As the parties have themselves stated⁽⁵²⁾, industrial customers and intermediaries on the sugar market are increasingly developing European purchasing strategies. This nascent trend among large industrial customers, especially in the food and drink industry, towards group-wide or at least cross-border procurement of sugar through pan-European deals also became apparent in the course of the market study. Unlike, say, small and medium-sized undertakings, large industrial customers are in a position to invite bids from various sugar manufacturers and to choose the most favourable one.

Unique implantation of the Südzucker group in continental Europe

- (139) Against this background, the future implantation of the Südzucker group in Europe is of decisive importance when it comes to assessing the notified merger under the competition rules. Südzucker already occupies a dominant position in southern Germany, Austria and Belgium. As a result of the acquisition of SLS, the group would also become the second-largest sugar supplier in France (see recital 5 and Table 3 above). Competitors have drawn the Commission's attention, moreover, to the close financial and commercial ties between SLS and the leading Spanish sugar producer, Ebro Puleva.
- (140) Ebro Puleva itself denies⁽⁵³⁾ that SLS has a decisive influence on the Spanish company. In the Commission's opinion it cannot in fact be proved that Ebro Puleva is under the decisive influence of SLS or even that it is controlled in a legal sense by the latter; there is therefore insufficient evidence to suggest that Ebro Puleva might in future be tied by the Südzucker group into the cross-border supply of large industrial customers.

Decisive competitive advantage held by the Südzucker group

- (141) Irrespective of its future position in Spain, Südzucker, alone among the major European sugar producers, would after its merger with SLS thus have a presence in several Member States, giving it a decisive advantage over its competitors. While the latter in the main occupy a position of any strength only on their home markets, or at most in two Member States, the Südzucker group would have a significant presence in four Member States in all, four neighbouring Member States at that. In three of the relevant geographic markets (southern Germany, Austria and Belgium), the group would in fact be in a dominant position, and in France it would be the second largest supplier.

⁽⁵²⁾ See SLS's reply of 25 September 2001 to the Commission's request for information of 31 August 2001, p. 57, where mention is made of 'industrial customers and distributors who are increasingly developing European purchasing strategies' (original French: 'clients industriels et distributeurs qui développent de plus en plus des stratégies d'achats européennes').

⁽⁵³⁾ Position taken by Ebro Puleva during talks with members of the Merger Task Force on 6 December 2001 and in a letter dated 7 December 2001.

- (142) The Südzucker group would, unlike any other European sugar manufacturer, therefore be in a position to do business with large industrial customers on a cross-border basis through pan-European deals. In the Commission's view, it could thus tie such customers more closely to itself. Last but not least, it could secure suitably higher quantity rebates as a result of the bigger deliveries associated with the group-wide, cross-border supply of large customers. The group would thereby gain a clear competitive advantage over other European sugar manufacturers in relation to such large accounts.

The outcome: a strengthening of Südzucker's dominant position in southern Germany and Belgium as a result of the opportunity for cross-border supply of large customers

- (143) In view of the Südzucker group's existing string of dominant positions on the southern German, Austrian and Belgian markets and its future position as the second largest supplier in France, the main sugar-producing Member State, the merger can be expected to help consolidate the group's leading position in Belgium and southern Germany.
- (144) In particular, the Südzucker group's much-enhanced capability to supply sugar to large customers on a Europe-wide and group-wide basis is likely not only to improve its market position in the newly opened markets, but also to strengthen its dominant position on the southern German and Belgian markets, inasmuch as a number of the large industrial customers in question, including Coca-Cola, Nestlé and Danone, have extensive production facilities in southern Germany and Belgium. As a result of the intended pan-European deals, Südzucker's competitors would, on the other hand, lose market share. And owing to Südzucker's enormous market power in southern Germany and Belgium, they would be unable to make up for this loss of market share in these, Südzucker's main sales territories.

Response to Südzucker's reply

- (145) In its reply to the Commission's statement of objections⁽⁵⁴⁾, Südzucker argued that, while the merger would at most increase the group's chances of gaining new customers in France, this would not be the case in Germany, Belgium and Austria. It also argued that the capacity to supply large customers across borders is thus of no relevance as regards a potentially stronger position in southern Germany and Belgium.
- (146) Having examined Südzucker's arguments, the Commission stands by its assessment. In the Commission's view, it is decisive that the merger will allow Südzucker to supply large industrial customers with sugar in several Member States at once. To the extent at least that some of the production plants of such large customers are located in southern Germany and Belgium — the market study showed this to be the case for many of them — Südzucker will be able to tie these customers, even in its previous main sales territories, even more closely to itself than before.

Conclusion on the cross-border supply of large customers

- (147) As a result of Südzucker's opportunity in future to tie large industrial customers, even in southern Germany and Belgium, more closely to itself than before through the cross-border supply of sugar, the intended merger will strengthen its dominant position on these two markets.

⁽⁵⁴⁾ Points 134 et seq. of the reply.

4. TO SUM UP

- (148) Following a merger with SLS, the second largest French sugar producer, Südzucker would be able appreciably to reduce potential competition on the southern German and Belgian sugar markets. The merger would also give Südzucker a potential for retaliation in France. Lastly, it would put the Südzucker group in the unique position of being able, unlike its main rivals, to supply sugar to large industrial customers across borders.
- (149) For the above reasons, the proposed transaction is likely to strengthen dominant positions of Südzucker's on the markets in industrial sugar and retail sugar in southern Germany and Belgium, these markets each constituting substantial parts of the common market.

VII. COMMITMENTS OFFERED BY SÜDZUCKER

- (150) In order to overcome the competition concerns expressed by the Commission with regard to the southern German and Belgian sugar markets, Südzucker has offered the commitments described in recitals 151 and 152 below. The full wording of the commitments is set out in Annex II, which is an integral part of this Decision.

A. COMMITMENTS RELATING TO BELGIUM

- (151) Through its subsidiary Raffinerie Tirlemontoise SA, Brussels, Südzucker has a 68 % share in Suikerfabriek van Veurne SA, Veurne, Belgium (hereinafter referred to as 'Veurne'). Veurne's remaining shares are held by the holding company Warcoing SA, which itself is linked to one of the two smaller Belgian sugar manufacturers, Sucrerie de Fontenoy. Südzucker undertakes to sell its interest in Veurne after the approval of the merger, within a period specified for the purpose. The purchaser must be in a position to operate Veurne as an active force in competition with Südzucker⁽⁵⁵⁾.

B. COMMITMENTS RELATING TO SOUTHERN GERMANY

- (152) Südzucker further undertakes to make available up to 90 000 tonnes of quota sugar a year from its southern German plants to an independent trading firm or sugar manufacturer (hereinafter 'distributor' for either) interested in the distribution of sugar in southern Germany. A framework agreement to this effect shall be drawn up within a period specified for the purpose and shall initially last until 30 June 2006; at the request of the Commission, it shall be extended beyond this date for the remaining duration, if appropriate, of the common organisation of the market in sugar. Should the distributor withdraw, a successor shall be nominated. The terms of supply shall be based on the intervention price set under the common organisation of the market in sugar and include mark-ups on the basis of Südzucker's costs, such as for the supply of sugar of a higher quality than that on which the intervention price is based⁽⁵⁶⁾.

VIII. COMPETITIVE ASSESSMENT OF THE TRANSACTION TAKING ACCOUNT OF THE COMMITMENTS OFFERED BY SÜDZUCKER

- (153) The commitments described in recitals 151 and 152 are sufficient in the Commission's view to provide an appropriate remedy for the competition concerns identified in respect of the southern German and Belgian sugar markets. This view was confirmed by the market test that was carried out.

⁽⁵⁵⁾ For details, see Section A of Annex II.

⁽⁵⁶⁾ For details, see Section B of Annex II.

A. ASSESSMENT OF THE COMMITMENTS RELATING TO BELGIUM

- (154) At present, Südzucker has access to close on 68 % of the Belgian A and B sugar quotas through its subsidiary Raffinerie Tirlemontoise SA and also controls the Veurne plant, with a further quota entitlement of 7,4 %. In contrast, the two independent Belgian competitors, Sucrierie de Fontenoy (6,6 %) and Groupe Sucrier SA (18,3 %) have much smaller production quotas allocated to them.
- (155) Südzucker's commitment to sell its majority interest in the Veurne plant will give competitors the opportunity to consolidate their position on the Belgian market or to establish themselves on that market for the first time. The Südzucker group's current allocation of the A and B quotas in Belgium will be 7,4 percentage points lower after the sale of its majority interest in the Veurne plant and that of the purchaser correspondingly higher. The corresponding sugar volumes account for some 10 % of the volume of the Belgian market as a whole and more than 10 % of the volume of the Belgian market in industrial sugar (see details on volumes for Belgium in Table 3).
- (156) Performance by Südzucker of its commitment will strengthen competition in the Belgian sugar industry and sufficiently offset the disappearance of SLS.

B. ASSESSMENT OF THE COMMITMENTS RELATING TO SOUTHERN GERMANY

- (157) As far as the southern German market is concerned, in contrast to Belgium, Südzucker has not undertaken to sell a plant, but has only committed itself to a given volume of sugar per year ('virtual sugar plant').
- (158) The Commission's established practice is, in principle, to give priority to the divestiture of a viable business to a suitable purchaser over the mere sale of the goods produced there. Divestiture is considered the most effective way to restore effective competition where the creation or strengthening of a dominant position would seriously impede it ⁽⁵⁷⁾.
- (159) In this particular case, however, the sale of a sugar plant, combined with the transfer of the corresponding sugar quotas to the purchaser, would, in southern Germany — in contrast to Belgium — have had little prospect of success (see point 1 below).
- (160) Südzucker's alternative commitment, on the other hand, to make available up to 90 000 tonnes of quota sugar a year to a distributor is sufficient in the Commission's view, given the particular circumstances of this case, to offset the strengthening of the group's dominant position in southern Germany (see point 2 below).

1. INSUFFICIENT LIKELIHOOD OF SUCCESS FOR A PLANT DIVESTITURE WITH QUOTA TRANSFER

- (161) Given the specific situation of the sugar industry in southern Germany, the sale of a Südzucker plant there, together with, in particular, the transfer of the corresponding sugar production quotas to the purchaser, would have had little prospect of success. This assessment is based on the reasons set out in recitals 162 and following.

⁽⁵⁷⁾ See Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 3, recitals 13 et seq.

(a) ***Legal framework***

- (162) Article 12, in conjunction with Annex IV, of the common organisation of the market in sugar lays down detailed rules on the re-allocation of sugar production quotas in the event of the sale of a sugar factory. The authority responsible for the quota transfer is the relevant Member State; in Germany, it is the Federal Minister for consumer protection, food and agriculture ⁽⁵⁸⁾.
- (163) The common organisation of the market in sugar contains the principle that, in such cases, the corresponding production quota be transferred to the purchaser of the factory ⁽⁵⁹⁾. However, the two restrictions on this principle described below have the effect of giving the Member State concerned a certain amount of discretion as regards the transfer of quotas — in the context of its duty of loyalty to the Community under Article 10 of the EC Treaty:
- firstly, the interests of each of the parties concerned, particularly sugar beet and cane producers, must be taken into consideration in the adjustment of sugar production quotas ⁽⁶⁰⁾,
 - secondly, a transfer of quotas is acceptable only if the Member State concerned considers that it is likely to improve the structure of the beet, cane and sugar-manufacturing sectors ⁽⁶¹⁾.

(b) ***Consideration of the interests of sugar beet producers***

- (164) As regards taking into consideration the interests of each of the parties, and in particular of sugar beet producers, it is of relevance to this case that Südzucker, unlike most other European sugar manufacturers, has a corporate structure. Most of its shares are held by farmers, whose interests are looked after by the South German Sugar Beet Use Cooperative ('SZVG'). Südzucker's supply of sugar beet from the farmers is indirectly linked to their capacity as shareholders. In practice, the farmers that supply Südzucker with sugar beet are also shareholders in the company. The concept even exists of the 'suppliers' rights' that the farmers have 'bought' through their shareholding in Südzucker AG. Südzucker also ties these farmers to itself by [...]*.
- (165) If one of Südzucker's southern German plants were sold off, this close link between the supply relationship and the farmers' shareholding interests in the company would be broken. This would have a particular effect on the interests of the farmers concerned.
- (166) In this connection, the Federal Ministry for consumer protection, food and agriculture has informed the Commission that its established administrative practice would be never to exercise its powers in redistributing sugar production quotas on the basis of the common organisation of the market in sugar in opposition to the anticipated resistance from the farmers concerned.

⁽⁵⁸⁾ Section 2 of the German Order on the distribution and amendment of quotas for sugar of 22 October 1981, BGBl. I, p. 1161.

⁽⁵⁹⁾ Article 12(1) (3) and (4), in conjunction with Annex IV, point II(1)(c), of the common organisation of the market in sugar.

⁽⁶⁰⁾ Article 12(1) and (4), in conjunction with Annex IV, point IV(a) of the common organisation of the market in sugar.

⁽⁶¹⁾ Article 12(4), in conjunction with Annex IV, point IV(b) of the common organisation of the market in sugar.

- (167) Ultimately, it can be left open in this case whether the performance of a commitment to divest would necessarily harm the interests of the sugar beet growers, especially given that the farmers concerned, as majority shareholders in Südzucker, support the proposed merger and would share, via their capital interest in the company, in any benefits deriving from the merger. For in all probability, the sale of a southern German sugar factory belonging to the Südzucker association is by itself unlikely to improve the structure of sugar beet growing and sugar production (see recitals 168 and 169 below).

(c) *Structure of the sugar beet cultivation and sugar manufacturing sectors*

- (168) As regards the effects of any factory sale on the structure of the sugar industry in southern Germany, it must first be pointed out that the criteria set out in the common organisation of the market in sugar refer only to improving sugar beet cultivation and sugar manufacturing, and not to any possible effects on the entire structure of the market in sugar, nor to consumer protection. This is clear from recitals 17 and 19 of the common organisation of the market in sugar, according to which the interests of beet and cane producers are those which the European organisation of the market is actually designed to protect.

- (169) In the case in point, it is of relevance that Südzucker has established a network of sugar factories across the whole of southern Germany; they operate in association and are incorporated into a group structure, resulting in a specialisation effect from one location to another. In this respect, the situation in southern Germany is distinct from that in Belgium, where the Veurne factory (see recital 151 above) does not belong to any comparable association. The German Federal Ministry for consumer protection, food and agriculture has already informed the Commission that it does not consider the sale of individual factories belonging to the southern German association of Südzucker plants to be likely to improve the structure of sugar beet growing and sugar production in this region.

(d) *Conclusion regarding the particular characteristics of the southern German sugar industry*

- (170) Given the particular characteristics of the southern German sugar industry as described above and the established administrative practice of the German Federal Ministry for consumer protection, food and agriculture, the Commission considers that the feasibility of selling a sugar-manufacturing plant in southern Germany and of transferring the corresponding sugar production quotas is uncertain. The prospect of success is not sufficient to make the sale of a sugar-manufacturing plant in southern Germany a condition of the approval of the merger. The Commission accepts, in view of the specific circumstances of the case, that Südzucker was not in a position to commit itself to such a sale.

2. EFFECTS ON THE SOUTHERN GERMAN MARKET OF THE COMMITMENT GIVEN AS AN ALTERNATIVE TO A FACTORY SALE

- (171) The Commission considers Südzucker's commitment, in place of the sale of a sugar factory, to make available up to 90 000 tonnes of quota sugar a year from its southern German plants to an independent distributor to be sufficient to offset the disappearance of SLS on the southern German market. It bases its assessment on the following considerations:

- (172) The maximum volume offered of 90 000 tonnes corresponds to roughly 8 % of the total market volume in southern Germany and to more than 10 % of the volume of the southern German market in industrial sugar (see volumes for southern Germany in Table 3). In terms of market volumes, the commitment is therefore comparable to that given for Belgium to sell the majority shareholding in the Veurne sugar plant and to transfer the corresponding quotas (see recital 151 above). This will allow the independent distributor to whom the above volume of sugar is made available to have significant influence on the southern German market, and especially on its price structure.

- (173) It is decisive in this connection that the price to be paid to Südzucker by the distributor on the basis of the intervention price and Südzucker's costs related to any additional services is significantly less than the comparable market price. This gives the distributor considerable room to undercut the current market price in southern Germany.
- (174) According to Südzucker's commitment, the distributor will also have the right to choose to obtain sugar of varying qualities, and not only the standard quality on which the intervention price is based. He will therefore be able to meet the quality requirements of any customers.
- (175) Since Südzucker is also offering to supply the distributor from his choice of any of the group's southern German plants, the distributor will not be put by distance at a competitive disadvantage vis-à-vis Südzucker as regards the supply of customers in southern Germany. The distributor will even have a competitive advantage in terms of supply distance over suppliers not based in southern Germany.
- (176) Overall, the Commission considers that the commitment offered by Südzucker, under the specific competitive conditions of the common organisation of the market in sugar, will have an effect essentially equivalent to that of a commitment to divest. In particular, the purchaser of a sugar factory offered for sale would, on the basis of the existing quota rules governing sugar production, be subject to a capacity restriction that would place him in a comparable situation to a distributor with access to a given volume of sugar per year. The reference to the Community intervention price also ensures calculation and planning certainty for the distributor.

3. CONCLUSION REGARDING THE COMMITMENTS RELATING TO SOUTHERN GERMANY

- (177) In the Commission's view, performance by Südzucker of its commitment will strengthen competition in the southern German sugar industry and sufficiently offset the disappearance of SLS.

C. OVERALL CONCLUSION REGARDING THE COMMITMENTS OFFERED

- (178) The Commission has therefore reached the overall conclusion that the notified merger, in view of all the commitments given by Südzucker, will not strengthen Südzucker's dominant market position in southern Germany and Belgium. In particular, the commitments relating to southern Germany and Belgium are sufficient to rule out a strengthening of Südzucker's dominant position through the cross-border supply of large industrial customers with sugar (pan-European deals). For as a result of the strengthening of competition due to the commitments given, it will be more difficult for Südzucker to tie large industrial customers in southern Germany and Belgium more closely to itself with the offer of cross-border supplies of sugar.

IX. CONDITIONS AND OBLIGATIONS

- (179) Under the first sentence of the second paragraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

- (180) Measures that give rise to a structural change of the market must be made subject to conditions, while the implementing steps which are necessary to achieve this result constitute obligations on the parties. Where a condition is not fulfilled, the Commission decision declaring the merger to be compatible with the common market is void. Where the parties commit a breach of an obligation, the Commission may revoke the clearance Decision in accordance with Article 8(5)(b) of the Merger Regulation; the parties may also be subject to fines and periodic penalty payments under Articles 14(2)(a) and 15(2)(a) of the Merger Regulation ⁽⁶²⁾.
- (181) In accordance with the basic distinction described above, the Commission makes its decision subject to the condition of Südzucker's fully complying with its commitments regarding the divestiture of shares and the provision of a given volume of sugar in southern Germany ⁽⁶³⁾. These commitments serve to offset the strengthening of Südzucker's dominant market position in southern Germany and Belgium and thus to maintain competition on these markets. All remaining parts of the statement of commitments, especially the commitment to temporarily maintain and administer separately the business that is to be sold, and the details relating to the trustees to be nominated by Südzucker, shall constitute obligations, since they serve merely to support the implementation of the above conditions.

X. CONCLUSION

- (182) The Commission is accordingly satisfied that, provided the commitments entered into by Südzucker are complied with in full, the planned concentration will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Always provided that the commitments set out in Annex II to this Decision are complied with in full, therefore, the concentration should be declared compatible with the common market under Article 2(2) and Article 8(2) of the Merger Regulation and with the EEA Agreement under Article 57 of that Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration by which Südzucker AG acquires sole control of Saint Louis Sucre SA within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the common market and with the EEA Agreement.

Article 2

Article 1 shall apply on condition that the commitments offered by Südzucker AG as set out in paragraphs 1, 2, 10 to 15 and 23 (first sentence) of Annex II are complied with in full.

Article 3

This Decision is issued subject to the obligation on Südzucker AG to comply in full with its commitments in accordance with paragraphs 3 to 9, 16 to 22, 23 (second to fourth sentences), and 24 to 27 of Annex II.

⁽⁶²⁾ See full text of Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 3, paragraph 12.

⁽⁶³⁾ Paragraphs 1, 2, 10 to 15 and 23 (first sentence) of Annex II.

Article 4

This Decision is addressed to:

Südzucker Aktiengesellschaft
Maximilianstr. 10
D-68165 Mannheim.

Done at Brussels, 20 December 2001.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

The following Commission web page contains a map showing the location of the production sites of the largest sugar producers in Germany:

http://europa.eu.int/comm/competition/index_en.html

ANNEX II

The full wording of the conditions and obligations referred to in Articles 2 and 3, in the original German, can be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html

COMMISSION DECISION**of 21 February 2002****declaring a concentration to be compatible with the common market and the EEA Agreement****(Case COMP/M.2495 — Haniel/Fels)***(notified under document number C(2002) 554)***(Only the German text is authentic)****(Text with EEA relevance)****(2003/260/EC)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

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

Having regard to the opinion of the Advisory Committee on Concentrations ⁽³⁾,

Having regard to the final report of the Hearing Officer in this case ⁽⁴⁾,

Whereas:

- (1) On 4 September 2001, Haniel Baustoff-Industrie Zuschlagsstoffe GmbH ('HBI') notified the Commission under Article 4 of Council Regulation (EEC) No 4064/89 ('the Merger Regulation') of a planned concentration whereby Haniel was, by share acquisition, to acquire sole control of Fels-Werke GmbH ('Fels').
- (2) The Commission examined the notification and initially found that the notified transaction fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and the EEA Agreement.

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

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

I. THE PARTIES AND THE TRANSACTION

- (5) HBI is a direct subsidiary of Franz Haniel & Cie GmbH ('Haniel'), a diversified German holding company. In the construction materials industry Haniel is active in the manufacture and sale of wall-building materials such as sand-lime bricks, aerated concrete and ready-mixed concrete. Haniel's main centre of activities is Germany, but it is also active in the Netherlands through its indirect stake in the Dutch cooperative undertaking Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten ('CVK'). Haniel has a stake in around 30 sand-lime brick factories in Germany, eight in the Netherlands, one in Belgium and two in Poland. It also operates a sand-lime facing brick factory in Denmark and has a stake in three ready-mixed concrete plants in France.
- (6) On 16 October 2001 Haniel notified as a concentration its acquisition of Ytong Holding AG ('Ytong'), a subsidiary of Rheinisch-Westfälische Kalkwerke AG, which in turn is controlled by the British firm RMC plc. (Case COMP/M.2568 — Haniel/Ytong). The notification is still pending. On 30 November 2001 the Commission

(1) OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.

(2) OJ L 180, 9.7.1997, p. 1.

(3) OJ C 97, 24.4.2003.

(4) OJ C 97, 24.4.2003.

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

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

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

II. THE CONCENTRATION

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

III. COMMUNITY DIMENSION

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

IV. PROCEDURE

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

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

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

V. COMPATIBILITY WITH THE COMMON MARKET

A. THE RELEVANT PRODUCT MARKETS

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

1. THE PRODUCTS

- (13) Sand-lime bricks are masonry units prepared from lime and sand by adding water and then compressing and hardening them under steam pressure. The bricks are used exclusively for building walls. They are generally rendered, filled in with thin plaster or hidden from view by a facing wall. When sand-lime masonry is visible, it generally consists of facing bricks, which are produced only in small formats ⁽⁶⁾. These form a separate market, which will not be discussed in detail here, as the parties produce such facing bricks only in small quantities. Besides sand-lime bricks, other, larger sand-lime walling units are used (usually measuring up to 900 mm × 625 mm × 300 mm in the Netherlands).
- (14) Aerated concrete is a building material made from sand, lime and cement, to which aluminium powder is added during the manufacturing process. The powder reacts with water to form a fine porous structure. Aerated concrete products (blocks and other units) are used mainly in the construction of buildings. They can be used for both load-bearing walls — particularly in the case of blocks and very dense units — and non-load-bearing walls.

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

- (15) Gypsum is a light wall-building material used only for non-load-bearing walls, as it has a very low load-bearing capacity. It is used in the form of gypsum plasterboards and planks.
- (16) Concrete is another widely used wall-building material. Concrete walls can be made by pouring mixed concrete on site (in situ concrete) or by using precast concrete walling units. A third form of concrete comes in small-format concrete blocks. Concrete walls are built only as load-bearing walls.
- (17) In situ concrete can be cast either by the traditional method of using formworks specially made on site or by 'tunnel forming' ('tunnelgietsbouw' in Dutch) using prefabricated tunnel formworks, whereby walls and ceilings are cast in a single process. Tunnel forming entails high fixed costs and is therefore profitable for construction firms only in projects where a large number of identical, rectangular storeys are to be built. It is not a suitable alternative for smaller construction projects or those not involving rectangular shapes or repeated applications.
- (18) Precast concrete walling units are produced in factories to precise specifications, then transported on site and built into the building for which they are intended. They generally constitute entire walls and are thus considerably larger than the sand-lime bricks or blocks predominantly used in masonry work, and require heavy equipment. Precast concrete walling units are therefore used primarily for larger projects, chiefly in non-residential construction ('utiliteitsbouw', abbreviated to 'u-bouw' in Dutch) rather than residential construction ('woningbouw', abbreviated to 'w-bouw').
- (19) Brick, the classic masonry material, is manufactured from a mixture of clay and water by firing at temperatures of over 1 000 °C. However, the size of individual bricks is limited, as the firing process causes deformations such as shrinkage and warpage. Jointing is therefore necessary when working with these products, in order to offset these deformations. This makes the use of bricks time consuming and labour intensive.
- (20) Steel plates are used mainly in non-residential construction, and to a lesser extent in residential construction. For example, they are used to fill in wall space in load-bearing concrete or steel structures. In such cases the wall usually consists of two steel plates with insulating material between them (metal sandwich plates).

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

2. DEFINITION OF THE RELEVANT PRODUCT MARKET

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

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

- (23) Haniel claims there is a single market in wall-building materials, given the existing conditions of competition, in particular the lack of any price difference based on use and the fact that they are invariably sold via the building materials trade. This market includes all products which are used in the construction of walls: clay bricks, concrete blocks, sand-lime bricks, aerated concrete blocks, precast concrete walling units, other sand-lime and aerated concrete units, masonry mortar, in situ concrete, steel plates, gypsum plasterboards and planks, and wooden panels. Haniel argues that, when a building is designed, there is generally a choice of various solutions for constructing the walls.
- (24) Haniel states that the architect or project developer generally defines the requirements to be met in relation to the building's load-bearing capacity, age resistance, ease of maintenance, thermal insulation, fire protection and noise insulation. In some cases the architect also makes a selection of building materials in the building's specifications, but, according to Haniel, these specifications leave ample room for alternative solutions. Building contractors have a free choice of building materials, provided that the specifications are met. In the project proposal they can opt for a specific building material or put forward several possible solutions.

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

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

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

(c) Practice of the German Bundeskartellamt (masonry)

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

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

- (28) By contrast, the Nederlandse Mededingingsautoriteit (NMa — the Dutch competition authority) draws a distinction between load-bearing and non-load-bearing walls because, to its knowledge, different materials are

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

3. ASSESSMENT

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

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

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

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

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

- (31) Each of the abovementioned wall-building materials has specific properties that are taken into account in the selection of a specific wall-building material for a specific building project.
- (32) Sand-lime bricks are a cheap building material which, though they cannot achieve the size of aerated concrete precast products, nevertheless, with dimensions of up to 900 mm × 625 mm × 300 mm, are larger than traditional bricks. Furthermore, sand-lime bricks, like aerated concrete, have a smooth surface that does not have to be evened out by jointing. The units can be cemented together. In addition, sand-lime products can be cut to shape at the factory in accordance with the building plans, so that units forming the gable or window openings can be pre-prepared. All these factors mean that less time and less expenditure on wage costs are needed than in the case of, for example, ordinary bricks. At the same time, sand-lime bricks do not require any large-scale investment in heavy cranes, as in the case of precast concrete wall units, or casting moulds, as in the case of in situ concrete. In the Netherlands, because of their excellent load-bearing properties, sand-lime bricks are used for load-bearing walls and, to a lesser extent, also for non-load-bearing walls. In the Netherlands, some [60 to 80] to [< 80]* (*) % of sand-lime bricks are used in load-bearing walls. When they are used in non-load-bearing walls, sand-lime bricks have the disadvantage of being relatively heavy (about twice as heavy as aerated concrete). However, the material does have good sound-insulating properties and is suitable in particular for high, non-load-bearing walls, such as those often required in non-residential construction. Sand-lime bricks are the traditional and most popular wall-building material in the Netherlands.
- (33) Precast concrete sections do not require masonry work as they are already the size of the wall to be produced. Concrete as a product can be produced from relatively simple raw materials. However, large-scale resources such as cranes must be used in erecting them, and this in its turn involves some investment costs. In the case of medium-sized projects involving 10 or more units, this can lead to cost savings, since the wall is produced at the factory and erection at the building site requires relatively little labour and takes relatively little time. The bigger the project, the lower the costs for the precast wall.
- (34) In situ concrete requires the largest amount of on-site investment in its use, particularly in situ concrete used in tunnel forming. The manufacture and use of the frameworks required for repeated casting in the tunnel forming method are so costly that this method is worthwhile only if there is a minimum of 30 to 50 residential units and only if the latter are identical in form and size. There is therefore little flexibility as to form and size in construction using in situ concrete in the tunnel forming method. However, flexibility is an important criterion in the Netherlands, even in the case of fairly large projects, so as to avoid uniformity. In situ concrete is used in the construction both of individual houses and of high-rises, if their load-bearing capacity is ensured by means of a cast concrete skeleton to which non-load-bearing wall-building materials are attached.
- (35) Aerated concrete is an expensive wall-building material. It is produced from high-grade, expensive basic materials with high energy costs. Large sections must be reinforced with steel, which further increases the price, since reinforced sections entail significant costs in the manufacture of the reinforcing elements. In contrast to steel reinforcement in the case of ordinary concrete, the steel used for reinforcement here has to be coated in order to protect against corrosion. The constructional properties of aerated concrete are somewhat more limited than those of sand-lime bricks, but it is possible to use it to build up to two stories with load-bearing walls. Aerated concrete does, however, have excellent thermal insulation properties. In Germany, some 80 % of the aerated concrete products used in wall-building is used for load-bearing walls, while only 20 % is used in non-load-bearing walls. In the Netherlands, however, the ratio is the reverse: some 80 to 85 % of aerated concrete is used in non-load-bearing walls.
- (36) Gypsum is a light, thin material. Because of this property, it is very well suited to non-load-bearing walls. The load-bearing demands placed on floors are small, and space is saved. Because of its lack of load-bearing capacity, plaster is used only for non-load-bearing walls.
- (37) Bricks are relatively small wall-building materials, and because of their uneven surface they have to be jointed. Their use thus entails relatively high labour costs and is relatively time consuming, and this makes bricks unsuitable for industrial construction.
- (b) **The distinction between wall-building materials for load-bearing and non-load-bearing walls**
- (38) The market investigation showed that the decision as to which building material to use for a specific project is influenced both by the client and the architect and by the building contractor. Exactly how much influence on the choice of wall-building material is exercised by each of these three groups of persons varies from case to case.

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

- (39) The client's precise preferences regarding, for example, aesthetics and buildings costs are factors here, as are the architect's specifications. Criteria which are of relevance in the selection of the various wall-building materials are quality, constructional properties, flexibility of use, appearance, the purchase price of the material and the costs involved in using it. The special requirements of the building project must be taken into account in this respect, as must the use to which the building is to be put, the necessary load-bearing capacity, resistance to ageing, fire protection, sound insulating properties, other technical capabilities, timetable and the overall costs of the project. The building contractor's main criteria, in so far as he has any options regarding the choice of wall-building materials, are costs and building speed. These in turn are influenced by his experience with specific building materials and the resources and facilities (e.g. cranes) available to him. As far as the cost factor is concerned, it must be borne in mind that the cost of materials is always just one part of the overall costs of erecting a wall.
- (40) In its market investigation, therefore, the Commission surveyed all these decision-makers to determine the basis of their conduct in selecting wall-building materials. Similarly, the manufacturers of the various building materials were asked to provide information. In the Netherlands, the survey showed that, in selecting building materials, a fundamental distinction was made between the choice of building materials for load-bearing walls and building materials for non-load-bearing walls.
- (41) The difference between load-bearing and non-load-bearing walls, as the terms already suggest, is the load-bearing function of the relevant wall-building material. Load-bearing walls ensure the stability of a building. The relevant walls are often external walls. However, internal walls too may perform a load-bearing function. Such walls must be distinguished from walls which do not have any function in supporting the building, but merely divide up the space or fill gaps inside a load-bearing framework (external or internal walls). Building materials used in load-bearing walls must meet certain requirements as to resistance to pressure, load-bearing capacity and stiffness. Building materials used in non-load-bearing walls, by contrast, must meet other, possibly contrary requirements. Lighter, non-load-bearing walls, for example, have the advantage of making fewer demands on the load-bearing capacity of the ceilings. Thin non-load-bearing walls for their part save space.
- (42) These varying requirements in respect of load-bearing and non-load-bearing walls result, in the Netherlands, in different building materials being selected for these different purposes. In the Netherlands, the main material used in load-bearing walls is sand-lime bricks. Sand-lime bricks are used in [50 to 60]* % of all load-bearing walls. Concrete is the next largest building materials category. In situ concrete is used in 12 % of all load-bearing walls.
- At least two-fifths of this building material is used in tunnel forming⁽¹⁰⁾. A total of 8 % is accounted for by load-bearing walls made from precast concrete wall units. Aerated concrete and bricks, accounting for proportions of 2 % and 5 % respectively, play a very minor role.
- (43) In the case of non-load-bearing walls, by contrast, gypsum products are the main materials used. They account for 44 % of the materials used in non-load-bearing walls. Next comes aerated concrete with 20 %, followed by sand-lime bricks with [15 to 20]* %.
- (44) This demand-side pattern is typical of the Netherlands and differs fundamentally from that in other countries, such as Germany. In Germany, the proportions in the use of aerated concrete for load-bearing and non-load-bearing walls are just the reverse of those in the Netherlands. Whereas in Germany 80 % of all aerated concrete products are used to construct load-bearing walls, in the Netherlands 85 to 90 % of all aerated concrete products are used in non-load-bearing walls. In Germany, concrete plays a minor role in load-bearing walls in residential construction, while bricks and other masonry units feature prominently. In Belgium, by contrast, concrete blocks appear to be much more widespread than in the Netherlands and are the most common wall-building material. The use of in situ concrete in tunnel forming is much less widespread in Germany and Belgium than in the Netherlands.
- (45) The reasons for these differences in demand-side behaviour stem, firstly, from differences in building traditions and aesthetic approaches and, secondly, from the advanced industrialised building methods used in the Netherlands.
- (46) In the Netherlands, building and construction activity is based on large-scale projects even in the residential sector. Less than 20 % of all new residential building relates to individual house building. In Germany, by contrast, the figure is more than 90 %. In the Netherlands, large areas are released by the Government for building purposes, and on such areas the building and construction industry erects as much as several thousand residential units (e.g. 'VINEX locaties'). In building projects on this scale, building materials that require high investment but involve lower wage costs, such as in situ concrete using the tunnel-forming method, are profitable. Consequently, bricks, which are labour-intensive at the building site (small size and need for jointing) and hence entail higher wage costs and are more time consuming, are used to only a minor extent.

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

- (47) Sand-lime bricks are the traditional building material in the Netherlands, since they are very cheap to produce and can be used with great flexibility, speed and on favourable cost terms in the building process (large units, cut to the required shape in the factory, no jointing necessary).
- (48) Aerated concrete, which is very widely used in Germany in load-bearing walls because of its good heat-insulating properties, is, despite this advantage, not so widely used in the Netherlands because of its substantially higher price compared to sand-lime. In Germany, 30 cm-thick aerated concrete units are used for load-bearing walls. These have then only to be plastered and painted to produce a complete wall that meets high heat-insulation requirements. There are no costs for facing masonry and additional insulation. In the Netherlands, by contrast, smooth, plastered external walls are not customary. The preference there is for facades which give the impression of brickwork. This is done by means of brickwork facing in front of the load-bearing wall. This means that the cost advantage of aerated concrete, which does not need insulation and facing, is forfeited and hence that aerated concrete is a much more expensive building material than sand-lime. Consequently, aerated concrete is used only occasionally in the Netherlands for load-bearing walls in residential construction.
- (49) However, since aerated concrete costs about the same as gypsum walls, is relatively light, but affords better heat insulation, aerated concrete products are used in the Netherlands for non-load-bearing walls. Sand-lime is also used here. This is because it has very good sound-insulating properties which may, in some cases, offset its disadvantages as a heavy building material. In addition, because of its constructional properties, it is particularly suitable for high, non-load-bearing walls, such as are required primarily in non-residential construction.
- (50) There is therefore only limited competition in the Netherlands between, on the one hand, products used in load-bearing walls and, on the other, those used in non-load-bearing walls. This prompts the Commission to draw a distinction in the Netherlands between a relevant product market in load-bearing walls and one in non-load-bearing walls. This is despite the fact that some wall-building materials that are suitable for load-bearing walls may also be used in non-load-bearing walls and vice-versa. This is the case in particular with sand-lime, which is the only wall-building material which is used to any significant extent equally in load-bearing and non-load-bearing walls. Firms which make products suitable for both types of wall are, in the market in load-bearing walls, in competition with a largely different set of competitors and faced with different competitive conditions than in the market in non-load-bearing walls.
- (51) In setting its prices for products used in load-bearing walls, CVK, as the only sand-lime brick producer in the Netherlands, is not restricted by prices charged on the market in products intended for non-load-bearing walls. The Commission's market investigation shows that CVK often knows the specific use of its products⁽¹¹⁾ and might therefore be in a position to determine its prices on the basis of whether its sand-lime products are being used in load-bearing or non-load-bearing walls. If this is not the case, it is to be assumed that CVK tailors its pricing strategy primarily to the requirements of the market in load-bearing walls, since it sells [> 80]* % of its products on that market. The share of CVK's total sales accounted for by sand-lime products sold for non-load-bearing walls, at 10 %, is too small for it to be assumed that it has any significant influence on CVK's pricing of its products intended for load-bearing walls.
- (52) The results of the market investigation raise the question of whether and to what extent in situ concrete is also to be included in the market in wall-building materials for load-bearing walls. This applies in particular to in situ concrete used in tunnel forming. As already explained above, this technique involves high fixed investment costs which become worthwhile only if at least some 30 to 50 residential units of identical form and size are to be built. This means that this method does not represent an alternative, not only in the case of small projects, but also in the case of large projects in which, for aesthetic and social reasons, a repetitive building style is to be avoided. Furthermore, as already explained, the tunnel forming method allows not only walls but also, as part of the same process, ceilings to be produced. For these reasons, a decision to opt for the tunnel-forming method is not so much a price decision as a decision in favour of a particular system. However, the question of the inclusion of in situ concrete and, in particular, in situ concrete used in tunnel forming, in the market in wall-building materials for load-bearing walls can be left open, as it does not affect the result of the assessment.
- #### 4. CONCLUSION CONCERNING THE RELEVANT PRODUCT MARKETS
- (53) On the basis of the considerations set out in recitals 29 to 52 in particular, the Commission takes the view that, for the purposes of assessing the notified concentration, a distinction has to be made in the Netherlands between a market in building materials for load-bearing walls and a market in building materials for non-load-bearing walls. As far as the market in building materials for load-bearing walls is concerned, the question of whether in situ concrete, in particular that used in tunnel forming, is to be included in this market, may be left open.
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- ⁽¹¹⁾ In particular for elements cut for a specific use or for specific deliveries; see paragraph 32. Haniel has also indicated that, generally, it must be assumed that, above a given wall strength, the product is used for load-bearing walls.

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

B. RELEVANT GEOGRAPHIC MARKETS

- (55) Leaving aside Germany, the activities of Haniel and Fels overlap in the Netherlands, Belgium and, possibly, France. As regards the part of the merger not referred to the *Bundeskartellamt*, the merger results in additions of market shares that are significant from a competition law point of view only in the Netherlands.
- (56) Haniel defines the relevant geographic market with regard to the Netherlands as national. Although a few firms involved in the building-materials trade tended to operate on a regional basis, it argues, transport costs in the Netherlands were not of such significance that building materials could not be supplied throughout the entire territory of the Netherlands. Wall-building materials were transported by lorry, usually from the production site direct to the building site.
- (57) The investigations have confirmed that the Dutch market is national. The market investigation has shown that the prices charged for most wall-building materials are calculated free at production site for delivery throughout the Netherlands, even though transport costs represent a not insignificant cost factor. CVK, as the only producer and supplier of sand-lime, can moreover supply any building site in the Netherlands direct from the nearest sand-lime works.
- (58) Although in the Dutch border areas there are evidently imports of wall-building materials from Belgium and Germany into the Netherlands, these are marginal and do not justify the inclusion of parts of Belgium and Germany in the relevant geographic markets. The market investigation has revealed the existence of barriers to market entry based, in particular, on building and industrial safety regulations. For example, bricks laid manually may not weigh more than 18 kg in the Netherlands which is not the case in other Member States. On the other hand, building standards in Germany dictate that comparable wall thicknesses must be stronger and, given the extra materials that requires, more expensive than in the Netherlands. All the important undertakings that operate on the Dutch market in wall-building materials are also established in the Netherlands. Belgian and German producers operating in the Netherlands also do so via Dutch subsidiaries.

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

C. COMPETITIVE ASSESSMENT

- (60) The concentration involved in this case does not create or strengthen, on any of the relevant product and geographical markets within the meaning of Article 2(2) of the Merger Regulation, a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market.
- (61) Leaving Germany aside, given that its market is not being examined by the Commission in these proceedings, the activities of Haniel and Fels overlap in the Netherlands and, to a limited extent, Belgium, and possibly also in France.

1. THE NETHERLANDS

(a) *Control of CVK by Haniel*

- (62) The assessment of the merger in the Netherlands in the light of competition law depends on whether the market shares of the CVK cooperative, in which Haniel has an indirect shareholding of 50 %, are to be ascribed to Haniel.
- (63) In the Netherlands there are altogether 11 sand-lime brickworks, all of which are members of the CVK cooperative. Of these brickworks, five are wholly owned by Haniel, three are wholly owned by the Dutch building-materials group Cementbouw and the remaining three are owned 50/50 by Haniel and Cementbouw. The shares in the CVK cooperative are apportioned among the 11 sand-lime brickworks that make it up in such a way that the wholly owned subsidiaries of Haniel and the wholly owned subsidiaries of Cementbouw together have equal-sized shareholdings in CVK, with the result that overall Haniel and Cementbouw each indirectly have a 50 % stake in CVK.
- (64) CVK, which was originally set up to carry out joint marketing on behalf of its members, was made subject by a pooling agreement in 1999 to management by those members. In the pooling agreement and in the statutes (*statuten*) of CVK it is stipulated that CVK members are to be bound by CVK's instructions, that the executive bodies may to only a limited extent comprise representatives of the parent companies and that the members must include a CVK representative in their management. It was also agreed that the members may appoint only one member of their shareholders to their management.

- (65) Strategic decisions concerning CVK are taken by its managing board (*Raad van Bestuur*) by a simple majority. Members of the *Raad van Bestuur* and of the supervisory board (*Raad van Commissarissen*) are appointed and removed by the members' meeting. Pursuant to the pooling agreement and the statutes, no member of the *Raad van Bestuur* may perform any function in one of the parent companies of the CVK members (Haniel and Cementbouw), and no persons who perform any function in Haniel or Cementbouw may form a majority on the *Raad van Commissarissen*. The day-to-day management of CVK and its members is in the hands of the *Raad van Bestuur*; the *Raad van Commissarissen* exercises the supervisory powers normally vested in such an organ under Dutch company law without being able to exert a direct influence over strategic corporate decisions.
- (66) Haniel takes the view that, owing to CVK's corporate structure as described above, the cooperative is, despite the 50 % indirect interest which Haniel and Cementbouw each have in it, controlled exclusively by itself and not by its member companies and/or their shareholders.
- (67) Pursuant to Article 3(3) of the Merger Regulation, the control of an undertaking consists in the possibility of exercising decisive influence on it. The question is whether the person or persons exercising control are in a position, alone or jointly, to determine the undertaking's strategic decisions. The decisive factor here as a rule is the composition and decision-making procedures of the body responsible for appointing and removing the management and approving any other strategic decisions.
- (68) In CVK's case, strategic corporate decision-making is a matter solely for the *Raad van Bestuur*. Whoever determines the composition of the *Raad van Bestuur* is therefore in a position to control the undertaking, for it is to be expected that, when taking strategic decisions, the members of the *Raad van Bestuur* take into account the interests of the person or persons who decide whether to appoint or remove them. Since the members of the *Raad van Bestuur* are appointed by the CVK members' meeting by a simple majority, and since in the members' meeting the representatives of the member undertakings in which Haniel holds the entire share capital and the representatives of the member undertakings in which Cementbouw holds the entire share capital each have the same number of votes and hence the representatives of those member undertakings in which Haniel and Cementbouw each have a 50 % share have a casting vote, both Haniel and Cementbouw can indirectly block the appointment and removal of members of the *Raad van Bestuur*. Their joint agreement is accordingly needed for every appointment or removal of a member of the *Raad van Bestuur*.
- (69) This means that Haniel and Cementbouw jointly control CVK within the meaning of Article 3(3) of the Merger Regulation.
- (70) The Commission is therefore of the opinion that CVK's market shares must be assigned to Haniel for the purposes of this Decision.
- (b) **The market in wall-building materials for load-bearing walls**
- (71) In the Netherlands, Haniel already occupies, through its indirect shareholding in CVK, the only sand-lime brick manufacturer, a dominant position on the market in wall-building materials used in load-bearing walls. However, this dominant position will not be significantly strengthened by the acquisition of Fels. This conclusion is based on the following reasons.
- (aa) **Structure of the market**
- (72) In 2000, the Dutch market in wall-building materials for load-bearing walls had a volume of 2,1 million m³ and was worth EUR 356 million. If in situ concrete is excluded from the load-bearing walls' market, the latter's volume shrinks to 1,8 million m³ and its value to EUR 276 million. If only in situ concrete cast by the tunnel-forming method is excluded, the market has a volume of 1,9 million m³ and is worth EUR 322 million⁽¹²⁾.
- ⁽¹²⁾ On the assumption that 40 % of the in situ concrete used in the Netherlands is cast using the tunnel-forming method; see footnote 10.

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

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

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

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

- (74) The Commission considers that, through its holding in CVK, Haniel has a dominant position on the Dutch market in wall-building materials for load-bearing walls. This applies regardless of whether or not in situ concrete should be included in this market.
- (75) The Court of Justice has defined a dominant position as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.
- (76) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among which the existence of very large market shares is highly important. Important evidence of the existence of a dominant position is, moreover, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest ⁽¹⁴⁾.
- (77) Haniel (CVK) has a share of more than [50 to 60]* % of the market in wall-building materials for load-bearing walls. Its main competitor is Cementbouw ⁽¹⁵⁾, with a market share of just under [2 to 5]* %. This figure does not take account of Cementbouw's stake in CVK, which for the purposes of this assessment is assigned in its entirety to Haniel. Cementbouw's market share of approximately [2 to 5]* % is based solely on its precast concrete walling unit and in situ concrete activities. The next-largest competitor is the in situ concrete manufacturer Mebin, with a market share of around [2 to 5]* %. Other competitors have market shares of 2 % or less.
- (78) The market share of Haniel (CVK) is therefore more than 10 times bigger than that of the leading competitor. In view, however, of the close structural links between, and common interests of, Haniel and Cementbouw in CVK, it is by no means clear how far Cementbouw and Haniel are in competition with one another. The largest competitor with no links with Haniel is, with its [2 to 5]* % or so market share, much smaller, Haniel being [10 to 15]* times bigger than this competitor.
- (79) If in situ concrete were not to be included in the definition of the market in wall-building materials for load-bearing walls, the market share of Haniel (CVK) would be [60 to 70]* % as Haniel (CVK) does not supply in situ concrete. Furthermore, the largest independent competitor, Mebin, would then not be active in the relevant product market. This would leave only a limited number of much smaller competitors whose market shares do not exceed [0 to 2]* %, or much less, even, in some cases. If only in situ concrete cast by the tunnel forming method is excluded from the market definition, the market share of Haniel (CVK) would be [50 to 60]* %.
- (80) None of the competitors of Haniel (CVK) in the Netherlands is active in the sand-lime brick sector. CVK is the only producer and supplier of this building material in the Netherlands. In that country, sand-lime bricks are, however, for the reasons given above, the traditional and, what is more, most popular wall-building material. Furthermore, they are the only wall-building material to be used to a significant extent in both load-bearing and non-load-bearing walls.
- (81) Substantial market entry barriers exist. CVK controls all the sand-lime brick works in the Netherlands and hence the production of by far the most important wall-building material assignable to the relevant product market. The Commission's market investigation has shown that it would be possible for manufacturers of other wall-building materials to undertake the manufacture of sand-lime brick products only at great expense in terms of time and investment; the same is also true of other wall-building materials such as aerated concrete. The production processes and hence the production plants are different for each wall-building material. A switch to production of sand-lime bricks would also depend on the acquisition of the necessary official authorisations for the working of lime deposits. For these reasons, a switch of production by competitors is not considered a serious possibility.
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- ⁽¹⁴⁾ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 39; see also Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraphs 201 and 202.
- ⁽¹⁵⁾ Until mid-2001, Cementbouw was a subsidiary of the Dutch building group NBM Amstelland NV. At the beginning of the year, the Cementbouw group was sold to CVC Capital Inc., a venture capital firm.

- (82) The customers of CVK (Haniel) have no buyer power. No one customer is potentially the buyer of a substantial part of CVK's output. In the case of sand-lime bricks, which are by far the most important of all the wall-building materials assignable to the relevant product market, there are no alternative suppliers.
- (83) Haniel's market position can thus be summed up as follows: Haniel (CVK) has, at well over [50 to 60]* %, by far the biggest market share and is linked to the next-largest competitor, which is 10 times smaller, through CVK. The remaining market volume is fragmented and divided among competitors with market shares of just a few percent. Haniel controls, moreover, in the form of CVK, the only Dutch supplier of the most important building material in the Netherlands. The market power available to Haniel (CVK) is not offset by buyer power on the other side of the market. The combination of all these factors gives Haniel (CVK) a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.
- (cc) The concentration will not strengthen the dominant position of Haniel (CVK)**
- (84) However, the Commission is of the opinion that the concentration will not strengthen the dominant position of Haniel (CVK) on the Dutch market in wall-building materials for load-bearing walls. The main reasons for this are as follows.
- (85) As a result of the concentration, the market share of Haniel (CVK) will be increased by only [0 to 2]* % to [50 to 60]* %. If in situ concrete were deemed not to form part of the market in wall-building materials for load-bearing walls, the market share of Haniel (CVK) would be increased by [0 to 2]* % to [60 to 70]* %; and if only in situ concrete cast by the tunnel forming method were to be excluded from the relevant market, the increase would be [0 to 2]* % and the joint market share [50 to 60]* %.
- (86) A possible strengthening of the existing dominant position of Haniel (CVK) cannot be assessed on the basis of the size of the increase in market share alone. This is particularly because the Dutch market in wall-building materials for load-bearing walls is already so rigidly carved up that very little in the way of competition takes place there and consequently even a small increase in Haniel's market position may remove the few remaining opportunities still open to competitors. In particular, the consolidation of the market position of the dominant undertaking through an increase in existing market entry barriers or the creation of new ones or some other extension in the room for manoeuvre of the dominant undertaking as a result of which competitors' existing scope is restricted (e.g. through an extension in the product range) may, depending on the circumstances of the case, constitute a strengthening of a dominant position within the meaning of Article 2(2) of the Merger Regulation.
- (87) In the present case, however, the Commission's market investigation has shown that the takeover of Fels by Haniel will not lead to this kind of consolidation and strengthening of the existing market position of Haniel (CVK).
- (88) It is true that Haniel will, through the takeover of Fels, extend its product range. Before the merger, Haniel (CVK) can supply only one wall-building material — sand-lime bricks — which, despite being by far the most important wall-building material for load-bearing walls, is, in the case of non-load-bearing walls, with a market share of [15 to 20]* %, in no stronger a position than gypsum and aerated concrete. These two products are, however, manufactured by Fels. Following the merger, Haniel (CVK) plus Fels would be in a position to supply all three products and hence cover the bulk of demand for wall-building materials for load-bearing and non-load-bearing walls.
- (89) However, Fels is not one of the leading suppliers in the Netherlands of either gypsum or aerated concrete. In the case of aerated concrete, which can also be used in load-bearing walls, Ytong is the leading supplier. Accordingly, on the neighbouring market in wall-building materials for non-load-bearing walls, on which aerated concrete plays a greater role than on the market in wall-building materials for load-bearing walls under discussion here, Fels has a market share of only [5 to 10]* %, as against [15 to 20]* % for Ytong. The market investigation has shown that Ytong is well established in particular as a supplier to the leading Dutch building-materials trading groups and Fels therefore has difficulties supplying them as well. Fels is consequently currently reliant on the 'independent dealers', who make fewer sales and are less strong financially. Furthermore, Fels does not have its own production plant in the Netherlands, but operates on the market only through imports. It cannot therefore be anticipated with sufficient certainty that, solely through the takeover of Fels, Haniel will be placed in a position to induce customers to a significant extent to obtain all their required wall-building materials from itself and thus to further restrict the scope of other suppliers. Although customers surveyed during the market investigation referred to the extension of the product range offered by Haniel, they also stated that they did not fear any significant price increases so long as Ytong remained on the market as an independent supplier of aerated concrete.
- (90) In these circumstances, the disappearance of Fels as an independent competitor is, on the basis of the facts known to the Commission, even taking account of the already substantially reduced level of competition, not such as to result in a strengthening of the existing dominant position of Haniel (CVK).

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

- (91) In 2000 the Dutch market in wall-building materials for non-load-bearing walls had a volume of 1,7 million m³ and was worth EUR 282 million. The following table shows the market shares (by volume) of the parties and of their main competitors including all non-load-bearing wall-building materials being included ⁽¹⁶⁾:

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

- (92) Haniel (CVK) is thus, with a market share of [15 to 20]* %, the market leader on the market in wall-building materials for non-load-bearing walls and, as already stated, the only supplier of sand-lime bricks, the main building material for load-bearing and for non-load-bearing walls. However, as the leading aerated concrete

producer for non-load-bearing walls, Ytong, with a [15 to 20]* % market share, is very close to the market position of Haniel (CVK), and the three main gypsum producers, GIBO, Lafarge and Gyproc, have substantial market shares of between [5 to 10]* and [10 to 15]* %. Given this market structure, the possibility of Haniel (CVK) having a dominant position can be ruled out.

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

(d) **Finding**

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

2. OTHER NATIONAL MARKETS

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

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

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

- (97) In France, Haniel has a stake in ready-mixed concrete plants; Fels (Hebel) operates in France through three aerated concrete plants. Market share additions will arise only if one assumes a larger market for wall-building materials that includes concrete precast products and in situ concrete. In that case, the combined market share amounts to about [0 to 2]* %. The possibility of market shares that reach competitively critical levels arising can be ruled out even if a distinction is made between building materials for load-bearing and non-load-bearing walls and/or if a possible regional market definition is applied.
- (98) The concentration will not therefore create or strengthen a dominant position in Belgium and France.

VI. CONCLUSION

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

Done at Brussels, 21 February 2002.

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision is addressed to:

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

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 27 November 2002****on the State aid implemented by Germany for Ambau Stahl- und Anlagenbau GmbH***(notified under document number C(2002) 4483)***(Only the German text is authentic)****(Text with EEA relevance)**

(2003/261/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 29 December 1999 Germany informed the Commission of aid to Ambau Stahl- und Anlagenbau GmbH (Ambau). The aid case was registered under NN 11/2000. By letters dated 21 January, 15 May and 26 October 2000, the Commission asked for further information. Germany replied by letters dated 4 April, 22 June and 14 December 2000.
- (2) By letter dated 16 March 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid and invited interested parties to submit their comments ⁽²⁾. The case was then registered as C 15/2001. Comments presented by Germany were received on 19 and 20 June 2001. Comments from the aid recipient were received by letter dated 28 June 2001. By letter dated 28 December 2001, the Commission informed Germany that it had extended the proceedings

to include measures supposedly granted under approved schemes and again invited interested parties to submit their comments ⁽³⁾. Comments from Germany on the extension of the proceedings were received on 7 February 2002. The Commission requested further information from Germany by letter of 16 September 2001. Germany replied by letter dated 17 October 2001. Further comments from the aid recipient were received by letter dated 23 May 2002.

II. DESCRIPTION**1. The beneficiary**

- (3) The case concerns financial measures for the restructuring of the Gräfenhainichen plant of Ambau, a company situated in the new German Länder which is active in the sector of process plant engineering. Ambau operates two production plants in the new German Länder. One is situated in Sperrenberg, Brandenburg, and the other in Gräfenhainichen, Saxony-Anhalt.
- (4) The plant in Gräfenhainichen was formerly owned by Anhaltiner Stahl- und Anlagenbau (ASTA), a State-owned company. In 1990, ASTA was taken over by the Treuhandanstalt (THA), which in 1992 privatised the company through a management buy-out (MBO). In 1996, ASTA incurred losses of DEM 7,5 million and subsequently had to file for bankruptcy. Until the end of 1997, the operation of ASTA was continued by the administrator.
- (5) In December 1997, Ambau took over the production of ASTA as well as 92 of the former 270 employees. Before the take-over, Ambau employed 42 people at its plant

⁽¹⁾ OJ C 179, 23.6.2001, p. 6 and OJ C 105, 1.5.2002, p. 7.

⁽²⁾ See footnote 1.

⁽³⁾ See footnote 1.

in Sperrenberg. Consequently, the company as a whole employed some 130 people after the transfer of ASTA's activity to Ambau. Since then the workforce has not increased significantly. In the accounting year 2000/2001, Ambau employed 139 people, i.e. 25 in Sperrenberg and 114 in Gräfenhainichen. The owners of Ambau are two private businessmen, each with a 50 % stake.

- (6) On 4 December 1997, Ambau concluded a contract with the administrator on the leasing of ASTA's assets. In January 1998, the Grundstücksfonds Sachsen-Anhalt (GSA), which belongs to a publicly-owned body, took over the assets from the administrator and later concluded a new long-term leasing contract with Ambau. Within the first ten years, the contract could only be terminated if there were 'extraordinary circumstances' within the meaning of the German civil code ⁽⁴⁾. In this initial period Ambau also has the option of buying the assets. Ambau is contractually responsible for the maintenance and renovation of the site. Despite the investor's original intention of founding a new company, the activity in Gräfenhainichen was integrated into Ambau GmbH itself at the request of the financing banks.

2. The restructuring

- (7) The main problems which led to the difficulties of ASTA were mismanagement and the absence of a clear product

profile. According to Germany, ASTA processed almost every available order without taking account of its profitability and without having a clear business plan.

- (8) The restructuring plan provided for a restructuring period of three years from 1998 to 2001. According to the new concept, Ambau's plant in Gräfenhainichen should specialise in a few main activities. Firstly, due to the growing importance of sustainable energy, it is to concentrate on the production of components for new technologies such as wind energy. Secondly, it is to engage in the production of other components for power plants such as turbines and exhaust systems. Other fields of specialisation are the assembly for furnaces to be used in the metallurgic and chemical industry as well as the production of large steel structures such as bridges and towers.
- (9) The new product profile required new working assets (stock and inventories) and the development of a new customer base. Furthermore, outdated machinery needed to be replaced and the over-large infrastructure, which initially led to excessive fixed costs, needed to be reduced.
- (10) The main investments during the restructuring were the modernisation of the production assets, the replacement and maintenance of some of the machinery as well as the introduction of new IT and software. The costs of restructuring initially were indicated as amounting to DEM 11 249 000.

- (11) The following performance originally was projected by the plan:

	(in DEM)		
	1998/1999	1999/2000	2000/2001
Turnover	13 700 000	16 700 000	18 500 000
Material costs	4 679 000	5 797 000	6 420 000
Staff costs	4 480 000	4 490 000	4 781 000
Other operational costs	2 171 000	2 727 000	3 020 000
Result before tax	- 164 000	494 000	676 000
Profit/loss	- 352 000	208 000	390 000

⁽⁴⁾ Circumstances which render the continuation of the contract unacceptable to the other party, such as serious breach of contractual obligations or impossibility of the contractually specified use of the object (Articles 545 and 569 of the civil code in the old version, now covered by Articles 542 *et seq.* in the new version).

3. State financial measures in support of restructuring

- (12) Before the decision to initiate formal investigation proceedings the following measures were indicated as contributions from public sources which were granted after the take-over in 1997 for the restructuring:

Table 1

Measures originally indicated as public contributions

(in DEM)		
1.	Waiver of former BvS(*)-loans granted in May 1999	1 000 000
2.	Regional investment grants supposedly granted in accordance with an approved aid scheme ⁽⁵⁾ ('GA-Mittel')	545 000
3.	80 % guarantee of the Land of Saxony-Anhalt in relation to a DKB(**) credit ('Avalrahmen') of DEM 4 000 000 supposedly granted in accordance with an approved aid scheme ⁽⁶⁾	3 200 000
4.	80 % guarantee of the Land of Saxony-Anhalt in relation to BfG(***)-loans of DEM 1 700 000 supposedly granted in accordance with an approved aid scheme ⁽⁷⁾	1 260 000
5.	Consolidation loan supposedly granted in accordance with an approved aid scheme ⁽⁸⁾	500 000
6.	56 % guarantee granted by the Land of Saxony-Anhalt in relation to a DKB-loan of DEM 1 500 000 supposedly granted in accordance with an approved aid scheme ⁽⁹⁾	840 000
7.	Dormant equity holding by the WSA(****) supposedly granted in 1999 under an approved aid scheme ⁽¹⁰⁾	1 500 000
Total		8 845 000

(*) Bundesanstalt für vereinigungsbedingte Sonderaufgaben.

(**) Deutsche Kreditbank.

(***) Bank für Gemeinwirtschaft.

(****) Wagnisbeteiligungsgesellschaft Sachsen-Anhalt.

⁽⁵⁾ SG(99) D/3472, 17.5.1999 (C 84/98).

⁽⁶⁾ SG(91) D/15633, 8.8.1991 (N 431/91).

⁽⁷⁾ See Footnote 6.

⁽⁸⁾ SG(97) D/9273, 10.11.1997 (N 452/97).

⁽⁹⁾ SG(91) D/13344, 15.8.1991 (N 297/91).

⁽¹⁰⁾ SG(97) D/9273, 10.11.1997 (N 452/97).

4. Financial contributions from other sources

- (13) Before the initiation of proceedings, Germany indicated the following contributions as contributions from the recipient or from private-sector sources:

Table 2

Measures originally indicated as private contributions

		(in DEM)
8.	Capital increase partially publicly refinanced by the DtA (*)	300 000
9.	Loan granted by Sparkasse Teltow in 1995 at 8,5 % p.a. and secured by guarantees of the investor (this loan was allocated to the restructuring in Gräfenhainichen in June 1999)	204 000
10.	Own risk of 20 % concerning item No 3 in Table 1	800 000
11.	Own risk of 20 % concerning item No 4 in Table 1	440 000
12.	Own risk of 44 % concerning item No 6 in Table 1	660 000
Total		2 404 000

(*) Deutsche Ausgleichsbank.

5. Market information

- (14) With its plant in Gräfenhainichen, Ambau is active in the field of general-purpose equipment (NACE Rev. 1 29.1 and 29.2) as well as special purpose equipment (NACE Rev. 1.29.4 and 29.5).
- (15) According to the initial information received, between 1998 and 1999 Ambau achieved 30 % of its turnover in Germany and 70 % through direct and indirect exports. At the end of 1998, Ambau held a market share on the German market of 2,5 % in the field of plant construction in the wind energy sector and 0,089 % in the field of equipment for the metallurgic and chemical industry. At European level Ambau's market shares are stated to be marginal and therefore, according to Germany, cannot be specified in percentage terms. The turnover of DEM 18,5 million in 2000/2001 is generated as follows: turbines for power generation (35 %); components for wind energy (35 %); equipment for metal-using industries and mechanical engineering and repair work (30 %).
- (16) On the basis of the initial information provided, capacities in Gräfenhainichen would remain the same.

6. The decisions to initiate and extend the proceedings under Article 88(2) of the EC Treaty

- (17) In the decision to initiate the formal investigation procedure, the aid was assessed under the Guidelines on state aid for rescuing and restructuring firms in difficulty adopted in 1994⁽¹¹⁾ (the 1994 Guidelines), since the aid was awarded before the publication of the new Guidelines in 1999⁽¹²⁾ (the 1999 Guidelines).

⁽¹¹⁾ OJ C 368, 23.12.1994, p. 12.

⁽¹²⁾ OJ C 288, 9.10.1999, p. 2.

- (18) In the decision to initiate proceedings, the Commission expressed the following doubts:
- (a) whether the leasing contract between the GSA and the investor included aid, since the GSA is a publicly owned body and the Commission did not possess sufficient information to assess whether the contract was concluded under market conditions.
 - (b) whether the ad hoc aid granted to the company complied with the conditions of the 1994 Guidelines. In particular:
 - (i) whether the recipient is eligible for restructuring aid;
 - (ii) whether, in view of the company's limited resources and the decline of the company's equity in particular, the restructuring plan was suitable to restore viability within a reasonable time scale;
 - (iii) whether the aid did not unduly distort competition, since, on the basis of the market information available at the time proceedings were initiated, it could not be excluded that Ambau had to reduce its capacity and that the information at that time only indicated that the capacity was not being increased;
 - (iv) whether the aid was in proportion to the costs and benefits of the restructuring, since it was doubtful whether measures 8 and 9 in Table 2 above could be considered as contributions by the recipient from its own or external commercial resources. Measure 8, the DtA-loan, appeared to be partially financed through public resources and may constitute aid. It was not clear whether measure 9, the Sparkasse-loan, was used for the plant in Sperrenberg or Gräfenhainichen.
- (19) Since it also was not clear whether the 56 % guarantee of the Land of Saxony-Anhalt (measure 6 in Table 1) and the dormant equity holding of the WSA (measure 7 ⁽¹³⁾) complied with the conditions of the schemes referred to by Germany, the Commission issued an information injunction pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁴⁾.
- (20) Germany subsequently supplied additional information on the application of the aforementioned schemes. Concerning the 56 % guarantee (measure 6 ⁽¹⁵⁾), Germany informed the Commission that this measure was granted to Ambau in 1996 before the take-over of the ASTA plant in Gräfenhainichen and therefore was not granted to a company in difficulty. Concerning the dormant equity holding (measure 7 ⁽¹⁶⁾), Germany informed the Commission that this measure actually was granted under a different aid scheme than initially indicated ⁽¹⁷⁾. Additionally, concerning the DtA loan (measure 8 ⁽¹⁸⁾) which initially was indicated as a contribution by the recipient, Germany corrected the information it had provided and stated that this measure was financed under an aid scheme ⁽¹⁹⁾ and subsequently should be considered to be existing aid.
- (21) In the decision to extend the formal investigation procedure, with regard to the 54 % guarantee (measure 6 ⁽²⁰⁾) the Commission stated that it was not to be further assessed since, according to the additional information, it appeared to comply with the conditions of the scheme referred to. Furthermore, the Commission considered that the dormant equity holding (measure 7) did not comply with the conditions of the scheme referred to by Germany since it was granted in

⁽¹³⁾ See Table 1.

⁽¹⁴⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁵⁾ See Table 1.

⁽¹⁶⁾ See Table 1.

⁽¹⁷⁾ SG(97) D/6976, 12.8.1997 (C 337/97).

⁽¹⁸⁾ See Table 2.

⁽¹⁹⁾ SG(99) D/9273, 28.1.1999 (N 463/98).

⁽²⁰⁾ See Table 1.

combination with other restructuring measures and therefore had to be assessed as ad hoc aid. The DtA-loan (measure 8) has to be considered ad hoc aid since the interest rate of the DtA-loan was lower than provided for in the scheme referred to by Germany and the measure was not granted within four years after the start-up, as provided for in the scheme.

- (22) These two measures must therefore be assessed as individual aid measures in this decision.

III. COMMENTS FROM GERMANY AND THE RECIPIENT

- (23) During the formal investigation proceedings, Germany supplied the following new or amended information, which also comprises comments from the recipient received after the decisions to initiate and extend the proceedings.
- (24) Concerning the new leasing contract concluded between Ambau and the GSA, Germany supplied an expert's report according to which the lease price had to take into account the particularly bad condition of the premises, for the restoration and maintenance of which Ambau was contractually responsible, as well as the fact that Ambau also took over the administration and maintenance of parts of the premises that it did not use itself.
- (25) Germany states that, before the take-over of ASTA's activity in Gräfenhainichen, Ambau was a very small enterprise with limited resources, which employed fewer than 50 people. Between 1993 and 1997, Ambau generated annual profits of about DEM 20 000 on average on an annual turnover of DEM 10 million. Germany also argues that the original activity in Sperrenberg required little working capital, since it mainly consisted of assembly work, whereas the new activity in Gräfenhainichen required a much higher working capital which Ambau could not have financed exclusively out of its own resources. Furthermore, as a result of the take-over of ASTA's existing orders, losses of DEM 1,2 million were incurred. The take-over of ASTA's activity consequently led to a decrease of Ambau's equity as well as an increase of the company's liabilities.
- (26) Germany also submitted additional information according to which all the state financial measures were exclusively used for the restructuring of the Gräfenhainichen site.
- (27) With regard to the viability of the restructuring plan, Germany argues that Ambau's effective equity ratio is higher than indicated in the company data because for the time being the aid received needs to be entered as a liability in the annual balance sheet until it is approved by the Commission.
- (28) The following information on the actual performance of Ambau was also supplied:

	1997/1998 ^(a)	1998/1999	1999/2000	2000/2001
Turnover	(...)* (*)	(...)*	(...)*	(...)*
Material costs	(...)*	(...)*	(...)*	(...)*
Staff costs	(...)*	(...)*	(...)*	(...)*
Other operating costs	(...)*	(...)*	(...)*	(...)*
Result before tax	(...)*	(...)*	(...)*	(...)*
Profit/loss	(...)*	(...)*	(...)*	(...)*

^(a) Before the integration of ASTA.

(*) Business secret.

- (29) As far as potential distortion of competition is concerned, Germany provided additional information on the market according to which the markets for plant construction and for wind energy in particular were growing. Germany stated that after the restructuring the total amount of possible production hours at Gräfenhainichen would be reduced compared to the ones formerly possible at ASTA before the take-over. The capacity in Sperrenberg remained stable. The actual market shares of Ambau in its main sectors of activity were as follows:

Market share in plant construction	Power plants	Wind energy	Bridge construction
Germany	< 0,1 %	2,5 %	< 0,1 %
EU	< 0,1 %	1 %	< 0,1 %

- (30) As to whether the aid was in proportion to the costs and benefits of the restructuring, Germany informed the Commission that the actual restructuring costs amounted to DEM 15,3 million, which comprised the following:

(in DEM million)		
1.	Loss coverage	3,19
2.	Investments and fixed assets	1,72
3.	Operating funds (required for the new product profile)	5,96
4.	Provision for warranty	4,00
5.	Miscellaneous	0,45
Total		15,32

Note: Table contains rounded figures.

- (31) In relation to the loan of the Sparkasse Teltow (measure 9 ⁽²¹⁾), Germany states that it was used for the restructuring in Gräfenhainichen. Germany argues that the loan therefore has to be regarded as a contribution by the recipient to the restructuring.
- (32) Germany also informs the Commission that the workforce had agreed to a derogation from a collective labour agreement bringing a saving of DEM 1 919 000 and that Ambau's suppliers had agreed to extensions in periods allowed for payment worth DEM 2 150 000, both of which should be regarded as a contribution by the recipient to the restructuring.
- (33) On the question of whether measure 7 in Table 1, the dormant equity holding by the WSA, complied with the conditions of the scheme referred to by Germany, Germany corrects its previous statement that it constituted existing aid and now states that this measure should be assessed as ad hoc aid.

⁽²¹⁾ See Table 2.

- (34) On the question of whether the DtA-loan (measure 8 in Table 2) complied with the conditions of the scheme referred to by Germany, Germany argues that the scheme did allow the stipulated four-year granting period to be exceeded in exceptional circumstances. Germany also states that the interest rates applicable within the scheme are flexible and in fact had decreased. Therefore the conditions of the loan did not exceed the aid intensity provided for by the scheme.
- (35) According to the new information, the restructuring is financed as follows:

Table 3

Measures indicated as public contributions after the initiation of proceedings ⁽²²⁾

(in DEM)

1.	Waiver for the repayment of BvS loans	1 000 000
2.	Regional investment grants	550 000
3.	80 % guarantee in relation to DKB credit (Avalrahmen)	3 200 000
4.	80 % guarantee in relation to BfG-loans	1 260 000
5.	Consolidation loan	500 000
6.	56 % guarantee in relation to DKB-loan	840 000
7.	Dormant equity holding by WSA	1 500 000
8.	DtA-loan (formerly indicated as private contribution; see Table 2)	300 000
Total		9 150 000

⁽²²⁾ See also Table 1.

Table 4

Measures indicated as private contributions after the initiation of proceedings ⁽²³⁾

(in DEM)

9.	Loan granted by Sparkasse Teltow	204 000
10.	Own risk of 20 % in relation to DKB credit	800 000
11.	Own risk of 20 % in relation to BfG-loans	440 000
12.	Own risk of 44 % in relation to DKB-loan	660 000
13.	Derogation from collective labour agreements agreed to by the workforce (newly indicated contribution)	1 910 000
14.	Extension of periods allowed for payment agreed to by the suppliers (newly indicated contribution)	2 150 000
Total		6 164 000
Total Tables 3+4		15 314 000

⁽²³⁾ See also Table 2.

IV. ASSESSMENT OF THE AID

- (36) Article 87(1) of the EC Treaty declares any aid granted through State resources to specific undertakings which distorts or threatens to distort competition incompatible with the common market in so far as it affects trade between Member States. Measures falling within the scope of Article 87(1) EC Treaty that do not constitute existing aid are generally incompatible with the common market unless they fall within the scope of the derogation of either Article 87(2) or Article 87(3) of the EC Treaty.

1. State aid

- (37) In view of the additional information submitted by Germany and in particular the expert's study on the new leasing contract between Ambau and the GSA, according to which the leasing price took into account atypical financial burdens related to the leased property, the Commission concludes that its doubts whether the contract might contain state aid have been allayed.
- (38) Article 87(1) of the EC Treaty applies to all other financial measures made available by Germany to the recipient undertaking. The Commission notes that the BvS, like its predecessor, the Treuhandanstalt, is a federal agency whose task is the privatisation of the State-owned companies in the new *Länder*. The BvS is part of the Federal Administration and is accountable to it. Consequently, measures taken by it are attributable to the State.
- (39) All the measures granted by Germany involve conferring economic benefits on a specific undertaking which it would not have received from private-sector sources. The measures therefore constitute aid. By its nature such aid is likely to distort competition. Given the nature of the assistance and the existence of intra-Community trade in the sectors in which the recipient undertaking is active, the financial measures fall within the scope of Article 87(1) of the EC Treaty.
- (40) Since the waiver of the obligation to repay BvS-loans amounting to DEM 1 million (measure 1⁽²⁴⁾) was not granted under an aid scheme approved by the Commission, it has to be assessed as ad hoc aid in this Decision.

- (41) With respect to the aid stated to be awarded under approved schemes, it can be noted that, in particular on the basis of the additional information provided by Germany, measures 2 to 6⁽²⁵⁾ and measure 8⁽²⁶⁾ appear to comply with the conditions of the schemes referred to. These measures need not be further assessed in this Decision.

- (42) With regard to the dormant equity holding of DEM 1,5 million by the WSA (measure 7⁽²⁷⁾) which, according to earlier information provided by Germany, was granted under an approved aid scheme, Germany informed the Commission that this measure is not covered by the provisions of the scheme initially referred to. Consequently this measure also has to be assessed as ad hoc aid.

- (43) Consequently, aid amounting to DEM 2,5 million (measures 1 and 7⁽²⁸⁾) has to be assessed as to its compatibility with the common market in this Decision.

- (44) The Commission further notes that Germany failed to comply with its obligation under Article 88(3) of the EC Treaty to inform the Commission in sufficient time of its plans to grant the aid. From a formal point of view, the aid is unlawful therefore. This does not necessarily mean, however, that the aid is incompatible with the common market. The individual measures must therefore be examined under Article 87 of the EC Treaty.

2. Derogation under Article 87 of the EC Treaty

- (45) Article 87(2) and (3) sets out the conditions according to which aid is compatible or may be considered compatible with the common market. Article 87(3)(c) is relevant here, since the purpose of the aid was to enable the restructuring of the recipient and no other derogation mentioned in Article 87(2) and (3) was invoked or can be applied.
- (46) In its Guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission set out the conditions for positive exercise of its discretion under Article 87(3)(c) of the EC Treaty. Since the information submitted by Germany indicates that all of the aid that is to be assessed was granted to the recipient before the entry into force of the 1999 Guidelines, the 1994 Guidelines apply to the measures in question pursuant to point 101 of the 1999 Guidelines.

⁽²⁵⁾ See Tables 1 and 3.

⁽²⁶⁾ See Tables 2 and 3.

⁽²⁷⁾ See Tables 1 and 3.

⁽²⁸⁾ See Tables 1 and 3.

⁽²⁴⁾ See Tables 1 and 3.

(47) In the decision to initiate the formal investigation procedure, the Commission expressed doubts whether the following conditions of the 1994 Guidelines were met:

(a) *Eligibility for restructuring aid*

1. Firm in difficulty

(48) Companies that are eligible for restructuring aid are defined in the 1994 Guidelines as firms in difficulty which are unable to recover through their own resources or by raising the funds they need from their shareholders or borrowing. The 1994 Guidelines do not provide for a precise definition of a company in difficulty. However, typical symptoms for a company in difficulty are described as deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset flow. In acute cases the company may already have become insolvent or gone into liquidation (point 2.1 of the 1994 Guidelines).

(49) Firstly, it has to be noted that, before its activity was continued by Ambau, ASTA clearly showed a whole range of the above mentioned symptoms which finally forced it into insolvency and led to the subsequent bankruptcy proceedings. Therefore, before its activity was transferred to Ambau, ASTA would have been eligible for restructuring aid. On the other hand, it must be noted that, before it took over ASTA's activity, Ambau was a healthy company. The aid measures to be assessed in this Decision were granted after the transfer of ASTA's activity to Ambau. It must therefore be determined whether, after the transfer, Ambau was eligible for restructuring aid.

(50) Generally, a healthy investor incorporating a company into its own company could be expected to finance the restructuring from its own resources or external commercial financing. Therefore, a healthy investor that incorporates a company in difficulty into its own company without itself being in difficulty in principle cannot be considered eligible for restructuring aid.

(51) However, the 1994 Guidelines (point 3.2.4) take a less restrictive attitude on restructuring aid granted to SMEs. In this particular case, it appears that only the specific problems the company was facing as an SME had made it necessary to legally incorporate the company that was to be restructured. Ambau is a very small company with

limited resources which at the time of the take-over also was considerably smaller than ASTA. Even after the incorporation, Ambau remained an SME with limited access to commercial financing, whose investors were two private businessmen that did not have any support from a larger group.

(52) Here the information submitted by Germany indicates that the aid was exclusively used for the restructuring of the former activity in Gräfenhainichen (former ASTA) and did not help to finance other activities of the firm. As a separate entity, the activity in Gräfenhainichen could have been considered eligible for restructuring aid. The legal incorporation of the activity in Gräfenhainichen into Ambau was only undertaken at the request of the financing banks in order to obtain sufficient securities for the loans granted. This legal incorporation was due to Ambau's very limited resources. Its two investors were already committed under the financial plan through guarantees relating to their personal property. No securities other than the engagement of their business in Sperrenberg were therefore available to the investors to obtain additional external commercial funding. Such additional funding was indispensable since at the time of the take-over Ambau possessed insufficient capital to finance and restructure the newly acquired activity in Gräfenhainichen.

(53) In the specific circumstances of this case, therefore, the incorporation did not take place in order to integrate the activities of both entities, but only for external motives, i.e. to raise external funding. Only the problems that the company was facing as an SME made it necessary here to legally incorporate the entity, which was in principle eligible into the investor company in order to provide improved securities. Such a situation could also be compared to a change of ownership of the site in difficulties. According to the 1994 Guidelines, however, a change of ownership does not affect the eligibility of a firm for restructuring aid.

(54) In view of these specific circumstances that the company was facing as an SME, the aid that was granted for the restructuring of Ambau's activity in Gräfenhainichen can be assessed on the basis of the 1994 Guidelines on rescue and restructuring aid.

2. Take-over of the activity in difficulty

(55) The transfer of the activity of ASTA, which was bankrupt, to Ambau has to be regarded as the emergence of a new firm from the bankruptcy proceedings. Generally a newly created firm, even if already initially being in difficulties, cannot be eligible for restructuring aid. However, due to the exceptional circumstances in the

new German *Länder*, the Commission's practice is to apply the 1994 Guidelines to the so-called 'Auffanglösungen' ⁽²⁹⁾ in these *Länder* in cases where such arrangements occurred before the end of December 1999. This exemption applies as long as the activity of the company is continued and there is not just a sale of individual assets ⁽³⁰⁾.

(56) In this instance, the transfer of the activity in Gräfenhainichen is in economic terms very similar to the aforementioned 'Auffanglösungen' as the investors took over the whole activity of ASTA as well as a significant part of the workforce. However, since Ambau at present only leases the assets in Gräfenhainichen, the question arises whether this can be considered to be a take-over of the activity in difficulties.

(57) Here the original intention of the investors was to buy the assets in Gräfenhainichen which, due to the very limited resources of Ambau, was not possible at the time of the transfer, because the available financial resources were already entirely used up for other restructuring measures. In this context, it is also noted that Ambau did not receive any aid to purchase the assets, although this would have been permissible under the Commission's practice in relation to the 1994 Guidelines. Ambau therefore concluded a long-term leasing contract in relation to the entire activity, including the option of buying the assets. The contractual obligations such as the restricted right of cancellation and the maintenance obligation aimed at ensuring a long-term commitment by the investor to the site. Ambau subsequently invested DEM 1,7 million into the renovation of the site. Ambau also took over existing orders of ASTA in relation to which losses of DEM 1,2 million were incurred. Furthermore, the two investors contributed their existing business in Sperrenberg as well as personal guarantees to the restructuring.

(58) The leasing contract in respect of the assets did not therefore take place because of a lack of the investors' commitment to the restructuring, but was due to their limited financial resources. Through the leasing contract, the investor took over the whole production site and

not just individual assets. The investors' commitment to the site is also confirmed by the long-term lease with purchase option and by the investments and the shift of staff to Gräfenhainichen. Furthermore, with the loss-making existing orders, the original activity with its inherent difficulties was taken over. Lastly, the investors undertook substantial personal risks linked to the success of the restructuring. Even if it did not become the owner of the assets, therefore, Ambau had effectively taken over the activity in difficulty.

(59) Consequently, Ambau was eligible for aid under the 1994 Guidelines as regards the restructuring of the Gräfenhainichen site in difficulty which it had taken over.

(b) Restoration of viability

(60) Under the 1994 Guidelines, the restructuring plan should lead to the restoration of viability within a reasonable time scale after which the company should be able to compete on the market on its own merits. This is mainly to be obtained by internal measures and should involve the abandonment of structurally loss-making activities.

(61) Concerning the viability of the restructuring plan, doubts whether the company was able to accomplish the goals set out in the plan arose because of a decrease in the company's equity capital. Germany supplied additional information according to which the low equity ratio derived from the fact that the aid is entered as a liability as long as it is not approved by the Commission. Furthermore, the equity ratio is not the most decisive factor in assessing the prospects of the plan. At present, one has to note that, with the considerable staff reduction at the Gräfenhainichen site, the modernisation of the production facilities as well as the concentration on a few key activities, the major problems that led to the difficulties of ASTA appear to have been adequately addressed. Therefore, it can be assumed that the restructuring plan, which foresaw a return to profits within two to three years after the take-over, was suited to restoring the viability of the company.

(62) The Commission's initial doubts whether the plan was suited to restoring viability have therefore been allayed. This conclusion appears to be confirmed by the actual performance of the company.

⁽²⁹⁾ New companies evolving out of the bankruptcy proceedings, thereby continuing the operation of the bankrupt business.

⁽³⁰⁾ This exemption now is explicitly laid down in footnote 10 of the 1999 Guidelines, establishing that 'the only exceptions to this rule are any cases dealt with the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* in the context of its privatisation remit and other similar cases in the new *Länder*, involving companies emerging from liquidation or take-over of assets occurring up to 31 December 1999'.

(c) *Avoidance of distortions of competition*

- (63) Another condition of the 1994 Guidelines is that the adverse effects of the aid on competition should be offset as far as possible. In so far as the company is engaged in markets with excess capacity, this should mean a reduction in the company's capacity.
- (64) From the information available before the initiation of proceedings, it could not be determined whether Ambau was obliged to reduce its capacity.
- (65) Germany supplied additional information showing that the market shares of Ambau are rather insignificant. Furthermore, it can be concluded from the new information that Ambau is engaged in activities on growing markets and that the company in fact has to some extent limited its own capacities. The doubts whether the aid granted to Ambau did unduly distort competition have therefore been allayed.

(d) *Proportionality to the restructuring costs and benefits*

- (66) The Guidelines require that the aid be limited to the strict minimum needed for the restructuring to be undertaken. Therefore the recipient is required to make a substantial contribution to the restructuring from its own or external commercial sources. The latter has to be understood as commercial financing at market rates.
- (67) According to the latest information, the restructuring costs amounted to DEM 15,3 million. Germany states that contributions from the recipient to these costs amounted to DEM 6,2 million, i.e. some 40 %, comprising measures 9 to 14 in Table 4 above.
- (68) In its decision to initiate proceedings, however, the Commission expressed doubts as to whether the DtA-loan (measure 8⁽³¹⁾) and the Sparkasse-loan (measure 9⁽³²⁾) could be considered to be a contribution from the recipient.
- (69) In the latest information, Germany itself takes the view that the DtA-loan has to be regarded as aid and therefore cannot be taken into account as a contribution from the recipient.

(70) As regards the Sparkasse loan, it was doubtful whether it could be counted as a contribution as it was not clear whether it had been used for the restructuring in Gräfenhainichen. Germany has supplied additional information as to its use at the Gräfenhainichen site as well as to the terms on which it was granted. It has to be noted that the Sparkasse is a publicly controlled financial institution. In view of the fact that, at the time the loan was granted, Ambau was a very small undertaking and that the loan was secured only by personal guarantees, it is not clear whether the actual rate of 8,5 % did in fact correspond to market conditions and is acceptable as an external commercial contribution. However, even if this measure is not taken into account as a contribution from the recipient from external commercial sources, this does not have any influence on the outcome of the proportionality assessment.

(71) As regards the derogation from the collective labour agreement (measure 13⁽³³⁾) which was first mentioned in the information received after the initiation of proceedings, the Commission notes that as long as the employees are not themselves investors in the company, their contributions cannot be regarded either as an investor contribution or as public financing.

(72) As regards the agreement by the suppliers to allow Ambau longer terms of payments, the Commission reiterates its position as expressed in the decision to extend the formal investigation procedure that it is doubtful whether such short-term postponement can be considered to be commercial contributions to a restructuring. However, even if this measure is not taken into account, this does not have any influence on the outcome of the proportionality assessment.

(73) The contribution made by the recipient from its own or external commercial sources therefore amounts to DEM 1,9 million, i.e. 12,41 %. Furthermore, Ambau is an SME in an assisted area currently employing some 140 employees. In previous cases the Commission has in very specific circumstances approved aid to SMEs with a relatively low investor contribution⁽³⁴⁾. In addition, the two investors have committed themselves to the restructuring with their original business in Sperrenberg

⁽³¹⁾ See Tables 2 and 3.

⁽³²⁾ See Tables 2 and 4.

⁽³³⁾ See Table 4.

⁽³⁴⁾ Cases: KHK Verbindetechnik GmbH Brotterode (11,5 %), OJ L 31, 1.2.2002, p. 80; GMB Magnete Bitterfeld (12 %), OJ C 50, 17.2.1998, p. 6; Stahl- und Maschinenbau Rostock (12 %), OJ C 365, 18.12.1999, p. 9; Draiswerke (11 %), OJ L 108, 27.4.1999, p. 44.

as well as their private property, since bank loans to the company have also been secured by personal guarantees provided by the investors. The investors have therefore taken considerable personal risks that are linked to the success of the restructuring process. Furthermore, the aid did not provide the undertaking with excessive surplus cash that could be used for distortive practices vis-à-vis competitors.

- (74) For these reasons, the Commission considers that the investor contribution can be considered significant within the meaning of the 1994 Guidelines and fulfils the condition of point 3.2.2.(iii) of the 1994 Guidelines as regards the proportionality of the aid.
- (75) Consequently, in view of the additional information supplied by Germany during the proceedings, the Commission's original doubts whether the aid complies with the conditions of the 1994 Guidelines have been allayed.

Done at Brussels, 27 November 2002.

V. CONCLUSION

The Commission finds that Germany has unlawfully implemented aid to the amount of DEM 2,5 million in breach of Article 88(3) of the Treaty. However, in view of the above considerations, the Commission concludes that these measures are compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany has granted to Ambau Stahl- und Anlagenbau GmbH, amounting to EUR 1,28 million, is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION
of 27 November 2002
on the premium scheme for tour operators in Greece

(notified under document number C(2002) 4488)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2003/262/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

I. PROCEDURE

- (1) By letter of 26 September 2001, received by the Commission on 1 October 2001, the German Ministry of Finance made inquiries regarding what appeared to be a premium scheme for tour operators applying in Greece. More specifically, the German authorities asked the Commission whether the scheme, if any, comprised a State aid element, and if so whether Greece had notified it.
- (2) By letter D/54388 of 24 October 2001 to the Greek Permanent Representation, the Commission requested information on the premium scheme to enable it to assess its compatibility with the State aid rules. The Greek authorities responded to that request by letter dated 21 November 2001 from the Greek Permanent Representation, received by the Commission on 27 November 2001, and at a bilateral meeting on 11 February 2002. The information supplied by the Greek authorities

indicated that the scheme had been put into effect before the Commission had taken any decision on it, and the scheme was accordingly entered in the register of unnotified aid measures.

- (3) By letter SG(2002) D/229610 of 26 April 2002, the Commission informed Greece that it had studied the information supplied by the Greek authorities, and that in accordance with Articles 87 and 88 of the EC Treaty and Articles 61 and 62 of the EEA Agreement it had decided to initiate the procedure laid down in Article 88(2) of the Treaty. The Commission asked Greece to submit its comments and to supply any information that might be relevant to an assessment of the measure within one month of the date of reception of the Commission's letter.
- (4) The Commission's decision to initiate the formal investigation procedure in respect of the scheme was announced in the *Official Journal of the European Communities* ⁽²⁾. The notice asked interested parties to submit their comments to the Commission within one month of the date of publication.
- (5) By letter of 7 June 2002 from the Greek Permanent Representation, received by the Commission on 13 June 2002, the Greek authorities submitted their observations.
- (6) The Commission did not receive comments from any other interested parties.

II. DESCRIPTION OF THE MEASURE

- (7) The scheme was put into effect by Decision No 503820/18-10-01 of the Chairman of the Greek Tourist Office (EOT); it provides that tour operators bringing foreign tourists to Greece in the periods from mid-October to

⁽¹⁾ OJ C 129, 31.5.2002, p. 13.

⁽²⁾ See footnote 1.

the end of November and from the beginning of March to mid-April of each year are to receive a premium of EUR 40 per tourist. The scheme was announced by means of calls for expressions of interest on markets of relevance to Greek tourism, and applies from autumn 2001 until spring 2004. It may be extended to cover the whole of the low season if it is found that that would be justified by the number of tourists carried in winter.

(8) The Greek authorities stated that the scheme was intended to make up for the seasonal nature of tourist demand for destinations in Greece, and to increase the number of tourists arriving in off-peak periods. They took the view that the scheme would reduce the prices charged to consumers, and therefore that it did not comprise aid to tour operators. The Greek authorities nevertheless stated that no premiums had yet been paid.

(9) In view of the characteristics of the scheme in question, the Commission in the first place observed that any advantages to recipient firms could be considered at two levels: that of the tour operators themselves, and that of businesses in the tourism industry in Greece.

(10) As far as tour operators were concerned, the Commission noted that there was no guarantee that all tour operators would be eligible for the premiums, or that premiums would be granted irrespective of the means of transport used. The scheme seemed to be addressed exclusively to package tour operators who offered organised tours on certain markets which were considered to present an interest. There was no provision for agreement between the responsible authorities and the tour operators concerned, so that there did not seem to be any guarantee either that the premium would result in an equivalent reduction in the prices charged to tourists. But it could not be ruled out that the scheme would confer direct financial advantages on certain firms.

(11) Turning to businesses in the tourism industry in Greece, the Commission noted that, as it had emphasised in Decision 1999/99/EC concerning Sicilian Regional Law No 25/93 on measures to promote employment⁽³⁾, businesses in the tourism industry would in any event

gain an indirect advantage as a result of the granting of the premiums, in the form of an increase in demand. The Commission accordingly took the initial view that such premiums might strengthen the financial position and scope for action of businesses in the tourism industry in Greece in relation to competitors not benefiting under the measure.

(12) On that basis, and in view of the fact that the aid would be continuing and would result in a reduction in the current expenditure of firms, the Commission took the initial view that the aid had to be regarded as operating aid. The Guidelines on national regional aid ('the Guidelines') state that 'Regional aid aimed at reducing firms' current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty provided that it is justified in terms of its contribution to regional development and its nature and its level is proportional to the handicaps it seeks to alleviate. It is for the Member State to demonstrate the existence of any handicaps and gauge their importance. Operating aid must be limited in time and progressively reduced' (point 4.15 of the Guidelines) ⁽⁴⁾.

(13) The Commission took the view that the Greek authorities had not supplied any information that would allow it to conclude that the premiums for tour operators were justified in terms of their contribution to regional development and their nature, or that the level of the aid was proportional to the handicaps it sought to alleviate. Similarly, it appeared difficult to conclude that the scheme complied with the requirement that operating aid be gradually reduced. The Commission also noted that, in the event that part of the premiums granted were to be retained by tour operators, and some of those tour operators were outside Greece, the effect might be that aid was being granted in regions not eligible for exemption under Article 87(3)(a) of the Treaty. The Commission was therefore unable at that stage to conclude that the premium scheme for tour operators was compatible with the relevant provisions of the Guidelines; the Commission consequently had to doubt whether the scheme was compatible with the Treaty.

(14) The Commission also questioned the compatibility of the scheme with the general ban on export aid, which was spelt out and repeated in point 4.17 of the

⁽³⁾ OJ L 32, 5.2.1999, p. 18.

⁽⁴⁾ OJ C 74, 10.3.1998, p. 9; amendments OJ C 258, 9.9.2000, p. 5.

Guidelines. The premiums were granted to tour operators who directly or indirectly, depending on the type of package, offered products supplied by tourist enterprises in Greece, chiefly hotels and restaurants, on the international market. The measure was expected to increase the number of tourists, and hence the income of businesses in the tourism industry, and it therefore could not be ruled out at that stage that its implementation might involve aid to intermediaries operating in distribution, in this case tour operators, in proportion to their results in the export of a particular product, in this case tourism products.

III. OBSERVATIONS SUBMITTED BY THE GREEK AUTHORITIES

- (15) In the observations they have submitted in the formal inquiry procedure, the Greek authorities begin by stressing that Greece, although it is highly developed in terms of tourism, has not yet succeeded in diluting the entirely seasonal character of tourist demand, and that its dependence on tour operators is greater than that of other European competitors, especially because of the distance that separates Greece from its main markets. According to the Greek authorities, this explains why steps to attract demand outside the tourist period were included in the Operational Programme for Competitiveness which was approved by the Commission for the period 2000 to 2006.
- (16) The Greek authorities say that they did not believe that the premium scheme for tour operators could comprise a State aid component, which is why they did not notify it to the Commission.

The adoption of a system of this kind was absolutely necessary in response to the competition from non-Community countries in the Mediterranean area, which were financing European tour operators to enable them to offer tourist packages at more advantageous prices.

Again according to the Greek authorities, the scheme does not favour certain undertakings in particular, as all tour operators that meet the requirements for eligibility laid down by the scheme are entitled to the premiums automatically, and the premiums are granted irrespective

of the means of transport used (on this point the Greek authorities also take the view that the reduction in the prices of tourist packages would be to the benefit of consumers, because they could be guided to new destinations only by offering very low prices).

- (17) Although they are convinced that a scheme of this kind is the only solution that would allow them to achieve their objectives, the Greek authorities in any event state that no premiums have yet been paid over: the debts towards tour operators that have been incurred in the meantime will be paid in accordance with the requirements of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid⁽⁵⁾.

IV. ASSESSMENT

- (18) As required by the formal inquiry procedure, the Commission has examined the observations submitted by the Greek authorities.
- (19) As regards the nature of the scheme under consideration, the Commission takes the view that the premiums constitute State aid for purposes of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement. They are granted out of State resources, are available only in a particular industry, and confer a selective advantage on firms in the tourism industry by reducing the expenses they would otherwise have to bear themselves; and, as the tourism industry is open to international competition, they may affect trade between Member States and threaten to distort competition by favouring certain undertakings.
- (20) The Commission would point out that all the decisions approving Community intervention under the Structural Funds contain a saving clause referring to State aid. The approval of an operational programme does not release Member States from their obligations in this respect. In addition, the Commission, by letter of 16 July 2001, expressly drew the attention of the Greek authorities to the need to ensure compliance with the competition rules when approving and applying measures to reduce the seasonal character of tourism (measure 5.3 in the Operational Programme for Competitiveness).

⁽⁵⁾ OJ L 10, 13.1.2001, p. 30.

Even if, as the Greek authorities contend, there is a danger that tourist preferences may be channelled towards non-Community countries if no countervailing measures are taken by the Member States most affected by international competition, the fact remains that any aid granted by a Member State in the tourism industry may affect trade between Member States. The premiums at issue here would have the effect of influencing the choices made by tourists, encouraging them to favour Greece as a holiday destination, so that Community tourist flows would be altered.

The lack of any distinction between different types of tour operator does not prevent the measure from being directed at a particular industry, or deprive it of its selective character. In addition, as there is no provision for agreement on this point between the responsible authorities and the tour operators concerned, there can be no guarantee that the granting of premiums will in fact lead to a corresponding reduction in the prices tourists are asked to pay. It cannot be ruled out, therefore, that the scheme may confer direct financial advantages on certain undertakings.

- (21) In these circumstances, and taking account of the fact that the aid would be continuing and would result in a reduction in the current expenses of firms, the Commission considers that the premiums constitute operating aid; and even if it is granted in a region which until the end of 2006 is eligible in its entirety for the exemption in Article 87(3)(a) of the Treaty, operating aid nevertheless cannot be authorised unless the tests laid down in the Guidelines are satisfied. Specifically, it must be justified in terms of its contribution to regional development and its nature and its level must be proportional to the handicaps it seeks to alleviate. It must also be limited in time and must be progressively reduced.

- (22) The Greek authorities have not supplied the Commission with fresh information relevant to an assessment of the appropriateness of the aid in terms of its contribution to regional development, especially in order to show that the aid is proportional to the defined handicaps, and that it will be progressively reduced, and they have not commented on the doubts expressed by the Commission, when it initiated the procedure, regarding the effects of the premium scheme on businesses in the tourism industry, and regarding the possibility that aid might be granted to regions not eligible for exemption under Article 87(3)(a) of the Treaty; the Commission is therefore still unable to conclude that the aid satisfies the tests of point 4.15 of the Guidelines. Consequently, the Commission cannot take the view that the aid

is compatible with the common market under the exemption provision in Article 87(3)(a) of the Treaty.

- (23) Similarly, the Commission cannot consider the aid as qualifying for any other exemption provided for in the Treaty. As the premiums constitute operating aid, they cannot be considered aid to facilitate the development of certain economic activities or of certain economic areas which does not adversely affect trading conditions to an extent that is contrary to the common interest (Article 87(3)(c)). The aid is not aid having a social character, granted to individual consumers (Article 87(2)(a)); it is not aid to make good the damage caused by natural disasters or exceptional occurrences (Article 87(2)(b)); it is not aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany (Article 87(2)(c)); it is not aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State (Article 87(3)(b)); it is not aid to promote culture and heritage conservation (Article 87(3)(d)); and it does not fall into any other category of aid specified by the Council (Article 87(3)(e)).
- (24) Lastly, the Commission nevertheless notes that no premiums have yet been paid out, and that the Greek authorities have undertaken to grant the aid in accordance with the requirements of Regulation (EC) No 69/2001. In addition, the aid scheme can have only indirect effects spread over the whole of the Greek tourism industry, so that it can be concluded that it is not directly linked to quantities exported; and in these circumstances the Commission takes the view that there are no grounds to apply Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, which provides that aid unlawfully granted may be recovered from the recipient⁽⁶⁾.

V. CONCLUSION

- (25) The Commission finds that Greece has put the premium scheme for tour operators into effect unlawfully, in breach of Article 88(3) of the Treaty. On the basis of the assessment set out above, and having considered the aid in the light of the Guidelines on national regional aid, the Commission considers that the aid does not meet the requirements for compatibility with the common market,

⁽⁶⁾ OJ L 83, 27.3.1999, p. 1.

HAS ADOPTED THIS DECISION:

Article 3

Article 1

The premium scheme for tour operators put into effect by Decision No 503820 of 18 October 2001 of the Chairman of the Greek Tourist Office (EOT) is incompatible with the common market.

Greece shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 2

Article 4

Greece shall withdraw the scheme referred to in Article 1.

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 27 November 2002.

For the Commission

Mario MONTI

Member of the Commission
