II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 3 February 1999

relating to proceedings under Council Regulation (EEC) No 4064/89

(Case No IV/M.1221 — Rewe/Meinl)

[notified under document number C(1999) 228]

(Only the German text is authentic)

(Text with EEA relevance)

(1999/674/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's decision of 28 September 1998 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,

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

Whereas:

(1) On 25 August 1998 REWE Internationale Beteiligungsgesellschaft mbH and REWE-Verkaufsgesellschaft mbH, both members of the Rewe group, notified pursuant to Article 4 of Regulation (EEC) No 4064/89 ('the Merger Regulation'), a proposed operation within the meaning of Article 3(1)(b) of that Regulation whereby they were to acquire the entire share capital of Julius Meinl AG.

(2) On 28 September 1998 the Commission, in accordance with Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement, decided to initiate proceedings in this case.

(3) The Advisory Committee discussed the draft of this Decision on 19 January 1999.

I. THE PARTIES

(4) The Rewe group ('Rewe') forms a uniformly directed group of companies consisting of Rewe-Zentralfinanz eG and Rewe Zentral AG together with their respective direct and indirect subsidiaries. Rewe's activities comprise the acquisition, financing and management of wholesale and retail companies, in particular companies in the food-retailing sector. Most of Rewe's turnover is achieved in Germany. Rewe has been active in Austria since 1996 through its subsidiary BML ('Billa'). Billa operates a food-retailing chain of hypermarkets (Merkur), supermarkets (Billa), smaller self-service outlets (Emma), discount stores (Mondo) and non-dispensing drugstores (Bipa), and is the market leader in food retailing.

(5) Julius Meinl AG ('Meinl') is a trading group active almost exclusively in Austria, although a few shops are operated in Italy. The overall turnover is achieved mainly through retailing daily consumer goods. Meinl operates hypermarkets (PamPam), supermarkets (Julius Meinl and Meinl Gourmet) and discount stores (Jéé).

[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 306, 23.10.1999.

II. THE PROJECT

(6) Rewe proposes to acquire all the shares in Meinl [...]*. The notified operation encompasses seven Meinl subsidiaries. A total of 341 shops, including supermarkets, discount stores, hypermarkets and a chain of delicatessens, are to be taken over. The business activities and subsidiaries of the Julius Meinl International AG group and Meinl's shops in Italy are not covered by the notified operation.

III. CONCENTRATION

(7) The operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation, in that Rewe is acquiring sole control of Meinl.

IV. COMMUNITY DIMENSION

(8) The companies concerned have a combined worldwide turnover of more than EUR 5 000 million [4] (Rewe: EUR [...]* million, Meinl: EUR [...]* million) and a Community-wide turnover of more than EUR 250 million (Rewe: EUR [...]* million, Meinl: EUR [...]* million). The parties do not achieve more than two thirds of their Community-wide turnover within one and the same Member State. The operation therefore has a Community dimension and is not a case of cooperation under the EEA Agreement.

V. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

(9) The proposed operation will have an impact above all on the food-retailing trade in Austria. In accordance with previous Commission decisions [5], a distinction must in principle be drawn, from the point of view of possible effects on competition, between two separate markets in the food-retailing sector:

— the distribution market, in which food retailers act as suppliers to final consumers,

— the procurement market ('demand market'), in which retailers act as buyers *vis-à-vis* producers of products forming part of the food-retailing trade's range.

A. DISTRIBUTION MARKET

1. Relevant product market

(10) There are, within the food-retailing trade, various forms of distribution which differ according to, among other things, the width and depth of the range carried and the size of the sales outlet (such as supermarkets with 5 000 to 10 000 articles, a fresh-food department and a sales area of 400 to 1 000 m^2, and hypermarkets with a sales area of at least 1 000 m^2). Owing to the existing competitive relationships between these different forms of distribution, it will be assumed below, however, as in previous Commission decisions [6], that there is a separate market in food retailing which embraces all retailers, and in particular supermarkets and hypermarkets, carrying a range of food and non-food products which is typical of the food-retailing trade (excluding, that is, specialised outlets such as butchers and bakers).

(11) The parties, by contrast, take the view that the relevant product market comprises all sources of supply of foodstuffs accessible to consumers, including all types of local outlet such as, for example, weekly street markets, farmers' markets, butcher's shops, baker's shops, petrol stations, 'bioshops', etc. (specialised trade). They base this view on an analysis by the GfK institute (Gesellschaft für Konsumforschung), of overlap between different forms of distribution for January to October 1998, according to which, although supermarkets, for example, reach out to 97 % of all consumers, 60 % of supermarket customers also go to the butcher's, 75 % to the baker's and 18 % to the greengrocer's. A similar proportion of hypermarket and discount store customers regularly shop at the butcher's, baker's and greengrocer's. Butcher's and baker's shops cater for 60 % and 72 % of all consumers, and of these, 98 % also shop at supermarkets, 78 % at hypermarkets and 85 % at discount stores.

(*) 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.

(4) The turnovers were calculated in accordance with Article 5(1) of the Merger Control Regulation and with the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25). Where turnover figures for the period before 1 January 1999 are mentioned, they were calculated on the basis of the average ECU exchange rates and converted into ecus on a one-for-one basis.

(5) For example IV/M.803 — Rewe/Billa (OJ C 306, 15.10.1996, p. 4); IV/M.1071 — Spar/Pro (OJ C 49, 14.2.1998, p. 13).

(6) For example Decision 97/277/EG — Kesko/Tuko (OJ L 110, 26.4.1997, p. 53, paragraphs 18 et seq. of the recitals); Rewe/Billa and Spar/Pro, see footnote 5; IV/M.1303 — Adeg/Edeka, (OJ C 385, 11.12.1998, p. 5).

(12) The Commission investigations have established, however, that in Austria there are no special features such as might justify departing from the Commission's standard practice. What is more, the market definition used by the Commission was taken as a basis by the parties in their notification of the Rewe/Billa merger.

(13) As in other Community countries, consumers in Austria expect from the food-retailing trade a specific distribution service, consisting in the supply of a particular range of food and non-food articles. From the Austrian consumer's point of view, also, shopping at specialised outlets such as butcher's and baker's shops is not interchangeable with the broader experience of shopping at a supermarket or other type of food-retailing outlet where he can find all the goods he needs on the spot (one-stop shopping). According to a survey by the GfK (household panel), a total turnover of some ATS 11,7 billion is achieved in the space of a month in perishable consumer goods throughout Austria, only 10 % of which is accounted for by the specialised trade. The specialised trade typically supplies only a particular product or category of product and, in terms of product type, sales area and average price, is not in direct competition with the food-retailing trade in its various guises. Supplies by the specialised trade therefore serve first and foremost to supplement supplies by the food-retailing trade.

(14) The parties' data do no more than indicate that, besides shopping at a supermarket or other food-retailing outlet, the consumers surveyed also go to butcher's or baker's shops. From the parallel purchasing behaviour as thus measured, it cannot, however, be determined whether consumers go to specialised outlets instead of, or in addition to, food-retailing outlets. The overlap analysis submitted by the parties is not therefore capable of proving that there is any interchangeability between the food-retailing trade and the specialised trade. On the contrary, the figures suggest that specialised outlets are no substitute for food-retailing outlets. This can be seen form the fact that 98 % of the specialised trade's customers also shop at supermarkets, coupled with the fact that supermarkets cover 97 % of all consumers. If specialised outlets were capable of satisfying consumer needs in the same way as food-retailing outlets, then a much smaller number of customers of the specialised trade could be expected to shop additionally at food-retailing outlets.

(15) Since the parties also wish to include petrol-station shops in the relevant market, it must be pointed out that the size of the sales area of such shops is on average only between 40 m^2 and 70 m^2 and that they carry only a limited range centred on beverages and impulse articles. In the case of petrol-station shops, moreover, there is generally a price differential of some 25 to 30 % compared with the food-retailing trade. The consumer is prepared, owing in particular to the more flexible opening hours, to pay higher prices (50 % more for beverages, for instance). Because of the disparate reasons for shopping at petrol stations and at food-retailing outlets, the two distribution channels are not interchangeable in the eyes of the consumer. Since the parties wish to include cash-and-carry stores in the market, it should be pointed out that cash-and-carry stores form a separate marketing stage which mainly provides distribution services to small food-stores, businesses in the service sector, small retail outlets, the hotel and restaurant trade, etc. Access to cash-and-carry stores are limited, moreover, to holders of a special permit (as a rule tradesmen and business people). In past decisions the Commission has accordingly not included cash-and-carry stores in the food-retailing trade's relevant market [7]. The parties have not submitted any arguments which might justify departing from these precedents.

(16) The results of the Commission's enquiries show that limiting the market to sales outlets which carry the typical range of the food-retailing trade is also appropriate in this case. The competitors who were surveyed all stated that specialised outlets, petrol-station shops and cash-and-carry stores are not in direct competition with food retailers. The market share data for Austria in the statistical yearbook of AC Nielsen are also based on the food-retailing trade market minus the specialised trade, petrol-station shops and cash-and-carry stores. The same goes for the study by Regioplan of the food-retailing trade in Austria.

(17) The question whether discount stores are to be included in the relevant market in this case for purposes of the competitive assessment of the proposed operation can remain open. The average number of articles stocked by discount stores in Austria is very small compared with supermarkets. And the poorer service and critical lack of branded goods point to there being

[7] See Footnote 6, Kesko/Tuko, paragraphs 24 et seq. of the recitals.

only a limited competitive relationship ([8]). In the last analysis, however, the question can be left undecided, as even if discount stores were included in the relevant market the competitive assessment of the present operation would be the same.

2. **Relevant geographic market**

(18) The Commission has already considered the question of the definition of the relevant geographic market in the Rewe/Billa decision ([9]), where it found that, from the direct viewpoint of the consumer, the geographic markets affected by a concentration in the food-retailing trade are the local markets in which the firms involved run shops. These local markets can be defined as a circle with a radius of approximately 20 minutes by car centred on the individual sales outlet. The Commission has, however, also stated in this connection that an examination limited to such local markets would not reflect the competitive impact of a concentration in the food-retailing trade, at least not where a large number of local markets affected by the concentration are connected in such a way as to overlap and seamlessly cover a larger area or even a whole Member State. It must be borne in mind in particular here that the competitive relationships between major retail chains are not limited to local competition but rather exist in a far wider geographical dimension. This is clear, for example, from the fact that in the case of major retail chains the range of goods carried is to a large extent centrally controlled, and hence at least as far as the basic range is concerned is the same in every local market, and that nationwide advertising is the norm. For the competitive assessment of the Rewe/Billa proposal the Commission, in its decision of that time, proceeded in this respect on the basis that the food-retailing trade in Austria formed an overall market. It found in this connection that a study of local or regional markets was unnecessary, if only because Rewe had not been active in Austria before and hence there could be no question of any additional market share in any conceivable geographic market.

(19) In this case, the Commission's investigations have revealed nothing that might justify a regional market delimitation. The sales outlets both of Rewe/Billa and of Meinl cover the whole inhabitable part of Austria. The same goes for their Austria-wide competitors Spar, ADEG and Löwa. Spar, on the one hand, and Rewe/Billa and Meinl, on the other, have, it is true, historically different regional centres of gravity. While Spar has a stronger presence in western Austria, Rewe/Billa occupies, as is explained in greater detail in recitals 31 to 36, a strong position in eastern Austria. This fact does not, however, in itself justify creating regional markets for geographic market delimitation purposes. All three firms are present in every Austrian province and hence throughout Austria. The competitors surveyed by the Commission have confirmed, moreover, that in each case they carry an identical or similar core range throughout Austria and that they advertise their products country-wide on national television and in the national press. Furthermore, the Commission has established that prices do not differ appreciably from one part of Austria to another, especially as between western Austria and eastern Austria.

(20) The parties have also submitted that the market is to be delimited nationally and comprises the whole of Austria. For the above reasons, the Commission will now proceed, for purposes of the competitive assessment of the operation, on the premise that the food-retailing market in Austria constitutes an overall market.

3. **Competitive assessment**

(21) It is to be assumed that the operation will lead to the creation of a dominant position on the part of Rewe/Billa/Meinl in the Austrian food-retailing market.

(a) ***Competitive assessment***

(22) (aa) *Rewe/Billa is already the leading supplier in the Austrian food-retailing trade, having strengthened its market position in recent years.* Austria is one of the European countries with the highest levels of concentration in the food-retailing trade. The five largest firms together control over 80 % of the market, with the top two alone accounting for nearly 60 %. With the exception of Finland, this is the highest concentration in the EU.

(23) The following firms are active in the Austrian food-retailing market:

Rewe/Billa, a centrally managed chain-store company, has over 1 071 shops across the whole of Austria, including 66 hypermarkets (Merkur), 809 supermarkets (Billa), 28 smaller self-service outlets (Emma) and 168 discount stores (Mondo). Meinl, also a chain-store company, operates 40 hypermarkets (PamPam), 274 supermarkets (Julius Meinl), 20 Meinl Gourmet supermarkets and nine discount stores (Jéé). Meinl currently belongs to the ZEV-Markant purchasing association, but it will leave it after the operation. The Spar group

([8]) IV/M.179 — Spar/Dansk Supermarked (OJ C 29, 6.2.1992, p. 18).
([9]) Rewe/Billa, see footnote 5.

is likewise active throughout Austria, with 1 560shops, 1 103 of which are, however, operated by independent retailers. The next largest countrywide competitor, ADEG, has a cooperative structure. ADEG has 1 246 shops throughout Austria, very few of which, however, it owns itself. Löwa, a member of the Tengelmann group, has 285 shops across Austria. The Aldi-owned chain of discount stores, Hofer, is also active throughout Austria with 199 outlets. Apart from these firms, only regionally active competitpors (such as M-Preis, Tirol, and Pfeiffer, Linz) are present.

(24) The Commission's investigations have revealed the following breakdown of market shares in the Austrian food-retailing market, varying according to whether or not discount stores are included in the market:

(%)

Firm	Market share with discount stores	Market share without discount stores
Rewe/Billa	[27 to 33]*	[33 to 38]*
Meinl	[5 to 10]*	[5 to 10]*
Spar	[23 to 28]*	[27 to 32]*
ADEG	[8 to 13]*	[10 to 15]*
Hofer	[< 15]*	
Löwa	[< 10]*	[< 10]*
Others	[< 10]*	[< 10]*

(25) The market shares worked out by the Commission are based on turnover figures which the Commission has itself ascertained and do not differ much from the data set out in the statistical yearbook of AC Nielsen (for the food-retailing market minus discount stores), a GfK study, a market survey by M+M Eurodata and a study by Regioplan.

(26) In their notification the parties claim considerably smaller market shares (Rewe/Billa [...]* %, Meinl [...]*%). These market shares are based, however, on the parties' market definition, which the Commission regards as incorrect (see recitals 10 to 17).

(27) Since the takeover of the Billa group by Rewe in 1996, Billa's market share (including discount stores) has increased from 25 % to approximately 30 % now. This is due to above-average domestic growth (opening of an average of 50 new shops a year, (more than 50) in 1997 alone).

(28) (bb) *As a result of the operation Rewe-Billa will increase its market share yet again by a considerable amount, and in so doing will further widen the gap between it and its competitors.* Rewe/Billa's market share will increase as a result of the operation from approximately [27 to 33]*% (including discount stores) to approximately [32 to 43]*%, or without discount stores from [33 to 38]*% to [38 to 48]*%. The number of shops will increase by one third from 1 071 to 1 414. The total sales area will increase by at least 30 %.

(29) The closest competitor, Spar, has by contrast an approximately [9 to 15]*% smaller market share. Although after the operation Spar will have all told, a slightly larger sales area than the parties, the turnover per square metre of sales area achieved by Rewe/Billa is a great deal higher than that of the other competitors (see below). Moreover, in the key region of eastern Austria, where the parties are particularly strong, Spar is distinctly less well represented than the Austrian average. Even before the operation, Spar had only about one-third of Rewe/Billa's market share there.

(30) Following the merger, Rewe/Billa/Meinl will have a market share advantage over all other competitors of at least 25 %. Although ADEG possesses a large number of shops, a substantial proportion of them are small foodstores (up to 150 m^2).

(b) ***Specific strengths of the parties***

(31) (aa) *Rewe/Billa and Meinl are by far the leading suppliers in the key regions of eastern Austria (Vienna, Lower Austria, northern Burgenland).* The Commission's investigations have revealed the following market share breakdown for eastern Austria and Vienna:

(%)

Firm	Vienna	Eastern Austria
Rewe/Billa	[47 to 53]*	[42 to 47]*
Meinl	[13 to 18]*	[7 to 12]*
Spar	[8 to 13]*	[15 to 20]*
Löwa	[< 15]*	[< 10]*
Others	[< 15]*	[< 20]*

The above figures do not include the Hofer discount chain. If it were included, the market shares would not be significantly smaller.

(32) Eastern Austria may be regarded as the key region of the Austrian food trade. In eastern Austria, which makes up less than a quarter of the country's surface area, the high population density means that, with over 40 % of all Austrian sales outlets, 41 % of total food-retailing trade turnover in Austria is achieved

there. Within the eastern Austrian region, the federal capital Vienna is of particular importance to the retail food trade. According to Nielsen, the Viennese have by far the highest purchasing power in Austria [10]. This is clear, *inter alia*, from the turnover achieved in Vienna.

(33) In eastern Austria Rewe/Billa/Meinl will have almost four times the market share of its closest competitor, Spar, and almost three times as many shops. What is more, Spar has achieved this market share only by taking over former outlets of the Konsum retail chain in 1995. Before that, Spar's market share was only about 5 %. Following Meinl's departure from ZEV-Markant [11], the latter will no longer be present in Vienna and will have only a minor presence in the rest of eastern Austria. Löwa has only [< 150]* shops in Vienna, including a mere seven hypermarkets and 38 supermarkets, compared with Rewe/Billa/Meinl's total of [< 500]* shops, including 277 supermarkets and 60 hypermarkets. This large number of shops which Rewe/Billa/Meinl will have at its disposal after the operation will give the firm a decisive competitive advantage inasmuch as, according to the competitors surveyed and the authorities, there are, in Vienna and eastern Austria, only a few sites available for new outlets. The parties rejoin that in Vienna the total operational floor space limit is, at 2 500 m², by far the highest and that there are therefore no substantial barriers to market entry in Vienna. The fact that in Vienna the relevant regulations permit a larger overall operational floor space than in other provinces merely implies, however, that, for physical planning and legal reasons, larger operational floor spaces are more justified in a city with over a million inhabitants than in small or medium-sized towns or in rural areas. It cannot lead to the provision of any extra floor space for new shops.

(34) The exceptionally strong position which Rewe/Billa will occupy after the operation in Austria and especially in Vienna will have a considerable impact on Rewe/Billa's market position in the Austria market as a whole. If Rewe/Billa clearly dominates a region of Austria which is by far the biggest in terms of turnover, the firm will be able to earn increased profits from its activities there. This is especially true of Vienna, where Rewe/Billa/Meinl will, with a total of some 475 shops and a 65 to 70 % market share, rising to over 80 % in eight of the capital's 23 districts, face hardly any competition worth mentioning. The advantages of this dominant position in eastern Austria are therefore likely to provide the firm with additional resources compared with its competitors which can be employed by the firm in areas where its market share is relatively low. The dominant position in eastern Austria accordingly affords Rewe/Billa additional scope for further squeezing its competitors in other regions and hence also for further consolidating its own market position in those regions as well.

(35) In the opinion of consumer representatives, consumer choice between different suppliers in the food-retailing trade providing a comparable service is already restricted by the high density of the Rewe/Billa shop network in eastern Austria and especially in Vienna. At present there is, however, still some competition, above all between Meinl and Billa shops. The consumer representatives consider that, after the operation, there will be the prospect, not only of a less varied range of goods on the shelves owing to Meinl's becoming a carbon copy of Billa, but also of a substantial limitation, if not total exclusion, of consumer choice.

(36) The parties rejoin that Spar is the market leader in five out of nine Austrian provinces and that, at 64 %, it has a market share in Vorarlberg which is far bigger than Rewe/Billa's market shares in eastern Austria. Moreover, Spar has, they say, a market share of 100 % in many rural areas of Austria because it operates the only food shop in the district. The latter argument is irrelevant as the competitive assessment is based, not on individual local markets, but on the overall market of the food-retailing trade in Austria. As to Spar's market share in Vorarlberg as referred to by the parties, it should be pointed out that, at fewer than 350 000, the population of Voralberg is only about a 10th of that of the key region of eastern Austria. Spar's relatively high market share in Vorarlberg accordingly does not confer on that firm anything like the same strength as that which Rewe/Billa possesses as a result of its strong position in the key region of eastern Austria.

(37) (bb) *Compared with their competitors, Rewe/Billa and Meinl have a particularly well developed network of highly productive, large shops*. Whereas the number of shops engaged in the Austrian food-retailing trade has fallen by half over the last 30 years, the number of supermarkets (400 to 999 m²), and in particular of hypermarkets (> 1 000 m²), has grown considerably (from 706 in 1980 to 1 907 in 1995). This corresponds to an increase in their share of the total number of shops from 5,3 % to 24 %. The share of turnover accounted for by supermarkets and hypermarkets is as high as 66 % of which approximately 27 percentage points are accounted for by hypermarkets [12]. The growing competitive importance of large shops is due primarily to consumers' changing shopping habits (weekly shopping trips, each covering a month's needs) and

[10] See AC Nielsen, *Statistical yearbook* 1998 Austria, p. 37.
[11] Meinl is by far the largest member of ZEV, accounting for some two thirds of ZEV's procurement volume.
[12] See AC Nielsen, *Statistical yearbook*1998 Austria, p. 46.

increased urbanisation of the population. A further factor is the ever-greater variety of goods on offer by the food-retailing trade, which necessitates adequate storage and shelf space. Large shops are *prima facie* placed at an advantage by this.

(38) Even before the operation takes place, Rewe/Billa controls far more hypermarkets (Merkur, 66 in all) than its largest competitor Spar (44 Interspar shops). As a result of the operation the gap will become even wider, as Rewe/Billa will take over 40 PamPam hypermarkets from Meinl. Löwa controls 17 Magnet shops, and ADEG 47 Contra hypermarkets ([13]). Hofer does not have any hypermarkets.

(39) Compared with its competitors (apart from the Hofer discount chain, which is not altogether comparable), Rewe/Billa already achieves on average for all forms of marketing the highest turnover per square metre (Rewe/Billa ATS 86 000, Meinl ATS 53 000, Spar ATS 54 000, ADEG ATS 60 000, Löwa ATS 45 000). Hypermarkets achieve a particularly high turnover per square metre. Rewe/Billa achieves in its Merkur shops by far the highest turnover per square metre, at ATS 103 700. Interspar shops, on the other hand, achieve only ATS 56 235/m^2, and Magnet shops ATS 86 700m^2. PamPam's turnover per square metre is, however, only ATS 44 000 ([14]).

(40) The parties contend that, because Interspar shops have larger sales areas, Spar carries a much wider range in those shops than do Rewe/Billa's Merkur shops. Spar is, they claim, able to subsidise the food sector through the better conditions obtained in the non-food sector. If this argument is correct and Spar actually enjoys considerable competitive advantages, it is hard to understand why, as indicated above, the productivity per unit area of Merkur shops is almost twice as high as that of Interspar shops.

(41) As a result of the operation, Rewe/Billa's already considerable lead over its competitors in terms of number of hypermarkets will increase even further.

(42) (cc) *Compared with their competitors, Rewe/Billa and Meinl occupy a strong position in conurbations and have especially favourable locations, which they can use flexibly thanks to the Bipa drugstore chain*. The Commission's investigations have shown that, even before the operation, Rewe/Billa has a particularly strong presence in conurbations. As a result of the operation, the density of Rewe/Billa shops in such areas will be further increased. This holds true, for instance, for seven of the nine provincial capitals, where more than 210 (that is to say, over 60 %) of the Meinl shops to be taken over are situated.

(43) Like the dominant position in eastern Austria and Vienna, this concentration on conurbations strengthens the position of Rewe/Billa/Meinl in the Austrian market as a whole. It must be borne in mind in particular here that in conurbations the turnover achieved in the food-retailing trade is higher than the purchasing power of the population resident there as, in such areas, commuters living elsewhere purchase considerable quantities of daily consumer goods. A food-retailer in a conurbation likewise enjoys considerable advantages from a logistical point of view in that it can supply a correspondingly large number of outlets there. This holds true despite the drawbacks inherent in delivering goods in conurbations, such as high traffic density and officially regulated delivery times. These drawbacks lead to a substantial increase in the logistical costs of food retailers who have only a relatively sparse distribution network in conurbations. Bearing in mind, moreover, that the competitors of Rewe/Billa and Meinl have distribution networks which extend for a large part to rural areas and even to remote Alpine valleys, it can be assumed that their logistical costs are on the whole much higher than those of Rewe/Billa/Meinl.

(44) It is already apparent from the sharply above-average productivity of Billa shops that Billa holds particularly favourable sites. This is borne out by the findings of the Commission's investigations and by what competitors say. The favourable location of a site is one of the essential parameters of a food retailer's market position. This holds true all the more as, owing to restrictive official authorisation practices, few new sites are available for food-retailing outlets. Especially in favourable city-centre locations, but also in outlying areas suited to hypermarkets, the construction of new outlets is subject to tight restrictions.

(45) A site may be considered favourable, *inter alia*, where it is centrally located (such as in an inner-city shopping street) or where it is located in a shopping centre or specialised supermarket centre easily accessible by car. The attractiveness of shopping centres lies in their broad mix of businesses offering customers a wide range of goods under one roof, often combined with eating, sports and leisure facilities ('shopping as an enjoyable experience'). Specialised supermarket centres

([13]) See market survey, *Der Lebensmittelhandel in Österreich*1998, RegioPlan Consulting, p. 90.

([14]) See market survey, *Der Lebensmittelhandel in Österreich*1998, RegioPlan Consulting, p. 49.

are to be found mainly on the outskirts of small towns with their own catchment area, being especially suited to bulk buying by car-owners.

(46) The Commision's analysis on the basis of the RegioPlan study shows that, together with Meinl, Rewe/Billa will have 160 shops in the 181 key locations covered by the RegioPlan study, of which 66 for Rewe/Billa and 40 for Meinl. Spar, the closest competitor, has 62 shops in key locations, followed by Hofer with 47 and Löwa with 20, while ADEG has only five shops and the smaller competitors number 14 altogether. The 181 key locations consist of the 98 shopping centres, 63 specialised supermarket centres and 20 inner-city shopping streets covered by the RegioPlan study. Taking these three types of key location together, it is clear that, by acquiring Meinl, Rewe/Billa will more than triple its hitherto weak presence in inner-city shopping streets in all provincial capitals (apart from Innsbruck and Bregenz). An analysis of the regional breakdown in Austria shows that Rewe/Billa/Meinl is overrepresented in key locations in every province compared with its average regional presence.

(47) The following table shows, for each retailer, the number of shops in shopping centres, specialised supermarket centres and inner-city shopping streets, together with the total number of such shops:

Firm	Shopping centres	Specialised supermarket centres	Inner-city shopping streets	Total
Rewe/Billa	24	34	8	66
Meinl	18	3	19	40
Rewe/Billa + Meinl	46	37	27	106
Spar	44	17	1	62
Hofer	4	42	1	47
Löwa	5	13	2	20
ADEG	1	4	0	5
Others	4	8	2	14

(48) It may be assumed that, after the takeover, Rewe/Billa will no longer operate all the 343 Meinl shops in Austria and the approximately 150 Meinl shops in the Vienna conurbation, as food-retailing outlets. The necessary restructuring would normally be carried out by closing or selling off shops, with the result that their business could be carried on by competitors. But Rewe/Meinl will, even after Meinl has been restructured, not necessarily sell the shops on the market, being able instead to use them, say, for its Bipa drugstore chain. The merger will thus prevent Rewe/Billa's competitors from getting their hands on the shops.

(49) (dd) *Unlike its main competitors, Rewe/Billa is a centrally managed chain-store company*. As already indicated in recital 23, there are in the Austrian food-retailing trade both pure chain-store companies and hybrid companies. The latter are mainly voluntary trading chains and retailers' purchasing associations, the first of which operate their own shops, and the second of which have distribution agreements with independent retailers. The ratio between the turnover of chain-store companies, including shops owned by voluntary trading chains and retailers' purchasing associations, and that of independent retailers is approximately 75:25. A large proportion of the sales outlets of independent retailers are smaller than 250 m^2.

(50) Pure chain-store companies are able to take important business decisions (e.g. assortment policy, price policy, advertising campaigns) centrally and implement them in all affiliated shops immediately. According to suppliers, it takes Rewe/Billa [...]* on average to list or delist a product, whereas it takes Spar [...]* to reorganise its range in affiliated points of sale. Moreover, in the case of all other organisation forms, full compliance by all affiliated retailers is never to be expected as the owners of affiliated retail outlets enjoy a much greater measure of independence than do branch managers of a centrally organised company. It follows that chain-store companies can react more quickly and more effectively to competitive challenges.

(51) It is also easier for chain-store companies to introduce own brands and pursue a purposive own-brand policy than it is for less tightly organised food-retailing chains. Rewe/Billa has at its disposal in several product categories an above-average proportion of own brands (see recital 111) and is the only Austrian food retailer so far to have successfully introduced an own-brand range in the upper price segment. Own brands can increase traders' profitability. The prices of well-known branded goods are often used by consumers as a yardstick by which to assess the value-for-money to be obtained from a particular shop. Traders therefore tend to price such goods keenly so as to appear in the consumer's eyes to be offering good value-for-money. This leads to somewhat narrow margins for well-known branded articles. In the case of own brands, however, the consumer is unable to make any direct price comparison. This can be used to achieve a higher margin than in the case of branded goods. Such a

strategy is particularly easy to implement in the case of chain-store companies, as the head office has firm control over all branches.

(52) Both Rewe/Billa and Meinl are straightforward chain-store companies. Their main competitor Spar, on the other hand, is organised to only a relatively small extent along chain-store lines. Of 1 560 Spar shops, 1 103 are run by independent traders. Rewe/Billa/Meinl will thus be further consolidating its existing structural advantages over Spar. Nor is the next-largest competitor ADEG a chain-store company. Although Löwa is organised along chain store lines and is a subsidiary of the Tengelmann group, it has market share of only about [< 10]* %. The only other straightforward chain-store company, M-Preis, is on the whole active only in the Tirol.

(53) (ee) *As a result of its tie-up with Rewe, Billa has considerable resources to fall back on*. Since 1996 Billa has belonged to the Rewe group. Rewe is the leading food retailer in Germany and the third largest in Europe. In 1997 the Rewe group achieved an aggregate turnover of EUR [...]* billion. The parties have submitted that Billa has so far not had to resort to the Rewe group's financial resources. This does not rule out the possibility, however, that those resources might be placed at Billa's disposal. By contrast, Billa's main competitor, Spar, is exclusively Austrian and achieves an aggregate turnover of the order of EUR [...] billion. Although Hofer and Löwa are also subsidiaries of international trading groups with a large turnover, they both have only a relatively small market share. And although ADEG and the German Edeka group recently forged ties, the impact is not the same for both, simply on account of their cooperative structure.

(54) (ff) *The dominant position to which the operation will give rise in the procurement market will give Rewe/Billa/Meinl a considerable competitive advantage in the distribution market*. As will be explained below, the merger will lead to the creation of a dominant position in a number of procurement markets which are of decisive importance to the food-retailing trade. And as will also be explained below, the position in the procurement market is of decisive importance as far as the position in the distribution market is concerned.

(55) The more a food retailer buys in, the more favourable as a rule are his buying conditions and hence the more chance he has of gaining a bigger share of the distribution market. This leads in turn to a further strengthening of his purchasing power. If a firm acquires a dominant position both in the distribution market and in the procurement markets, the combination of these two forms of market power enables it to squeeze existing competitors in the distribution market or to oust them completely from the market.

(c) ***Future developments***

(56) (aa) *The existing barriers to entry to the Austrian food-retailing market will be further increased by the merger*. The Austrian food-retailing market is already characterised by high entry barriers. This hold true especially for large-surface stores. Firstly, the land-use planning laws and building regulations of the nine provinces and the Shopping Centre Order adopted pursuant to the Federal Trade Regulations make the opening of food-retailing outlets subject to official authorisation or, above a certain sales area, to tight restrictions going as far as a ban on new shops over a certain size. Secondly, apart from already existing shops, especially in conurbations, suitable plots for additional food-retailing outlets very rarely become available. Both factors constitute a considerable barrier to entry to the Austrian food-retailing market. Moreover, the Austrian food-retailing market already has a high level of concentration.

(57) The parties dispute the existence of the above market entry barriers, pointing out that Rewe/Billa has succeeded in recent years in opening on average 50 new shops a year in Austria and in increasing its market share from 25 % to 30 % through internal growth. This can be answered firstly by saying that no competitor of Rewe/Billa has managed to expand as much in terms of new outlets. Secondly, the new shops were supermakets and not large-surface stores. Thirdly, as far as Rewe/Billa's internal growth in general is concerned, the parties have themselves stated that many smaller Billa shops have been closes and replaced by larger ones. It follows from all this that, compared with its competitors, Rewe/Billa enjoys strategic advantages thanks to which it can to some extent offset the difficulties standing in the way of expansion in the Austrian market.

(58) In view of the existing market entry barriers, it is not surprising that past attempts by foreign firms to enter the Austrian market have failed. A survey of the past years shows that even internationally active chains have been unable to gain entry to the Austrian market (Denner of Switzerland and Carrefour of France in the 1970s, the German firm Hurler, with Huma, in the 1980s, and Migros of Switzerland in the 1990s). Even the Tengelmann subsidiary Löwa, which has been active in Austria since the 1970s, is having difficulty retaining a foothold in the market. Its market share is

still well below 10 %. Before it acquired a stake in ADEG, Edeka of Germany operated, with moderate success, only two food-retailing outlets in Austria. Although the German trading company Lidl is now becoming active in the Austrian food-retailing market, its activity has so far been confined to a few shops and became possible only after many years of trying. Apart from Rewe in 1996 and the recent entry by Lidl, in the past 20 years or so there has been no new market entry by a large trading chain.

(59) As a result of the merger, the level of concentration in the Austrian food-retailing market will be increased further by a considerable margin and it will be even more difficult for newcomers to enter the market in the future. It cannot therefore be supposed that the room for manoeuvre of Rewe/Billa/Meinl will be restricted by potential competition.

(60) (bb) *The market position of Rewe/Billa/Meinl achieved through the merger can be expected to be further enlarged in the foreseeable future*. The total number of shops in the Austrian food-retailing trade has been falling steadily for years (between 1996 and 1996 and 1997, for example, by 3,7 %). Even before the operation is scheduled to take place, Rewe/Billa is the only supplier to be expanding rapidly, opening on average 50 new shops a year on its own resources. The other large suppliers have, by contrast, been carrying out closures.

(61) If Meinl's shops are fully integrated into the Rewe/Billa group, they can be expected to further enlarge their market position. If after the operation Meinl's volume of purchases is combined with the much larger one of Rewe/Billa, the former Meinl shops will be able to benefit from more favourable purchasing conditions.

(d) ***Causality***

(62) In their reply to the Commission's Statement of Objections, the sellers submitted that the operation would not lead to the creation of a dominant position on the part of Rewe/Billa/Meinl in the Austrian food-retailing market. In its present form, and given its present rate of growth and size, Meinl suffered from major competitive disadvantages vis-à-vis other, much larger, competitors. If Meinl were to quit the market or if it had to downsize, the market shares would, owing to the historical and geographical distribution of Meinl's shops, accrue mainly to Rewe/Billa. Nor was there any less anti-competitive alternative to the sale, as the only other potential buyer was Spar. Spar occupied a similar position to Rewe/Billa in terms of market share in the Austrian market as a whole, was especially strong in western Austria and had a larger sales area than Rewe/Billa.

(63) The Commission acknowledged in the Kali and Salz/MdK/Treuhand decision [15], which has since been upheld in this respect by the Court of Justice [16], that a merger which should normally be considered to lead to the creation or strengthening of a dominant position on the part of the acquiring firm can be regarded as not causing such a position on the market if, even in the event of the merger's being prohibited, the acquirer would inevitably achieve or strengthen a dominant position. Accordingly, a merger generally is not the cause of the deterioration of the competitive structure if it is clear that:

— the acquired firm would in the near future be forced out of the market if not taken over by another firm,

— the acquiring firm would take over the market share of the acquired firm if it were forced out of the market,

— there is no less anti-competitive alternative purchase.

(64) At the same time, the Commission made clear in the Kali and Salz decision that such a situation occurs only in exceptional cases. Normally, there would be a presumption that an operation which results in the creation or strengthening of a dominant position is the cause of this deterioration of the competitive structure. Consequently, the burden of proving that there is no causal link lies with the merging firms.

(65) It should be pointed out first of all that, in contrast to the situation underlying the Kali und Salz decision, in this case there is no question of the possible forcing of a whole firm out of the market. The group was split into two back in 1996 when the sub-group Julius Meinl Austria Industrie GmbH was formed. This sub-group includes the production division, which comprises the firms Julius Meinl Kaffee- und Tee Vertriebs GmbH (roasted coffee and tea), Julius Meinl Nahrungsmittel-produktion GmbH (predominantly marmalade, fruit juice, distillery products and wine), Julius Meinl Fleischwerke GmbH (meat and sausages) and Julius Meinl Grosshandels GmbH (distribution of own-label products). Julius Meinl Austria Industrie GmbH also holds 33,3 % of the shares in Meinl Bank AG and all the shares in Copem Compagnie de Participation Européenne Meinl BV, which holds 49 % of the shares in Julius Investment NV. The latter controls Julius Meinl International AG, which acts as holding company for the Meinl group's activities in central and eastern Europe. The retailing division retained by Meinl therefore accounts for only part of the business activities and subsidiaries of the Meinl group. Meinl's withdrawal

[15] OJ L 186, 21.7.1994, p. 38, paragraphs 70 et seq. of the recitals.
[16] Judgment of the Court of Justice in Joined Cases C-68/94 and C-30/95 French Republic and Others v Commission [1998 ECR I-1375.

from the Austrian food-retailing market will accordingly take the form of a management decision to abandon a business activity whose development has not lived up to the expectations of the firm's managing board. In such a case of a 'failing-division defence' and not of a 'failing-company defence', the burden of proving that the defence of lack of causality is valid must be especially heavy. Otherwise, every merger involving the sale of an allegedly unprofitable division could be justified under merger control law by the seller's declaring that, without the merger, the division would cease trading.

(66) The parties' submission is not such as to justify applying the defence of lack of causality. Apart from the general consideration outlined above, the parties have done nothing to prove that, in the absence of a takeover by another firm, Meinl will in any event withdraw from the market in the near future. While it is true that Meinl's financial situation has deteriorated in recent years, the parties have not submitted any evidence to suggest that Meinl is already, or is about to become, insolvent. It must be assumed, rather, that the intended divestiture of the Meinl group's food-retailing activities in Austria is based on a strategic decision of the group's top management. The restructuring of the Meinl group in 1996 suggests that, with the splitting of the group into two sub-groups, steps were already being taken to facilitate the subsequent sale of Meinl's food-retailing activities. As is clear from the 1996 annual report, the loss-making Meinl activities in Austria were being separated from the profitable, essentially more highly capitalised and strategically more important activities, which were being brought together within the sub-group Julius Meinl Austria Industrie GmbH. Against this background, merely proving that, in its present form and given its present rate of growth and size Meinl suffers from major competitive disadvantages vis-à-vis other, much larger, competitors does not suffice to show why Meinl's food-retailing activities must in any circumstances be terminated.

(67) In the Commission's view, the parties' contention that Meinl's market shares will, owing to the historico-geographical distribution of Meinl shops, accrue mainly to Rewe/Billa is likewise not valid. The parties themselves say in the same breath that Spar is a potential buyer. On the strength of the parties' own admission, it cannot therefore be assumed that Meinl's market shares would come what may, accrue to Rewe/Billa. The competitive situation which would arise with or without the proposed operation is therefore by no means the same.

(68) The parties' contention that there is no less anti-competitive alternative to the sale to Rewe/Billa, Spar being ineligible owing to its market position, is equally unsubstantiated. It is clear from the Commission's exposition in the Kali and Salz/MdK/Treuhand decision that the burden of proving that there is no alternative potential buyer apart from the acquiring firm is, in the Commission's opinion, a heavy one. This view has been upheld by the Court of Justice [17]. The parties' argument does not discharge this burden. The parties have neither indicated with which potential buyers the Meinl group has negotiated nor for what reasons the negotiations failed. In saying that Spar is excluded from the outset as a less anti-competitive alternative buyer, the parties have pre-empted the competitive assessment by the competent competition authority. In view of the abovementioned differences between Rewe/Billa and Spar, such a finding is by no means a foregone conclusion.

(69) The parties have therefore satisfied none of the Commission's three tests in the Kali and Salz/MdK/Treuhand decision for sustaining the defence of lack of causality. The proposed operation gives rise for this reason also to the creation of a dominant position on the part of Rewe/Billa/Meinl in the Austrian food-retailing market.

(e) ***Conclusion***

(70) For the above reasons, it is to be expected that the proposed operation will place Rewe/Billa/Meinl in a dominant position in the food-retailing market in Austria.

B. PROCUREMENT MARKET

(71) The exercise of buyer power which leads to the securing of a more favourable purchase deal is not to be considered per se detrimental to the economy as a whole. Especially where the supplier side is itself highly concentrated and powerful, buyers are faced with effective competition in their own selling market and hence are compelled to pass on any savings to their own customers, buyer power can prevent monopoly or oligopoly profits from being earned on the supply side [18]. However, if the powerful buyer himself occupies in his selling market a strong position which is no longer kept sufficiently in check by the competition, any savings can no longer be expected to be passed on to customers.

[17] See footnote 15.

[18] See, for example, *The welfare consequences of the exercise of buyer power*, study by Paul Dobson, Michael Waterson and Alex Chu for the Office of Fair Trading, September 1998, p. 17 et seq.

(72) In the retail trade there is a close interdependence between the distribution market and the procurement market. Retailers' shares of the distribution market determine their procurement volume: the bigger the retailer's share of the distribution market, the larger the procurement volume. And the larger the procurement volume, the more favourable as a rule are the buying conditions which the trader obtains from his suppliers. Favourable buying conditions can in turn be used in various ways to improve one's position in the distribution market (sometimes through internal or external growth, but also through low-price strategies targeted at competitors). The improved position in the distribution market is itself reflected in a further improvement in buying conditions, and so on.

(73) The spiral described above leads to ever-higher concentration both in distribution markets and in procurement markets. In the short term, final consumers may benefit from the process, as there may be a period of intense (predatory) competition in the distribution market during which the powerful buyer/trader is forced to pass on his savings to consumers. But this will last only until such time as a structure (as in this case, an individual dominant position) is arrived at in the distribution market which leads to a clear reduction in competitive intensity. At this stage, any consideration for the final consumer goes by the board, as he is left with few alternatives.

(74) Buyer power also gives a trader considerable influence over the choice of products which come to market and hence are obtainable by consumers. Products which are not bought by a dominant buyer have practically no chance of reaching the final consumer as the supplier lacks alternative outlets. Lastly, the dominant buyer determines the success or otherwise of product innovations.

1. **Relevant product markets**

(75) These markets comprise the sale of daily consumer goods by producers to customers such as wholesalers and retailers and other firms.

(76) The consisent practice of the Commission and the approach of the Court of Justice has been to define the market primarily from the viewpoint of the the consumer. True, the products or products-categories which are typically bought in by a food retailer are not, as far as the end consumer is concerned, totally interchangeable: even so, at a commercial level the specific distribution service offered by the food-retailing trade is, as was explained in recital 13, of great importance to the consumer, and that service entails a definite range of food and non-food products ('one-stop shopping'). The position is different, however, when it comes to defining procurement markets. Here, the critical factors are the producers' flexibility in changing output and the alternative outlets open to them. Producers generally produce a single product or category of products (such as dairy products, bread and pastries) and are unable to switch readily to making other products. A dairy producer, for instance, cannot produce bread and pastries without substantial investment and additional know-how. It is not possible, therefore, to speak of a uniform procurement market for the food-retailing trade. Although the food-retailing trade exerts demand for a complete range of goods inasmuch as its customers likewise demand variety (see recitals 10 et seq.), it cannot obtain this complete range from one and the same producer. It cannot therefore be accepted that there is a single procurement market.

(77) The Commission's investigations have confirmed that a market definition broken down by product category is generally considered meaningful and that a distinction can be drawn essentially between the following categories:

— meat and sausages,

— poultry and eggs,

— bread and pastries (fresh and packaged bakers' wares, excluding frozen ones),

— dairy products (milk, butter, yoghurt, puddings, fresh milk-bases desserts, all types of cheese),

— fresh fruit and vegetables,

— beer,

— wines and spirits,

— soft drinks (including mineral water),

— hot beverages (coffee and tea),

— confectionery,

— basis foodstuffs (including flour, sugar, noodles, rice and spices),

— preserved foods (non-perishable foodstuffs in tins or other packaging, with the exception of frozen foods),

— frozen foods (including ice cream),

— baby foods,

— pet foods,

— body-care products (creams, lotions, etc., the purpose of which is primarily preventive) and cosmetics (make-up and perfumes),

— detergents, polishes, cleaning products,

— other drugstore products (apart from the above, medicinal products available over the counter, health foods, personal hygiene products, and so on),

— other non-food products normally found in supermakets (for example, clothing, newspapers and magazines, entertainment).

(78) Supplier structures also differ between the various product categories. In the fresh-product sector, and especially in the case of meat and sausages, dairy products and bread and pastries, there is a highly fragmented supplier structure consisting mainly of small and medium-sized businesses. In the non-food field (such as detergents, body-care products and pet foods), on the other hand, large international producers predominate. The remaining product categories display a hybrid supplier structure, although it is normally [19] characterised by a lower level of concentration than the trader side. Buying-in by the food-retailing trade is likewise organised as a rule along the lines of the above product-categories.

(79) As a rule, the food-retailing trade is not the only sales channel open to producers of retail-food products. Other possible sales channels are, for example, the specialised trade, cash-and-carry stores and other wholesalers, delicatessens, drugstores and the export trade. Although the importance of the various sales channels differs depending on the product category (see table at recital 95), the food-retailing trade is, with a share of more than 50 %, by far the most important sales channel for most product categories. The disparate distribution of the sales channels also militates in favour of a delimitation of the procurement market according to product categories.

(80) It must be borne in mind that from the producer's point of view different sales channels are not readily interchangeable. Different container sizes, get-up and packaging (for which special machines or other production requisites may be needed), different sales strategies (as in the food-retailing trade and in delicatessens), the need for variety of knowledge and contacts for different distribution channels and different logistics make it difficult to switch between sales channels. The Commission has information in its possession which indicates that entry into a new sales channel is sometimes possible only after lengthy canvassing of the market. Numerous products (in particular impulse and branded goods) are expressly designed for direct sale to final consumers. For such products, there are, outside the food-retailing trade, few marketing alternatives (as a rule the specialised trade, for non-food products the drugstore trade, cash-and-carry stores). The Commission's investigations have disclosed that an immediate, smooth substitution of a lost food-retailing trade customer by selling through other sales channels is impossible in most product categories. A change of sales channel would instead, where it is at all possible, require considerable investment and adaptation of the firm's production and sales organisation and cost structure. This points to there being, at least in certain product categories, a pure food-retailing procurement market.

(81) The Commission therefore proceeds on the assumption that the procurement market may be objectively subdivided into the abovementioned product categories. This does not rule out the possibility that some of these markets may have comparable structures and can be lumped together in the analysis. Moreover, there are, for the reasons set out above, strong arguments in favour of subdividing the procurement market according to sales channels, so that procurement for the food-retailing trade may constitute a separate market. This matter does not have to be decided, however, as competition problems already arise in procurement markets covering all sales channels.

2. **Relevant geographic markets**

(82) According to the parties, the procurement market is EEA-wide. Following Austria's integration into the EU, both suppliers and retailers have concentrated increasingly on the European market. This can be seen from the growth in actual foodstuff exports, especially to Germany. At the same time, however, the parties concede that, more than two years after the takeover of Billa by Rewe, the joint procurement volume of both firms comes to less than 2 % of the total procurement volume of Billa for food and non-food. The parties point out, moreover, that Austrian brands and hence Austrian producers are an essential feature

[19] There are a number of exceptions, including very minor product categories without much importance in Austria, e.g. fish.

of the Rewe/Billa range, there being increased demand from consumers for Austrian and regional products. Rewe/Billa therefore works, they argue, very closely with regional and local suppliers, such as bakeries, mills, sausage and ham producers and water-bottlers. In fruit and vegetables, Rewe/Billa attaches great importance to freshness and hence, owing to the shorter carrying distances, to Austrian goods. As a direct result of the takeover of Billa by Rewe, many customers pay more attention to Austrian quality, Austrian products being preferred in many instances to those of international suppliers, precisely because of their high quality.

(83) The Commission's investigations have established that the procurement markets for all the product categories referred to below are to be regarded as national. This is due, first, to consumer preferences for Austrian products and a product range tailored accordingly. Secondly, the Austrian food-retailing trade buys predominantly from Austrian suppliers. According to data supplied by AC Nielsen, in the product categories ([20])of meat and sausages, dairy products, soft drinks, beer, bread and pastries, fruit and vegetables and coffee, the Austrian food-retailing trade obtains more than 80 % of its supplies from purely national suppliers. Even where supplies are procured from internationally active producers (such as branded-goods manufacturers), the procurement is effected almost exclusively through their Austrian establishments. Austrian producers (especially producers of foodstuffs) sell the bulk of their output in Austria, concentrating on the Austrian market with its 8 million inhabitants and special consumption habits. Only 8,4 % of the foodstuffs produced in Austria are sold abroad.

(84) A further pointer to there being Austrian procurement markets is the existence of higher prices for a number of, in particular, fresh products in Austria compared with Germany. According to the notifying parties, buying Austrian fruit and vegetables costs Billa [...]*% more than buying comparable goods elsewhere in Europe. Pork costs ATS [...]* per kilo more in Austria than the EU average. All told, according to the notifying parties, the prices of Austrian products are up to 20 % higher than comparable European market prices.

(85) Even international branded goods in both the food and the non-food sector are as a rule procured from Austrian establishments/subsidiaries of the relevant firms, and are not imported. This is due primarily to the fact that the food-retailing chains expect from producers, services such as shelf maintenance and market research, which can be provided only through a presence on the spot. This package of products and services, which is tailored specifically to the Austrian market, is negotiated by international producers in the annual rounds of talks with the Austrian food-retailing trade. An additional pointer to there being a national procurement market even in international branded goods is the fact that, especially in the food sector, international brands are often only collective brands. The content of the products differs from country to country according to different tastes. The Commission has determined, for example, that coffees, prepared dishes and even pet foods produced for Germany, are, in spite of identical packaging, not saleable in Austria, and vice versa. The opening-up of the procurement market anticipated in the decision of 27 August 1996 in case M.803-Rewe/Billa ([21]) has yet to manifest itself. It is also worth noting in this connection that, even more than two years after the takeover of Billa by Rewe, the joint procurement volume of both firms, according to their own estimates, amounts to less than 2 % of the total procurement volume of Billa for food and non-food. The parties themselves have, moreover, conceded that buying abroad continues to be difficult owing to red tape, for example, formal declaration and packaging.

(86) Lastly with regard to international branded goods, it is appropriate to define the geographic markets with reference to the ability of suppliers to switch to other means of channelling goods to final consumers ([22]). Here, access may be had to the consumer only through the corresponding distribution channels in Austria, of which the food-retailing trade is the most important.

(87) Owing to the abovementioned structural peculiarities, the Commission accordingly proceeds on the basis that there are national Austrian procurement markets.

3. **Competitive assessment**

(88) It is to be assumed that the operation will lead to the creation or strengthening of dominant positions on the part of Rewe/Billa/Meinl in nine Austrian procurement markets.

([20]) The product categories mentioned here do not correspond fully to the product categories set out above.

([21]) See footnote 5.

([22]) See Decision 92/227/EC, footnote 6, recital 37.

(a) ***Market structure***

(89) (aa) *In the Austrian procurement markets the supply side is much less concentrated than the demand side, especially as far as the food-retailing market as a demander is concerned.* The supply structure differs from one product category to another. In almost all product categories (with a few exceptions especially in the non-food sector, such as pet foods), the producer side is much less concentrated than the demand side. In the *Cash Almanach* ([23]), which, according to the trade, is the most comprehensive catalogue of, among others, foodstuff suppliers in Austria, on average for all product categories, 22 producers are listed per product category. In the product categories dairy products, meat/sausage and basic foodstuffs, there an 40 to 50 suppliers each, for confectionery, wines/spirits and preserved foods around 30 to 40 each, and for beer and bread/pastries about 20 each ([24]). A large proportion of the producers are, moreover, small firms with a turnover of less than EUR 7 to 8 million.

(90) The suppliers/producers of dairy products, meat and sausages, poultry and eggs, bread and pastries and beer in Austria are, with few exceptions, Austrian firms which concentrate on the domestic market and which, when compared with their foreign counterparts, are small and medium-sized enterprises. A few German firms (particularly from southern Germany) also supply the Austrian market. Big international firms are the exception (in the case of dairy products, for example, above all Danone, and to a lesser extent KraftJacobsSuchard, for which dairy products are more of a sideline).

(91) In the categories confectionery, soft drinks, coffee and tea, wines and spirits, basic foodstuffs, preserved foods and frozen foods, international groups (such as Nestlé, KraftJacobsSuchard, Masterfoods) and Austrian producers (such as Inzerdorfer, Felix Austria, Darbo, Mautner Markhof, Manner) are equally well represented in each case.

(92) Non-food products especially (body-care products, cosmetics, personal hygiene products, detergents, polishes and cleaning products), but also baby foods and pet foods, are supplied mainly by international suppliers. In these sectors also there are, however, a few (fairly small) Austrian producers.

(93) In the food-retailing trade sales channel, these producers stand opposite fewer than 10 food-retailing chains, of which only five (Rewe/Billa, Meinl, Spar, ADEG, Löwa) are active throughout Austria. According to the information in the Commission's possession, the buyers in other sales channels are, apart from cash-and-carry stores, not very highly concentrated. They are predominantly small and medium-sized enterprises, especially in the specialised trade and delicatessen sales channels. In the cash-and-carry sector, Metro is the only buyer in Austria worth mentioning, but the importance of this sales channel is on the whole minor (the share across all product categories being approximately 10 %). In the export field, although a few large buyers are present, this sales channel is also of much lesser importance than the food-retailing trade (the share across all product categories being approximately 13 %).

(94) (bb) *The food-retailing trade is by far the most important sales channel for the foodstuffs suppliers.* The importance of the various sales channels differs depending on the product category. The relative importance of each sales channel to the various product categories as determined by the Commission's investigations, based on the answers of the producers surveyed, weighted according to their turnover, can be seen from the following table:

(%)

Product category	Food-retailing trade share	Specialised trade share	Delicatessen share	Other sales channels share
Dairy products	64	3	3	30
Bread and pastries	33	35	2	30
Soft drinks	50	6	17	27
Hot beverages	62	0,5	19	18,5
Basic foodstuffs	65	5	10	20
Baby foods	31	0	0	69 [of which 66 % SDs ([1])]
Pet foods	52	7	0	41 (of which 32 % SDs)
Detergents, polishes and cleaning products	70	0	0	30 (of which 19 % SDs)
Body-care products and cosmetics	40	0	0	60 (of which 44 % SDs)

([1]) SDs = specialist drugstores.

([23]) *Cash Almanach für Handel, Gewerbe und Industrie '98*, published by the trade magazine *Cash*, Manstein Zeitschriften Verlagsges.m.b.H, Perchtoldsdorf.

([24]) In the case of bread/pastries, small producers producing products exclusively or almost exclusively for sale in their own bakeries or as local suppliers to the food-retailing trade are not included.

(95) These percentages show that, for all the product categories indicated apart from baby foods and body-care products/cosmetics, the food-retailing trade is the most important sales channel. The other sales channels are, by contrast, of far less importance.

(96) The Commission's investigations have determined that switching between different sales channels is extremely difficult. Differences in packaging, get-up and container size from sales channel to another are a bar to a speedy, smooth switch-over. More important, however, are differences in logistics and distribution structures from one sales channel to another, which place different demands on a firm. A different vehicle fleet, for example, is needed if, instead of having to supply a few central warehouses for the food-retailing trade, numerous smaller customers have to be supplied direct. The number, knowledge and contacts of the distribution staff also necessarily differ from one distribution channel to another. And different distribution channels call for different advertising messages aimed at final consumers.

(97) For these reasons and because of the large role played by the food-retailing trade in the sale of products in the above categories in Austria, it follows that a 'lost' food-retailing trade customer is as a rule difficult for producers to replace. The producers surveyed stated that they could replace without difficulty only small food-retailing trade customers (accounting on average for less than 5 % of turnover). Even food-retailing customers accounting for 5 to 10 % of turnover are, according to the same source, not easy to replace. Switching to other sales channels is normally out of the question owing to the difficulties referred to above. And the larger producers, both international and Austrian, especially already have as a rule, attained a very high degree of distribution through all sales channels and in particular through all the major food retailers. This shows clearly that in Austria the opportunities for producers to switch to other buyers are much more limited than the opportunities for buyers to switch to other producers.

(98) (cc) *Even prior to the merger, Rewe/Billa has the highest market shares in the procurement markets and will increase them substantially as a result of the operation*. It is difficult to determine precise market shares in the procurement market. The Commission asked some 300 foodstuff manufacturers predominantly in Austria ([25]), what share of their turnover was accounted for by Rewe/Billa and Meinl. On the basis of that survey, producers can be deemed to achieve on average per product category with Rewe/Billa and Meinl the percentages of turnover shown in the following table. The table covers some 200 evaluated answers. The data are based on procurement markets covering all sales channels, although, as indicated above, there are strong arguments in favour of there being separate markets for each sales channel.

Product category	Rewe/Billa	Meinl	Rewe + Meinl
Dairy products	[15 to 25]	[< 10]	[25 to 35]
Bread and pastries	[20 to 30]	[< 10]	[30 to 40]
Soft drinks	[20 to 30]	[< 10]	[25 to 35]
Hot beverages	[25 to 35]	[< 10]	[25 to 35]
Basic foodstuffs	[20 to 30]	[< 10]	[25 to 35]
Baby foods	[25 to 35]	[< 5]	[30 to 40]
Pet foods	[25 to 35]	[< 5]	[25 to 35]
Detergents, polishes and cleaning products	[20 to 30]	[< 5]	[25 to 35]
Body-care products and cosmetics	[25 to 35]	[< 5]	[30 to 40]

(99) As a result of the operation, the average shares of suppliers' turnover in the stated product categories accounted for by Rewe/Billa will increase appreciably, as therefore will the dependence on Rewe/Billa as a customer. As far as the food sector is concerned, these product categories account for a share of nearly 40 % of total turnover in the food-retailing trade and in the specialised trade ([26]). Of the three non-food product categories listed in the table, the two categories detergents/polishes/cleaning products and body-care products/cosmetics belong to the categories with the highest relative turnover share in the non-food sector. It can therefore be assumed that these two procurement markets are of considerable importance.

(100) Apart from these average figures, it must be borne in mind that a considerable proportion of suppliers are even more dependent on Rewe/Billa and Meinl than the averages show. In the case of dairy products, for example, a good third of suppliers transact more than [...]*% of their turnover with Rewe/Billa alone. After the operation, this will be true, assuming that procurement behaviour does not change, of nearly half of all suppliers.

(101) The Commission asked producers above what proportion of turnover, with a given customer could not be switched to other sales channels without difficulty.

([25]) Including both Austrian firms and Austrian establishments of international firms. Producers from other European countries were also surveyed.

([26]) Source: market survey, *Der Lebensmittelhandel in Österreich 1998*, RegioPlan Consulting, pp. 24 et seq.

It transpired that on average 22 % of turnover is the figure above which a customer can be replaced only at the cost of very heavy financial losses, if at all. The parties have contended that a producer behaving in an economically realistic manner must be able to withstand turnover reductions of up to about 20 %. The Commission proceeds in this case, having regard to supplier structures in the indicated procurement markets and assuming the existence of a dominant position in the distribution market, on the premise that the position which Rewe/Billa will occupy in the procurement markets after the operation takes place will be of an order of magnitude such that either a dominant position is created or an existing dominant position is strengthened.

(102) It must be borne in mind here firstly that, when they lose a major customer, producers do not have much in the way of alternatives. In the food-retailing trade, especially if the firm concerned is already on the list of the leading competitor Spar, only small competitors are left, and they are hardly in a position to take up a large share of turnover. Switching to other sales channels is difficult, costly and, in the short term at least, generally impossible. Switching to exports, mentioned by the parties as an alternative, is likewise not feasible in the short term. To build up export markets, an on-the-spot presence and an intensive, costly canvassing of the market are normally necessary. The Commission has information in its possession which indicates that it can take about five years to attain a satisfactory level of exports, to Germany for example. The upshot is that already on the supplier side there is a strong dependence on Rewe/Billa/Meinl, a dependence which will grow as a result of the merger.

(103) Rewe/Billa and Meinl, on the other hand, are not dependent on individual suppliers. The leading supplier to the Rewe group (the Nestlé group) covers, according to the notification, only about [...]% of the volume of purchases. In the case of Meinl, the leading supplier covers approximately [...]% of the volume of purchases. The result is a much heavier dependence of the supplier side on Rewe/Billa/Meinl than the other way round. This is the norm, moreover, with large food retailers ([27]). Range flexibility in the trade is far greater than the flexibility of producers in production and distribution. Hence it is much easier for the trade not to buy something than it is for the producer not to produce it. This puts the market share study well and truly into context.

(104) The parties argue, by contrast, that they, for their part, are dependent on certain producers. This is true, they say, of one branded goods producer who makes 'must carry'/products, as Rewe/Billa and Meinl risk losing customers if those products are not on their shelves. They add, moreover, that, in view of the strong preference of Austrians for Austrian products, there is for the same reason a dependence on Austrian producers. The latter argument is not valid, however. While it may be true that Rewe/Billa and Meinl cannot do without Austrian products, especially in the fresh produce sector (such as dairy products and bread), a dependence on individual suppliers cannot be deduced from this. The Commission's investigations have established that there are in the fresh produce sector a large number of Austrian suppliers potentially at the parties' disposal. If individual suppliers drop out, there are sufficient alternatives for the parties to turn to.

(105) The answer to the question as to the extent to which a trader is dependent on branded goods producers depends on what consequences the non-availability of certain brands has for the trader. What matters here is how the trader's customers react to the absence of a product. In the case of foodstuffs purchases, the duration of a shopping trip is an essential consideration to customers. One-stop shopping, meaning buying everything needed from one shop, is preferred. If a branded product which the customer wants is not stocked by such an outlet, the risks have to be weighed up that the customer might: (1) stop shopping or put off making the purchase till later, (2) go to another shop to look for the desired article, but otherwise remain faithful to 'his' trader, (3) take his business elsewhere in the longer term, or (4) buy another brand ([28]).

(106) The answer depends first on the importance of the product to the customer, and secondly on the availability of alternative sources of supply. In the case of foodstuffs which are purchased frequently and for which the convenience of shopping as a rule outweighs other aspects such as price and quality, the importance of the product is somewhat slight. This is all the more true if the customer finds in his shopping environment almost nothing but outlets of one and the same trader. It can accordingly be assumed that, in the event of a delisting of branded goods, the trader suffers less than the producer, especially since he will usually have more alternative possibilities open to him ([29]).

([27]) See the interim report by Dobson Consulting for the study, *Buyer power and its impact on competition in the food-retailing distribution sector of the European Union*, p. 27.

([28]) OECD background paper 'Round table on buying power', 1998, pp. 9 et seq.

([29]) OECD background paper, pp. 11 et seq.

(b) ***The parties' particular strengths***

(107) (aa) *Rewe/Billa has structural competitive advantages in the procurement markets which none of its competitors has*. Rewe/Billa is a centrally managed chain-store company which can decide centrally about important factors in competition such as the composition of the range it carries. If the decision is taken at Rewe/Billa head office to include a certain product in the range, according to the information in the Commission's possession only two weeks or so go by before the product is available in every Billa shop in the country.

(108) The closest competitor, Spar, on the other hand, is much less centralised, the majority of Spar outlets (71 %) being run by independent retailers. When launching a new product at Spar, the producer has to deal with three separate levels within the Spar group, namely the head office, regional Spar organisations and individual Spar traders. It accordingly takes much longer ([...]*) before a new product is available in a large number of Spar outlets. A 100 % availability rate, which is attainable at Billa without any difficulty, is normally impossible at Spar. Rewe/Billa cannot be bypassed in Austria when it comes to launching new products, and this places Rewe/Billa at a competitive advantage *vis-à-vis* producers as far as any modifying of the range is concerned.

(109) (bb) *The dominant position in the eastern Austrian/Vienna region strenghtens the position of Rewe/Billa/Meinl in the Austrian demand markets*. In order for a firm/product to be present throughout Austria, it is essential, according to the information in the Commission's possession, in all the product categories listed in recital 98 to be represented in the eastern Austrian/Vienna region. As was stated in recitals 32 et seq., it is in this region that the centre of gravity of the Austrian economy lies. According to AC Nielsen, 41 % of Austrian food-retailing trade turnover is achieved there (of which 20 % is in Vienna alone). And a national advertising strategy makes sense only if a product is actually obtainable throughout the country.

(110) With the exception of a few firms [30], all the producers of goods in the abovementioned categories who were surveyed told the Commission that an adequate presence in eastern Austria and especially in Vienna was impossible without a listing with Rewe/Billa/Meinl. Before the merger, Meinl offered firms not listed with Rewe/Billa an alternative, especially through its strong presence in the Vienna area. This alternative has now disappeared. The remaining competitors are too weak in eastern Austria and above all in Vienna to represent a viable alternative to the parties (market shares of at most [< 20]% [Spar] or [< 12]% [ADEG, Löwa]. Similarly, for the reasons given above, neither Hofer nor sales channels outside the food-retailing trade are alternative outlets for producers.

(111) (cc) *Rewe/Billa is using own brands strategically to further reduce its already limited dependence on suppliers*. On average the own-brand share in Austria amounts, according to the notifying parties, to approximately [< 10]% (minus Hofer, which stocks almost nothing but own brands, but which cannot use them strategically against branded-goods producers in the manner described below). Billa's own-brand share is well above average in some product categories:

(%)

Product category	Billa	Merkur	Mondo	Emma	Bipa
Dairy products	[...]*	[...]*	[...]*	[...]*	
Fruit and vegetables	[...]*	[...]*	[...]*	[...]*	
Wines and spirits	[...]*	[...]*	[...]*	[...]*	
Pet foods	[...]*	[...]*	[...]*	[...]*	[...]*
Personal hygiene	[...]*	[...]*	[...]*	[...]*	[...]*

(112) The growth and increasing importance of own brands are having the effect of shifting the balance of power between traders and producers in favour of traders. A trader has own brands produced to his own requirements and under his own logo. The actual producer is no longer visible to the customer and is therefore exchangeable almost at will. This can be illustrated by the example given to the Commission of Billa's own brand 'Heidi Teebutter', which, using almost indentical packaging, was produced, first by an Austrian producer, then by a Dutch one. The trader thereby enters de facto into direct competition with branded goods producers. The effect is that of a backwards integration into the producer stage [31].

(113) The presence of own brands endangers in particular weaker brands which do not number among the must-carry products. Such brands are quite easily

[30] Namely small producers of fresh produce who deliver only locally in western Austria, firms which have opted for supplying Hofer, and a few firms which supply products mainly through sales channels other than the food-retailing trade.

[31] See OECD background paper, p. 13.

replaceable by own brands. The presence of own brands therefore makes delisting threats against the producers of such brands even more credible than against producers of must-carry brands.

(114) The Commission's attention has been drawn to specific instances where, in various product categories, Billa has selectively delisted secondary brands or weaker producer's brands (not only of international branded goods producers but also goods of Austrian producers) and replaced them with own brands. Although must-carry products are as a rule not delisted, as they continue to be needed on the shelves as eye-catchers, their share is reduced to the extent necessary for them to perform their eye-catching function, for example by limiting the range. By the same token, the own-brand share can be considerably increased.

(115) (dd) *The dominant position to which the operation will give rise in the distribution market will further strengthen Rewe/Billa/Meinl's position in the procurement markets.* As indicated above (recitals 21 to 70) the operation will lead to the creation of a dominant position in the Austrian food-retailing market. The increased market shares in the distribution market achieved by Rewe/Billa as a result of the operation will increase the parties' volume of purchases. The higher Rewe/Billa's volume of purchases, however, the more dependent producers will be on this customer and the easier it will be for it to secure further improvements in its buying conditions.

(c) ***Causality***

(116) As was explained in recitals 63 to 69, the parties have satisfied, in respect of the food-retailing market, none of the Commission's three tests in the Kali and Salz/MdK/Treuhand decision for sustaining the defence of lack of causality. The proposed merger therefore results *a fortiori* in the creation of a dominant position on the part of Rewe/Billa/Meinl in the Austrian procurement markets mentioned below.

(d) ***Conclusion***

(117) It is accordingly to be assumed that, as a result of the operation, dominant positions on the part of Rewe/Billa will be created or strengthened in the procurement markets for dairy products, bread and pastries, soft drinks, hot beverages, basis foodstuffs, baby foods, pet foods, detergents, polishes and cleaning products, and body care products and cosmetics.

C. UNDERTAKING OFFERED BY THE PARTIES

1. **Undertaking**

(118) In order to meet the Commission's objections to the proposed operation, the parties have made the following commitments.

'Meinl will transfer to Rewe/Billa for operation as food-retailing outlets only those shops which are mentioned in the list attached to the letter of 26 January 1999 (Annex 1) as being sites to be transferred. The sites mentioned in Annex 1 are Meinl shops situated outside the territory of eastern Austria (Vienna, Lower Austria and northern Burgenland). Rewe/Billa undertakes to take possession of these shops alone with a view to operating them as food-retailing outlets.

Meinl will transfer to Rewe/Billa the shops listed in Annex 2, which shops will be converted into Bipa shops within three months of the Rewe/Billa merger being authorised and will continue to be operated as such indefinitely. Rewe/Billa undertakes in this respect not to operate, pending the completed conversion, as food-retailing outlets of Rewe/Billa any of the 45 Meinl sites intended for Bipa. Rewe/Billa undertakes for an unlimited period not to reconvert into food-retailing outlets, once they have been converted, any of the 45 Meinl sites intended for Bipa. Should Rewe/Billa not wish to continue to operate as drugstores the shops listed in Annex 2, it undertakes to offer them for sale to third parties independent of Rewe/Billa. If a transfer to third parties is not possible, these sales outlets may be closed or sub-leased to competitors active independently of Rewe/Billa both in the distribution market and in the procurement markets and to firms active in markets other than the food-retailing market.

Rewe/Billa will submit to the Commission, every six months until 28 February 2001 and thereafter every 12 months until 28 February 2004, a written report on the current status of the Meinl shops which are to be run as Bipa shops. These reports will contain in particular all the information which the Commission needs in order to verify whether the sites listed in Annex 2 are being operated by Rewe/Billa as drugstores.

Meinl will, as part of its own business operations, itself continue to operate the sites listed in Annex 3 and undertakes for an unlimited period not to transfer any of the shops listed in Annex 3 to Rewe/Billa or to any of its group member companies. Meinl is free, moreover, to sell shops listed in Annex 3 to firms independent of Rewe/Billa, subject if necessary to examination by the competent competition authority.

Meinl and Rewe/Billa undertake for an unlimited period to remain independent of one another when operating in the distribution and procurement markets. (At this point in the confidential version of the decision, further details are given of the parties' respective undertakings.)

Meinl will submit to the Commission, every six months until 28 February 2001 and thereafter every 12 months util 28 February 2004, a written report on the current status of the shops operated by it. These reports will include all the information which the Commission needs in order to verify whether the commitments entered into by Meinl are being adhered to.'

2. **Assessment**

(119) On the basis of the undertaking offered by the parties, Rewe/Billa will acquire 162 out of a total of 341 Meinl shops. The annual gross turnovers of the shops to be acquired total ATS [...] million, which would correspond to an acquisition of 41 % of the total turnover of Meinl's shops. It must be borne in mind in this connection, however, that, of the 162 shops, 45 will be converted into Bipa drugstores. The food-retailing turnovers of these shops correspond to a 7 % share of Meinl's aggregate food-retailing turnovers. Rewe/Billa will therefore in fact acquire only 34 % of Meinl's aggregate food-retailing trade turnovers. The increase in Rewe/Billa's share of the Austrian food-retailing market will accordingly amount to approximately 2,5 %, as opposed to 7 % on the basis of the proposal as originally notified.

(120) Meinl will remain active in the food-retailing distribution market in Austria as an ongoing competitor with 179 shops. It will concentrate its food-retailing activities on eastern Austria, where it is already in a stronger position than elsewhere. With the proceeds from the sale of 162 shops to Rewe/Billa, Meinl will also be able to carry out much-needed restructuring and above all it may be able to build on and improve its position in eastern Austria.

(121) The 117 Meinl shops which Rewe/Billa can acquire and continue operating as food-retailing outlets are located outside the key region of eastern Austria. The increase in market share will therefore occur in areas where Rewe/Billa has so far been in a weaker position. In the key region of eastern Austria, on the other hand, the already strong position of Rewe/Billa will not be further strengthened, as Rewe/Billa will not be acquiring there, any shops earmarked for operation as food-retailing outlets. What is more, Meinl will be active in eastern Austria with 179 shops.

(122) As regard large-surface stores, the increase in the number of PamPam hypermarkets is being limited to 16 instead of 40 as originally notified. The increase is taking place, moreover, outside the key region of eastern Austria, in areas where Rewe/Billa's Merkur hypermarket chain is not so strongly represented. As far as the key locations covered by the RegioPlan study are concerned Rewe/Billa will acquire half the sites occupied by Meinl in shopping centres, specialised supermarket centres and inner-city shopping streets. Here too, however, the increase will be limited to locations outside the key region of eastern Austria.

(123) In the procurement markets, the sharply reduced market-share increase in the distribution market will mean that the dependence of suppliers on Rewe/Billa as buyers in the product categories referred to in recital 99 will be hardly any greater. The purchasing potential which will accrue to Rewe/Billa as a result of the amended operation will have no noticeable influence on the position of Rewe/Billa in the procurement markets. Nor will Rewe/Billa further strengthen its strong position in eastern Austria. In addition, Meinl will be active as a purchaser in the procurement markets, albeit to a lesser extent, and will remain an alternative outlet for suppliers, owing especially to its strong presence in the Vienna area. It is accordingly to be assumed that the position which Rewe/Billa will occupy in the procurement markets after the operation takes place will be of an order of magnitude such that no dominant position is created and no existing dominant position is strengthened.

(124) Third parties have argued, on the other, hand, that, through the acquisition of 45 Meinl sites which are to be converted into Bipa shops, the posision of Rewe/Billa in four non-food procurement markets, baby foods, pet foods, detergents/polishes/cleaning products and body-care products/cosmetics, will be strengthened in a way which at least compares with the original proposal.

(125) It should be pointed out first of all that, looked at from a competition angle, the operation relates to the takeover of Meinl's present position in the distribution market and the various procurement markets. When considering the procurement markets, only the volume of demand which is attributable to the acquired Meinl sites can therefore be taken into account. In a merger review context, however, theoretically higher demand volumes which might arise following conversion of these sites cannot be taken as a criterion. Nor can any safe assertion be made in this respect. A total of at most 41 % of Meinl's demand volume in the procurement markets is to be assigned to Rewe/Billa, assuming that the position in the procurement markets is proportional to that in the distribution market. It follows from this, however, that the position of REWE/Billa in three of the said non-food procurement markets is being strengthened by less than 1 % and

in the market for detergents, polishes and cleaning products by less than 1,5 %. Bearing in mind, moreover, that in these markets, unlike in the food sector, large multinational groups are predominantly active, it is not possible to infer from an increased demand potential of the above order of magnitude any strengthening of Rewe/Billa's position of relevance from a merger-control point of view.

(126) Third parties have also argued that the takeover of a total of 45 Meinl shops which are to be converted into Bipa shops will cause competition problems in the specialised drugstore trade in Austria.

(127) In its decision of 28 September 1998 the Commission reserved the right to examine the market for drugstore products more closely in the course of the proceedings to be initiated. On the basis of the investigations that it carried out, the Commission has come to the conclusion that the concentration in the specialised drugstore trade in Austria gives rise to no objections under competition law. Since Meinl operates no drugstores, there was on the basis of the proposed operation as originally notified no market-share addition on the supply side. As regards the growth, likewise established on the basis of the proposed operation as originally notified, in the four non-food procurement markets of baby foods, pet foods, detergents/polishes/cleaning products and body-care product/cosmetics, this was, in view of the unchanged position on the supply side, not likely to strengthen the position of Rewe/Billa in the specialised drugstore trade in such a way as to affect merger control considerations.

(128) Nor can a different view be taken on the basis of the undertaking offered. This holds true even if one focuses only on drugstores. The current market volume for the Austrian specialised drugstore trade is estimated at just under EUR 1 billion (ATS 13 billion). In the drugstore field, three main suppliers with comparable market shares are active in Austria:

— dm-Drogeriemarkt GmbH, in which Spar has a 33 % holding, is the strongest supplier with a market share of 39 to 43 % and [...]* shops,

— Rewe/Billa-owned Bipa is, with 33 to 35 % and, according to it, 340 shops ([32]), is the second-largest supplier,

— the Schlecker drugstore chain has a market share of 22 to 28 % and operates some 550 shops.

Pursuant to the undertaking, Rewe/Billa would acquire 45 shops which are currently operated by Meinl as food-retailing outlets and which may no longer continue to be operated as such by Rewe/Billa. Assuming that Rewe/Billa converts all 45 shops into Bipa shops and that all 45 shops achieve the average turnover for drugstores in Austria of EUR 727 000 (ATS 10 million) ([33]), Bipa would achieve additional sales of EUR 32 million (ATS 450 million). This purely hypothetical increase in Bipa's turnover would correspond to a share of less than 3,5 % of the Austrian specialised drugstore trade. Even if the average turnover per Bipa shop were taken as a basis, this would result in only a slightly higher share of just over 4 %. The conversion of 45 Meinl shops into Bipa shops would therefore at most enable Rewe/Billa to catch up with the current market leader dm-Drogeriemarkt GmbH, assuming that the shops that are acquired and converted can be run as successfully as the existing Bipa shops.

(129) The Commission is accordingly of the opinion that the proposed undertaking is such as to avert the creation or strengthening of a dominant position in the Austrian food-retailing market and in the Austrian procurement markets referred to in recital 117.

VI. **SUMMING-UP**

(130) For the above reasons, it may be accepted that, on condition that the undertaking offered by the parties is carried out, the planned operation will not lead to the creation or strengthening of dominant positions as a result of which effective competition would be significantly impeded in a substantial part of the Community. Subject to this condition, the operation is therefore to be declared, pursuant to Article 2(2) of the Merger Regulation and Article 57 of the EEA Agreement, compatible with the common market and with the functioning of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Rewe Internationale Beteiligungsgesellschaft mbH and REWE-Verkaufsgesellschaft mbH are to acquire sole control over the entire share capital of

([32]) As many as 370 according to other sources.

([33]) Nielsen's countrywide estimate.

Meinl is, on condition that the undertaking offered by the parties and reproduced in recital 118 of this Decision is carried out, hereby declared compatible with the common market and with the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

REWE Internationale Beteiligungsgesellschaft mit beschränkter Haftung
Domstrasse 20
D-50668 Köln

REWE-Verkaufsgesellschaft mit beschränkter Haftung
Domstrasse 20
D-50668 Köln

Done at Brussels, 3 February 1999.

For the Commission

Karel VAN MIERT

Member of the Commission