II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 March 1999

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

(Case IV/M.1313 — Danish Crown/Vestjyske Slagterier)

(notified under document number C(1999) 560)

(Only the English text is authentic)

(Text with EEA relevance)

(2000/42/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 1310/1997 [2], and in particular Article 8(2) thereof,

Having regard to the Commission decision of 6 November 1998 to initiate proceedings in this case,

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

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

Whereas:

(1) On 5 October 1998, the Commission received a notification of a concentration pursuant to Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation) consisting of the merger of the Danish cooperatives Slagteriselskabet Danish Crown AmbA (Danish Crown) and Vestjyske Slagterier A.m.b.A. (Vestjyske Slagterier).

(2) By decision dated 6 November 1998, the Commission found that the notified operation raised serious doubts as to its compatibility with the common market. The Commission accordingly initiated proceedings in this case pursuant to Article 6(1)(c) of the Merger Regulation.

I. THE PARTIES

(3) Danish Crown is the largest Danish cooperative slaughterhouse and has 13 122 members (farmers) who supply raw materials (pigs and cattle) to the cooperative. Danish Crown is vertically integrated in slaughtering, meat processing and meat trading. Its main activities in the Community are in the United Kingdom, Germany, France, Denmark and Italy.

(4) Vestjyske Slagterier is the second largest Danish cooperative slaughterhouse and has 17 722 members (farmers) who supply raw materials (pigs and cattle) to

[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 21, 25.1.2000.

the cooperative. Vestjyske Slagterier is vertically integrated in slaughtering, meat processing and meat trading. Its main activities in the Community are in Denmark, Germany, the United Kingdom, France and Italy.

II. THE OPERATION

(5) The notified operation consists of a combination of the operations of Danish Crown and Vestjyske Slagterier in a newly incorporated cooperative society to which Danish Crown and Vestjyske Slagterier (hereinafter collectively referred to as 'the parties') will transfer all their activities, assets and liabilities and which the parties' members will join collectively as members. The parties slaughter approximately 16 million pigs and 500 000 cattle per year. The company will be the largest slaughterhouse in Europe [4] and the world's largest pork exporter.

(6) In addition, the parties are also shareholders in four other Danish cooperatives: daka a.m.b.a. (daka), Danske Andelsslagteriers Tarmsalg — Schaub & Co. a.m.b.a. (DAT-Schaub), Slagteriernes Fællesindkøbsforening a.m.b.a. (SFK) and Scan-Hide a.m.b.a. (Scan-Hide). As a result of the merger, the parties will acquire control of each of those four cooperatives for the reasons stated below.

(7) **Daka** is active in animal rendering (abattoir by-products). It is owned by Danish Crown (43%), Vestjyske Slagterier (34%), TiCan (3,8%) and a number of other slaughterhouses and retailers (12,5%). After the merger, the parties will have five out of 10 board members. Two members are elected by the employees. The Articles of Association provide for a specific system as to the appointment of board members and the majority of the board appoints the Chairman who has a casting vote. The Board is responsible for determining the commercial policy of the company. After the merger, the parties will be in a position to cast approximately 86 out of 114 votes at the General Assembly. The Articles of Association require that amendments of the Articles of Association can only be decided with the approval of another independent member who represents at least three votes.

(8) The entity resulting from the merger will be in a position to cast 75% of the voting rights in the General Assembly and will therefore be in a position to decide on the strategic decisions of the cooperative (budget, business plan and important investments). Furthermore, the parties will have half of the votes in the Board and the Chairman of the Board cannot be appointed against their will. The parties will acquire decisive influence and thus sole control within the meaning of Article 3 of the Merger Regulation.

(9) **DAT-Schaub** is traditionally active in the processing and sale of natural casings from the animals slaughtered at the Danish cooperative slaughterhouses. It also trades in spices, and in meat and meat products (main activity of the parties). DAT-Schaub is owned by Danish Crown (49,8%), Vestjyske Slagterier (31%), Steff-Houlberg (13,8%) and TiCan (5,5%). After the merger, the parties will have six out of nine board members and approximately 80 out of 101 delegates at the General Assembly. The Articles of Association state that a minimum of two independent members must be in favour of any resolution taken at the General Assembly. However, a member who represents two thirds or more of the voting rights, such as the merged entity, can amend the Articles of Association.

(10) The merged entity will be in a position to cast 80% of the voting rights at the General Assembly and has a clear majority in the board. Its majority at the General Assembly will allow it to change the provision of the Articles of Association that requires the agreement of two independent members for all resolutions at the General Assembly. Therefore, as a result of the merger, the parties will acquire sole control over DAT-Schaub.

(11) **SFK** is a supplier to the meat and food industry of packaging material, spices and food ingredients, cleaning products, clothing and tools for the meat industry and machinery and equipment for the meat industry. SFK is owned by Danish Crown (42,6%), Vestjyske Slagterier (24,7%), Steff-Houlberg (17,4%), other slaughterhouses (14,4%) and TiCan (1,1%). The Board consists of a maximum of 12 members. A maximum of eight is appointed by members of Danske Slagterier out of which the parties would be able to appoint five members [5]. Two board members are appointed by the other slaughterhouses while another two members are appointed by the employees. Decisions of the Board are adopted by simple majority and the chairman has a casting vote. The Board determines the commercial policy of the company. At the General Assembly, the parties will be in a position to cast 74% of the votes. Resolutions of the General Assembly are adopted by simple majority, but resolutions to amend the Articles of Association cannot be passed without a minimum of two independent members being in favour.

(12) The entity resulting from the merger will be in a position to cast 74% of the voting rights in the General Assembly and will therefore be in a position to decide on the strategic decisions of the cooperative (budget, business plan and important investments). The parties

[4] Danish Crown is Europe's largest pig slaughterhouse and Vestjyske Slagterier is the third largest pig slaughterhouse in Europe.

[5] Each of the members of Danske Slagterier (an Association consisting of Danish Crown, Vestjyske Slagterier, Steff-Houlberg and TiCan) appoints one member to the board and the remaining five are appointed on the basis of the number of votes held by each member. Votes are calculated on the basis of share capital (accounting for 50% of the calculation) and respective purchases during the previous three years (remaining 50% of the calculation).

will thus acquire decisive influence and thus sole control within the meaning of Article 3 of the Merger Regulation.

(13) **Scan-Hide** sells raw, sorted, and salted hides from cattle. It is owned by Vestjyske Slagterier (47,3%), Danish Crown (33,2%) and other slaughterhouses (19,5%). Before the operation, none of the parties had the possibility to exercise control over Scan-Hide although exceptionally this year, Vestjyske Slagterier would be able to cast more than 50% of the vote at the General Assembly as it supplied more than half of the hides in the previous year. After the merger, the parties will appoint five out of eight members of the Board and will be able to cast approximately 82 out of 104 votes at the General Assembly. Therefore, as a result of the merger, the parties will acquire sole control over Scan-Hide.

III. **CONCENTRATION**

(14) On the basis of the foregoing, the operation can be considered to lead to a concentration encompassing a full merger between Danish Crown and Vestjyske Slagterier within the meaning of Article 3(1)(a) of the Merger Regulation and the acquisition of control by the parties in each of the four cooperatives (daka, DAT-Schaub, SFK and Scan-Hide) within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. **COMMUNITY DIMENSION**

(15) The operation has a Community dimension pursuant to Article 1(2) of the Merger Regulation as the combined aggregate turnover of all the undertakings concerned exceeds EUR 5 000 million (Danish Crown: EUR 3 126 million; Vestjyske Slagterier: EUR 1 496 million; daka: EUR 68 million; SFK: EUR 116,8 million; Scan-Hide: EUR 39,9 million and DAT-Schaub EUR 589,3 million) [6]. Furthermore, Danish Crown (EUR 2 053 million), Vestjyske Slagterier (EUR 865,3 million) and DAT-Schaub (EUR 328,7 million) have an aggregate Community-wide turnover of more than EUR 250 million. Danish Crown, Vestjyske Slagterier, Scan-Hide and DAT-Schaub do not achieve more than two thirds of their aggregate Community-wide turnover within one and the same Member State.

(16) The operation does not necessitate cooperation with the EFTA Surveillance Authority pursuant to EEA Agreement.

[6] Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C 66, 2.3.1998, p. 25). To the extent that figures include turnover for the period before 1 January 1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

V. **RELEVANT MARKETS**

(17) The parties are active in the buying of live animals for slaughter, the sale of fresh meat for final consumption, the sale of fresh meat for industrial processing and the sale of processed meat products. The activities of daka, DAT-Schaub, SFK and Scan-Hide have been described above.

(18) In their notification the parties identified the following relevant markets: (i) the market for slaughter of live animals (divided into each species, i.e. pigs, cattle and lambs) in 'Northern Europe' (i.e. Denmark, Sweden, Germany and the Benelux countries); (ii) the Community-wide market for all types of meat; and (iii) the Danish market for the collection and processing of abattoir by-products (rendering).

(19) For the reasons stated below, the Commission considers that the relevant markets should be defined more narrowly. However, the Commission considers that the concentration does not raise concern, irrespective of the market definition chosen, with regard to the purchase of lambs and sheep and the sale of their meat. In addition, the business activities of DAT-Schaub, SFK and Scan-Hide on markets other than those described below do not give rise to concern either.

A. RELEVANT PRODUCT MARKETS

(a) **The purchase of live pigs and cattle for slaughtering**

(20) With regard to the slaughtering of live animals, the parties have stated that the killing lines in a slaughterhouse differ for each species and cannot be changed within a reasonable time-span and without incurring significant costs. In addition to that, it will take up both time and cost for a farmer to switch production from the breeding of one species of animal to another (raising cattle instead of pigs, for example). Therefore, there is no supply-side substitutability between the different species at the slaughtering level. The Commission investigation has confirmed those findings.

(21) In conclusion, the purchase of live pigs and cattle, respectively, for slaughtering constitute two separate relevant product markets.

(b) **Fresh meat markets**

Pork and beef are separate relevant product markets

(22) The parties have argued in their notification that all types of meat such as pork, beef and veal, sheep and lamb and poultry, together with processed meat

products, belong to the same product market as they are readily substitutable in the diet.

(23) However, in previous cases concerning consumer products markets, the Commission has found that simple substitutability in functional characteristics is not sufficient to define the relevant product market ([7]). Similarly in the case of meat the evidence shows that the different types of meat should not be considered as part of the same relevant product market for the purpose of assessing the impact on competition of the present merger.

(24) It is first to be noted that the different types of fresh meat are priced differently, with, on average, beef being the most expensive, pork 20 to 25% less expensive and poultry about half as expensive as beef. Furthermore, those meats are perceived differently by the consumers, and therefore have a different position in the market place. For example, with regard to meat attributes such as flavour, taste, nutritional value, tenderness, cost, ease of use, the evidence in the Commission's file shows that in Denmark poultry received the highest overall ratings, particularly high on tenderness and ease of use, whereas beef scores high on flavour and taste but low on cost. Pork on the other hand scores high on ease of use, flavour and taste, but low on leanness.

(25) Those considerations are confirmed by information from the Danish meat wholesalers and supermarkets, which have indicated that there are considerable underlying differences in the purchase motivation of consumers for the different meat types. The special taste and the specific image (seasonal consumption around Easter) distinguishes lamb from the other meat types. For poultry, a typical motivation to purchase is the 'healthy'-'low fat' image. In the case of Denmark, pork consumption is heavily motivated by tradition. Given the price differentials, the perceptions of consumers and their consumption patterns, it can be concluded that the different types of meat are only imperfect substitutes for each other.

(26) The Commission asked the buyers whether in their opinion a 5 to 10% price increase in pork or beef prices respectively would result in substitution of other meat types (beef/pork, lamb, poultry and processed meat products). The Danish caterers have indicated that such a price increase would not change their consumption patterns. In the opinion of Danish wholesalers a switch from beef to pork and from beef and pork to poultry would only be possible to a certain extent. In the opinion of Danish supermarkets the demand for beef would not be affected by a rise or fall in beef prices. Some supermarkets indicated that, in response to a price increase/decrease, consumers would rather buy cheaper/more expensive parts of beef. With regard to pork, supermarkets considered that a price increase for pork could lead to some switching to poultry. In conclusion, therefore, this market information confirms that the different types of meat are only imperfect substitutes, and accordingly only a certain degree of substitution exists between the different types of fresh meat.

(27) The parties have provided a graph on the development in the relative prices of pork and the relative consumption of pork (see Annex 21 to the notification). This graph shows that relative prices of pork have fluctuated relatively strongly without resulting in a large fluctuation in relative meat consumption. In particular it is seen that the change in the relative price of pork of 4 percentage points between 1986 to 1988, and the change of 7 percentage points between 1992 to 1995 resulted in proportionally smaller changes in relative consumption. That graph, therefore, supports the conclusion that there is only limited substitution between pork and the other types of meat in response to price changes.

(28) In the notification the parties have provided own-price elasticities for pork of −0,35, −0,4, −0,53. The sources are the OECD and DG VI of the Commission. In particular for the Community the OECD has estimated own-price elasticities of −0,3 for beef, −0,3 for pork, −0,2 for poultrymeat and cross-price elasticities, which are numerically smaller than 0,3, between each of those three types of meat. According to the parties, they believe that those elasticities reflect the situation on the Danish market as well. Furthermore, according to the parties, it is recognised that there is positive cross-price elasticity between different meat types in the Community (see the notification, Section 6, p. 5).

(29) The Commission acknowledges that there may be positive cross-price elasticities between different types of meat. This also means that the price developments of different types of meat are to a certain extent linked. However, this does not mean that it should be concluded that all types of meat are part of the same relevant product market for the purposes of assessing the competitive impact of the proposed merger. On the contrary, the inelastic own-price elasticities for beef, pork and poultry meat imply that an increase in the market price for each of those types of meat would only lead to a limited loss of volume due to substitution of other types of meat or a reduction in consumption. Those price elasticities, therefore, indicate that beef, pork and poultrymeat each constitutes a separate relevant product market.

(30) The fact that pork and beef are separate relevant product markets is also confirmed by the way the parties have organised the marketing of pork and beef. Indeed, their pork and beef sales organisations are completely separate and there are separate marketing

([7]) Case IV/M.190 — Nestlé/Perrier (OJ L 356, 5.12.1992, p. 1).

strategies for pork and beef. This can best be illustrated by the fact that the 'fore-calculation' (i.e. a management support-tool for the pork sales staff in assessing the optimal price for a particular cut) does not contain a single reference to beef prices or targets. Furthermore, in the organisational structure of the merged entity (as well as previously for both parties), there is a Livestock Committee and a Pig Producers' Committee that will separately follow and consider matters of relevance for the entire livestock (cattle) division and pig division respectively.

(31) Also the market organisations for beef and pork under the common agricultural policy (CAP) are quite different. In fact, the pork market organisation is described as 'very liberal' with very few market-regulating instruments at the disposal of the Commission (no guaranteed minimum prices — some aid for private storage). As a result less than 1% of the total EAGGF guarantee budget goes to pork. The Beef Regime has a system of guaranteed prices for the producers, which is now being gradually reduced. Beef accounts for 14% of the EAGGF budget and export refunds play a much more important role for beef than for pork. The fact that there are different regimes for pork and beef is a further indication that those products belong to different markets. If the two products were part of the same market, then the effect of measures in one regime would have an important impact on the other product so that they should then have either the same regime or a very similar one.

(32) As far as supply-side substitutability is concerned, it is not easy to change a cutting line for beef to one for pork. This is due to the fact that pigs supplied to a slaughterhouse are much more homogeneous than cattle. This therefore permits a much higher degree of automatisation of the pork cutting lines compared to the beef cutting. In beef cutting, a much more detailed selection procedure takes place when the carcase arrives, owing to the numerous breeds of cattle supplied and their respective meat characteristics. Therefore, the cutting process for beef is less automated than for pork. Accordingly, there is no supply-side substitutability between pork and beef meat.

(33) For all the above reasons it can therefore be concluded that fresh pork and fresh beef are separate relevant product markets for the purpose of the assessment of the proposed merger. This conclusion has not been contested by the parties in their reply (hereinafter 'the Reply') to the Commission's Statement of Objections pursuant to Article 18 of the Merger Regulation (hereinafter 'the SO').

The sale of fresh meat to industrial processors and the sale of fresh meat for human consumption (retail and catering) are separate relevant product markets

(34) The meat resulting from slaughtered animals is either consumed by the final consumer as 'fresh meat' or supplied to meat processors for the production of processed meat products. 'Fresh meat' means that the meat has not undergone further processing, i.e. no other ingredients or spices have been added, nor has the meat been cooked, smoked or dried.

(35) Most of the different parts of a slaughtered animal are sold to meat processors or for fresh meat consumption, taking into account the specific cutting requirements of those buyers. The Commission does not contest that the cutting specifications can be changed relatively easily. However, once the meat is cut by the slaughterhouse, there is for those cuts no more possibility for arbitrage. The parties have identified a limited number of cuts that are sold to both processors and for fresh consumption. There are, therefore, limited theoretical possibilities for arbitrage between the two channels. However, before that arbitrage could represent a competitive constraint on the parties' competitive behaviour vis-à-vis the supermarkets (see below), the processors would have to start to perform wholesale functions. This is not evident in a market where the 'freshness' of the meat is crucial. Furthermore, the high level of purchasing from other Member States by processors is also an indication that the competitive market conditions in this market are different. Therefore, the Commission considers that the sale of fresh meat to industrial processors constitutes a different market.

Catering, supermarket, butchers and farm sales are separate relevant product markets but supermarkets and butchers can be considered together

(36) The sale of both fresh pork and fresh beef for human consumption can be further distinguished into a retail market and a catering market. Furthermore, the retail market can be split into the sale of fresh meat through supermarkets, butchers and farmers (farm sales).

(37) The parties have contested that split. They claim that there is full supply and demand substitutability between those channels. Furthermore, their price structure would be identical as there is one basic weekly price list from which negotiations on price start. However, the Commission considers that the fact that there is a basic price list is not necessarily an indication that those different channels should be considered as one market. First, the basic price list already consists of different columns with reductions or increases in view of the different clients or categories. Second, the parties often deviate from the 'columns' in dealing with individual customers. Therefore, the fact that a basic price list

exists is no indication that the parties could not price-discriminate between those channels.

(38) The catering market is defined as the sale of fresh meat to restaurants, canteens, government institutions and ship and airport chandlers. The distinction between a retail and a catering market is based, firstly, on the fact that the origin of the meat is less important for the caterers than for the retailers. The caterers prepare the meat to serve it to the final consumer as part of a ready–cooked meal and do not sell the fresh meat as such. Therefore consumer preferences with regard to origin are less important. This has led to a greater share of imports in the catering market than in the retail market. Secondly, there is no realistic possibility for arbitrage between the two markets in view of the differences in distribution (specialised distribution to caterers via relatively small wholesalers — direct supply by slaughterhouses to retail) and packaging (meat supplied to supermarkets is to a large extent already pre-packed and labelled with the necessary information for the supermarket client). Thirdly, the retail market needs to be supplied at all times with a full assortment of the different cuts of fresh pork and beef. Caterers typically only need the cuts for the meals included on their menus. Fourthly, it results from the Commission's market investigation that the few large catering wholesalers who buy their meat [less than 10%] (*) cheaper than some of the retail clients, in particular smaller supermarkets and butchers, do not sell a single kilogram of pork to the retail market.

(39) In the retail sector, fresh meat is sold to the final consumer through supermarkets and butchers. Those channels differ in so far as a substantial part of butchers (some 100 out of the around 820 Danish butchers [8]) themselves slaughter the live animals or purchase their meat from local private slaughterhouses operated by butchers. Although the parties state that the fresh pork products supplied to butchers and supermarkets are the same, butchers buy more half- or quarter-carcases or main cuts than supermarkets. Furthermore, the sales price of the slaughterhouses to butchers is typically some [less than 10%] (*) higher than the price to supermarkets, including small supermarket outlets. The parties consider that those price differences are a result of differences in volume, trade structure (spot- or framework-agreement basis) and buying power. The butchers' retail prices are some 20 to 25% more expensive for pork, beef and lamb than those charged by supermarkets and up to 50% more expensive for poultry and processed meat products.

(40) The Commission considers that it can be concluded on the basis of the above that butchers and supermarkets constitute a distinct market. However, it can be noted that the competitive assessment would remain the same whether one considers a separate supermarket market or a combined retail market since butchers account only for around 10% of the combined retail market [9].

(41) So-called *farm sales* whereby farmers sell bigger quantities of up to a half or quarter carcase of their own animals directly to the final consumer can be distinguished from the retail market. Whereas both supermarkets and butchers sell meat in various cuts and offer the consumer the possibility to purchase relatively small quantities (typically covering the required quantity for one family meal), farm sales, whether further cut or not, will have to be stored in the consumer's freezer. Farm sales do not therefore constitute a direct substitute for the 'typical' buyer of small quantities and obviously do so even less for consumers living in cities [10].

(42) In conclusion catering and farm sales constitute separate relevant product markets. The same conclusion can be reached for supermarkets and butchers; however, the competitive assessment would not be different for a separate supermarket market or a combined retail market.

(c) **Processed meat**

(43) A processed meat product can be defined as meat from mammals or birds, containing external ingredients such as salt or spices, being raw, dried, smoked or cooked. In view of that additional processing of the meat, whereby up to 20% of the weight of the final processed product comes from external ingredients and whereby meat from different species is often mixed, the Commission considers that processed meat products are to be distinguished from fresh meat. This view has been confirmed by the Commission's market investigation where a substantial majority of meat wholesalers, supermarkets, meat processors and cutters have indicated that consumers, when faced with a 5 to 10% price increase for fresh pork or fresh beef, would not switch to processed meat products. In addition, the ultimate consumer does not 'perceive' the processed meat product as resulting from a slaughtered animal and is not able, for a large part of processed meat products, to see the intrinsic qualities of the originating meat (leanness, colour, tenderness, type of breed and very often even the type of species — pork/beef/poultry).

(*) 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.

(8) This number is the estimate of Danske Slagterier, based on their investigation and marketing activities. The two largest associations of butchers estimate the total number of Danish butchers to be between 500 and 550.

(9) On the separate butchers market, the concentration does not raise concerns.

(10) According to the GfK Household Panel data, farmers account for 0,1% of pork sales and 3,4% for beef in small quantities, but account for the bulk of so-called 'slaughter parcels'. As the parties are not active on this market, the concentration does not raise concerns.

(44) With regard to processed meat products, the information from the parties indicates that all processors are able to use all processing techniques (drying, smoking and cooking) on meat from all species. That supply-side substitutability would, therefore, tend to support the conclusion that there is an overall processed meat product market. However, it is not necessary for the purpose of the present assessment to reach a final conclusion on the exact scope of this market, as it will not affect the assessment of the operation.

(d) **Collection of abattoir by-products**

(45) This activity concerns the collection, processing and marketing of inedible animal waste/by-products from farms and the meat industry as well as the collection and destruction of dead animals. Those by-products are converted into meat meal, bone meal, animal fat, hides from dead animals and blood products.

(46) With regard to the collection of abattoir by-products, Community legislation distinguishes high-risk material from low-risk material. To obtain high-risk material, a rendering plant must be licensed for that purpose. A high-risk licensed plant has a general duty to receive and process specified risk material. All parts of slaughtered animals that are not veterinary-approved after slaughter are high-risk. High-risk material 'by nature' is thus, for example, blood waste, animals dead from natural causes, pig hair, floor waste, rejected carcases.

(47) Low-risk material is material that is separated and has received veterinarian approval. Potential low-risk material is, for example, offal, head and fat, bones, rind and blood. It does not necessarily have to be delivered to a 'high-risk licensed renderer', but can be supplied to, for instance, pet-food producers. However, if that potential low-risk material is not separated or has not received veterinarian approval, it is also high-risk material.

(48) As high-risk material can only be supplied to a high-risk renderer, the relevant product market, for the purpose of this case, is the high-risk material market ([11]). The parties agree with this conclusion.

(e) **Conclusion**

(49) On the basis of the above, it is concluded that there are separate markets for the purchase of live pigs and cattle for slaughtering, fresh pork and fresh beef. Furthermore, fresh pork and beef, respectively, can be subdivided into the sale to industrial processors and for human consumption. With respect to the latter, retail and catering are distinct markets. In the retail sector, fresh meat is sold to the final consumer through supermarkets, butchers and farm sales. It can be left open whether supermarkets and butchers constitute distinct markets, since the assessment would not be significantly different owing to the butchers' limited share of the retail market. Finally, with respect to abattoir by-products, the relevant product market is the high-risk material market. For the remaining products the market definition can be left open.

B. RELEVANT GEOGRAPHIC MARKETS

(a) **The purchase of live pigs for slaughtering**

(50) The parties consider that the geographic market for slaughtering of live pigs is 'Northern EC', including Denmark, Germany, the Benelux countries and the southern part of Sweden ([12]). This geographic market definition is based on the possibility of transporting live animals for slaughtering. In this context it has been argued by the parties that: (i) the cost of transport is limited given that, for a distance of 1 000 km, the cost would only amount to around 5 to 6% of the product value; (ii) although Community legislation provides that animals have to be rested, fed and watered if they are transported for more than eight hours, specially adapted trucks make a 24-hour journey possible permitting transport distances of 1 500 to 1 600 km including loading and unloading, and (iii) it is the loading and unloading of the pigs, as opposed to the transport itself, which is the primary concern for the development of stress.

(51) The parties have also referred to the fact that the export of live slaughter pigs from Denmark mainly to Germany has increased from 188 000 pigs in 1996 to around 307 000 in 1998. Furthermore, it has been argued that the commercial reasons for transporting live animals from Denmark to Germany are that significant overcapacity of German slaughterhouses (around 30%) exists and that German slaughterhouses and other

([11]) The Danish Competition Council reached the same conclusion in its decision of 22 March 1995 which was upheld by the Appeal Instance on 9 February 1996.

([12]) The parties have indicated that currently veterinary regulations, in particular concerning salmonella, make export to Sweden difficult. However, those rules will be easier to overcome as the Danish 'salmonella level' approaches the Swedish 'level' and other veterinary restrictions for import are limited in time. Furthermore, the parties observe that the new bridge between Sweden and Denmark will make it easy to transport pigs to and from Sweden. However, the company Swedish Meats, accounting for approximately 70% of pig slaughters in Sweden, has stated at the hearing that it will not buy Danish pigs.

Community slaughterhouses pay more than Danish slaughterhouses, although price fluctuations in one Member State are followed by the same trend in other Member States. Finally, it has been submitted that more than 5 million slaughter pigs are exported from one Member State to another of which, in 1996, some 2,8 million slaughter pigs were exported from the Netherlands to other countries, including almost 2 million to Germany (the bulk of those exports might be to slaughterhouses some 50 to 80 km from the Dutch border), but also some 360 000 to Italy.

(52) However, the Commission investigation has resulted in the following findings with regard to the definition of the relevant geographic market.

(53) The first element is the 'catchment area', i.e. the distance from which slaughterhouses obtain their pigs. The Commission's investigation has shown that Danish and foreign pig slaughterhouses buy 90% of their live pigs within 120 km of their slaughterhouses.

(54) The parties have argued in the Reply (pp. 37 to 38) that this fact 'is not sufficient to conclude that there is a separate Danish market for live pigs for two reasons. First, the observed pattern of local sourcing is quite consistent with effective substitution within the wider Northern European market in view of the low level of transport costs. Secondly, the parties contend that this pattern of local sourcing reflects historical supply arrangements and does not indicate the absence of effective competitive constraints over a wider area'. However, it is the view of the Commission that the possibility for effective substitution and the resulting competitive constraints over a wider area are considerably limited for 94% of Danish pig production as the farmers are subject to the cooperative obligations (see below). Even on the basis of a 120 km catchment area, the sourcing by Danish slaughterhouses of foreign pigs and by foreign slaughterhouses of Danish pigs is limited as can be seen from the import and export figures described below.

(55) Secondly, there are limited exports of Danish slaughter pigs and the exports are almost all to Germany. Moreover, those exports have remained rather limited despite relatively important price differentials between Denmark and Germany in 1996 and 1997. In 1995 exports accounted for less than 1% of total production and the price differential with Germany was 0,57%. In 1996 188 000 slaughter pigs were exported accounting for less than 1% of total Danish slaughter pig production ([13]) and the price differential was 4,3%. In 1997 the figures were 245 000 pigs accounting for less than 1,3% of total production and a price differential of 4,9% ([14]). For 1998, exports totalled 307 000 pigs, accounting for less than 1,6% of total production and a price differential of 2,5% for the first 37 weeks (taken over the whole year the prices in Denmark were 0,24% higher than in Germany).

(56) The parties contend that the above figures indicate a significant increase in the level of exports to Germany in the period 1995 to 1998 and that the total number further increased in 1998 when price differentials were considerably smaller than in 1996 to 1997 when the larger price differences were due to largely unanticipated special factors (BSE and Dutch swine fever).

(57) The Commission recognises that exports have further increased. However, they are still extremely limited if compared, for instance, with exports of Dutch pigs to Germany. For instance in 1996, the price in Germany was only 1,5% higher than in the Netherlands (compared to the 4,3% price difference with Denmark) and the Netherlands exported 1 916 201 slaughter pigs to Germany. Those exports account for some 15% of the Dutch production of slaughter pigs, compared to less than 1% of Danish production. It can thus be concluded that consistently higher prices in Germany during three years have not affected Danish exports to any significant extent.

(58) It can be noted that there is virtually no import of pigs for slaughtering into Denmark (almost 3 000 pigs in 1997 and only 210 in 1998 — all from Sweden). This is probably the consequence of rules adopted by Danske Slagterier to avoid 'contagious pig diseases'. Those rules include the necessity for a slaughterhouse to have facilities that allow for the separation of foreign pigs from local pigs, and a price reduction of some 20% for imported pigs. The parties submit that those rules do not prohibit the import of pigs for slaughter, but merely ensure that the veterinary status associated with for example United States Department of Agriculture (USDA) veterinary authorisations can be maintained at the relevant slaughterhouses. The USDA veterinary authorisations would allow for imports from Sweden, the United Kingdom and Ireland. The Commission recognises that those rules do not theoretically prohibit imports by the cooperative pig slaughterhouses, but, in reality, they make imports very difficult. The parties further state that private slaughterhouses, most of which have no USDA authorisation, can freely import animals for slaughter with no price deduction. Such imports have not taken place in the past as the relative prices have not provided an incentive to import pigs. The

([13]) The supplies of slaughter pigs to private slaughterhouses are not included in the figure for the total Danish slaughter pig production. The percentage figure is, therefore, preceded by 'less than'.

([14]) This difference has even been around 30% during some weeks in April and May 1997 when prices peaked in Germany and the Netherlands as a consequence of Dutch swine fever.

Commission accepts that the private slaughterhouses, accounting for 4% of Danish slaughters, can import. It can, however, be questioned whether such slaughterhouses, of which the largest slaughters less than 200 000 pigs per year, have the organisational structure to start such imports.

(59) Thirdly, no pig farmer joined a foreign cooperative or started export operations despite the opportunity given to the members of the parties to terminate their membership with immediate notice during a period of two weeks after the agreement of the parties to merge reached on 29 September 1998. The parties have informed the Commission that Steff-Houlberg benefited from that opportunity by accepting farmers, from Jutland and Funen, as members. Those members are expected to produce more than 600 000 pigs.

(60) The parties submit that this phenomenon is not relevant as at that time German pig prices were below Danish prices and producers might have chosen a 'wait and see' approach especially under the present weak market conditions. The Commission considers that this 'wait and see' approach could be taken as a further expression of the traditional preference of the Danish pig producer for the stability associated with long-term contracts (i.e. membership of a cooperative — see below) versus the opportunities and risks associated with the spot market (i.e. non-membership). It can be observed that, in the past, if a cooperative was less successful than others, the matter was always resolved by a merger between 'neighbouring' (Danish) cooperatives, rather than by the cooperative farmers starting to deliver to private slaughterhouses or to export markets.

(61) The Commission considers that the above factors are all an expression of the importance of the cooperative structure of pig slaughtering in Denmark and that, therefore, as far as buying live pigs in Denmark is concerned, the relevant geographical market is, at most, national ([15]). The four Danish cooperatives cover 94% of slaughters of Danish pigs and that figure has been more or less the same for at least the last five years. The farmers, members of a cooperative, are subject to (a) an exclusive supply obligation vis-à-vis their cooperative, (b) a 12 to 24 months notice of leaving period and (c) a bonus payment accounting for 4 to 8% of their total payment for the pigs supplied that will be handed out only once a year (see below). In addition to those 'structural links', pig prices are very cyclical. The farmer therefore has to strike a balance between his position as a member of the cooperative today and his position as a non-member in a relatively uncertain economic environment. Thus, the cooperative farmer will have no opportunity to give any immediate response to a possible price change in the market. The fact that the farmer can, if he has given his notice to leave, withdraw his notice up to three months before it would take effect, does not change that conclusion because the farmer can still only leave once a year.

(62) At the oral hearing the parties presented data showing that prices of live pigs in Denmark in the past have moved together with prices of live pigs in other northern European countries. In particular the parties showed a graph of the quarterly price development of live pigs in Denmark, Germany, France, the Netherlands and Sweden, a graph showing the weekly German price for live pigs relative to the Danish price, and a calculation of the correlation coefficients on quarterly average prices of live pigs between Denmark and respectively Germany (0,97), the Netherlands (0,98) and Sweden (0,93). According to the parties, those price developments and correlation coefficients are evidence that prices for pigs in different countries show a marked tendency to move together over time, and this suggests that competitive constraints keep prices in line.

(63) The Commission has examined those data and has come to the conclusion that the price developments and correlation coefficients presented by the parties are not evidence of any competitive constraints on the parties on the Danish market for purchase of live pigs. First, it is noted that there may be common factors such as the development in feed prices, which to a certain extent cause the correlations. More importantly, as noted in recital 55, Danish exports of live pigs have only been in the range of 0 to 2%. The low level of exports even in periods of price differences between Denmark and Germany is mainly due to the contractual obligations on farmers to deliver their pigs to the cooperative slaughterhouse of which they are members. Therefore, farmers in reality do not have the possibility to export live pigs in response to short-term price differences. Consequently, exports of live pigs do not have an impact on Danish prices of live pigs. In particular this means that if, for example, prices are higher in Germany than Denmark, then Danish prices will not increase in response to an increase in exports of live pigs to Germany owing to the restrictions on farmers which prevent such exports.

(64) Rather than competitive constraints the Commission found that the correlations between Danish live pig prices and the live pig prices in other countries can be explained by the way the Danish price is calculated. In particular it is noted that the weekly Danish price is a weighted average of the prices which the slaughterhouses achieve for meat on their various export markets. The Danish price is, therefore, owing to

([15]) In this context it should be noted that the German Bundeskartellamt concluded in a prohibition decision (Moksel/Südfleisch of 21 August 1997) that the relevant geographical markets were certain regions within Germany.

the high export share, mainly dependent on export prices rather than on domestic prices. The Danish price for live pigs is, therefore, automatically correlated with the prices of live pigs on the export markets. In other words the transmission mechanism for price fluctuations on the Danish market for live pigs goes via the price fluctuations on the downstream fresh meat markets abroad and is fed back on to the Danish market for live pigs through the weekly price quotation in Danske Slagterier. This link explains the price correlations. However, it also means that the parties' price correlations cannot be taken as evidence that the Danish market for live pigs is part of a wider northern European market for live pigs.

(65) On the basis of the above, it can be concluded that the purchase of live pigs for slaughtering is limited at most to Denmark.

(b) **The purchase of live cattle for slaughtering**

(66) The parties have also argued that the relevant geographic market for the purchase of live cattle is Northern Europe for the same reasons as indicated above for pig slaughtering. They have submitted that the cost of transporting cattle is somewhat greater, but that cattle can be transported more easily. The parties also estimate that the overall market will continue to decrease owing to Community milk quota limitations and the increased export of male calves from Denmark to the Netherlands.

(67) The Commission has examined the same factors for cattle as for pigs and has come to the conclusion that the indications in favour of a national geographical market are less clear.

(68) First of all, the 'catchment area' for cattle could be somewhat larger (up to 200 km) and other slaughterhouses have indicated that transport could be made profitably from a distance of 300 to 350 km.

(69) Second, only half of the Danish cattle for slaughtering are produced by members of the three Danish cooperative cattle slaughterhouses (the parties and NV-OX [16]). Therefore, half of the Danish cattle production is not subject to the cooperative rules (obligation to supply and notice to leave period), compared with 6% of the pig production.

(70) Third, the price differences with Germany have been smaller for cattle than for pigs but, nevertheless, there is somewhat more cross-border movement. Exports of live cattle from Denmark accounted for some 9 000 head in 1997, 1,2% of total Danish cattle production for slaughtering (731 600 in 1997) and imports into Denmark accounted for around 1,5% in 1995 and 1996. With a few exceptions, prices have in general been higher in Denmark than in Germany.

(71) In addition, the parties are both active in North Germany where Vestjyske Slagterier operates a slaughterhouse and Danish Crown has a substantial number of cattle slaughtered on contract.

(72) In contrast to pig farmers, Danish cattle farmers do not need themselves to set up a direct contract with a foreign buyer of their animals. They can sell their cattle on (Danish) live cattle markets where approximately 20% of Danish cattle is currently traded. On those markets foreign buyers (as well as private slaughterhouses and supermarkets) can buy the cattle.

(73) However, it is not necessary for the purpose of the present assessment to reach a final conclusion on the relevant geographical market, as even on the narrowest market, i.e. Denmark, the merger would not lead to a dominant position as a result of which effective competition would be significantly impeded in the common market.

(c) **Fresh pork — supermarkets**

(74) The parties argue that the geographic market for fresh pork covers, in view of the trade flow across Member States for pork (24%) and in view of the CAP, at least the Community and that there is a trend leading to a world market. A few years ago there were larger differences in the products bought in the Community, Japan, the USA and eastern Europe. Today, most of those differences are said to be smaller. In all those markets pork products are bought in different cuts, but the cuts show only small variations in the same basic products.

(75) The parties play down the issue of national or geographic consumer preferences for meat as those preferences can be associated with:

(a) the consumer's intention to support the national industry: the parties acknowledge that at times of an agricultural crisis, national forces can be mobilised to support the national industry but such situations are generally short-lived as the social links between the modern consumer and the local agricultural sector are disappearing;

[16] The three cooperatives slaughter some 66% of cattle of Danish origin. It can thus be noted that some 15% of cattle slaughtered by the cooperative slaughterhouses is supplied by non-members. It should also be noted that there are on-going negotiations between the parties and NV-OX concerning the possible acquisition of NV-OX by the parties.

(b) tradition: the professional retail buyer is looking increasingly international. In addition, the parties are increasing their own sales in Germany and refer to the large imports of beef and processed meat products in Denmark, and

(c) the degree of consumer confidence in the safety or quality associated with the product: this issue is losing its link with geographical preferences (origin of the meat), but becomes more and more associated with objectively based quality-assurance systems such as those of the UK retail industry.

(76) Furthermore, according to the parties there are no barriers to entering the Danish market. In particular it is argued that: wholesale prices show a similar development between Member States; veterinary controls in individual Member States are based on Community law and are non-discriminatory; and finally pork can be imported into the Danish market by simply delivering to the distribution centres of supermarkets, which could then distribute the fresh pork to individual stores. In conclusion, Denmark should not be considered a separate relevant geographic market. Rather there is a Community-wide market for pork.

(77) The Commission investigation has not confirmed the view of the parties. Danish pork has in the past accounted for 99% of total sales of fresh pork in supermarkets. This has not changed even when short-term price developments, say over a period of three to six months, have been markedly different on neighbouring geographic markets. In truly integrated geographic markets, it would be expected that price fluctuations would cause at least some trade flows simply in response to short-term price differences. However, this has not been the case. The parties have also produced price data based on the invoiced prices of the main cuts in countries such as Denmark, Sweden, Germany, and the United Kingdom. According to the parties those figures show that there has been a parallel development of prices on those markets. According to the parties it is always sought to sell a given product in a given week on the market which gives the highest price. Therefore, prices move in parallel. The Commission recognises this mechanism. However, it does not exclude that a dominant company on the Danish market for pork could keep a small but significant price difference between the Danish market and export markets, if there are barriers to imports (see below). It is, therefore, difficult to accept those price data as evidence of a market wider than Denmark.

(78) Furthermore, it seems quite clear that consumer preferences vary between countries. Differences occur at all levels: (a) preferred type of pork (lean/fat) with the related difference as to the preferred slaughter weight of pigs (lighter pigs in Denmark than in for example Germany), (b) differences in the typical consumption of specific parts of the pig, and (c) differences in the cuts of the same piece of meat.

(79) Moreover, there are other reasons, which explain why imports of pork into Denmark have been virtually non-existent in the past.

(80) First, it is not possible for imports simply to be distributed via the distribution centres of the supermarkets, as claimed by the parties. Rather according to the Commission investigation only the largest supermarket chain would have this possibility and, in this case, only for a part of their volume. Virtually all fresh pork sold in Danish supermarkets is distributed directly from the slaughterhouses to the stores either by the Danish slaughterhouses or by hauliers hired by the supermarkets. Therefore, the Danish supermarkets would have to invest in additional refrigeration and distribution facilities in order to import fresh pork.

(81) Second, all fresh pork (foreign and local) sold in Denmark is subject to a veterinary control for a special form of salmonella, namely Salmonella DT 104. The parties have stressed that this test is not discriminatory. However, no other country specifically tests this form of salmonella. In addition, only in Denmark and Sweden are there national programmes in place to contain salmonella levels in pork (the programmes cover farms and slaughterhouses). Therefore, importers (other than Swedish) face an increased risk, compared to the Danish producers, of being caught positively by the Salmonella DT 104 test as they do not routinely test for it in their total production, nor do they have in place a general salmonella reduction programme. The Salmonella DT 104 test is thus another barrier for imports of fresh pork.

(82) Finally, Danish consumer preferences for Danish pork are very strong. Danish supermarkets indicate the origin of the meat on the product because they consider that this is valuable information for their customers. This consumer preference, based, *inter alia*, on confidence in the strict Danish veterinarian regulations, makes it extremely difficult to convince consumers to purchase imported fresh meat. In the view of a clear majority of Danish supermarkets, and more than for any other meat type, the origin of pork is a relatively important to very important factor in the average consumer's purchasing decision. (see also Section VI.E.c below)

(83) At the oral hearing the parties presented data from Danish Crown showing that in the past, prices of fresh meat have shown similar movements in countries such

as Denmark, Germany, Sweden and France. In particular the parties presented graphs showing the quarterly price development of middles, hams, fore-ends, and tenderloins in Germany, Denmark, Sweden and France. Furthermore, graphs were produced of the monthly price development of collarjoints, shoulders, and loins in Denmark and Germany. Finally, a number of correlation coefficients for those cuts between Danish prices and prices in Germany, Sweden and France were presented. Those correlation coefficients were in most cases higher than 0,9. Those data according to the parties show that wholesale prices for fresh pork products in different countries show a marked tendency to move together over time. This suggests, according to the parties, that competitive constraints keep prices in line across countries.

(84) The Commission does not agree that the data presented by the parties are indications that the Danish market for fresh pork sold through supermarkets is part of a wider Northern European or Community market for pork. First, the data are only from Danish Crown and therefore do not necessarily represent the overall market situation. Second, correlations are likely to reflect, at least partly, the price development in common input factors between countries, such as feed prices. Third, the prices are to some extent based partly on sales to processors as well as sales for human consumption (retail and catering). Since for sales to processors the market is wider than Denmark, this also explains some of the correlation between Danish prices and prices in other countries. Fourth, and most important, the Danish prices are to a certain extent automatically correlated with export prices owing to the way the Danish slaughterhouses optimise their revenue stream. According to the parties, the sales department of a slaughterhouse will always sell a given quantity of meat wherever it will receive the best price. This creates an incentive for the slaughterhouse not to sell at a cheaper price in Denmark than on its export markets. Therefore, prices in Denmark and on export markets would be expected to move together.

(85) In any event, in this particular case past movements in prices cannot be taken as evidence that the geographic market is wider than Denmark for the purpose of assessing the competitive impact of the proposed merger. As noted above, there are barriers to trade. Consequently, imports have only been around 1 % and imports have not taken place in response to short-term price differences between Denmark and other countries. In conclusion, due to the existence of barriers to trade, it is not credible that a higher price on fresh pork in Denmark than, for example, in Germany would lead to imports which would align Danish and German prices in this short term. Therefore, it is more appropriate to assess the impact of imports under potential competition. It is noted that the Commission did not find it likely that a dominant company on the Danish market would be challenged by imports if it attempted to maintain a higher price on the Danish market compared to its export markets (see Section VI.E.c).

(86) In conclusion, the Commission recognises that fresh pork is transported and traded internationally. Therefore, as a matter of principle, fresh pork from other Member States could be offered to Danish consumers through the Danish supermarkets. However, as set out above it is also recognised that there are barriers to imports which make it unlikely for imports to have a competitive impact in the short term on the Danish market for pork sold through supermarkets. This is also evident from the fact that international price fluctuations have not in the past resulted in any imports into the Danish market. In conclusion, rather than considering the market for pork to be a Community-wide market, it is more appropriate to consider the Danish market for fresh pork sold through supermarkets to be a separate relevant geographic market, and assess the potential impact of imports under potential competition (see below).

(d) **Fresh pork — farm sales and butchers**

(87) Those markets do not extend beyond Denmark since they are mainly supplied by small local private slaughterhouses. The parties are not active on the farm sales market.

(e) **Fresh pork — the catering market**

(88) In the catering sector, the competing Danish slaughterhouses consider that at least 85 % of the pig meat sold to caterers is Danish. The larger caterers indicated that they bought up to 20 % of imported meat, the smaller caterers somewhat less (1997 figures resulting from the Commission's market investigation). The parties claim, on the basis of an estimate from their own sales people and some contacts with some of the larger catering-wholesalers that, at the end of 1998, imports accounted for around 50 % of total sales ([17]). The origin of the meat is, according to wholesalers, a relevant factor in the purchasing decisions of the caterers for pork, especially for government institutes and hospitals for which it is very important. However, none of the caterers indicated the origin of the meat to the final consumer, and they had not faced any demands from their consumers to do so.

(89) It is not necessary for the purpose of the present assessment to reach a final conclusion on the relevant

([17]) In the course of its investigation, the Commission has not been able to confirm this figure.

geographical market as even on the narrowest geographic market, namely Denmark, the merger will not lead to a dominant position.

(f) **Fresh beef — supermarkets**

(90) The Commission investigation indicates that there are strong consumer preferences in Denmark for beef of Danish origin. A clear majority of the responding Danish supermarkets, including the two most important supermarkets accounting for around half of the sales, consider the origin of the beef a relatively important to very important factor in the average customer's purchasing decision for beef. This consumer preference is also reflected in studies presented by the parties. Furthermore, the BSE-crisis has had almost no impact on beef consumption in Denmark. This can probably also be attributed to the strong confidence of the Danish consumer in the Danish veterinarian system.

(91) However, the Commission's investigation has shown that some 24% of the consumption of fresh beef (retail and catering) is imported and the responding supermarkets sell around 20% of beef of foreign origin. Although supermarkets and wholesalers alike have indicated that, despite those strong consumer preferences for beef of Danish origin, they must import beef because there is not enough high-quality Danish beef ([18]), the imported meat is sold in the supermarket at the same price and with the same presentation to the consumer. This tends to indicate that they are alternatives for the consumer.

(92) On the basis of the above, it is appropriate to consider that the relevant geographic market for fresh beef sold through supermarkets is wider than Denmark.

(g) **Fresh beef — farm sales and butchers**

(93) Those markets do not extend beyond Denmark since they are mainly supplied by small local private slaughterhouses. The parties are not active on the farm sales market.

(h) **Fresh beef — the catering market**

(94) The origin of the meat is, according to wholesalers, a relevant factor in the purchasing decisions of the caterers for beef, especially for government institutes and hospitals for which it is very important. However, imports are higher than in the supermarkets. In addition, none of the caterers indicated the origin of the meat to the final consumer, and they had not faced any demands from their consumers to do so. It appears, therefore, that the geographic scope of the catering market is wider than Denmark.

(i) **Sale of fresh meat to processors**

(95) The Commission investigation showed that, in general, meat processors can and do source their meat regardless of its origin. The geographic market is, therefore, wider than national.

(j) **Processed meat products**

(96) Although the origin of the processed meat products has been raised as a choice factor for certain processed meat products, consumer preference seems to be, overall, much less important than it is for fresh meat. Also the origin of the product is normally not indicated and even where it is, such as the sale of Danish origin bacon in the United Kingdom, it seems possible to exchange, to a large extent, bacon of Danish origin with, for instance, bacon of Dutch origin. Also in Denmark, supermarkets sell processed meat products (on the basis of pork) supplied directly by foreign processors and processed meat products of Danish processors that contain meat of non-Danish origin. The geographic market is, therefore, wider than national.

(k) **Collection of abattoir by-products**

(97) Community legislation prohibits the export of high-risk material. On the other hand, low-risk material may be exported and there is some import of low-risk material into Denmark.

(98) With regard to high-risk material, it can be concluded that, for the purpose of this assessment, the geographic market is at most Denmark.

(l) **Conclusion**

(99) It can be concluded that the market for slaughtering of live pigs and the market for high-risk material, respectively, is at most Denmark. The market for fresh pork sold through supermarkets is Denmark while the market for fresh beef sold through supermarkets is considered to be wider than Denmark. For the remaining products the geographic market definition can be left open.

([18]) This is said to be a consequence of the Danish cattle sector's main focus on milk production and not meat production, resulting in less tender meat.

VI. COMPATIBILITY WITH THE COMMON MARKET AND THE FUNCTIONING OF THE EEA AGREEMENT

A. OVERALL MARKET STRUCTURE

(100) In 1960, 62 cooperative slaughterhouses existed in Denmark. Over the years the number of cooperative slaughterhouses has decreased as a result of mergers and at present Denmark has four cooperative pig slaughterhouses (i.e. Danish Crown, Vestjyske Slagterier, Steff-Houlberg and TiCan). There are also 127 smaller private slaughterhouses. The four cooperatives account for 94% of the slaughters of slaughter pigs, sows and boars of Danish origin (19 153 000 pigs in 1997) ([19]).

(101) Danish Crown and Vestjyske Slagterier are by far the leading slaughterhouses in Denmark. In comparative terms, they have a combined turnover which is almost 10 times larger than that of Steff-Houlberg and more than 30 times larger than that of TiCan. In terms of market share for the buying of live pigs, the parties slaughter almost six times more pigs than Steff-Houlberg and 15 times more than TiCan. As to slaughter facilities, Danish Crown has 12 facilities and Vestjyske Slagterier seven facilities, all located in the western part of Denmark. Steff-Houlberg has two slaughter facilities east of the Great Belt (Sealand and Bornholm) and TiCan has one slaughter facility in the north western part of Denmark. With respect to distribution, both Danish Crown and Vestjyske Slagterier, as well as Steff-Houlberg, have their own distribution systems covering Denmark while TiCan does not have its own distribution system.

(102) Furthermore, Danish Crown and Vestjyske Slagterier are vertically integrated for both pork and beef, in the sense that they are also active in the downstream markets for the sale of fresh meat, meat processing and meat trading. In comparison, TiCan is much less vertically integrated than the parties. The vertical integration in the private slaughterhouses and NV-OX stops at the cutting of the carcases of the slaughtered animals.

(103) Both parties also control or have an important shareholding in a number of sales companies which, apart from their own products, also sell products from the other competing Danish pig and cattle slaughterhouses, mainly to export markets such as the rest of Europe, Japan and the USA.

(104) In this context it should be noted that, prior to the merger, there were two main channels for the important export business of the Danish pig cooperatives (around 85% of pork is exported). Foodane is a sales company fully owned by Vestjyske Slagterier and ESS-Food is owned by the three other cooperatives Danish Crown (70%), Steff-Houlberg (17%) and TiCan (13%). In addition to ESS-Food, export sales of the two small cooperatives are channelled through DAT-Schaub, Tulip International (a meat processing company owned by Danish Crown) and their subsidiaries. In sum, the two remaining cooperative slaughterhouses will depend for a substantial part of their exports on the merged entity.

(105) Furthermore, as mentioned above, the cooperative resulting from the merger will also acquire sole control over a number of other companies in related markets which the other (cooperative) pig slaughterhouses have significant commercial relationships with: abattoir by-products (daka), casings (DAT-Schaub) and packaging materials, etc. (SFK). Steff-Houlberg is a member of DAT-Schaub and SFK while TiCan is a member of daka, DAT-Schaub and SFK.

(106) Finally, Danske Slagterier (Danish Bacon and Meat Council) is an association consisting of the four cooperative Danish pig slaughterhouses whose overall aim is to safeguard the interests of the cooperative pig slaughterhouses. The board consists of 12 members of which four members are the chairmen of the four cooperatives, and the other eight members are elected on the basis of the number of slaughters in each cooperative. In 1998, Danish Crown had five members (including the chairman), Vestjyske Slagterier had four members (including the vice-chairman), Steff-Houlberg had two members and TiCan one member. On that basis, the parties will clearly have the majority of members following the merger.

(107) In the Reply, the parties have submitted that all members of Danske Slagterier have minority rights in the most important decision-making body of the association, namely the Assembly of Delegates. No decision can be passed without the consent of the majority of the delegates of at least two members.

(108) First, it should be noted that without prejudice to the said rule, decisions by the Assembly of Delegates are adopted by simple majority. As the delegates are appointed by the members of Danske Slagterier in proportion to the number of pigs slaughtered in the previous accounting year, the parties will control a clear majority of the votes and have, therefore, the possibility to block the adoption of any proposal. Secondly, the powers of the Assembly of Delegates are limited to the election of the accountant, the approval of the annual accounts, the adoption of any submitted proposal, and amendment of the Articles of Association and winding up, which, however, requires a two-thirds majority. Furthermore, the Assembly may at the proposal of the Board of Directors elect two members of the Board of Directors. If no such proposal is made, all members of the Board are appointed by the members in accordance with a fixed formula, giving the parties the abovementioned majority. The Board of Directors can decide on all issues. Decisions are taken by simple majority. There is thus no minority protection at this

([19]) As indicated above, exports total 1,6%. The remaining 4% of slaughters (798 000 pigs) are slaughtered in the 127 'private' slaughterhouses, of which only nine are authorised to export their meat. In 1997, those nine export-slaughterhouses slaughtered 550 953 slaughter pigs and the other 118 all together 220 312 slaughter pigs.

level. Therefore, the parties have the power to adopt any decision and at the same time ensure that no conflicting decision is adopted by the Assembly of Delegates. Against this background, it is the view of the Commission that the parties will be able to exercise decisive influence in Danske Slagterier.

(109) The activities of Danske Slagterier relate to the entire supply chain from primary production to marketing. Those activities include a national breeding programme, which is at present being reviewed by the Danish Competition Authority, veterinary and health programmes, meat industry research within the framework of the Danish Meat Research Institute, trade and consumer information, and promotion of Danish pork on export markets. The activities of Danske Slagterier are funded from three main sources: a statutory production levy on all slaughter pigs produced in Denmark, a rebate from Danish land tax, and a membership fee.

(110) Thus, Danske Slagterier provides essential functions and constitutes a very important and integral part of the entire Danish pig sector. Moreover, the nature and extent of those activities create strong links and common interests between the four cooperatives. Following the merger, Danish Crown and Vestjyske Slagterier will control Danske Slagterier and thus also those activities of the main competitors, Steff-Houlberg and TiCan, which are carried out by Danske Slagterier, including the promotional activities on export markets.

(111) Furthermore, a national price quotation system has been established within the framework of Danske Slagterier. Thus, a Price Committee each week fixes a price per kilo, which according to the agreement must be paid by the four cooperatives to their members. This price is calculated on the basis of the actual sales prices obtained by the cooperatives. Every Wednesday, each company reports the prices obtained for ham, middles and fore-ends. The quotation is published each Friday with effect for the following week. In addition, Danske Slagterier fixes other price parameters such as the deduction for weight above or below the standard 67 to 78,9 kg for a pig and payment for meat percentage. The Price Committee is composed of the chairman and the managing director of each of the four cooperatives.

(112) The agreement establishing the national price quotation system has been notified to the Commission by Danske Slagterier. The agreement is currently subject to a separate procedure under Article 85 of the Treaty. In that context a warning letter has been issued.

(113) Given that the parties, after the merger, will be in a position to control Danske Slagterier, they will also have control over the price quotation system.

B. THE COOPERATIVE STRUCTURE

(114) According to the parties, the farmers are in control of the cooperative and can therefore prevent any exploitation of a dominant position vis-à-vis themselves. This would imply that the assessment of the competitive impact of the transaction on the farmers should be excluded from the present assessment. In order to assess this contention, account must be taken of the Danish cooperative structure.

(115) Danish cooperatives are in general not subject to any specific statutory company law and hence all relevant provisions governing the activities of the cooperatives are laid down in the Articles of Association of each cooperative. The main characteristic of a Danish cooperative society is that the farmer is both a co-owner of and a supplier to the cooperative. The largest members supply significantly below 1 % of total supplies. A member is obliged to deliver all the animals intended for slaughtering to that slaughterhouse on an exclusive basis while the latter in turn is obliged to buy 100 % of the member's production. The cooperative slaughterhouses can also buy animals from non-members even though this is rare for pigs ([20]).

(116) Every farmer can become, on simple request, a member of the cooperative for a particular species. However, a member cannot leave his cooperative as easily. According to the Articles of Association of Danish Crown as well as Vestjyske Slagterier, members can leave the cooperative with one year's notice expiring on 1 April without any penalty. A farmer has, therefore, to give 12 to 24 months' notice before he can leave. This notice can be withdrawn by the farmer up to three months before the expiry of the notice (1 April). If he rejoins, the farmer is tied back to the cooperative for another full notice period.

(117) All members of a Danish cooperative receive the same base price for their supplies, namely the price resulting from the weekly quotation organised by Danske Slagterier (see recital 111). In addition to this base price, a member receives also a share of the overall profit of the cooperative that is paid out once a year. This 'residual payment' or 'bonus' is set by the cooperative as an amount of x DKK/kg for each kilogram of carcase weight supplied by the farmer in the respective year. The residual payment for pigs has accounted in all cooperatives, during the last years, for between 4 and 8 % of the total price per kg paid to the farmer.

(118) In comparison and although there are some similarities between the Danish cooperative structure and those in other countries, the Danish system appears to impose

([20]) Of the four cooperatives, only Danish Crown received pig deliveries from non-members in the years 1995, 1996 and 1997. However, the quantities were minimal (between 22 836 and 31 935 out of 9,5 million.)

more constraints on the farmer. By way of illustration, a Dutch slaughterhouse cooperative does not provide for exclusive supply and there is no term of notice to leave the cooperative. However, the cooperative is under an obligation to buy what the members wish to supply. If a member supplies his whole production to the cooperative, he is entitled to an annual bonus payment. However, this payment is only a fraction of the bonus payment that the Danish cooperatives pay out (NLG 0,40 or +/− EUR 0,18 per pig compared to DKK 0,50 per kg or +/− EUR 5 per pig), and therefore it constrains the farmer's freedom to supply much less.

(119) The merged entity will have a total of some 30 000 members which means that the direct influence of the individual farmer is limited. The members will belong to one of a number of regional assemblies that, *inter alia*, elect a total of 509 members to the committee of delegates. Each farmer will have one vote. The committee of delegates is the decision-making organ of the cooperative, which appoints the members of the board and decides, *inter alia*, on the appropriation of profits. Each member of the committee has one vote. Decisions are taken by simple majority, except decisions on amendment of the statutes and merger, which require a two-thirds majority. Therefore, the vote of one member cannot be exercised directly, but only through a number of elected representatives. It would thus appear that the individual farmer has no real direct influence on the commercial conduct of the cooperative, let alone control over it.

(120) Furthermore, the cooperative neither owns the individual farmer nor does it assume any liability for his operations. Hence, the individual farmers and the cooperative constitute separate legal and economic entities and thus the sale and purchase of pigs and cattle are not done internally within one group. Therefore, it is necessary for the purpose of the present assessment also to take into account the buying position of the merged entity vis-à-vis the Danish pig farmers, including cooperative members, in the assessment of the competitive impact of the transaction.

C. THE PURCHASE OF LIVE PIGS FOR SLAUGHTERING

(a) **Market shares**

(121) The new entity will buy 76% of the production of Danish live (slaughter) pigs (sows and boars). In this context, the addition of market shares is substantial given that Danish Crown at the moment has a share of 47% while Vestjyske Slagterier has a share of 29%. Their closest competitors, the two other cooperative slaughterhouses, have respectively 13% (Steff-Houlberg) and 5% (TiCan) of the market. Historically, those market shares have been very stable ([21]). The remaining 127 private slaughterhouses buy and slaughter 4% of Danish slaughter pigs and 1,6% of Danish pigs are exported.

(b) **Actual competition**

(122) The private Danish slaughterhouses are not realistic alternatives to the new entity. The 118 small slaughterhouses kill, on average, fewer pigs than the typical Danish farmer produces. Even the nine slaughterhouses licensed to export are too small to constitute a serious alternative to the new entity, as the largest of them accounts for only around 0,8% of total slaughters. Steff-Houlberg and TiCan will not be sufficient alternatives to the parties in the future in order to avoid the creation of a dominant buying position. Both companies are working at full capacity. TiCan has had a waiting list for years and, in view of the location of its slaughterhouse in the middle of a town, it has limited possibilities to expand further. The intake of new members by Steff-Houlberg following the parties' agreement to merge has exhausted the possibilities of this company to expand capacity further with relatively modest investment levels.

(123) The parties argue that capacity can be expanded with limited costs (cost calculations have been provided) and that capacity will be increased when raw material supply is available. The Commission does not dispute that capacity has increased in Denmark in line with the increase in pig production. However, a distinction has to be made between the obligation for the cooperative slaughterhouses to increase their capacity to take on the increased production of their *existing* members and a capacity expansion to accommodate supplies of new members. The latter increase will only occur if the slaughterhouse can be certain that it will receive increased supplies in the short to medium term. Given that potential new members would normally be bound by a notice period if they have previously been a member of another cooperative, it is far from certain that the slaughterhouse would receive the supplies in question once the capacity has been increased. Such an investment would involve a considerable risk since it would involve important sunk costs. It can in this respect be noted that pig production in Sealand, the 'home base' of Steff-Houlberg, has decreased proportionally compared to Denmark as a whole. This reduction has, as indicated above, now been 'compensated by the approximately 600 000 pigs produced by members who used the opportunity to leave Danish Crown or Vestjyske Slagterier in the

([21]) Based on data submitted by the parties, the changes have at most been 4% in an individual company's share (including market shares of pre-merger companies) over a 10-year period.

two-week period following the announcement of the merger to join Steff-Houlberg. Those additional supplies have exhausted the possibilities of Steff-Houlberg to increases capacity at relatively modest investment costs. It is, therefore, unlikely that Steff-Houlberg will increase its capacity further to an appreciable extent in order to accommodate supplies of new members.'

(124) In conclusion, the competitors currently present on the market will not be able to prevent the creation of a dominant position.

(c) **Potential competition**

(125) One of the effects of the exclusive supply obligation imposed on the farmers who are members of the cooperatives (and represent 94% of the Danish production of pigs) is that other Danish as well as foreign slaughterhouses may be foreclosed from obtaining supplies, or increasing present supplies of Danish live pigs because the farmer can only deliver to his respective cooperative. Only if he terminates his membership, can he export, deliver to one of the private slaughterhouses or deliver to one of the other Danish cooperatives (provided that they have excess capacity). And the termination of the membership will take between 12 to 24 months.

(126) Furthermore, if the farmer were to switch, that would involve certain costs. Delivering to a Danish cooperative as a non-member means that the farmer foregoes the annual profit share (4 to 8% of total payments to members). In practice, the farmer will thus be faced with the choice of remaining a member of his cooperative or of exporting everything to Germany (the cooperative Swedish Meats, accounting for 70% of slaughters in Sweden, does not buy imported pigs). It is therefore not surprising that exports of live slaughter pigs from Denmark are so limited in spite of relatively long periods of consistently higher prices in Germany, where the slaughterhouses at present operate below full capacity utilisation. Consequently, for the vast majority of Danish pig farmers there are no real alternatives other than to remain a member of their cooperative.

(127) The parties have indicated that Danish cooperative pig farmers are very well informed about live pig prices in Germany, that the export infrastructure (transport companies who also act as middleman) is in place and that delivery contracts of a longer term could be negotiated. The underlying idea is, therefore, that exports to Germany should be considered as a realistic form of potential competition. However, the German market is to a very large extent a 'spot market'. The German slaughterhouses thus have to compete by way of their (weekly) prices for deliveries with neighbouring slaughterhouses and the farmers will thus decide who to supply on the basis of those prices. This is a completely different framework to the Danish system. It would, therefore, be a major decision for a Danish farmer to enter into the German system. Due to the uncertainties and risks associated with such a decision, it is unlikely that the German market will become an attractive alternative. Even the cooperative farmers who would want to 'test' the German market will remain considerably hindered in their opportunities to do so in view of the exclusive supply obligation and the long notice period.

(d) **Conclusion**

(128) On the basis of the above, the Commission considers that the merger would lead to the creation of a dominant position on the Danish market for the purchase of live pigs for slaughtering. The concerns that the Commission identifies with regard to the creation of this dominant position do not relate to the possibility for the parties to extract monopsonistic profits from their suppliers as such profits would be shared out back to the farmer-members in the form of the 'residual payment' or 'bonus'. The Commission's concerns actually relate, *inter alia*, to: (a) the parties' control of innovation in the Danish pig industry; (b) the reduction of choice for the farmers; and (c) the possibility for the parties to drive private slaughterhouses out of business. This latter strategy would enable the parties to capture the private slaughterhouses' market shares both on the Danish market for fresh pork sold through supermarkets and on the market for the purchase of live pigs.

(129) In recent years there has been a trend towards more innovation in product development involving breeding pigs, animal feed, etc. This should be seen against the background that consumers demand a larger variety of products (for example organic products) than previously. The parties have indicated that they are at the forefront of product innovation in Denmark with products for export as well as for the home market and that there is no reason why they should deviate from this strategy.

(130) However, the parties will achieve control over innovation in the Danish pig industry. Pig cooperatives that wish to introduce specific schemes for the production of speciality pigs (organic pigs, free-range pigs, and so forth) need to have the price rules for the payment of such pigs approved by the Board of Danske Slagterier. The parties' control of the Board gives them, therefore, the possibility to achieve control over innovation in the Danish pig industry. In view of the Danish consumers' preferences for meat of Danish origin (see below), this could lead to less innovation addressed to the specific needs of the Danish market. In this respect, it can be noted that some Danish

supermarkets have, in the past, initiated direct contact with farmers (outside the cooperatives) in order to develop new products to the specifications of supermarkets.

(131) Furthermore, the merger will significantly *reduce the choice of the farmers*. Prior to the merger a farmer had at least the choice of supplying either Danish Crown or Vestjyske, both based on Jutland. If one of the cooperatives were to become less profitable than the others or if a (substantial) minority of the members were otherwise dissatisfied with its commercial strategy, they would have the possibility of terminating their membership and joining another cooperative. Following the merger, a substantial minority of the members of the new entity would in effect have no alternative. As indicated above, the two remaining cooperatives, Steff-Houlberg and TiCan, both run at full capacity and have waiting lists and the private slaughterhouses are not a real alternative. Following the merger, existing members would therefore be effectively locked into the new entity.

(132) The 127 private slaughterhouses, which collectively slaughter 4% of Danish pig production, hold less than 40% of the domestic market for fresh pork consumption (retail plus catering). The nine export-licensed slaughterhouses, accounting for three quarters of the production of the private slaughterhouses, depend on a very limited number of farmers for their supplies. By capturing a proportion of those limited product volumes, the new entity would be able both to substantially increase its share of the domestic market for fresh pork and to increase its market share at the buying level. It should be noted that: (a) deliveries from such suppliers are the only way in which a cooperative can attract new supplies of Danish pigs in the short term, since all other farmers are tied to a cooperative; and (b) capacity utilisation is very important in terms of profitability, making the private slaughterhouses all the more vulnerable if one of their few important suppliers fall away. Furthermore, by offering contracts to such non-members for the production of speciality pigs, the new entity could pay a higher price to those producers, without having to increase its purchase prices in general, and at the same time address specific and increasing demand in the market for such products, without destabilising the cooperative structure of the company. It would therefore appear to be a rational strategy for the new entity to exercise its economic power on the market for the purchase of live pigs for slaughtering by offering higher prices to farmers who currently supply the economically weak private slaughterhouses, depriving them of their commercial basis and thereby driving the latter out of business.

(133) In the Reply, the parties submitted that it would be contrary to the Articles of Association to offer higher prices to farmers currently supplying private pig slaughterhouses and that in fact none of the members of the parties would accept non-members being offered such contracts. More specifically, the parties argue that, according to the Articles of Association of Danske Slagterier, the cooperatives are obliged to follow its settlement rules, including the weekly price quotation. Those rules, which are adopted by the Board of Directors of Danske Slagterier, provide that all members are paid the weekly quotation and that non-members cannot be paid more than the quotation.

(134) However, the Commission does not consider that the settlement rules necessarily and effectively preclude a differentiation of the price paid to the farmers. First of all, as mentioned above, the settlement rules including the weekly price quotation have been notified to the Commission under Article 85 of the Treaty and a warning letter has been issued. It is therefore questionable whether those rules can provide a valid basis for the argument put forward by the parties. Furthermore, the Articles of Association of the parties merely refer to the settlement rules. The settlement rules themselves are adopted by the Board of Directors of Danske Slagterier and may be amended by the Board without necessitating an amendment of the Articles of Association of Danske Slagterier. It should be recalled that the parties appoint a clear majority of the members of the Board of Directors. The parties can thus amend the settlement rules at any time. Under the current settlement rules a slaughterhouse may, subject to approval by Danske Slagterier (the Board) conclude special contracts for the production of certain types of pigs and pay the farmer a supplement in addition to the weekly quotation to compensate him for the additional cost of producing such pigs. The parties claim that such contracts cannot be offered to non-members, as otherwise they would receive a price exceeding the weekly quotation, implying that the supplement not only covers actual costs but also includes an additional price incentive. Even if that interpretation is to be accepted, the present settlement rules could be amended, allowing such contracts to be granted to non-members, if the parties considered it to be in their commercial interest to do so. Finally, it is not obvious why it would not be in the interest of the members to accept the payment of a premium to non-members in the short term, if by doing so, the cooperative could increase its market share on the Danish market to the benefit of all members.

D. THE PURCHASE OF LIVE CATTLE FOR SLAUGHTERING

(a) **Market shares**

(135) As indicated above, even if the relevant geographic market is limited to Denmark, the merger would not lead to a dominant position as a result of which effective competition would be significantly limited in a substantial part of the common market.

(136) The parties will buy, as a result of the merger, 58% of Danish live cattle for slaughter. The addition of market

shares is substantial given that Vestjyske Slagterier at present accounts for 36% of the market while Danish Crown has a market share of 22%. As 45% of supplies of cattle to Danish Crown are made by non-members, the parties' 'guaranteed' supplies by cooperative members account for 48% of Danish live cattle for slaughter. The nearest competitors slaughter 9% and 8% of Danish live cattle for slaughter respectively. The competitor with 8% is NV-OX with whom the parties are in merger negotiations. If the merger with NV-OX goes through, the parties would increase their market share by a further 4 to 5% accounted for by the direct supplies to the slaughterhouse by the cooperative members and non-members ([22]). The six other slaughterhouses with an export licence have a market share of between 1 and 3%. The remaining 10% of slaughters take place at non-export slaughterhouses and farm slaughters. Steff-Houlberg and TiCan do not have cattle slaughter activities.

(b) **No significant limitation of effective competition even on a Danish market**

(137) It is acknowledged that the other cattle slaughterhouses all have market shares below 10% and that all, with the exception of NV-OX, are private slaughterhouses ([23]) with the competitive disadvantage that their supply is less secure than that of the parties which can rely heavily on the guaranteed supplies from their members.

(138) However, cattle production in Denmark is decreasing and expected to continue to decrease. On the other hand, consumption is stable. The private Danish slaughterhouses have access to half of the Danish cattle production that is accounted for by non-members of a cooperative, compared to only 6% of the pig production. From the perspective of the farmers, it can be concluded that the non-members supplying cattle to a cooperative and the individual cooperative cattle farmers (or a substantial minority ([24]) of them) have a viable alternative in selling their production on live cattle markets where currently 20% of cattle are already sold (and typically bought by private slaughterhouses, supermarkets and possibly exporters) ([25]) or directly to the private slaughterhouses.

([22]) The parties have indicated that they have no interest in the remainder of the supplies that are purchased on live cattle markets.

([23]) In fact, the slaughterhouse with a market share of 9% is a public slaughterhouse.

([24]) The majority of the farmers can change the policy of the cooperative.

([25]) In the course of the Commission's investigation, concerns were raised that the parties would buy up all the high-quality Danish cattle, and thereby foreclose the access to raw material. However, the Commission considers that this is not realistic in view of the fact that foreign beef is an alternative on the Danish fresh beef market (see below). Therefore, imports of fresh beef would constrain the parties in their pricing policy to Danish farmers for live cattle.

(139) In addition, one of the larger Danish supermarkets is also active in this market. It purchases itself Danish cattle on the cattle markets and has them contract-slaughtered at the private slaughterhouses. It is also directly involved in contract-production of calves.

(140) It is, therefore, concluded that, even if the relevant geographical market is Denmark, the merger would not lead to a dominant position as a result of which effective competition would be significantly limited.

E. DANISH MARKET FOR FRESH PORK SOLD THROUGH SUPERMARKETS

(a) **Market shares**

(141) The parties estimate that the total Danish fresh pork market (retail plus catering) is at least 111 000 t. The Commission subsequently attempted to verify this figure and to establish the main sources of uncertainty affecting the estimate. The Commission's market investigation confirms that the figure of 111 000 t is a realistic estimate of the total Danish fresh pork consumption.

(142) The parties have expressed doubts as to the reliability of parts of the calculation concerning sales of fresh pork for final consumption (see the table at Annex), in particular with regard to the estimate that imports in supermarkets account for only 1%. In particular, they questioned whether the Commission has correctly allocated the estimated total imports of 42 000 t pork in Denmark in 1997 over the different markets and whether the Commission has included in its calculation certain information which the parties obtained from several supermarket chains.

(143) The Commission's market investigation consisted in sending out questionnaires to all Danish slaughterhouses, to all meat wholesalers (including importers and 'cutters') known by the parties and to all the major supermarket chains plus some smaller supermarket chains. A limited number of questionnaires has been sent to Danish meat processors and Danish meat exporters. This has enabled the Commission to estimate: (a) the total sales of pork of Danish origin over the different retail and catering markets; (b) total purchases by supermarkets (Danish and imported meat); and (c) sales through caterers and butchers. 20 500 t sales of fresh pork to butchers have been reported by the cooperative slaughterhouses, a butcher association's wholesaler (Mesterslagteren) and the private slaughterhouses (based on the extrapolation of the replies of the private slaughterhouses). However, the figure of 20 500 t has been halved in the table in the

Annex in view of double counting with regard to the Mesterslagteren' sales and in view of the fact that a substantial part of the meat sold to butchers is further processed by them. Indeed, the highest estimate of sales by butchers is that they account for 10 % of total retail sales. Also the meat resulting from 'contract-slaughters' by the private slaughterhouses for the owner of the animal where the meat would be consumed by the owner (or sold as 'farm sales') and the sales by the cooperative slaughterhouses to their employees have been taken out of the total 111 000 t.

(144) On the basis of the replies of the parties, the other cooperative slaughterhouses, the private slaughterhouses (extrapolation), the wholesalers and the supermarkets, it can be concluded that supermarkets sell at least some 76 300 t of fresh pork. Sales of pork of foreign origin account, on the basis of the replies of the Danish supermarkets, for less than 1 % (volume and value). Based on the assumption that the total market accounts for 111 000 ([26]), that catering accounts for 15 % and that butchers account for around 10 % of retail, total supermarket sales would account for 84 350 t. The Commission considers that it is reasonable to assume that the purchases of supermarkets that did not reply to the Commission's questionnaires and from wholesalers that did not reply to the Commission's questionnaires account for the 'missing' 8 050 t ([27]).

(145) As the Commission's market investigation did not focus on imports by meat processors and meat exporters (who also re-export meat that they imported), the Commission cannot allocate the total estimated imports of fresh pork in Denmark over the different trade channels. However, imports by the responding supermarkets, covering small, medium-sized and large supermarket chains, account for 1 % of their total fresh pork sales ([28]).

(146) On the basis of the above methodology, it is estimated that Danish supermarkets sell around 84 350 t of pork. The parties will account for a market share of around 40 % (direct and via wholesalers). The addition of market shares is important: Danish Crown [20 to 25 %] (*) and Vestjyske Slagterier [15 to 20 %] (*).

([26]) This estimate is considered reasonable on the basis of the total sales by Danish slaughterhouses over the different channels and indications as to the levels of imports in supermarkets and caterers.

([27]) The Commission has not approached the individual supermarkets belonging to 'central buying' organisations that were unable to indicate the amounts of pork sold through their shops. However, this segment has not been omitted from the figures as, apart from the 8 050 t, sales by Danish slaughterhouses and responding wholesalers to those shops are included in the reported 76 300 t.

([28]) With regard to specific doubts expressed by the parties, the Commission can confirm that sales by Edeka and Aldi are included in the 76 300 t reported sales. Also, the Commission's investigation has confirmed that sales to FDB are larger than the estimate of their buyer for the sales through the whole organisation, including the independent cooperative retailers.

(b) **Actual competition**

(147) As a result of the merger, the supermarkets will only have one other main alternative supplier, the other cooperative, Steff-Houlberg, which accounted in 1997 for less than 30 % of their purchases. Furthermore, it should be noted that the third major cooperative slaughterhouse TiCan does not constitute a real supply alternative to the supermarkets ([less than 5 %] (*) market share). TiCan only has a small product portfolio compared to the other cooperatives which only allows it to compete on the Danish market in the local market of north west Jutland and its supplies to 'retail-wholesalers' are also limited. The 127 private slaughterhouses together account for less than 30 %. Although some of the larger of those slaughterhouses can to some extent serve as a third, fourth or fifth supplier to local outlets of a particular supermarket chain, none of them has the necessary volume, cutting, packaging or distribution facilities to enable them to compete on an equal basis with the parties. Actual competition will, therefore, only come from Steff-Houlberg. The merger will, therefore, result in the creation of a duopoly consisting of the parties and Steff-Houlberg, which together will have about 70 % of the market.

(148) The Commission considers that it is unlikely that Steff-Houlberg will be able to further increase its market share as a result of the merger, since to the knowledge of the Commission, no major supermarket has previously had only Danish Crown and Vestjyske Slagterier as their main suppliers. Accordingly, Steff-Houlberg will not be able to attract new customers who want to maintain a multi-sourcing policy as a consequence of the merger. Furthermore, Steff-Houlberg already has, in view of its overall position at the slaughtering level (13 % of all slaughtered pigs), a very strong position in the home market. It is also located on Sealand, close to the major population area in Denmark (Copenhagen) where it has a very strong position.

(149) The Commission has examined the likely future competitive relationship between the parties and Steff-Houlberg. As set out below, rather than a competitive duopoly, the operation is more likely to lead to the creation of a duopolistically dominant position, where the duopolists together have about 70 % of the market.

(c) **Potential competition**

(150) The Danish slaughtering sector has undergone a consolidation process over the last 40 years leading to a higher and higher concentration of the sector. There have been no significant new entrants to the industry other than small scale entries (a butcher requesting his slaughter permission). Furthermore, as a result of the operation the parties will effectively control access to the necessary raw materials owing to the structure of the cooperatives (see the market for purchasing live pigs

above). It is, therefore, unlikely that there will be any new entrants in the future.

(151) Imports are the most important source of potential competition. The Commission has, therefore, examined the possibility for slaughterhouses in countries such as Germany, the Netherlands and Sweden to start exporting pork to Denmark for sale through the Danish supermarkets. The Commission found that there are a number of barriers to such imports.

Adaptation of the supply of pigs and cutting to Danish specifications

(152) On the production side, to start exporting to Denmark, non-Danish slaughterhouses would need to adapt their supply of pigs to the type of pork demanded on the Danish market. They would also need to train their personnel to cut to Danish specifications. Moreover, cutting to Danish specifications would require non-Danish slaughterhouses to re-optimise their production, since cutting to Danish specification will have some impact on the cutting of products for other purposes and markets ([29]).

(153) The parties have argued that 'there are no significant differences between Danish pigs and pigs reared in other Northern European countries. It is not relevant to consider any difference in slaughtering weight between countries since it is very easy for producers to adjust weight by altering the length of the fattening period by a few weeks'. (Reply, p. 36.) Furthermore, the parties have argued that 'foreign slaughterhouses can readily switch sales to the Danish segment in response to a small but permanent increase in Danish fresh pork prices'. According to the parties this is also in line with the responses from foreign slaughterhouses, for example Dumeco to the Commission during its market investigation: 'Cutting to Danish specification (and breeding of special pigs for the UK bacon market) is no problem if necessary volume can be reached'. (Reply, p. 100.)

(154) The Commission recognises that it would be possible for pig farmers to adapt their breeding of pigs to the specific requirements of particular markets. Moreover, the Commission recognises that export-oriented companies such as Dumeco could adjust their production to Danish specifications. However, for this to be economically viable, the necessary volume needs to be achieved.

([29]) Put in simple terms cutting meat is not only a matter of cutting to a certain specification, but also how to use the cut off pieces. Cutting to Danish specifications may, therefore, change the composition of the 'by-products', which will, therefore, require a certain re-optimisation of the sales mix, but possibly also the scheduling on the cutting lines and the types of pigs slaughtered.

Distribution

(155) In Denmark pork sold through supermarkets is, with few exceptions, distributed directly from the slaughterhouses to the individual stores through the distribution systems of the parties. Among the Danish supermarkets only FDB would currently have the logistic facilities in terms of refrigeration capacity and trucks to distribute pork from its distribution centres ([30]). According to the parties, FDB at present undertakes own distribution for about 40 % of the pork sold in FDB stores via its own distribution centres, while the remainder is accounted for by direct distribution from the slaughterhouses to the individual stores. Consequently, in Denmark the overwhelming volume of pork sold through supermarkets is distributed directly from the Danish slaughterhouses to the individual stores through the distribution systems of the slaughterhouses. The supermarkets, therefore, depend to a large extend on the slaughterhouses for distribution of fresh pork.

(156) In terms of distribution the most obvious possibility for a non-Danish slaughterhouse to have its meat distributed in Denmark would be to deliver it to the distribution centres of major Danish supermarket chains. However, as set out above, the Danish supermarkets mainly rely on a system of direct distribution from the slaughterhouse to the individual stores. In reality, therefore, this possibility does not exist. For imports to have an impact on the market, distribution would have to be arranged. This would imply either the creation of a distribution system or the creation of additional distribution facilities by the supermarkets.

(157) The parties have argued that it would be easy for a non-Danish slaughterhouse either to set-up a distribution system for the Danish market by contracting directly with independent hauliers or by arranging distribution through Hjemmemarkedsselskabet Danmark or 'wholesalers with terminal facilities, who could also offer a viable alternative for some suppliers'. (Reply p. 57.) However, Hjemmemarkedsselskabet Danmark is owned by the main dairy cooperative, MD Foods, and the system is mainly focused on dairy products. As far as the wholesalers are concerned, those distribution facilities are more scattered and limited.

Controls for salmonella DT 104

(158) The additional veterinary control for salmonella (DT 104) on imported pork makes it less attractive for non-Danish slaughterhouses to export to Denmark. More importantly, the main potential exporters such as

([30]) According to the parties, Dansk Supermarket would also have this possibility for about one third of its volume. This was not borne out by the Commission investigation.

Germany and the Netherlands currently are less advanced in actions aimed at a general reduction ([31]) of all types of salmonella and they do not have specific veterinary controls for salmonella DT 104. Obviously, this increases the costs of exports to Denmark compared to exports to other countries. Furthermore, it involves an increased economic risk compared to that borne by Danish slaughterhouses, where general salmonella reduction plans are well advanced and specific DT 104 tests are routinely done. The importers thus face, in general, a greater risk that they will not pass those controls with the consequence that the whole shipment of pork, which may already to some extent have been distributed to the stores, has to be withdrawn.

(159) The Swedish producers are quite confident that they have salmonella under control in their production. However, the largest Swedish producer, Swedish Meats, has stated at the oral hearing that its potential exports to Denmark will be niche products in view of the fact that their production costs are higher than those of Danish producers.

Consumer preferences for Danish meat

(160) Third parties have stated that Danish consumer preferences for Danish pork are very strong, and that this is a major barrier to selling imported pork. According to the parties consumer preferences are not that strong. In particular the parties have presented two studies showing that there is a group of consumers who do not put any emphasis on the country of origin in their purchasing decision:

— the objective of the first study 'Den Danske Gris — forbrugerholdninger til svineproduktion of svinekød' by GfK was to analyse consumer attitudes to the Danish pig and in particular the factors on which consumers put emphasis, when purchasing ecological pork. The study is based on panel data from 1 022 households. This study shows that there is a group of consumers encompassing about 23% of all households which are more price-sensitive and are not happy with Danish pigs. Those households are not heavy consumers of pork,

— the second study 'Consumer choice criteria, when buying meat' by AIM Nielsen is based on interviews with 929 people. The objective of the study was to analyse which criteria consumers emphasise when buying meat. The study was produced for the purpose of the current proceedings and, therefore, not prepared in the normal course of business for the adoption of business decisions ([32]). In any event, according to this study there is a group of consumers of about 20 to 25% which attaches little or no importance to the country of origin of pork.

(161) In the SO the Commission stated that from those studies it can be concluded that it is possible that there is a group of Danish consumers who do not place any great emphasis on the country of origin in their purchasing decisions concerning pork.

(162) The parties contend in the Reply (p. 63) that those surveys support the view, 'that national preferences are not very strong in a significant proportion of consumers'. However, even supposing that 20 to 25% of consumers attach little or no importance to the country of origin of pork, it is not possible, as was said in the SO, to conclude on this basis that it is, therefore, commercially viable to import pork to the Danish market. The relevant question in this respect is whether consumer preferences in the overall population of Danish consumers is sufficiently weak that it is commercially viable for a potential competitor to enter the Danish market through imports of non-Danish pork. None of the studies answer this question.

(163) The studies presented by the parties cannot, therefore, be accepted as evidence that it would be a simple matter to sell imported pork in a commercially viable way on the Danish market. On the contrary real market evidence from Danish supermarkets suggest that it is extremely difficult to sell imported fresh pork to Danish consumers. On the very few occasions, when it has been tried, it has almost always only been possible to sell imported pork at a heavily discounted price. Therefore, imports are not realistic in the face of a small but significant price increase. Furthermore, according to Danish supermarkets the consumer preferences are so strong that they would not even consider advertising imported pork. In this respect it is of course obvious that a decision to start to import pork cannot only be based on the fact that some consumers may not consider the country of origin to be important in their purchasing decisions. A supermarket can only commercially defend a decision to start imports, which will require additional distribution logistics, shelf space and advertising, if it believes that a sufficient volume of

([31]) There are no countrywide actions in Germany and the Netherlands aimed at reducing salmonella. In Germany some regions have a test project going on and in the Netherlands there are voluntary programmes in some slaughterhouses.

([32]) See also point 41 of the Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

sales could be achieved. This is not expected to be the case, even in the face of a small and non-transitory, but significant, price increase in Danish pork compared to non-Danish pork.

(164) The parties consider that the Commission has put undue weight on the submissions from supermarkets, and that the Commission is not in compliance with its obligation to be objective as regards its burden of proof. However, the Commission has carefully examined what weight to put on the statements of supermarkets. In this respect the Commission does not see why it should not believe supermarkets when they say that past attempts to import pork have proved that it is very difficult to sell imported pork unless it is heavily discounted. Furthermore, the Commission finds that it is contradictory for the parties to claim that 'the supermarkets have a vested interest in maintaining the present imbalance of negotiations with the supply side'. (Reply, p. 59.) There is no reason why the supermarkets should have an interest in maintaining the current supply structure, if they had alternatives to the parties readily available.

(165) The parties have argued that there are large imports of tenderloins to the Danish market. Apparently this is explained by the fact that the Danish exporters prefer to sell their tenderloins on overseas markets. As far as the Commission is aware none of the major supermarket chains sell imported tenderloins to any large extent.

(166) Moreover, the parties believe that neither Dansk Supermarked or FDB have until now mounted a full-scale attempt to market imported pork (Reply, p. 59). Furthermore, the parties have argued that the fact that Denmark imports beef, poultry and lamb and pork to caterers (Reply, p. 62) is evidence that imports could also take place over time for pork. The Commission recognises that it is technically possible for importers to change the breeding of pigs and the cutting specifications, to ensure compliance with the salmonella DT 104 test, to arrange distribution and possibly over time also to change consumer preferences sufficiently for imports of pork to become commercially viable. Therefore, the Commission also believes that a determined effort by importers or the supermarkets could over time lead to more imports of pork. The Commission believes that the example of beef shows that this could be done. In this respect it is important to note that imports of beef have only been undertaken in response to a shortage on the Danish market of Danish beef. Furthermore, even if it was decided, for example by supermarkets, to undertake such an effort, then this could only be undertaken over time and at substantial cost, which would have to be paid by the supermarkets and eventually the Danish consumers. Such costs are a direct consequence of the negative impact on competition on the Danish market of this merger.

(167) In conclusion, none of the above factors taken individually constitute insurmountable barriers to the Danish market for fresh pork sold through supermarkets. However, the cumulative effect of the barriers create a situation making it unlikely that imports would take place in response to a small but significantly higher price in Denmark than on neighbouring geographic markets.

(168) In particular it should be noted that a potential importer would have to make substantial investments in order to enter the Danish market. Part of those investments would represent sunk costs. First, a potential importer would need to invest in the creation of the physical facilities for selling on the Danish market. In this respect the importer would need to create cutting lines for Danish specifications, distribution facilities for the Danish market would have to be arranged (either by the Danish supermarkets or the importers), and over time the importer would have to adapt its production systems in order to reduce the risk of failing the salmonella DT 104 test.

(169) Second, a certain marketing activity would be necessary in order to convince a sufficient number of Danish consumers to buy imported pork. This marketing activity would have to be undertaken either by the supermarkets or the non-Danish supplier or by both in combination. A large part of those marketing activities would be sunk costs. Such marketing activities would have to be undertaken in the knowledge that a large majority of Danish consumers have a preference for Danish pork and in the knowledge that the existing Danish suppliers would have an interest in retaliating against such an entry attempt, for example through targeted promotional activities on the Danish market ([33]).

(170) Consequently, the Commission finds it unlikely that non-Danish meat would enter the Danish market in reaction to a small but significant price difference between Denmark and neighbouring countries. On the contrary the Commission finds it likely that supermarkets would simply pass on the higher prices to the consumers in view of the price-inelastic demand.

(d) **Countervailing buyer power**

(171) The parties have argued that the supermarkets have countervailing buyer power. The Commission recognises that the demand side is relatively concentrated in the Danish market for fresh pork with the two main supermarket chains, Dansk Supermarked and FDB, accounting together for about 50 % of the sales of fresh pork. In particular, the parties claim that the fact that the supermarkets achieve special conditions outside the

([33]) Those activities can be undertaken with state aid (the statutory production levy on all slaughter pigs produced in Denmark, managed by Danske Slagterier).

normal contractual relationship such as reductions from the list price are evidence that FDB and Dansk Supermarked have countervailing buying power.

(172) The Commission is aware that the two main supermarket chains are able to purchase under more favourable conditions than smaller chains and stores. However, the fact that the big chains are able to purchase under more favourable conditions than the small chains does not necessarily imply that the big chains have enough countervailing power to remove a dominant position. In the present case it is in particular noted that the parties will be much less dependent on the supermarkets than the supermarkets will be on the parties, since the parties have alternative outlets for their pork on the export markets, whereas the supermarkets will have no alternative to Danish pork in the face of a small but significant price increase on Danish pork. The parties claim that they depend on the supermarkets as important channels for their sales. However, in the overall sales of the parties, the Danish supermarkets account for less than 5 % and the parties regularly shift the emphasis from one geographic market to another according to where they can obtain the best price (e.g. tenderloin to Japan). Therefore, clearly the parties have alternative outlets on export markets whereas the supermarkets have to buy Danish pork. Furthermore, the fact that the parties will be the only supplier of both beef and pork will add to their position vis-à-vis the supermarkets, and increase the dependency of the supermarkets on the parties. Consequently, it is not credible that even the largest Danish supermarkets would have countervailing buyer power. Rather any price increases are more likely to be passed on to the consumers. The cyclical fluctuations of pork prices would make it a simple matter to implement such price increases.

(173) In summary, the Commission recognises that the large supermarket chains have more buyer power than the small supermarket chains. However, the Commission does not find that the buyer side has sufficient buyer power to remove the dominant position. In particular the Commission is of the opinion that the Danish supermarkets are dependent on supplies of fresh Danish pork, which is a 'must stock item' for a Danish supermarket, whereas the slaughterhouses have the possibility to export. The slaughterhouses are not, therefore, nearly as dependent on the Danish supermarkets as those supermarkets are on them.

(e) **Duopolistic dominance**

(174) There is an absence of potential competition and countervailing buyer power. Therefore, actual competition in the market between the existing players on the market will be the only source of competition. In this respect the competitive relationship between the duopolists, Steff-Houlberg and the parties, will be crucial, since the other suppliers are too small to be anything but followers of the duopoly.

(175) In the view of the Commission the competitive relationship between the parties and Steff-Houlberg will not be characterised by strong competition, but rather by anti-competitive parallel behaviour, which will result in the creation of a duopolistically dominant position. The creation of dominance is not a result of explicit collusion between the duopolists, but will simply be the result of their adaptation to market conditions, which provide no incentive for Steff-Houlberg and the parties to compete. In particular, it would not be in the commercial interest of Steff-Houlberg to engage in competition with the parties to an extent that would remove their duopolistic dominance for the reasons set out below.

(176) The structural characteristics of the pork industry provide little incentive for competition. In particular it is noted that:

— the pork market is a mature market. The market growth in itself will, therefore, not provide any dynamics to the market, which could in turn provide an incentive to compete,

— the technology used in slaughterhouses is mature. New technological developments are, therefore, not sources of competitive advantages such as to provide competitive dynamics to the market. Obviously, this does not mean that the Commission believes that there are no new technologies being introduced in the slaughtering industry. As is normal in all industries new technologies are introduced on a continuous basis. However, the change is only gradual and relatively slow compared to, for example, high-tech industries such as computers. In any case many technological improvements will be shared by the parties and Steff-Houlberg since a major part of the innovation in the Danish meat industry is done by, or channeled via Danske Slagterier, which the merged entity will control,

— there is less scope for price competition between the cooperatives due to the pig quotation system. As a result of the system all the cooperatives buy live pigs from the farmers at the same price. Sourcing of raw materials cannot, therefore, be a source of competition between the slaughterhouses,

— the market for fresh pork is transparent. It would thus not be possible to start on any large scale a confidential rebate policy on the Danish market as this would immediately be detected by the merged entity via the weekly price quotation meetings that are based on a summary of the income stream of sales of the main cuts. The merged entity is also aware that Steff-Houlberg is more home-market oriented. Furthermore, there is no market on which Steff-Houlberg is active (independently or via an organisation controlled by the parties) on which the parties are not also active.

(177) Furthermore, the competitive position of Steff-Houlberg vis-à-vis the parties is not strong enough to provide any incentive for Steff-Houlberg to engage in competition with the parties on the Danish market:

— the merged entity would be able to retaliate on the export markets, if Steff-Houlberg were to compete on the Danish market,

— there are structural links between Steff-Houlberg and the parties on export markets. In particular Steff-Houlberg will continue in the future to channel a large volume of meat through companies controlled by the parties. In addition, Steff-Houlberg has been invited by the parties to join the merger. The parties argue that both TiCan and Steff-Houlberg have recently set up a certain number of new export companies. According to the parties, those developments clearly indicate the independence of the merged entity's competitors. The Commission has noted those developments. However, the Commission has found that Steff-Houlberg and TiCan will continue to be dependent on the parties for a substantial proportion of their exports through the company ESS-Food,

— Steff-Houlberg has no advantages in terms of cost structure. In particular it is noted that Steff-Houlberg buys its raw materials at the same price as the parties, uses the same production technology, and to a large extent sells its production through the same channels as the parties. Furthermore, it has little possibility of achieving advantages in the future. According to the Gira-report, Steff-Houlberg has already reached the optimum scale economies in terms of operating costs,

— Steff-Houlberg faces the competitive disadvantage, compared to the merged entity, that it cannot offer beef. The merged entity therefore has, vis-à-vis the supermarkets, the possibility to offer substantially more in overall turnover-related discounts to the supermarket buyers, and could use beef to push the sales of pork,

— the merged entity will be overwhelmingly more powerful economically than Steff-Houlberg. It will for example receive almost six times as many pigs and have a turnover that is almost 10 times greater than that of Steff-Houlberg.

(178) In conclusion, on the basis of the market structure and the overall market position of Steff-Houlberg vis-à-vis the parties it is unlikely that Steff-Houlberg would have any interest in engaging in competition with the parties. On the other hand, the merged entity will not be able to act without considering the actions of Steff-Houlberg, particularly in view of the latter's overall capacity and its strong market position on Sealand. Therefore, the operation is more likely to lead to anti-competitive parallel behaviour between Steff-Houlberg and the parties.

(179) The parties contest the reasoning of the Commission. In particular the parties have argued that (Reply, pp. 127 to 128):

(a) competition becomes stronger, when the market is mature as the only way to increase sales is by winning market share from competitors. However, the Commission has not said that mature markets cannot be competitive. Within the assessment of the oligopoly, the point is whether growth of the market will provide an incentive to compete. The parties have not contested that the pork market is mature. The main point to assess is, therefore, whether the market for other reasons than market growth will be competitive. As set out above the Commission has not found it likely that the Danish market for fresh pork will be competitive after the merger,

(b) the market is transparent due to the fact that the retailers inform the suppliers if they are more expensive. Transparency, therefore, contributes to competition. The Commission notes that the parties acknowledge that the market is transparent. However, the Commission has not disputed that there is competition in the market at present, but the Commission is of the view that it is likely that the operation will lead to anti-competitive parallel behaviour and duopolistic dominance for the reasons set out above,

(c) the parties argue that it is necessary for the Commission to prove structural links between the companies alleged to be duopolistic and collectively dominant, if the Commission applies the Merger Regulation (Reply, p. 128). The Commission considers that collective dominance can exist with and without structural links and that both types of situations are covered by the Merger Regulation. In any event, the Commission finds that there are strong structural links between the parties and Steff-Houlberg in the present case notably through Danske Slagterier and ESS-Food. It is correct as the parties have stated that Steff-Houlberg has taken important steps to find alternative export channels. However, Steff-Houlberg will still depend on ESS-Food for a substantial part of its turnover.

(d) Finally, the parties have submitted a table showing that an increase in the price of pork of DKK 1 per kilogram would benefit Steff-Houlberg and TiCan more than the parties owing to the fact that the Danish market make up a proportionately higher share of the turnover of Steff-Houlberg and TiCan. In particular it is shown that an increase of DKK 1 on the basis of 1996/1997 figures (Reply, p. 90) would have increased the payments per kilogram to the farmer by DKK 0,04 for the parties, DKK 0,09 for Steff-Houlberg, and DKK 0,07 for TiCan. Therefore, according to the parties, they would have an incentive to compete with Steff-Houlberg. However, the Commission does not find it plausible

that the parties should not try to maximise their profits on the Danish market as they do on all other markets. Indeed according to the parties, the sales departments are asked to maximise the price on any given cut by selling it in the market where it receives the best price ([34]).

(180) The parties have not contested the other elements in the Commission reasoning.

(f) **Conclusion**

(181) For the above reasons, the Commission concludes that the operation would lead to the creation of a duopolistically dominant position on the Danish market for fresh pork sold through supermarkets.

F. FRESH PORK — CATERING

(182) On the Danish market for fresh pork for catering, the parties are estimated to account for around 10% of the market with the bulk of the market share (over 50%) realised by a multitude of wholesalers which source their meat from the private slaughterhouses. On this market, the merger will thus not lead to a creation of a dominant position as a result of which effective competition will be significantly impeded.

G. FRESH PORK — BUTCHERS

(183) On this market, the parties will become the market leader with around 20 to 25% of the market. However, over 50% of supplies will be made by private slaughterhouses. Many of the 118 non-export licensed private slaughterhouses are operated by butchers or by a grouping of local butchers. Furthermore the largest national Danish butchers' association also has a wholesaler that supplies around 15% of the market. This association purchases a substantial proportion of the meat from the private slaughterhouses.

(184) On the basis of the above, it can be concluded that the merger will not lead to a creation of a dominant position as a result of which effective competition will be significantly impeded.

H. THE MARKETS FOR FRESH BEEF SOLD THROUGH SUPERMARKETS, BUTCHERS, CATERERS

(185) It has not been possible, on the basis of the market investigation to estimate in a reliable way market shares for the sales of beef in Denmark through supermarkets, butcher and caterers. Furthermore, no data are available for other Member States as to the split in the markets for those products and for fresh beef sold to processors. However, the parties' overall sales outside Denmark are much more limited. Therefore, it can, owing to the limited market shares of the parties outside Denmark, be concluded that the merger will not lead to a creation of a dominant position as a result of which effective competition will be significantly impeded.

I. SUPPLY OF FRESH MEAT TO MEAT PROCESSORS AND PROCESSED MEAT PRODUCTS

(186) As both those markets are wider than Denmark and in view of the limited market shares of the parties outside Denmark, the merger will not lead to the creation of a dominant position on those markets.

J. DANISH COLLECTION OF ABATTOIR BY-PRODUCTS (HIGH-RISK)

(187) As a result of the merger, the parties will control the dominant Danish renderer, daka, a company collecting 79% of Danish high-risk abattoir by-products. Kambas is the only competitor that also takes on material from other companies ([35]). It is a subsidiary of Steff-Houlberg (17% market share).

(188) The parties claim that Kambas can increase capacity and that abattoir by-products can be transported from west of the Great Belt to Kambas at low costs. Kambas does not currently obtain abattoir by-products from west of the Great Belt and works at full capacity. It can, therefore, be doubted whether, having regard to the low profitability of rendering, capacity will be increased in order to accommodate supplies from west of the Great Belt.

(189) It has been indicated, in the course of the Commission's investigation, by a number of the private slaughterhouses that the parties would be in a position to use their control over daka to their detriment. The

([34]) If anything, the figures illustrate that Steff-Houlberg does not have an incentive to compete vigorously on the Danish market since Steff-Houlberg would lose proportionally more than the parties through such price competition.

([35]) There is one other rendering company in Denmark with a 4% market share. However, this company exclusively takes in fresh poultry waste products. It is, therefore, not an alternative for more than 90% of supplies to daka.

parties could reduce the service by, for example, stopping the collection at the premises of the slaughterhouse or reducing the frequency of collection. The parties could also affect daka's revenue stream vis-à-vis its suppliers (decrease payment for the waste or request a fee for accepting the waste, combined with a strategy of not sharing the resulting profit of daka with the members).

(190) Before the merger, no company was in control of daka. As a result of the merger, the acquisition of control in daka will make it possible, as well as create an incentive, for the parties to exercise the market power of daka. In particular, by increasing the costs of their competitors or making collection more difficult, the parties could make the smaller slaughterhouses less competitive as buyers of live animals from the farmers. This would squeeze the smaller slaughterhouses and thereby reduce the alternatives to the parties on the markets for purchasing of live pigs. The operation therefore leads to the creation of a dominant position in the market for abattoir by-products. Over time this would also lead to a strengthening of the dominant position of the parties on the market for the purchasing of live pigs and fresh pork sold through supermarkets.

VII. **OVERALL ASSESSMENT**

(191) The proposed operation affects a number of different markets. At the upstream level it has an impact on the Danish market for the purchasing of live pigs. At the downstream level it has an impact on the Danish market for fresh pork as well as on the market for abattoir by-products.

The market for live pigs

(192) As far as the upstream markets for the purchasing of live pigs are concerned it is to be noted that the parties will achieve market shares as buyers of 76%. It is concluded that the parties will be able to act as dominant buyers on this market. However, it is also noted that the parties are owned by their members, and that the main part of the yearly profits of the slaughtering houses has in the past been distributed to the members in proportion to the deliveries by each member. Consequently, because of the cooperative structure, it is not possible for the slaughtering houses to exploit their members-suppliers in the traditional sense of a dominant purchaser. However, other negative effects may result from the merger. In particular it is noted that:

— the operation will reduce the choice of slaughterhouse for the farmer. Effectively, farmers will be forced to accept the business ideas of the parties and streamline their production of animals accordingly. A substantial minority will have no real alternatives if they disagree with the management or business philosophy of the parties,

— the parties will control, through Danske Slagterier, innovation in the Danish pig industry,

— the parties could offer higher prices to farmers who currently supply the economically weak private pig slaughterhouses, depriving them of their commercial basis and thereby driving the latter out of business.

The market for fresh pork

(193) As far as the downstream markets for pork are concerned the parties will achieve a market share of about 40% of the sales to the supermarket channels, which constitute 76% of the overall volume of fresh pork sold in Denmark. The only other major supplier on the Danish market is the cooperative Steff-Houlberg with close to 30% of the market. The operation will, therefore, result in a duopolistic market structure, where the duopoly will hold 70% of the market. The duopoly will behave as a dominant duopoly rather than a competitive duopoly. In particular it is noted that Steff-Houlberg will not provide competition to the parties to such an extent that it will remove dominance. The reasons are first of all the superior size of the parties (with almost 10 times the turnover). Second, Steff-Houlberg will be linked with the parties through the joint export activities, which will be controlled by the parties, and the activities of the trade association Danske Slagterier, which will effectively be controlled by the parties as well. Consequently, rather than competition between the new entity and Steff-Houlberg, the merger will lead to duopolistic dominance.

(194) Potential competition will not prevent the parties from keeping a small but significant and non-transitory higher price on the Danish market compared to neighbouring geographic markets. The reasons are mainly the need for importers to set-up a distribution system, additional veterinary controls for salmonella DT 104 for imported pork, and strong Danish consumer preferences for Danish pork, which has deterred and will continue to deter importers from entering the Danish market. Countervailing buyer power is not present in this market. First, Danish supermarket chains will need to purchase Danish pork owing to the strong consumer preferences. Secondly, there is no mutual dependency, since Danish supermarket chains will be much more dependent on the slaughterhouses than the slaughterhouses are on them, because the slaughterhouses will have alternative sales channels on the export markets. The Danish supermarket chains will, therefore, simply pass on a price increase to the final consumer. Consequently, as a result of the merger there will be no effective competition on the Danish market for pork.

Abattoir by-products

(195) As far as abattoir by-products are concerned, the parties will achieve a market share of 79%. The slaughterhouses today receive payments for their rendering products. However, as a result of the operation it would be possible for the parties to ask for a fee to collect rendering products. Furthermore, it would be possible for the parties to reduce the service level for small independent slaughterhouses. As a result the change in control over daka increases the scope for abuse on this market.

Conglomerate effects

(196) The parties will be the only major slaughterhouse selling fresh beef and pork on the Danish market. Relative to other slaughterhouses only active in either fresh beef or fresh pork, this will give the parties an additional advantage vis-à-vis the supermarkets, because the parties will be the only supplier able to offer both beef and pork. The parties will, for example, be able to introduce discounting schemes relating to the total volume of beef and pork sold, thus giving the parties the possibility to push the sale of pork using beef as a lever and vice versa.

(197) In addition, the acquisition of control over daka in the abattoir by-products market will give the parties the opportunity to squeeze the small independent slaughterhouses by charging a fee for the collection of abattoir by-products or reducing the level of service. Another mechanism to squeeze those private slaughterhouses is by attracting, by means of special contracts, the farmers supplying them. This would further contribute to the creation of dominant position of the parties on the markets for live pigs and fresh pork sold through supermarkets.

VIII. **ECONOMIC AND TECHNOLOGICAL PROGRESS**

(198) According to the parties, the concentration has three main effects. First, it will result in important cost savings (on average about […]%(*) per year of the turnover viewed over a period of three to five years). Second, the concentration will achieve volumes which will make it possible to move from the present indirect/narrow-assortment sales to the retail sector to a full-assortment, direct supplier status for retailers in some of the major European markets. Third, the concentration will achieve volumes which will enable the parties to maintain the market position on the Japanese market in the face of competition from US producers. As far as those efficiencies are concerned, it should be noted that under Article 2(1)(b) of the Merger Regulation the Commission may take account of the development of technical and economic progress only to the extent that it is to consumers' advantage and does not form an obstacle to competition. The creation of a dominant position in the relevant markets identified above, therefore, means that the efficiencies argument put forward by the parties cannot be taken into account in the assessment of the present merger. In addition, it is noted that the majority of the cost savings listed by the parties would seem to be at least partially achievable without the merger so that the synergy-related cost reductions directly attributable to the merger are, in the view of the Commission, likely to be less than […]%(*). Furthermore, it is not clear why it would not be possible for each of Danish Crown and Vestjyske Slagterier to envisage mergers with other partners, whereby benefits similar to the current merger could be achieved.

IX. **COMMITMENTS PROPOSED BY THE PARTIES**

(199) In order to resolve the competitive concerns raised by the Commission, the parties, by letter received 18 February 1999([36]), have offered to enter into the following commitments.

A. ARTICLES OF ASSOCIATION OF THE PARTIES

(200) Subject to the Commission's adoption of a positive decision, the parties will amend their Articles of Association so that no later than 1 October 2001 all pig-producing members will by individual notification be permitted to supply up to 15% of the individual member's weekly supply without restrictions to competitors to the merged entity. Permission to exempt pigs from the exclusive obligation will be given to all members applying for this with a six weeks' notice. If the merged entity, regardless of the permission of the individual member to sell the pigs to an alternative buyer, receives those pigs, the merged entity will not be obliged to pay residual payments on those pigs. If he so wishes, the individual farmer can re-enter on a three months' notice into an obligation to supply all pigs and receive residual payment for all pigs. The merged entity has the obligation to receive also the pigs which are exempted from the supply obligation, however, in situations where capacity is insufficient, with a non-discriminatory delay of up to two weeks.

(201) The parties undertake with effect from 1 October 1999 to amend paragraph 9.1 of the Merger Agreement (and thereby the Articles of Association), in order to allow members to resign from the cooperative at 12 months' written notice to expire on the last day in any month.

([36]) On 4 March 1999, the parties submitted clarifications of its originally submitted commitments.

B. PROVISION OF SLAUGHTER CAPACITY

Contract for slaughter

(202) At the latest […] (*) after the Commission's adoption of a positive decision and for a period of […] (*), the parties will offer to slaughter, chill and primal cut, at the parties' Danish slaughterhouses on terms necessary to maintain full EU, USDA and other usual export authorisations, up to 5 000 pigs per full working week for sale on the Danish market of fresh pork through supermarkets and unconnected to and independent of the parties and Steff-Houlberg ([37]) (the Competitor), on behalf of an existing or prospective, viable competitor to the parties and Steff-Houlberg, nominated and approved by the Commission.

(203) In the initial […] (*) of the […] (*) period beginning at the latest […] (*) after the Commission's adoption of a positive decision, the price setting in the contract for slaughter is to be agreed between the parties and the Competitor. If no agreement has been entered into during the first […] (*), the parties will have in the remaining […] (*) of the […] (*) period the right to set a price per kilo for each pig slaughtered and cut in primal cuts or half carcases which covers all the parties' documented costs connected to the slaughter and cutting and a reasonable profit of […] % (*) of total costs. If the Competitor so wishes, the cost calculation can be audited by the merged entity's chartered accountant or at the Competitor's expense by another chartered accountant approved by the merged entity and the Competitor.

(204) The Competitor must inform the parties at least six weeks in advance of the calendar week the slaughter is to take place, of how many pigs the Competitor wishes to be slaughtered and cut and whether the pigs are to be cut in half carcases or in primal cuts. The parties have the right to decide where the slaughter and cutting is to take place, however, using all efforts to accommodate the wish from the Competitor to have the slaughter conducted as close as possible to the Competitor's own facility(ies). The Competitor is responsible for transport of live pigs to the slaughterhouse and transport of the fresh pork half carcases or primal cuts from the slaughterhouse. The parties will pay the transport costs for transport to another slaughterhouse if that transfer to another slaughterhouse is due to circumstances under the control of the parties.

([37]) One or a combination of Danish or foreign slaughterhouses, wholesalers, supermarkets or other companies active in the meat industry.

(205) If no Competitor has taken advantage of the 'contract for slaughter'-offer within the […] (*) period beginning […] (*) from the Commission's adoption of a positive decision, the parties are no longer obliged to maintain this offer of contract slaughtering.

Sale of a slaughterhouse

(206) As of two weeks after the Commission's adoption of a positive decision and in the period of […] (*) in which the parties offer the contract for slaughter, the parties also undertake to offer for sale a pig slaughterhouse on the following conditions.

(a) Two weeks after the adoption of a positive decision, the merged entity will appoint an independent trustee (who must be an investment banker, an investment bank or similar institution) (the Trustee) who will act for the Commission. The Trustee shall be deemed approved by the Commission if the Commission has not responded in writing to the parties within two weeks after the appointment has been announced to the Commission.

(b) If the Competitor has decided to enter into an agreement on contract slaughter, the Competitor has also the option to purchase the slaughterhouse. If the Competitor decides to purchase the slaughterhouse, the parties are no longer obliged to maintain the offer of contract slaughtering and the contract slaughter agreement shall be terminated at the transfer of the slaughterhouse. If the parties wish to sell the slaughterhouse to a third party within […] (*) after the Commission's adoption of a positive decision or if the Trustee wishes to sell the slaughterhouse to a third party pursuant to recital 207 in the remaining […] (*) period of the […] (*) period in which slaughter on contract is offered, the Competitor shall have a right of first refusal to purchase the slaughterhouse at same terms and price as offered by a third party. The Competitor must respond within two weeks after he has been offered the exercise of his right of first refusal. If the Competitor declines to make use of his right of first refusal and the parties sell the slaughterhouse, the contract on slaughter at the premises of the parties shall be terminated with three months' notice.

(c) The slaughterhouse must be a pig slaughterhouse situated in Denmark and operational at the time of the actual transfer of ownership of the slaughterhouse to the Competitor. The slaughterhouse must have a capacity of slaughtering approximately 5 000 pigs per full working week (the Slaughterhouse). The parties foresee offering the pig slaughterhouse in Allingåbro for sale but may instead offer another Commission approved slaughterhouse.

(d) The Slaughterhouse is to be sold by the parties at a fair and reasonable market price set by the parties taking into account all relevant aspects in the evaluation of a Danish pig slaughterhouse and transferred on normal and fair conditions as generally applied within this industry in connection with the transfer of ownership of a slaughterhouse.

(207) If the parties have not succeeded in selling the Slaughterhouse prior to the expiration of […] (*) after the positive decision of the Commission, the parties undertake to give the Trustee an irrevocable power of attorney to sell the Slaughterhouse to a Competitor at a fair and reasonable market price for the parties before the end of the remaining […] (*) of the […] (*) period in which the slaughter capacity is offered on contract as set out in recital 202. This period can be extended by the Commission on reasonable grounds on application from the parties or at the request of the Commission. The parties shall provide the Trustee with all the assistance and information necessary for the execution of the sale or whatever his specific task is.

(208) If the Slaughterhouse has not been sold at the end of this period at a fair and reasonable price, the Trustee will have […] (*) to sell the Slaughterhouse without fixing a minimum price to any Competitor apart from the Competitor who has entered into an agreement on contract slaughter as set out above. At the transfer of the Slaughterhouse, the agreement on contract slaughter shall terminate.

(209) The parties or the Trustee will inform the Commission of all material developments and in any event every three months, of the status as regards the sale of the Slaughterhouse and inform the Commission of any plans to sell the Slaughterhouse to a Competitor. In this connection the parties must provide the Commission with necessary information for the Commission to assess whether the Competitor satisfies the conditions of being a viable Competitor. At the latest two weeks after Commission receiving the information in writing the Commission will inform the parties or the Trustee if it finds that the Competitor is not a viable Competitor to the parties and Steff-Houlberg on the Danish market for the sale of fresh pork through supermarkets and in this case the Slaughterhouse cannot be sold to the proposed Competitor. If the Commission has not responded within the two weeks, the parties or the Trustee are/is free to sell the Slaughterhouse to the proposed Competitor.

(210) The parties undertake not to buy back the Slaughterhouse sold unless approved by the Commission.

Supply of live animals

(211) From entering into an agreement on transfer of capacity to slaughter 5 000 pigs weekly in Denmark and until 1 October 2001, the parties undertake to sell to the purchaser of the slaughter capacity, if he so wishes, 5 000 pigs per week. The price for the pigs shall be the full market price i.e. a price equal to the price the parties have paid for the pigs with an addition of DKK […] (*) /kilogram to cover the residual payment and share of consolidation for the supplying farmers or a price equal to the price the parties have paid for the pigs with an addition of DKK […] (*) /kilogram. The parties shall not be responsible or cover the cost for transport of the pigs from the farmer to the purchaser.

C. DANSKE SLAGTERIER

Removal of control in Danske Slagterier

(212) No later than three months after the Commission's adoption of a positive decision, the parties will propose and vote in favour of a resolution to amend clause 7.10 of the Constitution of Danske Slagterier. According to the amended provision all matters shall be decided by simple majority. No resolution shall, however, be valid unless board members from at least two Section 3.1.1 members (currently the parties, Steff-Houlberg and TiCan) have accepted the resolution. If a resolution on (a) the increase or decrease of membership fees by more than a percentage warranted by the inflation, (b) the adoption of the business plan, (c) the adoption of the yearly budget, (d) essential changes in the equity capital, (e) approval of new Section 3.1.1 members, (f) any resolution to be taken pursuant to clauses 4.1, 4.2 and 4.3, (g) recommendation to the Ministry of Agriculture and Fisheries of members of the Board of Directors of the 'Pig levy reserve', (h) recommendation or appointment of members of other external Board of Directors to which Danske Slagterier has a right to recommend or appoint board members, (i) appointment of members of the independently acting companies, or (j) any resolution that has significant financial and/or commercial implications for at least one of the Section 3.1.1 members, has been blocked twice within three months by the parties solely or the other Section 3.1.1 members in common, the member who has put forward the proposal shall be entitled to submit the matter to arbitration.

(213) If the parties have not within 14 days after the last of the two votes agreed on the choice of a sole arbitrator, the President of the Maritime and Commercial Court in Copenhagen shall act as sole arbitrator. The arbitrator shall give the parties a fair hearing but is entitled to conduct the arbitration in such manner as he thinks fit. The arbitration award shall be final. The Section 3.1.1 member(s) whom the arbitration award has decided against may resign from Danske Slagterier provided notice in writing is given no later than 30 days after the arbitrator's decision is taken. The resigning members'

Special Accounts I and II shall be paid out with the entire balance as if the membership had ceased on the dissolution of Danske Slagterier. Furthermore, the resigning members' share of The Catastrophe and Activity Reserve of Danske Slagterier shall be paid out as provided for in the statutes governing the Reserve.

(214) If the parties choose to resign from Danske Slagterier, the remaining Section 3.1.1 members may decide not later than 30 days after the Board of Directors has received notice on resigning that Danske Slagterier shall be dissolved. All members shall receive their share of the proceeds from the liquidation calculated according to the Constitution of Danske Slagterier once the liquidation has been completed.

Abolishment of the national price quotation system

(215) No later than three months after the Commission's adoption of a positive decision, but prior to the decision concerning the parties' removal of control in Danske Slagterier, the parties undertake to propose and vote in favour of a resolution to amend, with effect from the start of the financial year 1999/2000, clause 2.3 and clause 4.3 of the Constitution of Danske Slagterier in order to abolish any commitment for the parties as members of Danske Slagterier to follow a common price quotation. In the future the parties will have no coordination of the prices for example the overall price grid. Immediately after Danske Slagterier has decided on amending the Constitution of Danske Slagterier, the Supervisory Board of Danske Slagterier will with effect from the start of the financial year 1999/2000 amend the 'Rules governing settlement for pigs ' and the 'Rules governing settlement of sows' accordingly.

(216) The changes to the 'Rules governing settlement for pigs' can be summarised as follows: References to 'the national quotation committee' will be replaced by 'the settlement committee'. Clauses 1.2, 3.5, 4.2, 4.7 and 7.0 will be deleted. In clause 1.3, the words 'and the national quotation' will be deleted. Clause 3.4 will be amended to 'The settlement committee shall fix the weight limits, the basis for lean meat content and all other objective criteria for the settlement for pigs'. The first paragraph of clause 3.6 will be amended to 'The Supervisory Board of Danske Slagterier shall fix the objective basis for adjusting the settlement of pigs in special cases concerning quality, collecting and slaughtering. Those are for time being:' The second sentence of clause 5.2 will be amended to 'If this results in delivery taking place in the next week, payment shall be made according to the highest of the member's price on account in the week of notification or the week of delivery'. Finally clause 5.3 will be amended to 'If a delivery of pigs is advanced more than one day at the request of a slaughterhouse, the weight shall be raised with the number of grams set out by the settlement committee. Where delivery is advanced to the preceding week, payment shall be made according to the highest of the members' price on account in the week of notification or week of delivery'.

D. ESS-FOOD

(217) After the Commission's adoption of a positive decision, the parties undertake to enter into negotiation with Steff-Houlberg and TiCan with the aim of reaching an agreement on the dissolution of the joint ownership in ESS-Food. The agreement may entail sale of parts of ESS-Food to either one of the owners or to a third party on terms and conditions to be agreed on by the parties.

(218) No later than two weeks after the Commission's adoption of a positive decision, the parties will submit a list of prospective trustees, who must be investment bankers, investment banks or similar institutions ('the Trustee'), for the approval of Steff-Houlberg and TiCan. If Steff-Houlberg and TiCan have not approved of the appointment of either of the prospective Trustees proposed by the parties within eight days of the receipt of the list, Steff-Houlberg and TiCan must within eight days make a list with alternative proposals for a Trustee and submit the list to the parties for their approval within eight days of the receipt of the list.

(219) If the parties and Steff-Houlberg and TiCan can agree on the appointment of a Trustee, the parties shall announce the appointed Trustee to the Commission. The Trustee shall be deemed approved by the Commission if the Commission has not responded in writing to the parties within two weeks of the appointment has been announced by the parties to the Commission.

(220) If the parties and Steff-Houlberg and TiCan cannot agree on the appointment of a Trustee, either of those proposed by the parties or Steff-Houlberg and TiCan, the parties will submit the lists of proposals from the parties and Steff-Houlberg and TiCan to the Commission together with all relevant material including the reasons why the parties and Steff-Houlberg and TiCan have not been able to agree on the appointment of the Trustee. In this case the Commission on the basis of the material presented to it will within two weeks appoint a Trustee. The same procedure will apply *mutatis mutandis* to the contents of the mandate of the Trustee.

(221) The Trustee will act for the Commission, in accordance with his mandate approved by the Commission, and ensure that the parties use all efforts to reach an agreement with Steff-Houlberg and TiCan as set out in recital 217 and that reasonable proposals in this context from Steff-Houlberg and TiCan and the merged entity are not turned down. Further, the Trustee shall ensure that the owners of ESS-Food at all times preserve the value of ESS-Food, and maintain ESS-Food as a going concern to the extent that this is commercially viable until the final evaluation of ESS-Food has been completed, see recital 223. However, the preservation of value may entail […] (*). Moreover, the Trustee will ensure that the merged entity does not abuse its sole control to the disadvantage of the minority members. The parties will provide the Trustee with all the assistance and information necessary, including information on volumes and prices of supply from the members of ESS-Food to ESS-Food, if necessary, to allow the Trustee to fulfil his tasks. The parties or the Trustee will inform the Commission of all material developments on at least three months' intervals as regards the dissolution of the joint ownership in ESS-Food and later as regards the sale of ESS-Food.

(222) If an agreement between the owners of ESS-Food according to recital 217 has not been reached before […] (*) after the adoption of a positive decision by the Commission, according to recital 217, which period on application from the merged entity can be extended by the Commission on reasonable grounds, the parties undertake to acquire Steff-Houlberg and TiCan's (remaining) shares of ESS-Food no later than […] (*) after the expiration of the first period of […] (*) after the Commission's adoption of a positive decision.

(223) The purchase price shall be a fair and reasonable price, based on an evaluation of ESS-Food as a going concern — except for […] (*). The evaluation of ESS-Food shall be carried out by an independent expert to be agreed on by all owners of ESS-Food. The expert shall act under the supervision of the Trustee in accordance with the mandate of the Trustee. The evaluation of the parts of ESS-Food which shall be evaluated as a going concern shall be based on the price-earning principle applied according to generally accepted international evaluation practice and if this evaluation principle is impossible to apply, then the evaluation shall be based on the net book value as set out in accounts prepared at the time of transfer of ownership. The expert may be the Trustee, provided all owners can agree to this. The parties and/or Steff-Houlberg and/or TiCan will each have the right to have a second opinion on the evaluation of ESS-Food by an expert Danish chartered accountant. If the evaluation of this/these expert(s) deviates from the first evaluation by more than 10 %, the evaluation shall be settled finally and made binding by a court of arbitration consisting of one arbitrator who must be a chartered accountant independent of and unconnected to any owner of ESS-Food and member of and appointed by Foreningen af Statsautoriserede Revisorer in Denmark.

(224) For a period of […] (*) after the merged entity has acquired Steff-Houlberg's and TiCan's (remaining) shares of ESS-Food, the parties undertake to offer on a non-discriminatory basis (including pricing) and under supervision of the Trustee to carry out distribution and sale of pig meat or other existing products on markets where ESS-Food is active from Steff-Houlberg and TiCan through ESS-Food. This period can be extended by another […] by the Commission on reasonable grounds on request of Steff-Houlberg and TiCan.

E. DAT-SCHAUB

(225) The merged entity will propose and vote in favour of a resolution to amend the Articles of Association of DAT-Schaub leading to the following: the equity in DAT-Schaub less the A- and B-share capital as at 30 September 1999 shall be distributed between the A-members (currently the parties, Steff-Houlberg and TiCan) and paid into personal liable accounts to the credit of the A-members. Distribution shall take place in proportion to the A-members' supply of sets of casings during the three financial years 1996/1997, 1997/1998 and 1998/1999. All future increases or decreases of equity will thereafter in each year be distributed on personal liable accounts according to the members' supply of casings in the relevant fiscal year of which the profits have been achieved.

(226) A-members who resign from DAT-Schaub shall be entitled to claim payment of their A-share capital at par and their personal liable accounts to the extent those are intact according to the first accounts adopted at the General Meeting after the resignation. The A-share capital shall be paid as at the day of resignation. The balance on the personal liable account shall be settled in five equal yearly instalments. The resignation payment paid in five yearly instalments shall bear interest on the unpaid balance equal to 50 % of the average interest paid by DAT-Schaub on its short term loans. DAT-Schaub shall at all times, however, have the right to settle any outstanding amounts in one payment. An A-member who resigns from DAT-Schaub according to the above shall have the right to purchase all of DAT-Schaub's machinery and working tools, present and in use at this particular A-member's slaughterhouse(s) at the market price to be determined on reasonable and objective terms taking into account all relevant aspects including the value of intellectual property rights connected to this machinery and working tools. The evaluation shall be carried out by an expert who shall be an accountant member of and appointed by Foreningen af Statsautoriserede Revisorer in Denmark.

F. DAKA

(227) After the Commission's adoption of a positive decision, the parties will invite third parties to buy a sufficient share of the parties' ownership in daka. The parties will thus transfer so many shares or accept that a third party subscribes for so many new shares in daka that the parties on one side lose their sole control over daka but on the other side together with the other slaughterhouse-shareholders maintain a majority of votes at daka's general assembly. A third party shall in this context mean any party unconnected to and independent of the parties.

(228) No later than two weeks after the Commission's adoption of a positive decision, the parties will appoint an independent trustee, who must be experienced with the slaughterhouse industry (the Trustee) who will act for the Commission and ensure that the parties' ownership of daka is not used to reduce the service level or change the price-setting systems for raw materials to the disadvantage of any competitor of the parties and to ensure that the parties use all efforts to transfer a sufficient share of ownership. The Trustee shall be deemed approved by the Commission if the Commission has not responded in writing to the parties within two weeks after the appointment has been announced to the Commission.

(229) The Trustee shall have the right to exercise the voting right on the parties' votes in the Board of Directors and the General Assembly of daka to the extent that is necessary to deprive the parties their sole control over daka. The parties will provide the Trustee with all the assistance and information necessary to exercise his task. The parties or the Trustee will inform the Commission in writing of all material developments on at least a three months' interval.

(230) If transfer of a sufficient share of the parties' ownership in daka has not taken place before […] (*) after the Commission's adoption of a positive decision, the parties will give the Trustee an irrevocable power of attorney to transfer a sufficient share of ownership to one or more third parties on terms and conditions which are fair and reasonable […] (*) after the Commission's adoption of a positive decision. On application from the merged entity, this period can be extended by the Commission on reasonable grounds.

(231) If the Trustee has not transferred a sufficient share of ownership in daka before the time limit set out in recital 230, the Trustee must sell a sufficient share of the parties ownership on best obtainable terms and conditions. This transfer must be concluded before […] (*) after the expiration of the time limit set out in recital 230, and at the end of the period at no minimum price.

(232) The parties or the Trustee will inform the Commission of any plans to transfer a sufficient share of ownership in daka to any third party. The parties or the Trustee will provide the Commission with all necessary information on a proposed purchaser of shares in daka in order to allow the Commission to assess whether the proposed purchaser satisfies the criteria on independence, viability, capital, management, and experience. The Commission will, at the latest two weeks after the information has been received in writing, inform the parties or the Trustee, if the Commission finds that the proposed purchaser does not satisfy the requirements of independence of the parties, and in this case the share of ownership cannot be transferred to the proposed purchaser. If the Commission has not responded within the time limit, the parties' share of ownership can be transferred to the proposed third party. The parties or the Trustee will inform the Commission of the transfer when it has been concluded.

(233) The merged entity will refrain from regaining sole control over daka, as long as the Commission is not satisfied that the parties would not acquire a dominant market position.

X. **ASSESSMENT OF THE COMMITMENTS**

A. DANISH MARKET FOR THE PURCHASE OF LIVE PIGS FOR SLAUGHTER

(234) The commitments given by the parties are such as to prevent the creation of a dominant position on the Danish market for the purchase of live pigs for slaughter.

— The possibility for the members of the parties to supply up to 15% ([38]) of their weekly supply, subject to a six weeks' notice period, to other buyers will create more possibilities for Danish and foreign slaughterhouses to have access to a substantial number of (Danish origin) pigs,

— the setting of the notice period at 12 months will make it easier for the farmer to change slaughterhouse.

(235) Consequently, the Commission considers that the operation will not lead to a foreclosure of the Danish market for the purchase of live pigs. Furthermore, the commitments will remove the control of the parties on innovation in the Danish pig industry. In particular, it will be possible for interested parties such as supermarkets to directly approach farmers with

([38]) 15% equals 2,4 million pigs per year which again equals approximately enough raw material to supply 140% of the Danish market for sale of fresh pork to supermarkets.

proposals for different productions. In addition, the commitments will increase the farmers' choice of outlet. Finally, it would be much more difficult for the parties to squeeze the private slaughterhouses by attracting a proportion of the 4% (800 000 pigs) of Danish pig production that the private slaughterhouses currently purchase. This is because the private slaughterhouses would potentially have an additional pool of up to 2 400 000 pigs resulting from the 15% pigs free of sales restrictions. Therefore, as a result of the commitments, the operation will not lead to the creation of a dominant position on the market for the purchase of live pigs for slaughter.

B. DANISH MARKET FOR THE SALE OF FRESH PORK THROUGH SUPERMARKETS

(236) The Commission finds that the commitments offered by the parties are sufficient to remove the creation of the duopolistically dominant position on the Danish market for fresh pork sold through supermarkets. In particular the Commission has noted that:

— there will be more scope for price competition, since the abolition of the pig quotation system will give the cooperative slaughterhouses more flexibility in their pricing to the farmers. Sourcing of raw material can, therefore, in the future be a source of competition between the cooperative slaughterhouses,

— the market will become less transparent due to the abolition of the pig quotation system,

— the dissolution of co-ownership of ESS-Food and the opportunity to leave DAT-Schaub removes the structural links between the parties and Steff-Houlberg. In particular it is noted that as a result Steff-Houlberg will become less dependent on the parties. However, the Commission is aware that Steff-Houlberg will need to develop alternative sales channels after the dissolution of co-ownership of ESS-Food. In order to sustain the investments needed for the development of new sales channels, and therefore to maintain Steff-Houlberg as a viable competitor, it is important that the dissolution of co-ownership of ESS-Food is not detrimental to Steff-Houlberg. The Commission finds that the procedure set out in the commitments is sufficient to safeguard Steff-Houlberg, in particular since the Commission will have to approve the mandate of the Trustee,

— there is more scope for differences in the cost structure of Steff-Houlberg and the parties due to the increased flexibility on input prices (see above), and the fact that in the future Steff-Houlberg will not sell through the same channels as the parties,

— finally, the commitment to contract-kill and to sell slaughter capacity to a competitor will make it possible to strengthen the alternative suppliers in the market sufficiently to create an important third alternative to the parties and Steff-Houlberg. In this respect it is also noted that the loosening of the supply obligation on the upstream market for live pigs will contribute to secure the raw material supplies for such a third alternative in the market and that before this loosening takes effect, the parties will supply, if necessary, the live animals to be slaughtered.

(237) In conclusion, the Commission considers that the increased scope for price competition, the decrease in the transparency of the pricing on the market, the removal of the structural links between the parties and Steff-Houlberg, the increased scope for differences in cost structures, and the strengthening of the alternatives in the market by providing slaughter capacity in combination with a loosening of the supply obligation of farmers are sufficient to remove the creation of a duopolistically dominant position, which would otherwise have resulted from the operation in this market.

C. DANISH MARKET FOR HIGH-RISK ABATTOIR BY-PRODUCTS

(238) The commitment will mean that the parties will not acquire sole control over daka. Therefore, there will be no creation of a dominant position on this market.

XI. **CONCLUSION**

(239) For the above reasons, the Commission has come to the conclusion that the notified concentration, as modified by the commitments, will not create a dominant position in the Danish markets for the purchasing of live pigs for slaughtering, fresh pork sold through supermarkets and abattoir by-products as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. The operation is, therefore, on condition that the

commitments are adhered to, compatible with the common market and the functioning of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

Subject to full compliance with the commitments, as set out in recitals 200 to 233, the concentration notified by the parties on 5 October 1998 relating to the merger between Slagteriselskabet Danish Crown AmbA and Vestjyske Slagterier A.m.b.A. and the acquisition of control by Slagteriselskabet Danish Crown AmbA and Vestjyske Slagterier A.m.b.A. of daka a.m.b.a., Danske Andelsslagteriers Tarmsalg — Schaub & Co a.m.b.a., Slagteriernes Fællesindkøbsforening a.m.b.a. and Scan-Hide a.m.b.a. is declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

1. Slagteriselskabet Danish Crown AmbA
   Marsvey 43
   DK-8900 Randers

2. Vestjyske Slagterier A.m.b.A.
   Havnevey 8
   DK-7600 Struer

Done at Brussels, 9 March 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

Sales of fresh pork for final consumption

	Supermarkets	Butchers	Retail	Caterers	Grand total
Danish Crown	[20-25]%*	[5-10]%*	[20-25]%*	[5-10]%*	[15-20]%*
Vestjyske	[15-20]%*	[10-15]%*	[15-20]%*	[< 5]%*	[10-15]%*
DAT-Schaub	p.m.	[< 5]%*	[< 5]%*	p.m.	[< 5]%*
The parties	40%	22%	38%	11%	34%
Steff-Houlberg	< 30%	< 5%	> 25%	< 5%	< 25%
TiCan	[< 5]%*	< 5%	[< 5]%*	< 5%	< 5%
Private	< 30%	+ 50%	> 30%	+ 50%	< 40%
Mesterslagteren		< 20%	< 5%		p.m.
Imports	1%		1%	20%	< 5%
Total	76%	9%	85%	15%	111 000 t

The sales of the different slaughterhouses include direct sales and sales via wholesalers.