II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 December 2001

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

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

(notified under document number C(2001) 4524)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/259/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

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

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

After consulting the Advisory Committee on Concentrations [3],

Having regard to the final report of the Hearing Officer in this case [4],

Whereas:

(1) On 20 July 2001 Südzucker AG, Mannheim/Ochsenfurt (Südzucker), notified the Commission under Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation) of a planned transaction whereby Südzucker was to acquire sole control of the whole of Saint Louis Sucre SA, Paris (SLS).

(2) The Commission examined the notification, and found that the notified transaction fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market.

(3) After a thorough investigation of the case the Commission has now come to the conclusion that in itself the notified merger proposal is indeed likely to strengthen dominant positions as a result of which effective competition would be significantly impeded in a substantial part of the common market. But the commitments Südzucker has entered into remove the competition concerns that it raises.

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(1) OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.
(2) OJ L 180, 9.7.1997, p. 1; corrigendum OJ L 40, 13.2.1998, p. 17.
(3) OJ C 97, 24.4.2003.
(4) OJ C 97, 24.4.2003.

I. THE PARTIES

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

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

II. THE TRANSACTION

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

III. CONCENTRATION

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

IV. COMMUNITY DIMENSION

(8) The combined aggregate worldwide turnover of the companies concerned is over EUR 5 billion [5] (Südzucker EUR 4,664 billion in the financial year ending on 28 February 2001, and SLS EUR [...]* (*) billion in the financial year ending on 30 September 2000). Südzucker and SLS each have an aggregate Community-wide turnover of more than EUR 250 million (Südzucker EUR 3,711 billion in the financial year ending on 28 February 2001, and SLS EUR [...]* million in the financial year ending on 30 September 2000). Südzucker does not achieve more than two thirds of its aggregate Community-wide turnover within one and the same Member State. The notified concentration consequently has a Community dimension.

V. PROCEDURE

(9) On 23 August 2001 the Commission decided pursuant to Article 6(1)(c) of the Merger Regulation to initiate proceedings in this case.

(10) On 9 October 2001 Südzucker was sent a statement of objections, on which it commented on 24 October 2001 in a written reply [6]. At Südzucker's request, on 26 October 2001 a formal oral hearing was held in Brussels pursuant to Article 14 of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [7]; the hearing was also attended by SLS and various third parties.

(11) On 22 November 2001 Südzucker submitted undertakings to the Commission, a number of technical details of which were improved upon on 6 December 2001. On 14 December 2001 the Commission informed Südzucker in accordance with its notice on remedies [8] that the resolution of competition concerns in this case does not depend on Südzucker's commitments as to the group's future relationship with the Spanish group Ebro Puleva. Südzucker thereupon withdrew this part of its commitments. The remaining commitments are described in greater detail in recitals 151 to 152 and assessed in recitals 153 et seq.

(*) 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.

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

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

(7) OJ L 61, 2.3.1988, p. 1.

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

VI. COMPETITIVE ASSESSMENT OF THE TRANSACTION AS IT WAS NOTIFIED

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

A. *THE RELEVANT PRODUCT MARKETS*

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

1. INDUSTRIAL SUGAR

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

2. RETAIL SUGAR

(15) Retail sugar is sold in small packages of up to 5 kg under the manufacturer's brand, and is used mainly by final consumers within the home or by the catering trade. It is distributed wholesale and retail.

(16) The distinction between industrial and retail sugar is one which the Commission has repeatedly made in its decisions ([9]). The two markets have overlapping characteristics: both involve the same basic product, and the total supply of both is governed by Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector ([10]) (common organisation of the market in sugar). But throughout the Community the differences in the packaging, distribution and customer profiles for industrial and retail sugar lead to different pricing structures, and justify a division into separate product markets.

3. SUGAR FOR DISTRIBUTORS' PRIVATE LABELS

(17) There is another market that has to be distinguished from those in industrial sugar and retail sugar, namely the market in the supply of sugar for distributors' private labels. Distributors who sell retail sugar under their private labels, especially large retail chains, are supplied by the sugar manufacturers. The manufacturers package the product in packages prepared by or specially made up for the distributor and carrying only the distributor's brand name.

(18) The supply of sugar for distributors' private labels constitutes a separate product market. From the point of view of the buyer, that is to say the distributor, there are vital differences between products that are to be sold under the distributor's private label and products to be sold under the label of the sugar manufacturer ([11]).

(19) The factors that guide the distributor's choice of products carrying a manufacturer's brand are primarily those that affect the market position of the product on the downstream retail market, that is to say customer loyalty, price, and the way in which the product is promoted. When selecting products to be sold under manufacturers' brands, the distributor can realistically choose only among products whose sales are promoted in some measure by means of advertising in the area. The number of possible suppliers is therefore limited.

(20) Where the goods being supplied to a distributor are to be sold on under the distributor's private label, however, these considerations are of no importance. It is the distributor who determines the quality, the volume and the other specifications of the goods to be supplied. The manufacturer supplies the goods to order. Marketing and advertising are a matter for the distributor, who also decides such things as the presentation or packaging of the product. This makes it a great deal easier for the distributor to switch to another supplier than it is in the case of goods carrying a manufacturer's brand; the distributor chooses suppliers on the basis of the economically most advantageous offer. The order is placed on the basis of price, quality, available capacity and reliable delivery.

(21) To say that there are separate markets for the supply of products to be sold under a distributor's private label and products to be sold under the manufacturer's label is not to deny that in sales to the ultimate consumer,

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

([10]) OJ L 178, 30.6.2001, p. 1.

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

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

4. FINDINGS OF MARKET STUDY

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

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

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

— industrial sugar,

— retail sugar, and

— sugar for distributors' private labels.

B. *THE RELEVANT GEOGRAPHIC MARKETS*

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

1. INDUSTRIAL SUGAR AND RETAIL SUGAR

(25) As far as the markets in industrial sugar and retail sugar are concerned, the Commission would point out, first of all, that under the common organisation of the market in sugar a stated sugar quota is allocated to every Member State. This has a significant influence on the production and sale of sugar in the Community, and helps to consolidate a partitioning of national markets ([12]). The sales territories of the main European sugar manufacturers are consequently quite distinct, and this is reflected in the very different market shares they hold in the separate Member States (see below, Tables 2 and 3). In its most recent decisions under Articles 81 and 82 of the EC Treaty, therefore, the Commission has taken the view that the relevant geographic markets for industrial and retail sugar are at most national ([13]).

(26) As long ago as its decision in the European sugar industry case, however, the Commission took the view that southern Germany constituted a relevant geographic market smaller than a Member State ([14]). Contrary to the view taken by the parties, the Commission considers that for the assessment of this transaction too sugar markets in Germany should be divided on a regional basis. The regional markets to be distinguished here can be defined in terms of groups of German *Länder*. This approach can be regarded as providing the best approximation possible, especially from the point of view of the practicability of the examination of the proposed concentration: the investigation of the market, for example, will require a study of market shares. The division into regions is justified by the following features of the German sugar market.

(27) First, Germany differs from countries such as France, for example, in that the production plants of the three largest sugar manufacturers — Südzucker, Nordzucker and Pfeifer & Langen — are located in different regions (see map in Annex I). Südzucker's plants are mainly in

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

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

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

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

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

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

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

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

Response to Südzucker's reply

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

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

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

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

([17]) Points 64 et seq. of the reply.

(34) After considering Südzucker's submissions, the Commission stands by its definition of the geographic markets in industrial sugar and retail sugar. The fact that there are Community rules governing a particular sector does not necessarily mean that a Community-wide relevant geographic market has to be taken as a basis for the competitive assessment of a merger. Rather, the very existence of the common organisation of the market in sugar prevents, owing to the national quotas provided for thereunder, the creation of European market structures in the sugar industry ([18]).

(35) As for the areas of overlap to which Südzucker refers, the Commission does not deny that there may be some overlapping on the fringes between the sugar manufacturers' main sales territories, because customers there are just as far from the factory of one manufacturer as they are from that of another. The competitive conditions in such areas of overlap cannot, however, be extrapolated to the core areas of the respective sales territories because a sugar manufacturer is not under the same competitive pressure in its core area as it is on the fringes between its sales territory and that of another supplier; the higher transport costs involved make entry by competitors into a manufacturer's core area less attractive than entry into overlapping areas on the fringes between sales territories.

(36) A more precise definition of the relevant geographic markets with the aid of concentric circles around each production plant and supply depot would, moreover, run into practical difficulties. The concentration on the borders between the German *Länder* on which this Decision is based does, however, yield a useable approximate value. Ultimately, the competitive assessment of the proposed merger would not be much different in the event of a market definition based on concentric circles as this method would also necessarily reveal the existence of main sales territories of the various sugar manufacturers.

2. SUGAR FOR DISTRIBUTORS' PRIVATE LABELS

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

Response to Südzucker's reply

(38) Südzucker contested this geographic market definition in its reply to the Commission's statement of objections ([20]). Even if the markets in industrial sugar and retail sugar in Germany were divided on a regional basis, this could on no account apply to the supply of sugar for distributors' private labels. What was involved here was a clearly European market, a national German market being the least there could be said to be. The market structures were fundamentally different from what they were in the two product markets mentioned above; in particular, the choice of supplier was much freer, service played no part, there were only a few large retail chains acting as customers, and transactions were only ever concluded centrally — with these customers procuring their sugar through a central buyer — and, indeed, not only regionally or nationally but also internationally. [...]* was a good example of this.

(39) After a thorough examination of Südzucker's submissions, the Commission has now also come to the conclusion that the relevant geographic market for the supply of sugar for distributors' private labels cannot be limited to southern Germany. Although the findings of the market study do not point to there being any generalised central buying of sugar on the part of large retail chains, it is a fact that, compared with the markets in industrial sugar and retail sugar, this product market has essential characteristics which justify its being treated differently. In the Commission's view, the following aspects in particular should be highlighted:

(40) In contrast to retail sugar, when sugar is supplied for products that are to be sold under a distributor's private label customer brand loyalty is not a factor. And in contrast to industrial sugar, which is also supplied to smaller firms, the retail chains which buy sugar for private label products are all large customers and have correspondingly bigger market power.

(41) It is also true that, in the area of the supply of sugar for distributors' private labels, Südzucker's main sales territory has been penetrated much more by the products of German and foreign competitors than is the case with the markets in industrial and retail sugar. Accordingly, the share of a putative southern German market accounted for by imports is, at over 50 %, so high, and the market share of Südzucker, at less than 50 %, so low that a broadening of the geographic market definition is

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

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

([20]) Points 64 et seq. of the reply.

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

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

(a) ***Industrial sugar and retail sugar***

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

(b) ***Sugar for distributors' private labels***

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

C. *A SUBSTANTIAL PART OF THE COMMON MARKET*

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

D. *LEGAL CONTEXT*

1. THE COMMON ORGANISATION OF THE MARKET IN SUGAR

(45) The sugar market organisation under the Common Agricultural Policy is designed to support and protect the production of sugar within the Community. There are basically three mechanisms in place for achieving this goal ([24]):

— the production of sugar destined for the Community market from beet and cane harvested in the Community is restricted by means of national quotas ('A' and 'B' quotas), which are decided by the Council. The quota allocated to each country is then divided amongst the national sugar manufacturers and their production plants by the government in question,

— a system of price support exists whereby an intervention price is set for A/B quota sugar, guaranteeing a minimum sales price,

— a guaranteed minimum price is also set for sugar beet required to produce A/B quota sugar.

(46) The sugar quotas apply to production during 'marketing years', which last from October to September of the following year.

(47) In addition to the scheme for A/B quota sugar, a number of agreements exist between the Community and non-Community countries, such as India and the ACP States ([25]), whereby the non-Community countries benefit from preferential export arrangements for sugar. The prices involved are comparable to the prices of quota sugar. In the context of the common organisation of the sugar market, these imports can be considered to be 'quota-equivalent imports'.

(48) Any sugar produced by Community undertakings in addition to their A/B quota and quota-equivalent imports is referred to as 'C' sugar, and must be either sold on the world market, that is, to non-Community countries, without support, or stored for at least 12 months and used as part of the following years' A/B sugar.

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

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

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

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

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

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

Table 1

Market statistics for 1999/2000

EU sugar balance for 1999/2000 marketing year

(in thousand tonnes)

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

Source: European Commission sugar balance.

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

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

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

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

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

(52) As mentioned above (recital 29), numerous customers of the sugar industry taking part in the market study confirmed that the markets, especially within Germany, were strictly divided between the individual sugar manufacturers into regional spheres of influence and that competition was therefore practically non-existent within a Member State. They also stated that competition essentially came into play only as a result of exports by foreign sugar manufacturers with production plants located near the border.

(53) The prevailing price level on the European sugar markets can be taken as a clear indication that competition is very restricted. Despite considerable overcapacity in Europe's sugar industry, European sugar manufacturers are able to obtain a price for the sale of their sugar that is not only more than double the price on the world market but is also 10 % to 20 % above the EU intervention price.

Response to Südzucker's reply

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

([26]) OJ 30, 20.4.1962, p. 993/62.
([27]) OJ 53, 1.7.1962, p. 1571/62.
([28]) Südzucker expressly agrees with this in point 6 of its reply to the statement of objections.
([29]) Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 [1975] ECR 1663, paragraph 24.
([30]) Point 93 of the reply.

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

E. *COMPATIBILITY OF THE MERGER WITH THE COMMON MARKET*

1. INTRODUCTION

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

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

Table 2

Shares of quota for 1999/2000

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

Source: parties and competitors.

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

(b) ***Affected markets***

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

Table 3

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

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

Source: notifying parties, competitors and customers.

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

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

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

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

2. SÜDZUCKER'S DOMINANT POSITION

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

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

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

(62) The Court of Justice has defined a dominant position as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

(63) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among these factors a highly important one is the existence of very large market shares. The relationship between the market shares of the parties and their competitors, especially those of their nearest competitor, is relevant evidence of the existence of a dominant position ([34]).

(64) Südzucker currently has an approximately [75-85]* % share of the industrial sugar market in southern Germany, while the market shares of other sugar manufacturers on this geographical market are comparatively low (see Table 3). As far as the Commission knows, there has been little change in this distribution pattern in the last five years, a point which the parties did not challenge either in their reply to the Commission's statement of objections or at the hearing.

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

(65) However, Südzucker's strong position in southern Germany is evident not only from the marked disparity between its market shares and those of the other sugar manufacturers. Rather, it is also linked to the concentration of Südzucker production and distribution plants there; Nordzucker and Pfeifer & Langen, as explained above, have similar concentrations in other parts of Germany (recital 27).

(66) The market study also confirmed that the sugar markets within Germany were divided between the individual sugar manufacturers into regional spheres of influence. Many customers of the sugar industry indicated that competition in Germany was already severely restricted for this reason. The restriction of competition is also reflected in the fact that the sugar price is not only more than double the world market price, but also 10 % to 20 % higher than the Community intervention price, despite overproduction and marked overcapacity in the European industry, especially in Germany.

(67) Faced with this de facto division of the German sugar market into regional spheres of influence belonging to the respective local sugar manufacturers, the manufacturers have little incentive to penetrate each other's main markets. Given the additional transport costs and the customer relations built up over the medium to long term that were mentioned in numerous replies to the Commission's market study, it would seem more worthwhile for manufacturers to consolidate their position in their own main market and to use their production quota primarily to satisfy the needs of their own customers. This is all the more true if a sugar manufacturer saw an immediate danger of reprisals were it to penetrate the main market of a competitor. Such reprisals are particularly easy in the sugar industry, since sugar is a homogenous bulk product and production quotas and intervention prices make the markets transparent.

(68) Customers of the sugar industry questioned by the Commission as part of its market study confirmed that competition in Germany essentially came only from exports by foreign sugar manufacturers with production plants near to the border.

(69) For the above reasons, the Commission has reached the conclusion that the Südzucker group already enjoys a position of economic strength in southern Germany that allows it to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. Even without the merger, Südzucker already enjoys a dominant position on the southern German market, which is a substantial part of the common market.

(70) The above comments can also essentially be applied to the market for retail sugar in southern Germany. There too, the Südzucker group's market share of [80 to 90]* % displays a marked disparity in relation to those of its main competitors. Recitals 65 to 69 apply *mutatis mutandis*.

(71) It is also in a dominant position on the markets for industrial and retail sugar in Belgium, with market shares of [60 to 70]* % and [85 to 95]* % respectively. The above comments also apply *mutatis mutandis*.

Response to Südzucker's reply

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

([35]) Points 90 to 94 of the reply.

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

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

(aa) **Southern Germany**

(74) In its statement of objections the Commission assumed with regard to the supply of sugar for distributors' private labels that, with a market share of [40 to 50]* %, Südzucker is on the threshold of dominance in southern Germany and that following a merger with SLS this position might increase by a further [20 to 30]* percentage points to a total of [60 to 80]* %. The Commission concluded from this in its statement of objections that the proposed merger would lead either to the creation or to a strengthening of a dominant position for Südzucker in southern Germany ([36]).

(75) The above estimate can no longer be upheld in view of the different conclusions that are now drawn regarding the geographic scope of this market (see recitals 37 et seq. above). Thus, taking as a basis, say, the whole of Germany the market shares of Südzucker and SLS come to only [15 to 25]* % and [5 to 15]* % (giving a total of [20 to 40]* %), whereas Nordzucker alone already has a [40 to 50]* % share of the German market. Consequently, the view cannot be taken that the merger would give rise to the creation or strengthening of a dominant position in the supply of sugar for distributors' private labels in Germany.

(76) This does not, however, change the overall assessment of the notified transaction. In terms of its extent and importance, the supply of sugar for distributors' private labels lags far behind industrial sugar, which played the decisive role from the outset when it came to the competitive assessment of the proposed merger by the Commission (see recital 61 above) ([37]).

(bb) **Belgium**

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

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

(78) There is a danger that the proposed merger would strengthen dominant positions held by Südzucker on the markets in industrial sugar and retail sugar in southern Germany and Belgium and consolidate prices at a level that is appreciably higher than the intervention price.

(79) In the Commission's view, the following three factors would result in a strengthening of Südzucker's dominant position:

— firstly, the merger would critically reduce potential competition on the southern German and Belgian markets,

([36]) See, in particular, points 54 and 57 of the statement of objections.
([37]) See also point 45 of the statement of objections.
([38]) See also point 55 of the statement of objections.

— secondly, the acquisition of the second-largest French sugar manufacturer would give Südzucker a potential for retaliation which it hardly enjoyed before, affording it greater protection against foreign competition in its main sales territory of southern Germany and in Belgium. The group would then be in a position to take effective retaliatory action on the French sugar market, thereby deterring any French competitors from entering the southern German and Belgian markets,

— thirdly, the merger would put Südzucker in the unique position — compared with its rivals — of being able to supply sugar to large industrial customers across national borders through 'pan-European deals'.

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

(80) By eliminating SLS as a potential competitor, the proposed merger would strengthen Südzucker's dominant position on the sugar markets in southern Germany and Belgium.

(81) From the point of view of competition law, the existence of potential competition generally plays a crucial role in the regulation of markets that are exposed to very little competition. Such potential competition helps protect customers from a situation where the marginal degree of competition results in prices that would otherwise arise only in a monopoly. This requires the presence of as many potential competitors as possible who — by dint of their stature and financial standing — are well placed to enter neighbouring markets where certain market players enjoy a dominant position.

(82) It can be assumed here that the importance of potential competition is all the greater,

— the less competition there is on the market,

— the higher the degree of market regulation,

— the greater the dependency of customers, i.e. the more difficult it is to replace upstream products or services that are absolutely vital with other products or services, and

— the greater the market strength of the market player whom companies from neighbouring markets will have to face as potential competitors.

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

(83) The description given above clearly shows that these factors play a very strong role in the sugar markets in southern Germany and Belgium, so that potential competition from neighbouring markets is of crucial importance.

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

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

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

(86) In practical terms, the main reasons why French sugar manufacturers may have an incentive to operate on the southern German and Belgian markets are: the high productivity of French sugar manufacturers, the location of French production plants, France's high sugar production surplus, dwindling export opportunities to non-Community countries, and higher profit margins for sugar sales within the Community compared with exports to non-Community countries.

(87) French sugar manufacturers have the most efficient sugar-growing area in Europe (highest percentage of beet per hectare, high sugar content of beet) and therefore enjoy crucial competitive advantages over all foreign competitors because of much lower costs for transporting beet to production plants. This leads to higher productivity and hence to obvious cost advantages.

(88) French sugar production plants are concentrated in the north and north-east of the country, i.e. closer to Südzucker's main sales territory in southern Germany and Belgium than those of any other foreign competitors.

(89) France has by far the biggest production surplus of A/B quota sugar of all Member States. In the 1999/2000 marketing year the surplus was 1,5 million tonnes — nearly twice as high as that in Germany (and over five times higher than Belgium's surplus). France's production surplus was equivalent to 56 % of total German sugar consumption (and nearly 300 % of total Belgian sugar consumption).

(90) Under the common organisation of the market in sugar, part of the surplus sugar produced by Member States who are net exporters should cover the needs of Member States whose own production is insufficient to meet their requirements. Spain is the only Member State where there is any notable shortfall in the production of quota sugar or in quota-equivalent sugar imported into the Community (197 000 tonnes in the 1999/2000 marketing year). But, as we have seen, this net shortfall in Spain falls well below the surplus produced each year in France alone.

(91) Member States have in principle two options for disposing of the remainder of their surplus quota sugar:

— subsidised exports to non-Community countries under the common organisation of the market in sugar, or

— exports to other Member States.

(92) For a Community sugar manufacturer, exporting A/B quota sugar to non-Community countries is far less profitable than exporting it within the Community. On exports to non-Community countries the common organisation of the market merely provides for compensation for the difference between the sales price (world market price) and the intervention price. By contrast, the price level within the Community is 10 % to 20 % higher than the intervention price. Transport costs are also much higher for exports to non-Community countries.

(93) Another major difficulty in exporting quota sugar to non-Community countries is the restriction on subsidised exports under the GATT. In the last GATT trade round, the Community committed itself to reducing the amount of subsidised sugar exports and in the amount of subsidies in absolute terms ([39]). In accordance with the GATT, the permitted volume of subsidised Community exports was reduced by around 14,5 % to 1329900 tonnes between 1995 and 2000. Over the same period the total subsidies allowed were cut by 25,5 % to EUR 545,9 million. Meanwhile annual imports of quota-equivalent sugar are rising steadily.

(94) By contrast, the only notable barrier to market entry for sugar supplies between Member States is the high cost of transport. Yet transport costs are less significant for French suppliers than for their German counterparts, as distances in France are longer anyway. As mentioned above (see recitals 27 and 88), French production plants are located predominantly in the north and north-east of the country. There is virtually no sugar production in south-western France. As a result, distances to southern Germany and Belgium are often shorter than those to certain destinations within France itself.

(95) The incentive for French sugar manufacturers to step up their activities on the German market is also borne out by recent trends in German sugar imports. Between the 1996/1997 and 1999/2000 marketing years, total German sugar imports rose by 46 % to 267 000 tonnes, equivalent to around 10 % of total German sugar consumption. The lion's share of this increase can be put down to the growth of sugar exports from France to Germany, which rose from around 140 000 tonnes in 1997 to around 187 000 tonnes in 2000. As a result of this disproportionate increase, the share of imports from France in Germany's total sugar imports rose to 70 % ([40]). The Commission has no reliable statistics for the situation in Belgium, but the market study pointed to a similar trend of increasing imports from France to Belgium.

(96) There are somewhat higher barriers to entry to the southern German and Belgian markets in retail sugar; the marketing costs for penetration of a new geographical market are higher, for example; and so the factors mentioned above apply slightly less strongly. In practical terms this means that the negative effect on prices caused by a dominant market position must be correspondingly higher. Subject to this qualification, however, there is also an incentive for potential competitors to enter the market in retail sugar.

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

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

Response to the parties' reply

(97) In its reply to the statement of objections ([41]), Südzucker said it doubted whether the increase in sugar exports from France to Germany to which the Commission referred had actually taken place. In the 2000/2001 marketing year a slight decrease had even been recorded. There could be no justification for taking an isolated increase over a relatively short space of time and turning it into a general trend. Looked at in a European context, that increase was comparatively small. What is more, the figures the Commission used did not distinguish between industrial sugar, retail sugar and sugar for distributors' private labels.

(98) The parties likewise called into question the attractiveness of increased exports from France to Germany compared with exports to non-Community countries ([42]). They contended that a 'switching' by French sugar manufacturers from non-Community exports to exports to other Member States, in particular Germany and Belgium, was 'entirely unrealistic' and would call for a huge marketing effort and lead to a drastic drop in prices there.

(99) After examining the parties' submissions the Commission stands by its assessment. With regard to the quality of the statistical evidence, it should be pointed out that the export data on which the Commission relied in its statement of objections were obtained from the German Federal Statistical Office. Although the data are not broken down by individual sugar market, the market study findings suggest that, quantitatively, the bulk of the export growth took place in the industrial sugar sector. In the Commission's view, a four-year observation period is a sufficient basis on which to detect a trend, at least in the medium term.

(100) The marketing effort required to switch from non-Community exports to exports to southern Germany and Belgium could be made by sugar wholesalers. This is already the channel chosen by French sugar manufacturers for their exports to German markets. Such a switch could therefore be made quickly and would not give rise initially to the need for any investment in a separate local distribution network. Nor, in the Commission's view, is a drastic drop in prices in southern Germany to be expected as the large-scale export of bigger quantities is likely to take place only if Südzucker uses its dominant position in order to raise prices significantly. For that eventuality, the potential competition constitutes a key corrective factor for southern Germany and Belgium.

(101) As indicated in recital 82, this corrective factor is all the more important as

— there is only very limited competition on the European sugar markets,

— the sugar markets are highly regulated,

— the raw material sugar is substitutable to only a very small extent as far as customers of the sugar industry are concerned, and

— a large number of companies have dominant positions on the various European sugar markets.

([41]) Points 105 et seq. of the reply.

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

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

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

(bb) **SLS's potential to compete**

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

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

— [...]* tonnes A/B quota sugar,

— [...]* tonnes A/B quota sugar grown outside Europe and quota-equivalent imported sugar,

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

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

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

(107) SLS has drawn the Commission's attention to what it describes as heavy investment in infrastructure for sugar exports to non-Community countries. In particular, it has contributed to the cost of investing in sugar transport vessels and port installations. In return for these contributions, the other partner involved in funding the infrastructure investment, sugar wholesaler [...]*, is required to buy from SLS [...]* tonnes per year, which are earmarked for export to non-Community countries using the infrastructure. However, SLS does not have to expend any quota sugar in order to make full use of [...]*'s purchase obligation, as it produces — or buys — enough C sugar each year (e.g. [...]* tonnes in the 2000/2001 marketing year plus [...]* tonnes of bought C sugar).

(108) Moreover, the cost of writing off these investments is marginal compared with the potential extra earnings mentioned above, which could be achieved by shifting the focus of its quota sugar operations more to the Community.

(109) SLS has also drawn the Commission's attention to the current limitations of its distribution mechanisms for the export of sugar to Germany. In the Commission's view, however, this problem could be circumvented in the short term by using wholesalers. In the medium term the cost of strategically retargeting its distribution mechanisms could be regarded as marginal compared with the extra earning opportunities mentioned above.

(110) Finally, SLS has pointed out to the Commission that a switch from exports to non-Community countries to exports to Member States would entail additional storage costs. The Commission is unconvinced by the arguments put forward here. In any case, the supposed additional storage costs would represent a mere fraction of the additional earning potential opened up by a refocusing of its business activities.

Response to the parties' reply

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

(112) The Commission thoroughly examined these submissions by the parties. Given the fact that, on sugar markets, the issues of potential competition and retaliation overlap, they will be treated together in recitals 130 and following.

Response to SLS's reply

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

([43]) Points 120 et seq. of the reply.
([44]) Confirmed in writing on 5, 9 and 23 November 2001.
([45]) Confirmed in writing on 5, 9 and 23 November 2001.

Table 4

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

(in EUR per 1 000 tonnes)

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

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

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

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

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

Table 5

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

(in EUR per 1 000 tonnes)

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

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

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

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

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

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

Conclusion regarding SLS's competitive potential

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

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

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

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

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

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

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

(124) This reduction in potential competition is all the more crucial if one considers the present territorial compartmentalisation of the German market between German sugar manufacturers (see recital 29 above), as confirmed by most customers of the German sugar industry in the market study. Many customers pointed to the fact that cross-border trade can be regarded as the only existing form of competition on the sugar market at present. These customers also fear that a merger of this size would considerably reduce scope for such competition.

(125) The removal of SLS's potential to compete would also significantly strengthen Südzucker's dominant market position on the Belgian sugar markets because of the proximity of its production plants to those markets.

(b) ***Giving Südzucker a potential for retaliation***

(126) Besides eliminating SLS as a potential competitor, the proposed transaction would give Südzucker a potential for retaliation which it hardly had before, in that the group would now have made a major inroad into the home market of its other potential French competitors, and would occupy a significant position there in future.

(127) As already indicated (see recital 5 above), SLS is currently the second-largest French sugar producer. As a result of the merger the Südzucker group would gain in France a share of [20 to 30]* % of the retail sugar market and [10 to 20]* % of the industrial sugar market (see Table 3 above). The corresponding figures for the market leader, Béghin-Say, are [20 to 30]* % (retail sugar) and [20 to 30]* % (industrial sugar), while the next largest competitors' shares come to [5 to 15]* % (Union SDA for retail sugar) and [10 to 20]* % (Sucre Union for industrial sugar). On the French market in retail sugar the Südzucker group would accordingly be just behind the market leader and on the market in industrial sugar it would be more or less on a par with the third largest producer.

(128) Compared with now, the acquisition of this significant position on the French market would represent a substantial improvement in Südzucker's competitive position, not only on the French market, but also and not least on its home market of southern Germany and in Belgium. As explained above (see recitals 67 and 84 et seq.), as far as southern Germany and Belgium are concerned it is precisely from France that potential competition is mainly to be expected. The Südzucker group's future presence in France would, however, enable it effectively to stop any advance by other French producers into southern Germany and Belgium by taking retaliatory measures on their own home markets in France, which it could do by reducing the prices of its future subsidiary SLS. Such retaliatory measures would, moreover, be that much easier to take in that, firstly, the price level in France is and has been for some time well above the intervention price and, secondly, at approximately [...]* ([50]), SLS's profit margins allow clear scope for price cuts.

Response to the parties' reply

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

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

([51]) Points 128 et seq of the reply.

(130) Having examined Südzucker's arguments, the Commission stands by its assessment. First, it would in any event not expect those concerned to become involved in a general price war harmful to all sides. Second, a general reduction in price levels in France as a result of any retaliatory measures is also not to be expected given that such measures, by their nature, are only ever practised selectively in respect of individual, strategic customers of targeted competitors. Since sugar manufacturers, to the extent that they are not in a dominant position, are in no way required to offer their customers the same terms for equivalent services, targeted price cuts aimed at individual, strategic customers of competitors are quite possible and even common in the sector.

(131) In view of the fact that, on sugar markets, the issues of potential competition and retaliation overlap, they will be treated together in what follows.

(132) As already mentioned in recitals 29 and 124 above, numerous customers of the German sugar manufacturers are of the opinion that sugar markets in Germany are geographically compartmentalised between individual sugar producers. This geographical compartmentalisation can be explained in particular by the potential for retaliation that German sugar manufacturers possess vis-à-vis each of their German competitors (see recital 67 above). For this reason, German sugar manufacturers barely rank as potential competitors for Südzucker. At the same time, the sugar surpluses on the Scandinavian, UK and Italian markets are too small to constitute significant competitive potential (see Table 1).

(133) This means that on the southern German sugar markets, French sugar manufacturers represent the only serious potential competition. At 1,54 million tonnes, their sugar surpluses are by far the biggest, while the German sugar manufacturers produce a surplus only half as large at 736 000 tonnes (see Table 1). At the same time, transport distances are less important for French manufacturers than for German, since the distances covered in France are already regularly greater than those covered in Germany, and the distances to certain destinations in southern Germany and Belgium are less for French manufacturers than to certain destinations within France (see recital 94 above).

(134) In Belgium, only French and Dutch sugar manufacturers can be considered potential competitors of any significance. However, even the opportunities of Dutch manufacturers in this respect are severely limited by the much smaller size of the sugar surpluses (only 285 000 tonnes).

(135) Furthermore, the merger will, for the first time, give Südzucker the opportunity to take targeted retaliatory action in several Member States. Especially in France, this new, previously non-existent potential for retaliation will prevent other potential competitors in France from penetrating Südzucker's main sales territories. On the basis of its dominant market position or market power, Südzucker can take targeted and selective retaliatory action on numerous sugar markets against competitors that intend to penetrate its main sales territories. Such action would be short-term and selective and would serve in the medium-term to safeguard or even to consolidate Südzucker's dominant market positions.

Conclusion as regards giving Südzucker a potential for retaliation

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

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

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

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

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

Unique implantation of the Südzucker group in continental Europe

(139) Against this background, the future implantation of the Südzucker group in Europe is of decisive importance when it comes to assessing the notified merger under the competition rules. Südzucker already occupies a dominant position in southern Germany, Austria and Belgium. As a result of the acquisition of SLS, the group would also become the second-largest sugar supplier in France (see recital 5 and Table 3 above). Competitors have drawn the Commission's attention, moreover, to the close financial and commercial ties between SLS and the leading Spanish sugar producer, Ebro Puleva.

(140) Ebro Puleva itself denies ([53]) that SLS has a decisive influence on the Spanish company. In the Commission's opinion it cannot in fact be proved that Ebro Puleva is under the decisive influence of SLS or even that it is controlled in a legal sense by the latter; there is therefore insufficient evidence to suggest that Ebro Puleva might in future be tied by the Südzucker group into the cross-border supply of large industrial customers.

Decisive competitive advantage held by the Südzucker group

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

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

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

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

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

(143) In view of the Südzucker group's existing string of dominant positions on the southern German, Austrian and Belgian markets and its future position as the second largest supplier in France, the main sugar-producing Member State, the merger can be expected to help consolidate the group's leading position in Belgium and southern Germany.

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

Response to Südzucker's reply

(145) In its reply to the Commission's statement of objections [54], Südzucker argued that, while the merger would at most increase the group's chances of gaining new customers in France, this would not be the case in Germany, Belgium and Austria. It also argued that the capacity to supply large customers across borders is thus of no relevance as regards a potentially stronger position in southern Germany and Belgium.

(146) Having examined Südzucker's arguments, the Commission stands by its assessment. In the Commission's view, it is decisive that the merger will allow Südzucker to supply large industrial customers with sugar in several Member States at once. To the extent at least that some of the production plants of such large customers are located in southern Germany and Belgium — the market study showed this to be the case for many of them — Südzucker will be able to tie these customers, even in its previous main sales territories, even more closely to itself than before.

Conclusion on the cross-border supply of large customers

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

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[54] Points 134 et seq. of the reply.

4. TO SUM UP

(148) Following a merger with SLS, the second largest French sugar producer, Südzucker would be able appreciably to reduce potential competition on the southern German and Belgian sugar markets. The merger would also give Südzucker a potential for retaliation in France. Lastly, it would put the Südzucker group in the unique position of being able, unlike its main rivals, to supply sugar to large industrial customers across borders.

(149) For the above reasons, the proposed transaction is likely to strengthen dominant positions of Südzucker's on the markets in industrial sugar and retail sugar in southern Germany and Belgium, these markets each constituting substantial parts of the common market.

VII. **COMMITMENTS OFFERED BY SÜDZUCKER**

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

A. *COMMITMENTS RELATING TO BELGIUM*

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

B. *COMMITMENTS RELATING TO SOUTHERN GERMANY*

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

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

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

([55]) For details, see Section A of Annex II.
([56]) For details, see Section B of Annex II.

A. *ASSESSMENT OF THE COMMITMENTS RELATING TO BELGIUM*

(154) At present, Südzucker has access to close on 68 % of the Belgian A and B sugar quotas through its subsidiary Raffinerie Tirlemontoise SA and also controls the Veurne plant, with a further quota entitlement of 7,4 %. In contrast, the two independent Belgian competitors, Sucrerie de Fontenoy (6,6 %) and Groupe Sucrier SA (18,3 %) have much smaller production quotas allocated to them.

(155) Südzucker's commitment to sell its majority interest in the Veurne plant will give competitors the opportunity to consolidate their position on the Belgian market or to establish themselves on that market for the first time. The Südzucker group's current allocation of the A and B quotas in Belgium will be 7,4 percentage points lower after the sale of its majority interest in the Veurne plant and that of the purchaser correspondingly higher. The corresponding sugar volumes account for some 10 % of the volume of the Belgian market as a whole and more than 10 % of the volume of the Belgian market in industrial sugar (see details on volumes for Belgium in Table 3).

(156) Performance by Südzucker of its commitment will strengthen competition in the Belgian sugar industry and sufficiently offset the disappearance of SLS.

B. *ASSESSMENT OF THE COMMITMENTS RELATING TO SOUTHERN GERMANY*

(157) As far as the southern German market is concerned, in contrast to Belgium, Südzucker has not undertaken to sell a plant, but has only committed itself to a given volume of sugar per year ('virtual sugar plant').

(158) The Commission's established practice is, in principle, to give priority to the divestiture of a viable business to a suitable purchaser over the mere sale of the goods produced there. Divestiture is considered the most effective way to restore effective competition where the creation or strengthening of a dominant position would seriously impede it ([57]).

(159) In this particular case, however, the sale of a sugar plant, combined with the transfer of the corresponding sugar quotas to the purchaser, would, in southern Germany — in contrast to Belgium — have had little prospect of success (see point 1 below).

(160) Südzucker's alternative commitment, on the other hand, to make available up to 90 000 tonnes of quota sugar a year to a distributor is sufficient in the Commission's view, given the particular circumstances of this case, to offset the strengthening of the group's dominant position in southern Germany (see point 2 below).

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

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

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

(a) ***Legal framework***

(162) Article 12, in conjunction with Annex IV, of the common organisation of the market in sugar lays down detailed rules on the re-allocation of sugar production quotas in the event of the sale of a sugar factory. The authority responsible for the quota transfer is the relevant Member State; in Germany, it is the Federal Minister for consumer protection, food and agriculture ([58]).

(163) The common organisation of the market in sugar contains the principle that, in such cases, the corresponding production quota be transferred to the purchaser of the factory ([59]). However, the two restrictions on this principle described below have the effect of giving the Member State concerned a certain amount of discretion as regards the transfer of quotas — in the context of its duty of loyalty to the Community under Article 10 of the EC Treaty:

— firstly, the interests of each of the parties concerned, particularly sugar beet and cane producers, must be taken into consideration in the adjustment of sugar production quotas ([60]),

— secondly, a transfer of quotas is acceptable only if the Member State concerned considers that it is likely to improve the structure of the beet, cane and sugar-manufacturing sectors ([61]).

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

(164) As regards taking into consideration the interests of each of the parties, and in particular of sugar beet producers, it is of relevance to this case that Südzucker, unlike most other European sugar manufacturers, has a corporate structure. Most of its shares are held by farmers, whose interests are looked after by the South German Sugar Beet Use Cooperative ('SZVG'). Südzucker's supply of sugar beet from the farmers is indirectly linked to their capacity as shareholders. In practice, the farmers that supply Südzucker with sugar beet are also shareholders in the company. The concept even exists of the 'suppliers' rights' that the farmers have 'bought' through their shareholding in Südzucker AG. Südzucker also ties these farmers to itself by [...]*.

(165) If one of Südzucker's southern German plants were sold off, this close link between the supply relationship and the farmers' shareholding interests in the company would be broken. This would have a particular effect on the interests of the farmers concerned.

(166) In this connection, the Federal Ministry for consumer protection, food and agriculture has informed the Commission that its established administrative practice would be never to exercise its powers in redistributing sugar production quotas on the basis of the common organisation of the market in sugar in opposition to the anticipated resistance from the farmers concerned.

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

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

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

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

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

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

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

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

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

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

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

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

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

(173) It is decisive in this connection that the price to be paid to Südzucker by the distributor on the basis of the intervention price and Südzucker's costs related to any additional services is significantly less than the comparable market price. This gives the distributor considerable room to undercut the current market price in southern Germany.

(174) According to Südzucker's commitment, the distributor will also have the right to choose to obtain sugar of varying qualities, and not only the standard quality on which the intervention price is based. He will therefore be able to meet the quality requirements of any customers.

(175) Since Südzucker is also offering to supply the distributor from his choice of any of the group's southern German plants, the distributor will not be put by distance at a competitive disadvantage vis-à-vis Südzucker as regards the supply of customers in southern Germany. The distributor will even have a competitive advantage in terms of supply distance over suppliers not based in southern Germany.

(176) Overall, the Commission considers that the commitment offered by Südzucker, under the specific competitive conditions of the common organisation of the market in sugar, will have an effect essentially equivalent to that of a commitment to divest. In particular, the purchaser of a sugar factory offered for sale would, on the basis of the existing quota rules governing sugar production, be subject to a capacity restriction that would place him in a comparable situation to a distributor with access to a given volume of sugar per year. The reference to the Community intervention price also ensures calculation and planning certainty for the distributor.

3. CONCLUSION REGARDING THE COMMITMENTS RELATING TO SOUTHERN GERMANY

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

C. *OVERALL CONCLUSION REGARDING THE COMMITMENTS OFFERED*

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

IX. **CONDITIONS AND OBLIGATIONS**

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

(180) Measures that give rise to a structural change of the market must be made subject to conditions, while the implementing steps which are necessary to achieve this result constitute obligations on the parties. Where a condition is not fulfilled, the Commission decision declaring the merger to be compatible with the common market is void. Where the parties commit a breach of an obligation, the Commission may revoke the clearance Decision in accordance with Article 8(5)(b) of the Merger Regulation; the parties may also be subject to fines and periodic penalty payments under Articles 14(2)(a) and 15(2)(a) of the Merger Regulation ([62]).

(181) In accordance with the basic distinction described above, the Commission makes its decision subject to the condition of Südzucker's fully complying with its commitments regarding the divestiture of shares and the provision of a given volume of sugar in southern Germany ([63]). These commitments serve to offset the strengthening of Südzucker's dominant market position in southern Germany and Belgium and thus to maintain competition on these markets. All remaining parts of the statement of commitments, especially the commitment to temporarily maintain and administer separately the business that is to be sold, and the details relating to the trustees to be nominated by Südzucker, shall constitute obligations, since they serve merely to support the implementation of the above conditions.

X. **CONCLUSION**

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

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

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

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

Article 4

This Decision is addressed to:

Südzucker Aktiengesellschaft
Maximilianstr. 10
D-68165 Mannheim.

Done at Brussels, 20 December 2001.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

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

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

ANNEX II

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

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