

Nederlandse Mededingingsautoriteit

DECISION

Decision of the Board of Directors of the Netherlands Competition Authority, as referred to in section 41 of the Competition Act.

No. 5703/ 304

Case: 5703/ Cosun - CSM

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I. PROCEDURE

1. On 28 August 2006, the Board of Directors of the Netherlands Competition Authority (hereinafter "the Board") received a notification, in which it was announced that Koninklijke Coöperatie Cosun U.A. (hereinafter "Cosun") intends to acquire the exclusive control of CSM Suiker B.V. (hereinafter "CSM"). Notice was given of this notification in the *Netherlands Government Gazette (Staatscourant)* No. 169 of 31 August 2006. On 25 September 2006, the Board of Directors of the Netherlands Competition Authority (hereinafter "NMa") decided¹ that a licence was required for this merger (hereinafter "the first-phase decision"). Notice was given of this decision in the *Netherlands Government Gazette* No. 191 of 2 October 2006.

2. On 29 September 2006, the application for a licence was received from Cosun and CSM (hereinafter jointly "the parties"). Notice of the application was given in the *Netherlands Government Gazette* No. 194 of 5 October 2006. Following the notice in the *Netherlands Government Gazette*, an opinion was received from a third party (see point 11 *et seq.*). The NMa's investigation in the licensing phase focused mainly on whether and to what extent the (recent) reforms to the European sugar market have resulted, or will result within the foreseeable future, in increasing competitive pressure from foreign sugar producers on the parties. The question focused strongly on the plausibility of the future expectations with regard to a market in which the competitive relationships have changed considerably due to new regulations (see point 52 *et seq.*). In its investigation, the NMa took into consideration, for instance, import and export figures, the development in the price of sugar, transport costs and purchasing patterns. To obtain this information, information (both in writing and verbally) was requested from (foreign) competitors, buyers and other relevant market parties and, in so far as this was available, use was made of empirical material.²

3. On 10 October 2006, the Board requested the parties to provide additional information with regard to the application for a licence. After this, the Board requested additional information on various occasions in relation to the application for a licence. On 5 February 2007, a statement of objections was issued (see point 4). The deadline of 13 weeks, referred to in section 44(1) of the Competition Act was extended by a total of 113 days in accordance with section 4:15 of the General Administrative Law Act [*Algemene wet bestuursrecht*].

4. On 5 February 2007, the statement of objections was sent to the parties. This statement of objections contains the preliminary findings of the Merger Control Department of the NMa. These preliminary findings were based on the outcomes of research carried out up until that moment. In the statement of objections, the Merger Control Department gave consideration to

¹ Decision of 25 September 2006 in Case 5703/ *Cosun – CSM*.

² Due to the situation which arose recently, only a limited amount of empirical material was available.

the fact that there were as yet insufficient arguments for defining the market in a way that was broader than a national market. The results of the NMa's research amongst competitors and buyers also provided insufficient evidence at that moment of a market which was broader than a national market. The Merger Control Department therefore adopted the position in the statement of objectives that the geographical markets for industrial sugar and sugar for consumption respectively are limited to the Netherlands.

5. The parties were then given the opportunity to present their opinions in relation to the statement of objections, as well as in relation to the facts and interests which concerned the parties and were provided by third parties on which the statement of objections was based. The parties presented their opinions both verbally and in writing. The parties presented four reports by independent experts³ with their opinions. In their opinions, the parties provided a further substantiation of, for instance, data which supposedly shows that the trade flows of sugar have increased. The parties have also provided various new arguments. On the basis of this, the NMa extended and deepened its investigation. The NMa obtained further information from buyers and competitors (both written and verbal). The NMa also discussed the matter with the European Commission (hereinafter "the Commission"). The results of the NMa's investigation have resulted in this decision.

II. PARTIES

6. Cosun is a Co-operative with Limited Liability in accordance with the law of the Netherlands. Cosun is a cooperative of sugar beet growers and a holding company of undertakings active in the area of the production and sale of ingredients for the food and beverages industry.

7. CSM is a limited liability company in accordance with the law of the Netherlands. CSM is a subsidiary of CSM N.V. CSM is active in the area of the production and sale of granulated sugar, animal feeds and fertilisers produced from the residual products of sugar production.

III. PROPOSED CONCENTRATION FOR WHICH AN APPLICATION FOR A LICENCE HAS BEEN SUBMITTED

³ This relates to the following reports: "*Kostprijsbepaling Suikerproducten*", D. Prinsen and C. van Esch, 12 February 2007; "*Geografische afbakening van de suikemarkt*", LangmanEconomen, 14 February 2007; "*De rol van aanbods substitutie bij de marktafbakening van suikerproducten: reactie op de Points van Overweging van de NMa*", Lexonomics, 13 February 2007; "*De (on)mogelijkheden voor food retailers en food service spelers om (inter-)nationaal suiker in te kopen*", J.W. Grievink and L. Kivits, 13 February 2007.

8. The merger for which an application for a licence was submitted relates to the acquisition by Cosun of all the shares in CSM. The structure of the merger is set out in a "Share and Purchase Agreement" of 21 July 2006, submitted by the parties with the notification.

IV. APPLICABILITY OF MERGER CONTROL

9. As was ascertained in the first-phase decision, the intended result of the proposed transaction is that Cosun will acquire exclusive control of CSM (hereinafter "the merger"). The merger, in respect of which the application for a licence was submitted, is therefore a merger in terms of section 27(b) of the Competition Act.

10. The undertakings involved are Cosun and CSM. It appears from the turnover data provided by the parties that the notified merger falls within the scope of merger control, governed by chapter 5 of the Competition Act.

V. OPINIONS OF THIRD PARTIES

11. On 27 February 2007, Stichting Behoud Suikerboer (hereinafter "SBS"), established in Veendam, submitted an opinion. In this opinion, it is stated that SBS represents a large number of sugar beet growers and has entered into a long-term supply contract with CSM. SBS has indicated that it is in favour of the merger of the parties, but objects to the conditions under which the growers, affiliated to CSM, are able to accede to Cosun's cooperative. SBS requests the Board to attach conditions to the merger on the grounds of these objections.

12. In the first-phase decision, the Board dealt with the market for sugar beet and the position of the beet growers.⁴ It was concluded that beet growers at best only have very limited opportunities to switch sugar producers and in practice have not or have hardly made use of this. The relationship between beet growers and producers is characterised by a considerable degree of mutual dependence, which considerably restricts the opportunities to switch. In the first-phase decision, the Board therefore stated that the conclusion could not be drawn that an important alternative for sugar beet growers in the Netherlands would disappear due to the merger. Most beet growers (approximately 90%), who supply sugar beet to CSM, are affiliated to the Nederlandse Bietenfederatie (the Netherlands sugar beet growers' association, hereinafter "NBF"). NPF, on request, indicated that it had no problems with the proposed merger.⁵ In the light of this, the Board subsequently drew the conclusion that it had no reason to assume that a dominant position may emerge or be strengthened on the market for sugar beet as a result of the merger, with the consequence that *de facto* competition on the market or a part thereof would be appreciably restricted.

⁴ See points 35 up to and including 38 of the first-phase decision.

⁵ See point 37 of the first-phase decision.

13. A judicial appeal was not lodged against the first-phase decision and therefore also not against the conclusion, as formulated in recital 38 of that decision. For this reason, the Board saw no reason to include consideration of the question regarding the extent to which the position of beet growers is affected as a result of the merger in the licensing phase. Nevertheless, the Board notes the following.

14. Following the first-phase decision, it emerged that a switch by a beet grower from CSM to Cosun (or vice versa) was obstructed even further by the fact that this switch had to be accompanied by the switch of a different beet grower with a similar quota from Cosun to CSM (or vice versa). The opportunity for switching sugar producers was therefore made even more difficult. This confirms the Board's conclusion in the first-phase decision that an important alternative for beet growers based in the Netherlands will not disappear as a result of the merger.

15. Secondly, SBS's complaint related to the outcome of negotiations between NBF and Cosun with regard to the accession conditions. According to SBS, Cosun and CSM formulated the result of the negotiations together. Cosun and CSM would allegedly be in a position to determine these accession conditions due to the merger. Within the framework of the merger and in the light of the coordinated behaviour of CSM and Cosun,⁶ this enables Cosun to abuse its future dominant position once, according to SBS.

16. With regard to this statement by SBS, it should be noted that in accordance with section 41 of the Competition Act, it is not the behaviour of an undertaking which is assessed, but a possible structural change to competition as a result of a merger. SBS's statement relates to the behaviour of the parties, namely the abuse of a dominant position. An increase in buyer power may have negative consequences if the merged undertaking were to use its buyer power in relation to its suppliers to protect its market from its competitors.⁷ However, this is not the situation in this case. The parties' competitors do not purchase beet from growers who supply Cosun or CSM. This merger will not change this. In its negotiations with NBF, Cosun has agreed to a transitional clause with a view to the one-off accession of approximately 5,000 beet growers who currently supply CSM.⁸ Furthermore, this transitional clause does not apply to all suppliers.

⁶ According to SBS, the coordination consists of the decision by CSM Holding to sell CSM and the amendment to the conditions with regard to accession to the cooperative by Cosun.

⁷ For instance, the parties would be able to impose conditions on sugar beet growers which would eliminate competition. See NMa's "*Visiedocument Inkoopmacht*" [Vision Document on Procurement Power] (The Hague, December 2004), as well as the Commission's Guidelines on the assessment of horizontal mergers (OJEC 2004/C-31/05), points 61 and 62. Both documents point out that buyer power can have a favourable effect on competition. See, for instance, also the Memorandum of Reply, *Proceedings of the Lower House of the Dutch Parliament 2005-2006*, 30 071, No. 6, p. 14 *et seq.*

⁸ These conditions for accession apply at the latest up to and including 31 May 2007. After this, the conditions for accession applicable up until the present will once again apply.

As a result, Cosun will not be in a position to protect the market from its competitors (permanently).

17. In the light of the above, the Board notes that SBS has not presented any arguments which lead to a conclusion other than that formulated in point 38 of the first-phase decision.

VI. ASSESSMENT

A. Assessment framework

18. In this decision, an analysis will be made to determine whether a dominant position will emerge or be strengthened on the market for the production and sale of sugar as a result of the merger, with the effect that *de facto* competition on the market or a part thereof will be appreciably restricted.

19. The following will be discussed below:

- the definition of the relevant product markets (points 20 up to and including 47);
- the definition of the relevant geographical markets (points 48 up to and including 107); and
- the consequences of the merger (points 108 up to and including 115).

B. Relevant markets

Relevant product markets

Production and sale of sugar

20. Both parties are active in the area of the production and sale of sugar and sugar products. The sugar produced by the parties is manufactured from sugar beet.⁹ The production of sugar from sugar beet is a capital intensive process. The period in which sugar beet is produced (the so-called "sugar beet campaign") lasts for an average of three to four months. For the rest of the year, the sugar factory is not in operation. Sugar beet has to be processed quickly because the sugar content decreases rapidly after harvesting. On average, 6 tonnes of beet is necessary to produce 1 tonne of sugar. To reduce transport costs, it is in the interests of beet growers to be based in the neighbourhood of the sugar factory.

⁹ Sugar can also be produced from sugar cane. Most sugar products from countries outside the European Union are manufactured from sugar cane.

21. Cosun has two production locations, namely Dinteloord and Groningen. CSM also has two production locations, namely the sugar factory Viervelaten in Hoogkerk (Groningen) and a factory in Breda. CSM's factory in Breda is only used for the production of special sugars.

22. Cosun and CSM are the only two sugar producers in the Netherlands. Two sugar producers, Iscal and Tienen (a subsidiary of Südzucker) are based in Belgium. Nordzucker, Südzucker and Pfeifer & Langen are the most important German sugar producers. In France, sugar is produced and sold by, amongst others, Cristal Union (a subsidiary of Sucre Union), Saint Louis Sucre (a subsidiary of Südzucker) and Tereos. The Netherlands, Belgium, Germany and France together form the so-called "sugar belt".¹⁰ In addition, sugar is produced and sold in the United Kingdom by, amongst others, Tate & Lyle and British Sugar. On the Scandinavian market, Danisco is a large player.

23. In 2006, Cosun produced approximately 525,000 tonnes and CSM approximately 296,000 tonnes of sugar: together approximately 821,000 tonnes of sugar.¹¹ The largest share of sugar produced by the parties (approximately [80-90]%) is sold to industrial buyers for processing in end products (hereinafter "industrial sugar").¹² The remainder, [10-20]%, is sold to buyers in the retail and food service¹³ channel for onward sale to or use by consumers (hereinafter "sugar for consumption"). The parties produce sugar for consumption both under their own brand names and under private label for certain buyers.

¹⁰ The sugar belt is the area in which the conditions for the production of sugar are most favourable, mainly due to climatic conditions.

¹¹ In this decision, only the so-called quota sugar is referred to, namely sugar which is produced in relation to a certain sales season within the quota determined for the undertaking in question (see Article 2(5) of Regulation 318/2006). A reference price applies to sugar. In addition, there is surplus sugar (previously referred to as "C sugar"), namely sugar which is produced outside the quota. Growers do not control the revenues of sugar entirely as weather conditions can have a considerable impact on the ultimate sugar content of the sugar beet. The production of surplus sugar is the result of the fact that growers cultivate a slightly greater area of sugar beet than is required to supply the quota which they are granted. Generally surplus sugar is supplied to the chemical industry. The sales price of surplus sugar is not regulated and is lower than that of quota sugar.

* In this public version of the decision, parts of the text have been replaced or omitted for reasons of confidentiality. Passages which have been replaced or omitted are indicated by square brackets. Figures or percentages may have been replaced by reference to bandwidths.

¹² For instance, producers of baking ingredients, confectionery and chocolate, dairy products, soft drinks and alcoholic products.

¹³ Food service companies supply food products to, for instance, the hospitality industry, healthcare institutions and the services sector.

24. In the first-phase decision, the NMa assumed separate product markets for the production and sale of sugar.¹⁴ In that decision, the possibility was left open that the market for the sale of sugar and sugar products would have to be subdivided into:

- (i) a possible market for industrial sugar¹⁵ and sugar for consumption;¹⁶ and within the possible market for sugar for consumption:
- (ii) a possible market for the production and sale of sugar for consumption under private label.

25. In the first-phase decision, it was also stated that the sugar production process results in various by-products. These are beet pulp, pressed sugar beet pulp, molasses and calcium carbonate. Both parties produce and sell these by-products. Since the joint turnover of the parties in relation to the production of these by-products or the joint market position of the parties is of limited size, and a number of competitors remain in relation to all the activities, these activities were not discussed further in the first-phase decision.¹⁷ Once again, no attention will be given to these activities in this decision.

26. In the discussion which follows, attention will be given firstly to the market for industrial sugar and sugar for consumption. Following this, the production and sale of sugar for consumption for private labels will be discussed.

(i) Industrial sugar and sugar for consumption

27. A market for the production and sale of sugar is defined in various decisions by the Commission¹⁸ and decisions of the national competition authorities.¹⁹ In many of these

¹⁴ Both Cosun and CSM do not themselves produce all the sugar products which they sell, but have a number of sugar products produced by third parties. This is not relevant, however, for the assessment of this merger.

¹⁵ This relates to sugar which is supplied in large quantities (usually in bulk wagons or big bags of 1,000 kilograms) in particular to food manufacturers.

¹⁶ This is sugar intended for food service companies and supermarkets.

¹⁷ See also the Commission Decision of 29 September 1999 in Case IV/M.1383 - *Exxon / Mobil*, recital 336, as well as the Commission Decision of 3 May 2000 in Case COMP/M.1693 - *Alcoa / Reynolds*, recital 111, in which the Commission states that the analysis of the effects of the merger in relation to by-products do not constitute a separate item for investigation in the respective cases.

¹⁸ See the Commission Decision of 24 April 2003 in Case COMP/M.2530 - *Südzucker / Saint Louis Sucre*, the Commission Decision of 14 October 1998 in the joined cases 33.708 - *British Sugar plc*, 33.709 - *Tate & Lyle plc*, 33.710 - *Napier Brown & Company Ltd.* and 33.711 - *James Budget Sugars Ltd* [1999], the Commission Decision of 14 May 1997 in Case 34.621 - *Irish Sugar plc*, the Commission Decision of 30 July 1991 in Case IV/M.62 - *Eridiana / ISI* [1991] C 204 and the Commission Decision of 2 January 1973 in Case 26.918 - *European sugar industry*.

decisions, this market is further subdivided into a market for industrial sugar and a market for sugar consumption.²⁰

28. Sugar for consumption differs from industrial sugar with regard to its packaging, distribution and buyer profile, as a result of which their price structures differ. According to the Commission, this justifies the definition of separate relevant product markets.²¹

29. It also emerges from the NMa's investigation that the market for the production and sale of sugar has to be subdivided further. The NMa distinguishes, as does the Commission, between two markets, namely the market for industrial sugar and the market for sugar for consumption. It emerges from the NMa's research that different sugar products exist on both markets, namely granulated sugar and various types of (solid and liquid) special sugars.²² Every sugar producer offers a number of special sugars, in addition to ordinary granulated sugar and is able to provide all possible special sugars on request (see also points 78 and 104). In this decision, no further distinction is made within the markets for industrial sugar and sugar for consumption on the basis of the various types of special sugars. In so far as this is important for the assessment of this case, special sugars will be dealt with separately in the discussion which follows.

a. Demand substitution

30. It emerges from the NMa's research that there is no or hardly any demand substitution between industrial sugar and sugar for consumption. Industrial sugar is used by buyers in (end) products such as confectionery, bread and soft drinks. Sugar for consumption is sold on by the retail and food service channel to consumers, who mainly use the sugar products for domestic use. In addition, sugar for consumption is purchased by the food service channel, where sugar is used as an end product, for instance as sugar cubes in the catering industry.

¹⁹ See the report of March 2005 of the UK Competition Commission in respect of *James Budget Sugar – Napier Brown Foods plc* (www.competition-commission.org.uk), the decision of 3 August 2006 of the German Bundeskartellamt in Case B2-90/05 *Pfeifer & Langen - Zuckerfabrik Jülich*, the decision of 24 June 2002 of the German Bundeskartellamt in Case B2-31/02 *Nordzucker - Union Zucker* (www.bundeskartellamt.de), as well as the decision of 1 August 2002 of the Italian Autorità Garante della Concorrenza e del Mercato in Case C5151 *Saci - Sadam, Coprob, Ininbiaticola/Ediana - Eribrand*.

²⁰ Referred to in the decisions as 'retail sugar', 'household sugar' and 'sugar for sale to retailers'.

²¹ Case 2003/259/EG, *Südzucker*, decision of the Commission of 24 April 2003, OJEC 2003, L 103, p. 1 *et seq.*, recital 16.

²² Special sugars are processed granulated sugar with a certain added value. Icing sugar (powdered sugar), jam sugar, candy and castor sugar are examples of solid special sugars and syrup is an example of a liquid special sugar. Some sugar products (such as liquid sugar and inverted sugar syrups) are only used for industrial applications, but most products by far (including, in any event, granulated sugar, icing sugar, castor sugar and syrups) are used in both market segments.

31. The parties acknowledge that there is hardly any demand substitution.²³ They state that consumers have no need of bulk sugar and that industrial buyers have no use for granulated sugar in kilogram packets.²⁴

32. In the light of the above, there is no reason to assume that industrial sugar and sugar for consumption belong to the same market due to demand substitution.

b. Supply substitution

33. The parties are of the opinion that a clear distinction cannot be made between industrial sugar and sugar for consumption; both must be deemed to belong to one and the same market. The reason which the parties give for this is the fact that competition in both segments works in similar ways. Price differences between both segments are explained by the additional cost of packaging, milling, blending, etc.

34. However, it appears from the data provided by the parties that the price of sugar has fallen quicker in recent years on the industrial market than on the consumer market. The average price of industrial granulated sugar in the Netherlands fell in the period from 2003 to 2006 by approximately [0-10]%. On the other hand, the average price of granulated sugar for consumption has only fallen by approximately [0-10]%. In the NMA's view, this data sooner indicates that competition in both segments operates differently rather than similarly.²⁵

35. The buyers of industrial sugar and sugar for consumption have stated in the NMA's research that there is a difference between the types of packaging of the sugar which they purchase. Industrial sugar is usually delivered in bulk or big bags (usually holding 1000 kg). Sugar for consumption is packaged in bags, canisters and packages of 500 g, 1 kg, 1.5 kg or 25 kg. As a result, the packaging costs of sugar for consumption are higher than those of industrial sugar.

36. In addition, the transport costs of (packaged) sugar for consumption are lower than those of industrial sugar. Foreign sugar producers have stated that this difference is

²³ In the report by Lexonomics, commissioned by the parties, it is stated, however, that there is a certain degree of demand substitution since some buyers can process sugar in both smaller packaging and larger packaging. See the report commissioned by the parties: "*De rol van aanbodsubstitutie bij de marktafbakening van suikerproducten: reactie op de Punten van Overweging van de NMA*", p. 6, *op. cit.*

²⁴ See the research report commissioned by the parties: "*De marktpositie van Cosun en CSM Suiker*", LangmanEconomen, Amsterdam, 22 August 2006, p. 25.

²⁵ Approximately 80% of the cost of sugar for consumption relates to the same raw material. The same raw material is used in industrial sugar. For the remaining 20%, there is no evidence that significant changes have occurred in the cost of packaging, milling etc.

approximately 15-20%.²⁶ The reason for the difference in transport costs is the fact that in the case of industrial sugar, silo wagons are often used. For reasons of hygiene, the silo wagons often cannot return with a different cargo. As a result, the transport costs per kilo of sugar are higher. Sugar for consumption is transported in packaged form and does not require a special freight wagon. As a result, return freight occurs more frequently, resulting in lower transport costs.

37. The parties argue that the sugar-processing industry, suppliers of processing services, and packagers of granulated sugar and other products (for instance, coffee creamers), manufacturers of sweet sandwich fillings and suppliers of bakery ingredients can easily process the sugar products which they purchase or, alternatively, repackage these as granulated sugar and special sugars in consumer packaging and supply these to the retail and food service channel.

38. The NMa questioned the undertakings referred to by the parties by name and other undertakings. Almost all the undertakings questioned, however, stated that they were not in a position or did not intend to enter the consumer market. The undertakings questioned gave as their reason for this the fact that supplying the consumer market is not consistent with their present activities, that they have no knowledge of the market for sugar consumption, that they do not have the necessary equipment, and that these machines are not able to process products in such a way that they can be sold on the consumer market.

39. In the Prinsen report,²⁷ which was commissioned by the parties, it is also argued on the basis of figures that if demand were to emerge from the market, in the event that the parties were to increase their prices permanently by 5-10%, packagers would package profitable sugar products for the consumer market. The parties have declared the report in its entirety to be confidential, as a result of which it was not possible to present the calculations in the report to market parties.

40. Nevertheless, on the basis of its own investigation, the NMa has obtained evidence which gives cause to question whether the assumptions underlying the Prinsen report are realistic. Firstly, it should be noted that the effect that packagers would have to demand a lower price than the parties, in order to give buyers reason to switch was not taken into account. Secondly it emerged from a comparison of the calculations in the report with information obtained from several packagers and from the parties themselves that the packaging costs, calculated in the report, are (considerably) lower than the information on packaging costs with which the parties and several of the packagers provided the NMa. Finally, it must be noted that the assumption in the report, namely that a packager will be able to sell its product for five years, is fairly sensitive to changes. If a packager cannot sell its product for one or more years, this has a

²⁶ The parties assume a slightly larger difference.

²⁷ See the report: "*Kostprijsbepaling Suikerproducten*", p. 6, *op. cit.*

considerable effect on the net present value and, as a result, on the packager's decision as to whether or not to invest.

41. Although several packagers have indicated that it is difficult to package sugar for the consumer market in the event of a permanent price increase of 5-10%, other packagers also referred to limitations. One packager questioned stated in this regard that a packager must obtain its margin from the packaging of sugar, while this does not apply to sugar producers. Sugar producers already realise their margin on the production of sugar. Furthermore, this packager noted that the margins for packaging sugar are small. A different packager noted that in combination with existing production factors the sugar industry has logistical and cost advantages for packagers. In the light of the above, supply substitution by packages, as suggested by the parties, does not seem plausible.

Conclusion

42. In the light of points 33 up to and including 41, there is insufficient reason to assume that industrial sugar and sugar for consumption belong to the same market from the perspective of supply substitution.

Conclusion with regard to the relevant product market

43. Together with the parties, the Board concludes that no demand substitution exists between industrial sugar and sugar for consumption. Although sugar is a homogenous product, it emerges from the NMa's research that there is no or insufficient supply substitution. This is supported by the diverse development of prices for industrial sugar and sugar for consumption. For this reason, two separate product markets are assumed for the assessment of this case, namely the market for industrial sugar, on the one hand, and the market for sugar for consumption, on the other.

(ii) Possible market for the production of sugar for private label products within the market for sugar for consumption

44. In a decision taken by the Commission,²⁸ a separate market was defined for the production and sale of sugar for consumers in the retail trade (supermarkets and the food service channel), which sell the sugar under a private label (generic brand) to the end user.

45. In recent cases in relation to other products sold through the retail trade,²⁹ however, the NMa concluded that there is no reason to assume separate product markets for the production

²⁸ See the Commission Decision in Case COMP/M.2530 – *Südzucker / Saint Louis Sucre*, *op. cit.*

of brand products and generic brands (private labels) due to the substitutability of brands and generic brands at the retail level. As a result, having a strong position in the area of the production of generic brands is no longer relevant in assessing the effects of a merger.

46. It emerged from the research carried out by the NMa in the present case that for buyers sugar clearly has the characteristics of a commodity.³⁰ Furthermore, it appears that in the case of sugar the value of a brand is limited compared to other foodstuffs which are obtainable at the retail level. Supermarkets usually have either the Cosun brand or the CSM brand on their shelves. The limited importance of brands is also apparent from the increase in the share of private label products. Both parties (substantiated with figures) and one of their competitors stated this. Precisely in the case of sugar, brands and generic brands are very easily substituted.

Conclusion

47. Building further on the cases referred to above, in this case the NMa does not assume that a market for the production of sugar under a private label can be distinguished within the market for sugar for consumption.

Relevant geographical markets

Introduction

48. In all earlier decisions in relation to the sugar industry, the Commission has assumed geographical markets of a national size.³¹ The same applies to decisions of national competition authorities.³² An important argument in favour of a national definition of the market was the former European common organisation of the sugar market (hereinafter "the former common organisation of the sugar market"). This former common organisation of the sugar market was characterised by intervention prices, import levies, export subsidies and national quotas. (As a result) there were no substantial trade flows between the Member States of the European Union (hereinafter "the EU").

²⁹ This relates, for instance, to canned vegetables (see the decision of 29 November 2005 in Case 5265/ NPM - HAK, points 25 up to and including 27), deep-frozen snacks (see the decision of 17 February 2006 in Case 5499/ Ad van Geloven – Mora, points 14 and 15) and savoury snacks, in particular crisps and cocktail snacks (see the decision of 24 April 2006 in Case 5476/ PepsiCo – Duyvis, points 14 up to and including 17 and 20).

³⁰ A commodity is a product of a basic nature, such as rice, crude oil, etc.

³¹ See the decision of 24 June 2002 of the German Bundeskartellamt in the Case B2-31/ 02 Nordzucker - Union Zucker (www.bundeskartellamt.de).

³² Case 34.621 - Irish Sugar plc, decision of the Commission of 14 May 1997; Cases 33.708 – 33.711 - British Sugar plc, Tate & Lyle plc, Napier Brown & Company, James Budgett Sugar Ltd, decision of the Commission of 14 October 1998; Case 2003/ 259/ EG - Südzucker, decision of the Commission of 24 April 2003, OJEC 2003, L 103, p. 1 *et seq.*

49. For the aforementioned reasons, the Board assumed a geographical market no larger than the Netherlands in the first-phase decision. In this regard, consideration is given to the fact that merger control takes account of future developments, provided these are sufficiently certain. It is a fact that the European sugar sector has been reformed since the coming into force³³ of Regulation 318/2006,³⁴ which introduced a new organisation of the common organisation of the sugar market (hereinafter "the new common organisation of the sugar market"). The Board, however, stated in the first-phase decision that at that stage in the investigation it was not sufficiently plausible that the geographical market would acquire a size greater than the geographical market as a result of this reform. The uncertainty referred to above could only be removed by means of extensive further research amongst international buyers, competitors and other market parties, in particular.

50. As was stated in point 2, the NMa's research in the licensing phase focuses to a considerable extent whether and to what extent the (recent) reforms on the European sugar market have resulted in increasing competitive pressure from foreign sugar producers on the parties. If this is the case, a geographical market may be assumed which is larger than the Netherlands. The relevant market in terms of competition law is defined on the basis of the SSNIP test,³⁵ if this is possible and feasible. With regard to the definition of the geographical market it is therefore important in the present case to ascertain whether the buyers of industrial sugar and sugar for consumption are sufficiently able to switch to other suppliers of sugar if the parties were to increase their prices for industrial sugar permanently and profitably by 5-10%, or if the parties were to reduce³⁶ their prices permanently and profitably by 5-10% less than foreign suppliers.

51. As emerges from the discussion below, the results of the NMa's further research in the licensing phase gave sufficient cause to define the national market more broadly in the present case with regard to both industrial sugar and sugar for consumption. In the discussion which

³³ The new common organisation of the sugar market came into force on 1 July 2006.

³⁴ Council Regulation (EC) No 318/2006 as regards the management of the Community market in sugar and the quota system, *OJEC* L 58/1 of 28-2-2006.

³⁵ SSNIP stands for 'small but significant non-transitory increase in price'. In terms of this (hypothetical) test, the market may be regarded as the relevant market in terms of competition law if a supplier can profitably increase its prices permanently by 5-10% within the chosen definition of the product market and geographical market. See also the Commission Notice on the definition of relevant market for the purposes of Community competition law, *OJEC*, C 372, 1997, pp. 5-13.

³⁶ In response to the announcement of the new common organisation of the sugar market, which provides for a fall in the reference price for sugar, sugar prices have fallen over the last two years. This fall is expected to continue, since the reference price for sugar determined by the EU will fall further in the coming years. In this decision, for the sake of convenience reference will be made below only to a (hypothetical) price *increase* of 5-10%. The comments made here apply *mutatis mutandis* in the event that the parties increase their prices by 5-10% less than their foreign competitors.

follows, a description will first be given of the market trends as a result of the new common organisation of the sugar market. Following this, each product market (industrial sugar and sugar for consumption) will be discussed with regard to the size of the geographical market.

Common organisation of the sugar market

52. Under the former common organisation of the sugar market, which applied up until 1 July 2006, sugar production in the EU was subject to far-reaching regulation. By means of import levies, the European market was protected from the world market. The level of sugar prices within the EU was considerably higher than that on the world market and was maintained by an intervention mechanism with guaranteed minimum prices. The purpose of the above-mentioned import levies was to bridge the price differences between the world market and the common market and to protect European sugar producers from competition from countries outside Europe.

53. Under the former common organisation of the sugar market, sugar production was regulated by granting production quotas to each Member State. Each Member State then divided the quota amongst the sugar producers. In the Netherlands, the Ministry of Agriculture divided the quota according to a fixed allocation (61-39) to Cosun and CSM. The production quotas which were granted to each Member State were originally related to national consumption. Over time this relationship became distorted and the quotas for each Member State under the former common organisation of the sugar market were so high that structural overproduction arose relative to consumption within the EU. This surplus could be sold on the world market by means of export subsidies. As a result of this system, producers within the EU could sell their surplus at an attractive price on the world market. As a result, European sugar producers had no or little incentive to sell these surpluses in other Member States.

54. On 1 July 2006, the new common organisation of the sugar market was introduced. With this new common organisation of the sugar market, the sugar sector has undergone far-reaching reform. The aim of the new common organisation of the sugar market is to stabilise the markets in the sugar sector and to guarantee the growers involved a reasonable standard of living.³⁷ The aim of the reform is to ensure that the production of sugar in the EU is reduced towards the level of consumption. In doing so, the increase in imports from the least developed countries, such as Haiti, Angola (hereinafter "the LDCs") and Cuba is taken into account.³⁸ On the basis of the

³⁷ Preamble to Regulation 318/2006, recital 2.

³⁸ In 2009, the present import levy on sugar from LDCs was abolished under the Everything but Arms (EBA) agreement. As a result, the price of sugar imported from these countries has fallen. The LDC's export mainly raw sugar to Europe. This raw sugar is refined by European sugar producers, such as Tate & Lyle, and is then traded within the EU. As a result of the reduction in the import levy for sugar from LDCs, the price of this imported sugar has been brought into line with prices on the world market.

ruling by the WTO, the possibility of selling sugar surpluses on the world market has largely disappeared.³⁹ The possibility cannot be excluded that a new WTO agreement will further open the borders for the import of sugar into the EU.⁴⁰

55. In the light of the above, the import of sugar from countries outside the EU is expected to increase. A reduction in production and a fall in the price of sugar within the EU may counterbalance this import. To realise this reduction in production, the Commission has set up a system whereby sugar producers can relinquish their quotas voluntarily. Since the price of sugar will fall, the least efficient sugar producers will no longer be able to produce profitably. In line with the Commission's expectations, these sugar producers will voluntarily relinquish their quotas and disappear from the market.⁴¹ As a result of this, so-called "deficit countries" have or will emerge, that is countries in which less sugar is produced than is consumed. Ireland has already relinquished all of its quotas. Italy, Spain, Greece and Finland intend to relinquish or have already relinquished all or part (at least 50%) of their quotas. On the other hand, efficient sugar producers, which are situated in the sugar belt (France, Germany, the Netherlands and Belgium), as well as sugar producers in Denmark and the United Kingdom, have purchased additional quotas. It emerges from this that the relationship between national production quotas and national consumption, which was characteristic of the former common organisation of the sugar market, has been broken.

56. The expectation expressed by the Commission, the parties and various other market parties is that countries from the sugar belt will continue to retain their sugar surpluses. As a result of the limitations on export restitution, these surpluses can only be sold to a limited extent on the world market. These sugar producers will be forced to a greater extent than under the regime of the former common organisation of the sugar market to look for opportunities to sell their surpluses within the EU. The Board expects this to result in competitive pressure from foreign sugar producers on the parties.

Industrial sugar

³⁹ On the basis of a ruling by the WTO, the total export of sugar, which may be sold with subsidies from the EU, may not exceed 1.3 million tonnes a year as of June 2006.

⁴⁰ See the LEI report, April 2006, p. 34.

⁴¹ See Regulation 318/2006. When they leave the market, these sugar producers may make use of so-called "exit support". As a result, the quotas granted to these sugar producers disappear from the market. In so far as the reduction in production desired by the Commission cannot be realised by means of this voluntary relinquishing of quotas, the Commission (after 2009/2010) will resort to downward adjustment of the production quotas, which will be shared proportionally amongst the Member States (the so-called "lawn-mowing" method). In addition to the voluntary relinquishment of quotas, the new common organisation of the sugar market also provides the possibility of purchasing additional sugar quotas up to a maximum per country (see Article 8 of Regulation 318/2006).

57. The NMa's research into the size of the geographical market in the present case concentrated on whether and to what extent the (recent) reforms of the European sugar market have resulted in increasing competitive pressure from foreign sugar producers on the parties.

58. The following are discussed in turn: (a) transport costs; (b) supply by (foreign) sugar producers and (c) the role of buyers.

a. Transport costs

59. The NMa obtained information on transport costs from both the parties and competitors. It appears from this data that the transport costs for industrial sugar amount to approximately EUR 0.08 per tonne per kilometre. Furthermore it appears from the data which the parties and various other market parties (both buyers and competitors) provided that the price for industrial sugar amounts to approximately EUR 650 per tonne. If the parties were to introduce a permanent price increase of 5% or 10% on the basis of a price for industrial sugar of EUR 650 per tonne, other sugar producers could profitably sell sugar in the party's area from a distance of approximately 400 kilometres or 800 kilometres respectively from their production location.⁴² The new common organisation of the sugar market provides for a reference price for sugar which falls gradually to a price of EUR 404.40 per tonne in 2009/2010.⁴³ Assuming an average sales price of EUR 500 per tonne,⁴⁴ the maximum distance at which companies will be able to sell sugar profitably from their production location, in the case of a permanent price increase of 5% or 10%, will be approximately 300 kilometres or approximately 600 kilometres respectively.

60. The transport costs are not the same for all countries. In a recent decision, the German competition authority, the *Bundeskartellamt*, assumed a geographical market which amounted to 220 kilometres around the sugar factory in Jülich.⁴⁵ German sugar producers incur higher transport costs than Dutch or French producers. One reason for this is that the maximum

⁴² This can be calculated by dividing 5% or, alternatively, 10% of EUR 650 per tonne by the transport costs per tonne per kilometre (EUR 0.08). In calculating the transport distances, it is assumed that sugar prices in the EU are the same. It emerges from NMa's research that the average price level for sugar in the Netherlands is at a level comparable to the average price level for sugar in neighbouring countries (see also points 65 and 102).

⁴³ Article 3 of Regulation 318/2006 stipulates that the reference price of sugar for the seasons 2006/2007 and 2007/2008 is EUR 631.90 per tonne, which falls to EUR 541.50 per tonne for the season 2008/2009.

⁴⁴ In practice, the sales price of sugar up until the present has been higher on average than the reference price. The sales price is the result of negotiations between sugar producers and their buyers.

⁴⁵ See the decision of 3 August 2006 of the German *Bundeskartellamt* in Case B2-90/05 *Pfeifer & Langen- Zuckerfabrik Jülich* *Bundeskartellamt (Pfeifer & Langen - Jülich)*. The part of the Netherlands and Belgium which is less than 220 kilometres away from the factory in Jülich does not fall within the relevant geographical market, according to the decision, because there were no substantial interstate trade flows.

permissible tonnage that may be transported in Germany is lower than that in the Netherlands and France. As a result, trucks are able to carry fewer kilograms of sugar per trip. This has a direct effect on costs.⁴⁶ This results in higher transport costs in Germany than in the surrounding countries. In the case of German producers, the radius of 220 kilometres calculated by the Bundeskartellamt is assumed. In the case of the Dutch producers, a radius of 300 kilometres around the parties' sugar factories is assumed. The countries which are part of the sugar belt (see point 22) fall within this circle.

61. According to various buyers, the transport costs may restrict the purchasing of industrial sugar from other countries. Partly in the light of these comments, the NMa investigated the possible restrictions due to transport costs. The NMa's calculation showed that for a maximum distance of 300 kilometres, transport costs do not restrict cross-border transport. If the parties increase their prices, the distance increases over which it is possible to transport sugar profitably. Transport costs are possibly an obstruction to transport over great distances, but not within a radius of 300 kilometres.

Conclusion

62. On the basis of calculations, the Board concludes that transport costs in themselves do not restrict the cross-border supply of industrial sugar. In the event of a permanent price increase of 5%, industrial sugar can in any case be transported profitably over a maximum distance of 300 kilometres, whereby a maximum distance of 220 kilometres applies to Germany. In the absence of other technical, legal or economic restrictions, this means that there is no *a priori* reason to assume that imports may not increase if the economic factors, such as price differences, give cause for this.

b. Supply of (foreign) sugar producers

63. The most efficient sugar producers are based within the sugar belt (see point 55). These producers have mainly sold their sugar surpluses in the past on the world market. The sugar producers which have provided information on this point have indicated that they can sell less sugar on the world market as a result of the new common organisation of the sugar market and therefore export more sugar to other countries within the EU (see point 56). Various sugar producers have stated in this regard that the market for industrial sugar can no longer be regarded as a national market, but is tending towards becoming a European market, if it is not already a European market.

⁴⁶ In France it is possible to transport a higher tonnage than in the Netherlands. However, the tonnage applicable in the Netherlands was assumed because this is the maximum tonnage which French producers can transport in the Netherlands.

64. The parties have provided data which shows that Dutch buyers are increasingly purchasing sugar from foreign parties. In the case of the Netherlands, the import of sugar in the period from 2004 to 2006 is estimated to have increased from 8% to 18%.⁴⁷ An increase is visible from the moment (the end of 2004) that it was announced that a new common organisation of the market would be introduced. Figures for the calendar years 2004, 2005 and 2006, which were provided by four foreign producers, provide predominantly evidence of an increase in the export of industrial sugar to the Netherlands. In the same period, the parties also exported more sugar to other European countries. In the period from 2002 to 2004, the parties sold approximately [0-10]% of their total sales of industrial sugar in other countries. In the period from 2004 to 2006, this percentage increased to [10-20]% in 2006.

65. Support can also be found for the increased trade flows in evidence that the prices which parties demand for industrial sugar have increasingly converged with the prices which other suppliers demand.⁴⁸ Various foreign competitors have stated prices which are comparable to those of the parties. The market parties have also indicated that they receive prices from foreign parties which are at a level comparable to those of the parties. From the parties' customer files, it appears that the parties have had to adjust their prices downwards in past years as a result of increasing competitive pressure from other countries. The buyers requested offers from one or more foreign sugar producers and presented the prices offered during negotiations with the parties. The latter responded to these [...] with a price reduction. It also appears from a number of customer files that the parties [...] also reduced their prices. It is therefore plausible that the parties under pressure from foreign competitors cannot permanently and profitably increase their prices by 5-10%.

66. The NMa expects the actual trend of increasing trade flows to continue. This relates partly to the increasing orientation of sugar producers to the sale of industrial sugar within Europe. This follows firstly from the increasing import and export flows within Europe. For

⁴⁷ These percentages are based on data provided by the parties. According to the parties, these data are based on the Monthly Schedules which the Commodity Board for Arable Farming [*Hoofdproductieschap Akkerbouw*] and the Dutch Ministry of Agriculture, Nature and Food Quality collect and verify. These data relate to the following data on an annual basis (the year runs from 1 July – 30 June): the opening stock (A), the production of quota sugar (B), imports of quota sugar (C) and the closing stock (D). A+B+C-D is the (calculated) sales (E). Cosun's and CSM's exports within and outside the EU (F and G) published in the monthly schedules are then deducted from E. This results in Cosun's and CSM's sales in the Netherlands (H). In addition, an assumption is made with regard to the consumption of sugar in the Netherlands (I). This consumption minus the sales, according to the parties, represents the import of sugar. A certain volume is stated in the EU's sugar balance for the year 2002/3 (the last year that data on consumption was collected). According to the parties, this is assumed to be constant. The Commodity Board for Arable Farming agrees with the figures submitted by the parties. The Commission also assumes a constant consumption of sugar. NMa has no reason to doubt this assumption.

⁴⁸ It should be noted that little objective information is available from public sources with regard to the average level of sugar prices in the countries within the sugar belt.

instance, it appears from an annual report of Tereos (France)⁴⁹ that its sales of sugar to other countries within Europe has increased from 23% of its quota in the period from 2001 to 2002 to 53% of its quota in the period from 2005 to 2006. In addition, sugar producers have taken concrete measures to facilitate exports within Europe. It appears from Tereos's annual report that Tereos's strategy is to establish itself on every important market in Europe and to make offers on each of these markets which are comparable to those of the established sugar producer(s).⁵⁰ It appears from the NMA's research that Tereos has already applied this strategy in the Netherlands. Another foreign sugar producer has indicated that its sales strategy focuses on the profitable sale of sugar within Europe.

67. In addition, almost all the (foreign) competitors indicated in the NMA's research that they gave priority to supplying pan-European customers. Some competitors (Nordzucker, EDF Man and Cristal Union⁵¹) even recently set up a joint venture which will focus particularly on pan-European customers. The parties have stated that pan-European buyers have purchasing power due to the considerable volume of sugar which they purchase and the opportunities which they have to compare prices internationally.

68. In the past four years, the parties have taken various measures to make exports of sugar to other Member States possible. In this regard, the parties referred to measures such as the recruitment of new personnel with international experience, the translation of product specifications, brochures and packaging, the setting up of international transport systems, adjustments to computer systems to generate order confirmations and invoices in other languages, etc.

69. An increasing orientation of European sugar producers to supplying sugar in Member States of the EU other than their own home market is evident from the above. On the basis of this, it is plausible that international trade flows between the Netherlands and the Member States will increase further with greater competitive pressure from other countries on the parties as a result.

⁴⁹ Annual Report 2004-2005 (April 2006), p. 14.

⁵⁰ "L'objectif de Tereos est d'être présent sur les marchés les plus importants de l'Union européenne pour apporter un service équivalent à celui des producteurs locaux (...), d'accompagner les grands clients sur place et de capter des clients de taille plus modeste. Cette évolution a été rendue possible grâce à la création de filiales commerciales dans les grands pays européens. (...) Plus récemment, Tereos Deutschland a été créée à Fribourg-en-Brisgau en octobre 2004, puis Tereos UK en Angleterre en mai 2005. Un bureau commercial est en cours de création en Italie." Annual Report 2004-2005 (April 2006), p. 14.

⁵¹ See the press release issued by Nordzucker, Cristal Union and EDF Man of 26 April 2006, which includes a statement by the managing director of Cristal Union, Alain Commissaire: 'Die Gründung der Eurosugar wird uns in die Lage versetzen, unsere europäischen Kunden mit hoher Qualität und Service in einem sich rasant ändernden Markt zu bedienen.'"

70. The above applies all the more if the parties were to increase their prices permanently and profitably by 5-10%. Three foreign sugar producers have indicated that they would like to sell more industrial sugar in the Netherlands if the parties were to increase their prices permanently by 5-10%. Two others indicated that they would consider this. In addition, the distance that foreign producers can profitably transport sugar is greater in the case of a permanent 5-10% price increase. This also gives other sugar producers located further away the opportunity to export sugar to the Netherlands.

Possible restrictions

71. Various foreign sugar producers have stated that they give priority to supplying their own, existing customers in their own sales areas as well as supplying customers in the deficit areas. Sugar producers also have limited capacity as a result of the quota system. This may limit their opportunities to meet demand for sugar from buyers. For instance, Cosun has stated that after winning a tender from a large purchasing group, it could no longer compete for other tenders because it no longer had a sufficient (sugar) quota. The quota system may therefore restrict the opportunities for importing/exporting sugar.

72. It follows from the above import and export figures, however, that sugar producers increasingly export sugar within the EU. This actual increase in trade flows illustrates that the quota system does not restrict sugar producers' selling sugar within the EU. In addition, the Netherlands is situated in the sugar belt with relatively large sugar surpluses. Most sugar producers in the sugar belt have availed themselves of the opportunity to purchase additional quotas. The NMa therefore expects a surplus of sugar to continue to exist within the sugar belt. As has been stated by the parties and a foreign producer, sugar producers will sell their sugar in areas in which, or to buyers from which, they can realise the highest turnover. If the parties demand higher prices in the Netherlands than in the surrounding areas, it is plausible that the sugar producers situated within a radius of 300 kilometres around the parties' sugar factories will start selling their sugar in the Netherlands. As is already clear from the customer files, this (threat of) competitive pressure will have a disciplining effect on the parties.

Conclusion

73. The Board concludes that competitive pressure has increased considerably in past years. In the period from 2004 to 2006, imports of industrial sugar have more than doubled. The parties have also exported more than twice as much industrial sugar. It is plausible that the export and import of industrial sugar will increase further. This appears, for instance, from the increasing orientation of sugar producers to export and to pan-European customers. This increase will be strengthened by a permanent and profitable increase of 5-10% in the parties' prices.

c. Role of buyers

74. It emerged from the responses of various industrial buyers that they have approached foreign producers more often in recent years to request an offer for the supply of industrial sugar. Industrial buyers refer in this regard, in particular, to players such as Tienen (Belgium, a subsidiary of Südzucker), Tereos (France) and Tate & Lyle (United Kingdom). Players such as Danisco (Denmark), Nordzucker and Pfeifer & Langen (Germany) are also mentioned. The industrial buyers stated that in general all the suppliers approached respond by submitting an offer. Various buyers of industrial sugar have also stated that they are approached increasingly by foreign suppliers. As has already been stated in point 65, it appears from a number of customer files (also those of small buyers) that the parties have negotiated and that buyers of industrial sugar have exerted pressure on the parties to reduce the price of sugar by presenting offers from foreign suppliers.

75. Various buyers have also stated that they would purchase a larger portion of their sugar from other countries if they were confronted by a permanent price increase of 5-10%. In anticipation of the merger, one buyer has already stated that it will increase its international purchasing because it does not wish to be dependent on one supplier. This exerts pressure on the parties.

76. In addition, the parties and various sugar producers have stated that their buyers are increasingly resorting to centralised purchasing. One sugar producer stated in this regard that so-called pan-European buyers represent approximately 50% of its total sales. Through the spread of their factories, these pan-European players are able to compare the sugar prices of sugar producers from the various European countries. The European players will keep you informed of sugar prices in Europe and by doing so can enter into attractive agreements with sugar producers. This also exerts pressure on the parties to ensure their prices are competitive.

Possible restrictions

77. Some groups of buyers of industrial granulated sugar have stated that they expect problems with the purchasing of certain types of special sugars, in particular castor sugar, but also icing sugar and the like. Such special sugars are used, for instance, for confectionery and sauces. According to these buyers, these special sugars cannot be obtained from other countries. From interviews with these buyers, it also appears that splitting the package (purchasing of granulated sugar in another country and purchasing of special sugars from the parties) would not be financially attractive. The advantage which could be obtained in another country due to the lower price of granulated sugar does not outweigh the additional cost of the special sugars,

according to these buyers.⁵² The merger would therefore result in a situation where some groups of buyers would become dependent on the parties.

78. It appears from the research carried out by the NMa amongst the market parties that it is indeed the case that solid special sugars are hardly purchased at all from foreign sugar producers by Dutch buyers. It also appears from the research carried out by the NMa that buyers are sometimes still unfamiliar with the opportunities for purchasing special sugars, such as icing sugar and castor sugar, from other countries. The lack of familiarity is partly due to the fact that buyers have not yet researched the possibilities. Foreign sugar producers stated in answer to questions posed by the NMa that they (can) produce all the special sugars offered in the Netherlands.⁵³ The foreign producers at present do not produce castor sugar to Dutch specifications, but do produce products comparable to castor sugar.⁵⁴ All the special sugars, save one, are directly obtainable in other countries. In addition, the parties state that buyers can process the ingredients of castor sugar separately in their end products. This was confirmed by a buyer. On the grounds of the above, it must be concluded that buyers have sufficient alternatives.

79. In addition, it should be noted that the sale of special sugars to industrial buyers only represents a small part of the parties' total sales. Approximately [90-100]% of the volumes sold relate to the sale of industrial granulated sugars, while approximately [0-10]% of the volumes sold relate to the sale of (solid) special sugars.⁵⁵ With regard to their turnover, the parties depend, in particular, on the sale of industrial granulated sugar and not on special sugars. If the parties increase their prices, it is plausible that buyers will be able to discipline them by threatening to purchase granulated sugar in other countries. In addition, foreign competitors apply discount systems, as do Cosun and CSM. In the light of this dependence, it is not plausible that the parties will be able to permanently increase their prices profitably by 5-10% after the merger.

80. Finally, a number of market parties have stated that they have purchased a powder mill to produce their own icing sugar. It emerged from the research carried out by the NMa that the buyers questioned on this point jointly produce 20,000 tons of icing sugar by milling granulated sugar themselves. From statements made by the parties, it appears that they sell significantly less icing sugar ([10,000-20,000] tonnes) to industrial buyers. By purchasing a powder mill, buyers have a realistic alternative to the purchasing of icing sugar from the parties. They can purchase

⁵² This relates to discounts/bonuses received for the total volume of sugar purchased.

⁵³ In the case of castor sugar, in particular, whether it is profitable for a buyer to have this specific product produced only for this buyer depends particularly on the volume requested by the buyer.

⁵⁴ Or comparable products such as *Vergeoise*, *Cassonade*, soft sugar or *Brauner Zucker*.

⁵⁵ Part of the turnover is also realised through the sale of liquid special sugars. The concerns which emerged from the market research related mainly to the sale of solid special sugars. The concerns relate mainly to castor sugar. Castor sugar represents approximately [0-10]% of the total sales volume.

castor sugar from the parties or from foreign sugar producers and mill this to icing sugar themselves.

Conclusion

81. The Board concludes that the parties experience increasing competitive pressure as a result of offers made by foreign sugar producers. This makes it plausible that in the event of a permanent and profitable price increase of 5-10% by the parties, Dutch buyers will increasingly purchase industrial sugar from foreign sugar producers. Buyers have sufficient alternatives which allow them to purchase industrial sugar from other countries.

d. Conclusion with regard to industrial sugar

82. The Board concludes that the market for industrial sugar can no longer be defined as a national market. The Board is of the opinion that industrial sugar can in any event profitably be transported for a maximum distance of 300 kilometres (or a maximum distance of 220 kilometres in the case of Germany).

Sugar for consumption

83. With regard to sugar for consumption (sugar for the retail trade and food service sector) and with regard to the size of the geographical market, research was carried out to ascertain whether and to what extent the (recent) reforms of the European sugar market have resulted in an increase in competitive pressure by foreign sugar producers on the parties.

84. The following items are dealt with in turn: (a) transport costs; (b) supplied by (foreign) sugar producers; and (c) the role of buyers.

a. Transport costs

85. The way in which the transport costs of industrial sugar are calculated is set out in points 59 and 60. It appears from the NMa's research that the transport costs of sugar for consumption are lower than the transport costs of industrial sugar, which is transported in bulk.

86. The NMa has obtained data from the parties and from competitors with regard to transport costs. It appears from these data that the transport costs of sugar for consumption amount to approximately EUR 0.07 per tonne per kilometre. Furthermore, it appears from the data which the parties and the various market parties (both buyers and competitors) provided that the price for sugar for consumption amounts to approximately EUR 800 per tonne on average. If the parties were to increase prices permanently by 5% or 10% on the basis of a sugar price of EUR 800, other sugar producers could sell sugar profitably in the parties' area from a

distance of approximately 575 or 1,150 kilometres respectively.⁵⁶ If the price of sugar falls to EUR 650 per ton as a result of the new common organisation of the sugar market, the companies will be able to sell sugar from their production location in the event of a permanent price increase of 5% or 10% respectively from a maximum distance of approximately 450 kilometres or approximately 900 kilometres respectively.

87. As was stated in point 60, the transport costs are not the same for all countries. In the case of German producers, the radius of 220 kilometres calculated by the Bundeskartellamt is assumed.⁵⁷

Conclusion

88. On the basis of the calculations, the Board concludes that transport costs in themselves do not restrict the cross-border supply of sugar for consumption. In the event of a permanent price increase of 5%, it would be possible to transport sugar for consumption profitably up to a maximum distance of 450 kilometres (in the case of Germany, in any event a maximum distance of 220 kilometres applies). This means that in the absence of other technical, legal or economic restrictions, there is no *a priori* reason to assume that imports may not increase further if the economic factors, such as price differences between countries, give cause for this.

b. Supply by (foreign) sugar producers

89. The NMa questioned the parties, market parties and foreign producers on what effect they thought the new common organisation of the sugar market would have on exports.

90. At the European level, sugar for consumption is already exported to other EU countries (in particular granulated sugar and sugar cubes). Up until 2005, the export of sugar for consumption by Cosun to other EU countries was fairly stable. Since 2006, as a result of winning tenders which were partly issued by foreign supermarkets, Cosun supplies significantly more sugar for consumption to buyers in other EU Member States. Between 2005 and 2006, exports have increased fivefold.⁵⁸ In total, Cosun exported approximately one third of the total quantity of sugar for consumption which it produced to other countries within the EU in 2006.

⁵⁶ This can be calculated by dividing 5% or, alternatively, 10% of EUR 800 per tonne by the transport costs per tonne per kilometre (EUR 0.07). In calculating the transport distances, it is assumed that sugar prices in the EU are the same. It emerges from market research that the average price level for sugar in the Netherlands is at a level comparable to the average price level for sugar in neighbouring countries (see also points 65 and 102).

⁵⁷ The Bundeskartellamt assumes the same transport distance for industrial sugar and sugar for consumption. This line is followed for Germany in this decision. In fact, for the situation examined here, this is an underestimate of the actual distance.

⁵⁸ From [0-10,000] tonnes to [10,000-20,000] tonnes.

91. Sugar producers in other EU countries also export sugar for consumption to other EU Member States. The majority of the producers who provided data indicated that in the period from 2004 to 2006 they started exporting more sugar for consumption within Europe. An example is a French producer which sells sugar for consumption in Germany and the United Kingdom. This producer is increasingly orienting itself towards foreign markets. It appears from the above that sugar producers in the EU are increasingly exporting sugar for consumption to other EU Member States.

92. It emerged from various discussions with buyers of sugar for consumption that a number of them had requested offers from foreign producers. Some of them stated that the prices of foreign producers differed too little from Dutch prices to warrant switching. Recently, a buyer switched to a foreign producer for part of its purchasing. Both in the retail and in the food service channel there is now limited import of sugar for consumption from other countries.

93. The import of sugar for consumption into the Dutch market is expected to increase. It emerged from the NMA's research that foreign producers are willing and able to supply the Dutch market for sugar for consumption. A large purchasing group, for instance, comprising a Dutch supermarket and other European supermarkets issued a tender for the first time in 2005 (and again in 2006) to which both Dutch and foreign producers subscribed. For examples of the increasing interest of buyers in cross-border purchasing, see points 97 *et seq.*

94. In addition, attention must once again be drawn to the fact that as a result of the new common organisation of the sugar market, sugar producers are compelled to sell more of their sugar within Europe (see point 56). This applies not only to industrial sugar, but also to sugar for consumption. On the industrial market, a clear trend towards internationalisation is already discernible. There is no reason why this trend should not occur on the market for sugar for consumption. Sugar is a relatively homogenous product. There are no tariff restrictions and transport costs do not play a restrictive role. It appears from the NMA's research that the prices of the parties and foreign competitors are comparable. The Board subscribes to the statement by the parties that the development on the market for sugar for consumption has lagged behind that of the market for industrial sugar due to the limited importance of sugar for consumption to both producers and buyers. In the case of producers, sugar for consumption accounts for only 20% of their total sales. In the case of supermarkets, although sugar is a 'must stock' product, it represents a very small part of their total sales (< 1%). The effort which they take to purchase sugar in comparison to other products is also relatively low. It is plausible that producers first wish to gain experience in selling the bulk product (industrial granulated sugar) in other countries. There is no reason why they should not start selling sugar for consumption in other countries, once this experience has been obtained.

95. The definition of the relevant market in terms of competition law is based on the SSNIP test,⁵⁹ if this is possible and feasible. The NMa has examined to what extent a permanent increase in the prices of the Dutch producer(s) would result in an increase in competitive pressure from foreign producers. Three foreign competitors have stated in answer to questions from the NMa that they would supply sugar for consumption to Dutch buyers if the parties were to increase their prices permanently by 5-10%. A foreign producer stated that it regularly changes its sales area. It determines its sales area on the basis of the most favourable prices. If prices in the Netherlands are relatively favourable compared to other countries it is therefore plausible that this producer will start selling sugar for consumption on the Dutch market. Seven of the eleven Dutch buyers of sugar for consumption questioned on this point indicated that they would start purchasing (part of) their sugar for consumption in other countries if the parties were to increase their prices permanently or in any event would consider the opportunities for doing so (in this regard, see also point 97 *et seq.*). It follows from the above that it is plausible that cross-border trade flows will increase in the event of a permanent increase in the parties' prices.

Conclusion

96. The Board concludes that competitive pressure has increased considerably in recent years. There is an increase in exports of sugar for consumption from the Netherlands to other EU Member States. Import also occurs into the Netherlands from other Member States. Although the quantities are still small, it emerged from the NMa's research that it is plausible that exports and imports of sugar for consumption will increase. This increase is certainly plausible if the parties' prices increase permanently by 5-10%.

c. Role of buyers

97. On the market for sugar for consumption, foreign producers exert competitive pressure because buyers can compare prices. This happens in two ways: firstly, by requesting offers from foreign producers and, secondly, by comparing prices within the international group of which the Dutch company is a part.

98. It appears from the NMa's research that buyers of sugar for consumption already request offers from foreign producers. Numerous foreign competitors have responded to these requests for offers. As a result, the buyers are able to compare the prices of the various foreign suppliers with those of the parties. This exerts pressure on the parties to ensure that their prices are competitive.

99. The second way in which buyers can compare prices is to examine the prices which sister and parent companies pay for sugar for consumption in other EU countries. Various

⁵⁹ See footnote 35.

supermarkets have stated that they do this and that they (will) purchase from sister companies or their parent company if this is more advantageous. One supermarket already purchases some of its sugar products from its parent company. A different supermarket does this for other products and will also examine the opportunities in relation to sugar due to the new common organisation of the sugar market. The fact that the buyers compare prices in the manner described above does not make it plausible that the parties will be able to increase their prices permanently by 5-10% after the merger.

100. It appears from research carried out by the NMa that several buyers on the market for sugar for consumption purchase through an (international) purchasing group. As appears from point 93, these buyers receive offers as a result from foreign producers. They are therefore in a position to compare prices within Europe. With regard to purchasing by purchasing groups, Ahold stated that "the more the product has the character of a bulk product, the greater the likelihood that we will purchase it through AMS, as in the case of sugar, which really is the same throughout Europe".⁶⁰ It can be concluded together with the parties that as a result of these (international) purchasing groups, pressure is brought to bear on the parties to ensure that their prices are competitive.

Possible restrictions

101. It appears from the NMa's research that only a limited quantity of sugar for consumption is purchased in other countries. This is mainly kilogram packets of sugar and sugar cubes. These products, granulated sugar and sugar cubes, comprise [80-90]% of sales on the market for sugar for consumption. The remainder consists of special sugars, of which castor sugar accounts for approximately [...]. Buyers give two reasons for the limited quantity of imports. Firstly, they state that the prices of foreign sugar producers and the parties do not differ much. The second reason which buyers give is the fact that certain special sugars are apparently difficult to obtain in other countries. Splitting the package (acquiring granulated sugar from another country and purchasing special sugars from the parties) would also not be interesting financially. Any advantage which could be obtained in another country due to a lower price for granulated sugar does not outweigh the additional cost of special sugars, according to these buyers.⁶¹ The merger would therefore supposedly result in some groups of buyers becoming dependent on the parties.

102. It emerges from the NMa's research that the parties' prices for sugar for consumption differ little from those of foreign competitors. The following comments may be made with regard to the obtainability of special sugars in other countries and the purchase of a package.

⁶⁰ See *FoodPersonality*, November 2006, p. 28.

⁶¹ This relates to the discounts/bonuses obtained for the total volume of sugar purchased. One buyer of sugar for consumption also recently stated that the discount structure used has been changed. For this reason, it is no longer attractive to this buyer to purchase special sugars as part of a single package.

103. It emerged from the NMa's research that buyers are sometimes unfamiliar with the possibilities for purchasing special sugars, such as castor sugar, in other countries. This lack of familiarity is partly due to the fact that buyers have not yet researched the opportunities.

104. Foreign sugar producers stated in answer to questions from the NMa that they (can) produce all the special sugars which are purchased in the Netherlands (see also point 78).⁶² One of the producers stated that it wished to expand the sale of sugar for consumption and, in particular, special sugars on the European market due to the higher added value of these products. In addition, the parties do not produce all the special sugars themselves, but partly purchase these from foreign producers. Sales of special sugars therefore already occur on the Dutch market through the parties. This relates to icing sugar and jam sugar. Foreign competitors also produce products similar to castor sugar.⁶³ Depending on the volume and the price, foreign producers, as some of them indicated, can also produce castor sugar according to Dutch specifications. On the basis of the above research results, it must be concluded that, save one, all the special sugars are directly obtainable from other countries and are suitable for sale on the Dutch market.

105. In addition, it appears that the discounts which the parties give buyers, are volume discounts and not loyalty discounts. Finally, foreign producers stated that they, grant (volume) discounts to buyers, as do the parties. On the basis of the above, it must be concluded that the buyers have sufficient alternatives.

Conclusion

106. The Board concludes that price comparisons by buyers exert competitive pressure. At the same time, the fact that buyers compare prices makes it probable that buyers will increasingly purchase sugar for consumption from foreign sugar producers in the case of a permanent price increase of 5-10% by the parties in the Netherlands. The buyers have sufficient opportunities to purchase sugar for consumption in other countries.

d. Conclusion in relation to sugar for consumption

⁶² In the case of castor sugar, in particular, whether it is profitable for a buyer to have this specific product produced only for this buyer depends particularly on the volume requested by the buyer. Several buyers stated that they would not perhaps purchase special sugars in other countries in the short term, but possibly would do so in the medium term, provided the volumes to be purchased are large enough for the foreign sugar producer. Buyers can combine their volumes through a purchasing group and by doing so improve their negotiating position.

⁶³ For instance, products such as *Vergeoise*, *Cassonade*, soft sugar or *Brauner Zucker*. In addition, several of these products are not a perfect substitute for Dutch castor sugar in all cases.

107. The Board concludes that the market for sugar for consumption can no longer be defined as a national market. The Board is of the opinion that sugar for consumption can be transported profitably in the event of a permanent price increase of 5% in any event up to a maximum distance of 450 kilometres (or up to a maximum of 220 kilometres in the case of Germany).

C. Consequences of the merger

108. Foreign competitors have (large) production locations situated in the vicinity of the parties. In the discussion below, the joint market share of the parties will be approached in two ways.

Method 1

109. To calculate the parties' joint market shares within the relevant geographical market defined in points 82 and 107, the following method was used. The locations of the sugar producers based in Belgium and France were included in so far as these locations fall within a radius of 300 kilometres around the parties' production locations. In the case of sugar producers in Germany, circles with a radius of 220 kilometres were assumed.⁶⁴ If a production location of a competitor falls within the circle, the sugar production of this location is included in full. The sugar production calculated is equated with the production capacity corrected for the production quota in the following way. The production capacity is equated with the processing capacity in tonnes of sugar beet processed per day.⁶⁵ The sugar production is then calculated by dividing the production quota of a sugar producer by the sugar producer's various production locations in proportion to the available production capacity.

110. The table below provides an estimate⁶⁶ of the market shares of the parties, assuming a circle with a radius of 300 kilometres (and 220 kilometres for production locations in Germany). The above-mentioned joint market shares relate to both the market for industrial sugar and the market for sugar for consumption. The parties sell approximately [80-90]% of the sugar which they produce as industrial sugar and [10-20]% as sugar for consumption. Evidence emerges from

⁶⁴ In Bundeskartellamt, "*Beschluss in dem Verwaltungsverfahren Pfeifer & Langen KB und Zuckerfabrik Jülich*," AG, 3 August 2006) this 220 kilometre radius is assumed (see point 60). The data on transport costs relate to transport over land. It appears from the data provided by the parties that the transport costs to the United Kingdom are generally higher than transport on the Continent. In an earlier decision, the Commission reached the conclusion that transport by sea incurs additional costs. For this reason, in its decision of 10 January 2002 in Case COMP/M.2176 – *K+S/Solvay/M* it defines the United Kingdom and Ireland as a separate geographical market.

⁶⁵ Source: *Sugar Economy Europe 2006*, Verlag Bartens.

⁶⁶ This is an estimate because it cannot be concluded with certainty that the producers actually utilise all the processing capacity.

the NMa's research which shows that this ratio between industrial sugar and sugar for consumption is indicative for other European sugar producers. In addition, it should be noted that the distance which sugar for consumption can profitably be transported is greater than 300 kilometres or, alternatively, 220 kilometres (see point 85). However, there is no reason to present the market shares on the market for sugar for consumption separately, since the joint market shares of the parties are low in the case of circles with a radius of 300 kilometres or, alternatively, 220 kilometres.

Table 1: Market shares on the basis of circles with a radius of 300/ 220 kilometres

	Calculated (in tonnes of sugar production)	Market share (%)
Cosun/ CSM	864,561	20.4
Südzucker	1,051,455	24.9
Tereos	1,060,912	25.1
Pfeifer & Langen	560,318	13.3
Iscal	265,330	6.3
Sucre Union	228,078	5.4
SVI	156,242	3.7
Other	41,304	1.0
Total	4,228,200	100

111. On the basis of the method applied above, the parties will therefore realise a joint market share of approximately 20%. This joint market share is not a reason to assume that the present merger will result in the emergence of a dominant position or the strengthening of a dominant position. In addition, competitive pressure is also exerted on the parties by sugar producers other than those referred to in Table 1). For instance, although three large sugar producers, namely Danisco, Nordzucker and Tate & Lyle, are not included in the calculation of the joint market share, these players are referred to by various buyers as possible suppliers of sugar.

112. in addition, many competitors based within the above-mentioned circles are larger than the parties if their share of the total European quota is considered. From information obtained from Tereos,⁶⁷ it appears that Südzucker, of which the Belgian company Tienen is a subsidiary, controls approximately 24% of the total European quota; Tereos and Nordzucker both have approximately 9%; Pfeifer & Langen have approximately 6% and Cosun and CSM together have approximately 5%. After the merger, the four foreign competitors mentioned will therefore have a larger share of the total European quota than the parties. As a result, they will be able to take advantage more flexibly of market opportunities and the possibilities which markets offer.

⁶⁷ Annual Report 2004-2005, April 2006.

Method 2

113. It is possible to calculate the market share of the parties by means of an alternative method. In the NCD-Fernhout⁶⁸ case, the size of the market was determined on the basis of overlapping sales areas based on distances in a straight line.⁶⁹ Calculated in this way, market shares are determined which are comparable to the market shares calculated in Table 1. The parties realise a joint market share of approximately 25%. The market share of Südzucker therefore amounts to approximately 23%, that of Tereos to approximately 19% and that of Nordzucker to approximately 7%.

Market shares on the basis of a larger geographical market

114. If a radius of more than 300 kilometres or, alternatively, 220 kilometres is assumed, the joint market shares of the parties are lower, since various other foreign sugar producers (such as Danisco and Nordzucker) will be included in the calculation of the joint market share. This applies both to the market for industrial sugar and to the market for sugar for consumption.

Conclusion

115. In the light of the parties' joint market share, there is no reason to assume that a dominant position will emerge or be strengthened with the result that *de facto* competition on the Dutch market or a part thereof will be appreciably restricted.

⁶⁸ See the decision of 20 July 2001 in Case 2427/ NCD – Fernhout.

⁶⁹ Circles of 300 kilometres and 220 kilometres are drawn around the production locations of the various sugar producers, as in the case of the method described in point 109. The extent to which these circles overlap is then determined. For every location, this overlap is the quotient of the surface of the overlapping part of the circle of the competing production locations and the total surface of the circle of the merged producer. The quotient calculated in this way is then multiplied by the production capacity of the respective location, corrected for the production quota.

VII. CONCLUSION

116. On the above grounds, the Board of Directors of the Netherlands Competition Authority has reached the conclusion that the operation to which the application for a licence relates falls within the scope of merger control governed by chapter 5 of the Competition Act. The Board of Directors is of the opinion that the proposed merger will not result in the emergence of a dominant position or the strengthening of a dominant position, with the result that *de facto* competition on the Dutch market or a part thereof will be appreciably restricted.

117. In the light of the above, the Board of Directors of the Netherlands Competition Authority gives notice that a licence is granted for the merger to which the application relates.

Date: 20 April 2007

The Board of Directors of the Netherlands Competition Authority,
on its behalf,

(Signed) P. Kalbfleisch
Chairman of the Board of Directors

Persons whose interests are directly affected by this decision may file a substantiated judicial appeal against this decision with the Court of Rotterdam, Administrative Law Section, P.O. Box 50951, 3007BM, Rotterdam within six weeks after the announcement of this decision.