INFORMAL TRANSLATION

Netherlands Competition Authority

DECISION

Decision of the Board of the Netherlands Competition Authority, as referred to in section 37(1) of the Competition Act

Number: 5883/147
Case: Case 5883/CIMC - Burg

I. NOTIFICATION

1. On 8 December 2006, the Board of the Netherlands Competition Authority received notification of a proposed concentration in terms of section 34 of the Competition Act. In this notification, China International Marine Containers (Group) CO.Ltd. gave notice of its intention to obtain control, in terms of section 27 (b) of the Competition Act, of Burg Industries B.V. Notice of the notification was given in the *Netherlands Government Gazette (Staatscourant)*, No. 244 of 14 December 2006. Following the notice in the *Netherlands Government Gazette*, no opinions were received from third parties. As a standard official procedure, questions were put to various market parties.

II. PARTIES

2. China International Marine Containers (Group) CO. Ltd. (hereinafter "CIMC") is a company established under Chinese law. None of its shareholders have exclusive or joint control of CIMC. CIMC is active in the area of (i) the production of marine containers (standard containers for dry freight, special containers for dry freight, reefer containers[1] and standard ISO tank containers), (ii) the production of road transport equipment (in particular trailers), (iii) tanks for the storage and transportation of LNG[2] and (iv) airport support equipment.

3. Burg Industries B.V. is a private limited liability company established in accordance with the law of the Netherlands under Dutch law. Burg Industries B.V. is active in the area of (i) the production of standard ISO tank containers and special tank containers, (ii) the production of road transport equipment (in particular, trailers), (iii) the design and production of storage and process tanks and associated apparatus and (iv) related services. Burg Industries B.V. is managed through personal holdings, which are managed by two natural persons. These are Mr

[1] 'Reefer' containers are containers for transporting refrigerated and deep-frozen goods.

[2] LNG is 'Liquid Natural Gas'.

C.M.J. van der Burg, through Buhold B.V. (hereinafter "Buhold")[3] and Mr P.G.M. van der Burg, through PGM Holding B.V. (hereinafter "PGM")[4]. Buhold and PGM hold 89% and 11% respectively of the shares in Burg Industries B.V.

III. NOTIFIED OPERATION

4. The notified operation relates to a transaction whereby CIMC will acquire control of Burg Industries B.V., which will be preceded by a carve-out, whereby Burg Industries B.V. will sell the subsidiary, Burg Intermodal Holding B.V. (hereinafter "Burg Intermodal"), under which all the tank container activities fall, to Buhold. This transaction prior to the concentration has been set out in the Share Purchase Agreement, signed on 15 March 2007, and in the Disentanglement Schedule of 13 February 2007. The parties state that the carve-out is implemented on 15 March 2007. In the discussion below, references to Burg Industries refer to Burg Industries to the exclusion of Burg Intermodal.

5. The notified transaction relates to the acquisition of exclusive control by CIMC of the "new" Burg Industries. For this purpose, a new undertaking, under the name of "Newco", shall be set up over which CIMC will acquire exclusive control through an 80% shareholding. PGM will hold the remaining 20% of the shares in Newco. Newco will acquire 100% of the shares in Burg Industries. Burg Industries owns the subsidiaries Beheermaatschappij Burg B.V. (road transport equipment) and Holvrieka Holding B.V. (storage and process tanks and associated apparatus). Beheermaatschappij Burg B.V. owns, amongst others, Burg Service B.V. (hereinafter "Burg Service") as a subsidiary. This transaction is set out in the Term Sheet of 16 October 2006.

IV. APPLICABILITY OF MERGER CONTROL

6. The notified operation is a concentration in terms of section 27(b) of the Competition Act. As a result of the transaction, described above under points 4 and 5, CIMC will acquire exclusive control of Burg Industries.

7. The undertakings concerned are CIMC and Burg Industries.

8. The turnover data provided in the notification show that the notified concentration falls within the scope of concentration control governed by chapter 5 of the Competition Act.

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[3] Mr C.M.J. van der Burg has exclusive control of Buhold.

[4] Mr P.G.M. van der Burg has exclusive control of PGM.

V. ASSESSMENT

A. RELEVANT MARKETS

Relevant product markets

9. The activities of CIMC and Burg Industries do not overlap in the area of tank containers. For the assessment of the concentration in question it is nevertheless important to discuss the activities of the parties in the area of tank containers. The parties are both active in the area of road transport equipment.

1. Tank containers

10. Tank containers are cylindrical tanks which are placed in a frame and are used to transport liquids or gases in bulk. Tank containers may differ depending on their capacity, size, the materials used, special equipment and other characteristics.

Opinions of the parties

11. In the notification, the parties do not explicitly discuss the product market to which tank containers belong, but they refer in this regard to the procedure before the European Commission in case COMP/M.4009 – *CIMC/Burg*.[5]

12. In the above-mentioned European procedure, the parties indicated that the market for tank containers must be subdivided into two segments: standard ISO tank containers and special tank containers.

1.a. Standard ISO tank containers

13. The parties define standard ISO tank containers as tank containers constructed according to the 20 foot ISO standard.[6] They have a capacity ranging from 15,000 to 27,000 litres. Since the external dimensions are exactly the same as box containers for dry freight,

[5] This procedure involved the full acquisition of the "former" Burg Industries B.V. by CIMC. There was therefore an overlap of the activities of CIMC and Burg in the area of tank containers. In the first phase decision of 13 March 2006 in this case, the European Commission concluded that the concentration gave rise to serious doubts with regard to whether it would be compatible with the common market and the EEA agreement. In the second phase before the European Commission, the Parties withdrew their notification. In relation to the present concentration of which the NMa was notified, the parties have stated that the activities of the "former" Burg Industries in the area of tank containers have been excluded from the transaction to avoid in advance the possible competition concerns which the European Commission identified in its decision of 13 March 2006.

[6] This is 6,058 mm long, 2,438 mm wide and 2,591 mm high.

standard ISO tank containers can easily be stacked and transported on container ships. For this reason, standard ISO tank containers are used mainly for deep sea transport. In the light of the characteristics described above, standard ISO tank containers are fully standardised products. Buyers of standard ISO tank containers are mainly lease companies[7] and logistic operators.[8] Standard ISO tank containers are mainly used for the transportation of general liquid freight.

14. The parties are of the opinion that general liquid freight can be transported not only in standard ISO tank containers, but also in three alternative types of transportation which, as in the case of standard ISO tank containers, fit within the standard dimensions of box containers for dry freight. These three types of transport are: i) flexi-bags or flexi-tanks,[9] (ii) Intermediate Bulk Containers (hereinafter "IBCs"),[10] and (iii) steel or plastic drums.[11] The parties therefore argue that standard ISO tank containers do not constitute a separate product market, but are part of a larger product market which may be defined as a market for new modes of transporting general liquid freight for marine use.

European Commission

15. In its decision of 13 March 2006 in case COMP/M.4009 -*CIMC/Burg,* the European Commission concluded that there exists a separate market for standard ISO tank containers as well as markets for special tank containers. The European Commission concluded on the basis of its market investigation that the definition of the product market, as proposed by the parties, namely a market for new modes of transporting general liquid freight for marine use, which also includes flexi-bags, IBCs and drums, in addition to standard ISO tank containers, should be rejected.[12]

16. During the first phase, the European Commission carried out extensive research amongst the buyers of tank containers. It followed from this market investigation that the vast majority of buyers are of the opinion that no or only very little substitution is possible between

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[7] Lease companies have their own fleet of tank containers and lease or rent these to logistic operators and, to a limited extent, to producers of liquids which are to be transported.

[8] Logistic operators buy, lease or rent tank containers and organise transport for their customers, particularly chemical and pharmaceutical companies, but also producers of foodstuffs or gases.

[9] These are flexible inflatable bags with a capacity of 10,000 to 24,000 litres.

[10] These are cube-shaped containers with a steel frame and a capacity of 800 to 1,200 litres

[11] Steel or plastic drums are used for the transportation and storage of non-bulk goods. They have a capacity of between 210 and 220 litres.

[12] See the decision of the European Commission of 13 March 2006 in case COMP/M.4009 - *CIMC/Burg*, points 18 and 29.

standard ISO tank containers, on the one hand, and other means of transportation, on the other hand, for the transportation of liquids.[13]

17. The two main categories of buyers of tank containers are lease companies and logistic operators. In the case of lease companies, there are hardly any possible substitutes for standard ISO tank containers. It should be noted that standard ISO tank containers are durable goods with an economic life of 15 to 25 years and are relatively expensive to purchase (approximately EUR 20,000). Flexi-bags, IBCs and drums, on the other hand, are much cheaper and have a shorter economic life. Flexi-bags and drums, for instance, are often used for a single transport. The European Commission therefore concludes that it is self-evident that lease companies can only make use of standard ISO tank containers. Logistic operators, however, usually use a full range of modes of transportation. Depending on the goods which have to be transported, they may opt for the most advantageous mode of transportation. However, they also indicate that standard ISO tank containers are the most advantageous method of transportation for the transport of a large group of liquids.[14]

18. On the basis of its market investigation, the European Commission concluded that flexi-bags may be regarded as a reliable alternative for non-dangerous liquids (for instance, wine, foodstuffs). Standard ISO tank containers, however, are mainly used for dangerous liquids, for which flexi-bags are not suitable at all. Flexi-bags also cannot be used for goods which have to be heated prior to off-loading (for instance, viscose or thick liquids). In addition, flexi-bags incur greater risk of leakage than tank containers, as a result of which flexi-bags are accepted less often by buyers for safety reasons. [15]

19. The European Commission therefore reached the conclusion that the substitutability of standard ISO tank containers and all other modes of transportation is extremely limited in the case of the transportation of liquids. Logistic operators have to have a certain quantity of standard ISO tank containers in their fleet. If the price of standard ISO tank containers increases, logistic operators cannot easily reduce the number of standard ISO tank containers which they require for their fleet.[16]

[13] *Ibid.*, point 25.

[14] *Ibid.*, points 19 up to and including 23.

[15] *Ibid.*, point 24.

[16] *Ibid.*, point 25.

1.b. Special tank containers

20. According to the parties, the special tank containers comprise two main categories of containers, namely (i) oversize tank containers,[17] which cannot be transported on a tank container ship and are usually used for transportation within Europe by road, rail, inland shipping or for short sea crossings and (ii) specialised tank containers[18] with special characteristics, designed especially for the transportation of liquids which require special treatment during transportation.

21. According to the parties, special tank containers are always tailor-made, that is manufactured to order. Special tank containers are almost always necessary to transport very sensitive liquid freight.[19]

22. The parties stated that there are hardly any substitutes for special tank containers. In addition, the parties stated that the production of special tank containers requires more know-how than the production of standard ISO tank containers. For this reason, it is easier for new players to produce standard ISO tank containers than to produce special tank containers and it is more difficult to switch from the production of standard ISO tank containers to the production of special tank containers than vice versa. Special tank containers are more expensive than standard ISO tank containers because a special tank container has to meet the customer's specific requirements, according to the parties.

European Commission

23. On the basis of its market investigation, the European Commission has concluded that standard ISO tank containers and special tank containers are separate product markets for the following reasons: [20]

- special tank containers not only have additional, but also totally different characteristics compared to standard ISO tank containers; [21]

[17] The maximum dimensions of oversized special tank containers are: 9,125 mm long, 2,600 mm wide and en 2,700 mm high. The capacity varies from 23,000 litres to 37,000 litres.

[18] In this regard, it should be noted that tank containers of this type are regarded as special tank containers, even though they may usually have the same dimensions as a 20 foot standard ISO tank container.

[19] Such as liquid and solid gases, bulk materials, such as powders or granulates, foodstuffs which are sensitive to high temperatures, chemical products and corrosive liquids which have to be transported in containers with a specific interior coating or with special refrigeration or heating.

[20] See the decision of the European Commission in case COMP/M.4009 - *CIMC/Burg*, *op. cit.*, points 29 up to and including 33.

- special tank containers are significantly more expensive than standard ISO tank containers; due to the significant price difference, special tank containers are only purchased for goods for which they are developed, although in principle they can also be used for the transportation of other goods; and

- special tank containers are tailor-made so that they meet the customer's specific requirements. For this reason they are produced in small quantities.

24. On the basis of its market investigation in the first phase, the European Commission concludes that four separate markets can be distinguished for special tank containers, namely the markets for (i) oversized (swap) tank containers,[22] (ii) gas tank containers,[23] (iii) cryogenic tank containers[24] and (iv) specialised ISO tank containers.[25]

25. The European Commission states that although buyers of special tank containers regard each special tank container as unique, there is a certain degree of consensus amongst producers of tank containers (including the parties) with regard to the distinction between the above-mentioned four main categories of special tank containers. In this regard, the European Commission also states that within each of the above-mentioned four main categories, there is a considerable degree of supply substitution.[26] This supply substitution, however, does not apply to substitution between the four main categories, according to the European Commission.[27]

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[21] Special tank containers, for instance, may have non-ISO dimensions, electrical heating, additional steam-heating components, special insulation or refrigeration elements, or additional or special valves, and may be made of specific materials such as carbon steel for gas tank containers.

[22] Oversized (swap) tank containers are tank containers of which the external dimensions do not comply with the ISO standard. Oversized tank containers are built to a wide variety of dimensions and are used predominantly on intra-European routes.

[23] Gas tank containers are built for the transportation of pressurised gases and are made of carbon steel instead of stainless steel.

[24] Cryogenic tank containers are suitable for cargoes that need to be transported at very low temperatures. Their production requires highly sophisticated technology and equipment.

[25] Specialised ISO tank containers are fitted with extra features including heating and cooling systems, special insulation and additional types of baffles.

[26] In relation to this it is also the case that special tank containers within each of the four main categories cannot be substituted by buyers, according to the European Commission.

[27] See the decision of the European Commission in case COMP/M.4009 - *CIMC/Burg*, *op. cit.*, points 34 up to and including 37.

1.c. Assessment

26. The NMa's market investigation in the present case comprises, on the one hand, its own market investigation, in which a supplier and buyers were questioned, and, on the other hand, (some of) the responses of the market parties within the framework of the market investigation carried out by the European Commission during the first and second phase in the case COMP/M.4009 – *CIMC/Burg*.

Tank containers, flexi-bags, drums and IBCs

27. It emerges from the responses of the market parties that due to security, quality, reliability and flexibility aspects and regulations with regard to the transportation of certain types of freight, there are no substitutes for tank containers.

28. Market parties state that the tank containers have considerable cargo capacity, that is, they fill up the space between small volumes (such as drums and IBCs) and large volumes (such as parcel tankers[28]). This considerable cargo capacity means that tank containers are suitable for intermodal transport (in other words, that they are suitable for transportation by ship, rail or truck). In other words, even if substitutes for tank containers were to exist theoretically and technically, there are no or hardly any substitutes from a logistical and economic point of view.

29. Market parties argue that in some cases flexi-bags are an alternative for the transportation of liquids and foodstuffs which are not dangerous and are not sensitive to temperature. However, flexi-bags can under no circumstances be used for dangerous liquids, gases, or chemicals, nor for goods which have to be heated by steam components or electricity. In addition, flexi-bags are much more susceptible to leakages and are therefore less safe. Finally, flexi-bags have a lower cargo capacity. As a result, space is lost between, for instance, containers and drums.

30. It appears from the market investigation that drums are also not an alternative for tank containers. Firstly, larger volumes can be transported in tank containers than in drums which, in turn, are placed in a container. They have a smaller cargo capacity (loss of space). Furthermore, drums are not suitable for transporting goods under pressure and are less safe than tank containers.

31. Some market parties stated that IBCs are used more often for storage than for transportation. It also emerged unanimously from the market investigation that IBCs are only suitable for smaller volumes, which incurs considerable handling and logistical costs.

[28] Parcel tankers are deep sea ships equipped with various compartments which can be used to transport various types and quantities of liquids without danger of contamination.

Standard ISO tank containers versus special tank containers

32. The market investigation further confirmed that standard ISO tank containers and special tank containers cannot be substituted. Market parties stated that although the same goods could be transported in principle in special tank containers and in standard ISO tank containers, in practice this will never happen. A special tank container, after all, is much more expensive than a standard ISO tank container. As a result, it is not worthwhile using a special tank container for goods which can also be transported in a standard ISO tank container.

Conclusion

33. In the light of the above, it can be concluded that there is a separate market for standard ISO tank containers. In line with the European Commission, a distinction between four markets for special tank containers may be assumed, namely the markets for(i) oversize (swap) tank containers, (ii) gas tank containers, (iii) cryogenic tank containers and (iv) specialised ISO tank containers.

2. Road transport equipment

34. Both CIMC and Burg Industries produce vehicles for road transportation of goods. It depends on the type of product which vehicle is most suited for transporting it.

35. According to CIMC, a rough distinction can be made within road transport equipment between trailers and fixed bodies. The distinction between trailers and fixed bodies is based on the fact that fixed bodies are mounted on the chassis of a truck and cannot be decoupled, while trailers can always be coupled to and decoupled from a truck.

36. Within the category of trailers, the following possible markets can be distinguished: (a) tank trailers,[29] bulk tipping trailers and hoppers[30], (b) curtainsider trailers[31], (c) closed trailers without temperature control,[32] (d) closed trailers with temperature control,[33] (e) special-purpose trailers, [34] and (f) tipping trailers.[35]

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[29] Tank trailers are used for the transportation of liquids.

[30] Bulk tipping trailers and hoppers are used for granulates and powders.

[31] Curtainsider trailers are suitable for packaged goods.

[32] Closed trailers without temperature control are used for packaged goods.

[33] Closed trailers with temperature control are suitable for the transportation of, for instance, flowers, meat, fruit, fish and dairy products.

[34] Special-purpose trailers are suitable, for instance, for the transportation of containers which may have various contents.

[35] Tipping trailers are used for building materials and grain.

37. Within the category of fixed bodies, the following possible markets can be distinguished: (a) tank bodies fixed on a truck, (b) curtainsider bodies fixed on a truck, (c) enclosed bodies without temperature control fixed on a truck, (d) enclosed bodies with temperature control fixed on a truck, (e) special-purpose bodies fixed on a truck, and (f) tipper bodies fixed on a truck.[36]

38. The parties, however, are of the opinion that, despite the differences between all the categories which could possibly be distinguished, there is a single product market for road transport equipment. They argue that it is possible to produce a different category of road transport equipment without incurring considerable additional cost. According to them, there is a high level of supply substitution, as a result of which the various categories must be assigned to the same product market.

Conclusion

39. For the assessment of this case, it is not necessary to decide whether there is a possible overall market for road transport equipment or whether a distinction must be made between trailers and fixed bodies. It is also not necessary to decide whether a distinction should be made between trailers and fixed bodies on the basis of the possible markets referred to in points 36 and 37, since the material assessment will not be affected by this (see points 140 and 141).

Relevant geographical markets

1. Tank containers

40. In line with earlier decisions[37] by the European Commission in relation to marine transport, the parties argue that the market for new modes of transporting general liquid freight for marine transport is a global market.

41. On the basis of its market investigation in case COMP/M.4009 – *CIMC/Burg* the European Commission concluded that the market for the various types of tank containers is a worldwide market. The production of standard ISO tank containers occurs in China and South Africa (and a minimal quantity in Europe), while special tank containers are produced in South Africa and Europe. Demand is concentrated in Europe and, to a lesser extent, in North America. Although the transport costs may be significant (particularly when the tank container travels empty from the factory to the buyer’s location), the European Commission's market investigation

[36] The types of fixed bodies referred to in this point under (a) up to and including (f) are used in the same way as referred to in the footnotes corresponding to (a) up to and including (f) of the previous point.

[37] See the decision of the European Commission of 28 April 1998 in case IV/M.1020 - *GE Capital/SEA Containers*, point 16, and the decision of the European Commission of 4 August 2000 in case COMP/M.2023 - *Brambels/Ermewa/JV*, point 18.

showed that almost all buyers procure globally. This even applies to SWAP tank containers, which are used almost exclusively in Europe.

42. As in the case of the European Commission's decision [38] in case COMP/M.4009 – *CIMC/Burg,* a worldwide market for standard ISO tank containers may be assumed in the present case. This also applies to the markets for special tank containers.

2. Road transport equipment

43. In the area of road transport equipment, CIMC is active in China and the United States. Burg Industries is only active in Europe in this area. With regard to road transport equipment, the parties distinguish between three separate geographical markets: (i) Chinese, (ii) American, and (iii) European markets.

44. According to the parties, legislation and regulations in Europe differ considerably from legislation and regulations in China and the United States. This relates, in particular, to matters such as the legally permissible weight, the distance between the axles and the load on the axles. As a result of these differences, the road transport equipment in these areas is different and may not be used outside the respective area. As a result, it is necessary to assume separate geographical markets, according to the parties.

45. The parties state that the road transport equipment produced in Europe is generally more advanced than that produced in China. This also applies to the production techniques, design, registration conditions and the materials used in Europe.

46. According to the parties, the costs incurred to transport road transport equipment from the Far East to Western Europe are relatively high. This is supposedly the most important reason why non-European producers do not compete with European producers. The cost savings achieved by producing a trailer intended for the European market in China do not outweigh the additional transport costs, according to the parties.

47. In addition, the parties argue that if the transport costs were not restrictive, the additional time taken to deliver a trailer produced in China would mean that a buyer would not be quick to choose this option.

[38] See the decision of the European Commission in case COMP/M.4009 - *CIMC/Burg*, *op. cit*., points 38 up to and including 41.

Conclusion

48. In this case, it is not necessary to decide whether the market for road transport equipment either includes China, the United States and Europe or comprises a separate Chinese, American and European market, or, alternatively, comprises a combination of these geographical areas, since the material assessment is not affected by this (see points 140 and 141).

B. CONSEQUENCES OF THE CONCENTRATION

1. Tank containers

1.a. Standard ISO tank containers

49. The notified transaction relates to the acquisition of Burg Industries, excluding the activities of Burg Industries in the area of standard ISO tank containers and special tank containers. As was mentioned above, the activities of Burg Industries in the area of tank containers fall under Burg Intermodal and as a result of the carve-out Burg Intermodal is controlled entirely by Buhold.

50. There is therefore no horizontal overlap in the activities of the parties on the market for standard ISO tank containers. Burg industries is no longer active on the market for standard ISO tank containers as a result of the carve-out.

Burg Service

51. As was stated in point 5, Burg Service is a subsidiary of Burg Industries. Before and after the proposed concentration, Burg Service (will) provide(d) services to Burg Intermodal in relation to standard ISO tank containers and special tank containers.[39]

52. Burg Service has branches in the towns of Hendrik Ido Ambacht, Barneveld and Moerdijk. All the branches offer service, repairs and maintenance for both road transport equipment and tank containers. In the area of tank containers, Burg Service provides both services to third parties in relation to used tank containers and services to Burg Intermodal in the area of new tank containers. These services in the area of new tank containers provided to Burg Intermodal relate largely to special tank containers. An important reason for this is that standard

[39] These services relate to standard ISO tank containers and special tank containers originating from Welfit Oddy in South Africa. Welfit Oddy falls under Burg Intermodal. The parties stated that a different part of Burg Intermodal, which only produces special tank containers, namely WEW GmBH (hereinafter "WEW"), has no need of the services of Burg Service, because it is based in Germany and it delivers special tank containers ex works or on a different basis, but does not require Burg Service's depot for any of these methods of delivery.

ISO tank containers are usually delivered ex works (from the factory) by Burg Intermodal and special tank containers are delivered from the depot.

53. Other producers of tank containers do not purchase services in the area of new tank containers from Burg Service. According to the parties, the other producers of standard ISO tank containers, like Burg Intermodal, deliver almost exclusively ex works. In the case of special tank containers, the other producers are usually based in Europe and deliver ex works there. As a result, the special tank containers need not be collected from the port of Rotterdam or Antwerp, they are not damaged during transportation and the finishing and adjustments to the special tank container take place in the factory. As a result of this, they do not require the services which Burg Service provides in relation to tank containers produced in South Africa, according to the parties.

54. CIMC and Burg Intermodal are the two largest suppliers on the market for standard ISO tank containers. They have market shares of [50-60]%[*] and [30-40]% respectively.

Possible creation or strengthening of a dominant position of CIMC

55. In the present case, research was carried out to establish whether Burg Intermodal depends on Burg Service (and on CIMC after the proposed concentration) as a result of the services which Burg Services provides to Burg Intermodal. Such dependence could result in reduced competitive pressure from Burg Intermodal on CIMC and, as a result, in the creation or strengthening of a dominant position of CIMC on the market for standard ISO tank containers. This would be the case if the services are of considerable importance to Burg Intermodal and there are insufficient real alternative suppliers from which Burg Intermodal can purchase such services.

Possible strengthening of an existing collective dominant position

56. In the present case, an investigation was also carried out to ascertain whether a collective dominant position (of CIMC and Burg Intermodal) could be strengthened as a result of the services which Burg Service provides to Burg Intermodal. This supply relationship, which will be continued after the proposed concentration, may strengthen a possible existing collective dominant position, since market coordination may become easier, more effective and/or more stable as a result. A collective dominant position may be strengthened if the services are of great importance to Burg Intermodal and there are insufficient real alternative suppliers for Burg Intermodal to purchase such services. In addition, prior to the takeover of Burg Industries, a

* In this public version of the decision, parts of the text have been replaced or deleted for reasons of confidentiality. Sections of the text which have been replaced or deleted are indicated by square brackets. In the case of figures or percentages, these may have been replaced by bandwidths.

collective dominant position (of CIMC and Burg Intermodal) must already exist.[40] An investigation was also carried out into this.

57. Below, the following items will be discussed: (1) the suppliers on the market for standard ISO tank containers, (2) the services which Burg Service provides to Burg Intermodal, (3) the importance of these services to Burg Intermodal in relation to standard ISO tank containers, (4) the presence or absence of alternative suppliers of services which Burg Service provides to Burg Intermodal, (5) the assessment of the market parties' opinions, (6) the possible existence of a collective dominant position in relation to CIMC and Burg Intermodal and (7) the conclusion.

1.a.1. Suppliers on the market for standard ISO tank containers

58. In 2006, CIMC, Burg Intermodal and ZZTC were active on the market for standard ISO tank containers. In 2006 they had market shares of [50-60]%, [30-40]% and [0-10]% respectively.[41] In 2002, CIMC entered the market for standard ISO tank containers on the basis of a strategic alliance with UBHI, a company which was already active in the area of tank containers. On the basis of this alliance, CIMC acquired a licence for the UBHI tank container design, as well as construction engineering support and technical training.

59. Of the present suppliers, Burg Intermodal has been active the longest in the area of standard ISO tank containers and is regarded by buyers as a producer of high-quality products.

60. ZZTC entered this market in 2003. The parties, as well as a number of buyers, stated that ZZTC had done so independently. The capacity of ZZTC, in comparison to CIMC and Burg Intermodal, is limited. A number of buyers have indicated that ZZTC is therefore not really an alternative. A number of buyers have indicated that ZZTC has difficulties meeting the required quality standards. In addition, a number of buyers stated that the tank container design used by ZZTC is outdated, or has not proved itself adequately. One buyer also stated that ZZTC does not have a proven track record yet.

61. Parties and market parties have indicated that at the end of 2006, the company Singamas entered the market. For this purpose, Singamas cooperates with Flax Field Trading, a company based in the Netherlands which has knowledge in the area of tank containers, as well as in relation to the production of these. At present, Singamas's capacity, compared to that of CIMC and Burg Intermodal, is limited. It is unclear at present whether and, if so, how successful the entry by Singamas will be.

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[40] A collective dominant position is not likely to be created as a result of the services which Burg Service provides to Burg Intermodal.

[41] The market share of ZZTC is based on the production figures for 2005. There is no reason to assume that this production increased significantly in 2006.

62. The parties have also stated that they expect other market parties to enter the market. However, it appears from the market investigation that no other concrete plans to enter the market are as yet known.

63. It emerged from the market investigation that reputation is an important factor for success on the market for standard ISO tank containers. A number of buyers stated that a proven track record is important when choosing a supplier. Quality is very important, according to a number of buyers, for one reason because the transportation of chemical products is often involved here. One buyer stated that due to the economic life of a tank container (approximately 20 years) it sometimes only emerges after some time that a tank container is of inferior or superior quality. This buyer stated that buyers rely on the track record of the supplier because the quality is not clear at first sight.

1.a.2. Services which Burg Service provides to Burg Intermodal

64. At present, the following services are provided by Burg Service to Burg Intermodal:

a. collection from the port of Rotterdam, cleaning, inspection and transfer of the tank containers to customers;[42]

b. repairing of tank containers damaged during shipping;[43]

c. the finishing of tank containers, for instance the addition of advertising, plumbing and the installation of valves and safety valves,[44] and repairs and alterations to improve lower quality and incomplete tank containers in line with customers' urgent delivery requirements; and

d. alterations or additions requested by customers after the tank container has been constructed and shipped to the Netherlands.[45]

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[42] The parties have indicated that this usually relates to regular cleaning. By way of illustration, after a marine journey the tank containers are dirty, for instance due to soot from the ship's funnels and Sahara sand.

[43] This usually relates to typical cases of minor damage during transport as a result of careless transport or rough handling in the port. In most cases, this relates to special tank containers due to their dimensions which deviate from the ISO standard.

[44] The parties have stated that, leaving aside the year in which Burg Service carried out a large assignment in relation to the installation of refrigeration units, this relates to repairing shortcomings which can no longer be carried out without missing the ship, due to the critical moment of transport from the harbour of Port Elizabeth (South Africa).

[45] This relates in particular, to attaching logos (for instance, due to a change in the company logo), the installation of accessories (such as a walking platform) or the painting of standard ISO tank containers.

65. These services therefore usually precede delivery, and are in this sense related to the delivery of a tank container to the buyers of Burg Intermodal.

1.a.3. Importance to Burg Intermodal of the services provided by Burg Service

Opinions of the parties

66. The parties have stated that Burg Intermodal also occasionally purchases one or more of the services referred to in point 64 from other companies.

67. The parties have stated that no framework contract or contracts for a certain term have been entered into between Burg Intermodal and Burg Service. Burg Service will apply tariffs which are in line with the market (as is also the case before the carve-out). In other words, Burg Service will charge Burg Intermodal the same tariffs as it charges to every other customer. Burg Intermodal is not obliged to procure services from Burg Service, according to the parties.

68. The parties have indicated that Burg Service's activities in relation to new standard ISO tank containers and special tank containers do not add significant value.

69. The parties state that Burg Intermodal, and not Burg Intermodal's customers, contract Burg Service to carry out the activities described in point 64 and maintain the actual contact with Burg Service in relation to the activities to be carried out. Burg Service has no contact with customers in this regard, except for a single contact in relation to delivery dates, in which case the customer is referred to Burg Intermodal, according to the parties.

70. The parties have indicated that only some (approximately [10-20]%) of the standard ISO tank containers which Burg Intermodal delivered from its depot in Moerdijk in 2005 underwent one of the activities other than the "standard activities", as stated in point 64(a).

71. In addition, the parties stated that the delivery of standard ISO tank containers at Burg Service's depot in Moerdijk never had the primary aim of facilitating the delivery of standard ISO tank containers by Burg Intermodal or to strengthen its commercial position. To this extent the depot is not of any commercial importance, or of little value at any rate, to Burg Intermodal – and in the future to CIMC - according to the parties.

72. In addition, the parties state that particularly in the case of standard ISO tank containers it is considerably cheaper to carry out these activities as much as possible in South Africa, due to the high cost of labour in the Netherlands. Burg Intermodal has no (economic or financial) advantage in having Burg Service carry out the above-mentioned activities, but will rather attempt to deliver finished standard ISO tank containers in South Africa.

Assessment

73. Burg Intermodal delivers the vast majority of its standard ISO tank containers ex works (from the factory in Port Elizabeth in South Africa). The parties state that all other suppliers of standard ISO tank containers and special tank containers deliver ex works. From data provided by the parties it can be deduced that [90-100]% of all standard ISO tank containers of Burg Intermodal were delivered ex works in the years 2004 up to and including 2006. The remaining percentage was delivered through Burg Service's depot in Moerdijk.

Conclusion

74. It follows from the previous point that it is not likely that Burg Service is of considerable importance to Burg Intermodal in relation to standard ISO tank containers, since Burg Intermodal only purchases the services in question from Burg Service for a very small part of the standard ISO containers which it produces.

1.a.4. Alternative suppliers of services

75. The parties state that there are sufficient alternatives for the services which Burg Service supplies at present to Burg Intermodal.

76. It appears from investigation amongst the suppliers of services for standard ISO and special tank containers that there are service providers which provide the same services as those provided by Burg Service to Burg Intermodal. Four of these market parties are based in the Netherlands and have stated that they could supply the services referred to in point 64 to Burg Intermodal without problems. A number of these market parties stated that they could not provide services relating to the cleaning of tank containers. Burg Service itself has outsourced this service.

77. All four market parties are located at the same distance from the port of Rotterdam as Burg Service in Moerdijk, where Burg Intermodal delivers the tank containers, or at a shorter distance.

78. In addition, a Belgian and a German supplier have stated that they already provide the services in question and could supply these services without any problems to Burg Intermodal. The Belgian supplier indicated that it did not offer any cleaning services and would not collect the tank containers from the port of Rotterdam.

Conclusion

79. In the light of the above, it can be concluded that that there are sufficient real alternative suppliers of the services which Burg Service provides to Burg Intermodal in the area of standard ISO tank containers.

1.a.5. Assessment of the opinions of market parties

Hoyer

80. Hoyer, a buyer of tank containers, has expressed various concerns about the proposed concentration. Hoyer has stated that it expects the present concentration to result in the creation or strengthening of a dominant position of CIMC in the area of standard ISO tank containers. Hoyer's arguments are discussed below.

(i) Strategic importance of Burg Service

81. In the opinion of Hoyer, Burg Service is of strategic importance to CIMC, as this provides access to the customers of Burg Intermodal, their relevant company information and market information.

82. Since Burg Intermodal purchases none of the services in question from Burg Service in relation to [90-100]% of the standard ISO tank containers it produces, it is not likely that access will be obtained to the customers of Burg Intermodal and their relevant business data and market information as a result of the concentration.

(ii) Know-how (of, amongst others, Mr P.G.M. van der Burg)

83. Hoyer also states that the acquisition of shares in Newco, and in relation to this the indirect acquisition of the know-how which Burg Intermodal has, will contribute to the strengthening of the single dominant position of CIMC. This know-how is obtained through the employees of Burg Industries who are transferred to Newco. Hoyer emphasises the importance of Mr P.G.M. van der Burg, who will continue to work for Burg Industries after the proposed concentration and who has very extensive knowledge of tank containers and the necessary customer contacts and contractual conditions (in relation, in particular, to European customers). In addition, according to Hoyer, Mr P.G.M. van der Burg has knowledge of all the commercial data relating to Burg Intermodal (for instance, detailed prices and cost structures).

84. Article 10.3(a) of the Share Purchase Agreement stipulates that Burg Industries B.V. (therefore including Mr P.G.M. van der Burg) will not disclose confidential information relating to Burg Intermodal for a period of two years, with the exception that the employees of the "former" Burg Industries B.V. (including Mr P.G.M. van der Burg) are entitled to make use of their personal technical know-how. This refers to the know-how in the minds of employees and which is not supported by any drawing, file, document or any other source of information which is the property of Burg Intermodal.

85. Leaving aside the previous point, it is not possible within the framework of the assessment of the present concentration to determine (i) what exact know-how Mr P.G.M. van der Burg was in relation to Burg Intermodal, and (ii) how important this know-how is. In relation to the importance of the know-how which Mr P.G.M. van der Burg allegedly has, it should be noted that it is likely that Mr C.M.J. van de Burg and other persons associated with Burg Intermodal also have this know-how so that the conclusion cannot simply be drawn from this that this will detract from the opportunities which Burg Intermodal has to compete with CIMC.

86. It is not likely that the "transfer" of the know-how of Mr P.G.M. van der Burg will result in the creation or strengthening of a dominant position of CIMC.

(iii) Financial basis

87. Hoyer also stated that the transaction will weaken the financial basis of Burg Intermodal and offers financial incentives for the Burg family to relinquish its activities in the area of tank containers. Hoyer has also expressed the fear that Burg Intermodal will leave the market for standard ISO tank containers in the coming years and a monopoly position will be created for CIMC as a result.

88. There is no evidence that Mr C.J.M. van der Burg has financial incentives to relinquish the tank container activities. There is also no evidence at present that Burg Intermodal is subsidised by (the remainder of) Burg Industries, which will disappear as a result of the transaction. In addition, the carve-out will result in a situation where the sole shareholder of Burg Intermodal, Buhold, and therefore Mr C.J.M. van der Burg, will have considerable financial assets at his disposal. It is therefore not likely that the financial basis of Burg Intermodal will be weakened because of the transaction and that this will result in the creation or strengthening of a dominant position of CIMC. In addition, Burg Intermodal's order book is full until [...], which does not make it likely that Burg Intermodal has an incentive to exit the market in the short term.

(iv) Substitution of trailers - tank containers

89. Hoyer has stated that it fears that CIMC will acquire or strengthen a dominant position in the area of tank containers, since a development has started involving a transition from

transportation by means of trailers to transportation by means of tank containers. This development, according to Hoyer, will continue in the future. As a result, CIMC will be able to use Burg Industries' customer contacts in the area of trailers to further expand its activities in the area of tank containers.

90. The market shares of Burg Industries on the possible markets for road transport equipment are small. It is therefore not likely that CIMC will be able to expand its activities in the area of tank containers, as a result of which a dominant position may be created or strengthened, on the basis of these specific customer contacts of Burg Industries in the area of road transport equipment (and therefore also trailers). In addition, the NMa has no indications that such substitution will occur.

(v) Purchase price

91. Hoyer has also stated that the transaction of which the NMa was notified has the same negative effects on competition as the transaction assessed in case COMP/M.4009 - *CIMC/Burg*. The purchase price provides clear evidence of this, according to Hoyer. According to Hoyer, the purchase price of both transactions is approximately the same. According to Hoyer, this would mean that the same economic reasons underlie the present transaction as those on which the previous transaction was based: acquiring control of the activities of Burg Intermodal in the area of tank containers.

92. The parties state that there are primarily two reasons why a purchase price is paid which is comparable to that in the transaction of which the European Commission was notified. On the one hand, the value of the entities, which are included in the present transaction, has increased. On the other hand, the parties have stated that for CIMC the importance of the transactions, notified to the European Commission and the NMa has always lain in the subsidiaries which are not active in the area of tank containers.

93. The fact that the purchase price is comparable to the purchase price in the transaction of which the European commission was notified does not provide evidence that the economic rationale of the transactions is the same. The circumstance, namely that no activities in the area of tank containers are transferred to CIMC as a result of this transaction contradicts the view that the rationale of the transaction is to acquire control precisely of these activities.

94. The correspondence between the purchase prices does not provide evidence that the transaction would have the same negative consequences for competition as the transaction of which the European Commission was notified. The notification at that time related to a horizontal concentration which, according to the European Commission, would possibly give rise to a quasi-monopoly, since CIMC would acquire control of the tank container activities of Burg Intermodal. There is no evidence at all that control is acquired by CIMC over the activities of Burg Intermodal

in the area of tank containers in any way as a result of the present transaction. The activities of Burg Intermodal in the area of tank containers are controlled by Mr C.M.J. van der Burg and will be continued independently by him after the transaction. In addition, as appears from point 89, Burg Intermodal is not dependent on Burg Industries.

95. In addition to the circumstance that the purchase price provides no evidence of the rationale of the transaction, the above-mentioned concern is not relevant and has no effect on the assessment of the consequences of the proposed concentration because, in principle, the parties have contractual freedom and are at liberty to agree to the purchase price of an acquisition. An assessment of the sales or purchase price of a company or part of a company is not part of the tasks which the NMa exercises within the framework of concentration control.

Objections raised by Magyar

96. In addition to Hoyer, Magyar, a producer of road transport equipment and special tank containers, expressed its objections to the proposed concentration at a late stage in the procedure.

97. Magyar believes that the transaction in question will inevitably result in co-operation between CIMC and Burg Intermodal on the market for tank containers.

(i) Viability of Burg Intermodal

98. According to Magyar, Burg Intermodal will not be viable without continuing its links to Burg Industries. Magyar states that, in particular, the sales personnel and logistics are indispensable to Burg Intermodal. The distribution networks of Burg Industries and Burg Intermodal are too closely related to separate these effectively. The sales personnel are trained in the area of the joint sale of products of both Burg Industries and Burg Intermodal. In relation to the distribution network, at present there are subsidiaries which sell products of both Burg Industries and Burg Intermodal.

99. It appears from the information provided by the parties that only the services referred to in point 64 will be purchased from Burg Service after the proposed concentration. As a result of the carve-out, other (possible) links in the area of sales personnel, logistics and distribution will cease to exist. It also appears from the information provided by the parties that Burg Intermodal has its own sales department. These sales activities focus exclusively on tank containers. Therefore, a too close connection between the sales activities of Burg Intermodal and those of Burg Industries can be ruled out. There is also no evidence that Burg Intermodal would not be viable.

(ii) Purchase advantage (stainless steel) and foreclosure

100. Magyar also states that synergies exist between the tank container activities and the activities of the "former" Burg Industries. The necessary raw materials, for instance, are partially the same. If Burg Industries and CIMC opt for joint procurement, this will enable the parties to charge prices which are such that it makes it impossible for smaller players to compete on a level playing field. The competitor expects suppliers of stainless steel to give priority to large orders placed jointly by CIMC and Burg Industries and that these suppliers will have no choice but to succumb to the considerable joint buying power of CIMC and Burg Industries, which would result in substantially less favourable conditions for Magyar.

101. Magyar also states that CIMC and Burg Industries are able to offer their products at lower prices due to their superior market position, as a result of which smaller players will not be able to compete with the parties and will therefore be compelled to exit the market. This will then give CIMC and Burg Industries the possibility of increasing their prices and reduce the choice which buyers have.

102. The NMa has found no evidence that such foreclosure may occur. In addition to CIMC and Burg Industries, there are many other buyers of stainless steel. Even if purchase advantages were to be obtained from suppliers of stainless steel, it is not likely that a dominant position of CIMC would as a result be created or strengthened on the market for standard ISO tank containers.

103. In addition, there is no overlap in the activities of CIMC and Burg Industries. It is not likely that CIMC and Burg Industries will be able to increase their prices and reduce the choice which buyers have as a result of the proposed acquisition.

(iii) Smaller suppliers

104. In addition, Magyar states that the parties will be in a position to focus their product offerings on smaller market players to foreclose them from the market.

105. This objection raised by Magyar appears to signify that CIMC, after the proposed concentration, could foreclose smaller suppliers of tank containers from the market. It is not likely that this will occur as a result of the proposed acquisition, since there is no question of a horizontal overlap in the area of tank containers.

(iv) Separation of sales personnel

106. Furthermore, according to Magyar, the sales personnel of Burg Intermodal and Burg Industries appear not to be separated sufficiently.

107. Magyar also wondered whether the technical know-how and the customer base of Burg Intermodal will be effectively kept away from Burg Industries, or whether they will, in fact, be transferred to Burg Industries through coordination by the future management of Burg Industries and Burg Intermodal. This view is also partly prompted by the fact that the purchase price of Burg Industries was almost the same as the purchase price of the entire Burg Group, as stated in the past in the earlier proposed transaction, of which the European Commission was notified.

108. On the basis of the information and agreements provided by the parties, it can be concluded that the parties have sufficiently demonstrated that this is a matter of an actual carve-out of Burg Intermodal and Burg Industries in which the (sales) personnel is separated. In the light of the description given in point 84, it is sufficiently likely that Burg Intermodal's customer base and know-how have also been separated. For the assessment of the purchase price, see points 93 up to and including 95.

Objections of other market parties

109. In addition, four market parties indicated that the possibility cannot be excluded that Mr C.M.J. van der Burg and Mr P.G.M. van der Burg will exchange information informally with regard to the market for standard ISO tank containers. According to these parties, it is possible as a result that Burg Intermodal and CIMC/Burg Industries will informally be linked to each other after the proposed concentration.

110. The above-mentioned objection cannot be taken into account in the assessment of the concentration in question. Concentration control does not cover the above-mentioned practices of undertakings. Section 6 of the Competition Act and Article 81 of the EC Treaty relate to such practices between undertakings.

1.a.6. Collective dominant position on the market for standard ISO tank containers

Introduction

111. The market for standard ISO tank containers is very concentrated. At present four players are active on this market. The possibility that a collective dominant position exists on this market cannot be excluded *a priori*.

112. On the basis of, amongst other things, an expert opinion,[46] the parties argued that the market conditions in the area of standard ISO tank containers are such that coordinated effects are unlikely.

113. Hoyer, a buyer of tank containers, states that the concentration in question may result in the creation or strengthening of a collective dominant position on the market for standard ISO tank containers, since the joint market share of the parties is higher than 90%, there is a lack of competition between Burg Intermodal and CIMC, and there is a lack of competition between the parties and third parties.

114. In the discussion below, only the existence of a collective dominant position of CIMC and Burg Intermodal will be examined, since it is not likely that ZZTC or Singamas are part of a possible collective dominant position, given the small market share of ZZTC and its reputation and due to the fact that Singamas entered the market for standard ISO tank containers fairly recently.

115. If a collective dominant position is to exist, the market conditions must be such that the following four cumulative conditions are met:

(a) it must be fairly easy to reach an understanding on the terms of the coordination on the market;

(b) the coordinating undertakings must sufficiently be able to verify whether the understanding is being observed;

(c) a credible deterrent mechanism must exist which can be activated when evidence of deviating behaviour comes to light;

(d) the results intended by the coordination cannot be jeopardised by actions of outsiders, such as present and future competitors who do not participate in the market coordination, and buyers.[47]

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[46] "*Evaluatie economische aspecten van mogelijke marktdominantie in zaak 5883/ CIMC-Burg*" by Prof. Arnoud W.A. Boot, of 3 April 2007.

[47] The conditions referred to in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), points 39 up to and including 60. See also the Court of First Instance, ruling of 6 June 2002 in case T-342/99, *Airtours plc v. Commission of the European Communities*.

Condition (a): reaching an understanding

116. In general, it is a case that the less complex and the more stable the economic environment is, the easier it is for undertakings to reach an understanding on the terms of coordination. Factors which are conducive to this are: a small number of players, an homogenous product, a stable supply and demand situation and a low level of innovation.[48] Another factor which may make it easier for undertakings to reach an understanding is symmetry between the players. This symmetry relates particularly to the cost structure of the undertakings, their market shares, their capacity and the extent of vertical integration.[49]

Market stability

117. The parties state that the market for standard ISO tank containers is not stable because there are considerable fluctuations in this market. These are caused by fluctuating demand for standard ISO tank containers.

118. This fluctuating demand, according to the parties, is caused firstly by the fact that the product depends very much on the economic situation. Secondly, the parties state that the market for standard ISO tank containers is an investment market with a speculative character. The prices of raw materials, such as stainless steel and consequently the prices of standard ISO tank containers vary considerably, so that buyers attempt to anticipate these when making investments. Thirdly, the parties state that there are four types of buyers of standard ISO tank containers, each of which has dynamics (reasons and timing) entirely of its own with regard to investments in tank containers: (i) lease companies, (ii) operators of tank containers, (iii) end users with their own tank containers (for instance, the chemical industry) and (iv) investors.

119. In addition, on the basis of the expert opinion, the parties indicated that the market for standard ISO tank containers is far from stable because there are large incidental orders (no stable and predictable developments in orders), the "day prices" of tank containers are very susceptible to fluctuations in stainless steel prices and currency changes.

120. The parties have provided data on the annual production of standard ISO tank containers for the period 1992 to 2006, which support the impression that the market has fluctuated considerably over the years.

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[48] See the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/ C 31/03), point 45.

[49] See the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/ C 31/03), point 48.

Symmetry

121. It emerges from the data provided by the parties that the market shares of CIMC and Burg Intermodal are not symmetrical. CIMC and Burg Intermodal have market shares of approximately [50-60]% and approximately [30-40]% respectively.

122. In addition, it appears from the data provided by the parties that there is no symmetry in the capacity of CIMC and Burg Intermodal on the market for standard ISO tank containers. The capacity of CIMC on this market is [..] the size of the capacity of Burg Intermodal.

123. It is difficult to compare the cost structures of CIMC and Burg Intermodal. The costs of standard ISO tank containers may vary per day. The parties indicate that there is a clear difference in the salary costs of Burg Intermodal (in South Africa) and CIMC (in China).

Conclusion

124. It is concluded that there is (i) asymmetry between CIMC and Burg Intermodal with regard to market share, capacity and costs and (ii) fluctuating demand on the market. As a result, it is difficult to reach an understanding on the terms of coordination.

Condition (b) verifying compliance with the understanding

125. On a transparent market, in which information on the prices charged, volumes sold and the behaviour of undertakings which are active on the market can be obtained without considerable cost and relatively easily, coordinating one's own behaviour with that of other undertakings is more likely than on a market in which there is a lack of transparency. Transparency ensures that deviations from the understanding are noticed and the deterrent mechanism can be activated.

126. Where transactions arise through bilateral negotiations, there may be less transparency.[50] On the market for standard ISO containers, bilateral negotiations take place between producers and buyers. The parties state that they have no insight into the turnovers, sales and prices of other suppliers of standard ISO tank containers.

127. All the buyers questioned in relation to this case stated that they do not provide suppliers with the prices charged by other suppliers during negotiations. In addition, within the context of the investigation into this case, the buyers questioned stated that the suppliers and

[50] See the Guidelines on the assessment of horizontal concentrations under the Council Regulation on the control of concentrations between undertakings (2004/ C 31/03), point 50.

buyers do not have insight into the turnovers, sales and/or prices of suppliers of standard ISO tank containers.

128. It is also the case that no turnovers, sales and prices are published by a branch association or other media.[51]

Conclusion

129. In the light of the above, it is concluded that there is little transparency on the market for standard ISO tank containers.

Condition (c): a credible disciplining mechanism

130. If there is no or limited transparency on a market, a disciplining mechanism cannot be applied effectively. The asymmetry in (available) production capacity between the various producers gives rise to the situation that penalties in the case of a deviation from the shared line may only occur in one direction.

131. Since Burg Intermodal's order book is fully booked at least until [...], it seems that Burg Intermodal in any event does not (as yet) have the possibility of, for instance, producing more to discipline CIMC. However, CIMC does still have (a certain quantity) of additional available production capacity.

Conclusion

132. In the light of the above, the condition that a credible mutual disciplining mechanism should exist which can be evoked when deviating behaviour comes to light has not been met.

Final conclusion

133. In the light of the above, it must be concluded that CIMC and Burg Intermodal are unlikely to have a collective dominant position. In any event, at least three of the four conditions discussed have not been met, while all of the conditions would have to be met.

1.a.7. Final conclusion the market for standard ISO tank containers

134. Taking into account (i) the limited importance of the services of Burg Service for Burg Intermodal (see points 66 up to and including 74) and (ii) the presence of sufficient real

[51] There is a trade journal (*Hazardous Cargo Bulletin*) which annually describes developments in the area of tank containers and in doing so states the number of tank containers produced by each manufacturer. However, in this regard no distinction is made between standard ISO tank containers and other types of tank containers.

alternative suppliers of the services which Burg Service provides to Burg Intermodal in the area of standard ISO tank containers (see points 75 up to and including 79), it is not likely that a single dominant position of CIMC can be created or strengthened on the market for standard ISO tank containers.

135. It was concluded above that it is not likely that CIMC and Burg Intermodal have a collective dominant position (see point 133). If CIMC and Burg Intermodal were to have a dominant position, a collective dominant position would not be strengthened because of (i) the abovementioned limited importance of the services of Burg Service for Burg Intermodal and (ii) the abovementioned presence of real alternative providers of the services which Burg Service offers to Burg Intermodal.

1.b. Special tank containers

136. Burg Intermodal is also active in the area of special tank containers. CIMC is not active in this area. The European Commission stated in the decision in case COMP/M.4009 -*CIMC/Burg* that CIMC was the best positioned potential new entrant in the area of special tank containers.[52]

137. Since CIMC has no activities at present in the area of special tank containers, it is not likely to result in the creation or strengthening of a dominant position of CIMC in the area of special tank containers as a result of the activities which Burg Service provides to Burg Intermodal.

138. The parties have stated that Burg Service is of particular importance to Burg Intermodal in relation to special tank containers. As was stated above in point 76, it follows from the investigation into the present case that Burg Intermodal has sufficient real alternative suppliers of the services which Burg Service provides in relation to special tank containers.

Conclusion

139. In the light of the above, it may be concluded that the proposed acquisition is not likely to result in the creation or strengthening of a dominant position in the markets for special tank containers.

2 Road transport equipment

[52] See the decision of the European Commission in case COMP/M.4009 - CIMC/Burg, *op. cit.*, points 89 up to and including 91, in which the acquisition of the activities in the area of tank containers of the "former" Burg Industries is assessed (see also footnote 5).

140. With the exception of the possible market for special purpose trailers, the joint market share of the parties is not higher than 25% on any of the markets for road transport equipment which could possibly be distinguished, irrespective of the geographical dimensions of these markets. On the possible market for special purpose trailers, the maximum joint market share of the parties is [30-40]%. This share is realised on a possible geographical market which comprises China, the United States and Europe. The addition of Burg Industries to this is very small, namely [0-1]%. On certain possible markets, on which there is no overlap, CIMC has larger market shares. However, in the light of the low market shares of Burg Industries, it is not likely that a potential competitor would disappear as a result of this.

Conclusion

141. There is no reason to assume that a dominant position may be created or strengthened on one of the possible markets for road transport equipment as a result of the concentration in question, which would have the effect of significantly restricting actual competition on the Dutch market.

VI. ANCILLARY RESTRAINTS

142. The parties have requested a ruling on the non-recruitment clauses, as included in Articles 10.2.b and 10.3.c of the Share Purchase Agreement between Burg Industries, Buhold and Burg Intermodal, which was signed by the aforementioned parties on 15 March 2007. These provisions are therefore part of the carve-out transaction, as referred to in point 4 of this decision. The transaction aims to remove any competition concerns about CIMC's acquiring control of Burg Industries by the divestiture of Burg Industries' activities in the area of tank containers.

143. The provisions of Article 10.2.b stipulate that Buhold shall undertake to ensure that its Companies (including Burg Intermodal), except with the prior written consent of Burg Industries, the granting of which shall depend on whether the person involved has specific knowledge, skills or business contacts, that are of relevance to the business of Burg Industries and its group companies, for a period of two years after the transfer of the shares,[53] shall refrain from employing or appointing (in any way whatsoever), on its own behalf or jointly with a third party, to carry out services, any person, who in the period from 1 January 2005 up to and including the date of the transfer of the shares was employed by Burg Industries or was appointed in any other way by Burg Industries (for instance as a director or agent) or by a group company of Burg Industries, in the capacity of a director, advisor, consultant or agent for any other person.

[53] The date of transfer of the shares is understood to be the date on which the Share Purchase Agreement was signed, namely 15 March 2007.

144. The provisions of Article 10.3.c stipulate that Burg Industries shall undertake to ensure that its group companies, except with the prior written consent of Buhold, the granting of which shall depend on whether the person involved has specific knowledge, skills and business contacts which are relevant to Buhold's companies (including Burg Intermodal), for a period of two years after the share transfer, shall refrain from employing or appointing (in any way whatsoever), on its own behalf or jointly with a third party, to carry out services, any person, who in the period from 1 January 2005 up to and including the date of the transfer of the shares was employed or was appointed in any other way (for instance as a director or agent) by Buhold’s Companies, in the capacity of a director, advisor, consultant or agent for any other person.

145. A provision can only be deemed to be an ancillary restraint in so far as it relates directly to and is necessary for the realisation of the concentration in question. In this case, the NMa regarded the importance, in particular, of the contribution which those provisions make to the *de facto* realisation of the above-mentioned carve-out, which is indeed necessary to obtain approval of the acquisition of exclusive control of Burg Industries by CIMC along the lines of this decision, as intended by the parties.

146. In view of the *de facto* carve-out, as referred to above, and partly taking into account the actual circumstances, including the fact that many managers and employees of the companies involved in the carve-out know each other and for this reason will still be able to maintain contact with each other easily for a certain period, the NMa is of the opinion in this case that restricting acknowledgement of this as an ancillary restraint only to 'active' recruitment is not necessary. In addition, the NMa has taken into account the fact that the duration of the clauses is limited to a period of two years, which may be deemed reasonable in this case.

147. The conditions of Article 10.2.b and Article 10.3.c of the Share Purchase Agreement may be deemed to be necessary for and directly related to realisation of the concentration in question, in so far as the provisions relate to employees who were employed with the remainder of Burg Industries or one of its group companies or, alternatively, with Buhold’s Companies, on the date of the implementation of the concentration.

VII. CONCLUSION

148. After investigating this notification, the Board of the Netherlands Competition Authority has reached the conclusion that the notified operation falls within the scope of concentration control governed by chapter 5 of the Competition Act. The Board sees no reason to assume that as a result of the concentration a dominant position will be created or strengthened, resulting in a significant restriction of competition on the Dutch market or a part thereof.

149. In the light of the above, the Board of the Netherlands Competition Authority gives notice that a licence is not required for the realisation of the concentration to which the notification relates.

150. In the light of the grounds given in points 145 up to and including point 147, the Board is of the opinion that, in so far as the clauses described in points 143 and 144 constitute agreements, as referred to in section 6 of the Competition Act, pursuant to section 10, section 6 does not apply to this agreement, in so far as these clauses do not go further than the description given in point 147.

Date: 18th May 2007

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

(Signed) A.J.M. Kleijweg
Acting Director Merger Control Department

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, 3007 BM, Rotterdam within six weeks after the announcement of this decision.