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Case No COMP/M.4525 – KRONOSPAN/CONSTANTIA

Only the English text is authentic.

**REGULATION (EC) No 139/2004
MERCER PROCEDURE**

Article 8 (2)
Date: 19/09/2007



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19/09/2007

C(2007) 4293 final

PUBLIC VERSION

COMMISSION DECISION

of 19 September 2007

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

(Case No COMP/M.4525 – Kronospan / Constantia)

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 14 June 2007 to initiate proceedings in this case,

After consulting the Advisory Committee on Concentrations,

WHEREAS:

I. INTRODUCTION

1. On 4 May 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 ("**the Merger Regulation**"), following a referral pursuant to Article 4(5) of that Regulation, by which the undertaking Kronospan Holding GmbH (Germany), a sub-holding of the Kronospan Group (hereinafter referred to as "**Kronospan**" or "**the Notifying Party**"), acquires within the meaning of Article 3(1)(b) of the Merger

¹ OJ L 24, 29.1.2004, p. 1.

Regulation sole control over the raw and coated particle board as well as the decorative laminates and components businesses Fundermax GmbH ("**Fundermax**", Austria), Falco CC ("**Falco**", Hungary), and Sprela GmbH ("**Sprela**", Germany) (together "**the original Target**") of the seller Constantia Industries AG ("**Constantia**", Austria, and together with the acquirer hereinafter referred to as "**the Parties**").

2. After examination of the notification, the Commission concluded that the operation fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and with the EEA Agreement. It therefore decided on 14 June 2007 to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.
3. On 12 July 2007, the Parties submitted a proposal to modify the concentration and commitments with a view to rendering the concentration compatible with the common market. Pursuant to that proposal, Kronospan would acquire only two of the three original Target plants, namely the companies Falco and Sprela (hereinafter "**the new Target**"), whereas Fundermax would remain with the seller, Constantia. Moreover, Kronospan would undertake not to acquire, or have an undertaking controlled by or affiliated with it acquire, Fundermax – wholly or in part – for a period of [...] years.
4. After carrying out a market investigation of the proposed modification and commitments, the Commission concluded that the modification of the concentration and the commitments entered into by Kronospan would remove the serious doubts as to the compatibility of the notified operation with the common market and the EEA Agreement.
5. The Parties were informed about the outcome of the market test of the modified transaction and commitments. On 31 July 2007, they signed an Amendment Agreement to the Framework Agreement (Annex 1 to the commitments, hereinafter "**the Amendment Agreement**") and Kronospan submitted the final commitments, in which it undertook not to acquire sole or joint control over Fundermax for a period of [...] years (Annex to this decision).

II. THE PARTIES

6. Kronospan [...] has worldwide activities concerning the production and sale of wood-based boards and related products, in particular the production of raw particle board, coated particle board, decorative laminates and post formed wooden elements (components) as well as related products, such as resin and specialty overlay paper. Its production sites for raw and coated particle board² within the Community are located in Austria, Bulgaria, Croatia, the Czech Republic, Germany, Hungary, Latvia, Luxembourg, Poland, Romania, Slovakia and the United Kingdom. In addition, it has production sites for raw and coated particle board in Ukraine and Russia.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

² All of the acquirer's raw particle board production facilities also contain facilities for coating the particle board; in some of these facilities, the acquirer is also producing decorative laminates and components and other products, such as impregnated decor paper.

7. The Austrian company M. Kaindl Holzindustrie ("**Kaindl**"), which is also active in the manufacture and supply of wood-based products, in particular raw particle board and coated particle board, [...] ³ [...] ⁴ [...] *The Parties have submitted that there are no links of control between Kronospan and Kronoswiss.
8. The original Target is currently part of the Austrian Constantia group. It is active in the production of raw and coated particleboard, decorative laminates, cement-bonded wood particleboards and semi-finished products called "semis" ("Halbteile") or post formed elements (components), that is to say, raw particleboards coated with high pressure laminate (HPL) or continuous pressure laminate (CPL), which are sold as finished elements, such as worktops and window sills, or as raw material, such as bonded panels. The raw and coated particle board business of Constantia is carried out at two production sites situated relatively close to each other: Fundermax in Neudörfel/St. Veit (Austria) and Falco in Szombately (Hungary). Both plants have their own sales force, management, brands and marketing. Components and decorative laminates are produced by Constantia's production plant Sprela in Spremberg (Germany).

III. THE CONCENTRATION

9. Since Kronospan would acquire sole control over the target companies the (modified) transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation .

IV. COMMUNITY DIMENSION

10. The original concentration did not have a Community dimension within the meaning of Article 1 of the Merger Regulation. The aggregate turnover of the acquirer and the original Target in Germany, Austria and Poland exceeded EUR 100 million (Article 1(3)(b) of the Merger Regulation), but the aggregate turnover of the original Target in Poland did not meet the threshold of Article 1(3)(c) of the Merger Regulation.
11. The Commission acquired jurisdiction to review the originally notified operation by means of a referral pursuant to Article 4(5) of the Merger Regulation. On 15 February 2007, the Parties informed the Commission in a reasoned submission that the transaction constituted a concentration within the meaning of Article 1 of the Merger Regulation, capable of being reviewed under the national competition laws of six Member States (namely Austria, Germany, Hungary, Latvia, Poland, and Slovakia)⁵, and requested the Commission to examine it. None of the Member States competent to examine the concentration under its

³ [...]*

⁴ In the following assessment, the market shares of Kaindl will thus be attributed to Kronospan when determining Kronospan's – and the merged entity's – position on the market.

⁵ The originally intended transaction was also notifiable in Bulgaria and Romania, but since the framework agreement concerning the originally intended transaction had been concluded on 8 December 2006, i.e. before their accession to the Community, neither the referral nor the Form CO covered these two Member States. The Parties have filed notifications with the National Competition Authorities in these countries. The Bulgarian Commission for the Protection of Competition issued a clearance decision on 19 June 2007. The Romanian Competition Council issued a clearance decision on 27 August 2007.

national competition law expressed disagreement as regards the request for referral within the period laid down by the Merger Regulation.⁶ Consequently, the transaction was deemed to have a Community dimension pursuant to Article 4(5) of the Merger Regulation. The modification of the transaction, by which Kronospan will acquire only the new Target, does not remove the Commission's jurisdiction to assess the modified concentration.⁷

V. RELEVANT MARKETS

A. RELEVANT PRODUCT MARKETS

12. Both Parties are active in the manufacture and supply of wood based products. Their activities overlap in the production and supply of raw particle board, coated particle board, components and decorative laminates.
13. The different products are widely used within the construction and furniture industry. Raw particle board (also called chipboard) is an engineered wood-product made of wood particles such as chips or shavings, which are pressed and bonded together with resin or another binder. Raw particle board can be overlaid with a decorative melamine film or print paper; in this case, the end product is called coated particle board. Particle board can also be shaped and surfaced with decorative laminates in a post-forming process to result in a so-called post-forming element or component, used, for example, as worktops in kitchens, or as window sills. Decorative laminates are not derived from raw particle board. They are based on several layers of craft paper and decor paper sealed together with heat and pressure.
14. This chain of production and the links between the different products is mirrored in the industry, where several suppliers of raw particle board are vertically integrated and also produce coated particle board, decorative laminates and components.

1. RAW PARTICLE BOARD

15. Raw particle board is an input in the production of coated particle board and components and can also as such be used in furniture applications, for example for the production of upholstered furniture or (simple) shelves and work tops. Whereas raw particleboard can serve some specific low-end uses and applications, for instance in the construction industry, coated particleboard represents a considerably higher value-added product.
16. The Parties submit that the market for raw particle board constitutes a separate product market. This has been confirmed in the market investigation and is also in line with the

⁶ It should be noted, however, that the Hungarian Competition Authority contacted the Commission during the referral process, stating that, in their view, the transaction could have considerable horizontal effects in Hungary and that they would open phase-2-proceedings if they had jurisdiction in this case (i.e. in the absence of a referral).

⁷ See recital 30 of the preamble to the Merger Regulation: "*Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market*"; see also judgment in Case T-290/94 – *Kaysersberg SA v Commission*, ECR 1997 II-02137, para.127, as well as the Opinion of the Advocate-General Kokott concerning the case *Cementbouw vs Commission*, Case C-202/06 P, Opinion of 26 April 2007.

findings in a recent merger case⁸, where the products were identical with those in this case. It can therefore be concluded that raw particle board constitutes a separate product market.

2. COATED PARTICLE BOARD

17. Coated particle board is raw particle board that has been further refined through coating. The Parties submit that this market constitutes a separate product market. The market investigation has confirmed this market definition, which is also in line with the findings in the recent Commission decision *Sonae Indústria / Hornitex*. Coated particle board, thus, forms a separate product market.

3. DECORATIVE LAMINATES

18. Decorative laminate consists of several layers of resin or melamine impregnated craft paper (for the core) and decor paper (for the surface) sealed together. It is used, for example, in shower cabins, facades and balconies. A distinction can be drawn between high pressure laminate (HPL), continuous pressure laminate (CPL) and compact laminate.

19. The market investigation indicates that all types of decorative laminate belong to one product market, which is separate from the product market for coated particle board or components. This finding is in line with the submission by the Parties and the recent Commission practice. However, there are no indications for competition concerns under any possible product market definition of decorative laminates. The question of a sub-segmentation of the market, for example according to different types of decorative laminates or different decor papers, can thus be left open for the purposes of this decision.

4. COMPONENTS

20. Components or post-forming elements are pieces of particle board to which laminate (HPL or CPL) has been glued and which have been shaped to the required profile. The Parties submit that components constitute a separate product market. This is in line with the results of the market investigation and previous cases. However, since there are no indications of competition concerns under any possible alternative product market definition, the exact scope of the product market can be left open.

B. RELEVANT GEOGRAPHIC MARKETS

21. In an earlier decision, the Commission has indicated that the geographic markets for all products mentioned above could be wider than national, or at least are not aligned with national boundaries (and could be, for example, cross-border regional).⁹ Price levels throughout the Community appeared to be similar for some products and export and import of both raw and coated particle board appeared to be substantial. However, for each of the relevant products, the Commission ultimately left the geographic market definition open.¹⁰

1. RAW PARTICLE BOARD

⁸ Commission decision of 28 June 2006, Case Comp. M. 4165 *Sonae Indústria / Hornitex*.

⁹ Commission decision of 28 June 2006, Case Comp. M. 4165 *Sonae Indústria / Hornitex*, para. 13.

¹⁰ See above, fn. 9, para.14.

22. The Parties submit that the market for raw particle board is at least (cross-border) regional, covering an area with a radius of 1000 km around the production site.
23. In its decision to initiate proceedings the Commission indicated, based on the results of the market investigation in phase I, that, given the importance of transport costs relative to the value of the product¹¹, raw particle board is generally shipped up to a distance of 500 km from the production plant. This view was confirmed by the overwhelming majority of the customers and competitors that responded to the Commission's questionnaire in phase I.
24. The Commission also sought to determine in its phase I market investigation the geographic market based on actual supply patterns. The data gathered from the Parties pointed towards a geographic reach of 500 km, with some supplies to customers located between 500 and 600 km from the production facility and few supplies beyond that distance. The purchase and sales data that the other respondents submitted in the phase I market investigation showed that these products generally travel between 150 and 500 km; only sometimes were there sales to customers located further away.¹²
25. During the in-depth market investigation in phase II, the Commission requested additional shipment data from the main suppliers who ship into the affected area in order to be able to verify its initial results. Suppliers were asked to submit data regarding all shipments by volume as well as the distance to the customer.¹³ The data confirms that the vast majority of shipments (81% in 2006) are within a radius of 500 km from the plants (see Table 1 for details).

Table 1: Shipment distances for deliveries coming from raw particle board plants of the main suppliers shipping into the affected area – Source: Market Investigation.

	2004	2005	2006
below 500	76,3%	77,0%	81,2%
500 to 600	9,4%	6,3%	6,2%
600 to 700	2,4%	4,0%	4,4%
700 to 800	1,9%	2,4%	1,4%
800 to 900	2,7%	2,6%	1,8%
900 to 1000	0,8%	0,8%	0,7%
above 1000	6,6%	7,0%	4,1%

¹¹ Customers and competitors have informed the Commission in their replies to the market investigation that transport costs are quite substantial compared to the overall value of the product – they vary between approximately [0-10]* and [10-20]* %; some customers even indicated that they account for [20-30]*% of the purchase price, cf. replies to the questionnaire to customers, sent on 7 May 2007, question 16; replies to the questionnaire to competitors, sent on 8 May 2007, question 16.

¹² Replies to the questionnaire to customers, sent on 7 May 2007, question 20; replies to the questionnaire to competitors, sent on 8 May 2007, question 21.

¹³ The request covered the following producers: Kronospan, Constantia, Kronoswiss, Pfleiderer, Sonae/Glunz, Egger, Fantoni, DDL and Lesna.

26. In view of the above, it is concluded that market shares presented by the Parties (based on sales within a radius of 1000 km from the original Target's facilities) do not appropriately capture the competitive interaction between the Parties and their competitors. Shipment data of most suppliers active in the region illustrates that customers generally source within a range of well below 1000 km and in most cases not more than 500 km. In particular for those Member States in proximity to Constantia's two plants at the Austrian/Hungarian border – Slovakia, Hungary, Czech Republic, Slovenia and Austria – the Commission calculated the share of shipments to customers from plants located within 500 km of the customer and found this share to be significant. Based on the shipment data of the previously mentioned companies (see fn. 14) [90-100]*% of raw particleboard sold to Slovakian customers was delivered from plants located within 500 km of the customer. The respective figures for the other Member States are: Hungary [90-100]*%, Czech Republic [90-100]*%, Slovenia [80-90]*% and Austria [80-90]*%.¹⁴ In other words, the overwhelming majority of customers in those Member States source their raw particle board from plants located within 500 km of their own facilities.
27. In such a market, national market shares are imperfect indicators of post-merger market power, as national boundaries do not necessarily reflect the competitive interaction between plants (for example, two plants located on each side of a border would be closer substitutes than two plants in the same country but located far from each other). What ultimately matters for the competitive assessment is the change in the set of alternative suppliers that customers will be able to economically source from after the merger.
28. According to the Commission's notice on the definition of the relevant market for the purposes of Community competition law, *"the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas"*.¹⁵
29. Consequently, the geographic area where the originally intended transaction may have affected the conditions of competition lies within a radius of about 500 km around the original Target's production facilities (hereinafter referred to as "the affected area").¹⁶ Customers inside this area that have identical sets of realistic supply alternatives are likely to belong to the same relevant geographic market because they are likely to face homogeneous conditions of competition. In applying this approach, the Commission considers that transportation distances for raw particle board can be used as a first proxy to determine whether or not a particular production plant belongs to a set of realistic supply alternatives for a given customer.
30. For the purpose of this analysis, it is not necessary to give a precise, general definition of the relevant geographic market, since the competitive analysis will in any event have to focus on

¹⁴ [...]*

¹⁵ OJ C 372, 9.12.1997, para. 8.

¹⁶ The two production sites for raw particle board are located within a distance of 70 km away from each other.

the affected area. For customers in that area, potential alternative suppliers will be identified in order to determine to what extent their choices would be affected by the proposed merger.

2. COATED PARTICLE BOARD

31. As regards coated particle board, the Parties submit that the geographic scope of the market is broader, since transportation costs are less important in relation to the overall price of this product. The Parties submit that the geographic market for coated particle board is at least Community-wide.
32. The initial investigation confirmed the Parties' views that transport costs are less important for coated compared to raw particle board. Some customers, however, indicated that the relevant geographic market could be more limited in scope than submitted by the Parties and indicated that products are shipped up to approximately 1000 km rather than Community-wide. Furthermore, given that the Parties' market shares on this product market also differ largely from country to country, the Commission doubted that market shares presented by the Parties (calculating sales at the Community level) appropriately captured the competitive interaction in this product market.
33. The Commission therefore investigated the shipment data of the main suppliers for coated particle board in more detail, aiming to identify the relevant supply distances and, as a consequence, the supply alternatives for customers.
34. A precise analysis of the shipment data for coated particle board in 2004-2006 on a plant by plant basis revealed that although companies mainly serve customers located in their proximity, a significant amount of production by the leading suppliers of coated particle board has been shipped well beyond 1000 km.¹⁷ This is in stark contrast to the findings for raw particle board and confirms that transport costs are not a decisive factor for the supply of coated particle board. For individual plants, the patterns of shipments for raw particle board and coated particle board were generally significantly different. For example, one plant in the dataset producing both raw and coated particle board shipped 94% of its raw particle board within a 500 km radius in 2006 while it only shipped 38.4% of its coated particle board within 500 km of the plant. Another plant shipped 76.6% of its raw particle board within a 500 km radius in 2006 while the equivalent figure for coated particle board was 45.3%.
35. In view of the significant amount of coated particle board that is shipped more than 1000 km, it can be concluded that the relevant geographic market for coated particle board in this case includes at least Central Europe and may be even wider. For the purposes of this decision, however, it can be left open whether the geographic market is EEA-wide, since it can be excluded that the supply conditions for customers in the affected areas, where the activities of the Parties overlap, would change to a significant extent as a result of the merger (see competitive assessment below, VI.B.2).

3. DECORATIVE LAMINATES AND COMPONENTS

36. The Parties submit that the geographic market for decorative laminates and components is at least EEA-wide. They state, that - relative to the prices - transportation cost is less decisive for components and decorative laminates, as these products have a higher added value than

¹⁷ Competitor A up to 28%, Constantia [10-20]*%, Competitor B 17%, Competitor C 11%, Kronospan and Competitor D [10-20]*% and Competitor E 9%.

raw particle board. During the Commission's market investigation, customers confirmed that the relevant geographic markets for decorative laminates and components could be regarded as EEA wide.¹⁸ A few customers even indicated that the market for decorative laminates could be regarded as worldwide in scope.

37. These findings are in line with the outcome of previous market investigations¹⁹. The Commission therefore considers that the relevant geographic market for decorative laminates and the relevant geographic market for components are EEA wide.²⁰

VI. COMPETITIVE ASSESSMENT

A. THE INDUSTRY AND COMPETITIVE STRUCTURE IN THE PARTICLE BOARD MARKETS

38. Raw particle board is a basic input material mainly for the furniture and construction industries. The particle board industry has experienced periods of tight capacity and high prices alternating with periods of excess capacity and low prices. Over the last four years demand has been strong and the merchant market is expected to grow at a rate of [400.000-500.000]* m³ per year.²¹ Another factor contributing to price increases is the rising cost of the main input factors (wood and energy), which constitute roughly 40% of production cost for raw particle board. In 2005, approximately 17 million m³ or half of the total production volume of 33 million m³ in the EEA was sold on the merchant market, whereas the other half was used internally by raw particle producers for coating.²²
39. Throughout the EEA, there are several production facilities of raw particle board and these are often clustered in the same region, located close to where demand is (for example, furniture producers). There are currently fewer plants in the Eastern part of Europe compared with the Western part. In recent years, the industry has undergone a consolidation phase during which some market participants have been taken over by larger groups.²³
40. In Europe, there are currently five main players - Kronospan, Pflaiderer, Sonae, Egger and Kronoswiss - all of which are vertically integrated with production sites in several countries across the continent. Of the few larger players that have facilities in Eastern Europe, Kronospan is by far the most active with plants in Poland, Bulgaria, Croatia, the Czech Republic, Latvia, Romania, Slovakia and Ukraine. As regards other major players in this area, Pflaiderer has production sites in Poland, Kronoswiss operates plants in Poland,

¹⁸ Replies to the questionnaire to customers, sent on 7 May 2007, question 19.

¹⁹ See Commission decision of 12 June 2006, Case Comp. M. 4048 (Sonae Indústria / Tarkett / JV) and Commission decision of 28 June 2006, Case Comp. M. 4165 (Sonae Indústria / Hornitex). In these decisions, however, the geographic market definition was left open.

²⁰ These EEA-wide markets are not affected, since the Parties' combined market share (taking into account the original Target) would have amounted to less than [10]*% on both markets.

²¹ Report by Pöyry Consulting on the Particleboard Market in Europe of March 2007 submitted by the Parties.

²² Figures based on the European Panel Federation Annual Report 2005-2006, p. 48, table 28.

²³ Sonae acquired Glunz in 1998 and Hornitex in 2006, whereas Pflaiderer bought Kunz in 2005.

Hungary and Ukraine, and Egger will start operating a production facility in Romania in 2008. Given that many players are vertically integrated not all the plants supply to the merchant market.

B. NON-COORDINATED EFFECTS OF THE ORIGINALLY INTENDED TRANSACTION²⁴

1. RAW PARTICLE BOARD

(a) Structure of the market

41. The Parties' activities overlap in the market for raw particle board. In order to assess the effect on competition of this overlap, the Commission in a first approximation tried to estimate market shares of the Parties and their main competitors for the affected area since high market shares can in themselves – absent countervailing factors like potential entry or buyer power - be regarded as evidence of a dominant position²⁵, which could lead to a significant impediment of competition in markets in which the merging Parties' combined share clearly exceeds the share of the next largest competitor.
42. Moreover, the Commission has also undertaken a detailed analysis with respect to the change in the set of alternative suppliers that customers will be able to economically source from after the merger as this is what ultimately matters. Thus, the Commission has examined whether the originally intended transaction would have led to a significant impediment of competition in the affected area.
43. Concerning market shares, the estimates submitted by the Parties in the Form CO proved to be only imperfect proxies of the actual market power of the various players, since they were based on publicly available data regarding share of production and did not take into account that a large proportion of the production of certain players is actually not sold on the merchant market, but used for in-house production of value-added products. During the in-depth investigation in phase II the Commission has therefore used data provided by the Parties and their main competitors for shipments into Austria, Hungary, Slovakia, Slovenia and the Czech Republic, the countries that roughly coincide with the affected area, to reconstruct the market. In contrast to the market share data provided by the Parties, the Commission's data clearly distinguish between sales to the merchant market and captive sales.
44. Using this approach as a first proxy to assess competitive effects, Table 2 shows that the originally intended transaction would have led to high market shares in the market for raw particle board in the countries roughly coinciding with the affected area. The new entity would have held a dominant position with a market share of [60-80]*%. The transaction would have brought together two players holding a significant share of output, with an increment of around [30-40]*%.²⁶

²⁴ For the competitive assessment of the modified transaction cf. below at item VII.

²⁵ See judgment of 14 December 2005 in Case T-210/01 - General Electric/Commission, not yet reported, paragraph 115.

²⁶ It should be noted that the Commission estimated market shares by using the shipment data from the main suppliers into the affected area: Kronospan, Constantia, Kronoswiss, Pfleiderer, Sonae, Egger, Fantoni, DDL

Table 2: Market Shares in the region covering Austria, Hungary, Slovakia, Slovenia and Czech Republic. – Source: Market Investigation

Market Share %	Affected Area
Kronospan	[30-40]*%
Constantia	[30-40]*%
Combined	[60-80]*%
Egger	[0-10]*%
Sonae/Glunz	[0-10]*%
Kronoswiss	[0-10]*%
Pfleiderer	[0-10]*%
Fantoni	[0-10]*%
Lesna	[0-10]*%
DDL	[0-10]*%

(b) *Customers have limited possibilities of switching suppliers*

45. In the affected area customers for raw particle board have only limited possibilities to switch suppliers. From a supply-side point of view the market investigation showed that the delineation of the geographic market should be based on a distance between customers and their suppliers (plants) of roughly 500 km. From a customer perspective the closeness or relative distance to alternative suppliers is the decisive factor in this type of market. Thus, although the market shares presented above (Table 2) provide a first indication of the effects of the transaction, these cannot be fully captured by merely looking at these figures.
46. The market investigation in phase II has revealed that a large number of customers in the affected area have so far been sourcing from both the acquirers' facilities and from the original Target. Both Parties make a significant proportion of their sales to common customers in the affected area.²⁷ As the following analysis shows, the originally notified transaction would have the effect that customers would lose a significant independent source of supplies and that the merged entity would be able to raise prices. The ability of the new entity (as originally intended) to raise prices would, in particular, not be constrained by increased supplies from alternative sources given the capacity constraints and rising demand in the market (see point (c) below).
47. As indicated in the table above (Table 2), Pfleiderer, Egger, Kronoswiss, Sonae and a number of smaller suppliers are active on the merchant market in the affected area. They represent the supply alternatives in the area of roughly 500 km around the customers located in the affected area.
48. *Pfleiderer*, a German producer, has two production facilities in Poland. One production facility is located in the North of Poland, the other is located towards the South of Poland. Pfleiderer also operates five production facilities in Germany, three of which are located in

and Lesna. These market shares may be slightly overestimated as the Commission did not obtain data from smaller competitors but their market share in the area is likely to be minimal.

²⁷ During the market investigation in phase II, the supply data for 2004, 2005 and 2006 submitted by the original Target facilities has been compared with the supply data of Kronospan for the same period. The Commission identified common customers of Kronospan and the original Target and calculated their share in the Parties' sales volumes. Since the customer details are considered confidential by the Parties, the precise percentage of common customers cannot be disclosed.

the Southwest of Germany (and thus more than 500 km away from customers in the affected area). As regards the facility in the South of Poland, while it can supply certain customers in the affected area, it is (significantly) more than 500 km away from customers located in the East of Hungary. In fact, Pfleiderer hardly supplies any raw particle board to customers in Hungary.

49. *Egger*, an Austrian producer of raw as well as coated particle board, has several production sites in geographic proximity to the customers in the affected area. However, Egger currently supplies limited (and decreasing) volumes of raw particle board on the merchant market.²⁸ In fact, the company buys raw particle board and customers have also indicated during the Commission's market investigation, that they could not, or could only to a very limited extent, source from Egger, as it was using all its raw particle board capacity for in-house production of coated particle board.²⁹ For example, Egger virtually stopped supplying customers in one of the countries in the affected area in 2006.
50. *Kronoswiss* is owned by Mr. *Ernst Kaindl*, who has family ties to the owners of Kronospan and Kaindl.³⁰ [...] *³¹ [...] * Kronoswiss has a plant in Vasarosnameny (Hungary) and mostly supplies Hungarian customers in the affected area.
51. On a European level *Sonae*, a Portuguese Group active *inter alia* in (raw and coated) particle board, is an important player. It produces [90-100]*% of its output in raw particle board for the merchant market, and the sales data submitted by Sonae shows that the company's customers are almost exclusively located well within a radius of 500 km from its production facilities, which are located in the West and Northwest of Germany (Sonae Glunz). Since they are more than 500 km away from the original Target's facilities, Sonae's supply radius therefore only covers customers in the Western part of the affected area. Consequently, Sonae cannot be regarded as being in a position to exercise competitive constraint vis-à-vis the originally intended new entity with regard to all of the latter's customers. Indeed, Sonae has only a few customers in Austria and the Czech Republic and hardly supplies any customers located in Hungary.
52. The smaller suppliers, such as *Saviola* (Italy), *Fantoni* (Italy), *Lesna* (Croatia) and *DDL* (Czech Republic) cannot be regarded as imposing any significant competitive constraint on the (originally intended) new entity in the affected area. Lesna and DDL only have one plant each which are small in size and have less than half the capacity dedicated to the merchant market as Fundermax. Their role as "fringe players" is also underlined by their relatively low market shares in the region concerned and their focus on their "home region".³² Italian suppliers consider that higher transport costs for shipments departing from

²⁸ Except for sales within Austria, its home market. Even here sales to the merchant market declined by [10-20]*% in volume between 2004 and 2006. Reply of Egger to questionnaire to competitors 8 May 2007, question number 21, later confirmed in sales data submitted by Egger on 9 July 2007.

²⁹ Reply to questionnaire to customers 7 May 2007, question number 28.

³⁰ See above, para. 8.

³¹ [...] *.

³² According to the shipment data Lesna is only supplying into Slovenia, whereas DDL mainly ships to Czech Republic.

Italy across the Alps and in particular to the Eastern parts of the affected area (compared with shipments departing from Eastern European plants) constitute a competitive disadvantage. Fantoni, for example, therefore primarily supplies Italian customers.³³

53. Furthermore, supply alternatives from Ukraine are not comparable to the players mentioned above (para. 47), due to the fact that custom duties of 7.5% on imports from Ukraine to the Community still make it difficult for Ukrainian producers to compete effectively on price with producers from within the Community.
54. In view of the above, in Slovenia, Slovakia, the South-Eastern part of Austria and the major part of Hungary, the realistic set of supply alternatives for some customers would have been reduced from 4 to 3 main suppliers as a result of the originally intended transaction.³⁴ Whereas customers in this area could have sourced from Pfleiderer, Constantia, Kronoswiss and Kronospan before the transaction, after the transaction their supply alternatives would have been limited to Pfleiderer, Kronoswiss and the new entity.
55. The Parties noted that if prices were to rise in (parts of) the affected area, plants located more than 500 km away could become competitive alternatives, thus constraining the merged entity in its potential ability to raise prices. Yet, what matters for the competitive assessment is whether the Parties would be able to profitably raise prices after the merger. If the new entity was to raise prices, competitors' plants located more than 500 km away from the customer could indeed become competitive alternatives (while they were not pre-merger). However, the new entity would still be able to raise prices up to the point where customers would start considering plants further away for their supplies, whereas pre-merger, the Parties were exerting a direct constraint on one another. In addition, as raw particle board has been described as a relatively homogeneous product, and because of the relative significance of transport costs for the ultimate price, even within the radius of 500 km distance should play a role for customer choice among the various supply alternatives. Therefore, given their relative proximity, for certain customers the Parties appear to be "close" alternatives, which finds some confirmation in the proportion of common customers. Hence, certain customers, in particular those located in Hungary and Slovakia, would likely face a removal of a close competitor to the Notifying Party.
56. In the South-Eastern region of Hungary the merger as originally notified would even have led to a reduction of supply alternatives from 3 to 2, as the customers located in that area are more than 500 km away from the Pfleiderer production facilities in Southern Poland.
57. The fact that customers would have had few realistic supply alternatives in those regions is also reflected by the Parties' high market shares on the level of national markets. The Parties themselves estimated that their combined market shares (taking into account the

³³ Due to its location close to a port, Fantoni is shipping raw particle board to customers based outside Europe as well.

³⁴ Although some fringe players are active in the areas mentioned, their presence is limited according to the market share data that was submitted by the Parties. Moreover, customers have confirmed not to regard those fringe players as a viable alternative, especially not for larger orders.

original Target) in Austria, Hungary and Slovakia would have reached [40-50]*%, [60-70]*% and [60-70]*% respectively.³⁵

58. The limited possibilities of switching supplier would have made customers in the affected area particularly vulnerable to price increases. If, prior to the merger, one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger as originally notified would have removed this particular constraint. Moreover, firms other than the merging firms could also have benefited from this reduction in competitive pressure as the price increase by the merging firms might have switched some demand to them, which would have allowed them to increase prices as well. The reduction in these competitive constraints, the magnitude of which is evidenced by the market shares, could have led to a significant price increase in the affected area.

(c) *Competitors unlikely to increase supply if prices increase*

59. When market conditions are such that the competitors of the Parties are unlikely to increase their supply substantially if prices increase (in this case to increase supplies to the area where prices may rise), the merging Parties may have the incentive to reduce the output below pre-merger levels, thereby raising market prices. Capacity constraints are more likely to be important when goods are relatively homogeneous. The originally notified transaction appeared to create such incentives, as will be further outlined in the following paragraphs.

60. According to a report that was submitted by the Notifying party there are already capacity shortages which have resulted in an increase in raw particle board prices of more than 50% since 2003.³⁶ Customers have repeatedly reported that they are confronted with the fact that suppliers' capacities for the production of raw particle board are currently fully utilised.³⁷ The Commission's market investigation confirmed that the main suppliers do not have significant spare capacity to increase supplies into the affected area.³⁸

61. Expanding capacity would need considerable investment and a significant lead time. The planning of a new production facility, the acquisition of the land, the necessary permission process and finally the delivery/installation of a raw particle board production line usually takes more than two years.³⁹ Although some capacity is expected to come on stream in the EEA over the next two years, notably from new Egger facilities in Romania and the United Kingdom and from a new Kronospan facility in Slovakia⁴⁰, these additional capacities

³⁵ See Form CO, Annex 8.7 (Pöyry report), p. 16. It should be noted that on the basis of the shipment data received during the market investigation, the market shares seem to be significantly higher.

³⁶ See Form CO, Annex 8.7 (Pöyry report), p. 16.

³⁷ Reply to questionnaire to customers 7 May 2007, question number 28.

³⁸ Reply to questionnaire to competitors 8 May 2007, question number 31 in conjunction with sales data submitted by competitors during phase II.

³⁹ Answer to questionnaire to Parties of 23 May 2007 for example states that the lead time raw particle board equipments supplier Dieffenbacher for delivery of a particular planned line is currently two years.

⁴⁰ Kronospan plans to invest and extend capacity in Slovakia (Zvolen). [...]*

would barely be sufficient to meet the increasing demand for raw particle board of approximately [400.000-500.000]*m³.⁴¹

62. Although part of the new capacity will come on stream in the affected area, it seems unlikely that this will significantly change the tight capacity situation in the foreseeable future. According to the data concerning the predicted growth in the markets for raw particle board that was submitted by the Notifying Party, demand for raw particle board is expected to grow until 2015, in particular in Eastern Europe.⁴² In addition, as outlined with regard to Egger, the planned capacity that is coming on stream in the foreseeable future will mainly be dedicated for internal use and can therefore not be expected to have a significant impact on the merchant market for raw particle board. An important amount of the additional capacity of Kronospan in Slovakia will might be used for coating, [...]*.⁴³ According to these plans, the raw particle board required for the coating will be delivered from other Kronospan factories as well as the original Target, thereby reducing the sales to the merchant market in the affected area.
 63. The Parties have argued that distant competitors could redirect their supplies to the affected area if prices were to rise post-merger. Again, while suppliers from greater distances than 500 km might become competitive if prices were to rise in the affected area and would have an incentive to shift supplies given the increased price level, the new entity would still be able to raise prices up to a certain point whereas, pre-merger, the Parties exerted a direct constraint on one another (and distant suppliers would not have considered shipping into the affected area or would not have been considered by customers).
 64. In summary, based on the information gathered by the Commission it appeared unlikely that competitors of Kronospan and Constantia would have been able to significantly increase their already existing supplies if prices had increased, or that they could have constrained the ability of the new entity to raise prices by redirecting supplies into the affected area.
- (d) *Originally intended transaction would have eliminated an important competitive force*
65. The raw particle board activities of Constantia consist of two production plants, each operating as a separate business. Falco with [40.000-50.000]* m³ of output volume of raw particle board is not very active on the merchant market, but Fundermax, with an output volume of [400.000-500.000]* m³ for the merchant market, is.
 66. Constantia submits that Fundermax has, in the past, largely been operated as a stand-alone business within the Constantia group, and that it is a relatively efficient organisation.⁴⁴ Fundermax is well-known in the market and has modern facilities with fully modernized

⁴¹ See fn. 22.

⁴² See Form CO, Annex 8.7 (Pöyry report), p. 11 and 16. The report in particular mentions Romania, Bulgaria and Ukraine as countries where in the future the build-up of a modern furniture industry can be expected, raising demand for particle board.

⁴³ Revised answer to questionnaire to Parties of 23 May 2007.

⁴⁴ See Form CO.

continuous particle board pressing lines.⁴⁵ It appears that Kronospan originally intended to keep Fundermax as a separate stand-alone business under existing trademarks and with a sales program and distribution system of its own within its group.⁴⁶ Falco and Fundermax have so far targeted different regions. Falco has been directing its sales mainly towards the East and Fundermax has been directing sales towards the West.⁴⁷

67. In the market investigation respondents also pointed out that Constantia's raw particle board business is competitive. Customers indicated that Fundermax is an efficient company with high quality standards. They also emphasized that it has a broad product portfolio. Fundermax was also reported to be a lean, "more efficient" organisation (compared to other suppliers in the region).⁴⁸ Constantia submitted that Fundermax has the [...] ⁴⁹ Several customers and competitors reported that Constantia offered competitive prices.⁵⁰
68. In light of the above, the Commission considers that Constantia's raw particle board business, in particular Fundermax, is an important competitive force in the affected area that would have been eliminated as an independent competitor through the originally intended transaction. Indeed, many customers expressed their concern that the supply side would become less competitive as a result of the originally intended transaction. Customers were also afraid that only a few competitors would remain in the market for raw particle board.⁵¹

(e) *Entry barriers*

69. The in-depth market investigation in phase II has also confirmed that it cannot be expected that new entrants, which are currently not active in the raw particle board business in the EEA, will enter the market in the foreseeable future.
70. According to the Parties there has been no significant entry on the raw particle board market in the EEA during the last five years, and future entry by a new supplier seems unlikely. New production facilities would only be started by producers who are already active in the business in the EEA.
71. The lead time for starting up a raw particle board production facility is considerable and investment in a raw particle board pressing line and roofed production site is needed. It normally takes more than two years from the strategic decision to set up a production facility until it comes on stream. In addition, since the set-up investment is significant the costs of failed entry for new players are high. Based on the elements gathered in this

⁴⁵ Reply of Constantia Industries AG to information request by the Commission, 20 July 2007.

⁴⁶ Reply of Constantia Industries AG to information request by the Commission, 20 July 2007.

⁴⁷ Reply of Constantia Industries AG to information request by the Commission, 20 July 2007.

⁴⁸ Reply to questionnaire to customers 16 July 2007, question number 6.

⁴⁹ Reply of Constantia Industries AG to information request by the Commission, 20 July 2007.

⁵⁰ Reply to questionnaire to customers 16 July 2007, question number 8 and Reply to questionnaire to competitors 16 July 2007, question number 4.

⁵¹ Reply to questionnaire to customers 7 May 2007, question number 36 to 41.

investigation it thus appears that new entry within the relevant time horizon of two years⁵² is unlikely.

72. Barriers to expansion by existing players appear lower, but here also the time needed to implement new investment plans is considerable. During its investigation, the only plans to start new production lines within the next two years that were brought to the attention of the Commission concerned investments of existing suppliers of raw particle board, notably Egger in the United Kingdom and Romania, and Kronospan. However, as already indicated, the expansion of Egger will not work as an additional competitive constraint on the merged entity.
73. In conclusion, potential entrants would encounter barriers to entry which give incumbent firms advantages over potential competitors. Given the considerable investment and a significant lead time for new capacities of more than two years, price increases will not be significantly constrained by entry.

(f) Possible subsidies

74. [...] ⁵³ Therefore, the Commission is not in a position to take into account the possible effects of such measures in this Decision. Any possible effects of these measures on competition will therefore have to be taken into account in the course of a possible State Aid assessment by the Commission. This Decision does not prejudice the outcome of a possible Commission investigation under the State aid rules.

3. COATED PARTICLE BOARD

(a) Structure of the market

75. The activities of Kronospan and the original Target also overlap in the market for coated particle board. On the EEA level the combined market share of these undertakings would amount to approximately [10-20]*%, with an increase of Kronospan's estimated market share by [0-10]*%. The actual position of both Kronospan and the original Target on the market for coated particle board seems to be stronger in the Central Eastern part of Europe than in the Western part. Whereas in Western Europe the combined market share on a (hypothetical) national level – based on the Parties' own estimates – would hardly have reached [10-20]*%, the combined market share in the Eastern European countries would have been more elevated.
76. However, as in the case of raw particle board, national market shares are only imperfect indicators for the market situation, since the competitive interaction between plants does not take place on a national level, but rather within the respective supply areas (which can also be cross-border areas). Therefore, the following assessment focuses on the question whether customers' choice of potential suppliers would have been significantly limited due to the originally intended transaction.

⁵² See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/3), OJ C31, 5.2.2004, p. 5, para. 74.

⁵³ [...]*

77. Since transport costs are less important for coated particle board given the higher added value of the product, the distances over which such products can be economically supplied are longer. The Commission has concluded that a significant amount of coated particle board is shipped more than 1000 km and, thus, that the affected market includes at least Central Europe and may even be wider. On the basis of this geographic delineation, it is concluded that the originally intended transaction would not have raised any concerns with respect to its compatibility with the common market, for the reasons set out in recitals 78 and 79.
78. In its assessment, the Commission has concentrated on those customers in an area where the Parties have overlapping activities within a radius of 1000 km around the production facilities of the original Target. The Commission has assessed the competitive supply alternatives for these customers within a distance of 1000 km.
79. Based on the supply data gathered in the market investigation in phase II, these customers have already sourced and would, post-merger, be able to source coated particle board from suppliers based, for example, in Austria, Germany, Belgium or France, such as Egger, Pfleiderer, Sonae, Kronoswiss, as well as several smaller suppliers.
80. In summary, the originally intended transaction would not have significantly impeded effective competition in the market for coated particle board.

4. CONCLUSION ON NON-COORDINATED EFFECTS

81. In the light of the above, it is concluded that the originally intended transaction would have significantly impeded effective competition in the common market through non-coordinated effects in the market for raw particle board production in certain areas within a radius of around 500 km surrounding the original Target's production sites.

C. COORDINATED EFFECTS

82. A merger in a concentrated market may also significantly impede effective competition by way of coordinated effects, namely if it increases the likelihood that firms are able to coordinate their behavior. In some markets the most likely coordination may involve keeping prices above the competitive levels. In other markets the coordinated outcome may be a division of the market, for instance by geographic areas.⁵⁴
83. There are several features of the market for *raw particle board* that appear to be conducive to facilitating coordination aimed at selling at higher prices: Firstly, raw particle board is a commodity product for which brand loyalty does not play a major role. According to the Parties, the products are nowadays standardized to a large extent and quality is not a major differentiator.⁵⁵ Secondly, research and development or intellectual property rights are not important in this sector. The product itself is rather simple and has been produced more or less in the same way for a long time. The existing know-how is used mainly to improve the cost effectiveness of the production process. Finally, regulatory issues are of minor importance and product certification can be obtained easily when the standards are fulfilled.

⁵⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/3), OJ C31, 5.2.2004, p. 5, para 40.

⁵⁵ Form CO, page 82.

84. Suppliers also appear to have a good knowledge of the prices of their competitors. In addition, it appears that suppliers sometimes cross-sell to each other. Customers have voiced the suspicion that the leading suppliers know each others' prices.⁵⁶ According to some competitors, they are aware of their competitors' prices mainly through the customer response to their offers.⁵⁷ The majority of customers that responded to the Commission's questionnaire allege that the leading suppliers of raw particle board in the EEA have aligned their prices.⁵⁸ The vast majority of customers that responded to the Commission's questionnaire have expressed concerns about whether competition is functioning on this market; in particular, customers have expressed concerns about possible cartelisation and possible customer allocation and have observed simultaneous price increases. Some customers also informed the Commission that they consider Constantia as one of the few "independent" suppliers, which would be lost due to the merger.
85. The originally intended transaction might have increased the likelihood that suppliers of particle board would have been able to coordinate their behavior or would have made coordination easier, more stable or more effective, as the number of suppliers of particle board would have been reduced as a result of the transaction.
86. However, any such concerns have, in any event, been removed by the modification of the transaction and the commitment entered into by the Notifying Party, which (as will be explained in more detail in the assessment of the commitments) will maintain a market structure similar to that prevailing before the transaction.

D. VERTICAL EFFECTS

87. The leading suppliers of coated particle board, Sonae, Pfleiderer, Egger and Kronospan, are all vertically integrated companies. However, some competitors to the leading coated particle board suppliers do not have their own in-house production of raw particle board; these are mostly smaller suppliers of coated particle board.
88. Non-vertically integrated competitors in the market for coated particle board depend on raw particle board producers for their input material. Given that the major suppliers of raw particle board are vertically integrated, and are at the same time competitors in the market for coated particle board, some competitors and customers have indicated that the new entity would have the ability and the incentive to foreclose its competitors on the market for coated particle board by ceasing to supply raw particle board, increasing the prices of raw particle board or delivering on uncompetitive terms. This would increase costs for the coated particle board producers that do not have their own in-house raw particle board production and may ultimately drive them out of the market.⁵⁹

⁵⁶ Replies to Questionnaire to Customers, 7 May 2007, question no. 40.

⁵⁷ Replies to Questionnaire to Competitors, 8 May 2007, question no. 42.

⁵⁸ Replies to Questionnaire to Customers, 7 May 2007, question no. 40.

⁵⁹ One customer of coated and raw particle board pointed out to the Commission during its market investigation that the leading (integrated) suppliers sometimes sell their coated particle board at lower prices than their market prices for raw particle board. A customer of coated particle board indicated that a non-integrated supplier of coated particle board was threatened with a supply stop by one of the leading raw particle board producers if it behaved too competitively on the market for coated particle board.

89. However, given that supply of coated particle board takes place over distances of more than 1000 km, the situation of customers of coated particle board would only be changed if their supply alternatives on such a broader geographic scale would be affected by the merger. On this basis, it should be noted that the originally intended transaction would have increased the Notifying Party's output of raw particle board for the merchant market only by [400.000-500.00]* m³ (taking into account the original Target). Even if this output were entirely used for coating, it would only be equivalent to [0-10]* percent of the overall coating production in the EEA. Moreover, given that all important suppliers of coated particle board in the EEA are vertically integrated, and given that the Parties would have a combined market share in coated particle board (taking into account the original Target) of only [10-20]*%, it appears that there would still remain sufficient competition on this market. Suppliers of coated particle board located more than 500 km away from the original Target facilities could still supply customers and thereby guarantee effective competition in a region where rival producers of coated particle board would potentially face foreclosure concerning the necessary raw particle board from the Notifying Party. Thus, end-customers would not be harmed. Following the modification of the transaction, such concerns have in any event been removed, as it will re-create a market structure similar to that prevailing before the transaction (see below at VII.2).

VII. MODIFICATION OF THE TRANSACTION AND COMMITMENTS

1. PROCEDURE

90. In order to enable the Commission to declare the concentration compatible with the common market and the EEA Agreement even prior to issuing a Statement of Objections, in line with Article 10(2) of the Merger Regulation, the Parties undertook to modify the originally notified transaction.
91. The Parties proposed to amend the Framework Agreement dated 8 December 2006 prior to a Commission decision pursuant to Article 8(2) of the Merger Regulation, to the effect that Kronospan will only acquire control in Sprela and Falco, while Fundermax will be retained by Constantia. Moreover, Kronospan proposed a commitment not to acquire, or have an undertaking controlled by or affiliated⁶⁰ with it acquire FunderMax, be it wholly or in part, for a period of [...] years.
92. After examination and market testing of this proposal, the Commission concluded that the modification of the concentration and the commitments to be entered into by Kronospan would remove the serious doubts as to the compatibility of the notified operation with the common market, provided Kronospan also undertakes not to acquire joint control over Fundermax for a period of [...] years.
93. On 31 July 2007, the Parties signed the relevant Amendment Agreement to the Framework Agreement (Annex 1 to the Commitments) and the Notifying Party submitted the final Commitment text, in which it also undertook not to acquire joint control over Fundermax for a period of [...] years. These "Commitments to the European Commission, revised version of 31 July 2007" are set out in the Annex to this Decision.

⁶⁰ It is the Commission's understanding that this would cover companies in which Kronospan does not have control but holds a substantial interest in.

2. SUITABILITY OF THE MODIFICATION AND COMMITMENT TO REMOVE SERIOUS DOUBTS

94. The feedback during the market test of the proposal by the Parties has been mostly positive, although some negative but non-merger specific comments were made. The overwhelming majority of customers which raised concerns in phase I confirmed that the proposal could remove the serious doubts raised by the Commission in its decision of 14 June 2007. All customers and almost all competitors that replied⁶¹ confirmed that Fundermax constitutes a viable stand-alone business. In particular, customers in the affected area viewed the modification of the transaction and the commitment by the Notifying Party optimistically and expressed their interest in sourcing from Fundermax.

(a) The Fundermax business is able to compete effectively

95. Fundermax has in the past largely been operated as a stand-alone business within the Constantia group. It is a relatively efficient organisation. Fundermax is well-known in the market and has modern facilities with fully modernized continuous particle board pressing lines. The viability of the Fundermax business is underlined by the fact that Kronospan originally intended to keep Fundermax as a separate stand-alone business under existing trademarks and with a sales program and distribution system of its own within its group.

96. In July 2007, in preparation of the modified transaction, Constantia implemented a new organizational structure that will enable it to keep the whole Fundermax business within the Constantia Group following the transaction. According to Constantia, Fundermax is profitable by itself and is expected to continue to provide a positive contribution to the Constantia Group. As mentioned above (para. 94) all customers and most competitors have confirmed in replies to the market test that Fundermax has always been and will continue to be a viable business.

97. The proposed modification would have the effect of, on the one hand, securing in the affected area the significant volume of at least [400.000-500.000]* m³ of production of raw particle board for the merchant market. It would also keep the number of significant suppliers at pre-merger level. According to the Notifying Party, another [30.000-40.000]* m³ would become available for the merchant market, because sales of Fundermax to Sprela would, after the modified transaction, have to be considered merchant sales (and might not continue at all).⁶²

98. Having been part of the same group until now, Falco and Fundermax have so far targeted different regions. Falco has been directing its sales mainly towards the East (notably Hungary), whereas Fundermax has been directing its sales towards the West. Following the modified transaction, Fundermax would continue to compete in the regions where it was already active, but would also be able to direct its marketing and sales efforts towards the East. Falco's customers in the affected areas (in particular in Hungary, Slovakia and Slovenia) would still be able to approach Falco/Kronospan, but would, in addition, gain a supply alternative through the Fundermax business.

⁶¹ Except for one competitor from a country within the affected area, which, however, did not specify the reasons for its negative reply.

⁶² [...]*

99. Respondents to the market test have pointed out that Fundermax is relatively close to Falco (70 km) and is therefore in a good position to compete effectively with the latter. [...]*

(b) Potential third party acquirer

100. As regards potential acquirers of Fundermax, should Constantia decide to sell it in the near future⁶³, some customers and one competitor expressed concerns regarding the competitive situation should the business be sold to Kronoswiss, Egger, Pfeleiderer or Sonae. However, it should be noted that under current merger control legislation in the Member States and based on Fundermax' turnover in 2006, any transaction involving the sale of this business would – irrespective of the turnover of the acquirer – in all likelihood have to be notified in at least three Member States, namely Austria, Germany and Slovakia.⁶⁴

101. In order to exclude a development by which Kronospan would gain control over Fundermax without acquiring its (entire) business, the Commission has also asked Kronospan for an undertaking not to acquire joint control over Fundermax for a period of [...] years. Wording to that effect was subsequently included in the revised commitments.

(c) Non-merger specific comments

102. Some respondents underlined that in Europe there are only four large particle board producers left due to ongoing consolidation in the sector. Others pointed out that in Eastern Europe, two large competitors, Kronospan and Egger, have a relatively strong position. Some smaller competitors were also concerned that Kronospan would be able to offer very low prices because of its scale of operations, thereby trying to force them out of the market. However, these concerns do not seem to be merger-specific or otherwise related to the proposed transaction, and there has been no indication that the merged entity would be in a position to follow a strategy of predatory pricing.

103. The modified transaction, namely the acquisition by Kronospan of Falco/Sprela, would only affect a minor volume of raw particle board currently available for the merchant market. The number of competitors would remain at the same level. Especially in the region of Austria, Hungary, Slovenia, Slovakia and Romania, Fundermax could become a new realistic and competitive supply alternative for customers and would thus be able to exercise competitive pressure on Kronospan in the affected area. In addition, Kronospan has committed not to acquire Fundermax within a period of [...] years.

104. The modification and commitment will also address any potential increase in the risk of coordination in the particle board markets envisaged by the originally notified transaction, since it will largely maintain the market structure with the same number of eligible suppliers.

⁶³ Four competitors – three larger and one smaller player – already expressed an interest to acquire the Fundermax business, should Constantia consider to sell it.

⁶⁴ In Hungary, Slovenia and Greece, a notification obligation is also possible and depends on the turnover of the acquirer in these Member States.

(c) Conclusion

105. The modification of the transaction and the Commitment rectify the serious doubts as to the compatibility of the concentration with the common market and the EEA established in the decision of 14 June 2007.

VIII. CONDITIONS AND OBLIGATIONS

106. Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
107. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
108. The decision in this case should be made conditioned on compliance with Section A.2. of the revised version of the Commitments to the European Commission submitted by the Notifying Party on 31 July 2007.

IX. OVERALL CONCLUSION

109. For the reasons outlined above the notified operation, as modified, should be declared compatible with the common market and with the EEA Agreement pursuant to Article 2(2) of the Merger Regulation, subject to compliance with the Commitments in the Annex to this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The modified operation, whereby Kronospan Holding GmbH acquires sole control over Falco CC and Sprela GmbH within the meaning of Article 3 (1) (b) of Regulation (EC) No 139/2004, is hereby declared compatible with the common market and the EEA Agreement.

Article 2

Article 1 is subject to compliance with the condition set out in Section A.2. of the revised version of the Commitments to the European Commission submitted by the Notifying Party on 31 July 2007 (Annex) .

Article 3

This Decision is addressed:

To the Notifying Party:

Kronospan Holding GmbH
Leopoldstaler Str. 195
D-32839 Steinheim
Germany

Done at Brussels, 19 September 2007

For the Commission,
Neelie KROES
Member of the Commission

ANNEX

**Commitments to the European Commission
Revised Version of 31 July 2007**

European Commission
DG Competition
Rue Joseph II 70 Jozef-II straat
B-1000 BRUSSELS

Case M.4525 Kronospan / Constantia

COMMITMENTS TO THE EUROPEAN COMMISSION

Revised Non-Confidential Version 31 July 2007

On 4 May 2007, Kronospan notified the proposed acquisition of Sprela GmbH, Falco CC and of the raw and coated particle board division of FunderMax GmbH (this division in the following referred to as “FunderMax”) from Constantia to the Commission, pursuant to Council Regulation (EC) No. 139/2004 (“Merger Regulation”). On 14 June 2007, the Commission issued a decision according to Article 6(1)c of the Merger Regulation in order to open a detailed investigation of the case.

In order to enable the European Commission (the “Commission”) to declare the concentration compatible with the common market and the EEA Agreement even prior to issuing a Statement of Objections, in line with Article 10(2) of the Merger Regulation (the “Clearance Decision”), Kronospan and Constantia (the “Parties”) modified the notified concentration on 31 July 2007 by amending the Framework Agreement dated 8 December 2006 to the effect that Kronospan will only acquire control in Sprela and Falco, while FunderMax shall be retained by Constantia.

In order to implement the above, the “Parties” herewith commit themselves vis-à-vis the Commission as follows (the “Commitments”):

Definitions

Any term used in these Commitments, unless otherwise defined, or unless the context indicates otherwise, shall be interpreted in the light of the Commission Notice on remedies acceptable under the Merger Regulation.

A. Commitments

1. The Parties amended the Framework Agreement dated 8 December 2006, on which the notified concentration is based, as set out in ANNEX 1 [*confidential – not attached*] to these Commitments.

The amendment shall take effect upon the date of adoption of the Clearance Decision.

2. Kronospan undertakes for a period of [...] years not to acquire sole or joint control, or have an undertaking controlled by or affiliated with it acquire sole or joint control over FunderMax, be it wholly or in part.

This undertaking shall take effect upon the date of adoption of the Clearance Decision.

B. Review Clause

The Commission may, where appropriate, in response to a request from Kronospan showing good cause, waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Stuttgart, 31/07/2007

Vienna, 31/07/2007

Dr. Jörg Schneider-Brodthmann
KLEINER Rechtsanwälte

Dr. Astrid Ablasser-Neuhuber
bvp Hügel Rechtsanwälte OEG

duly authorized for and
on behalf of Kronospan Holding GmbH

duly authorized for and
on behalf of Constantia Industries AG