Case No COMP/M6286 - SÜDZUCKER/ ED&F MAN

Only the English text is authentic.

REGULATION (EC) No 139/2004

MERGER PROCEDURE

Article 8 (2)

Date: 16/05/2012

EUROPEAN COMMISSION

Brussels, 16.5.2012
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PUBLIC VERSION

COMMISSION DECISION

of 16.5.2012

addressed to:
SÜDZUCKER AG MANNHEIM/OCHSENFURT

declaring a concentration to be compatible with the internal market and the functioning of the EEA Agreement

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 undertakings[1], and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 9 November 2011 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission on 14 February 2012,

Having regard to the opinion of the Advisory Committee on Concentrations,

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

WHEREAS:

1. INTRODUCTION

(1) On 19 September 2011, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 (the "Merger Regulation")[2] by which the undertaking Südzucker Holding GmbH, controlled by Südzucker AG Mannheim/Ochsenfurt ("Südzucker", Germany), acquires within the

[1] OJ L 24, 29.1.2004, p.1.
[2] OJ L 24, 29.1.2004, p.1.

meaning of Article 3(1)(b) of the Merger Regulation control of ED&F Man Holding Limited ("EDFM", United Kingdom) by way of purchase of shares (the "proposed transaction"). Südzucker and EDFM are designated hereinafter as the "Parties" while Südzucker is the "notifying party".

2. THE PARTIES

(2) Südzucker is a German food company active in the areas of sugar production and marketing, food additives, frozen food, portioned food articles, bioethanol production and fruit juices concentrates and preparations. The sugar segment covers white sugar production from beet as well as the refining of raw cane sugar and marketing of sugar and by-products. Südzucker produces sugar in 29 beet sugar factories and three refineries in Germany, Belgium, Bosnia-Herzegovina, France, Poland, Austria, Slovakia, the Czech Republic, Hungary, Moldova and Romania.

(3) EDFM is primarily a commodity trading company. Its product portfolio comprises sugar, liquid by-products of sugar production such as molasses (liquid-products segment), coffee, tropical oils and biofuels (primarily biodiesel, ethanol is not supplied in the EEA). The company also provides logistic services (storage and transportation) and financial services.

3. THE OPERATION AND THE CONCENTRATION

(4) Pursuant to a Subscription Agreement and the New Articles of Association of EDFM (as amended by a Deed of Variation signed on 24 August 2011), Südzucker will acquire 24.99% of EDFM's share capital. Pursuant to paragraphs 54 to 57 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Jurisdictional Notice")[3] sole control may be acquired *de jure* by a minority shareholder if it obtains the ability to exercise decisive influence over the other undertaking's strategic commercial behaviour[4]. The Subscription Agreement and the Articles of Association grant Südzucker strong veto rights in particular over the annual budget, business plan and appointment of directors[5*]. No other shareholder will enjoy such veto rights[6].

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[3] OJ C/95, 16.4.2008, p. 1.

[4] See Jurisdictional Notice, paragraph 54: "*Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished (…) Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control).*" And paragraph 57: "*Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure*".

[5] For instance [...][*].

[*] 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.

[6] The current major shareholders of EDFM are [...]* of EDFM's shares, [...]* of the shares and [...]*.

Therefore, the proposed transaction will lead to negative sole control within the meaning of paragraph 54 of the Jurisdictional Notice[7].

(5) The proposed transaction thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

4. UNION DIMENSION

(6) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5,000 million [...]*. Each of them has a Union-wide turnover in excess of EUR 250 million [...]*. Neither of the undertakings achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

(7) The proposed transaction therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

5. THE PROCEDURE

(8) Based on its first phase investigation, the Commission raised serious doubts as to the compatibility of the proposed transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 9 November 2011 (the "Article 6(1)(c) decision").

(9) The notifying party submitted its written comments on the Article 6(1)(c) decision on 17 November 2011.

(10) A non-confidential version of certain key statements of third parties collected during the first phase investigation was provided to the Parties on 24 November 2011.

(11) On 14 February 2012, the Commission adopted a Statement of Objections (the "SO") pursuant to Article 18 of the Merger Regulation.

(12) By submission of 28 February 2012 Südzucker responded to the Statement of Objections and asked for an Oral Hearing.

(13) On 5 March 2012 an Oral Hearing took place. As a third party, Società Fondiaria Industriale Romagnola SpA ("SFIR") attended the Oral Hearing.

(14) The meeting of the Advisory Committee took place on 25 April 2012.

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7 See Jurisdictional Notice, paragraph 54: *"Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished (…) Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control)."*

6. ASSESSMENT

(15) The proposed transaction concerns the acquisition of sole control by Südzucker, the largest European sugar producer, of EDFM, the second largest sugar trader worldwide. EDFM is also active in the production of sugar in Europe via two refineries; the SFIR Raffineria di Brindisi ("SRB" or the "Brindisi refinery") in the South of Italy and the Sociedade de Desenvolvimento Agro-Industrial, S.A. (the "DAI refinery") in Coruche, Portugal.

(16) The proposed transaction results in potentially affected markets for (i) the supply of white sugar in Italy and Greece, (ii) the supply of preferential raw cane sugar in the EEA, and (iii) the supply of molasses in several Member States, mainly in Central Europe. The competitive assessment will therefore focus on the markets for sugar and molasses, which are elaborated separately in the following sections of this Decision.

6.1. THE SUPPLY OF WHITE SUGAR TO ITALY AND GREECE

6.1.1. INTRODUCTION TO THE SUGAR INDUSTRY

6.1.1.1. The production of sugar

(17) Sugar (the proper term is sucrose[8]) is the most common sweetener. It can be found in many natural foods (e.g. fruits and vegetables) but can only be extracted from sugar beet and sugar cane.

(18) Sugar is a relatively homogeneous product. Although some variations of sugar exist on the market, such as liquid or specialty sugars, the vast majority of sugar sold is so-called "granulated white sugar".

(19) Sugar has many different uses in industrial processing. It can be used as: a sweetener, a preservative, a flavour enhancer, a bulking agent in other foods, a food for yeast to aid fermentation in baking and brewing, a means to raise boiling or lower freezing points (e.g. in ice cream) and as an enhancer of the texture and shelf-life of certain foods (sugar absorbs moisture and provides a crunchy feel). Only around 30% of all sugar used in Europe is destined for direct consumption[9].

(20) Sugar is produced either from sugar beet, which is grown in Europe and elsewhere and processed into sugar locally, or from sugar cane, grown in more tropical climates.

(21) Both sugar cane and sugar beet are increasingly used in the production of bio-fuels. Due to higher oil prices in recent years, Brazil is currently streaming more sugar cane yields into the ethanol industry in order to lower gasoline prices. In the Union, the use of bio-fuels in gasoline is also increasing, due to regulation at both Union and Member State levels calling for decreases in CO2 emissions.

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8 Sucrose may be hydrolisated into two molecules: glucose and fructose which are also sweeteners.
9 See CBI report on sugar, June 2009.

(22) Currently, 80% of world sugar production is based on cane, while most of the sugar consumed in the Union is still beet sugar. However, since the reform of the sugar regime in the Union in 2006 a higher percentage of Union production is based on raw cane sugar.

(23) Sugar production from beet involves extracting the beet sugar content with water into a raw juice solution which is then filtered, purified and evaporated to remove moisture and impurities and then concentrated until crystallisation occurs. This juice is in turn put through a centrifugal process to which small crystals are added in order to act as a nucleus for the crystallisation process. At the end of this process, crystallised sugar is dried, stored and packed according to end-use markets, i.e. generally in bulk, 1 tonne and 50 kg bags for industrial and merchant customers and in 1 kg or smaller packets for retail customers.

(24) Sugar cane is a tropical grass which is harvested mechanically or by hand. Unprocessed cane sugar is not imported into the Union. Indeed, the sugar content per unit of weight is much lower for unprocessed sugar cane than for semi-processed raw cane sugar. Therefore, the import of unprocessed sugar cane would not be economical compared with the import of semi-processed raw cane sugar. Rather, the sugar cane is processed at a mill in the country of origin and the resulting raw cane sugar is then shipped to the Union as a product for further processing (refining). Alternatively, raw cane can be refined into the final product locally.

(25) The first stage of processing cane sugar is carried out in factories close to or in the growing area. The cane is cleaned, crushed and shredded and sprayed with hot water in order to extract the juice. The juice is then further processed to create "raw cane" or raw cane sugar, which is an off-white sugar that is partly purified and is in a concentrated, crystallised, microbiologically stable form (so-called "semi-processed form") suitable for bulk handling, storage and transportation to refineries.

(26) At the sugar refinery, the remaining impurities in the raw cane are removed through a second onward processing/refining stage which in itself is a complex process comprising various distinct stages (including affination and melting; carbonation and filtration; decolourisation; evaporation and crystallisation; and separation and drying).

(27) White sugar production from raw cane sugar is mainly done in specialised refineries, i.e. refineries that are optimised for raw cane sugar and in which sugar cannot be produced from processing sugar beet. This is the case for EDFM's refinery in Brindisi as well as Südzucker's refinery in Marseille.

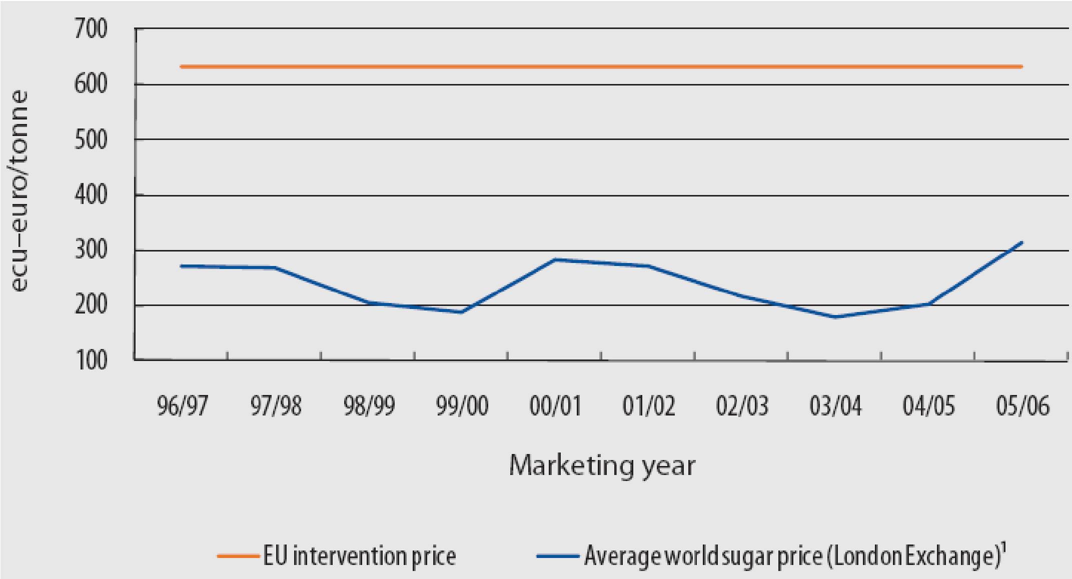
(28) It is also possible to refine raw cane sugar in factories that are mainly dedicated to beet processing but this requires some significant modifications[10]. In the Union some beet sugar factories have been equipped in such way. This is the case for example in a factory of the Eridania group in Minerbio (Italy) and Südzucker group in Romania.

10 An ion exchanger for decolourization would have to be added. The crystallization process would have to be modified, but the same machinery (crystallizers, pumps, centrifuges, sugar drier etc.) can be used. Some equipment like flow transport devices or tubes, the automation systems and some other devices must be modified.

6.1.1.2. The Union regime prior to the sugar reform of 2006

(29) The sugar common market organisation (CMO) was set up in 1967[11] to ensure a fair income to Community producers and to stabilise the market. Union producers could sell sugar at guaranteed prices, i.e. intervention prices which in the period 1996–2006 were significantly higher than the international market price.

Graph 1: Prices for white sugar from 1996 to 2006[12]



(30) Production quotas distributed amongst the Member States kept the overall production within certain limits. Levies were applied on imports and sugar surpluses were exported. Sugar which had been produced within the quotas but in excess of internal market requirements was exported with export refunds (or stored). No export refunds were granted for the export of sugar which had been produced in excess of the quotas.

(31) Prior to the 2006 sugar reform, the Union was the third largest sugar producer in the world with annual production in excess of 20 million tonnes and was the second largest consumer[13] [...]*[14].

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11 CMO was set up by Regulation No 1009/67/EEC of the Council of 18 December 1967 on the common organisation of the market in sugar (OJ 308, 18.12.1967, p. 1). Currently CMO is governed by Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

12 Special report n°6 from the European Court of Auditors – "Has the reform of the sugar market achieved its main objectives?" - 2010.

13 In 2005 the Union produced 20.3 million tonnes of sugar and consumed 15.6 million tonnes. The Union imported 2.3 million tonnes of raw sugar while exports of white sugar amounted to 7.5 million tonnes, of which 2.5 million tonnes were subsidized by the EU through export refunds.

14 The Union also had a limited production of isoglucose which is derived from processing starch usually extracted from maize or from wheat or potatoes. Isoglucose is largely used in the food industry and in many cases, for instance in soft drinks, is a potential substitute for sugar. Union production of isoglucose has been limited by the establishment of a quota of marginal magnitude. Quotas of limited importance also exist for the production of inulin syrup, a sweetener obtained from a fibre extracted from the chicory root.

(32) In the years preceding the 2006 sugar reform, the Union came under increasing pressure to avoid exporting surplus quantities of sugar at subsidised rates on the world market. This pressure finally resulted in a World Trade Organisation ruling in 2005 which obliged the Union to include out-of-quota sugar exports and re-exports of ACP imports in its sugar export limit. Thus, since 2006 the Union cannot export more than 1.37 million tonnes of subsidised white sugar, instead of the previous annual average exports of 6.5 million tonnes[15].

6.1.1.3. The regime put in place by the sugar reform of 2006

(33) Following the negative WTO ruling condemning in particular the export subsidies, the Union sugar regime was reformed in 2006 in order to increase the competitiveness in the sugar sector, stabilise the markets, guarantee the availability of sugar supplies and improve the market orientation of the sector by reducing some of the regulatory barriers.

(34) Therefore the Union sugar regime was reformed in 2006 and final changes took place in October 2009.

(35) Some of the main regulatory instruments remained unchanged, such as the allocation of beet sugar production quota to Member States, which in turn allocate the quotas to sugar beet processors as a precondition for the obligation to pay the minimum beet price (reference price). Whereas the 2006 sugar reform abolished intervention prices, it still maintained a system of minimum, albeit reduced, prices to be paid to beet growers. The sugar reform also suspended export refunds for sugar as of September 2008 onwards.

(36) The main features of the sugar reform were as follows[16]:

(a) Significant reduction of the overall European sugar beet production through massive quota renunciation. In the first two years of the sugar reform, the expected level of voluntary quota renunciations was not achieved, as only 2.2 million tonnes instead of the targeted 6 million tonnes were renounced, indicating that the incentives offered were not deemed to be sufficiently attractive. Therefore, in 2007 several modifications were made to the reform process creating a stronger incentive for all producers to renounce at least a certain percentage of their quota. These amendments aimed at achieving the desired Union sugar market balance through a 6 million tonnes reduction of the production of sugar, isoglucose and inulin syrup. As a direct consequence of these changes, in 2008 and 2009 producers renounced around 3.6 million tonnes quotas. By 2009, total renunciations reached 5.77 million tonnes, of which 5.23 million tonnes relates to the sugar quota.

(b) Abolition of intervention prices: reference prices, which replaced intervention prices, have been reduced by 36% over four years starting from 2006/07. The

15 Special report n°6 from the European Court of Auditors – "Has the reform of the sugar market achieved its main objectives?" - 2010 p. 9.

16 Special report n°6 from the European Court of Auditors – "Has the reform of the sugar market achieved its main objectives?" - 2010 p. 13 et seq.

2006/07 white sugar support price of EUR 631.9 per tonne was therefore reduced to EUR 404.4 per tonne by the end of the transition period in 2009/10.

(c) Suspension of export refunds for sugar as from September 2008 on, and only limited out-of-quota exports permitted. Following to WTO sugar panel, exports of out-of-quota sugar are limited to 1.37 million tonnes.

(d) Establishment of a temporary restructuring fund to finance compensatory payments for voluntary production quota renunciations. A restructuring fund paid a basic EUR 730 per tonne in the first two years for producers, renouncing their quotas and quitting the industry, with at least EUR 73 per tonne going to ex-growers (the fund would be paid for by a levy on continuing processors).

(e) Tariff-free market access for sugar from the Least Developed Countries ("LDC") and from the African, Caribbean, Pacific ("ACP") countries sugar as from 1 October 2009 on (see section 5.1.1.5).

6.1.1.4. Consequence of the reform on the sugar production in the Union (internal dimension of the new regime)

(37) From being a net leading exporter the Union has become the 2nd largest importer in the world. Quota renouncements have changed the Union market supply from a level of sugar production significantly above the internal consumption to a level of production (beet quota sugar production is currently of 13.3 million tonnes) markedly below consumption (Union domestic demand is approximately 16.7-17.1 million tonnes per year), the EU thus becoming a net importer, with Union production covering 85% of its consumption.

(38) Those quota renouncements led to (i) a significant reduction of the Member States producing sugar, (ii) a limited number of large Union sugar producers (iii) which grew and are still growing by the way of horizontal and vertical integrations.

(39) The Union accounts for around 9% of global sugar production[17]. Within the Union, France was, in 2009, the largest refined white sugar producer, accounting for almost 25% of the Union sugar production. The second largest sugar producer is Germany, accounting for approximately 22% of the Union sugar production.

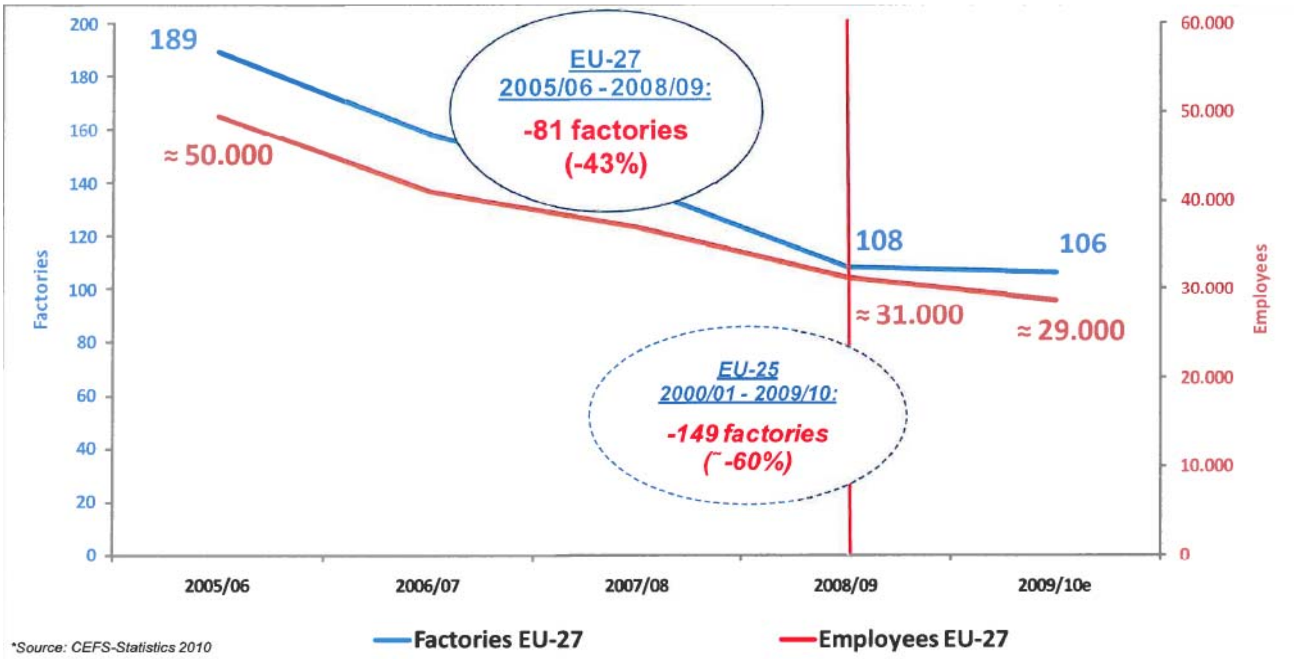
(40) The quota renouncements led to a significant reduction of the number of Member States producing sugar. While before the sugar reform 23 out of 27 Member States produced sugar from beets, after the reform five Member States stopped sugar production entirely (namely Ireland, Portugal, Slovenia, Bulgaria, Latvia), while six further Member States renounced 50% or more of their respective quota (namely Italy, Hungary, Slovakia, Greece, Finland and Spain).

(41) Since 2000/2001, 149 sugar factories (more than 60%) have been closed, of which alone 81 sugar factories were closed between 2005/06 and 2007/08. Sugar production is now concentrated in six Member States (France, Germany, Poland,

[17] Global sugar consumption reached over 162 million tonnes for the year 2007/2008 and grew to 166 million tonnes in 2008/2009, indicating a growth of 2.2% (International Sugar Organisation, 2009).

United Kingdom, Netherlands and Belgium) to which approximately 75% of the quota is allocated[18].

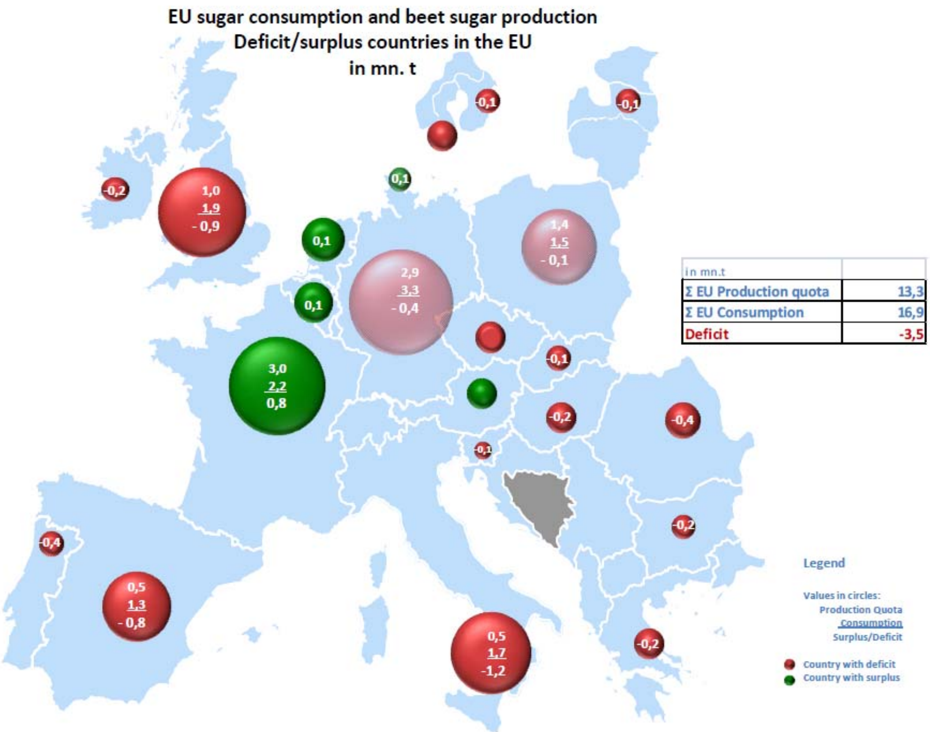
Sugar Factory closure 2001-2010



(42) Furthermore, a large number of Member States have become sugar deficit countries in the Union with consumption exceeding domestic beet sugar production. These deficit regions are in particular southern Europe and the United Kingdom. Italy is the biggest deficit Member State followed by the United Kingdom and Spain.

18 See for instance Special Court of Auditors Report Nr 6/2010, Annex II.

Union Sugar consumption and beet sugar production



(43) As shown by the table below[19], amongst the Member States which were still important sugar producers before the sugar reform, the impact has been greatest on Italy, which lost 67% of its sugar production quota between 2006 and 2009 (which represents more than 1 million tonnes).

[19] Court of Auditors Report, page 49, Annex II.

Evolution of the Union sugar quotas from 2006 to 2010

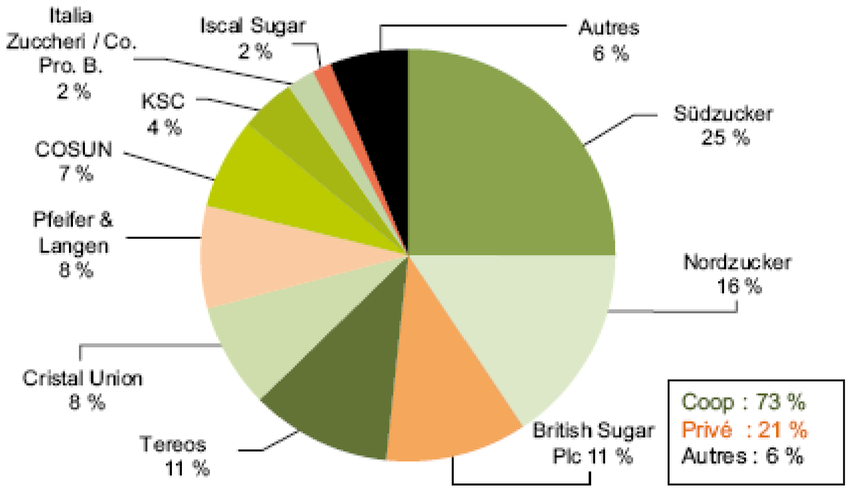
Member State	Initial quotas[1]	Quota renounced for given marketing year				Quotas available from marketing year 2009/10	Percentage of total quotas renounced
		2006/07	2007/08	2008/09	2009/10		
	(A)	(B)	(C)	(D)	(E)	(F) = (A+B+C+D+E)	(G) = Σ(B+C+D+E)/A
France[2]	4 120 687			-683 655		3 437 032	16,6 %
Germany	3 655 456			-757 200		2 898 256	20,7 %
Poland	1 772 477			-366 869		1 405 608	20,7 %
United Kingdom	1 221 474			-165 000		1 056 474	13,5 %
Netherlands	931 435			-126 547		804 888	13,6 %
Belgium	882 301			-206 066		676 235	23,4 %
Italy	1 557 443	-778 737	-24 861	-245 467		508 378	67,4 %
Spain	996 961	-93 119	-16 679	-256 578	-132 106	498 479	50,0 %
Czech Republic	474 932		-102 473			372 459	21,6 %
Denmark	452 466			-80 083		372 383	17,7 %
Austria	405 812			-54 785		351 027	13,5 %
Sweden	385 984	-42 562		-50 236		293 186	24,0 %
Greece	317 502		-158 800			158 702	50,0 %
Slovakia	216 037		-70 133	-33 584		112 320	48,0 %
Hungary	406 684		-108 093	-193 171		105 420	74,1 %
Romania[3]	109 164			-4 475		104 689	4,1 %
Lithuania	111 010			-20 758		90 252	18,7 %
Finland	146 087		-56 087	-9 001		80 999	44,6 %
Portugal[4]	79 671	-35 218	-19 500	-15 000		9 953	87,5 %
Slovenia	52 973		-52 973			0	100,0 %
Latvia	66 505		-66 505			0	100,0 %
Ireland	199 260	-199 260				0	100,0 %
Bulgaria[3]	4 752			-4 752		0	100,0 %
TOTAL	18 567 073	-1 148 896	-676 104	-3 273 227	-132 106	13 336 740	28,2 %

(i) Union sugar production is concentrated in a few large companies

(44) The 2006 sugar reform has led to a reduction of the number of players, thus reinforcing the concentrating pre-existing trend in the Union sugar sector. Today, five corporate alliances, namely Südzucker, Nordzucker, British Sugar, Tereos and Pfeifer & Langen account for over 80% of Union sugar beet processing capacity and 72% of the Union sugar market[20].

[20] Cf Special Agritrade report, May 2010 - http://agritrade.cta.int/Resources/Agritrade-documents/Special-reports/Corporate-restructuring-in-the-EU-sugar-sector-Implications-for-the-ACP

The 10 main Union sugar producers – 95% of the EU quota[21]



(45) **Südzucker AG** is the largest sugar producer in Europe with a Union sugar quota of around 25% and a yearly sugar production of 4.2 million tonnes. Südzucker produces sugar in 29 sugar factories and three refineries in Germany, Belgium, Bosnia-Herzegovina, France, Poland, Austria, Slovakia, the Czech Republic, Hungary, Moldova and Romania.

(46) **Nordzucker** is the second largest sugar manufacturer in Europe with an estimated Union-wide quota of 16%. The company runs five sugar beet processing factories in Germany. These are located in Sachsen-Anhalt and Niedersachsen. Additionally, there are sugar factories in Denmark, Finland, Lithuania, Poland, Slovakia and Sweden, and raw cane sugar refineries in Sweden and Finland.

(47) **British Sugar plc** is a subsidiary of Associated British Foods and the sole British producer of sugar from sugar beet. British Sugar processes all sugar beet grown in the United Kingdom and produces about half of the United Kingdom's quota of sugar, with the remainder covered by Tate & Lyle and imports. They hold around 11% of the Union quota with four beet processing plants in the United Kingdom, three beet processing plants in northern Spain and cane sugar refinery in the South of Spain.

(48) **Tereos** has an estimated sugar production quota of 11% in the Union and is the largest sugar manufacturer in France. The company operates nine sugar factories in France, two in the Czech Republic, and one raw cane sugar refinery in Spain. Outside the Union Tereos operates two sugar factories in La Reunion, one in Mozambique and seven in Brazil. Refineries are located in Mozambique and Brazil.

(49) **Pfeifer & Langen** has an estimated sugar production quota of 8% in the Union and produces around 100,000 tonnes of beet molasses p.a. in Germany. It has sugar-related operations in Germany, Czech Republic, Poland, Italy, Slovenia, Croatia, Ukraine, Romania, Hungary and Greece. The company runs six sugar factories in Germany, four of which are located in the very western part of Germany close to the

[21] Graph avalable on the "*Rapport d'activité 2011 from Confédération Générale des planteurs de betteraves*" http://www.cgb-france.fr/IMG/pdf/RapportDactivite-2011-Web.pdf p.6.

Dutch and Belgian border. P&L is also the third largest sugar manufacturer in Poland with four beet sugar factories. It also operates a sugar factory in Romania.

(50) In its decision on the merger *Nordzucker/Danisco (B2-46/08)*, the Bundeskartellamt considered that the German sugar market was dominated by an oligopoly of Nordzucker and Südzucker and that those companies created "sealed off" regional distribution areas, which they mutually respected. Sugar companies agreed on avoiding price competition within Germany by increasing activities in deficit countries regardless of high transport costs. The Bundeskartellamt has finally cleared the acquisition of Danisco by Nordzucker under the condition that Danisco's production plant in northern Germany (Anklam/Mecklenburg-Western Pomerania) is sold to a suitable purchaser before the acquisition is realized. The purchaser proposed by the parties, the Dutch sugar producer Royal Cosun ("Cosun"), has been accepted by the Bundeskartellamt.

(ii) The increasing trend towards horizontal and vertical integrations

(51) Due to the impact of the 2006 Union sugar reform, many Member States have become sugar deficit countries in the Union. In these countries where the demand is much higher than local production, the leading sugar producers in the Union have used different ways in order to be present. For instance, Nordzucker acquired the Scandinavian producer Danisco while ABF acquired the Spanish refiner Azucarera. In Italy, the traditional Italian sugar manufacturers, such as Eridania-Sadam, Italia Zuccheri S.p.A. ("Italia Zuccheri") and SFIR, have been trying to keep their "pre-reform" market share. In that context, they have established joint ventures mainly with manufacturers from surplus Member States, in order to satisfy the demand of their customers.

(52) Thus, the German sugar manufacturer Pfeiffer & Langen acquired 49.9% of Italia Zuccheri, while Tate & Lyle (recently replaced by Cristal Union) established a joint venture with Eridania for the marketing and sales of all sugar products. SFIR has taken a different approach by building a new refinery in a joint venture with EDFM in the South of Italy. SFIR also bought white sugar from other players, such as Eurosugar (Nordzucker, Sucre Union, and EDFM) in order to satisfy the demand of its customers. Other sugar manufacturers, such as Tereos, entered the market by establishing local distribution companies. Finally Südzucker, the leading supplier in Italy, markets and sells refined sugar through the joint venture Maxi Srl –a well-known Italian wholesaler, which Südzucker jointly controls together with Podini Holding S.p.A ("MAXI").

(53) To balance the lower sugar production, a few European beet sugar producers have tried to secure their own raw cane sugar supplies from ACP and LDC countries either by creating powerful integrated players – (e.g. ABF through Illovo which controls a significant amount of raw cane in Malawi, Zambia, Swaziland, Mozambique and Tanzania) – or through strong partnerships with players in those

countries (e.g. Südzucker in Mauritius, Tereos in Mozambique, Tate & Lyle in Barbados, Belize, Cambodia, Fiji, Guyana and Laos)[22].

6.1.1.5. Consequence of the reform on the trade between the Union and third countries (external dimension)

(54) Since the reform of the Union sugar industry was initiated in 2006/07, it was expected that the Union domestic demand of approximately 16.7-17.1 million tonnes per annum would be covered by Member State beet quota sugar production of 13.3 million tonnes, with the remainder covered by imported sugar from traditional preferential trade partners[23]. However, between then and now this has not been the case notably because expected imports from LDC/ACP-countries have been below the Commission's expectations, with the result that quota stock levels have progressively fallen.

(55) At the moment, raw cane sugar for refining may be imported into the Union from third countries under the following customs schemes:

(i) Sugar imports from ACP/LCP countries - Everything But Arms initiative and Economic Partnership Agreements

(56) On 26 February 2001, the "Everything But Arms" (EBA) amendment to the EU's Generalised Scheme of Preferences (GSP) was adopted. EBA extended duty and quota free access to all products originating in Least Developed Countries (LDCs), except arms and ammunition. However, three sensitive products, namely sugar, bananas and rice were not liberalised until 1st October 2009.

(57) On 23 June 2000, a new Partnership Agreement between the 77 ACP countries and the then 15 Member States was signed in Cotonou. The ACP-EU Sugar Protocol was annexed to Annex V of the Cotonou Partnership Agreement. Compared with the Lomé Conventions, the Cotonou trade regime paved the way for a profound transformation, preserving non-reciprocal tariff preferences until 31st December 2007, but replacing them as from 2008 with trade arrangements agreed in reciprocal Economic Partnership Agreements (EPAs) compatible with the rules of the World Trade Organisation (WTO).

(58) From 2001 until 2009, imports of sugar from LDCs were restricted by an annual first-come-first-served quota. In the 2001/02 marketing year, the quota was fixed at

[22] See answer of Südzucker to the third request of information. See also http://agritrade.cta.int/en/Welcome-to-Agritrade (Agritrade is the website for ACP-EU agriculture and fisheries trade issues).

[23] Even though the Commission decided to suspend export refunds for sugar from September 2008, the Union still exports between 500,000 tonnes and 1 million tonne of sugar/year, see Commission Regulations (EC) No 900/2007 of July 2007 on a standing invitation to tender to determine refunds on exports of white sugar until the end of the 2007/2008 marketing year (OJ L 196, 28.7.2007, p. 26), Commission Regulation (EC) No 947/2008 of 25 September 2008 suspending the export refunds on white and raw sugar exported without further processing (OJ L 258, 26.9.2008, p. 60), Commission Regulation (EC) No 948/2008 of 25 September 2008 suspending the export refunds on syrups and certain other sugar products exported without further processing (OJ L 258, 26.9.2008, p. 61) and Commission Regulation (EC) No 951/2008 of 25 September 2008 fixing the rates of refunds applicable to certain products from the sugar sector exported in the form of goods not covered by Annex I to the Treaty (OJ L 258, 26.9.2008, p. 66).

74,185 tonnes w.s.e., and was increased by 15% (compound) per annum until 2008/09. The EBA quota did not increase the raw sugar access or availability to the Union market because that quantity reduced tonne-for-tonne the amount of SPS/CQ required from the ACP suppliers.

(59) With the tacit approval of the Commission, the LDC Ambassadors based in Brussels agreed a "EBA Sugar Framework Agreement" which allocated the overall annual EBA quantity on the basis of a formula (based one third on GDP per capita, one third sugar production and one third in equal shares) which ensured that every LDC sugar supplier which wanted to ship to the Union in any year could register and would be allocated a meaningful share by the Ambassadors in accordance with the agreed formula.

(60) As from 1 October 2009, in accordance with the provisions of the EPAs, the ACP and the Union agreed to duty-free-quota-free ("DFQF") access for ACP sugar to the Union markets, subject to a the transitional safeguard mechanism for sugar of 3.5 million tonnes per annum fixed in Article 9 (1)(b) of Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain States which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements[24]. At the same time, the DFQF for sugar was also extended to the LDCs under the EBA initiative with a non-automatic safeguard clause. Taking into account the number of ACP countries involved, the EPA regime applies to almost half the ACP countries (36 countries), and the EBA regime applies to 31 countries. All 19 ACP beneficiaries of the Sugar Protocol will come either under the EPA (17 countries) or the EBA regime (2 countries). The only ACP countries excluded from the preferential regime are the 10 non-LDCs that have neither signed nor initialed an EPA with the Union.

(ii) CXL quotas

(61) In the wake of the accession of Austria, Finland and Sweden, and in the context of the conclusion of the negotiations under Article XXIV of the General Agreement on Tariffs and Trade (GATT), the Union undertook to import from third countries, from 1st January 1996, a quantity of raw cane sugar for refining, known as the CXL sugar quota, at a rate of duty of EUR 98 per tonne. The quota was originally set at 85,463 tonnes (of which 58,969 tonnes was assigned to Cuba and 23,930 tonnes to Brazil).

(62) The quota was further expanded to its current level in 2007 following the accession of Bulgaria and Romania to the Union and negotiations under Article XXIV:6 of the GATT. The current CXL quotas are presented in the table below.

[24] OJ L 348, 31.12.2007, p. 1.

Country	Access
Australia	9,925
Brazil	334,054
Cuba	68,969
Erga Omnes (3rd Countries)	253,977
India	10,000
TOTAL	**676,925**

(iii) Exceptional tariff rate quotas

(63) Special rules have been agreed for exceptional tariff rate quotas (TRQs) for sugar, these exceptional quotas being deemed necessary from time to time by the Commission in case of exceptional market conditions (Article 186 and/or 187 of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products[25] (the "Single CMO Regulation")).

(iv) Other sugar import custom schemes

(64) Sugar can also be imported from the world market under most favoured nation (MFN) conditions on payment of the appropriate import duties, notably EUR 419 per tonne for white and direct consumption sugars and EUR 339 per tonne for raw sugar for refining, plus additional special safeguard (SSG) duties.

(65) The system of import licenses is regulated by framework rules set by the Commission[26].

(v) However the volumes available of raw cane sugar are insufficient for the Union refineries

(66) The access to raw sugar from ACP/LDC countries or under CXL quotas is crucial and strategic for Union sugar producers since it is the only raw cane sugar that can be imported without prohibitive duties and quantities into the Union.

(67) In the sugar marketing year 2010/11 the expected use of sugar in the Union was around 17.2 million tonnes. Thereof 13.8 million tonnes were supplied by beet quota sugar production of the marketing year and 1.1 million tonnes by CXL and Balkan import quotas. The 700,000 tonnes under CXL quotas consisted almost exclusively of raw cane sugar for refining while the 400,000 tonnes imported from the Balkans was white sugar for direct consumption.

25 OJ L 299, 16.11.2007, p. 1.

26 Commission Regulation (EC) No 376/2008 of 23 April 2008 laying down common detailed rules for the application of the system of import and export licenses and advance fixing certificates for agricultural products. In addition, for ACP/LDC and CXL sugar from a named origin, an export licence is required in order to apply for an EU import licence. These export licences must be certified and authenticated by the competent authorities of the originating country, thereby giving the exporting country the wherewithal and moreover the obligation (under customs cooperation agreements) to control the export marketing of the sugar originating in its territory.

(68) The remaining 2.3 million tonnes were partially covered by [...]* tonnes of imports from ACP/LDC producers, [90-100]*% of which being raw cane sugar for refining and [10-20]*% white sugar for direct consumption[27].

(69) Therefore, for the marketing year 2010/2011, about 2.5 million tonnes of preferential raw cane sugar for refining (including raw sugar from ACP/LDC countries and raw sugar under CXL quotas) were imported into the EEA. This is less than what was necessary to close the gap with European demand. One reason for that gap was that international market prices[28] increased significantly relative to Union prices. Another reason was that the ACP and LDC countries were not able to expand their sugar production as fast as initially expected.

(70) Due to unavailability of raw cane sugar, cane sugar refineries are currently operating well below capacity in the EEA as shows the figure below.

Estimated supply and demand for raw cane sugar for refining in the Union[29]

[...]*

6.1.1.6. Significant price increase in the Union

(71) European prices for sugar, at least initially, fell drastically. At the beginning of the 2010/11 marketing year (starting from 1 October 2010) the international market price for sugar were even at a higher level than the Union sugar price as a consequence of shortfalls in important sugar producing countries, such as Mauritius, Fiji, Guyana, Swaziland and Brazil. Whereas one of the recommendations of the special report of the European Court of Auditors was that *"[t]he Commission and the Member States must ensure that competition law is correctly enforced in the sector thus ensuring the Treaty objective that supplies reach consumers at reasonable prices*"[30], the press in several Member States has recently reported however significant price rises in particular of retail sugar. In some Member States such price rises seem to reach 30 to 40 %. [...]*.

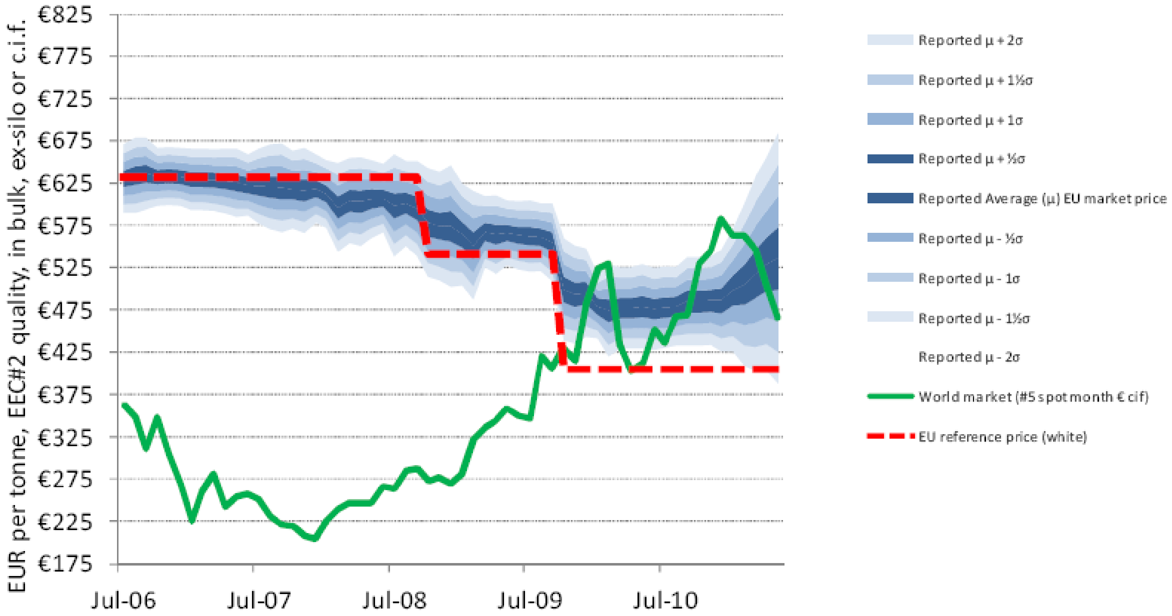
27 See 3rd request for information to EDFM. 10/12/2011.

28 The spot prices determined for raw sugar on the two main futures markets, London (LDP) and New York (NY spot price), are considered to be indicators of the world price. The International Sugar Organisation spot price is calculated daily from these two prices. The key indicator price for refined white sugar is the London LIFFE Contract Number 5.

29 Estimates from EDFM in the submission entitled "The European Union market for raw cane sugar for refining and the place of ED&F Man in that market".

30 Court of Auditors Report, paragraph 102, Recommendation IV.

Union and international market white sugar prices[31]



(72) Article 187 of Council Regulation (EC) No 1234/2007 states that, in the event of sugar prices reaching a level that disrupts or threatens to disrupt the availability of supply on the Union market and where that situation is likely to continue or to deteriorate, the Commission may, in particular, suspend the usual MFN import duties in whole or in part for certain quantities.

(73) In the Union sugar sector, such an event was recorded during the 2010/11 season, when it became clear that high international market prices were leading to a very low level of Union sugar stocks. Given the situation in March 2011, the Commission opened an 'exceptional' import quota for 300,000 tonnes at zero duty for raw and white sugar. When it became clear that this quantity would not be enough to cover a projected shortfall in the Union market, a second 'exceptional' import quota for 200,000 tonnes was opened at the end of May 2011.

(74) The rule for allocating licences was the "simultaneous examination method"[32], and given the high margins that were available at the time, each quota was heavily oversubscribed (for example, for the first quota a final allocation coefficient of 1.8053% was fixed, implying that import licences for applications for 16.6 million tonnes were received). According to the Parties, a consequence of this was that the final awarded tonnages were small (for example, if an operator had applied for the full first 300,000 tonne quota, they ended up receiving just 5.400 tonnes).

31 Annex 7.8 e) Form CO.

32 In the case of tariff quotas, e.g. for CXL sugar, applications are administered according to the "simultaneous examination method". In accordance with the rules of this method, applicants may not lodge more than one import licence application for the same quota order number each week; where an applicant lodges more than one application per order number per week, none of his applications will be admissible. An application may not relate to a quantity exceeding the total quantity of the quota. If the Commission receives more applications than total quota available in any week, it will fix an allocation coefficient to apply to each licence application. The allocation coefficient will be calculated as follows: [(available quantity/requested quantity) × 100] %.

(75) Against this backdrop, and with Union supply shortages still not alleviated, the Commission opened a third 'exceptional' import quota on 29th June 2011. However, the mechanism for allocating import licences to Union operators was not the same; instead the Commission decided on a tendering procedure for raw and white sugar imports. Under this scheme, five tenders were opened between July and September, during each of which tenderers could apply for between 20 - 45,000 tonnes and the proposed amount of customs duty they were willing to pay. It was then at the Union's discretion as to the quantities and duties that were awarded after each tender. The table below shows the quantities of sugar that was awarded at each of the tenders:

EU - Results of the Tendering Scheme, 2010/11

		Raw Sugar for Refining		Direct Consumption Raws		White Sugar		TOTAL	
Tender	Date	Total Bids	Awarded	Total Bids	Awarded	Total Bids	Awarded	**Total Bids**	**Awarded**
1	14/07/2011	260,800	55,000	1,644	1,644	127,976	7,720	**390,420**	**64,364**
2	28/07/2011	n.a.	141,960	n.a.	200	n.a.	10,048	**n.a.**	**152,208**
3	24/08/2011	n.a.	83,535	n.a.	775	n.a.	27,440	**n.a.**	**111,750**
4	15/09/2011	n.a.	0	n.a.	1,160	n.a.	7,509	**n.a.**	**8,669**
5	29/09/2011	176,040	14,500	2,721	827	106,407	4,266	**285,168**	**19,593**
Total			**294,995**		**4,606**		**56,983**		**356,584**

Note: n.a. = not announced

(76) Under those five tenders in 2010/11, a total of 356,584 tonnes was awarded, 85% of which was for raw sugar for refining.

(77) As the situation of high and volatile international market prices has continued, in November 2011 the Commission once again agreed to open an exceptional import quota to be allocated under a tendering scheme for the 2011/12 marketing year. The Commission announced that it aims to allow about 300,000 tonnes to enter into the Union through the import tenders in order to cover an estimated shortfall of 700,000 tonnes (the rest being covered by the release of out-of quota sugar into the Union domestic market).

6.1.1.7. A new sugar reform is currently discussed

(78) On 12 October 2011 the Commission published its legislative proposal for the Common Agricultural Policy (CAP) after 2013. The Commission's stated intention is to finalise the legislation and implementing rules so that the revised CAP can enter into force on 1 January 2014.

(79) The potential expiry of quotas should not take place before September 2015 as evidenced by the document "Prospects for agricultural markets and income 2011-2020" published in December 2011 by DG AGRI[33].

(80) At the moment, the outcome of this reform is uncertain and the end of sugar quotas faces considerable opposition as is illustrated by the press releases of the last European Council for Agriculture stating that "[t]*he Council took note of the request from the Hungarian delegation on the extension of the sugar quota regime to 2020. This received varied support from the Belgian, Czech, German, Spanish, French, Lithuanian, Austrian, Portuguese, Slovak, Finnish and Romanian delegations*"

[33] http://ec.europa.eu/agriculture/publi/caprep/prospects2011/fullrep_en.pdf.

(14/11/2011)[34] and "*many delegations mentioned that the end of sugar quotas scheduled for 2015 should be postponed*" (28/01/2012)[35].

(81) Furthermore, in his report, the MEP Albert Dess "*advocates that the 2006 sugar market regime be extended at least to 2020 in its existing form and calls for suitable measures to safeguard sugar production in Europe and to allow the EU sugar sector to improve its competitiveness within a stable framework; to allow the sector to better adapt*"[36].

(82) Given the number of uncertainties, the reform of the CAP cannot be considered as a relevant counterfactual in the assessment of the competitive effect deriving from the proposed transaction.

6.1.1.8. Background of the Italian sugar industry

(83) Italy is the second largest sugar consumer in the Union after Germany. In Italy, the annual demand amounts to 1.73 million tonnes of sugar[37]. Italy is also the market with the largest sugar deficit in the Union.

(84) In Italy the sugar is mainly sold to two types of customers: industrial processors and retailers. The following [...]*[38] presents the most important Italian sugar consumers:

Sugar consumers type in Italy

[...]*

(85) Around 60% of all sugar is consumed in the North of Italy, to where sugar from closely located regions can be economically transported. Central Italy and southern Italy are in a more disadvantageous situation. According to internal documents of EDFM based on an internal logistics model, the average transportation costs in Italy amount to EUR [...]* per tonne, while the transportation costs to Central Italy and southern Italy amount to EUR [...]* per tonne.

(86) The local production after the 2006 quota reform and prior to the launch of the Brindisi refinery covered less than 50% of the Italian demand. In Italy 15 out of 19 sugar beet factories closed after the reform and the limited domestic beet sugar production was carried out by three companies until the jointly controlled Brindisi refinery became operational in January 2011. Those three Italian producers are Eridania Sadam [description of Eridania' production]*, CO.PRO.B. s.c.a. ("COPROB")/Italian Zuccheri [description of COPROB's production]* and Zuccherificio del Molise ["ZDM"]. The rest of the Italian sugar demand is satisfied *via* imports mainly from the closely located surplus countries, in particular from

[34] See press release – 3123rd Council meeting - Agriculture and Fisheries.

[35] See press release - 3140th Council meeting - Agriculture and Fisheries.

[36] See Report "the CAP towards 2020: meeting the food, natural resources and territorial challenges of the future" Albery Dess, 31 May 2011.

[37] Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 12, sent by e-mail of 1 December 2011 (19:33).

[38] Answer to the 6th request for information to EDFM of 11 October 2011, internal document on "Italian Market" (undated).

South-East France and especially the French producer Tereos and from southern Germany from the Südzucker.

(87) Major European sugar producers have considered the deficit in the Italian market as a real opportunity to enter a key market. However, except Tereos which entered at a very early stage by establishing a sales office in Italy, they all teamed up with an existing Italian player in order to sell their sugar in Italy: Südzucker with MAXI, Pfeifer & Langen with Italia Zuccheri, Cristal Union with Eridania[39].

(88) Other characteristics and aspects of the Italian sugar market will be analysed in more detail in the market definition and in the competitive assessment parts.

6.1.1.9. Background of the Greek sugar industry

(89) The Greek sugar market is characterized by the presence and strength of the incumbent sugar producer, Hellenic Sugar. It is the only sugar supplier in Greece having sugar production facility in Greece[40]. [description of Hellenic Sugar's production plants]*. The Hellenic Sugar's production quota amounts to [...]* tonnes per year[41]. That quota does not cover domestic demand; therefore Greece is a sugar deficit Member State like Italy.

(90) Other market players are, nevertheless, present in Greece via sugar imports, namely Südzucker, Tereos, Nordzucker and Pfeifer & Langen (Sugartia).

6.1.2. RELEVANT PRODUCT MARKET

6.1.2.1. Description of white sugar

(91) The supply of sugar in the Union is regulated by the Common Market Organization (CMO), the principles of which are set out in Regulation (EC) No 1234/2007.

(92) Depending on the sucrose content, Regulation No 1234/2007 distinguishes between "white sugar" and "raw sugar": while both refer to "*not flavoured or coloured or containing any other added substances*" sugar, "white sugar" must contain, in the dry state, 99.5 % or more by weight of sucrose. Sugar with less than 99.5 % of sucrose is considered as "raw sugar".

6.1.2.2. White sugar as compared to industrial sugar

(93) Under the Union sugar regime, the white sugar market is divided into two segments; for quota sugar and out-of-quota sugar utilization. Different regulations apply to each segment. There are approximately 16 to 17 million tonnes of quota sugar available to the Union consisting of white sugar produced within the Union as well as white sugar imported under various quota arrangements into the Union, including quota allocated to Brazil, the Balkan countries, LDC and ACP countries (accounting for approximately 2.5 to 3 million tonnes). Quota sugar is primarily used for food

39 Tate & Lyle had until last year a partnership with Eridania.

40 Reply by Hellenic Sugar to question 65 of the Questionnaire to Sugar Suppliers/Producers in Greece – Phase II.

41 Reply by Hellenic Sugar to question 46 of the Questionnaire to Sugar Suppliers/Producers in Greece – Phase II.

applications. In contrast, out-of-quota sugar (also referred to as "industrial sugar") cannot be sold on the market for food applications but only for certain defined purposes such as alcohol, yeast production or in the chemical and pharmaceutical industry[42]. Therefore, there are significant differences between the commercialisation of quota sugar and the out-of quota sugar. The quota sugar market is regulated to a certain extent, including some elements of price regulation, whereas the out-of-quota market is less regulated and adheres more to international developments and conditions[43].

(94) As the proposed transaction does not lead to any overlap or any other reason for competition concerns with respect to the supply of out-of-quota sugar in Italy or in Greece[44], this Decision will only assess the Parties' activities in the supply of quota sugar for food applications (hereinafter white sugar).

(95) The notifying party considers that it is not necessary to further segment the white sugar market according to the origin (beet or cane), the type (such as granulated, liquid, industry specialities, etc.), or the distribution channel (food industry or retail) of sugar. According to the notifying party, the market should include all types of sugar intended for food consumption[45].

6.1.2.3. Different origins of sugar

(96) On the basis of the market investigation, the Commission considers that, with regard to both Italy and Greece, no distinction is necessary as regards the origin of white sugar. Although, according to respondents, for very limited applications refined beet and cane sugar are not interchangeable, their vast majority considers the two types of sugar to be interchangeable. Therefore, for the purpose of this Decision, the Commission concludes that it is not appropriate to distinguish between beet sugar and cane sugar.

6.1.2.4. Different forms of white sugar

(97) White sugar is available on the market under various forms: granulated sugar, liquid sugar, industry specialities etc.

(98) Granulated sugar is the most common type of sugar sold in the Union, the basic product used in all industries. Liquid sugar is obtained by mixing granulated sugar with a liquid. Liquid sugar is used mainly in the beverage/soft drink industry in technically highly developed Member States, where smaller beverage producers dominate the market structure[46]. The category of industry specialities refers to sugar processed for special clients' use. For example, one type of industry specialities sugar, fondant, is based on granulated sugar with the addition of glucose and various other elements.

[42] Article 62(2) of the Regulation (EC) No1234/2007.
[43] Form CO, p.48.
[44] Südzucker reply to the 7th Request for Information ("RFI") in Phase II.
[45] Form CO p. 48.
[46] Form CO p.49.

(99) The Commission and national competition authorities ("NCAs") have considered the sugar market in several cases[47]. In its most recent decision[48] the Commission left open whether different types of sugar belong to the same market indicating that *"for different types of sugar there is limited substitutability from the customer's point of view since each type of sugar tends to fulfil a certain requirement and each type differs as to the texture, colour and flavour. However, from a supply-side perspective, in the market investigation most sugar producers indicated that they can easily switch production between different types of sugar without significant cost as well as within a short period of time (i.e. significantly less than one year) in order to meet the demands of customers".*

(100) The notifying party submitted in the present case that the appropriate product market to assess the proposed transaction in this case encompasses all types of sugar (granulated, liquid etc). It refers to the Commission previous findings, as well as to the United Kingdom Competition Commission's findings in the case *James Budgett Sugars Ltd and Napier Brown Foods PLC*[49], according to which, although different sugar products may not be close substitutes for each other in certain industrial processes, there is, on the supply side, a high degree of substitutability between different types of sugar.

(i) Italy

(101) In Italy, Südzucker sells a variety of sugar products derived from further processing of white sugar. [...]*[50]. Therefore, a distinction between granulated, liquid and other types of sugar is immaterial for the assessment of the proposed transaction. The Commission will therefore not consider a further segmentation according to the different types of sugar, as also put forward by the notifying party.

(ii) Greece

(102) EDFM has no overall sales of sugar in Greece, and thus also no sales of liquid sugar or industry specialities sugar to end-customers[51]. Therefore, a distinction between granulated, liquid and other types of sugar is immaterial for the assessment of the proposed transaction in Greece. The Commission will thus not consider a further segmentation according to the different types of sugar, as also put forward by the notifying party.

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47 Commission Decision 2003/259/EC in Case No COMP/M.2530 - Südzucker/Saint Louis Sucre (OJ L 103, 24.4.2003, p. 1); Commission Decision 97/624/EC of 14 May 1997 in Case IV/F 3/M.34.621 Irish Sugar (OJ L 258, 22.9.1997, p. 1); Commission Decision 1999/210/EC of 14 October 1998 in Case IV/F 3/33.708 British Sugar (OJ L 76, 22.3.1999, p. 1).

48 Commission Decision of 30 March 2009 in Case No COMP/M.5449 – ABF / AZUCARERA (OJ C 97, 28.4.2009, p. 2).

49 United Kingdom Competition Commission *James Budgett Sugars Ltd and Napier Brown Foods PLC*, 2005.

50 [...]*.

51 Südzucker's reply to the 3rd RFI in Phase II, Annex 35-1 Form CO Greece, page 15.

6.1.2.5. Distinction according to customer types

Commission previous findings

(103) In its previous decisions, the Commission considered a potential segmentation of the sugar supply market by distribution channel. The Commission has consistently confirmed a distinction between industrial and retail sugar in its decisions[52]: industrial sugar is sold in large quantities to industrial customers mainly in the food and beverage industry ("white sugar sold to industrial processors"), while retail sugar is sold in small packages to end-customers primarily via retail chains ("white sugar sold to retailers").

(104) In the case *Südzucker/Saint Louis Sucre*[53], the Commission concluded that in Germany a third additional market for the sugar supply can be distinguished according to the distribution channel, namely sugar for distributors' private labels. The Commission acknowledged, however, that this category is less familiar among businesses in other Member States such as France, where on the downstream retail market very little sugar is sold under distributors' private labels. Such a third distinction (i.e. to consider private label sugar as a distinct product market) was not considered by the Commission to be necessary in the case *ABF/AZUCARERA*[54].

View of the notifying party

(105) With regard to the proposed transaction, the notifying party considers that white sugar sold to industrial processors and white sugar sold to retailers may constitute separate market segments, although they also point out the "*great degree*" of supply-side substitutability between these two categories. Indeed, the notifying party explained[55] that sugar production is a two steps process. In a first step bulk sugar is produced which is stored in most cases in sugar silos. In a second step this bulk sugar is directly sold or can be further processed and/or packed depending on the customers' demands. The ability of a producer to switch between white sugar sold to industrial processors and white sugar sold to retailers depends on the availability of free capacities for the - compared to the standard product bulk sugar - additional steps.

Commission findings in the case at hand

(i) Italy

(106) In the Commission's view, the replies to its requests for information show that switching production from white sugar sold to industrial processors to white sugar sold to retailers may not be as easy as described by the notifying party. Although some competitors of the Parties answered positively, when asked whether, in case of a permanent price increase of 10% in Italy for white sugar sold to retailers they could

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52 See Commission Decision 97/624/EC of 14 May 1997 in Case IV/F 3/M.34.621 Irish Sugar, OJ L 258, 22.09.1997,p. 1, recital 90, and Commission Decision 1999/210/EC of 14 October 1998 in Case IV/F 3/33.708 British Sugar, OJ L 76, 22.3.1999, p. 1, recital 59.

53 Commission Decision 2003/259/EC in Case No COMP/M.2530 – Südzucker / Saint Louis Sucre.

54 Commission Decision of 30 March 2009 in Case No COMP/M.5449 – *ABF / AZUCARERA*.

55 Answers to 3rd Request for Information to Südzucker, Form CO – Italy, pages 6 and 7, sent by e-mail of 1 December 2011 (19:33).

switch their production, the largest player in the retail market replied that it would not switch.[56] Furthermore, when asked to elaborate on their position, those competitors explained that, when switching production from white sugar to be sold to industrial processors to white sugar to be sold to retailers, several elements have to be considered.[57] In addition to the technical investments in order to install a packaging line, the supplier must consider the costs involved in designing the packaging, the listing fees in each Italian store and the promotion in stores which is necessary in order to become established as a retail sugar supplier. This could require significant investments (up to several millions of euros)[58].

(107) From a demand side perspective there is also limited substitutability between products sold to retail and industrial customers. The great majority of customers responding to the market investigation consider the Commission's previous market segmentations[59] in which sugar for industrial processors and for retailers constitute separate markets to be appropriate[60]. The main reason the majority of respondents consider such product market segmentation as the appropriate way to assess the competition in the sugar industry is because distribution through industrial and retail channels follows different market logics (for example in terms of marketing and packaging).

(108) Concerning the packaging, industrial processors require their sugar delivered in bulk or large bags, whereas retail customers tend to prefer smaller packets of 1 kilogram or less.

(109) Different competitors adopt different market positioning and, as a result, the market shares in the two markets differ significantly (see in particular recitals (336) and (337) of this Decision which discusses market shares). In particular, Eridania, which is seen as one of the most recognised brands of white sugar sold in the retail channel in Italy, has market shares several times higher in the market for white sugar sold to retailers compared to the market for white sugar sold to industrial processors. In contrast, the notifying party has significantly higher market shares for white sugar sold to industrial processors than for white sugar sold to retailers.

(110) Some respondents to the market investigation also explained that colour or quality differences may exist between industrial and retail users[61].

(111) Overall, these differences in the packaging, distribution and customer profiles for industrial and retail sugar are also manifested by different pricing structures, with white sugar sold to retailers persistently being more expensive than white sugar sold

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56 Questionnaire to Sugar Competitors Italy, Phase II, question 24.

57 Follow-up questions to Sugar Competitors in Italy sent on 17 January 2012.

58 SFIR's reply to Question 9 of the 2nd RFI in Phase II; [...]* reply to Question 20 of the Questionnaire to Sugar Competitors Italy, Phase II.

59 See Commission Decision 2003/259/EC in Case No COMP/M. 2530 - Südzucker/Saint Louis Sucre, Commission Decision 97/624/EC in Case No IV.F-3/M34.621 Irish Sugar 1997, Commission Decision 1999/210/EC in Case No IV/F-3/33.708 British Sugar but also the Decisions from the British, French and Spanish competition authorities: (i) Acquisition of Illovo Sugar Limited by ABF Oversas Limited, OFT, 31 July 2006. (ii) Decision C 2005-113 du Ministre de l'Economie, des Finances et de l'Industrie en date du 18 janvier 2006. (iii) Decision N-07012 Azucarera Ebro/Negocio de azucar de DAI. 22 March 2007.

60 Questionnaire to Sugar Customers Italy, Phase II, question 15

61 Questionnaire to Sugar Customers Italy, Phase II, question 13; Questionnaire to Sugar Competitors Italy, Phase II, question 21.

to industrial processors[62]. Moreover, the review of Südzucker's internal documents shows that the price difference between the white sugar sold to industrial processors and the white sugar sold to retailers is not stable [...]*[63]:

[...]*

(112) The Commission also notes that the distinction between white sugar for industrial processors and for retailers is also a standard industry practice. [...]*[64]. […]*.[65] Moreover, the investigation shows that the split between industrial and retail customers is in line with the market segmentation used in the sector, such as the Parties' competitors, the economics studies or the business intelligence services (notably the F.O.*Licht's* reports[66]).

(113) For these reasons, the Commission takes the view that, for the assessment of the proposed transaction, the supply of white sugar to industrial processors and the supply of white sugar to retailers constitute separate relevant product markets.

(114) Concerning a possible further distinction within white sugar sold to retailers, and in particular whether sugar for distributors' private labels constitutes a separate market, the market investigation has not brought to light any substantial elements supporting such a conclusion. On the contrary, it rather supports the notifying party's submission that, in Italy, the retail market is driven by price and availability rather than brand[67]. If end-users may be "brand sensitive" for some other products sold in the retail chains, this seems not to be the case for sugar.

(115) In addition, the review of Südzucker's internal documents shows that, when assessing the market dynamics in Italy, [...]*[68].

(116) Therefore, for the purpose of this Decision, no distinction is made between private and brand label products.

(ii) Greece

(117) EDFM has no sales of sugar in Greece, and thus no sales of white sugar to either industrial processors or to retailers[69]. Therefore, a distinction between white sugar

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62 Questionnaire to Sugar Competitors Italy, Phase II, question 19-24.

63 See document submitted as "Monthly Report Maxi. 5 October 2011", Annex 8 to Südzucker' reply to the 3rd RFI, Phase I.

64 See document submitted as "Monthly Report Maxi. 5 October 2011", Annex 8 to Südzucker' reply to the 3rd RFI, Phase I; the agendas of Südzucker' Group Sales function ("GSF") meetings where its commercial policy is discussed/decided provided as Annex Q3-1 to Südzucker's reply to the 1st RFI Phase I; document submitted as "ED&F Man and SFIR S.p.A. Competitive analysis of supplying sugar to the Italian market".

65 See document submitted as "Status Contracts CY 11/12", Annex Q1-c to Südzucker's reply to the 5th RFI, Phase II.

66 F.O. Licht is a soft commodity analyst, reporting on a wide range of commodities, including sugar, grain, coffee, tea, molasses, ethanol and biofuels, with reports online and in print.

67 Südzucker' reply to the 8th RFI, Phase II.

68 See document submitted as "Monthly Report Maxi. 5 October 2011", Annex 8 to Sudzucker' reply to the 3rd RFI, Phase I as well as the agendas of Sudzucker' Group Sales function ("GSF") meetings where its commercial policy is discussed/decided provided as Annex Q3-1 to Sudzucker's reply to the 1st RFI Phase I.

69 Südzucker's reply to the 3rd RFI in Phase II, Annex 35-1 Form CO Greece, page 15.

sold to industrial processors or to retailers is immaterial for the assessment of the proposed transaction in Greece. The Commission will thus not consider, in respect of Greece, a further segmentation according to the different types of sugar, or according to customer types.

6.1.2.6. Conclusion

(118) For the reasons elaborated above, the Commission takes the view that, for the purpose of this Decision, the relevant product markets are the market for the supply of white sugar to industrial processors and the market for the supply of white sugar to retailers with regard to Italy, while with regard to Greece such distinction is immaterial.

6.1.3. RELEVANT GEOGRAPHIC MARKET

(i) Italy

(119) The relevant geographic market for the assessment of the effects of the proposed transaction on competition in Italy is national.

6.1.3.1. General framework on the definition of the relevant geographic market

(120) The general framework for the definition of the relevant geographic market is provided for in the Merger Regulation and the Commission notice on the definition of the relevant market for the purposes of Community competition law[70] (the "Notice on the definition of the relevant market").

(121) Article 9(7) of the Merger Regulation states that *"[t]he geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences".*

(122) As regards the supply side, paragraph 13 of the Notice on the definition of the relevant market states that *"from an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions".*

(123) As regards the demand side, paragraph 17 of the Notice on the definition of the relevant market states that *"[t]he question to be answered is whether the parties' customers would switch to [...]* suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the [...]* areas being considered. If substitution were enough to make the price*

70 OJ C 372 of 9.12.1997, p. 5.

increase unprofitable because of the resulting loss of sales, additional [...] areas are included in the relevant market. This would be done until the set of [...]* geographical areas is such that small, permanent increases in relative prices would be profitable".*

(124) Also, in accordance with paragraph 8 of the Notice on the definition of the relevant market, the relevant geographic market comprises *"the area in which the undertakings concerned are involved in the supply and demand of products or 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".*

(125) In order to gain evidence for the purposes of market definition, the Commission takes *"a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the Parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and EEA level. [...]* The initial working hypothesis will [...]* be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. [...]* The Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level".* [71]

(126) The Notice on the definition of the relevant market states also that, after the demand side has been analysed,: *"If necessary a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network [...]*"*[72].

(127) Concerning basic demand characteristics, paragraph 46 of the Notice on the definition of the relevant market states that *"[t]he nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition"*, while paragraph 48 states that *"an examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market".*

(128) In addition, *"[t]rade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive"*[73].

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[71] Notice on the definition of the relevant market, paragraphs 28, 29 and 30.
[72] Notice on the definition of the relevant market, paragraph 30.
[73] Notice on the definition of the relevant market, paragraph 49.

(129) Moreover, according to paragraph 50 of the Notice on the definition of the relevant market, *"The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products".* The same paragraph also states that: *"access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area".*

(130) Paragraph 52 clarifies and concludes that *"[t]he paragraphs above describe the different factors which might be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a subset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission".*

6.1.3.2. Geographic definition of the market for the supply of white sugar in previous cases

(131) In a number of previous decisions[74], the Commission considered that the relevant geographic market for the supply of sugar was national in scope or even sub-national, at least for Germany.

(132) In *Südzucker / Saint Louis Sucre*[75] the Parties claimed that the market for sugar in general should be Union-wide. However, the Commission concluded in line with previous decisions[76] on a market that is even smaller than national in Germany. The main reason for this was the location of the production sites in Germany. Whereas, for example, in France the production sites were located in the northern and north-eastern parts of the country, the production sites of the different competitors in Germany were located in different parts of Germany. Due to transport costs, longer distances between customers and suppliers played an important role for the final price of the sugar. This resulted in Südzucker having large market shares (over 80 %) in the campaign year 1999/2000, as in the previous years, in Bavaria, Baden-Württemberg, Saarland, Hessen and Rheinland-Pfalz, whereas Nordzucker had comparable market shares in Schleswig-Holstein, Hamburg, Bremen and Niedersachsen and Pfeifer & Langen had comparable market shares in Nordrhein-Westfalen. The market shares were comparable only in Eastern Germany. The Commission also found that this effect was strengthened on the German market due to different market acting strategies of the producers. Most of the customers had confirmed during the market investigation that proximity to the customer is a major factor affecting customer choice. Sugar is only supplied for "free-house-prices" in a certain radius around the production site. Longer distances are not be supplied at all or only for much higher costs.

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74 Commission Decision 2003/259/EC in Case No COMP/M.2530 - Südzucker / Saint Louis Sucre and Commission Decision of 30 July 1991in Case No IV.M.O62 - Eridania / ISI 30 July 1991.

75 Commission Decision 2003/259/EC in Case No COMP/M.2530 - Südzucker / Saint Louis Sucre.

76 Commission Decision 1999/210/EC in Case No IV/F-3/33.708 British Sugar plc, paragraph 65; Commission Decision 97/624/EC in Case IV/F-3/M. 34.621 Irish Sugar, paragraph 98.

(133) In the most recent decision after the 2006 sugar reform, *ABF/Azucarera*[77], the Parties argued that the relevant geographic market was, at the very least, wider than national, and is increasingly becoming EEA-wide in scope, because the dynamics of competition in the supply of sugar in the EEA have changed following reforms to the Sugar Regime and the anticipated removal of quotas and tariffs on imports from ACP countries and LDCs, together with the elimination of restitution payments for exports to third countries. They submitted that the reforms to the sugar regime have led and will continue to lead, to an intensification of intra-EEA trade with sugar producers increasingly selling across national borders and a significant increase in imports from third countries.

(134) The Commission reported that on the basis of the market investigation most customers were still sourcing their supply from sugar producers located close-by and only within deficit areas[78], cross-border sales could be observed. While the Commission ultimately left the market definition open, it also stated expressly that *the results of the market investigation have generally not confirmed this view*[79], i.e. that the reforms of the sugar regime had led to wider than national markets.

(135) Some NCAs, including Bundeskartellamt[80] and the Autorità Garante della Concorrenza e del Mercato[81], have come to the conclusion that the geographic market is national, whilst other NCAs have left the final definition open without an own assessment[82]. The Dirección General de Defensa de la Competencia, although ultimately leaving open the definition of the relevant geographic market, conducted its assessment under different alternative geographic delineations which included national markets as well as the (larger than national) regional market, consisting of Iberia together with France[83].

(136) In Case C5151 – SECI – CO.PRO.B. – Finbieticola / Eridania, the Italian Competition Authority (ICA) considered the geographic market for the production and supply of sugar to be national in scope with respect to Italy, regardless of imports as high as 26% in 2001. The decision was however partially annulled by the Italian High Administrative Court ("Consiglio di Stato") insofar as the commitments attached to the approval decision were concerned.

(137) In 2005, the ICA readopted the decision in Case C5151. The 2005 decision does not include a separate relevant market definition. However, the ICA concluded that the competitive conditions in the market had not changed since 2001. In particular, the reasons for a very significant increase in the imports between 2001 and 2005 (up to

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77 Commission Decision of 30 March 2009 in Case No COMP/M.5449 - ABF/Azucarera. This case mainly dealt with the sugar supply in Spain.

78 Paragraph 43 of the ABF/Azucarera decision refers to Spain and Italy as "deficit areas", although Italy was not specifically considered in that case.

79 Commission Decision of 30 March 2009 in Case No COMP/M.5449 - ABF/Azucarera, paragraph 43.

80 Bundeskartellamt, Beschluss *Nordzucker/Danisco* of 17 February 2009.

81 Provvedimento n. 11040 (C5151) - SOCIETÀ ESERCIZI COMMERCIALI INDUSTRIALI-S.E.C.I.-CO.PRO.B.- FINBIETICOLA/ERIDANIA, de 1 de agosto de 2002.

82 The United Kingdom Office of Fair Trading has stated that the regulatory changes affecting the EU sugar market may cause imports to be a stronger competitive constraint in the future (Acquisition of Illovo Sugar Limited by ABF Overseas Limited, OFT decision of 31 July 2006).

83 Case N 07012 Azucarera Ebro/Negocio de azucar de DAI of 22 March 2007.

50%) were not structural in nature and appeared to depend mainly on isolated events such as a crop failure in Italy.

(138) Further to a request by the parties to review the commitments because of the new competitive conditions in the market, a new decision in the same case was adopted in 2006. In that decision, the ICA did not explicitly depart from its relevant geographic market definition of the sugar market as national. The ICA considered, however, that the change in the European regulation would have been likely to make structural the increase of imports in Italy already noted in the 2005 decision. As a result, the constraints on the merger entity had been modified and the commitments were no longer necessary. The ICA therefore decided to revoke the remedies attached to its conditional decisions of 2002 and 2005.

(139) Concerning the case *Nordzucker/Danisco*,[84] which was decided almost four years after the sugar reform, the German Bundeskartellamt concluded that markets were national pointing to continued price differences between Member States. The Bundeskartellamt regarded the German market as national, because (i) there were only small chances of accessing the market, (ii) transport costs were relatively high, (iii) imports were small, (iv) in order to compete in Germany a strong local presence was necessary due to the fact that customers did not have their own storage capacities but were dependent on just-in-time deliveries, (v) there were different national market conditions regarding prices and the market structure on the supply-side in different Member States.

(140) The Bundeskartellamt stressed that potential importers need to have a strong national presence, including in particular important storage facilities, since industrial food processors require security of supply and flexible adaptation of sugar supplies according to their factories' needs.

6.1.3.3. View of the notifying party

(141) The notifying party puts forward that the relevant geographic market for the supply of white sugar is at least larger than national if not EEA-wide, since the Commission's decisional practice indicating national geographic markets should be re-assessed, in the light of the intensified intra-Union trade post-2006. In particular, the notifying party points to the quota renouncements that transformed the Union into a net importer of sugar and the abolishment of quantitative restrictions on LDC imports as of 1 October 2009.

(142) More specifically, the notifying party argues that (i) already today, 50% of the Italian demand is satisfied through imports, and (ii) the fact that customers mention a practice of nationwide contracting and do generally not source directly from abroad does not say anything with respect to the trade flows in the sugar industry.

(143) Therefore, the notifying party is of the opinion that the relevant geographic market should be EEA-wide. In this regard, the notifying party has submitted that the European sugar market experiences an intensification of the sugar trade flows as (i) regional consumer preferences disappear more and more, (ii) contracts are increasingly based on international tenders for key accounts, since retailers and other

[84] Bundeskartellamt, Beschluss *Nordzucker/Danisco* of 17 February 2009.

sugar customers increasingly change to European sourcing strategies, and (iii) the new sugar market regime reduced the entry barriers. Concerning in particular the supply of white sugar in Italy, the notifying party points to the fact that the white sugar sold in Italy originates from Austria, Germany, France, but also from the United Kingdom, Spain, the Netherlands, Poland, Serbia, Croatia, ACP/LDC-countries and other third countries.

(144) Therefore, the notifying party considers that for the assessment of the proposed transaction with respect to the supply of white sugar in Italy the relevant geographic market should include at least southern Europe, including southern Germany and southern France[85].

6.1.3.4. Assessment

(145) Despite the sugar reform of 2006 and subsequent market developments in Italy and the EEA, the relevant geographic market for the supply of white sugar to industrial processors in Italy remains national essentially for the following reasons analysed in detail below:

(1) On the demand side, (i) industrial customers in the vast majority of cases buy from suppliers based in Italy, have national contracts and do not source directly from abroad; (ii) the few large players which do buy transnationally from transeuropean players have to pay "Italian" prices for their purchases; (iii) the vast majority of industrial customers buy nationally, because security and regularity of supply and thus closeness to storage facilities are crucial factors for industrial processors and retailers; and (iv) while customers multisource they rarely switch their main supplier. These demand-side characteristics mean that suppliers who want to compete successfully in the overall market for industrial customers in Italy need to have access to an established customer base, possess a developed distribution and logistics network and have a good knowledge of local and national market conditions, as analysed below under point (2).

(2) On the supply-side, (i) producers of beet sugar in Italy are constrained by non-tradable fixed production quotas which are set on a national basis; (ii) the large quantity of imports in Italy is the direct consequence of the quota system which limits beet sugar production in Italy and does not as such indicate competitive pressure exercised upon Italian producers by foreign players; (iii) foreign producers operate in Italy mainly through joint ventures with well-established Italian players; this tends to show that the Italian market has characteristics distinct from other markets in Europe, otherwise the big European producers would simply sell directly into Italy and not engage in joint venture agreements which force them to share profits; (iv) in recent years Südzucker's strategy in Italy has been to compete with low prices and thus is markedly different from its strategy in Germany or France where it maintained high prices; in a market wider than national transnational arbitrage would have defeated such separate strategies; (v) internal documents of the Parties indicate national marketing strategies per Member State; (vi) internal documents of the Parties indicate

[85] Annex 16-1 of Südzucker's reply to the 3rd RFI in Phase II (Form CO Italy, page 10).

sales programs and price-setting at a national level; (vii) market boundaries along national borders are both reflected and reinforced by non-compete clauses based on Italy as reference territory in joint-venture agreements; and (viii) a submission by the Bundeskartellamt also points towards national market definition for Germany, with arguments which are by analogy relevant for the Italian market and coherent with a national definition of the market.

(3) Price data collected by the Directorate General for Agriculture of the Commission ('DG AGRI') show that (i) during the last years significant price differences between Italy and Germany/France have not been arbitraged away as would be expected to happen in the same geographic market, (ii) Italian market price changes co-move less strongly with its neighbouring and exporting Member States than these neighbouring Member States' price changes co-move amongst each other and (iii) in recent years where Europe experienced scarcity of sugar supply the price differences between Member States actually increased which is incompatible with the claim that the market is increasingly EEA-wide.

(4) Persistent significant divergences in market shares from one Member State to another, even when those Member States are neighbouring, point towards the continued existence of national markets, since market share differences are not competed away.

(1) DEMAND SIDE CHARACTERISTICS

(146) According to paragraph 13 of the Notice on the definition of the relevant market, *"from an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decision"*. More specifically, the Commission will conduct an analysis of the demand characteristics, such as the importance of national or local preferences, current pattern of purchase of customers (paragraph 29 of the Notice).

(i) Industrial and retail customers in the vast majority of cases buy from suppliers based in Italy, have national contracts and do not source directly from abroad

(147) According to paragraph 48 of the Notice on the definition of the relevant market, *"an examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market"*.

(148) In the case at hand, the main part of commercial relationships between customers and suppliers is national. The market investigation revealed that most of the customers purchase on a national level and do not import into Italy (only 4 out of 35 customers buy from abroad). Even some large customers [...]* have only national wide contracts. [A large customer]* argued that, because of national contracts, an Italian producer delivers only to Italy[86] indicating that Italian customers cannot source

[86] Reply by [...]* ([...]*) (reply to question 28) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

directly from producers active outside that Member State. Also, [a large customer]*[87] explains that their contracts are exclusively national.

(ii) The few big players which do buy transnationally have to pay "Italian" prices for their purchases

(149) Only a few very large customers [...]* indicate that they have both EEA and national wide contracts while another important customer, [a large customer]* underlines that negotiations take place regionally (cross-border) and the contracts are signed locally[88]. However, even in the few cases where the overall negotiations take place on a wider than national level (regional or EEA), the majority of customers replied that prices are set for each Member State separately, according to the market situation in the Member State of supply. With respect to Italy, the market participants explained that the scarcity of sugar is the most important factor determining the Italian prices they have to pay[89].

(150) On the basis of the above, it is considered that the market investigation has shown that even in the few cases where contracts were negotiated centrally for several countries, the prices and market characteristics differed between Italy and other countries. Transnational purchases are therefore not able to exercise a meaningful constraint on pricing in Italy.

(151) The existence of national prices in Italy different from prices in other Member States is evidenced in more detail by the analysis in recitals (215) to (250) of this Decision.

(iii) Industrial and retail customers buy nationally because security and regularity of supply and thus closeness to storage facilities are crucial factors for industrial processors and retailers

(152) In the customers' view[90], the availability of sugar is fundamental for their business. All customers questioned during the second phase market investigation considered that security of supply is a determining factor for their activities with regard to their purchases of sugar in Italy, both in terms of quantity and quality. Apart from other disadvantages of sourcing abroad - such as high transport costs, longer delivery period resulting from long-distance transportation - the need to maximise security of supply and minimise the risk of disruption are essential for their choices regarding the sourcing of sugar. Sugar is an essential product for the food and beverage industries (e.g. producers of biscuits, ice-cream, sweats, soft drinks) as well as for the retailers which cannot be substituted by other products.

(153) This is not contested by the notifying party which agrees that security of supply is one of the main characteristics that industrial customers (in the food and beverage industry) and retailers are seeking from their suppliers. The notifying party has further explained that its own strategy for ensuring security of supply for its customers in sugar deficit countries is based on two pillars: (i) sufficient storage

87 Reply by [...]* ([...]*) (reply to question 28) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).
88 Questionnaire to sugar customers in Italy – Phase II, question 28.
89 See replies to the Follow-up questions to Sugar Customers sent on 17 January 2012.
90 Questionnaire to sugar customers in Italy – Phase II.

facilities close to the customers and (ii) sound management decisions about allocation of sales to a specific destination (including stock levels required)[91].

(154) In order to ensure security of their sugar supplies, customers generally conclude long-term (annual and/or 3-8 months) contracts with suppliers[92]. Furthermore, the vast majority of those contracts are concluded under "Italian" prices and conditions.

(155) The contractual and established commercial relationships in the different markets also do not allow producers in other Member States to effectively constrain sugar prices in Italy. For example, even the notifying party suggests that there is "*no incentive and/or possibility for Südzucker to redirect sugar supply that is originally destined for other markets to deficit countries such as Italy unless prices in Italy would exceed considerably the price levels in other markets thereby covering the extra logistics costs [...]**[93]. [...]*[94].

(156) Customers also acknowledge the importance of regular deliveries, which may even have to take place on a daily basis. This is even more true for small customers who - in contrast to the notifying party - lack their own storage facilities and are therefore dependent on in time supply of relatively small quantities. Therefore, customers seek suppliers which control storage and distribution sites geographically close to their own facilities in order to minimize the risk of supply disruptions and delays.

(iv) Low price elasticity of demand confirms dependence of customers on suppliers

(157) The importance of regular and uninterrupted sugar supplies for industrial processors is further confirmed by the low price elasticity of demand of industrial customers. In an internal document EDFM describes the sugar consumption within the Union as relatively static and thus independent of price fluctuations. In the same document it also states that both the industrial and retail demand is income and price inelastic. "*The total EU-27 sugar consumption is relatively static at around 16.5 million tonnes, and moreover, sugar demand, both industrial demand and retail demand, in the EU is markedly income and price inelastic*"[95].

(158) The statement suggests that customers will buy similar quantities of sugar independently of price levels and thus also when prices are very high. It also suggests that customers have limited leverage to negotiate prices below market price levels and that they cannot choose to switch to alternative suppliers.

(159) In view of the above elements, combined with the customers' need for security of supply, customers have no leverage to deviate from Italian contracts. This element also suggests that there is a national market for Italy.

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91 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 58, sent by e-mail of 1 December 2011 (19:33).

92 Questionnaire to sugar customers in Italy – Phase II.

93 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 15, sent by e-mail of 1 December 2011 (19:33).

94 EDFM's reply to the 6th request for information of 11 October 2011, internal document on "Italian Market" (undated), slide 12.

95 European Sugar Logistics Study prepared for the Ethiopian Sugar Development Agency from 16 February 2010, provided by ED&F Man, p.17.

(v) Many customers who view the market as wider than national base their opinion on the fact that Italy imports sugar.

(160) In its response to the Statement of Objections the notifying party stated that *"[a]ll competitors and 27 out of 47 customers stated in response to the market testing that they view the relevant geographic market is wider than Italy*".

(161) A more careful reading of the replies to the market investigation shows however a different and much more nuanced picture.

(162) With regard to competitors, only 5 out of 10 considered that the market was not confined to Italy but was wider. By contrast 4 out of 10 competitors considered that the relevant geographic market for the supply of sugar was still national while one of the competitors did not answer this question.

(163) Concerning the customers, out of a total of 50 customers who replied, 25 consider that the market is wider than national, while 25 customers do not consider the market to be wider than national.

(164) In addition, out of 25 customers considering the market wider than national, 18 justified their answer by pointing towards the large import quantities entering into Italy due to the deficit nature of the Italian sugar market.

(165) The Notice on the definition of relevant market (paragraph 49) emphasizes in this respect that "*trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive".*

(166) In the case at hand, these large quantities of sugar imports are the direct result of market regulation, that is to say the radical reduction of Italian production quotas after the sugar reform of 2006, which limits Italian internal production and thus has created an important but artificial gap between Italian supply and consumption. Therefore, large quantities of imports of sugar into Italy do not as such illustrate competitive pressure exercised upon Italian producers by foreign players and do not evidence a market wider than the Italian market. The fact that imports result from regulation means that they do not come into the market as a response to relatively higher prices but to an artificially created gap.

(167) Thus, the 18 customers, concluding that the market was wider than national on the basis of significant imports, did not take into account that the rationale for the imports was not well-functioning cross-border competition, but an output restriction in Italy imposed by regulation.

(168) Of the remaining 7 customers who stated that the market is wider than national, 6 stated that they purchase sugar exclusively on a national basis and do not purchase sugar directly from abroad.

(169) Accordingly, (i) around half of the competitors and customers consider that the market is national and (ii) a significant proportion of the other half's replies have to be read bearing in mind that they did not take into account the regulatory rationale of the large amounts of imports and/or did not themselves engage in any cross border sales.

(vi) Customers have not switched to non-Italian suppliers in the recent past despite significant price increases

(170) Even if a majority of contacted customers stated that in the case of a price increase of 5% to 10%, they would consider buying sugar directly from abroad, such replies need to be read in the light of the replies which the same customers gave to other questions and in particular those concerning their actual market behaviour.

(171) Only about 4 of 35 end customers which replied to the questionnaire seem to buy directly from abroad[96]. Therefore, the prevailing pattern for end-customers is to purchase through national (Italian) sales offices, thus under Italian prices and conditions.

(172) Those 4 exceptional customers are particularly large and sophisticated multinationals [...]* and cannot serve as a proxy for the average industrial sugar customer in Italy.

(173) In addition, even within that group of 4 customers, at least 2 of them stated that for such purchases prices were different between Member States and that such price differences apply in particular for Italy. Therefore, even the sugar supply contracts of those 2 customers reflect the different pricing patterns in the Member States, which points towards national markets.

(174) In addition, as stated in paragraph 47 of the Notice on the definition of the relevant market, where appropriate the views of customers on the boundaries of the geographic market, as well as most of the factual information it requires to reach a conclusion on the scope of the market, have to be sufficiently backed by factual evidence. Furthermore, as evidenced by paragraph 38 of the Notice on the definition of the relevant market "*in certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substitution between two products (…) if there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability*".

(175) Therefore, taking this into account, the actual behaviour of the customers in the past under comparable market conditions as outlined in the questionnaire[97] becomes as important as their opinion as to how they would react under the outlined conditions. The conditions outlined in the questionnaire were a significant price increase in Italy. While this very same situation actually took place in the last years in Italy, a vast majority of the customers, as indicated above, did not actually start sourcing sugar from abroad.

(176) Furthermore, according to all customers, responding to the questionnaire[98], in the last five years and despite recent significant price increases in Italy which were much

[96] Questionnaire to sugar customers in Italy – Phase II, question 22. Three end-customers were not included for calculating the previous percentage of 15% referred to in the Statement of Objections. The total responding customers are in fact 35, the 3 additional ones not sourcing from abroad.

[97] Questionnaire to sugar customers in Italy – Phase II.

[98] Questionnaire to sugar customers in Italy – Phase II.

higher than 5% to 10 %, no customer responded by purchasing sugar directly from abroad in the last 5 years[99].

(177) The above considerations support the conclusion that (i) the prices are set at the Member State level for the Italian market, and (ii) customers cannot/do not source directly from abroad even when they are faced with significant price rises.

(2) SUPPLY SIDE PERSPECTIVE

(i) Production quotas are still national and non-tradable

(178) In its reply to the Statement of Objections, the notifying party has argued that the Commission should not rely on its previous decision-practice due to the fact that all previous decisions deal with the situation prior to the sugar reform or still influenced by the previous regime[100]. In support of its argument, Südzucker points to paragraph 32 of the Notice on the definition of the relevant market, which states that "*the Commission also takes into account the continuing process of market integration*" when defining geographic markets.

(179) The continuing process of market integration has been taken into account in this Decision. Nevertheless, paragraph 32 of the Notice on the definition of the relevant market does not necessarily mean that the Commission will define markets as Union-wide or EEA-wide for each product which is covered by internal market legislation. The Commission analyses, on the basis of the facts in every individual case, to what extent the process of market integration has actually led to Union-wide or larger than national markets.

(180) As regards the sugar regime following the 2006 reform, the Court of Auditors in its 2010 report[101] found that the currently applicable sugar regime had similar consequences as the regime in force before 2006, namely limited possibilities of transferability of quotas and rigidity of production capacity. The Court of Auditors stressed that: "*The Court's previous special report on the sugar CMO) drew attention to the rigidities linked to the quotas system and concluded that 'national quotas have prevented production moving to the most efficient areas', 'normal competitive forces do not operate and in several cases sugar companies have been fined for abuses of competition' and stated that the existence of barriers to entry for new sugar beet growers warranted consideration by the Commission. In this regard a 2004 Commission Communication initially proposed a sugar sector reform based on a uniform cut in quotas and intended to foster quotas transferability between producers in the EU. However, this proposal was not adopted because a majority of Member States opposed the idea of intra-Community quota transfers. In terms of sugar industry processing efficiency, the maintenance of rigidities and constraints incorporated into the current quota system, i.e. such as the establishment of quantitative quotas per individual grower in certain Member States, the absence of tradability of quotas and the limited possibilities for their transferability, results in undue rigidity of production capacity and reduces scope for both growers and*

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99 Questionnaire to sugar customers in Italy – Phase II, question 38(e).

100 Südzucker's reply to the Statement of Objections, para. 32.

101 Special report n°6 from the European Court of Auditors – "Has the reform of the sugar market achieved its main objectives?" – 2010.

producers to increase efficiency. The audit confirmed that in some of the audited Member States, quota restrictions hamper the entry of possible new growers and delivery rights of existing growers may not be changed without their consent. This entails significant constraints in the sugar production market."

(181) In this context, the 2001 Commission reasoning in *Südzucker/Saint Louis Sucre*[102] stating that *"the existence of an EU-wide regulation for a certain economic branch would not necessarily lead to an EU-wide market but rather, on the contrary, prevent an EU-wide market due to national quota"* is still valid under the current regime.

(182) Therefore, the reform of 2006 did not change one of the main rigidifying factors why sugar markets are still national, namely the attribution of quotas on a national basis to established national players without possibility to trade quotas.

(ii) Imports do not imply a wider than national market

(183) According to paragraph 49 of the Notice on the definition of the relevant market "*trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive".*

(184) In addition, paragraph 50 of the Notice on the definition of the relevant market states: *"The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to [be] identified before it is concluded that the relevant geographic market in such a case is national [...]* access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area".*

(185) It follows that although trade flows often provide useful insights and information for the purpose of establishing the scope of the geographic market, under paragraph 49 of the Notice on the definition of the relevant market, they are not in themselves conclusive and it is necessary to look carefully at their *rationale*, as well as at other elements.

(186) As discussed above, in the present case the existence of large imports as such does not indicate a larger than national market, because the need for such a large amount of imports is a direct consequence of the significant reduction of Italian production quotas after the sugar reform of 2006, which limits beet sugar output in Italy and thus has created an important gap between supply and demand in Italy which can only be filled by imports.

(187) Moreover, the nature of the imports in question needs to be taken into account[103]. The market investigation has shown that the vast majority of these imports are intra company supplies by the big northern European players [...]* to their Italian sales joint ventures or organisation[104].By contrast there seems to be hardly any direct

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102 Case COMP/M. 2530 – *Südzucker / Saint Louis Sucre* of 20 December 2001, para. 34.

103 See paragraph 49 of the Notice on the Definition of the Relevant Market.

104 Questionnaire to sugar competitors – Phase I & Phase II.

imports from players active outside Italy directly to customers in Italy. Such intra company imports do not exercise any direct competitive pressure on the big suppliers active in Italy.

(188) Thirdly, it is important to bear in mind that the prevailing pattern for large scale sugar operations of northern European sugar producers in Italy remains that of a joint venture between an Italian and a foreign player (e.g. Südzucker with MAXI, Pfeiffer & Langen with COPROB, Cristal Union with Eridania and in a certain way EDFM with SFIR). This shows first of all that Italian producers limited in their output by the quota system need to co-operate with foreign producers in order be able to supply the necessary quantities in the Italian market. Furthermore and more importantly, it also shows the lack of direct competitive pressure exercised by sugar producers with no established presence in Italy on prices in Italy. If it were easy to react to high prices in Italy with direct imports, then foreign producers would have no reason to engage into joint ventures with Italian players and share profits with the Italian joint venture partner. In fact, the profit-sharing of the joint venture structures is the "price" that foreign players have to pay because it is not easy for them to establish themselves during a short period of time as independent competitors in Italy on their own.

(189) Fourthly, while Tereos is [Description of Tereos' market strategy]*, its case also shows that there is no direct pressure from imports leading to price arbitrage between the rest of Europe and Italy. Tereos entered the Italian market in 2005/2006, at a moment when the sugar reform led to a particularly large sugar deficit in Italy and other foreign players were only starting to enter the market through joint ventures with Italian players. [...]*. Moreover, Tereos [Description of Tereos' market strategy]*.

(190) In line with the above [a large Italian sugar producer]* describes Tereos as a player on the Italian white sugar market with very good access to input, no infrastructure in Italy, very light national sales office, non-existent regional sales office, no partnership on the Italian white sugar market[105], poor customer relationship[106] and in addition without ability to expand its sugar output[107].

(191) In view of the above, the quantities of the imports of white sugar to Italy by other Member States do not point towards a wider than national geographic market. Rather, the nature of those imports actually militates in favour of a national definition of the market.

(iii) Foreign producers operate in Italy through joint ventures with Italian players

(192) The Notice on the definition of the relevant market states that the Commission analysis on supply factors will include "*an examination of requirements for a local*

105 Reply by [...]* ([...]*) (reply to question 58) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

106 Reply by [...]* ([...]*) (reply to question 69) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

107 Reply by [...]* ([...]*) (reply to question 59) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network [...]*"[108].

(193) The need for security of supply pushes Italian customers towards a strong preference for local suppliers. For example, internal documents of Südzucker show that "*Italian customers appreciate national partners more than customers of other countries*"[109]. This leads to the necessity for foreign suppliers to establish partnerships with local players in Italy.

(194) The notifying party itself argued that prior to its acquisition of MAXI, [...]*. Those statements stress the necessity for a foreign producer to establish a partnership with a player already active in Italy in order to be an effective competitor.

(195) The other non-Italian players also had to team up with well-known Italian players in order to enter the Italian market in a large-scale:

(a) the German sugar manufacturer Pfeifer & Langen has acquired 49.9% of the sales subsidiary of COPROB/Italia Zuccheri;

(b) the British sugar manufacturer Tate & Lyle had established a joint-venture with Eridania for the marketing and sales of all their sugar products. In the course of 2011, Tate & Lyle left the Italian market, [...]*;

(c) subsequently the French sugar manufacturer Cristal Union via CristalCo had to step in and replaced Tate & Lyle in the joint-venture with Eridania; and

(d) EDFM has built a new refinery through a joint-venture with SFIR in the South of Italy (Brindisi - SRB).

(196) Although the French sugar manufacturer Tereos is [Description of Tereos' market strategy]*, this does not break the pattern of joint-venture entry, because: (i) Tereos' entry took place in 2006, thus very early in the reform at a period when producers still disposed significant volumes of sugar; and (ii) Tereos' market share in Italy [...]* over the past years and is [...]* that of other foreign players, such as Südzucker who teamed up with MAXI the same year and increased significantly its presence over the last 5 years.

(197) Therefore the prevailing pattern for foreign producers' operations in Italy is through joint ventures with Italian players or at the very least through a national sales organisation.

(iv) Südzucker's pricing strategy [...]*

(198) [...]*.

(199) During the oral hearing the Parties submitted a graph[110], which was meant to show a convergence of prices between Germany, France and Italy. However, first of all, the prices shown are Südzucker prices only and it is not clear whether they correspond to

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108 Commission Notice on the definition of the relevant market, paragraph 30.

109 Annex 23 of Südzucker's answer to the 2nd RFI in Phase I, at page 13.

110 Slide 13 of Südzucker's presentation in the hearing of 5 March 2012.

market prices. Secondly, the alleged convergence in 2011/2012 appears to be mainly driven by the forecasted data inserted for 2011/2012 on the basis of 'contracted prices' instead of 'invoiced prices'[111]. The Commission is of the view that the data from DG AGRI used in the Commission's analysis below offers a more reliable view on price differences between Member States.

(200) However, even assuming that some conclusion can be drawn from the price figures given for the years 2006 to 2011[112], those price figures would actually confirm significant price differences between Member States which cannot be explained by transport costs. According to the graph in question from campaign year 2006/2007 to 2008/2009, price differences between [...]* are in the range of EUR [...]* and between [...]* in the range of EUR [...]*. In campaign year 2009/2010, price differences between [...]* are in the range of EUR [...]* and between [...]* in the range of EUR [...]*. Even in campaign year 2010/2011, price differences between [...]* are in the range of EUR [...]*.

(201) These price differences are higher than the transport costs between those Member States. If those Member States belonged to the same geographic market, these price differences would not exist since arbitrage would equalise prices through sales of low-priced Italian white sugar to high-priced Germany and France.

(202) Furthermore, statements by competitors indicate that the conditions of competition are substantially different in the (more competitive) Italian market than in Germany or France. For example, [a large sugar producer]* stated that *"MAXI, Südzucker's distributor in Italy, may have managed to deter potential entrants by significantly reducing its prices during the last 3 to 4 years in Italy. It appears that Südzucker via MAXI were selling at lower prices in Italy than in surplus markets in the last few years. Normally, the market price in Italy should reflect the high transport costs involved when sugar is imported into the Italian market from France, Germany and the United Kingdom. However, MAXI's prices in Italy during the last couple of years were lower than the ones in the abovementioned countries."*[113]. In addition, [a large Italian sugar producer]* stated: *"Tate & Lyle had not enough raw sugar to supply their refineries. Nordzucker concentrated its commercial action in North of Europe, given the fixed quantity at their disposal and the low level of pricing in Italy not sufficient to cover logistic costs to arrive in Italy. However, we can assume that the dumping were made in that period by Südzucker was aimed to discourage the competitors to play in Italy"*[114].

(v) Internal documents of the Parties indicate national strategies

(203) Internal documents of the Parties show that they develop their strategies on [...]*.

(204) Südzucker's internal documents show that it monitors the production and prices for sugar [...]*. For example, Südzucker's presentation for the acquisition of MAXI

[111] See recitals (246) to (249) of this Decision which explain in more detail why the data are not reliable.
[112] Slide 13 of Südzucker's presentation in the hearing of 5 March 2012.
[113] Minutes of the conference call with [...]* on 30 November 2011.
[114] [...]* reply to question 60 of the Questionnaire to sugar producers/suppliers in Italy.

performs an analysis of the conditions of competition [...]*, while it also concludes that [...]*[115]. [...]*[116].

(205) With respect to EDFM, the preparatory documents for the construction of the Brindisi refinery in 2009 also analyse extensively [...]*[117].

(vi) Internal documents of the Parties indicate sales, marketing and price-setting at a national level

(206) A review of internal documents submitted by the notifying party shows that it [...]* that sales, marketing and price-setting are elaborated[118]. [...]*[119].

(207) Furthermore, Südzucker's "planning tool"[120] makes reference to [...]* programs with regard to [...]*, Therefore, the "planning tool" shows that the notifying party establishes strategies for [...]*.

(208) The monthly reports of MAXI submitted by Südzucker also report prices [...]*[121].

(209) As to the Brindisi refinery, [...]* analysis is also conducted [...]*[122].

(vii) National boundaries are reflected and reinforced by nationwide non-compete clauses in joint-venture agreements

(210) The Italian white sugar market is widely characterised by the existence of nation-wide non-compete clauses in the joint-venture agreements for the supply of white sugar.

(211) [...]*[123]. [...]*[124].

(212) Those [...]* clauses both reflect and reinforce the segmentation of sugar supply and demand in Italy along national boundaries because [...]*.

(viii) The findings of the Bundeskartellamt also point towards a national market definition

(213) The Bundeskartellamt in a letter[125] to the Commission makes reference to the behaviour and market strategy of Südzucker in Germany indicating the existence of a national market with regard at least to Germany.

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115 Annex 23 of Südzucker's answer to the 2nd RFI in Phase I, at page 13.

116 Annex 23 of Südzucker's answer to the 2nd RFI in Phase I, at page 13.

117 "Information Memorandum", "Project Overview" and "Competitive Analysis of supplying Sugar to the Italian Market" submitted respectively as Annexes 4, 5.a and 5.b of EDFM's answer to the 2nd RFI in Phase I.

118 See document submitted as "Sales policy SZ Group 2011/2012", Annex Q1c to Südzucker's reply to the 5th RFI Phase II. See also the agendas of Südzucker Group Sales function ("GSF")' meetings between 1 January 2010 until November 2011 mentioned above.

119 See documents submitted as Annex Q1-a, Q1-b and Q1-c to Südzucker's reply to the 5th RFI Phase II.

120 Annex 6 of Südzucker's reply to the 3rd RFI in Phase I.

121 Annex 5 of Südzucker's reply to the 5th RFI in Phase I.

122 Annex 17 of EDFM's reply to the 6th RFI in Phase I.

123 Article 12 of the "RAHMENVERTRAG" signed on 6 December 2006 in Bolzano.

124 Annex 1.a of EDFM's reply to the 2nd RFI in Phase I.

(214) The Bundeskartellamt's letter is, inter alia, based on a [...]*[126]. This shows that Südzucker is likely to be capable of segmenting the market in Italy and Germany along national lines.

(3) WHITE SUGAR PRICE DIVERGENCES BETWEEN THE DIFFERENT MEMBER STATES

DG AGRI data points towards the existence of national markets

(i) DG AGRI data description

(215) In order to verify the boundaries of the geographic market the Commission has also analysed a database collected by DG AGRI on monthly Member State price data for the period April 2008 to November 2011, as well as aggregate price data at Union level for the period June 2006 to October 2011.

(216) Union beet producers submit their ex-works prices and quantities sold every month and DG AGRI computes (i) the weighted Union and national average price levels for sugar and (ii) the standard deviations, a measure of price dispersion, thereof (i.e. in the database DG AGRI computes the standard deviation both within a given Member State and also across the Union). Data on average price levels and standard deviation at the Union level, but not at Member State level, are publicly available.

(217) There are some general clarifications on what is included in the data collected by DG AGRI. First, the pricing data are collected from beet producers while pricing information from raw cane refiners are not included in the database. This issue however should not be material to the analysis as prices of white sugar produced either from beet or from raw cane sugar should be very similar within the same geographic market[127]. Second, the pricing data provided by beet producers refer to homogeneous granulated crystal, standard quality, in bulk or big bags and in particular exclude bag for retailers[128]. Therefore, as the data collected specify the quality of sugar they are comparable across Member States.

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125 Letter from the BKA dated 07.10.2011 addressed to [Commission official].

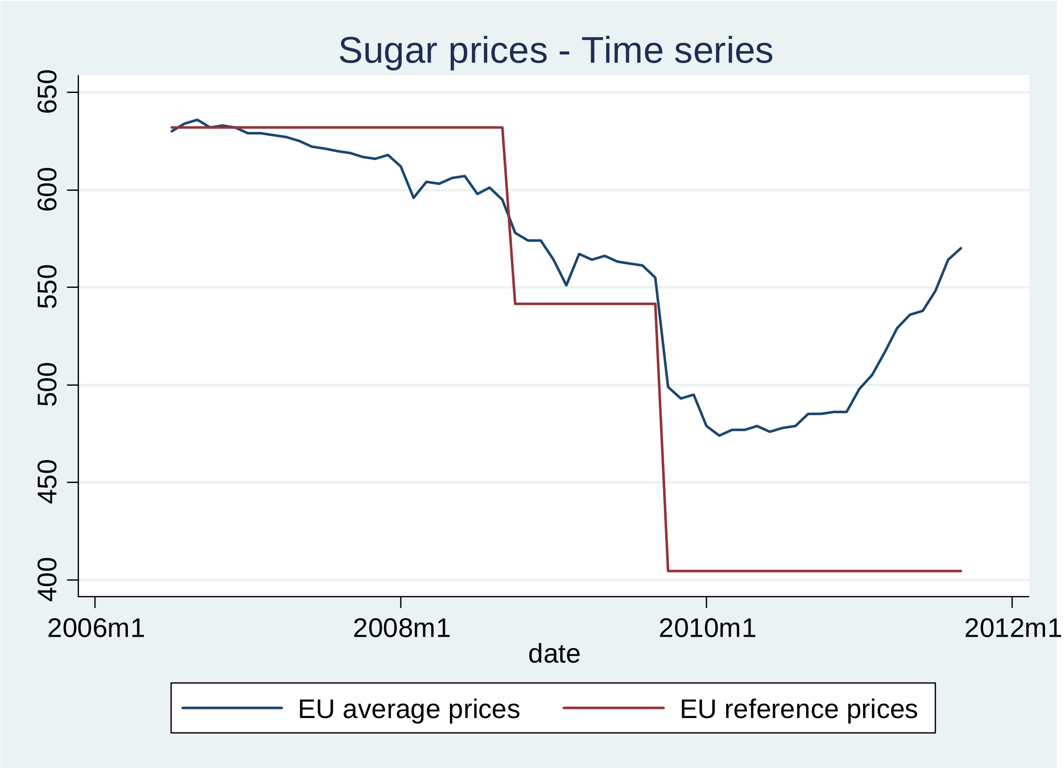
126 *"[...]* Danach respektieren Nordzucker und Südzucker ihre jeweiligen Vertriebsgebiete in Deutschland. Dies hat schon in der Vergangenheit zu Preissteigerungen und zur Zurückhaltung von Zuckermengen geführt. Wesentliche Abnehmer von Industriezucker haben vorgetragen, trotz wiederholter Nachfrage kein Angebot von anderen Zuckerproduzenten als dem Stammlieferanten zu erhalten. Quotenzucker [...]* wird offenbar unter Inkaufnahme hoher Transportkoten in Defizitgebiete, insbesondere Italien, exportiert. Dadurch konnte ein vergleichsweise hohes Preisniveau für Verarbeitungszucker in Deutschland etabliert und aufrecht erhalten werden. Diese Probleme haben sich im Jahr 2011 nach den Marktrecherchen des "Infozentrum Zuckerverwender" als einer Interessenvertretung der Industriekunden, weiter verschärft."* [Letter from the BKA from 07.10.2011 p. 2-3]

127 White sugar produced either from beet or from raw cane is entirely substitutable as shown by the replies in Questionnaires to Competitors in Phase I.

128 See price reporting system regulation (EC) No 1234/2007, Article 9, update: March 2011.

(ii) Price evolution

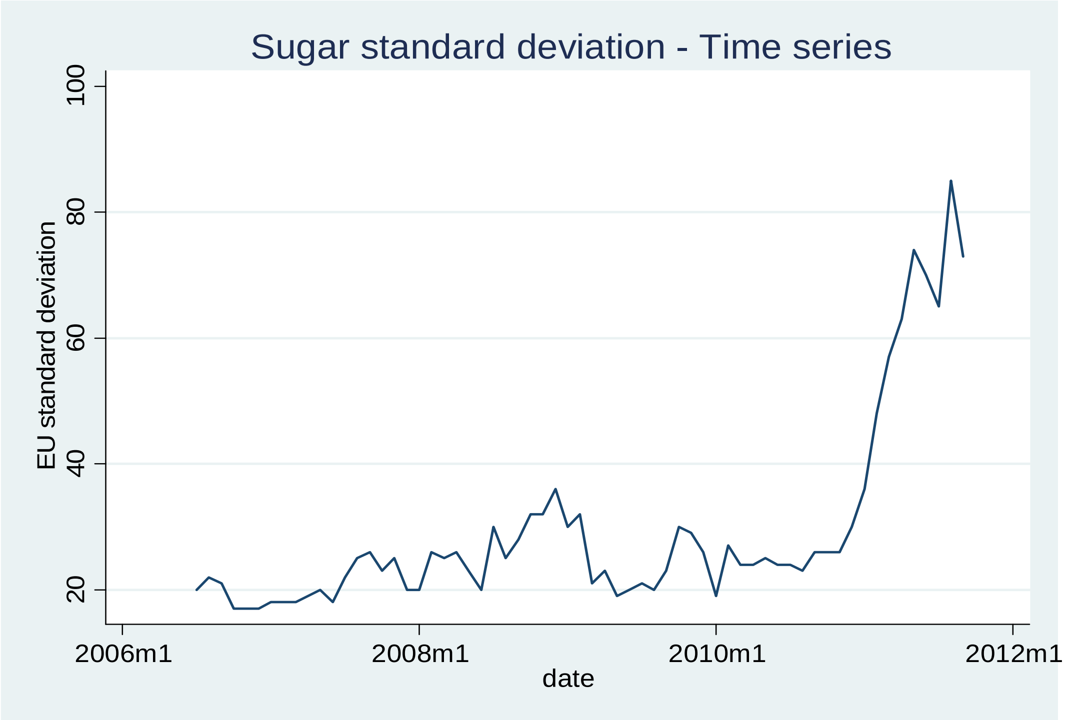
Figure 1: Union average price



(218) DG AGRI computes the Union average prices based on those Member State data. As shown in Figure 1, the Union average price has decreased until 2010 but since then the average Union price for white sugar has increased substantially, despite the decrease in the reference price introduced by the 2009 reform. DG AGRI also computes the evolution of the weighted standard deviations across the Union[129]. Those data show that while price dispersion has remained relatively stable up to the end of 2010, it has increased significantly during 2011. This finding is likely to illustrate that the variation of sugar prices in the Union has increased during 2011, instead of converging.

[129] Computing the weighted average standard deviation across Member States yields a very similar pattern.

Figure 2: Union standard deviation weighted by quantities



(219) These aggregate level trends are also evident at the Member State level. In particular, while prices in different Member States follow similar overall patterns, the differences across Member States in levels have been increasing, especially during 2011, as shown in the following graphs of Member States prices and within Member State standard deviation[130].

[130] Due to the confidentiality of the Member State data collected by DG AGRI there are no labels provided for the different Member States prices and standard deviations. The countries shown in the graphs are Austria, Belgium, Bulgaria, Czech Republic, Denmark, Germany, Spain, Finland, France, United Kingdom, Greece, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, Sweden and Slovakia.

Figure 3: Member States prices

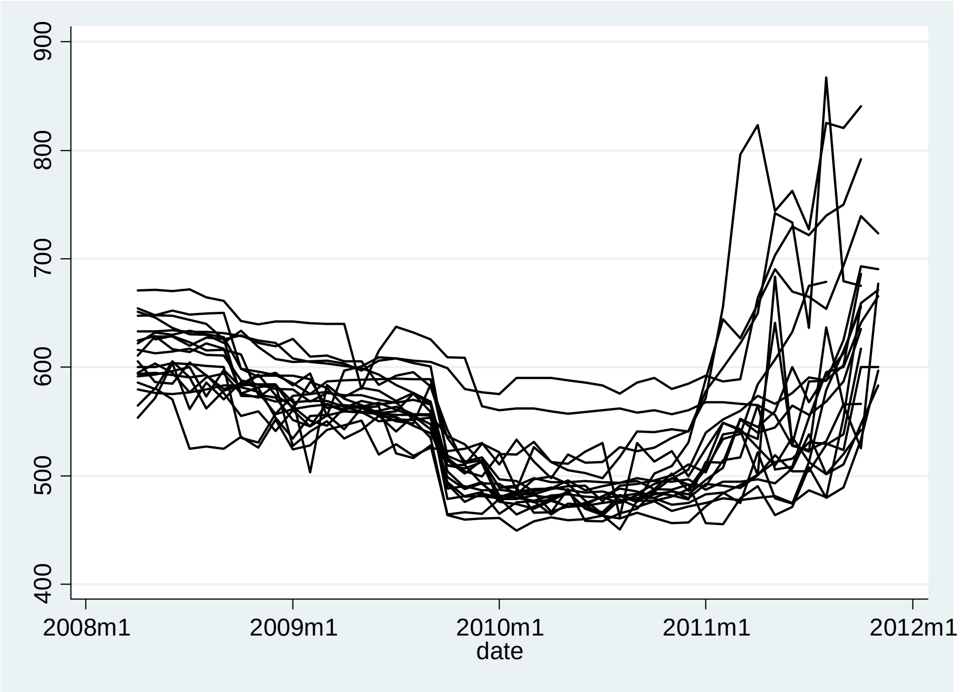
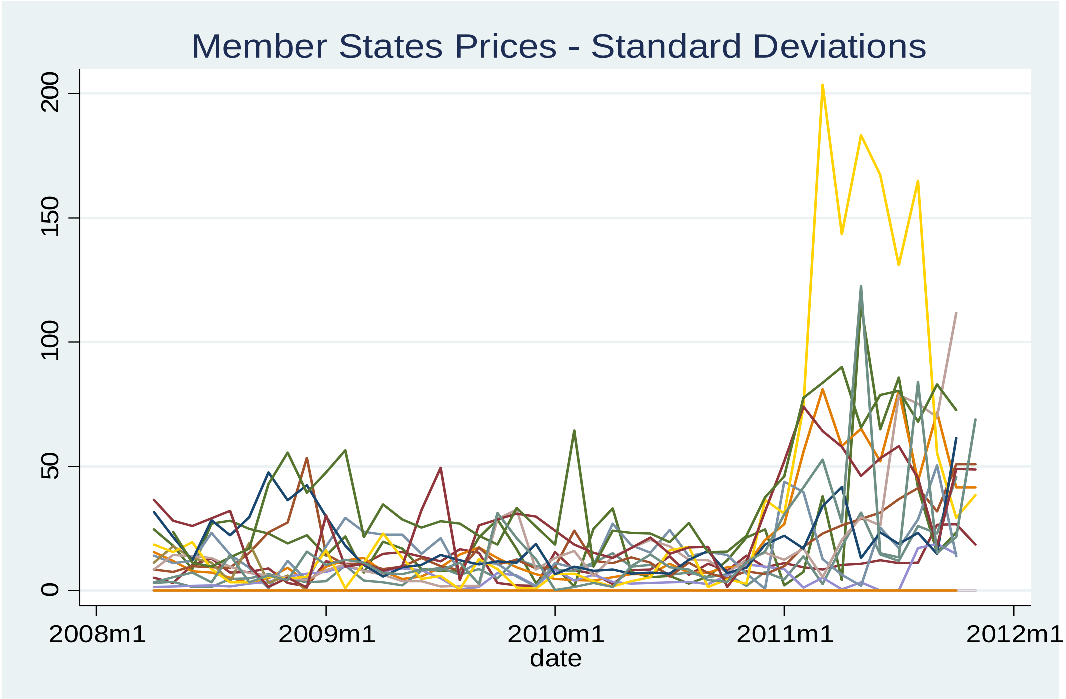


Figure 4: Member States prices - Standard Deviations



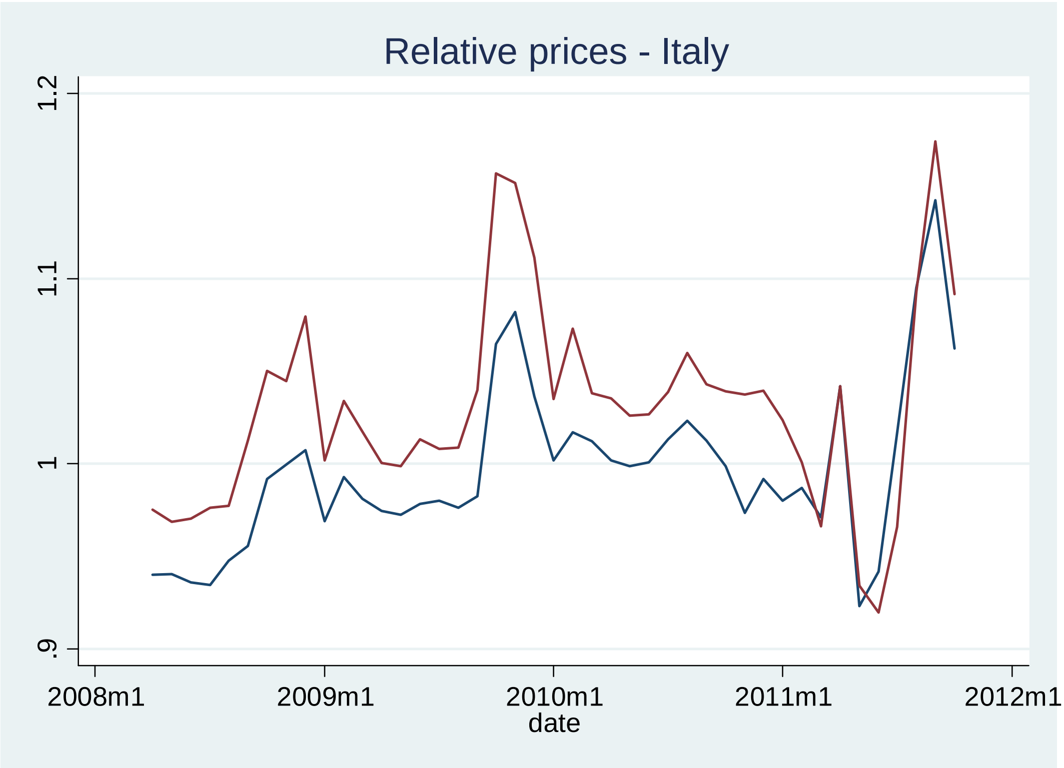
(220) Focusing on the Italian market, two patterns at the end of the period under consideration appear. First, the prices in Italy have risen relatively more than in other main Union markets, such as Germany and France (see Figure 5 on relative prices of Germany and France compared to Italy). The prices in Italy have risen from levels that were below German and French prices, by around 8%, in the second quarter of 2011 to more than 15% higher in the third quarter of 2011. Secondly, during 2011

the variability observed within Italy is much greater than the variability in the two large surplus Member States, Germany and France (the standard deviation in the Italian market even reached above EUR 100 in 2011). This finding implies that price differences well in excess of 15% (but also well below 15%) were observed between Italy and France and Italy and Germany[131].

(221) In the presence of one geographic market, however, one would expect that prices for a homogeneous product do not diverge significantly from each other as arbitrage opportunities will "correct" any pricing difference (and any divergence would only reflect differences in transportation costs). The two figures however suggest that the German and French markets are not likely to be in a position to constrain, at least to a significant level, the increase in the variability observed in the Italian market, in a period where Italian prices have increased significantly compared to the German and French levels.

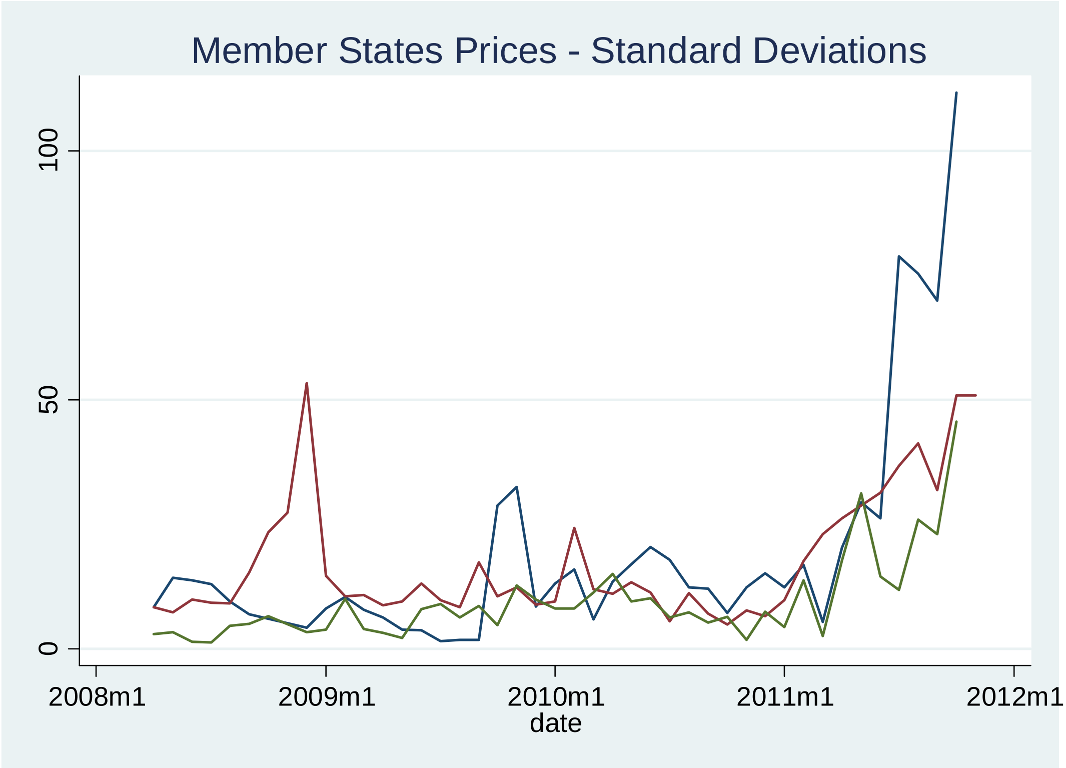
(222) In summary, the price dispersion across Member States goes up as the Union price level goes up (during 2011 when sugar becomes scarce overall). As regards Italy, the price level as well as the price dispersion within Italy goes up by relatively more than in its neighbouring Member States. This suggests that price differences are not arbitraged away as should be expected to happen in the same geographic market.

Figure 5: Member States relative prices – Italy



131 The swings in the relative prices of Italy vs Germany and Italy vs France, as depicted in Figure 5, shows that prices in Italy can diverge from German and French prices.

Figure 6: Member States prices Standard Deviations - Italy



(223) Overall, as far as Italy is concerned, the above Figures of the pricing data collected by DG AGRI are consistent with the qualitative evidence that does not support the definition of a supra-national geographic market.

(iii) Correlation analysis

(224) A correlation analysis on the Member States price series has also been performed in order to explore the pricing patterns across Member States further. Price correlation analysis is based on the idea that in the absence of common (demand or supply side) shocks the extent of co-movement in the prices of different Member States will provide information about the substitutability amongst them. This is because price competition results in an alignment of prices in the two Member States if they belong to the same relevant market[132]. Hence, if two Member States are considered to be part

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[132] For example for two Member States that were to belong to the same market, if a *country specific* cost shock (such as labour costs) were to lead to a price rise in Member State *i*, then consumers would substitute their purchases away from this Member State and purchase instead from Member State *j*. As a result of the increase of the demand in Member State *j* the price in this Member State should increase and so a co-movement (measured by a positive correlation) between the changes in the prices in the two Member States is expected. The Commission acknowledges that price correlation analysis is not a perfect measure for the purposes of market definition and the results of this analysis should be interpreted with caution and in parallel with the pricing evolution and the qualitative evidence collected during the market investigation. A main caveat of correlation analysis is that common shocks (such as fuel costs) can induce spurious correlation and therefore high correlations could be driven by factors which can cause a co-movement but are still unrelated to consumer/producer substitution. Similarly, two price series may be found to be correlated only because each of them has a trend (again, leading to spurious correlation).To address these concerns, correlation analysis is performed on stationary series, i.e. series with constant mean and variance. A series is non stationary if it fails to satisfy any part of this

of the same geographic market then the price movements should be correlated. If the prices of the two geographic areas move perfectly in line with each other, the correlation coefficient is equal to one and if there is no relationship the correlation is equal to zero.

(225) To assess whether the prices are sufficiently correlated, as one of the elements to consider the two geographic areas to belong to the same market, it is typical to use as a benchmark some other correlations (for which one has strong indications on whether they belong to the same market or not). Therefore, the most useful source of information from this correlation analysis comes from a comparison of correlations among different pairs. For the purpose of this Decision, correlation analysis has been carried out on price changes amongst Member States.

(226) The results of the correlation analysis are provided in Annex I. The results show that price correlations between Italy and its "neighbouring" and main exporting Member States (notably France and Germany)[133] are significantly lower than amongst these Member States, suggesting that the Italian market is more isolated. Therefore, the significant imports from Germany and France to Italy have not led to higher correlation between the price changes in Italy and each of those Member States than between the changes in prices amongst Germany and France[134].

(227) Price correlation analysis measures the contemporaneous adjustments in the price changes[135]. The comparative results mentioned above are relatively robust when we consider a (moving average correlation) specification of the tests that captures adjustments in the price changes over a three month period[136].

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definition. In the current case it is found that the Member State price series in levels are non stationary and therefore correlation analysis on the levels is not meaningful. Taking the first difference of the price series though yields stationary series and therefore correlation analysis was conducted on first differences. The economic interpretation when calculating correlations in differences measures whether the price changes rather than price levels would be potentially correlated or not (and therefore the interpretation would be of relative convergence). A high correlation indicates that price changes co-vary.

133 The correlation coefficient between Italy and Austria is higher than Italy and Italy's other "neighbouring countries" but still lower than other pairs of "neighbouring countries", in particular of the main exporting Member States (i.e. Germany and France).

134 The Commission has also tested whether the differences in the correlation coefficients are statistically significant following the cortesti command in Stata. These tests show that the correlation coefficients between Italy-Germany and Italy-France are significantly smaller (even at the 1 percent significance level) than the correlation coefficient between Germany-France.

135 Annex I of this Decision provides the correlation results for a quarterly moving average. Even though the correlations between Italy and its neighbouring/exporting Member States are in most instances higher than the simultaneous correlation they are still relatively lower than the correlations amongst these neighbouring Member States (notably France and Germany). Furthermore, the correlation coefficients between Italy-Germany and Italy-France are found to be statistically significantly smaller (the former at the 5 percent and the latter at the 1 percent) than the correlation coefficient between Germany-France.

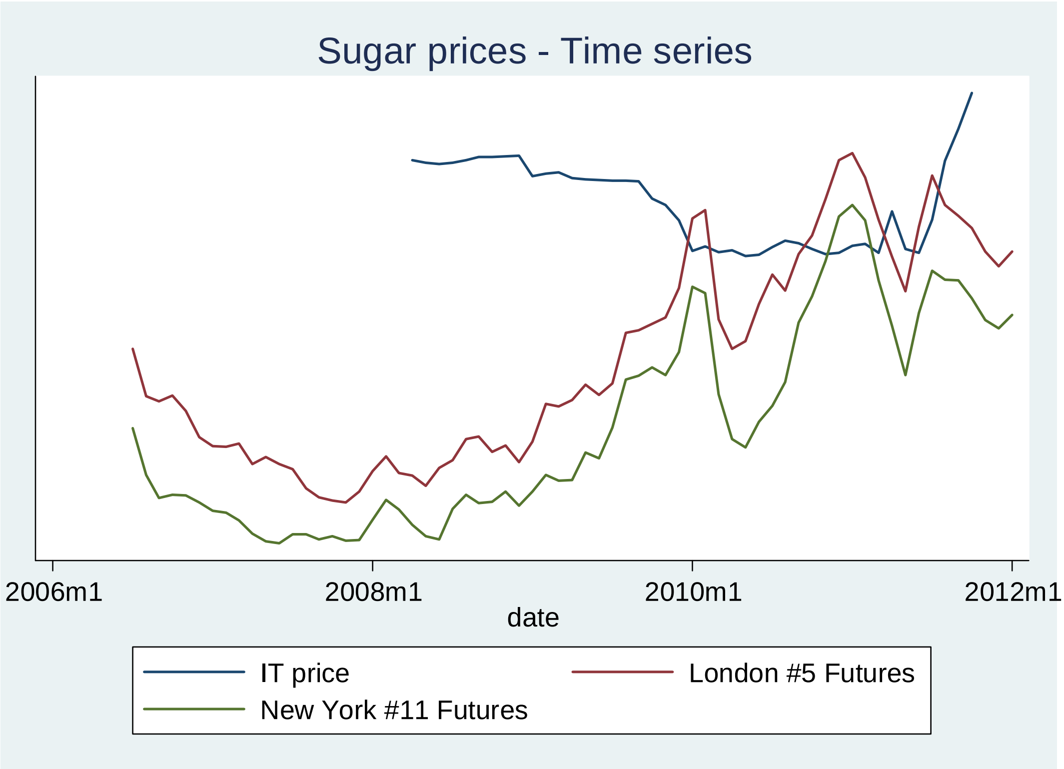
136 Furthermore, the Commission notes that much larger movements in prices were recorded during the 2010/2011 campaign compared to previous campaigns, largely due to the regime change and the general shortage of white sugar in the market (as evidenced by the market investigation). These larger shifts in prices would be an interesting source of variation for the purposes of price correlation analysis. However, even if the correlations for this subsample for Italy and its "neighbouring countries" are relatively lower than correlations between other "neighbouring countries", the time period is particularly short to draw any meaningful estimates on correlations for this specific subsample.

(228) Overall, it is concluded that the correlation analysis is consistent with the qualitative evidence collected during the market investigation showing that the Italian market price changes co-move less strongly with its neighbouring and exporting Member States than those neighbouring Member States' price changes co-move amongst each other.

White sugar price divergences between Italian and world price

(229) The notifying party also claims that the Italian market adheres to world price market conditions. It claims that any increase in market prices in Italy is simply the consequence of increasing world market prices and not capable of being influenced materially by Südzucker. However, the notifying party has not provided evidence to this effect. On the contrary, the evolution of future contracts for white sugar and raw cane sugar (measured by the London #5 and New York #11 futures respectively) and the Italian price do not follow each other closely, as shown in Figure 7.

Figure 7: Italian sugar prices and futures prices



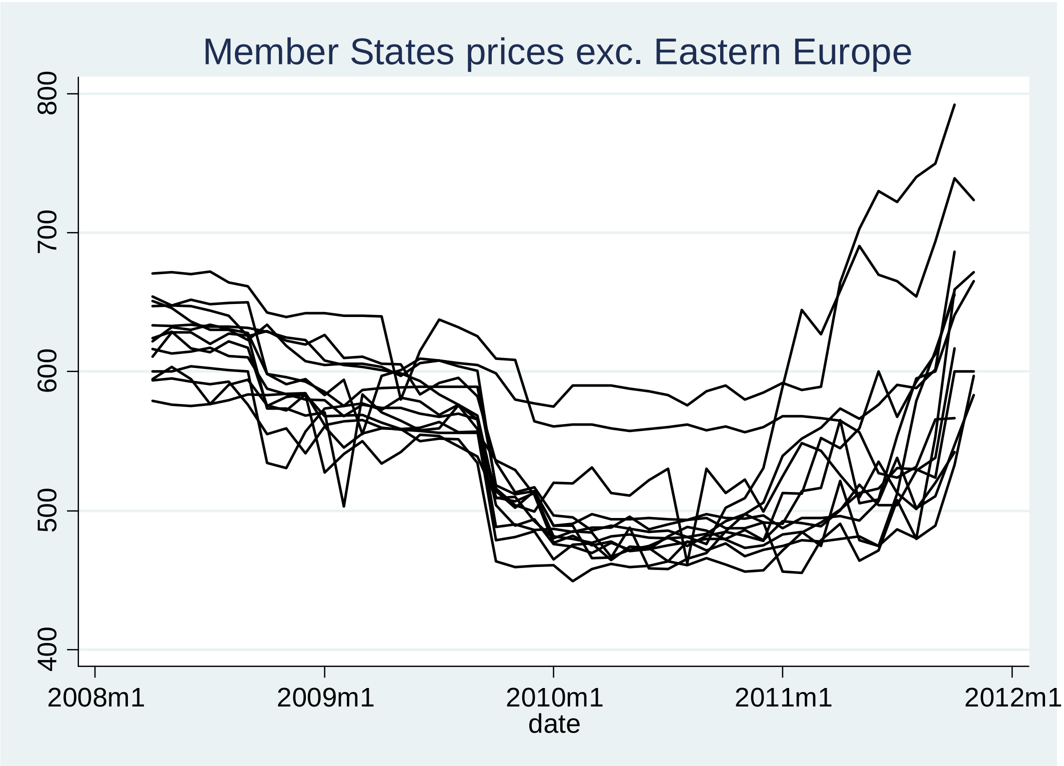
The concerns raised by the notifying party on the comparability of the DG AGRI data are either incorrect or do not affect the main conclusions of the analysis

(230) The notifying party has raised several arguments on the comparability of the DG AGRI data (see paragraphs 76 to 90 of the reply to the Statement of Objections). The arguments can be grouped into three groups.

(231) First, the notifying party raises concerns on the usefulness of the analysis and the data due to the differing product mix and the differing contract duration across

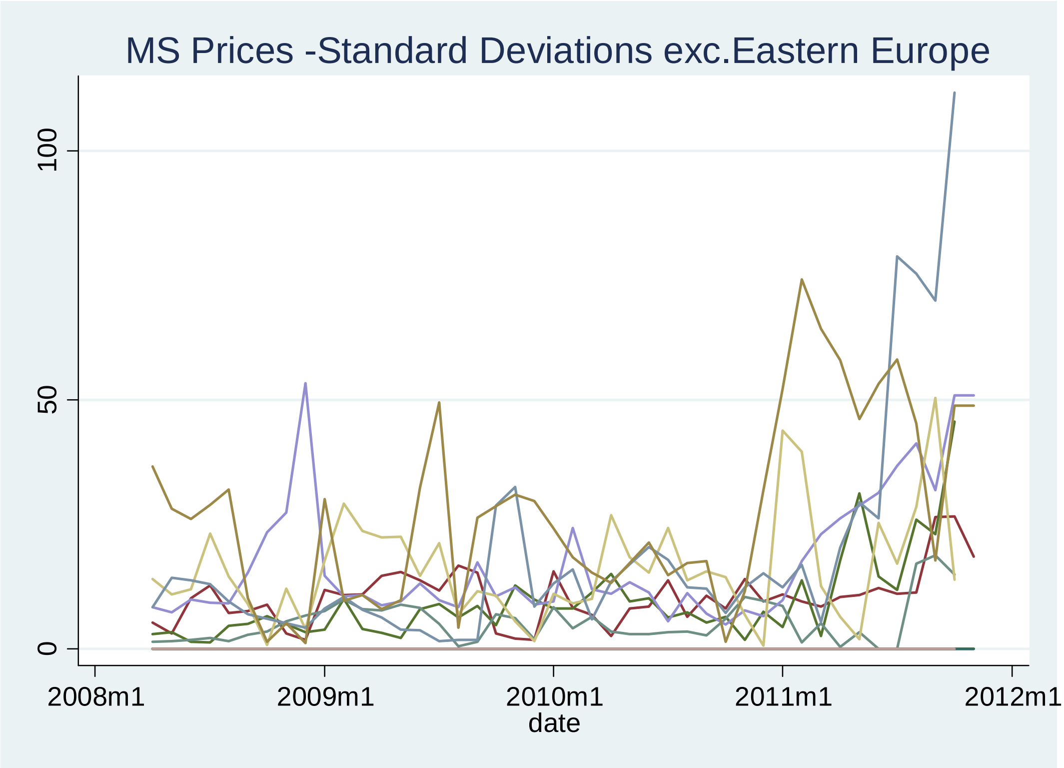
Member States. It suggests that "*any nationwide analysis of prices also had to include the mix between bulk and retail sugar in that country*"[137]. However, as explained above and as acknowledged by the Parties during the Oral Hearing, the DG AGRI data exclude retail sugar and therefore that argument is not relevant for those data. The notifying party also alleges the differing contract duration across Member States to bias the comparability of the data. However, it argues that its contracts are usually shorter in Italy for the retail segment and in Eastern European countries[138]. As retail prices are not included in the data, the price evolution and price correlation analysis is at least valid for all non-Eastern European countries and thus the main findings that compare Italy with France and Germany remain unaffected[139]. Besides, and for sake of completeness, Figures 8 and 9 representing Member States prices and standard deviations excluding Eastern European countries show that the main findings based on Figures 3 and 4 that include all Member States still apply. The Parties contest the similarity of the graphs and claim that "*it is unclear for the Parties how these deviations can be explained*"[140]. The Commission notes that the only difference between the two sets of graphs is the exclusion of the Eastern European Member States. Also the graphs show an increase in the price level differences across Member States and an increase in the Member State standard deviations.

Figure 8 : Member States prices excluding Eastern Europe



137 See reply to the SO, paragraph 87.
138 See reply to the SO, paragraph 79.
139 The possibility of different contract durations in different Member States is also addressed by the robustness check of moving average correlation analysis. A moving average analysis relaxes the assumption of contemporaneous price correlation but captures also price adjustments with a lag.
140 Reply to the Letter of Facts, paragraph 31.

Figure 9: Member States standard deviation excluding Eastern Europe



(232) Second, the notifying party claims that "*reported prices relate to ex-factory prices causes any price analysis to be strongly biased in the sense that large exports from e.g. France and Germany to Italy will not be reflected adequately in the reported prices. i.e. amounts and prices of sugar exported to Italy are included in the German average price and the Italian average price is calculated only on the basis of local Italian production which represents much less than 50% of the market*"[141]. The Commission understands this argument to acknowledge that different ex works prices (i.e. prices that exclude any transport cost) are set for different Member States for a given factory. This would imply that the "*law of one price*"[142] would not hold and a country specific "margin" (unrelated to transport costs) would be set.

(233) Otherwise, namely if ex works prices are the same irrespective of the destination country then this bias cannot be present in the dataset and therefore the analysis above is not affected in any way. Under the assumption that ex works prices depend on the destination country, the Commission notes the following:

(1) Given that the notifying party does not put forward that the geographic market for Italy is narrower than national, nor does it result from the market investigation, it is not obvious why the price of factories located in Italy would not be representative of the average Italian prices. Imports into Italy would need to compete with Italian producers (therefore no bias would be present in the data for importing countries, such as Italy).

141 Reply to the SO, paragraph 78.

142 The Law of one price suggests that all identical products should have only one price.

(2) The Commission is aware of the German data in the DG AGRI data also comprises ex works prices of German exports to Italy. Indeed, the ex works average prices for exporting Member States are calculated on the basis of data that also include the price of exports from that Member State in other Member States. The exporting structure (as well as the share of exports compared to production sold domestically) is important to understand the impact that the method used to calculate prices may have on exporting countries' prices, as computed in the DG AGRI dataset and on the resulting correlation analysis. For this purpose, the Commission has consulted the Comext database collected by Eurostat on intra-Union white sugar flows[143]. During the period of correlation analysis, from April 2008 to November 2011, the sugar exports from Germany to Italy have been consistently between 43-51% of the German exports and therefore represent the vast majority thereof. As these German exports to Italy are part of the German ex works price, the estimated correlation coefficient for Italy-Germany would be higher than the correlation coefficient of Italy-Germany that would result if the prices of these German exports were instead allocated to Italy. Conversely, if German data did not contain the prices of these exports, the correlation between Italy-Germany would be lower than the estimated correlation[144]. Hence, the impact of the effect that the notifying party alleges leads to lower correlation between Germany and Italy which therefore suggests that Italian prices are likely to be even more isolated compared to Germany and, similarly, to other exporting Member States. This would therefore be an element militating not against but, to the contrary, in favour of the national dimension of the market for the supply of white sugar to industrial processors in Italy.

(234) The third argument raised by the notifying party suggests that "*the price correlation between Italy and Germany resp. France has been significantly affected by the explained special events*"[145] such as the unlimited access of sugar from LDC/ACP countries in October 2009 and the temporary low price level in Italy immediately after the reform in 2006. The Commission, however, notes that the correlation analysis performed was based on the first difference of the series. As a result the effect of common shocks, such as EEA wide regulation, would be accounted for in the Commission's correlation analysis.

(235) The notifying party provided supplementary comments following the Oral Hearing. In this submission the notifying party claims that the price variation analysis is flawed for three reasons which are discussed and dismissed in turn[146].

(236) First, the notifying party considers that the time intervals chosen for correlation/price evolution/dispersion analyses yields irrelevant results. The Commission does not accept that the extraordinary economic situations, as described by the notifying party,

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143 The data refer to codes 1701 99 10 and 90.

144 As to the question whether the relative high correlation between France and Germany is driven by a similar exporting structure, the Commission notes that this is not the case. Indeed, the trade flows suggest a markedly different exporting structure between the two Member States as shown in Appendix 3.

145 Reply to the SO, paragraph 90.

146 Südzucker Supplement Comments following Oral Hearing, 12 March 2012. The Parties have repeated the same concerns in their Reply to the Letter of Facts, paras 24 to 30 without providing any further explanations.

imply that prices in this time interval cannot provide useful insights. The explanation provided by the notifying party for persistent differences in prices across Member States may provide the reasons for such movements, however, to the Commission's view they confirm that prices in different Member States do not move closely together.

(237) The notifying party admits that due to higher stock levels at the beginning of the transition significant quantities had to be redirected and made "*the sugar producers compete aggressively for customers in Italy. Strong price competition resulted temporarily in attractive offers for Italian customers compared to existing customers in neighbouring countries*"[147]. The Commission considers that this explanation cannot be reconciled with one EEA-wide geographic market, especially in the light of the fact that those price differences lasted for several years. On the contrary, the fact that the German and French prices were shielded from the alleged very low prices in Italy is an indication that there is no arbitrage between Italy and these Member States. This is also confirmed by the results of the price correlation analysis which shows that the arbitrage between Italy and its neighbouring/exporting Member States is lower than amongst these Member States. The presence of asymmetric shocks (such as the reduction in Italian domestic quota) does not render price correlation analysis irrelevant but on the contrary such shocks provide useful source of information for detecting whether two Member States belong to the same market (i.e whether prices adjust through arbitrage). The Commission also notes that the starting period of the analysis is April 2008 well after the start of the post 2006 regime[148].

(238) Second, the notifying party claims that the inclusion of ex-works prices for exports from Germany/France into Italy in Italian ex-works prices would lead to lower price differences and higher price correlation. The Commission accepts the notifying party's point that the ex-work prices in Italy would normally be lower than what is reported in the DG AGRI data as it is likely that the ex-works prices of the exports from Germany/France into Italy have to incur higher transport costs than Italian domestic production (and since the final price of sales in Italy should be similar to the ex-works prices of the exports from Germany/France into Italy would be lower)[149]. However, this argument does not affect the results of the analysis. Even if the level of Italian ex-works prices would be somewhat lower than indicated in the DG AGRI data, the evolution of the adjusted ex works prices would be identical to the one observed in the dataset (in particular as in the period under consideration the distribution of imports per Member State into Italy are rather stable). The only effect would be a horizontal shift of the Italian prices series downwards to reflect the lower ex work prices for the quantities sold from Germany to Italy. The relative prices (Figure 5) would also fall by the same amount, however the relative swings in the prices would remain and the Italian prices would have increased the most during the last period compared to French and German prices (and as a result there would not be lower price differences as the notifying party suggests).

147 Supplementary Comments following Oral Hearing, p2.

148 The Commission also notes the fact that intervention stocks were sold in Italy is not relevant. Besides, the sale of this intervention stocks was sold through EEA tenders.

149 The Commission notes that exporters from Germany and France may often have to incur transport costs of EUR 30-40 to sell in northern Italy.

(239) The correlation analysis would also largely remain unaffected. As the correlation analysis focuses on the price changes, it is irrelevant whether the German exports to Italy are included in the Italian dataset. The price changes of the Italian producers and German exports to Italy are expected to be basically the same. Also, the Commission notes that the results of the correlation analysis contradict the conditional statement of the Parties that "*ex-works prices for sugar exports from Germany are comparable to ex-works prices for sugar sales within Germany when the market is balanced. Otherwise, it would be more profitable to sell sugar to other destinations*"[150]. This is precisely the price arbitrage (price alignment) hypothesis tested by the correlation analysis. If the tested hypothesis of a common geographic market is true the correlation between the two countries' prices should be very strong. If, on the other hand, the estimated correlation is weak (and especially in comparison with the correlations of other country pairs, such as Germany-France) the hypothesis is rejected, and this is interpreted (in this Decision) as evidence consistent with the national market hypothesis. If Germany and Italy were to belong to the same geographic market, the ex-works price of a German factory would be identical irrespective of the destination of the quantities. An increase in the ex-works price for domestic German sales would also be followed by an increase in the ex-works price for exports to Italy which in turn would also be followed by an equivalent increase in the ex-works price of Italian domestic producers. Therefore, the correlation between German and Italian ex work prices as captured by DG AGRI data would be very high, which is however not supported by the data. On the other hand, if one assumes that the two Member States belong to separate geographic markets then the estimated correlation would be an upper bound of the correlation between the two Member States, given the high share of German exports directed into Italy.

(240) Besides, as Mr Wolfgang Heer claimed in the Oral Hearing "*We have defined the volume of quota sugar which we have to sell in Europe countries and we decide where to sell this sugar. And the price, that is done by the market. [...]**[151].

(241) This statement shows that ex work prices are not necessarily the same for a given factory. [...]*[152].

(242) Third, the notifying party suggests that a comparison of biased ex-works prices is unfit to determine whether the competitive situation differs across Member States. However, this view is not explained and is in stark contrast with the reasoning of the Commission as set out above.

(243) Therefore, the Commission concludes for the reasons described above that overall, the findings of the analysis based on DG AGRI data, which support the qualitative evidence in favour of a separate national market for Italy, remain largely unaffected by the arguments raised by the notifying party.

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150 Supplementary Comments following Oral Hearing received on 12 March 2012, p3.

151 Statement by Wolfgang Heer, Speaker of the Board ('Vorstandssprecher'), during the Oral Hearing of 5 March 2012, minute 43:55 to 44:36 of recording C-15.50-16.42.

152 [...]*.

Exchange of arguments on Südzucker's own pricing data

(244) With respect to prices that Südzucker sets in different Member States, the Commission argued in the SO, on the basis of Südzucker's internal documents, that its average sugar prices differ between the different Member States it supplies[153].

(245) In its reply to the SO, the notifying party has provided a table with its invoiced prices with inclusion of data from Agrana and Südzucker Polska[154]. The resulting differences in levels are lower, notably in Member States where Agrana is active such as [...]*. However, even the revised tables show significant differences in average prices between e.g. Italy and [...]*.

(246) The notifying party also acknowledges other deficiencies of the data, namely the inclusion of transportation costs and different mixes of products in different Member States to cast doubts on the comparability of the data across Member States. The Commission has concerns that those deficiencies are such that those data are not suitable for an analysis for the purposes of geographic market definition. In particular the Commission considers that the possibly different mix of industrial vs retail sugar sales of Südzucker in different Member States may have an impact on the comparability of the data across Member States. As a result, the Commission considers that those aggregate data are not sufficiently reliable for the purposes of the definition of the geographic market for sugar sold to industrial processors. On the contrary, DG AGRI data, which only consider prices of sugar sold to industrial processors, are much more reliable for the purposes of the geographic market definition.

(247) The notifying party, while strongly criticising the reliability of Südzucker's pricing data for the purposes of geographic market definition, also provides a graph based on these data on the prices between France, Italy and Germany. On the basis of that graph, the notifying party argues that there is national average price convergence amongst those three Member States. According to the notifying party *"the price increases in Italy in 2010/2011 and 2011/2012 are not the result of limited competitive pressure but of convergence process following years of relatively low prices in Italy not even covering transport costs"*[155]. Furthermore, these graphs only include five annual prices and one estimate of prices based on contracted prices for 2011/2012. In this respect, the Commission notes that the "*greater convergence*" of prices takes place in 2011/2012 when contracted and not invoiced prices are graphed, which creates an inherent incomparability[156].

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153 Annex Q10 Südzucker's reply to the 4th RFI, Phase II. The Commission notes that this data do not include volumes sold by Agrana (Austria and Slovenia) and SZ Polska (Poland, Baltics and partly Scandinavia). At the Commission's request, Südzucker also provided data including all consolidated Südzucker's group companies sales, although stressing that the data is available only on high cumulated levels. In any event, this does not change the fact that the prices differ between the different Member States supplied.

154 Table 2 of reply to the SO, p. 43.

155 Figure 2, reply to the SO, p. 47.

156 The Parties in para 12 their Reply to the Letter of Facts claim that the Commission had in its possession the data underlying the graph. The Parties only hide in their last sentence that the Commission's point in the Letter of Facts (para 20) only relate to the use of contracted data for 2011/2012 as opposed to invoiced data for previous years. The Parties only further submit that contracted prices are extracted

(248) Even if the data provided by the notifying party in this context were reliable, they would still not support the geographic market definition as being national. Even if the graph was based on comparable data it would merely show a starkly different evolution of prices in different Member States.

(249) First, the notifying party acknowledges that prices in Italy were for several years lower than in Germany and in particularly in France. For several years there has been a difference of prices of around EUR [...]* between the sales of the notifying party notably in [...]* and Italy. This is even more striking as the transport costs for the notifying party are higher for Italy than in [...]* (as in Italy, in contrast to [...]*,). Assuming comparable sales in different Member States, the graph would show that the arbitrage opportunities between Member States are not exploited which can lead to persistent price differences well above transport costs (this arbitrage argument would need to hold also in cases of asymmetric shocks across Member States, as described by the notifying party[157]). Second, even the evolution of prices as shown by the notifying party's graph shows a greater co-movement between Germany and France than between these two Member States and Italy, which is also consistent with the result of the correlation analysis described before.

(250) Therefore, while acknowledging that the data have several limitations, it has to be noted that if the data were considered at face value they show that the notifying party's prices may well differ across Member States for a persistent period. Contrary to the Parties' claim in the Letter of Facts that these differences were due to the transitory period post 2006 reform, such sustained differences show a clear lack of arbitrage amongst Member States.

(251) In view of the above, the Commission considers, on the basis of DG AGRI data, that the price differences between Italy and its neighbouring Member States are not arbitraged away. In addition, the price changes in the Italian market co-move less strongly with its neighbouring (exporting) Member States than these neighbouring Member States' price changes co-move amongst each other. This finding suggests that the Italian market is relatively more isolated than its neighbouring countries. The arguments raised by the notifying party on the comparability of DG AGRI data do not affect the above conclusions of the analysis. Finally, the Südzucker aggregate pricing data is not sufficiently reliable for the purpose of the geographic market definition of sugar sold to industrial processors in Italy.

(4) MARKET POSITIONING OF COMPETITORS DIFFERS SIGNIFICANTLY ACROSS MEMBER STATES

(252) The presence of the same major suppliers or producers in a number of countries or regions provides initial evidence suggestive of a market comprising those countries or areas. However, the Commission will also seek to determine whether there are material deviations in those countries or regions[158].

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form ordinary course of business data and invoiced prices at the end of the year "do not usually significantly differ" without providing any further evidence.

157 In their Reply to the Letter of Facts, the Parties also provide a list of reasons pointing to asymmetric (i.e. only relevant for Italy) and symmetric shocks (EEA wide shocks) during the transitory period.

158 See Commission Decision of 27 July 2001 in Case No IV/M.2337 - Nestlé/Plaston Purina, OJ C 239, 25.8.2001, p. 8; Commission Decision of 8 January 2002 in Case No COMP/M.2621 - Seb/Moulinex,

(253) Generally, the Commission views significant national market share differences as evidence that the conditions of competition are not sufficiently homogeneous to support a wider geographic market definition[159].

(254) In the case at hand, even more than 6 years after the latest reform, the market shares of all European players are very different depending on the Member States in which they sell sugar. This is illustrated by the presence of Südzucker, the main European sugar producers, in the various Member States.

(255) Indeed, Südzucker held the following market shares (for the sales of white sugar to industrial processors) for the marketing year 2010/2011 of: [70-80]*% in Austria, [30-40]*% in Germany, [20-30]*% in France, [60-70]*% in Belgium, [0-5]*% in the Netherlands, [40-50]*% in Hungary, [5-10]*% in Denmark and [5-10]*% in the United Kingdom.

(256) Similarly, Nordzucker, the second main sugar producer in Europe, held on the same product market and the same year market shares of [30-40]*% in Germany, [60-70]*% in Finland (through Nordic Sugar AB), [40-50]*% in Latvia and [5-10]*% in Poland and has almost no presence in France, Italy and Spain.

(257) Such significant divergences in market shares from one Member State to another, in particular where those Member States are neighbouring, point towards the existence of national markets in this case.

(i) Greece

(258) The market investigation conducted in this case has demonstrated that Greece is a deficit country like Italy. Therefore, the existence of imports itself does not suggest that those imports pose competitive constraints on competitors in Greece because such imports simply derive from the regulatory environment. The demand and supply patterns are similar to those in Italy; similar price and market share differences are also observed in Greece like in Italy. Therefore, although Greece is a deficit Member State and imports are important in order to fulfil the domestic sugar needs, from a customer and organisation of supplies perspective the market is likely to be national. However, as the likelihood of entry of EDFM in Greece is low and as the proposed transaction would not lead to any significant impediment of effective competition under the narrowest possible market definition, there is no need to conclude on the precise scope of the geographic market as regards Greece.

OJ C 49, 22.2.2002, p. 18; *Summary* of Commission Decision in Case No COMP/M.4513 - Arjowiggins/M-real Zanders Reflex, OJ C 96, 25.4.2009, p. 10.

159 In Commission Decision 2003/777/EC in Case No COMP/M.2861 - Siemens/Drägerwerk/JV, OJ L 291, 8.11.2003, p. 1, the Commission identified national markets for therapy equipment, inter alia because of wide variations of market shares (ranging from 65-75% in some countries to 5-15% in others). In Commission Decision of 29/06/2007 in Case No COMP/M.4540 - Nestlé/Novartis, OJ C 229, 29.9.2007, p. 1, the Commission identified national markets for nutrition products inter alia, because of "significant unexplained price differences among Member States" and "considerable" differences of the parties and their competitors.

6.1.3.5. Conclusion

(259) For the reasons illustrated above, the Commission takes the view that with regard to Italy and for the purposes of the assessment of the proposed transaction the geographic market for the supply of white sugar to industrial processors and the market for the supply of white sugar to retailers is national in scope.

6.1.4. EFFECTS ON COMPETITION / COMPATIBILITY WITH THE INTERNAL MARKET

(i) Supply of white sugar to industrial processors in Italy

(260) The following competitive assessment presents a number of factors on the basis of which the Commission concludes that the proposed transaction results in non-coordinated effects in the market for the supply of white sugar to industrial processors in Italy. The Parties' combined market shares are significant in this relevant market for the supply of white sugar to industrial processors in Italy. As a first illustration for the markets for the supply of white sugar to industrial processors and to retailers in Italy, a table below presents the market shares for these two relevant markets as defined by this Decision. It also shows the market shares of the main competitors. The presentation then examines, first, the elements pointing towards price rises before discussing possible expansion of output by competitors, potential buyer power of industrial processors and likely, timely and sufficient entry of new competitors into the relevant market post-merger, in line with the framework for analysing non-coordinated effects in the Guidelines on the Assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings[160] (the "Horizontal Merger Guidelines")[161].

(261) The proposed transaction has the following characteristics and consequences: (i) Südzucker is the most important player on the Italian market for the supply of white sugar to industrial processors, (ii) EDFM is an important player on the same market, (iii) the increment added by the proposed transaction is significant (conservatively estimated at [10-20]*%), (iv) the post-merger market shares are very high (superior to [50-60]*%), (v) Südzucker and EDFM are close competitors and are the two competitors that can most easily adapt their quantities/sales in the Italian market, (vi) post-merger the merged entity would have the incentive and ability to withdraw quantities from Italy, thereby raising prices, (vii) the competitors of the merged entity, established in Italy or outside Italy, face capacity constraints and therefore are unlikely to increase supply if prices increase, and therefore to counteract such market behaviour, (viii) countervailing buyer power appears unlikely to constrain the ability of the merged entity to increase prices post transaction, especially in periods of overall shortage of sugar supply, and (ix) entry post-merger in the relevant market is not likely, sufficient and timely. As a result of all the elements enumerated above, it is concluded that the proposed transaction would significantly impede effective competition, in particular as a result of the creation of a dominant position.

160 OJ C 31, 5.2.2004, p. 5.

161 Pages 5 – 18 of the Horizontal Merger Guidelines.

6.1.4.1. Introduction

(262) Italy is the second largest sugar consumer after Germany. In Italy, the annual demand amounts to approximately 1.73 million tonnes of sugar[162], with sugar sold to industrial processors accounting for around 70% of that demand. Italy is one of the largest deficit sugar markets in the Union.

(263) Prior to the 2006 sugar reform, Italy was mainly supplied with sugar by local producers; COPROB/Italia Zuccheri had a market share of 30%, Eridania Sadam 30%, SFIR 18% and Zuccherificio del Molise 4%. Approximately 18% of Italy was supplied by sugar imports[163].

(264) However, as already mentioned, in Italy 15 out of 19 sugar beet factories closed following the 2006 sugar reform. Therefore, prior to the launch of the Brindisi refinery in December 2010, less than half of Italian demand was covered by domestic (beet sugar) production. Apart from the Brindisi refinery, Italian sugar production in 2011 consisted of beet sugar production carried out by three companies:

(a) Eridania: one beet factory in San Quirico (Parma) with a capacity of [...]* tonnes per year[164].

(b) COPROB/Italia Zuccheri: one beet factory in Minerbio with a capacity of [...]* tonnes per year and one beet factory in Pontelongo with a capacity of [...]* tonnes per year[165].

(c) Zuccherificio del Molise: one beet factory in Termoli with a capacity of [...]* tonnes per year[166].

(265) If the [...]* tonnes per year[167] of cane sugar production capacity of the Brindisi refinery are also taken into account, it follows that at least 875,000 tonnes of the 1.73 million tonnes per year of Italian sugar demand have to be satisfied via imports mainly from the closely located surplus Member States, such as France and Germany.

(266) Around 60% of all sugar is consumed in the North of Italy. The Centre and South of Italy are in a more disadvantageous situation, as they are located further away from production facilities, with the exception of Brindisi and Termoli, and from the exporting countries. According to internal documents of EDFM, based on an internal logistics model[168], the average transportation costs for imports (mainly from Germany, Austria and France) in the whole of Italy amount to EUR [...]* per tonne, while the transportation costs to the Centre and South of Italy amount to EUR [...]* per tonne.

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162 See below the reconstructed table of market shares in recitals (336) and (337) of this Decision.

163 SFIR's answer to Question 3 of the 2nd RFI in Phase II.

164 Eridania's reply to the Questionnaire to competitors in Italy.

165 COPROB's reply to the Questionnaire to competitors in Italy.

166 Zuccherificio del Molise's reply to the Questionnaire to competitors in Italy.

167 "Brindisi capacity paper" submitted by EDFM on 2 December 2011. This figure has also been confirmed by SFIR on the cover letter of SFIR addressed to the Commission dated 30 January 2012 (DG 08/2012).

168 Annex 5b of Südzucker's answer to the 2nd RFI in Phase I.

6.1.4.2. The Italian sugar market structure prior to the proposed transaction

Role of Südzucker

(267) Südzucker, the leading supplier in Italy, markets and sells refined sugar through the joint venture Maxi Srl (an Italian sugar trader), which Südzucker jointly controls together with Podini Holding S.p.A.

(268) Even at the beginning of its commercial activity in Italy, direct sales from Südzucker to industrial processors or to retailers had always been very rare[169]. Until the end of the 1990s, Südzucker used to sell sugar to various traders in Italy. However, in 2000 Südzucker entered into a cooperation agreement with MAXI, and thus Südzucker's sales in Italy became more and more channelled through MAXI. At the end of 2006, the cooperation agreement between Südzucker and MAXI was substituted by a joint-venture through the acquisition of a 50% stake by Südzucker in MAXI[170].

(269) [Description of MAXI]*[171]. [Description of MAXI]*

(270) As a result, MAXI has been integrated into the overall Union sugar marketing of Südzucker [...]*[172] [Description of MAXI]*[173].

(271) Since Italy is the second largest consumer of white sugar in the Union and has a substantial deficit, over the past five years Südzucker has had a clear commercial strategy [Description of Südzucker's strategy]*.

(272) Südzucker has admitted that the main reason for its focus on the Italian market has been the expectation that Italy would become a large deficit market after the closure of large parts of its domestic beet production[174]. Furthermore, Südzucker submitted that it had envisaged supplying to Italy up to [...]* tonnes of sugar per year to Italy[175]. Indeed, a presentation from 2006 shows that Südzucker was aiming at supplying approximately [...]* tonnes/year to the Italian market[176].

(273) In fact, Südzucker has increased its sales volume drastically from approximately [...]* tonnes in 2008[177] to approximately [...]* tonnes in 2010[178] following a very conscious expansion strategy.

(274) Therefore, today Südzucker is the largest and fastest growing player in Italy.

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169 Südzucker's answer to Question 17 of the 3rd RFI in Phase II.

170 Südzucker's answer to Question 17 of the 3rd RFI in Phase II.

171 Südzucker's answer to Question 19 of the 3rd RFI in Phase II. See also [...]* presentation in Annex 23 of 2nd RFI and SZ's reply to the 6(1c) Dec.

172 [...]*.

173 Südzucker's answer to Question 19 of the 3rd RFI in Phase II. See also [...]* presentation in Annex 23 of 2nd RFI and SZ's reply to the 6(1c) Dec.

174 Südzucker's answer to Question 17 of the 3rd RFI in Phase II.

175 Südzucker's answer to Question 17 of the 3rd RFI in Phase II.

176 Presentation of Commercial Director [...]* dated 17 July 2006, chart 6, provided as Annex 23 of Südzucker's reply to the 2nd RFI in Phase I.

177 Annex Q16-1 (chart at p. 16) of Südzucker's answer to the 3rd RFI in Phase II.

178 Annex Q16-7.3.a of Südzucker's answer to the 3rd RFI in Phase II.

Role of EDFM

(275) In 2008, EDFM engaged in a [...]* joint-venture with SFIR. The joint-venture was the Brindisi refinery and its purpose was to build and operate a new raw cane refinery in Brindisi, in the south of Italy.

(276) Both EDFM and SFIR made considerable investments in SRB. The whole project was originally budgeted at EUR [...]* million[179], but an additional contribution of EUR[...]* million[180] was made in September 2010.

(277) Both EDFM and SFIR exercise control over SRB. The voting shares in SRB are held [...]* between the two partners. [Description of SRB]*[181]. [Description of SRB]*[182].

(i) EDFM jointly controls with SFIR the sales of white sugar from the Brindisi refinery to industrial processors in Italy

(278) According to the Parties, ESI, a 100% subsidiary of SFIR in charge of [...]*, buys in principle [...]* white sugar produced by SBR. From December 2010 to October 2011, SRB sold [...]* tonnes to ESI, while exporting [...]* tonnes to [...]* and [...]* tonnes to [...]*[183].

(279) The Parties claim that EDFM [...]* the sugar produced in the Brindisi refinery[184] and thus SRB is in their view [...]*[185], [...]* of the sugar produced. They argue that sugar originating in the refinery is sold [...]* to ESI, who then relying on its historical customer relationships and storage facilities [Description of SRB and ESI]*.

(280) However, the investigation with regard to the role of EDFM in the sales and marketing of the white sugar produced by SRB does not confirm the Parties' claim. In fact, internal documents show that [Description of SRB]*.

(281) The SRB joint-venture agreement between EDFM and SFIR states that the purpose of the joint-venture is to *refine, sell and distribute* sugar[186]. Indeed, the partners even agreed [Description of SRB]*[187]. [Description of SRB]*.

(282) Furthermore, in the markets for the supply of white sugar it is the supplied quantity that directly determines the price. This has been illustrated by Südzucker in the Oral Hearing of 5 March 2012: [...]*[188]. Given that it is the Brindisi refinery that

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179 Answer to the 2nd request for information to EDFM of 27 September 2011, "Information Memorandum SFIR/ED&F Man Brindisi Project" of 4 June 2009.

180 Answer to the 2nd request for information to EDFM of 27 September 2011, SFIR Raffineria di Brindisi Spa - Operational Progress Report of 15th April 2011.

181 Article 5 of the Brindisi Joint Venture Agreement.

182 See for instance "White paper on Brindisi" submitted on 19 October 2011.

183 Annex Q16-1 (p. 19) of Südzucker's answer to the 3rd RFI in Phase II.

184 Form CO, p.27.

185 EDFM's answer to the 1st RFI of 26 September 2011 and answer to the 2nd RFI of 27 September 2011.

186 Article 3 of the Brindisi Joint Venture Agreement (Annex 1.a of EDFM's reply to the 2nd RFI in Phase I), which states that the business of SRB is [...]*.

187 Article 14 of the Brindisi Joint Venture Agreement submitted as Annex 1.a of EDFM's reply to the 2nd RFI in Phase I.

188 Statement by Wolfgang Heer, Südzucker, during the Oral Hearing of 5 March 2012 (minute 43:55 to 44:36 of recording C-15.50-16.42).

determines the quantities that ESI can sell in Italy, necessarily it is also the Brindisi refinery that determines the price at which those quantities will be sold.

(283) In the Brindisi refinery, the production output and sales of the refined sugar are discussed [Description of SRB]*[189], where there is [Description of SRB]*[190]. [Description of SRB]*. In this respect, the argument of the Parties that [Description of SRB]* is immaterial. The fact that [Description of SRB]* indicates its influence on marketing.

(284) The internal documents submitted by EDFM also demonstrate that [Description of SRB]*[191]. In particular, the internal document entitled as [...]*[192] indicates that [Description of SRB]*.

(285) Moreover, the [...]* minutes of [...]* state that [Description of SRB]*[193]. According to the minutes of [...]*,[194]. During that meeting, the participants also agreed [Description of SRB]*[195].

(286) The minutes of meetings of [...]* further demonstrate that, [Description of SRB]*[196]. [Description of SRB]*[197], [Description of SRB]*. This is also demonstrated by the sale of [...]* tonnes to [...]* and [...]* tonnes to [...]* by SRB[198].

(287) The minutes of the meeting of [...]* of [...]* indicate that [Description of SRB]* and further support that ESI acts [Description of SRB and ESI]* as [Description of SRB and ESI]* for the joint venture rather than [Description of SRB and ESI]*[199].

(288) The reason for EDFM's active participation in the value created through refining and production of white sugar can be found in the business case study for Brindisi, which EDFM conducted prior to the creation of SRB. This study did not solely concern the supply of raw cane sugar, but also covered extensively the economics of the Italian white sugar market[200].

(289) Indeed, EDFM has a strong financial interest to control the selling activity of SRB. The total capital expenditure for the Brindisi refinery project is quite substantial, amounting to approximately EUR [...]* million. The raw cane supplies to the Union are currently particularly tight and the [...]*. As the initial business case study

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189 Annex 5.b in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I; Annex 5.c in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.

190 EDFM's reply to the 6th RFI in Phase I.

191 Annex 15 of EDFM's answer to the 6th RFI of 11 October 2011.

192 Annex 17 of EDFM's answer to the 6th RFI in Phase I.

193 Annex 5.b in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.

194 Annex 5.c in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.

195 Annex 5.c in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.

196 See for instance the minutes of the Board meeting of 19 May 2009 in Annex 7.b of EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.

197 EDFM's reply to Question 9 of the 6th RFI in Phase I.

198 Annex Q16-1 (p. 19) of Südzucker's answer to the 3rd RFI in Phase II.

199 Annex 5.b in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.

200 See, for example, the "Information Memorandum", the "Project Overview" and the "Competitive Analysis of supplying Sugar to the Italian Market", submitted respectively as Annexes 4, 5.a and 5.b of EDFM's answer to the 2nd RFI in Phase I.

indicates [Description of SRB]*[201]. [Description of SRB]*[202]. [Description of SRB]*[203] [Description of SRB]*.

(290) In its reply to the Statement of Objections[204], Südzucker claimed that the sales of white sugar produced by SRB should not be attributed to EDFM.

(291) First, according to Südzucker, SRB is in charge of "wholesale" sales to ESI, whereas ESI is in charge of the "retail" sales to the industrial processors and retailers. [Description of SRB]* Südzucker believes that the mention in the [...]* minutes of [...]* is a normal mechanism when a production company sells to a marketing and sales company. In this context, ESI's sales of white sugar (quality, quantity and prices) were discussed on [...]* and a discussion on the creation of [...]* took place. [Description of SRB]*.

(292) Second, the plan that ESI would [Description of SRB and ESI]* was a proposal that was never implemented[205].

(293) Third, Südzucker submitted that the purpose of the [...]* clause in the Brindisi Joint-Venture Agreement (the "JV Agreement")[206] was only to [Description of SRB]*.

(294) Fourth, the documents in preparation of the SRB project[207], where EDFM and SFIR discuss extensively the economics of white sugar sales in Italy and average prices that could be achieved, are not evidence that SRB would market white sugar in Italy.

(295) The above arguments put forward by the notifying party cannot be accepted. The sales of white sugar produced by SRB should be attributed to EDFM, [Description of SRB and ESI]*.

(296) First, ESI's sales to industrial customers and to retailers cannot constitute "retail" sales, since these customers are still supplied at the wholesale level. It is retailers that then sell at the retail level to the end-customers. [Description of SRB and ESI]* this argument does not alter the conclusion that it is SRB [Description of SRB and ESI]* for the white sugar produced in Brindisi. In that regard, SRB does not need to know individual clients and prices of ESI.

(297) For SRB to make [Description of SRB and ESI]*[208] [Description of SRB and ESI]* is sufficient. On the basis of [Description of SRB and ESI]*, SRB can set the price at which it sells white sugar to ESI [Description of SRB and ESI]*.

(298) [Description of SRB and ESI]*.

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201 See the "Information Memorandum" submitted as Annex 4 of EDFM's answer to the 2nd RFI in Phase I.

202 "Operational Progress Report" submitted as Annex 5.c of EDFM's answer to the 2nd RFI.

203 EDFM's answer to the 3rd RFI in Phase I.

204 Paragraphs 108 *et seq.*

205 Annex 5.b in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.

206 Article 3 of the Brindisi Joint Venture Agreement, which states that the business of SRB is [...]*.

207 See, for example, the "Information Memorandum", the "Project Overview" and the "Competitive Analysis of supplying Sugar to the Italian Market", submitted respectively as Annexes 4, 5.a and 5.b of EDFM's answer to the 2nd RFI in Phase I.

208 As demonstrated *inter alia* in the document "ESI transfer price analysis" submitted as Annex 17 of EDFM's answer to the 6th RFI in Phase I.

(299) Second, even if the plan that ESI [Description of SRB and ESI]* was an unimplemented proposal[209], the fact that this proposal was discussed and almost implemented in the SRB [...]* shows that SRB [Description of SRB]* and that EDFM [Description of SRB]*.

(300) Third, if SRB were [Description of SRB]* and each party to the joint venture wanted to ensure that [Description of SRB]*, a [...]* clause would be unnecessary and irrelevant, since [Description of SRB]*. In fact, if SRB were [Description of SRB]* it would not be conceivable that [...]*. Nevertheless, the [...]* clause of the Joint Venture Agreement states that [Description of SRB]*[210].

(301) Fourth, if SRB were a [Description of SRB]*, EDFM and SFIR would have only analysed the ways to efficiently produce white sugar from raw cane. Nevertheless, the fact that [Description of SRB]*[211] also points towards the conclusion that [Description of SRB]*.

(302) In the light of the above and, in particular, EDFM's active participation in [Description of SRB]* and the [Description of SRB]*, the refined sugar sales of the refinery should be attributed to EDFM. Therefore, EDFM controls SRB, which markets the white sugar it produces, and thus the sales of white sugar produced by SRB should be attributed to EDFM.

(ii) EDFM has secured the supply of raw cane sugar input to the Brindisi refinery

(303) SRB benefits from three [...]* contracts [...]*[212]: [contracts with Supplier A, Supplier B and Supplier C]*

(304) Therefore, in times of scarcity of raw cane sugar for refineries in the Union, the Brindisi refinery has secured the input of at least [...]* tonnes [...]*.

(305) Moreover, EDFM has also concluded two other [...]* contracts: (i) the contract with [...]* in [...]*, which gives [...]*, and (ii) the contract with [...]* in [...]*[213].

(iii) EDFM's participation in the DAI refinery

(306) SFIR does not only depend on EDFM with respect to the [...]* supply contracts secured for the Brindisi refinery, but also with respect to the operation of the DAI refinery, which is situated in Coruche (Portugal) located approximately 65km from the Port of Setubal. The current shareholders of the DAI refinery are EDFM with [...]*%, SFIR with [...]*%, "Sociedade Industrial de Açúcar" with [...]*% and "Caixa de Crédito Agrícola Mútuo de Coruche" with [...]*%. Originally a sugar beet factory, since 2007 the DAI refinery has re-focused its operations on refining due to the sugar reform. Over the first three years of the sugar reform, DAI has renounced its entire

209 Annex 5.b in EDFM's answer to the 5th RFI of 7 October 2011 in Phase I.
210 Annex 1.a of EDFM's reply to the 2nd RFI in Phase I.
211 See, for example, the "Information Memorandum", the "Project Overview" and the "Competitive Analysis of supplying Sugar to the Italian Market", submitted respectively as Annexes 4, 5.a and 5.b of EDFM's answer to the 2nd RFI in Phase I.
212 Annexes 3a, 3b and 3c of EDFM's answer to the 3rd RFI in Phase I.
213 EDFM's answer to the 3rd RFI in Phase I.

beet quota to the Union restructuring fund and is concentrating on achieving maximum refinery output and sales, in line with the refinery's designed capacity of [...]* tonnes/year[214].

Role of other sugar suppliers

(307) Due to the negative impact of the 2006 sugar reform in Italy in terms of sugar production, the traditional Italian sugar manufacturers, such as Eridania, COPROB/Italia Zuccheri and SFIR, have been trying to maintain their "pre-reform" market share. In that context, they have established joint-ventures mainly with manufacturers from surplus Member States, and/or are building raw cane refining facilities, in order to satisfy the demand of their customers.

(308) In that context, the following developments have taken place:

(a) the German sugar manufacturer Pfeifer & Langen has acquired 49.9% of the sales subsidiary of COPROB/Italia Zuccheri ;

(b) the British sugar manufacturer Tate & Lyle had established a joint-venture with Eridania for the marketing and sales of all their sugar products. In the course of 2011, Tate & Lyle left the Italian market (because it did not have sufficient raw sugar input) and subsequently the French sugar manufacturer Cristal Union via CristalCo stepped in and replaced it in the joint-venture with Eridania;

(c) SFIR has gone into a different direction by building a new refinery in a joint-venture with EDFM in the South of Italy (SRB). Meanwhile, SFIR also bought white sugar from other players, such as Eurosugar (Nordzucker, Sucre Union, EDFM) in order to satisfy the demand of its customers;

(d) the French sugar manufacturer Tereos has entered the market by establishing its own national sales office for Italy. However, this does not break the pattern of joint-venture entry in Italy for the following reasons: (i) Tereos' entry took place in 2006, thus very early in the reform at a period when producers still disposed significant volumes of sugar; and (ii) Tereos' market share in Italy has remained stable over the past years and is way below that of other foreign players, such as Südzucker who teamed up with MAXI the same year and has increased its presence significantly over the last 5 years.

Wholesalers

(309) In the Form CO and in the first two Requests for Information, the Parties did not mention wholesalers as a competitive force in the Italian market. In the market shares submitted in the 2nd Request for Information[215], the Parties only identified Eridania/Tate & Lyle, Pfeifer & Langen/COPROB/Italia Zuccheri, SFIR and Tereos as competitors in the markets for sales of white sugar to industrial processors and to retailers in Italy.

214 EDFM's answer to Question 4 of the 3rd RFI in Phase I.

215 Annex 19 of Südzucker's answer to the 2nd RFI in Phase I.

(310) However, when the issue of EDFM's control over the Brindisi refinery was raised, and thus that its sales should be attributed to EDFM, the Parties submitted new market share estimations[216]. These new estimations included a new category of suppliers, the "wholesalers", to whom the Parties attributed 20% of the market for sales to industrial processors and 18% of the market for sales to retailers in Italy.

(311) According to Südzucker, wholesalers constitute a significant competitive factor in the Italian sugar market. Wholesalers have a multitude of sources which they can easily change and the volume that they trade amounts to approximately 20% of total consumption. It is also put forward by the notifying party in this context that wholesalers fulfil transparency and arbitrage functions in a perfectly competitive Italian market. Finally, according to Südzucker, wholesalers have very good relationships with the customers, and the supplier's brand is irrelevant in the Italian sugar market.

(312) However, Südzucker acknowledged that wholesalers obtain a large proportion of their sales volumes from the same producers and/or importers who are selling also directly to industrial processors and retailers in Italy[217]. SFIR has also stated that wholesalers are mostly active in servicing customers (industrial processors and retailers) who need special service requirements or who require only small volumes, in particular hotels, restaurants, catering, bars, bakeries, patisseries[218].

(313) According to the second phase market investigation[219], only 6 out of 33 customers consider wholesalers as a significant competitive constraint on white sugar producers/suppliers in Italy, whereas more than half of the customers do not have any business relationship with wholesalers. Furthermore, only 5 out of 12 wholesalers consider themselves to constitute competitive constraints on existing producers/suppliers in Italy. Moreover, with one exception, none of the producers/suppliers who are active in Italy considers wholesalers as a competitive constraint on them.

(314) During the second phase market investigation[220], approximately 1/3 of customers were of the view that wholesalers import part of their sugar supplies from sources different from the existing producers/suppliers in Italy. On their part, all wholesalers replied that they purchase from 2/3 to 100% of their supplies from existing producers/suppliers in Italy, with the exception of one wholesaler who purchases approximately 1/3 of its supplies from existing producers/suppliers in Italy. In any event, even under the broadest interpretation of the data from the market investigation, the wholesalers' total sugar supplies from sources different than the existing producers/suppliers in Italy would not exceed 50,000-70,000 tonnes per year.

216 Annex 4 of Südzucker's answer to the 3rd RFI in Phase I.
217 Südzucker's answer to Question 25 of the 3rd RFI in Phase II.
218 SFIR's answer to Question 58 of the 2nd RFI in Phase II.
219 Questionnaire to sugar customers – Phase II.
220 Questionnaire to sugar customers – Phase II.

(315) Moreover, internal documents of the Parties only distinguish between sales to [...]* while not even mentioning sales to wholesalers as a distinct category of sales[221]. Therefore, the Parties themselves regard the wholesalers as pure intermediaries that cannot exercise arbitrage.

(316) When the Parties were requested to present internal documents supporting that wholesalers are perceived as competitors for the sale of white sugar in Italy, the Parties admitted that they were unable to provide such documents[222]. The only such document that the Parties could provide at a much later stage[223] was the presentation held by Mr [...]*[224] on the acquisition of a 50% stake in MAXI, where wholesalers MAXI, Inagra and Csapo were allegedly presented on equal footing with the sugar producers Italia Zuccheri/COPROB, Eridania/Saddam and SFIR.

(317) However, that presentation was dated on 17 July 2006. Such a document of more than five years ago cannot reflect the (drastically altered) situation in the Italian white sugar markets post-reform. Indeed, prior to the 2006 sugar reform, wholesalers might have had a different role because of the different market structure in the Italian sugar market. Until 2006, sugar wholesalers might have been able to have an impact on the Italian white sugar markets, since Italian and Union production were higher and wholesalers could buy from different sources. Thus, it cannot be excluded that until 2006 wholesalers might have played an arbitrage role and thus possibly contributed to a price decrease. Today, however, the lack of available sugar supply as well as the sales agencies put in place by the large sugar market producers/suppliers, such as MAXI, certainly leave very little room for manoeuvre for wholesalers in the Italian deficit markets[225].

(318) Furthermore, Südzucker does not systematically monitor wholesalers (if it does so at all), since the abovementioned presentation was the one and only internal document that Südzucker could invoke as evidence for the wholesalers' alleged role as competitors in the Italian sugar markets. In particular, this presentation analyses [...]* and therefore its focus was on alternative wholesalers active in the market, irrespective of their ability to set/constrain prices in the market.

(319) The presentation also demonstrates that [...]*. It also shows that all important wholesalers are systematically coupled with an important sugar producer[226]. Indeed, MAXI, Inagra and Csapo are clearly indicated to be wholesalers as opposed to producers and in particular MAXI is portrayed as a partner of [...]* Csapo as a partner of [...]* and Inagra as [...]* and delivered by [...]*. Therefore, this presentation also stresses the economic dependency of these wholesalers from producers.

(320) Moreover, when contacted during the market investigation[227], the Autorità Garante della Concorrenza e del Mercato, the Italian NCA, also confirmed the Commission's

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221 See, for example: Annex 8 of Südzucker's answer to the 3rd RFI in Phase I; Annex 17 of EDFM's answer to the 6th RFI in Phase I.

222 Südzucker's answer to Question 2.e of the 5th RFI in Phase I.

223 Südzucker's answer to Question 25 of the 3rd RFI in Phase II.

224 Annex 23 of Südzucker's answer to the 2nd RFI in Phase I.

225 See, for instance, minutes of the conference call with Achard Italia on 15 December 2011.

226 Annex 23 of Südzucker's answer to the 2nd RFI in Phase I, at pages 9-10.

227 Conference call on 1 December 2011.

understanding that wholesalers do not exercise a competition constraint in the Italian sugar markets.

(321) In its reply to the Statement of Objections[228], Südzucker restated its views on the competitive role of wholesalers.

(322) First, the notifying party claimed that wholesalers source quantities of sugar from sources different from the existing suppliers in the Italian sugar markets. Wholesalers source on average 1/3 of their requirements abroad, which amounts to more than 110,000 tonnes of white sugar. Moreover, seven wholesalers import sugar from Croatia and Serbia.

(323) Second, it was claimed that the majority of customers view wholesalers as a competitive force in Italy and five out of twelve wholesalers consider themselves as competitive constraint on sugar producers in Italy.

(324) Third, wholesalers account for [20-30]*% of total consumption and without them Südzucker would have never reached sales of [...]* tonnes/year. Südzucker has named [...]* wholesalers that could sell more sugar in Italy. Half of the customers have business relationships with wholesalers. Südzucker's internal documents do not mention wholesalers because they are an Italian particularity and, in any event, Südzucker's internal documents do not mention much about other competitors either.

(325) The above arguments put forward by the notifying party cannot be accepted. For the following reasons, wholesalers cannot be regarded as competitors in the markets for the supply of white sugar to industrial processors in Italy and to retailers.

(326) First, Südzucker's claim that wholesalers source on average 1/3 of their requirements abroad is not based on any evidence. On the contrary, during the market investigation all wholesalers replied that they purchase from 2/3 to 100% of their supplies from existing producers/suppliers in Italy, with the exception of one wholesaler who purchases approximately 1/3 of its supplies from existing producers/suppliers in Italy[229].

(327) Even under the broadest interpretation of the data from the market investigation, the wholesalers' total sugar supplies from sources different than the existing producers/suppliers in Italy would not exceed 50,000-70,000 tonnes per year. This quantity is very small compared to total Italian consumption of 1.73 million tonnes/year. Furthermore, imports from Croatia to the Union are expected to significantly decrease post-accession as analysed in recitals (509) to (514) of this Decision.

(328) Second, only five out of twelve wholesalers consider themselves as competitive constraint on sugar producers in Italy and the majority of wholesalers do not share that view. Most importantly, with one exception, none of the producers/suppliers who are active in Italy considers wholesalers as a competitive constraint on them.

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228 Paragraphs 203 *et seq.*

229 Statement of Objections, para. 195.

(329) Third, the fact that 20% of sales in Italy might be passing through wholesalers as pure intermediaries does not render wholesalers competitors, since the existing producers/suppliers remain in full control of these quantities and, in essence, the prices at which they are sold. If wholesalers played such an important competitive role in Italy, as the Parties claim, there should be at least one internal document of Südzucker, MAXI or EDFM mentioning the allegedly special role of wholesalers in Italy.

(330) Therefore, the arguments submitted by Südzucker for the attribution of sales to Italian "wholesalers" in the Italian markets for the sale of white sugar to industrial processors and to retailers cannot be accepted within the course of the assessment of the proposed transaction.

(331) In view of the above, it is concluded that wholesalers are not regarded as competitors in the Italian markets for sales of white sugar to industrial processors and to retailers.

Market shares of the Parties and their competitors

(332) In the Form CO, the notifying party submitted that the Parties' activities did not overlap in Italy, where only Südzucker was allegedly active as a supplier of white sugar with market shares of [40-50]*% (regarding sales to industrial processors) and [10-20]*% (regarding sales to retailers). In particular, the Parties submitted the following table,[230] where Südzucker's sales and market shares were calculated over the period from March 2010 to February 2011, whereas EDFM's sales and market shares were calculated over the period from October 2009 to September 2010. The notifying party thus attributed no sales to EDFM in Italy, where the Brindisi refinery had started operating in December 2010.

230 Annex 7.3.a of the Form CO.

	White sugar sales to industrial processors, including liquefied white sugar, refined cane sugar		White sugar sales retailers	
	Qty in mt	Market share in % of Qty	Qty in mt	Market share in % of Qty
Total market 2009/2010 (without sales to Ethanol industry)	[...]*	[90-100]*	[...]*	[90-100]*
Südzucker 2010/2011	[...]*	[40-50]*	[...]*	[10-20]*
[...]*	[...]*			
ED&F MAN 2009/2010		-		-
[...]*	[...]*	[40-50]*	[...]*	[10-20]*
Eridania / Tate & Lyle	[...]*	[20-30]*	[...]*	[30-40]*
Italia Zuccheri / Pfeifer & Langen	[...]*	[10-20]*	[...]*	[20-30]*
SFIR	[...]*	[10-20]*	[...]*	[10-20]*
Tereos	[...]*	[10-20]*	[...]*	[10-20]*

(333) When the issue of EDFM's control over the Brindisi refinery was raised, and in particular that its sales should be attributed to EDFM, the notifying party submitted new market share estimates.[231] As explained above, the new data included a new category of suppliers, the "wholesalers",[232] to whom the Parties attributed 20% of the market for sales to industrial processors and 18% of the market for sales to retailers in Italy. Furthermore, the notifying party attributed a significant amount of sales to "others",[233] although Südzucker admitted that it could not provide accurate estimates of companies and quantities supplied in Italy under this vague category.[234] In particular, for the period from January 2011 to September 2011, the Parties submitted the following table:

231 Südzucker's reply to the 4th RFI in Phase I.
232 This category has been highlighted in red in the table that follows.
233 This category has been highlighted in red in the table that follows.
234 Südzucker's answer to Question 1 of the 5th RFI in Phase I.

	White sugar sales to industrial processors		White sugar sales retailers	
	Qty in mt	Market share in % of Qty	Qty in mt	Market share in % of Qty
Jan - Sep 11 (without sales to Ethanol industry)	[...]*	[90-100]*%	[...]*	[90-10]*%
Südzucker	[...]*	[20-30]*%	[...]*	[10-20]*%
ED&F MAN incl Brindisi	[...]*	[10-20]*%	[...]*	[10-20]*%
[...]*	[...]*	[30-40]*%	[...]*	[20-30]*%
Eridania / Tate&Lyle	[...]*	[10-20]*%	[...]*	[20-30]*%
Italia Zuccheri / Pfeifer & Langen	[...]*	[10-20]*%	[...]*	[10-20]*%
SFIR (exc. Brindisi)	[...]*	[0-5]*%		[0-5]*%
Tereos	[...]*	[5-10]*%	[...]*	[0-5]*%
[...]*	[...]*	[5-10]*%	[...]*	[0-5]*%
Zuccherificio del Molise	[...]*	[0-5]*%	[...]*	[0-5]*%
[...]*	[...]*	[20-30]*%	[...]*	[20-30]*%

(334) However, the market shares submitted by the Parties were not considered credible, in particular for the following reasons:

(a) The volumes of sales attributed to specific competitors were only the Parties' estimates without any concrete and objective basis for such allegations.

(b) Wholesalers were attributed a volume of sales as an alleged category of sellers, whereas no sales were attributed individually to each of them. Moreover, the sales attributed to wholesalers were only the Parties' estimates without any concrete and objective basis for such allegations.

(c) Most importantly, for the reasons analysed under recitals (309) to (331) of this Decision, wholesalers cannot be regarded as competitors in the Italian markets for sales of white sugar to industrial processors and to retailers, and thus no market share should be attributed to them.

(335) Therefore, a market reconstruction on the basis of credible data was necessary. In that market reconstruction, producers' sales to wholesalers were attributed either to industrial processors or to retailers, according to who was the final customer. The fact that producers were able to give precise estimates of the percentage of their sales to wholesalers which is finally sold to industrial processors or to retailers confirms that wholesalers are not competitors in the Italian sugar markets, but pure intermediaries between producers and customers, in line with the reasoning under recitals (309) to (331) of this Decision.

(336) The following table shows the sales of white sugar (in metric tonnes) to industrial processors and to retailers in Italy from 1 January 2011 to 31 October 2011:

	sales to industrial processors		sales to retailers		sales to industrial processors and retailers	
	volume	market share	volume	market share	volume	market share
Südzucker[235]	[...]*	[30-40]*%	[...]*	[10-20]*%	[...]*	[30-40]*%
EDFM (incl. Brindisi)[236]	[...]*	[10-20]*%	[...]*	[10-20]*%	[...]*	[10-20]*%
Südzucker/EDFM combined	**[...]***	**[40-50]*%**	**[...]***	**[30-40]*%**	**[...]***	**[40-50]*%**
COPROB/Italia Zuccheri/Pfeifer & Langen[237]	[...]*	[20-30]*%	[...]*	[10-20]*%	[...]*	[20-30]*%
Tereos[238]	[...]*	[10-20]*%	[...]*	[5-10]*%	[...]*	[10-20]*%
Eridania/Cristal Union [239]	[...]*	[5-10]*%	[...]*	[30-40]*%	[...]*	[10-20]*%
Zuccherificio del Molise[240]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Société Vermandoise[241]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Sunoko[242]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%

235 Südzucker's answer to the 6th RFI in Phase II. This is a conservative basis for the calculation of Südzucker's share in the market for the supply of white sugar to industrial processors. As a way of example, Annex Q21-1 of Südzucker's reply to the 3rd RFI in Phase II shows that from January 2011 to September 2011 the ratio of sales to industrial processors over sales to retailers was [...]*, as opposed to a ratio of [...]* on the basis of Südzucker's answer to the 6th RFI in Phase II.

236 Confidential information provided by SFIR.

237 Questionnaire to sugar competitors – Phase II.

238 Questionnaire to sugar competitors – Phase II.

239 Questionnaire to sugar competitors – Phase II.

240 Questionnaire to sugar competitors – Phase II.

241 Questionnaire to sugar competitors – Phase II.

242 Questionnaire to sugar competitors – Phase II.

	sales to industrial processors		sales to retailers		sales to industrial processors and retailers	
	volume	market share	volume	market share	volume	market share
Total volume of competitors	**[...]***	**[40-50]*%**	**[...]***	**[60-70]*%**	**[...]***	**[50-60]*%**
Total market volume	**1,013,039**	**100%**	**363,182**	**100%**	**1,377,028**	**100%**

(337) The following table shows the forecasted sales of white sugar (in metric tonnes) to industrial processors and to retailers in Italy for the campaign year 2011/2012 (from October 2011 to September 2012):

	sales to industrial processors		sales to retailers		sales to industrial processors and retailers	
	volume	market share	volume	market share	volume	market share
[...]*[243]	[...]*	[30-40]*%	[...]*	[20-30]*%	[...]*	[30-40]*%
[...]*[244]	[...]*	[10-20]*%	[...]*	[10-20]*%	[...]*	[10-20]*%
[...]*	**[...]***	**[50-60]*%**	**[...]***	**[30-40]*%**	**[...]***	**[40-50]*%**
COPROB/Italia Zuccheri/Pfeifer & Langen[245]	[...]*	[20-30]*%	[...]*	[10-20]*%	[...]*	[20-30]*%
Tereos[246]	[...]*	[10-20]*%	[...]*	[0-5]*%	[...]*	[10-20]*%
Eridania/Cristal Union [247]	[...]*	[5-10]*%	[...]*	[30-40]*%	[...]*	[10-20]*%
Zuccherificio del Molise[248]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Société Vermandoise[249]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%

243 The forecast of overall sugar sales of [...]* tonnes for the campaign year 2011/2012 is based in the internal document submitted as Annex 6 in Südzucker's answer to the 3rd RFI in Phase I. This figure is then attributed between sales to industrial processors and sales to retailers on the basis of the ratios provided in Südzucker's answer to the 6th RFI in Phase II (including the clarification received by email on 13 January 2012).

244 Internal document entitled as "ESI's sales forecast for 2012" and submitted by EDFM on 13 January 2012.

245 Questionnaire to sugar competitors – Phase II.

246 Questionnaire to sugar competitors – Phase II.

247 Questionnaire to sugar competitors – Phase II.

248 Questionnaire to sugar competitors – Phase II.

	sales to industrial processors		sales to retailers		sales to industrial processors and retailers	
	volume	market share	volume	market share	volume	market share
Sunoko[250]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Total volume of competitors	**[...]***	**[40-50]*%**	**[...]***	**[60-70]*%**	**[...]***	**[50-60]*%**
Total market volume	**1,278,112**	**100%**	**453,827**	**100%**	**1,731,939**	**100%**

(338) Therefore, on the basis of the market reconstruction the Parties appear to have high combined market shares, especially in the market for sales of white sugar to industrial processors in Italy. According to the estimates of the 2011/2012 campaign for sales of white sugar to industrial processors, the pre-transaction clear market leader (Südzucker) joins forces with the 3rd largest player in the market (EDFM including SRB) post-merger. As a result, it is likely that the merged entity would have market shares above [50-60]*% ([50-60]*%) on a market that is already concentrated. The next largest competitor COPROB would have market shares slightly above [10-20]*%. Tereos ([10-20]*%) and Eridania ([5-10]*%) follow with no other player having more than 5%.

(339) Furthermore, the two tables above are a conservative reconstruction of the Parties' market shares, given that according to the Horizontal Merger Guidelines *"[n]ormally, the Commission uses current market shares in its competitive analysis. However, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion"*[251].

(340) The combined market shares of the Parties as illustrated in the two tables above should be considered to reflect conservative estimations of their market position, since SRB is still in the initial stages of its start-up period. [Description of SRB]*.[252]

(341) Furthermore, Südzucker's forecasted sales for campaign year 2011/2012 are based on internal planning documents[253], which constitutes the most detailed and substantiated source for this forecast. The Parties themselves have not contested the validity of these internal planning documents or the figures contained therein. The use of the 2011/2012 forecasted sales contained in these planning documents is still a conservative basis, since Südzucker's actual sales tend to exceed its planned sales in a given campaign year[254].

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249 Questionnaire to sugar competitors – Phase II.
250 Questionnaire to sugar competitors – Phase II.
251 Horizontal Merger Guidelines, para. 15.
252 Draft Form RM submitted by the Parties on 16 January 2012, paras 16 and 37.
253 Annex 6 in Südzucker's answer to the 3rd RFI in Phase I.
254 See, for example, the actual sales of MAXI in campaign year 2010/2011, which exceeded by approximately [...]* tonnes its planned sales for that same year (Annex 8 of Südzucker's reply to the 3rd RFI in Phase I).

(342) Even on the basis of such conservative estimations, post-transaction the Parties would become the clear leader in the market for white sugar sold to industrial processors with a combined market share of [50-60]*% for the campaign year 2011/2012, while the remaining competitors would have significantly lower market shares.

(343) In addition, according to the Horizontal Merger Guidelines and settled case-law, *"very large market shares - 50 % or more - may in themselves be evidence of the existence of a dominant market position"*[255]. Since the Parties' combined market share post-transaction in Italy would reach at least [50-60]*%, this also evidences the creation of a dominant position of the Parties which would allow them to behave independently of competitors and customers.

(344) Furthermore, the Parties' market shares should be seen dynamically, in order to obtain a more realistic estimation of their market power post-transaction. First, the production of the Brindisi refinery will be at least [...]* tonnes per year of white sugar, after its start-up period, as analysed under recitals (361) to (364) of this Decision. Secondly, Südzucker can easily expand in Italy by reallocating sugar across different Member States, since it benefits from the highest quota in the Union of approximately [...]* tonnes per year[256], which amounts to around [...]* of total sugar quota production in the Union. For example, in 2010 Südzucker managed to direct [...]* tonnes of white sugar into Italy from other Member States.[257] At the same time, all other competitors have limited abilities and no incentive to expand in Italy, as analysed under recitals (393) *et seq.* of this Decision. Thus, in the near future the merged entity could sell [...]* tonnes/year of white sugar out of the approximately 1.73 tonnes/year of Italian consumption (for industrial processors and retailers combined).

(345) In its reply to the Statement of Objections, Südzucker claimed that the combined market share of the Parties amounted to [40-50]*%, i.e. [20-30]*% for Südzucker and [10-20]*% for ESI/SFIR/EDFM, on the basis of a market volume of 1.73 million tonnes per year.

(346) Nevertheless, Südzucker's calculation of the combined market share of the Parties is manifestly incorrect. First and most importantly, Südzucker calculated and provided an "overall" combined market share, since it took into account the volumes both in the market for the supply of white sugar to industrial processors and in the market for the supply of white sugar to retailers in Italy. However, as noted above in section 6.1.2 of this Decision, these are two different product markets and Südzucker should have calculated the respective market shares separately.

(347) In view of the above, the Parties have high combined market shares of at least [50-60]% in the market for sales of white sugar to industrial processors in Italy. Therefore, in an already concentrated industry, further consolidation would take place and the proposed transaction would create a market leader unmatched by its competitors.

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[255] Horizontal Merger Guidelines, para. 17, citing Case T-221/95, *Endemol v. Commission*, [1999] ECR II-1299, para. 134, and Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753, para. 205.

[256] Annex 16-1 of Südzucker's reply to the 3rd RFI in Phase II.

[257] Annex Q16-7.3.a of Südzucker's answer to the 3rd RFI in Phase II.

6.1.4.3. The effects of the proposed transaction on the Italian sugar market structure

Elimination of competition between Südzucker and EDFM

(i) Role of Südzucker

(348) Already before the acquisition of 50% of MAXI's capital by Südzucker, Südzucker and MAXI had entered into a cooperation agreement in which Südzucker *inter alia* agreed to supply MAXI with white sugar. However, at that time, Südzucker was not the only supplier of MAXI. MAXI did not produce sugar itself and storage capacities were not necessary due to the lower sugar sales. MAXI's white sugar sales mainly covered northern Italy and industrial processors (beverage, chocolate, biscuits, etc)[258]. Already in 2006, Südzucker had foreseen the potential benefits from a closer cooperation with MAXI[259].

(349) After the acquisition of 50% of MAXI's capital by Südzucker, MAXI has become Südzucker's [...]* sales arm in Italy, following which Südzucker's sales increased in the Italian markets of white sugar to industrial processors and to retailers.

(350) MAXI currently has [...]* storage facilities in [...]* ([...]* tonnes), [...]* ([...]* tonnes), [...]* ([...]* tonnes) and [...]* ([...]* tonnes). According to Südzucker, stocks are used for packed goods and the facilities are currently used [...]*[260].

(351) The following maps indicate for 2011 the areas served by each of MAXI's storage facilities in [...]*[261]:

[...]*

The following table shows the distance of deliveries for each of MAXI's storage facilities:[262]

[...]*

(352) According to Südzucker, sugar storage has two main purposes: (i) bringing sugar into sales areas during campaign periods (external warehousing), and (ii) ensuring continuous deliveries to clients. The extent to which Südzucker uses external warehousing during campaign periods for bringing sugar into the sales areas depends on the produced quantity. Security of supply is one of the main characteristics industrial processors and retailers seek from suppliers[263].

(353) Südzucker's strategy for ensuring security of supply for its customers in Italy is based on two pillars: (i) sufficient storage facilities, and (ii) sound allocation of sales and required stock levels to a specific destination[264].

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258 Südzucker's answer to Question 1 of the 3rd RFI in Phase II.
259 Annex 23 of Südzucker's answer to the 2nd RFI in Phase I, at page 13.
260 Südzucker's answer to Question 5 of the 3rd RFI in Phase II.
261 Annex 5-1 of Südzucker's answer to the 3rd RFI in Phase II.
262 Südzucker's answer to Question 8 of the 3rd RFI in Phase II.
263 Südzucker's answers to Questions 12 and 30 of the 3rd RFI in Phase II.
264 Südzucker's answer to Question 29 of the 3rd RFI in Phase II.

(354) In order to ensure continuous supply to customers, Südzucker works with an average stock in Italy that covers approximately [...]* weeks of sales, i.e. around [...]* tonnes. This quantity is split into [...]* tonnes packed goods (circa [40-50]*%) and [...]* tonnes bulk (circa [60-70]*%)[265].

(355) Moreover, Südzucker is perceived by other sugar producers/suppliers as an aggressive competitor in Italy. In that regard, [large sugar producer] stated: *"since the Italian sugar market is significantly deficit, it should have normally attracted new players. However, [large sugar producer]* believes that MAXI, Südzucker's distributor in Italy, may have managed to deter potential entrants by significantly reducing its prices during the last 3 to 4 years in Italy. It appears that Südzucker via MAXI were selling at lower prices in Italy than in surplus markets in the last few years. Normally, the market price in Italy should reflect the high transport costs involved when sugar is imported into the Italian market from France, Germany and the United Kingdom. However, MAXI's prices in Italy during the last couple of years were lower than the ones in the abovementioned countries. [...]* [large sugar producer]* believes that the competitors of MAXI could not follow its example since this strategy would not be economically viable for them. Therefore, there is a risk that once all players are driven out of the market, MAXI would be able to increase its prices higher without facing any competitive constraint"*[266]. In addition, [another large sugar producer]* stated: *"Tate & Lyle had not enough raw sugar to supply their refineries. Nordzucker concentrated its commercial action in North of Europe, given the fixed quantity at their disposal and the low level of pricing in Italy not sufficient to cover logistic costs to arrive in Italy. However, we can assume that the dumping were made in that period by Südzucker was aimed to discourage the competitors to play in Italy"*[267].

(356) Following this expansion strategy in the Italian market illustrated by the acquisition of MAXI and the subsequent increase of market presence in Italy, Südzucker has managed to become the market leader in the market for white sugar for industrial processors and currently manages to sell approximately [...]* tonnes of white sugar per year in Italy of which [...]* tonnes to industrial processors.

(ii) Role of EDFM and the Brindisi refinery

(a) EDFM

(357) EDFM entered the Italian market as a producer of white sugar through its SRB joint-venture with SFIR. The background of the business decision to establish SRB was the reaction to the effects of the 2006 sugar market reform in Italy. As explained above, between 2006 and 2008, Italy gave up 67% (1,049,000 tonnes/year), of its 2005 quota, which amounted to 1,557,000 tonnes/year. As a result, 15 out of 19 beet factories in Italy had to close. Facing a relatively stable demand for white sugar and the limited Italian beet quota, the four remaining beet sugar factories in Italy (located

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265 Südzucker's answer to Question 12 of the 3rd RFI in Phase II.

266 Minutes of the conference call with [...]* on 30 November 2011.

267 [...]* reply to question 60 of the Questionnaire to sugar producers/suppliers in Italy.

in San Quirico (Parma), Minerbio, Termoli and Pontelongo) could not satisfy demand[268].

(b) EDFM and SFIR partnership

(358) In the past, SFIR was one of the historical Italian beet sugar producers[269] in need of a reorientation of its business after the closure of its sugar production. EDFM was part of the dissolved Eurosugar joint-venture, a sugar distribution joint-venture operating between 2007 and 2009. EDFM and SFIR, thus decided to establish an Italian refinery to process raw cane sugar. EDFM assumed a strategic role in the supply of raw cane to the refinery, whereas SFIR had the customer relations and knowhow to serve the Italian market.

(359) The main business consideration behind the Brindisi project was precisely the large Italian deficit, in particular in the South of Italy. According to the project plans, the refinery would supply customers within a radius of [...]* km covering [20-30]*% of the Italian domestic consumption[270]. On this business *rationale* EDFM and SFIR built up the Brindisi refinery, which started operating in December 2010.

(c) Production capacity of the Brindisi refinery

(360) EDFM's internal documents of 2007 and 2009 indicate that SRB would have a maximum capacity of [...]* tonnes per year and that SRB would reach a production of: (i) under a worst-case scenario [...]* tonnes/year, (ii) under a base-case scenario [...]* tonnes/year, and (iii) under a best-case scenario [...]* tonnes/year.[271] A further internal document of 2009 plans EDFM's and SFIR's strategy in Italy on the assumption that SRB will be producing [...]* tonnes per year[272].

(361) The Brindisi refinery is the second largest raw cane sugar refinery in the Union with a maximum capacity of [...]* tonnes[273]. In 2011, the projected production for the refinery was around [...]* tonnes to industrial processors and [...]* tonnes to retailers covering roughly [20-30]*% of the entire Italian sugar demand[274].

(362) Contrary to all the above mentioned internal documents, in the second phase the Parties suddenly claimed that EDFM had reduced its planned production for the Brindisi refinery to [...]* tonnes/year[275]. However, EDFM was unable to submit internal documents that could substantiate its allegedly modified estimation for a production of [...]* tonnes instead of [...]* tonnes per year (under the base-case

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268 "Information Memorandum" and "Competitive Analysis of supplying Sugar to the Italian Market" submitted as Annexes 4 and 5.b of EDFM's answer to the 2nd RFI in Phase I.

269 SFIR owned and operated four sugar beet factories in Italy prior to the sugar reform.

270 "Information Memorandum" and "Project Overview" submitted respectively as Annexes 4 and 5.a of EDFM's answer to the 2nd RFI in Phase I.

271 "Information Memorandum" and "Project Overview" submitted respectively as Annexes 4 and 5.a of EDFM's answer to the 2nd RFI in Phase I.

272 "Competitive Analysis of supplying Sugar to the Italian Market" submitted as Annex 5.b of EDFM's answer to the 2nd RFI in Phase I.

273 Form CO, p. 135 and answer to the 2nd RFI to EDFM of 27 September 2011, "Information Memorandum SFIR/ED&F Man Brindisi Project" of 4 June 2009.

274 Form CO, p. 27.

275 Südzucker's reply to the Commission's Decision under Article 6(1c) of the Merger Regulation, paragraph 15.

scenario) by the Brindisi refinery[276]. On 2 December 2011, the Parties submitted a paper[277] claiming that in reality the Brindisi refinery could only produce up to [...]* tonnes per year.

(363) In view of the above and taking into account the base-case scenario as well as the paper submitted on 2 December 2011, the production of the Brindisi refinery should be at least [...]* tonnes per year in the future.

(d) Supply area of Brindisi

(364) The Brindisi refinery will not only be a substantial relief for the South of Italy, where there are no other sugar factories at all but according to internal documents of EDFM made in preparation of the refinery[278], [Description of SRB's supplies]*.

(e) Storage facilities

(365) The main Italian distribution hubs for the Brindisi refinery are the four former (no more operational) sugar beet factories of SFIR located in Forlimpopoli (close to Ravenna), in San Pietro in Casale (close to Bologna), in Pontelagoscuro (close to Ferrara) and Foggia in the South of Italy[279]. SRB also owns white sugar storage facilities in Brindisi with capacity of [...]* tonnes[280]. The following table and map[281] show SFIR's (rented or owned) storage facilities, which are used to store white sugar from the Brindisi refinery:

[...]*

(366) The locations of these storage facilities cover the whole Italian market from North to South. EDFM acknowledges that SFIR has maintained a good distribution network and the necessary structures (storage and packing facilities), relationships and customer contacts in Italy[282].

(367) [Description of SRB's supplies]*. These storage facilities enable SFIR to minimize time of delivery and to offer better service to the final customer. SFIR considers such storage facilities as very important, in order to deliver bulk sugar to final customers and to feed packaging facilities. [Description of SRB's supplies]*[283].

(f) Perception by competitors and customers

(368) With regard to SFIR, respondents have largely emphasized the competitive advantage linked to the Brindisi refinery in terms of access to input (raw cane sugar),

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276 Südzucker's answer to Question 15 of the 3rd RFI in Phase II.

277 "Brindisi capacity paper" submitted by EDFM on 2 December 2011.

278 "Competitive Analysis of supplying Sugar to the Italian Market" submitted as Annex 5.b of EDFM's answer to the 2nd RFI in Phase I. Zuccherificio del Molise is located in the centre of Italy and in any event only has a limited capacity of approximately 85,000 tonnes/year.

279 "Information Memorandum" submitted as Annex 4 of EDFM's answer to the 2nd RFI in Phase I.

280 Annex 5 of EDFM's answer to the 2nd RFI in Phase II.

281 SFIR's answers to Questions 17 and 18 of the 2nd RFI in Phase II.

282 "Information Memorandum" submitted as Annex 4 of EDFM's answer to the 2nd RFI in Phase I.

283 SFIR's answers to Questions 22 and 25 of the 2nd RFI in Phase II.

geographic position of the refinery[284] or the excellent established customer relationship of SFIR[285]. Besides, according to an internal document on the competitive analysis of supplying sugar to the Italian market, it is acknowledged that Brindisi has a *"EUR [...]* logistic premium to the average of imported and Italian beet supplied sugar"*[286].

(iii) Closeness of competition between Südzucker and EDFM

(369) The main competitors of Südzucker and EDFM, as identified in the reconstructed market shares table in recitals (336) and (337) of this Decision, have their storage facilities located in the north of Italy, such as Eridania and COPROB, or do not have any, like Tereos.

(370) On the contrary, as analysed above, both Südzucker and EDFM have storage facilities and make sales of white sugar to industrial processors and to retailers in the whole territory of Italy. Südzucker and EDFM are geographically close competitors in the sense that they operate in the same areas in Italy. The following two maps illustrate the sales activities and storages for Südzucker and for EDFM/SFIR respectively[287]:

[...]*

(371) The proposed transaction would thus bring together two of the largest Italian suppliers with nation-wide presence, contrary to their main competitors. Post-transaction, the new entity would no longer be exposed to the competitive constraint they exercised to each other. Absent the proposed transaction, the recently introduced SRB could offer a competitive alternative to Südzucker (due to its logistics cost advantage and stable supply) in the Italian market for the supply of white sugar to industrial processors.

(iv) Post-transaction Südzucker and EDFM would have the incentive and ability to withdraw quantities and raise prices in Italy

(372) Südzucker and EDFM post-transaction would have the incentive and ability to withdraw quantities from Italy, thereby raising prices.

(373) Indeed, the proposed transaction would bring together the two most dynamic and fastest growing players in Italy as analysed above and further explained below.

(374) Also, as admitted by Südzucker and as stated in its internal documents, Südzucker has a clear commercial strategy [Südzucker's strategy]*. Südzucker has increased its

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284 Reply by Tate & Lyle (2011/132417) (reply to question 53) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

285 Reply by COPROB (2011/132649) (reply to question 51) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

286 Annex 5.b of EDFM's reply to the 2nd RFI in Phase I, p.13.

287 Annex 5-1 of Südzucker's answer to the 3rd RFI in Phase II; SFIR's answer to Question 17 of the 2nd RFI in Phase II.

sales volume from approximately [...]* tonnes in 2008[288] to approximately [...]* tonnes in 2010[289]:

[...]*

(375) As shown in the Commission's reconstructed table of market shares[290], today Südzucker is the biggest player in Italy with at least [30-40]*% of the market for sales of white sugar to industrial processors. However, most importantly, Südzucker is able to reduce the quantities it sells in Italy either by reallocating part of these quantities to other Member States or by increasing its stocks of white sugar. Südzucker can easily reallocate sugar from Italy to other Member States, since it benefits from the highest quota in the Union of approximately [...]* million tonnes per year[291], which amounts to around [...]* of total sugar quota production in the Union. Südzucker's internal documents indicate that [Südzucker's strategy]*[292].

(376) On the other hand, with a realistic future production of at least [...]* tonnes[293], the Brindisi refinery has produced [...]* tonnes during the first ten months of 2011[294], and it is expected to produce [...]* tonnes in 2012, according to internal documents[295]. Therefore, only in its first year, the Brindisi refinery represents approximately [10-20]*% of the market for the supply of white sugar to industrial processors in Italy[296]. In the absence of the proposed transaction, the Brindisi refinery would have both the ability and the incentives to supply an even larger part of the Italian market,[Description of SRB]*. The following graph depicts the quantities produced by the Brindisi refinery (i) in the first ten months of 2011, (ii) in campaign year 2011/2012, (iii) under the worst-case scenario of production, (iv) under the base-case scenario of production, (v) under the best-case scenario of production, and (vi) in terms of theoretical capacity, as analysed in recitals (361) to (364) of this Decision.

[...]*

(377) Also, in the market for sales of white sugar to industrial processors, the closest competitors in terms of size would be significantly smaller than the merged entity, with market shares of around [10-20]*%.

(378) In the internal documents preparing the proposed transaction, EDFM and SFIR themselves analyze their competitors[297]. They indicate that [Description of SRB's supplies]*[298] [...]*[299] .

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288 Annex Q16-1 (chart at p. 16) of Südzucker's answer to the 3rd RFI in Phase II.

289 Annex Q16-7.3.a of Südzucker's answer to the 3rd RFI in Phase II.

290 See recitals (336) and (337) of this Decision.

291 Annex 16-1 of Südzucker's reply to the 3rd RFI in Phase II.

292 Annex 6 of Südzucker's reply to the 3rd RFI in Phase I.

293 See recitals (360) to (363) of this Decision.

294 See recital (336) of this Decision.

295 Excel table entitled "The Brindisi Project", provided in EDFM's reply to Question 1 of the 4th RFI in Phase I.

296 See recital (336) of this Decision.

297 Answer to the 2nd request for information to EDFM of 27 September 2011, "ED & F Man and SFIR S.p.A – Competitive Analyses of Supplying to the Italian Market" p. 13-19.

298 *Ibid*, at pp.13 and. 17.

(379) As the stability of the demand in Italy and the responses of market participants indicate, for all the customers sugar is a crucial input product, therefore security of supply is essential and demand is inelastic. Respondents systematically see Brindisi as an important improvement for the Italian sugar market holding significant competitive advantages in terms of its position, infrastructure and access to preferential raw cane sugar.

(380) Indeed, in the absence of the Brindisi refinery, Südzucker and other suppliers from northern Italy and Member States north of Italy would not face any significant competitive constraint from the South in setting their commercial strategy in Italy, including pricing. Moreover, when the Brindisi refinery will reach its maximum production capacity, it will alone be able to supply approximately [30-40]*% of the current Italian deficit (approximately 1 million tonnes/year). Since white sugar for industrial processors is a homogeneous product, where the quantity supplied determines its final price, the additional quantities expected in the near-future from the competitive Brindisi refinery will play an important role in the determination of white sugar prices in Italy.

(381) The maps below[300] taken from the preparatory documents of EDFM before investing in the Brindisi refinery, reflect the supply patterns and logistics costs in Italy before the start of production in the Brindisi plant and the predictions for after that moment. They illustrate that the refinery has a strong logistics cost advantage over its competitors and could strongly reduce logistics costs in the South of Italy, including Sardinia and Sicily (from EUR [...]*/tonne previously to EUR [...]*/tonne with the Brindisi refinery), but also in the North of Italy (overall logistics costs to supply Italy falls from EUR [...]*/tonne to EUR [...]*/tonne).

Trade flows and transport costs for sugar in Italy prior the start of production of the Brindisi refinery

[...]*

Predicted trade flows and transport costs for sugar in Italy after the inauguration of the Brindisi refiner

[...]*

(382) Another internal document also demonstrates the effects of the sugar supplies in Italy indicating that [Description of SRB's supplies]*[301].

[...]*

(383) According to an EDFM internal document analysing the Italian market and the Brindisi project, [Description of SRB's supplies]*.[302]

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299 *Ibid*, at p. 17.

300 2nd request for information to EDFM of 27 September 2011, "Information Memorandum SFIR/ED&F Man Brindisi Project" of 4 June 2009.

301 Answer to the 6th request for information to EDFM of 11 October 2011, internal document on "Italian Market" (undated), slide 12.

302 Answer to the 2nd request for information to EDFM of 27 September 2011, "ED & F Man and SFIR S.p.A – Competitive Analyses of Supplying to the Italian Market" p. 12.

(384) Furthermore, the Brindisi refinery has secured approximately [...]* tonnes of raw cane sugar per year [...]* through the three contracts mentioned at recital (303) of this Decision, as also confirmed by the Parties. In particular, the [Supplier A]* contract has secured [...]* tonnes per year [...]*, whereas the [Supplier B]* and [Supplier C]* contracts have together secured [...]* tonnes per year [...]*. These contractually secured quantities of raw cane sugar are an important element towards SRB's base-case scenario production of [...]* tonnes of white sugar per year.

(385) The analysis in another document also shows that SRB can ensure substantially lower transport costs than imports from France or Germany[303]:

[...]*

(386) Therefore, in the absence of the proposed transaction there would be intense competition in Italy between Südzucker and the Brindisi refinery and the latter would bring even stronger competition in the future [...]*.

(387) However, post-transaction Südzucker would have negative control over EDFM, which in turn controls the Brindisi refinery jointly with SFIR. Therefore, the merged entity could exercise negative decisive influence over the commercial policy and the strategic decisions of the Brindisi refinery, irrespective of SFIR's position. In fact, the merged entity would have a veto right with respect to decisions and plans of the Brindisi refinery that could impose competitive constraints upon Südzucker in Italy.

(388) Parent companies can generally be presumed to have an incentive to co-ordinate their competitive behaviour in the decision-making process of the respective company when it is likely to be profitable and thus economically rational. There are many factors which could influence the incentives of the parents to compete outside the joint venture. The most important factor is the joint venture's ownership and control structure. Under the assumption of rational economic behaviour, the greater the parent's stake in the joint venture, (i) the less likely the parent is to compete with it, and (ii) the easier it is for the parent to control the joint venture. In that regard, the acquisition or strengthening of significant market power is relevant, as the ability to raise prices or exclude competitors, on their own or together with third parties, will most likely eliminate the incentive to compete.

(389) As a result of the proposed transaction, the merged entity will benefit from a dominant position in the market for white sugar to industrial processors in Italy reinforcing the risk of co-ordinate the competitive behaviour between the parent companies.

(390) Also, the merged entity could compensate SFIR for any short-term loss of revenue caused by a decision to withhold quantities of sugar from being sold on the Italian market. In the long run, SFIR would in all probability not object to such practices if they lead to higher sugar prices, as the merged entity and SFIR would thus achieve joint profit maximisation.

303 EDFM's reply to the 6th request for information of 11 October 2011, internal document on "Italian Market" (undated), slide 12.

(391) Given the above, in the absence of the proposed transaction the Brindisi refinery would bring significantly stronger competition to the largest deficit market in the Union, Italy. On the contrary, post-merger the competitive force exercised by the Brindisi refinery in the Italian market for the supply of white sugar to industrial processors would disappear.

Other competitors currently active in Italy are unlikely to increase supply if prices increase

(392) In accordance with the Horizontal Merger Guidelines, when market conditions are such that the competitors of the merging parties are unlikely to increase their supply substantially if prices increase, the merging firms may have an incentive to reduce output below the combined pre-merger levels, thereby raising market prices[304]. A merger such as the proposed transaction leading to a significantly increased market shares increases the incentive to reduce output by giving the merging firms a larger base of sales on which to enjoy higher margins resulting from an increase in prices induced by the output reduction[305].

(393) If market conditions are such that competitors do not have enough capacity and do not find it profitable to expand output significantly, the Commission is likely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition[306].

(394) In other words if competitors have the ability and incentive to significantly increase their supplies and market shares in reaction to a price increase, the merger should not raise competition concerns[307].

(395) In this context, such output and market share expansion is in particular unlikely when competitors face binding capacity constraints and the expansion of capacity is costly or if existing excess capacity is significantly more costly to operate than capacity currently in use[308]. At the same time, it should be also pointed out that *"[n]on-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which in turn, may find it profitable to increase their prices*" and the "*reduction in these competitive constraints could lead to significant price increases in the relevant market*"[309].

(396) This section therefore analyses the positioning of each competitor of the Parties in the market for supply of white sugar to industrial processors in Italy and examines in particular whether they (a) are in a position and (b) have incentive to increase their sugar supplies on the Italian white sugar market for industrial processors in case of price increase[310].

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304 Paragraph 32 of the Horizontal Merger Guidelines.
305 Paragrpah 32 of the Horizontal Merger Guidelines.
306 Paragraph 33 of the Horizontal Merger Guidelines.
307 Paragraphs 17 and 33 of the Horizontal Merger Guidelines.
308 Paragraph 34 of the Horizontal Merger Guidelines.
309 Paragraph 24 of the Horizontal Merger Guidelines.
310 The Horizontal Merger Guidelines.

(i) Lack of ability or incentive for competitors of Südzucker and EDFM to expand in Italy: assessment of generally prevailing market conditions

(397) The Italian sugar market is characterized by low production capacities due to fixed limited white sugar production quotas, therefore Italian competitors, including [...]*, [...]* and [...]*, are capacity constrained. Indeed, half of the Italian white sugar demand (1.73 million tonnes/year[311]) is satisfied from domestic production fixed on the basis of the Italian production quota (855,000 tonnes/year)[312]. Therefore, the Italian white sugar market is highly import dependent since half of its domestic consumption has to be satisfied from imports. At the same time, the sugar stocks in the Union are very low[313] and significant shortage of access to preferential raw cane sugar is commonly known by the industry[314]. All these elements taken together significantly limit the ability of sugar producers that are already established in Italy to reallocate capacities in Italy.

(398) Therefore, in response to a price increase, those producers would have to reallocate white sugar quantities which are in principle destined to already existing customers in other Member States. Therefore, such reallocation of sugar quantities would be quasi impossible without withdrawing sugar from other customers with whom the producer has already a well-established relationship. That is different from the 2005/2006 market conditions where surplus country producers with stocks were in a position to reallocate quantities without disrupting already existing customer relationships[315].

(399) In particular, in times of scarcity other significant European players with sales organisations in the Italian market such as [...]*, [...]*and [...]*, have limited capacities and also no incentives to redirect substantial additional sugar quantities from other Member States to Italy on the basis of the elements above and below. In addition, such reallocation of quantities would also imply additional transport costs leading to lower margins for sales in Italy than for sales in the country of origin of the white sugar.

(400) Reallocation of sales with a view to expanding market shares in Italy would also entail the risk that Südzucker will protect its market shares in Italy in a selective manner as it is in a position to do so, in particular post-merger, by giving selective and pre-emptive price reductions to those customers which a supplier would like to acquire.

(401) A further factor which needs to be taken into account is that a failure of an expansion strategy on the Italian market would entail high costs, because it requires to accept for the additional quantities low prices and thus margins, transport costs to bring the sugar from abroad and the loss of high margins in the country of origin. According to

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311 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 12, sent by e-mail of 1 December 2011 (19:33).

312 Production capacities of [...]*

313 Recital 2 of Commission Regulation (EU) No 222/2011 of 3 March 2011 laying down exceptional measures as regards the release of out-of-quota sugar and isoglucose on the Union market at reduced surplus levy during marketing year 2010/2011 (OJ L 60, 5.3.2011, p. 6).

314 See recitals (69) to (73) of this Decision.

315 Reply by [...]* (reply to questions 7 and 8) (Non-Confidential Version – Questionnaire to [...]* – Phase II) (received by e-mail of 9 January 2012 at 18:15).

the Horizontal Merger Guidelines high risks and high costs of failed entry or expansion make entry or expansion less likely[316].

(402) Last but not least, [...]*, [...]*and [...]* all indicated to the Commission that they will not expand their white sugar supplies in Italy even in reply to a price increase.

(403) Against this background, in paragraph 181 of its reply to the SO, the notifying party argued the following: "*[t]he fact that producers are capacity constrained does not mean that they will not sell more sugar to industrial customers in Italy if there is a permanent price increase as postulated by the Commission's theory of harm. The postulated higher Italian sugar prices resulting from withholding of volumes will necessarily change the incentives of the sugar producers and suppliers in Europe – sales to industrial customers in Italy will be relatively more profitable making it profit-maximising for producers to commence sales in Italy or to divert a higher proportion of their sales to Italy*".

(404) [...]*[317] [Description of Südzucker's market strategy]*.

(405) [Description of Südzucker's market strategy]*. The analysis of Südzucker stops there, however as explained above, on top of the high risk of losing home market customers and facing additional transport costs, as rightly pointed out by Südzucker, a re-allocation of sugar quantities to Italy would also imply the risk of facing an incumbent operator who would protect its market shares in a selective manner by offering long-term contracts or giving targeted pre-emptive price reductions to those customers that the given supplier would try to acquire[318]. That would lower the profitability of such sugar reallocation, and is especially relevant for the Italian sugar market where such market behaviour has already taken place.

(406) Indeed, [a large Italian sugar producer]* indicated to the Commission in the following terms that "*Tate & Lyle had not enough raw sugar to supply their refineries. NZ concentrated its commercial action in North of Europe, given the fixed quantity at their disposal and the low level of pricing in Italy not sufficient to cover logistic costs to arrive in Italy. However we can assume that the dumping* [was] *made in that period by SDZ was aimed to discourage the competitors to play in Italy*". [a large sugar producer]* took the view that "*[f]urthermore, since the Italian sugar market is significantly deficit, it should have normally attracted new players. However, [a large sugar producer]* believes that MAXI, Südzucker's distributor in Italy, may have managed to deter potential entrants by significantly reducing its prices during the last 3 to 4 years in Italy. It appears that Südzucker via MAXI were selling at lower prices in Italy than in surplus markets in the last few years. Normally, the market price in Italy should reflect the high transport costs involved when sugar is imported into the Italian market from France, Germany and the United Kingdom. However, MAXI's prices in Italy during the last couple of years were lower than the ones in the abovementioned countries*"[319].

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316 Paragraph 69 of the Horizontal Merger Guidelines.

317 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 15, sent by e-mail of 1 December 2011 (19:33).

318 Paragraph 69 of the Horizontal Merger Guidelines.

319 Reply by [...]* ([...]*) (reply to question 60) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) and Non-confidential version of the Minutes of the

(407) In paragraph 148 of its reply to the SO the notifying party qualifies these quotes being "*anecdotes*" by simply objecting that "*many other European sugar producers had expansion strategies and directed significant quantities of sugar to Italy*" before however qualifying these anecdotes "*evidence*" which would reflect "*the existence of functioning competition*".

(408) Also, during the Hearing of 5 March 2012, the notifying party produced a table[320] with Südzucker's national average invoiced sugar prices [Information about Südzucker's prices in Italy between 2006/2007 and 2010/2011]*. In this respect, the notifying party explains that such strategy only took place because during the transitional period from the old regime to the full effects of the 2006 sugar regime Südzucker had surplus sugar to reallocate in other Member States. [Information about Südzucker's prices in Italy between 2006/2007 and 2010/2011]*. In addition, competitors without stocks could not engage in such strategy which resulted in an increase of Südzucker's market shares on the Italian white sugar markets to the detriment of its direct competitors. Therefore, Südzucker cannot validly argue that evidence of its aggressive market behaviour is only an "*anecdote*" and that competition for market shares did not take place in Italy.

(409) As for the replies by the competitors whether they would expand in Italy as a reaction to a sugar price increase as a result of the proposed transaction, the notifying party takes the view in its reply to the Statement of Objections that the question in the questionnaire sent to the competitors in Phase II was not precise enough and that the replies of the competitors were flawed as they replied to leading questions in some instances.

(410) As for the irrelevance of the question in the questionnaire[321], the notifying party argued in this respect in its reply to the SO that reference should be made to the two years period as provided for in Paragraph 74 of the Horizontal Merger Guidelines and that price increase should be "*permanent*". However, Paragraph 74 of the Horizontal Merger Guidelines relates to "*entry*" of new competitors and not "*expansion*" of existing competitors and the Horizontal Merger Guidelines do not require the use of reference to a "*permanent*" price increase.

(411) Also, in its criticism[322] the notifying party overlooks the fact that several follow-up questions were addressed to competitors on that very issue. Indeed, more precise answers were obtained in the course of the follow-up questions. Reference to such exchanges is widely reflected in the Statement of Objections and this Decision.

(412) As for [a large Italian sugar producer]* for example references to these exchanges are made in footnotes 224, 245, 247 or 248 of the Statement of Objections or the non-confidential version of the Minutes of the conference call with [a large sugar producer]* on 30 November 2011. Concerning [a large Italian sugar producer]*, reference is also made to footnote 265 of the Statement of Objections or the non-

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Teleconference with [...]* of 30 November 2011, e-mail of Mr [...]* of 9 January 2012, at 14:18, paragraphs 4 and 5.

320 Slide 13 of the presentation by [...]*, 5 March 2012, entitled "Effects of the Transaction on the White Sugar Market".

321 Paragraphs 167 – 169 and 175 of the reply of the notifying party to the Statement of Objections.

322 Paragraphs 172 – 173 of the reply of the notifying party to the Statement of Objections.

confidential version of the Minutes of the Teleconference with [a large sugar producer]* on 8 December 2011. With regard to [a large sugar producer]* reference is made to footnotes 291 or 292 of the Statement of Objections or a specific questionnaire with 10 questions on the ability and incentives of [a large sugar producer]* to expand in the Italian white sugar market to industrial processors entitled "M.6286 – Südzucker / ED&F Man Questionnaire to [...]* – Phase II" or also the Non-confidential Minutes [...]* – 18 November 2011 and several other exchanges.

(413) Concerning the alleged leading nature of some questions[323], it must be borne in mind that replies to the questions about the ability and incentive to expand output in the Italian white sugar markets in case of price increases imply highly confidential market strategy information of the competitors subject to the market investigation.

(414) The Commission has proposed summaries of the confidential information provided by the respondents to them in order for them to be able to agree to the non-confidential summaries being used for the purposes of the investigation. Therefore, the indications by the Commission did not constitute a question on a stand-alone basis but only the non-confidential summary of the confidential answers of the respondents already obtained beforehand.

(415) Therefore, on the basis of the market investigation, it is concluded that white sugar producers / suppliers would have limited ability and no incentive to expand their white sugar supplies in the market for supply of white sugar to industrial processors in Italy post-merger even in response to a price increase.

(ii) Eridania / Tate & Lyle / Cristal Union

(a) The notifying party

(416) According to the notifying party[324], Eridania (Eridania Italia S.p.A.) is one of the incumbent Italian beet sugar manufacturers with two beet factories producing 275,000 tonnes per year. As one of the incumbent Italian beet sugar manufacturers, Eridania has expert knowledge of the Italian market, good client contacts and distribution network. It furthermore profits from being an Italian company, providing a "local touch" for certain customers. In order to maintain its historically strong position on the Italian market despite the reduction of its beet production, Eridania is sourcing sugar from inside and outside the Union. Eridania had a cooperation agreement in place with Tate & Lyle and is now tied to Cristal Union, one of the major French sugar beet manufacturers (the envisaged[325] acquisition of Groupe Vermandoise would make Cristal Union the fifth largest sugar producer in the Union). According to the notifying party, that cooperation agreement will help Eridania get significant sugar supplies from France and is intended to "*reinforce the leadership position of Eridania in Italy and maintain its strong position vis-à-vis*

323 For example Paragraphs 189, 194 or 199 of the reply of the notifying party to the Statement of Objections.

324 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 21, sent by e-mail of 1 December 2011 (19:33).

325 The "*protocole d'accord*" was signed on 7 January 2012 ("http://www.cristal-union.fr/1157/conclusion-d%e2%80%99un-protocole-d%e2%80%99accord-avec-cristal-union-pour-l%e2%80%99acquisition-du-controle-du-groupe-vermandoise/")

industrial clients". The notifying party has also put forward that both Eridania and Cristal Union have significant refinery projects in the pipeline. Cristal Union builds a refinery in Algeria which is expected to start operations in mid-2012 while Eridania announced in April 2011 an agreement with Kenana Sugar Company of Sudan to build a major sugar refinery in Sudan with an initial capacity of 500,000 tonnes of raw sugar which is planned to reach 1 million tonnes in the future. The notifying party suggests that the realisation of the Sudan project[326] will enable Eridania to source for the Italian market within the LDC/ACP preference framework and compete with sugar of Sudan origin in the Italian market.

(b) Historical background

(417) Eridania is a historical operator on the Italian white sugar market. Currently Eridania has a [...]* production facility[327]. Following the 2006 sugar reform it concluded a cooperation agreement with Tate & Lyle on 28 March 2007.

(418) Tate & Lyle had been trading in the Italian sugar market for 20-30 years through a local agent before deciding in 2007 to create a joint venture together with Eridania Sadam[328]. However, Tate & Lyle exited the Italian sugar market in 2011[329] as [...]*[330].

(419) On 7 March 2011 Eridania Italia S.p.A. set up a joint-venture ([...]*) with [...]*, CristalCo[331]. [Shareholder structure of CristalCo]*[332].

(c) Sources of supply and infrastructure

(420) Contrary to the indication by the notifying party, Eridania [...]*[333] and [...]*[334].

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326 Also see Presentation by Südzucker to the Commission on the "Sugar Market in Italy" of 2 December 2011, slide 6 (Sugar Market in Italy Presentation to the Commission (M.6286) Brussels, 2. December 2011).

327 Reply by [...]* ([...]*) (reply to question 5) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

328 Non-confidential version of the Minutes of the Teleconference with [...]* of 30 November 2011, e-mail of Mr [...]* of 9 January 2012, at 14:18, paragraph 1

329 (http://www.eridaniaitalia.it/media/documents/eridania_italia/PARTE_GENERALE_-_ERIDANIA_ITALIA_SPA_rev290311_INGL.pdf), page 5

330 Non-confidential version of the Minutes of the Teleconference with Tate & Lyle of 30 November 2011, e-mail of Mr [...]* of 7 January 2012, at 1:05, paragraph 2 [...]*, Reply by [...]* ([...]*) (reply to question 60) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) and Reply by [...]* ([...]*) (reply to question 48) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

331 (http://www.eridaniaitalia.it/media/documents/eridania_italia/PARTE_GENERALE_-_ERIDANIA_ITALIA_SPA_rev290311_INGL.pdf), page 5

332 Reply by [...]* ([...]*) (2012/002468) (reply to question 5) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

333 Reply by [...]* ([...]*) (reply to question 9) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) and e-mail of Mr [...]* of 6 January 2012 at 18:43 entitled "Rif: M.6286 - Clarification of your reply to question 9 of the Questionnaire to sugar suppliers / producers Italy - Phase II".

334 Reply by [...]* ([...]*) (reply to question 96) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

(d) *Market positioning*

(421) Despite Eridania's important sales of white sugar in Italy, its commercial focus is strongly placed on the retail market. This is also evidenced by the fact that Eridania has market shares almost [CONFIDENTIAL] times higher in the market for the supply of white sugar to retailers compared to industrial processors. Eridania holds [5-10]*% market share in the market for the supply of white sugar to industrial processors in Italy.

(e) *Perception by Eridania*

(422) Eridania describes itself very succinctly as a company with infrastructure, national and regional sales offices and established customer relationship[335].

(f) *Perception by competitors*

(423) [A large Italian sugar producer]* describes Eridania on the Italian white sugar market with good access to input, very good infrastructure, customer relationship and national sales office and partnership with Cristal Union, however without the ability to expand its output on the Italian market in view of fixed limited production quotas and limited access to preferential raw cane sugar [336].

(424) [A large Italian sugar producer]* also explains that Tate & Lyle exited the Italian white sugar market because it had not sufficient raw cane sugar to supply the Eridania joint venture. At the same time, [a large Italian sugar producer]* considers that Cristal Union entered the joint venture as it has a surplus of sugar as a result of the recent acquisition of Société Vermandoise Industries and it was necessary to channel sugar into deficit and close market such as Italy[337]. [A large Italian sugar producer]* also emphasizes that Cristal Union entered the Italian market as it benefits from a surplus under the French sugar beet quota[338] and [A large Italian sugar producer]* left the Italian white sugar market in the absence of enough raw sugar[339]. [A large Italian sugar producer]* explains that one of the reasons for Cristal Union's plan to cooperate with Eridania is the deficit situation of the Italian white sugar market[340].

(425) While [a large Italian sugar producer]* claims that competitors (in general) are able to increase the volumes sold in Italy, such increase would necessitate reallocation of volumes sold in other countries or through imports since no increase of production in

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335 Reply by [...]* ([...]*) (reply to question 90) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

336 Reply by [...]* ([...]*) (reply to questions 58, 59 and 69) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

337 Reply by [...]* ([...]*) (reply to questions 61 and 63) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

338 "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to question 64) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

339 Non-confidential version of the Minutes of the Teleconference with [...]* of 30 November 2011, e-mail of Mr [...]* of 7 January 2012, at 1:05, paragraph 2 "[...]*".

340 Reply by [...]* (reply to question 64) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

Italy is possible[341]. [A large Italian sugar producer]* takes the view that Eridania has a fixed quota for beet sugar output and has therefore little flexibility to increase output before adding that at current price levels raw sugar bought on the free market (for example, from Brazil) cannot be sold profitably in the Union because of high duties[342]. [A large Italian sugar producer]* explains that Italy is a highly deficit country in terms of sugar[343] and states in this respect that no player on the Italian market (including Eridania) is in a position to expand its output in a short period of time as a response to a price increase in view of the fact that "*all the players deal with production quotas which are fixed and with constraints in access to preferential sugar*"[344].

(g) Perception by customers

(426) As for customers, [a customer]* indicated that "*ESI/SFIR, MAXI and Italia Zuccheri have more strengths compared to Eridania/Tereos and Zuccherificio del Molise*"[345]. [A customer]* put forward that Eridania has its own refineries in Italy which constitutes a competitive advantage, however does not have important sugar quantities[346]. [A customer]* also indicated that Eridania has a favourable geographical situation[347]. However, [a customer]* indicated that "*Eridania is just a dealer not a producer*"[348] while [a large customer]* underlined that Eridania is too small to be competitive on the segment for supply of sugar to industrial processors but has more sugar as a result of the cooperation with Cristal Union but is more present on the retail market via its brand "Zefiro"[349].

(427) Concerning the exit of the Italian white sugar market by Tate & Lyle, [a large customer]* explains that Tate & Lyle left the Italian market because of lack of sugar[350]. [A large customer]* suggests with regard to Cristal Union's market entry that it is linked to the deficit character of the Italian sugar market with high prices[351] while [a large customer]* takes the view that with the departure of Tate & Lyle Cristal Union has captured the opportunity to form a joint-venture with Eridania and

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341 Reply by [...]* (reply to question 61) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

342 "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to question 61) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

343 Reply by [...]* ([...]*) (reply to question 112) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

344 Reply by [...]* ([...]*) (reply to question 59) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

345 Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

346 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II).

347 Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

348 Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential and Confidential Versions – Questionnaire to sugar customers in Italy – Phase II).

349 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

350 Reply by [...]* ([...]*) (reply to question 48) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

351 Reply by [...]* ([...]*) (reply to question 50) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

"*secure*" a straight entry on the market[352]. In this line, [a large customer]* puts forward that Cristal Union (CristalCo) "*needs to sell its sugar produced in France in other countries*" and Italy constitutes the best option to do it "*in terms of payback*"[353].

(428) In general, Italian customers are very much concerned by the lack of availability of sufficient sugar quantities for Italian sugar producers / suppliers[354].

(h) Assessment

(429) As already mentioned, it is submitted by the notifying party that both Eridania and Cristal Union have significant on-going refinery project developments. Cristal Union is building a refinery in Algeria which is expected to start operations in mid-2012 while Eridania announced in April 2011 an agreement with Kenana Sugar Company of Sudan to build a major sugar refinery in Sudan with an initial capacity of 500,000 tonnes of raw sugar which is planned to double to 1 million tonnes in the future. According to the notifying party, the realisation of the Sudan project[355] will enable Eridania to source for the Italian market, within the LDC/ACP preference framework, and therefore compete with sugar of Sudan origin in the Italian market.

(430) In view of the Commission, the ability and incentives for Eridania/Cristal Union to substantially expand supplies on the market for supply of white sugar in Italy within the timeframe relevant for merger control are unlikely.

(431) As analysed in recitals (398) to (402) of this Decision, the Italian sugar market is production limited, Italian competitors are capacity constrained, sugar stocks in the Union are very low and significant shortage of access to preferential raw cane sugar is commonly known by the industry. In such difficult market conditions of scarcity of sugar, other major players with established presence in Italy such as Cristal Union with its joint venture with Eridania, do not have the capacity and incentives to redirect substantial additional sugar quantities from other Member States to Italy since it would entail commercial risks of losing existing customers, lower margins due to transport costs and the risk of failure of expansion due to the risk of selective reaction of the post-merger entity.

(432) Therefore, competitors such as Eridania and Cristal Union would have limited ability to substantially increase white sugar supplies in Italy post-merger and such strategy

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352 Reply by [...]* ([...]*) (reply to question 50) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

353 Reply by [...]* ([...]*) (reply to question 50) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

354 For example, Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II) or Reply by [...]* ([...]*) (reply to question 23) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

355 Also see Presentation by Südzucker to the Commission on the "Sugar Market in Italy" of 2 December 2011, slide 6 (Sugar Market in Italy Presentation to the Commission (M.6286) Brussels, 2. December 2011).

does not appear to be profitable as it would imply the significant commercial risks to lose existing customers in the country of origin of the sugar, to get lower margins due to transport costs and the high risk of failure of expansion of market share due to the risk of selective reaction of the post-merger entity, Südzucker/EDFM.

(433) The new Sudanese refinery project for the time being is not precise enough and, as described by Südzucker's presentation[356] in the most optimistic scenario the project will not commence operations before 2014. First of all, given the size of the project, its limited stage of advancement and the Sudan related political, legal and economic challenges to respect an ambitious calendar, it is at this stage not certain whether that timeframe is realistic. At this stage it is even uncertain whether the project will be realised at all. In this respect, the Commission notes that the project is still at an early stage [...]*. It must also be borne in mind that in the current economic and financial crisis it is difficult to find financing for a project like this. In addition, the Commission notes that the project has been on hold for several years now. Also, the political and economic environment in Sudan does not guarantee the timely implementation of the project. Therefore, there is uncertainty whether this project will materialise and significant doubts whether, if it does, it will come on-line in 2014. Accordingly, the Sudanese refinery project does not constitute a likely plan in view of the uncertainties surrounding the project and the fact that in the most optimistic scenario it is not foreseen to be in a position to provide white sugar on the Italian market prior to 2014.

(434) Concerning the Algerian refinery, the Commission notes that, notwithstanding the fact that the project is at an advanced stage and is foreseen to operate as of the end of 2012, importing white sugar from Algeria is subject to world market import duties and is thus not currently an economically viable alternative compared to white sugar imported from LDC/ACP countries. [A large Italian sugar producer]*[357] puts forward that the [...]*. [A large Italian sugar producer]* also explains that the [...]*. Consequently, the actual TRQs (exceptional tariff rate quotas) will not allow sufficient white sugar imports [...]* from Algeria[358]. Therefore, even if the Algerian refinery is operational at the end of 2012, it will have no financial incentive to supply white sugar into Italy and therefore does not constrain the Parties from increasing prices in the Italian white sugar market.

(435) Moreover, [a large Italian sugar producer]* also indicated that it did not plan [...]* during the next 1-2 years[359] and most importantly that "[a large Italian sugar producer]*"[360] while [a large Italian sugar producer]*[361] also confirmed to the Commission that it [market strategy]*.

356 Presentation by Südzucker to the Commission on the "Sugar Market in Italy" of 2 December 2011, slide 6 (Sugar Market in Italy Presentation to the Commission (M.6286) Brussels, 2. December 2011).

357 E-mails of Mr [...]* on 5 January 2012, at 18:25 and on 6 January 2012 at 08:01 entitled "M.6286 EDFM/Sudzucker - Algerian refinery".

358 E-mails of Mr [...]* on 5 January 2012, at 18:25 and on 6 January 2012 at 08:01 entitled "M.6286 EDFM/Sudzucker - Algerian refinery": "(…) [...]*".

359 Reply by [...]* ([...]*) (reply to question 104) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

360 E-mail by Mr [...]* of 12 January 2012 at 11/15, Subject: "Rif: M.6286 - Your reply to question 93 of the Questionnaire to sugar suppliers / producers in Italy - Phase II".

361 E-mail of Mr [...]* of 11 January 2012 at 15:26 stating that "[...]*".

(436) Especially as for the ability and incentive of expansion by Eridania/Cristal Union[362], the notifying party, in its reply to the Statement of Objections, without mainly putting forward new elements simply reiterates its arguments of the Form CO.

(437) The only new element is that it takes the view that expansion of supply of white sugar to industrial processors could result from switching from supply of white sugar to retailers to supply of white sugar to industrial suppliers[363] by Eridania who is an important operator in the field of supply of white sugar to retailers.

(438) However, replies of the market players to new requests for information depict a different picture. Indeed, the new documents and information collected by the Commission, following the reply to the Statement of Objections by the notifying party, confirm the findings of the Statement of Objections in the sense that competitors do not have the ability or incentive to expand their sales to industrial customers in Italy, since it is not even possible or profitable to switch quantities from retail customers to industrial customers.

(439) In reply to follow up questions sent by the Commission on 16 February 2012, producers/suppliers of white sugar in Italy indicated that they are not able to expand in Italy and they do not have incentives to do so. As to the claimed ability of suppliers/producers to increase quantities available to industrial processors at the expense of supplying the same sugar to retailers, none of these producers/suppliers finds it feasible and profitable to do so, mainly because of (i) the necessity to keep the loyalty of existing retail customers in the long-term, and (ii) the need to maintain low unit costs of sugar sold to retailers in the long-term taking into account the relevant costs, such as the cost of the marketing structure or the cost of the packaging lines[364].

(i) Conclusion

(440) On the basis of the above, it is concluded that notwithstanding the fact that Eridania and Cristal Union seem to be well established sugar suppliers on the Italian sugar market, they would have (a) limited ability and (b) no commercial incentives to substantially expand output post-merger in the Italian market for supply of white sugar to industrial processors even in response to a price increase.

(iii) Italia Zuccheri / Pfeifer & Langen / COPROB

(a) Views of the notifying party

(441) According to the notifying party, Italia Zuccheri has expert knowledge of the Italian market, good client contacts and a good distribution network, being one of the incumbent Italian beet sugar manufacturers. Being an Italian company provides it furthermore with a "local touch" certain customers are seeking. Italia Zuccheri owns two beet factories producing around 290,000 tonnes. Italia Zuccheri, moreover, has access to imports from within the Union as it has a cooperation agreement with

362 Paragraphs 185 - 191 of the reply of the notifying party to the Statement of Objections.
363 Paragraph 191 of the reply of the notifying party to the Statement of Objections.
364 The notifying party was informed about it by a Letter of Facts of 14 March 2012 and was provided with the non-confidential versions of the replies of the competitors.

Pfeifer & Langen, Germany's third largest beet sugar producer. To the further extend of release of out of quota sugar by the Commission additional sugar quantities would be available for the commercialisation in the Italian market. Furthermore, Italia Zuccheri and Pfeifer & Langen are building a refinery in Minerbio with a capacity of 150,000 tonnes, which will start operations in February 2012, allowing them to get access to further quantities of sugar for the Italian market[365].

(b) Historical background

(442) Italia Zuccheri is a historical operator on the Italian white sugar market. Via COPROB Italia Zuccheri has created a Joint-venture (Italia Zuccheri Commerciale S.r.l.) with Pfeifer & Langen ([shareholder structure of the joint-venture]*) on 27 November 2006 to share the sales in the Italian market. All the sugar quantities of COPROB and of Pfeifer & Langen intended for sale in Italy are sold via Italia Zuccheri Commerciale S.r.l.[366].

(c) Sources of supply and infrastructure

(443) Italia Zuccheri currently has two sugar production facilities: Minerbio ([...]* tonnes/year for beet – [...]* - while [...]* tonnes/year for cane) and Pontelongo COPROB ([...]* tonnes/year for beet, [...]*)[367]. It has sugar storages in Minerbio, Pontelongo, Argelato, Porto Viro, Finale Emilia and Pontelagoscuro[368].

(d) Market positioning

(444) Italia Zuccheri / COPROB / Pfeifer & Langen holds [20-30]*% market share in the market for the supply of white sugar to industrial processors in Italy.

(e) Perception by COPROB

(445) COPROB considers that it has good access to sugar, very good infrastructure, very good national sales office with dedicated staff, good regional sales office with dedicated staff, very good established customer relationship and a specific partnership with Pfeifer & Langen[369]. However, it considers itself less competitive than Südzucker / EDFM in terms of access to input, price making and location to supply north and south of Italy. It also considers that it has less volume than Südzucker / EDFM[370].

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365 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 22, sent by e-mail of 1 December 2011 (19:33).

366 Reply by [...]* ([...]*) (reply to question 7) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

367 Reply by [...]* ([...]*) (reply to question 9) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

368 Reply by [...]* ([...]*) (reply to question 95) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

369 Reply by [...]* ([...]*) (reply to question 88) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

370 Reply by [...]* ([...]*) (reply to question 89) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

(f) Perception by competitors

(446) [A large sugar producer]* takes the view that Italia Zuccheri has a fixed quota for beet sugar output and therefore has little flexibility to increase output and at current price levels raw sugar purchased on the free market (for example, from Brazil) cannot be sold profitably in the Union[371].

(g) Perception by customers

(447) [A large customer]* emphasizes the partnership of Italia Zuccheri with Pfeifer & Langen and the fact that it has the largest Italian production quota and that it will soon start to refine raw sugar which constitutes its most important strength[372].[A customer]* indicated in general terms that Italia Zuccheri has more strengths compared to Eridania/Tereos and Zuccherificio del Molise[373] while [a customer]* puts forward that Italia Zuccheri has its own refinery in Italy which constitutes a competitive advantage however it has no important sugar quantities[374]. [A large customer]* and [a large customer]*[375] also underline the fact that the production of Italia Zuccheri is in Italy and the relationship with Pfeifer & Langen[376] but, in line with [...]*, it has only small volume quota available (also emphasized by [a customer]*)[377].

(448) As already underlined, in general, Italian customers are very much concerned by the lack of sufficient sugar quantities available for the Italian sugar producers / suppliers[378].

(h) Assessment

(449) As already mentioned, the notifying party puts forward that Italia Zuccheri and Pfeifer & Langen have built a refinery in Minerbio with a capacity of 150,000 tonnes, which started operations in February 2012, allowing them to get access to

371 "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to question 61) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

372 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

373 Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

374 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II).

375 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II) and Reply by Dr Oetker (2011/129139) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

376 Underlined only by [...]*: Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

377 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II) and Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

378 See paragraph (428) of the present.

further quantities of sugar for the Italian market[379]. The investment adds refining capacity to an existing sugar beet production site.

(450) In the Commission's view, it is unlikely that Italia Zuccheri / Pfeifer & Langen / COPROB will have the ability and incentives to substantially expand its supplies on the market for the supply of white sugar in Italy within the timeframe relevant for merger control.

(451) As analysed in recitals (398) and (402) of this Decision, the Italian sugar market is production limited, Italian competitors are capacity constrained, sugar stocks in the Union are very low and significant shortage of access to preferential raw cane sugar is commonly known by the industry. In such difficult market conditions of scarcity of sugar, other major players with established presence in Italy such as Pfeifer & Langen with its joint venture with Italia Zuccheri, do not have the capacity and incentives to redirect substantial additional sugar quantities from other Member States to Italy since it would entail commercial risks to lose existing customers, lower margins due to transport costs and risk of failure of expansion due to risk of selective reaction of the post-merger entity.

(452) Therefore, competitors such as Pfeifer & Langen and Italia Zuccheri would have limited ability to substantially increase white sugar supplies in Italy post-merger and such strategy does not appear to be profitable as it would imply the significant commercial risks to lose existing customers in the country of origin of the sugar, to get lower margins due to transport costs and the high risk of failure of expansion of market share due to the risk of selective reaction of the post-merger entity, Südzucker/EDFM.

(453) To the very contrary Pfeifer & Langen would have the incentive to reallocate sugar quantities back to Germany. Indeed, first, the Commission observes significant scarcity of white sugar in the whole Union and also outside Italy. As a result of historically low stocks and scarcity of white sugar, prices have gone up significantly in all Member States[380].

(454) In this context the German NCA, Bundeskartellamt has indicated to the Commission[381] that the German white sugar market suffers from white sugar scarcity and historically high market prices. This situation could be a first rationale for a market strategy by Pfeifer & Langen to repatriate its current sugar exports to Italy back to Germany or other neighbouring markets where it could for those quantities compete and achieve higher margins on the basis of lower transport costs.

(455) Also, [a large Italian sugar producer]* has indicated to the Commission that it is not in a position to expand its output in a short period of time in response to a price increase on the Italian white sugar market given (i) the production quota which is

379 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 22, sent by e-mail of 1 December 2011 (19:33) and Presentation by Südzucker to the Commission on the "Sugar Market in Italy" of 2 December 2011, slide 6 (Sugar Market in Italy Presentation to the Commission (M.6286) Brussels, 2. December 2011).

380 Recital 2 of Commission Regulation (EU) No 222/2011 of 3 March 2011 laying down exceptional measures as regards the release of out-of-quota sugar and isoglucose on the Union market at reduced surplus levy during marketing year 2010/2011.

381 Letter of the Bundeskartellamt to Mr [...]* of 7 October 2011, (2011/107118).

fixed, and (ii) the constraints on sourcing preferential raw cane sugar. Notwithstanding the increase of its production in 2012 due to the investment made to [...]*,[a large Italian sugar producer]* confirmed that as a matter of organisation of their supplies they will not be able to supply additional quantities in the Italian market post-merger[382]. Indeed, [a large sugar producer]* indicated to the Commission that "[...]*"[383]. The Commission considers that this strategy of reorganisation of supplies makes economic sense in the current market circumstances as described above.

(456) Especially as for the ability and incentive of expansion by Italia Zuccheri / COPROB / Pfeifer & Langen[384], the notifying party, in its reply to the Statement of Objections, without hardly putting forward any new elements simply reiterates its arguments in the Form CO.

(457) The only new element is that it takes the view that expansion of supply of white sugar to industrial processors could result from switching from supply of white sugar to retailers to supply of white sugar to industrial suppliers[385] by Italia Zuccheri who is "*also*" an important operator in the market for the supply of white sugar to retailers.

(458) However, as analysed in recitals (439) and (440) of this Decision, market players indicated to the Commission that such switch would not be feasible and profitable due to (i) the necessity of keeping the loyalty of existing retail customers in the long-term, and (ii) the need to maintain low unit costs of sugar sold to retailers in the long-term taking into account the relevant costs, such as the cost of the marketing structure or the cost of the packaging lines[386].

(i) Conclusion

(459) Therefore, after the analysis of the above, notwithstanding the fact that Italia Zuccheri / COPROB and Pfeifer & Langen seem to be well established sugar producers / suppliers on the Italian sugar market, they would have (a) limited ability, and (b) no commercial incentives to substantially expand output post-merger in the Italian market for supply of white sugar to industrial processors, even in the event of a price increase by the merged entity.

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382 Reply by [...]* ([...]*) (reply to question 91) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) and e-mail of [...]* from [...]* of 13 January 2012 at 15:54, entitled: " M.6286 - Your reply to question 93 of the Questionnaire to sugar suppliers / producers in Italy - Phase II - [...]*" and Reply by [...]* (reply to question 93) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

383 E-mail of [...]* from [...]* of 13 January 2012 at 15:54, entitled: " M.6286 - Your reply to question 93 of the Questionnaire to sugar suppliers / producers in Italy - Phase II - [...]*".

384 Paragraphs 192 - 198 of the reply of the notifying party to the Statement of Objections.

385 Paragraph 198 of the reply of the notifying party to the Statement of Objections.

386 The notifying party was informed about it by a Letter of Facts of 14 March 2012 and was provided with the non-confidential versions of the replies of the competitors.

(iv) Tereos

(a) Views of the notifying party

(460) According to the notifying party, French sugar producer Tereos plays and will continue to play a significant role in Italy. It has gone into a different direction than other sugar producers by having established its own sugar marketing company in Italy. Tereos belongs to the group of five beet sugar producers that according to the Commission account for a combined 80% of the sugar beet processing capacity and 72% of the Union sugar market. Furthermore, Tereos has strong links to a number of raw cane exporting countries, such as Mozambique. This access to sugar combined with a network of local distribution companies in Italy would enable Tereos to readily increase its LDC/ACP supply to Italy in case Südzucker/ESI would increase their prices in Italy following completion of the proposed transaction[387].

(461) Südzucker believes that Tereos is delivering 40% to wholesalers (instead of 20% like the others) because Tereos has established its own marketing company while the other big sugar producers entered into cooperations with local companies, in most cases with a local producer. Absent long-established local contacts, the notifying party considers that it should be more difficult for Tereos to build up and develop a client network in industry and retail. To reach its sales volume, Tereos will therefore probably have to rely to a much greater extent on sales to wholesalers[388].

(b) Historical background

(462) Tereos is a cooperative agro-industrial group, specialized in the production and supply of sugar, alcohol, bio-ethanol, sweeteners and by-products. Tereos is mainly a producer of sugar. Tereos sells industrial sugar in almost all Member States while its sales of retail sugar are geographically more restricted[389]. Tereos Group, which is active at European level, created in 2006/2007 "Tereos Italy", its own commercial office in Milan to facilitate its business in Italy with a [...]* sales organisation. This new entity is in charge of the contacts with local customers of Tereos Group and sales in Italy are conducted through it[390].

(c) Sources of supply and infrastructure

(463) Tereos has no sugar factory or refinery in Italy and Tereos supplies the Italian market via its sugar factories situated in France[391].

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387 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 22, sent by e-mail of 1 December 2011 (19:33).

388 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 22, sent by e-mail of 1 December 2011 (19:33).

389 Reply by [...]* (reply to questions 3 and 5) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

390 Non-confidential Minutes [...]* – 18 November 2011

391 Reply by [...]* (reply to question 9) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

(d) *Market positioning*

(464) Tereos holds [10-20]*% market share in the market for the supply of white sugar to industrial processors in Italy.

(e) *Perception by Tereos*

(465) With regard to its Italian market entry Tereos puts forward that in the context of the reform of the sugar sector in the Union, Tereos benefited from important volumes of quota sugar to reallocate from France. Tereos therefore increased its sales into other Member States (from France) in 2005/2006 and at the same time carried out investments to develop its commercial presence outside France. In 2005/2006, Tereos reallocated volumes that were initially shipped outside the Union, taking into account pricing, customers requests and logistic aspects. This was the first stage of expansion of Tereos outside France. Since this period Tereos has been increasing its activities all over the Union by creating local subsidiaries. Indeed, Tereos developed a European network notably by creating commercial subsidiaries in various European countries. Tereos has therefore been in a position to satisfy the demand of its industrial clients that were increasingly requesting it to secure the supply of their plants throughout the Union[392]. In Italy, Tereos sells only white sugar to industrial processors[393].

(f) *Perception by competitors*

(466) [A large Italian sugar producer]* describes Tereos on the Italian white sugar market as having very good access to input, with no infrastructure in Italy, very light national sales office, inexistent regional sales office and without partnership on the Italian white sugar market[394] as well poor customer relationship[395] and no ability to expand its sugar output[396].

(467) [A large sugar producer]* takes the view that Tereos (based in France) has a large sugar beet quota thus incurring low production costs and since Italy is close to its domestic market it can export to Italy without bearing high distribution costs[397].

(468) [A large Italian sugar producer]* also explains in respect of Tereos' successful market entry in the Italian white sugar market in 2006 that "*[t]he decrease of Italian production had to be compensated by higher French inflows as forecasted by the*

392 Reply by [...]* (reply to questions 7 and 8) (Non-Confidential Version – Questionnaire to [...]* – Phase II) (received by e-mail of 9 January 2012 at 18:15).

393 Reply by [...]* (reply to question 1.g)) (Non-Confidential Version – Questionnaire to [...]* – Phase II) (received by e-mail of 9 January 2012 at 18:15).

394 Reply by [...]* ([...]*) (reply to question 58) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

395 Reply by [...]* ([...]*) (reply to question 69) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

396 Reply by [...]* ([...]*) (reply to question 59) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

397 "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to question 63) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

Commission" and such entry was easy in view of the sugar deficit created by the 2006 sugar reform[398].

(g) Perception by customers

(469) In view of [a large customer]*, Tereos represents the largest French sugar producer with big share on the Italian market and "*will definitely increase it*" while it delivers only from factories in the Union with some risk of limited quantities in case of bad crop or other events[399] while, according to [a large customer]*, Tereos is not competitive but only follows the policy of Südzucker and it does not "*disturb*" the latter's market approach, its strength being that it has "*huge*" French production but is not flexible and has only a short term approach vis-à-vis the Italian white sugar market coupled with a low degree of services[400]. [A large customer]* describes Tereos without strengths while making echo of its poor customer relationship resulting from lack of trustworthiness[401]. [A customer]*also doubts that Tereos is a competitive player on the Italian sugar market since it delivers from the northern part of France to Italy[402].

(470) As for the incentives of Tereos to enter the Italian white sugar market, [a large customer]* underlines that Tereos is the largest French sugar producer whose production costs are the lowest interested in entering a deficit market such as Italy[403]. [A large customer]* or [a large customer]* see in Tereos' market entry only an opportunity to fill the gap in a largely deficit region that is Italy[404] in order to market their "*surplus French sugar*"[405] while [a large customer]* puts forward the proximity of the French sugar factories to Italy and such French factories are more competitive than the sugar produced in Italy[406]. From a different angle [a large customer]* would have the same view about the entry of Tereos on the Italian sugar market; it sees indeed that Tereos "*bought the market with low prices. Now, they get their money back!!*"[407] in other words [a large customer]* seems to indicate that Tereos dumped French sugar on the Italian market in order to obtain market shares and once its market shares stabilised it was no longer necessary for it to maintain relatively low

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398 Reply by [...]* ([...]*) (reply to question 62) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

399 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

400 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

401 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

402 Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

403 Reply by [...]* ([...]*) (reply to question 49) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

404 Reply by B[...]* ([...]*) (reply to question 49) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

405 Reply by [...]* ([...]*) (reply to question 49) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

406 Reply by [...]* ([...]*) (reply to question 49) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

407 Reply by [...]* ([...]*) (reply to question 49) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

sugar prices. In this respect, [a customer]* also emphasizes that for the time being Tereos is not competitive and the quantities dedicated to Italy are "*too low*"[408].

(h) Assessment

(471) As already indicated, the notifying party puts forward that Tereos has strong links to a number of raw cane exporting countries, such as Mozambique. Moreover, it is also put forward that this access to sugar combined with a network of local distribution companies in Italy would enable Tereos to readily increase its LDC/ACP supply to Italy in case Südzucker/ESI would increase their prices in Italy following completion of the proposed transaction[409].

(472) However, Tereos expressly indicated to the Commission that it does not intend to expand its output in the Italian sugar market during the next three years and post-merger[410].

(473) In the Commission's view, the ability and incentives for Tereos to substantially expand supplies on the market for supply of white sugar in Italy within the timeframe relevant for merger control are limited.

(474) As analysed in recitals (398) and (402) of this Decision, the Italian sugar market is production limited, Italian competitors are capacity constrained, sugar stocks in the Union are very low and significant shortage of access to preferential raw cane sugar is commonly known by the industry. In such difficult market conditions of scarcity of sugar, other major players with established presence in Italy such as Tereos, do not have the capacities and incentives to redirect substantial additional sugar quantities from other Member States to Italy since it would entail commercial risks to lose existing customers, lower margins due to transport costs and risk of failure of expansion of market share due to risk of selective reaction of the post-merger entity.

(475) Therefore, competitors such as Tereos would have limited ability to substantially increase white sugar supplies in Italy post-merger and such strategy does not appear to be profitable as it would imply the significant commercial risks to lose existing customers in the country of origin of the sugar, to get lower margins due to transport costs and the high risk of failure of expansion of market share due to the risk of selective reaction of the post-merger entity, Südzucker/EDFM.

(476) Indeed, Tereos is the one and only non-domestic sugar manufacturer who succeeded in entering the Italian sugar market following the Union sugar reform in 2006/2007 without entering into cooperation with a local player. Indeed, other foreign players entered the Italian market such as Südzucker, Tate & Lyle, Cristal Union or Pfeifer & Langen but only in cooperation with local players such as MAXI, Eridania or Italia Zuccheri/COPROB. Therefore, its unique situation in the Italian sugar market

408 Reply by [...]* ([...]*) (reply to question 49) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II).

409 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 22, sent by e-mail of 1 December 2011 (19:33).

410 See e-mails by the legal representatives of [...]*, Mrs [...]* and Mr [...]*, of 10 January 2012 at 15:50 and at 16:12 "*[w]e confirm that [...]* does not intend to increase its presence in Italy in the next three years*".

is obvious leading the Commission to pay particular attention[411] in its analysis to the incentives of Tereos to enter, to develop its market presence in the Italian white sugar market and also its capacity to do so.

(477) In the mid 2000 Tereos had at its disposal important sugar quantities to allocate in the Union. Indeed, in the context of the reform of the sugar sector in the Union, Tereos benefited from important volumes of quota sugar to reallocate from France and it therefore increased its sales into other Member States (from France) in 2005/2006 and at the same time carried out investments to develop its commercial presence outside France by having reallocated volumes that were initially shipped outside the Union, taking into account pricing, customers requests and logistic aspects[412]. In other words Tereos benefitted from important sugar stocks that it could reallocate in deficit markets at commercially interesting price in order to develop its market presence in a given market[413].

(478) Its market entry in Italy is thus rather a specific situation than reflection of the sign of significant competition. Indeed, [...]* explains that Tereos' successful market entry in the Italian white sugar market in 2006 is due to the fact that "*[t]he decrease of Italian production had to be compensated by higher French inflows as forecasted by the Commission*" and such entry was easy taken into account the sugar deficit created by the 2006 sugar reform. This view is also acknowledged by Tereos when it explains that Tereos benefited from important volumes of quota sugar to reallocate from France to other Member States following the 2006 sugar reform. Indeed, Tereos therefore reallocated in 2005/2006 volumes that were initially shipped outside the Union and increased its sales into other Member States (from France) for the obvious reason to take advantage of deficit nature of the Italian sugar market. Indeed, Tereos' market entry can be seen as only a specific opportunity in the past to fill the gap in a largely deficit region that is Italy[414] in order to market their "*surplus French sugar*"[415].

(479) However, notwithstanding the fact that Tereos entered recently the Italian white sugar market without local partnership, Tereos has remained a player with a light Italian sales organisation and is exclusively focused on supply of white sugar to industrial processors. Also, the market shares of Tereos have remained stable over the last years[416] since its entry and the lacunas in the quality of its customer relationship were also highlighted by some customers. All these elements taken together do not militate in favour of an analysis pointing towards a dynamic maverick entrant able to expand in Italy.

(480) As for its future market development, in the light of its stable market presence in Italy, it is doubtful that Tereos will develop its sales organisation and will reallocate

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411 See also recital (412) of this Decision.

412 Reply by [...]* (reply to questions 7 and 8) (Non-Confidential Version – Questionnaire to [...]* – Phase II) (received by e-mail of 9 January 2012 at 18:15).

413 Reply by [...]* ([...]*) (reply to question 49) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

414 Reply by [...]* ([...]*) (reply to question 49) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

415 Reply by [...]* ([...]*) (reply to question 49) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

416 See for example recital (189) of this Decision.

additional sugar quantities in Italy even in case of price increase. Indeed,the conditions of its market entry are different from the ones currently applicable in the Union and in Italian sugar markets and do not advocate for an incentive for further expansion. As explained by Tereos itself, its successful market entry in Italy was basically conditioned by two elements: (a) Italy is a deficit market, (b) it had available stocks to reallocate. While Italy is still a deficit market, sugar stocks in the Union are historically low therefore any strategy of expansion for Tereos would be much less profitable as it was in the past in view of the high number of significant risks that such a strategy would imply as described in recitals (398) and (402) of this Decision. In the same line of logic, Tereos expressly indicated to the Commission that it does not intend to expand its output in the Italian sugar market during the next three years, and therefore post-merger[417]. The reason behind Tereos' market strategy with regard to Italy appears to be linked to the absence of enough quantities to be allocated in the Italian white sugar market.

(481) Therefore, Tereos would have limited ability and no incentives to expand on the Italian white sugar market, even in the event of price increase following the proposed transaction.

(482) Especially as for the ability and incentive of expansion by Tereos[418], the notifying party, in its reply to the SO, without putting forward new elements simply reiterates its arguments of the Form CO.

(i) Conclusion

(483) In light of the above, it is concluded that Tereos would have limited ability and no incentives to substantially expand output in the Italian market for supply of white sugar to industrial processors even in case of a price increase by the merged entity.

(v) Zuccherificio del Molise

(a) Views of the notifying party

(484) According to Südzucker, Zuccherificio del Molise has one of the four still active beet sugar factories in Italy. The quota allocated to Zuccherificio del Molise is between 60,000 and 70,000 tonnes/year. The production and sugar marketed is estimated to about 72,000-76,000 tonnes/year. Zuccherificio del Molise is located in the South of Italy. Südzucker assumes that most of the sugar produced is sold locally[419].

(b) Historical background

(485) Zuccherificio del Molise is a producer and distributor of sugar in the Centre and South of Italy[420].

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417 See e-mails by the legal representatives of [...]*, Mrs [...]* and Mr [...]*, of 10 January 2012 at 15:50 and at 16:12 "*[w]e confirm that Tereos does not intend to increase its presence in Italy in the next three years*".

418 Paragraphs 199 - 200 of the reply of the notifying party to the Statement of Objections.

419 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 23, sent by e-mail of 1 December 2011 (19:33).

420 Reply by [...]* ([...]*) (reply to question 5) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

(c) Infrastructure

(486) Zuccherificio del Molise has a beet sugar factory in Termoli with an annual quota of 84.326tonnes/year[421].

Market positioning

(487) Zuccherificio del Molise holds [0-5]*% market share in the market for the supply of white sugar to industrial processors in Italy.

(d) Perception by competitors

(488) [A large Italian sugar producer]* describes Zuccherificio del Molise on the Italian white sugar market with poor access to input, poor infrastructure, poor customer relationship, poor national-regional sales office and without any partnership and in addition without the ability to expand its output on the Italian sugar market[422].

(e) Perception by customers

(489) [A large customer]* puts forward that Zuccherificio del Molise is a public sugar producer in a deficit area with low volume produced coupled with financial instability and low market shares[423]. [A customer]* indicated that "*ESI/SFIR, MAXI and Italia Zuccheri have more strengths compared to Eridania/Tereos and Zuccherificio del Molise*"[424] or [a customer]* putting forward that ESI, Italia Zuccheri, Eridania and Zuccherificio del Molise have their own refineries in Italy which constitutes a competitive advantage. However, none of those sugar producers/suppliers has large sugar quantities[425]. The description by [a larger customer]* is much less positive since it is put forward that "*they should have disappeared several years ago*" maybe for political reasons they have not[426] while [a customer]* explains that it is not a competitive market player[427].

(f) Possibility to expand output

(490) The notifying party does not submit that Zuccherificio del Molise would be in a position to expand its sugar output on the Italian white sugar market and it was several times underlined that Italian customers are very much concerned by the lack of sufficient sugar quantities at the disposal of the Italian sugar producers /

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421 Reply by [...]* ([...]*) (reply to question 9) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

422 Reply by [...]* ([...]*) (reply to questions 58, 59 and 69) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

423 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

424 Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

425 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II).

426 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

427 Reply by [...]* ([...]*) (reply to question 43) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

suppliers[428]. In this respect, [a large Italian sugar producer]* claims that Italy is a highly deficit country in terms of sugar[429] and no player on the Italian market is in a position to expand in a short period of time its output as a reply to a price increase due to the fact that "*all the players deal with production quotas which are fixed and with constraints in access to preferential sugar*"[430]. [A customer]* underlines also with regard to Zuccherificio del Molise that it does not have large sugar quantities[431].

(g) Assessment

(491) Neither Südzucker or any other competitor nor customers take the view that Zuccherificio del Molise would be a well positioned competitive market player able to expand its white sugar supplies in the event of an increase of white sugar prices following the proposed transaction on the Italian market.

(h) Conclusion

(492) Following the analysis of the above, Zuccherificio del Molise does not seem to be a well-positioned market player and does not seem to have the ability and the incentives to substantially expand output in the Italian market for supply of white sugar to industrial processors in the event of a price increase by the merged entity.

(vi) Others (other Union or Balkan sugar producers / suppliers)

(493) The notifying party also claims that other sugar producers in the Union or in the Balkans (Serbia and Croatia) also exert competitive constraint on the post-merger entity[432]. The in-depth market investigation, however, did not confirm this view.

(a) Views of the notifying party

(494) Südzucker claims that there are a number of other players from the Union who supply the Italian market. Such producers include Group Vermandoise, Cosun/Suiker Unie, British Sugar/Azucarera Ebro or Krajowa Spolka Cukrowa, Sunoko doo, Kandit Premijer, Viro Tvornica Secera etc.[433].

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428 For example, Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II), Reply by Daila (2011/129886) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II) or Reply by Nestlé (2011/130092) (reply to question 23) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

429 Reply by [...]* ([...]*) (reply to question 112) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

430 Reply by [...]* ([...]*) (reply to question 59) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

431 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II).

432 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 23, sent by e-mail of 1 December 2011 (19:33).

433 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 23, sent by e-mail of 1 December 2011 (19:33).

(495) The notifying party has estimated sales by those "other competitors" (including both other Union and Western Balkan producers) at 78,000 tonnes in 2010 (56,500 tonnes industry and 21,500 tonnes retail), at 79,058 tonnes for 2011 (57,464 tonnes industry and 21,594 retail) and at 67,000 tonnes for 2012 (57,000 industry and 10,000 retail)[434].

(496) In this respect it is also put forward by the notifying party that a significant price increase by Südzucker/ESI, which does not result from the increase of the sugar price on the world market, would provide an incentive for those sugar producers to enter/expand on the Italian market as customers would switch demand away from Südzucker/ESI and towards other sources[435].

(b) Market investigation

(497) As for sugar producers established in the Union, within the course of the second phase investigation, [a large sugar producer]* indicated to the Commission that it currently has no activities on the Italian market[436], [a large sugar producer]* stated that it does not supply and has not ever supplied Italy from any of its production facilities[437] while only [a sugar producer]* indicated to have supplied some quantities in Italy but only limited quantities[438].

(498) Concerning Western-Balkan sugar (Serbia / Croatia), most importantly, in its reply to the Commission in-depth market investigation, [a sugar producer]* indicated to the Commission that it is not able to expand in a short time period its production quantity in response to a price increase or sugar deficit in the Italian sugar market and that it has no competitive advantage in terms of transport costs in Italy[439].

(499) In this respect [a large sugar producer]* takes the view that third countries of the Balkans which are close to Italy can exert a competitive pressure on Italy since imports from these countries have a duty free access to the Union market (equal to 380,000 tonnes)[440].

434 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 23, sent by e-mail of 1 December 2011 (19:33).

435 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 23, sent by e-mail of 1 December 2011 (19:33).

436 Reply by [...]* ([...]*) (reply to question 9) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2584).

437 Reply by Associated British Foods (2011/130802) (reply to question 9) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2147).

438 Reply by [...]* ([...]*) (reply to question 11) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2817). In this regard, it has to be also emphasized that [...]* confirmed to the Commission that it does not intend to increase its presence in Italy in the next three years however with the very recent [...]* in the Italian sugar market (E-mail of Mr [...]* of 11 January 2012, at 15:26).

439 Reply by [...]* ([...]*) (reply to questions 93 and 95) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2364).

440 Reply by [...]* (reply to question 65) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

(500) On the other hand [a large sugar producer]* states that it has not observed any competitive constraint from producers in countries such as Serbia or Croatia on the Italian white sugar market[441].

(501) In the same context [a large Italian sugar producer]* explains that the success of export from the Balkans to Italy was linked to a positive swap of world market sugar, with these countries exporting their production and importing for their domestic consumption needs. Consequently, in the event of an increase in international market prices there is no interest to supply Italy from the Balkans. In addition Eastern European countries which are also deficit countries are closer to the Balkans sugar producers and will therefore (allegedly) be first supplied[442]. The same view is held by [a large sugar producer]* which submits that "*it is generally difficult to bring more white sugar to Italy from the Balkans. Especially for Croatia it is anticipated that there will be a reduction in the available quantity to be exported due to the entry of the country in the EU. Following accession Croatia will have a quota of approximately 190.000 tonnes while currently it exports to the EU 180.000 tonnes and domestic consumption is approximately 70.000 tonnes. White sugar from the Balkans goes mainly to Slovenia, Hungary and Greece*"[443].

(502) Seven Italian wholesalers including [a customer]* indicate that they purchase sugar from the West Balkans (Croatia and Serbia)[444] and [a customer]* indicates that Serbian and Croatian sugar has been imported in Italy for many years by Italian traders[445]. On the other hand, most customers [a customer]*[446], [a customer]*[447], [a customer]*[448], [a large customer]*[449], [a large customer]*[450], [a large customer]*[451], [a large customer]*[452], [a large customer]*[453] or [a large customer]*[454] indicate that

[441] "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to question 65) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

[442] Reply by [...]* ([...]*) (reply to question 63) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

[443] Non-confidential version of the Minutes of the Teleconference with [...]*on 8 Decmber 2011, paragraph 10.

[444] Reply by [...]* ([...]*) (reply to question 47) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

[445] Reply by [...]* ([...]*) (reply to question 47) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

[446] Reply by [...]* ([...]*) (reply to question 47) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

[447] Reply by [...]* ([...]*) (reply to question 47) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

[448] Reply by [...]* ([...]*) (reply to question 47) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

[449] Reply by [...]* ([...]*) (reply to question 47) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

[450] Reply by [...]* Italia ([...]*) (reply to question 47) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

[451] Reply by [...]* ([...]*) (reply to question 47) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

[452] Reply by [...]* ([...]*) (reply to question 47) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

[453] Reply by [...]* ([...]*) (reply to question 47) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

[454] Reply by [...]* ([...]*) (reply to question 47) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

they have no experience with sugar producers from the Balkans and are not aware of any activities on the Italian sugar market.

(c) Assessment

(503) As for the actual situation, the proportion of sugar imported on the Italian white sugar market by other Union based sugar producers or by Balkan producers is not very high even in the most optimistic scenario as presented by the notifying party. Indeed, the notifying party puts forward that into Italy 78,000 tonnes/year[455] are imported by other Union and Balkan sugar producers. This would represent approx. 4.5% of Italian annual consumption, which is 1.73 million tonnes per year[456]. Even if this quantity is not large, in addition no element of the market investigation has shown the existence of such a quantity. Indeed, the sugar quantities imported by Vermandoise into Italy constitute only limited quantities. As a result, the estimation put forward by Südzucker as for the imports from other Union sugar producers to Italy seem to be too optimistic. With respect to sugar imported into Italy from the Balkans, [a large sugar producer]* indicated to the Commission that no sugar is imported into Italy from its Balkans sites[457], while the sugar quantities imported by [a large sugar producer]* in Italy were by far lower[458] the 78,000 tonnes indicated by the notifying party while another important player also indicated that it had no sales in Italy during the campaign year 2010/2011. As a result, the estimation put forward by Südzucker as for the imports from the Balkans and also for other competitors in the Union to Italy seem to be too optimistic.

(504) In addition, none of the other Union based sugar producers indicated plans to enter or expand in the Italian sugar market.

(505) Furthermore, some respondents ([a large Italian sugar producer]*[459], [a large sugar producer]*[460]) take the view that Eastern Central European Member States such as Slovenia or Hungary are more natural destinations of Balkan sugar than Italy. And anyhow as a result of the Croatian accession to the Union much less sugar from Croatia will be available.

(506) Therefore, no expansion on the Italian white sugar market is foreseen and available quantities from the Balkans to the Union will also significantly lower as a result of the Croatian accession to the Union.

(507) As a result of the accession of Croatia in March 2013, the exports from Croatia to the Union (including Italy) will be completely reorganised and the sugar quantities

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455 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 23, sent by e-mail of 1 December 2011 (19:33).

456 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 12, sent by e-mail of 1 December 2011 (19:33).

457 E-mail of 13 February 2012 by H[...]*entitled "RE: Sales in Italy" received at 14:55.

458 Reply by [...]* ([...]*) (reply to question 13) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2364).

459 Reply by [...]* ([...]*) (reply to question 63) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

460 Non-confidential version of the Minutes of the Teleconference with [...]* on 8 December 2011, paragraph 10.

currently exported to the Union (also Italian) white sugar market from Croatia will be reverted to domestic use.

(508) In particular, the two main principles behind the determination of Croatia's post-accession sugar production quota were (i) that this quota should not add a surplus to sugar balance in the Union, and (ii) that this quota should not exceed Croatia's domestic consumption. Thus, Croatia's sugar production quota was set at 192,877 tonnes/year based on the level of domestic consumption in the reference period 2004-2008.

(509) At present, Croatia produces 260,000 tonnes/year, while its domestic consumption is approximately 193,000 tonnes/year. Given Croatia's current export quota of 180,000 tonnes/year to the Union, 180,000 out of 260,000 tonnes are exported to the Union, whereas 80,000 out of these 260,000 tonnes are consumed in Croatia. The remaining 113,000 tonnes of Croatian consumption are satisfied through duty-free imports.

(510) Following accession, Croatia will benefit from a production quota of approximately 192,877 tonnes/year and a preferential import quota of 40,000 tonnes/year.[461] The present Croatian sugar import regime will be substituted by the Union sugar import regime, thus erasing Croatia's possibility to import unlimited duty-free quantities and exporting almost all its domestic production to the Union. These 40,000 tonnes will partly satisfy the 193,000 tonnes of Croatian consumption. The remaining 153,000 tonnes of Croatian consumption will be satisfied by the three Croatian factories, which will produce on the basis of the quota of 192,877 tonnes/year. This leaves 40,000 tonnes/year for export to the rest of the Union, significantly less than the 180,000 tonnes/year exported today.

(511) As for the Serbian sites, the most important sugar producer in Serbia in terms of production and storage capacities according to the notifying party is by far [a large sugar producer]*. However, as already mentioned [a large sugar producer]* indicated to the Commission that it was not in a position to expand in a short time period its production quantity in response to a price increase or sugar deficit in the Italian sugar market and that it has no competitive advantage in terms of transport costs in Italy[462].

(512) Consequently, significant additional sugar imports from the West-Balkans (Croatia and Serbia) to Italy cannot be considered as likely. To the contrary, as a result of the expected Croatian adhesion to the Union much lower quantities of sugar will be available to the Union and thus West Balkan sugar producers cannot constitute a viable and foreseeable competitive pressure on the Italian white sugar producers / suppliers including the Parties.

(513) In its extensive reply to the Statement of Objections, the notifying party does not contest the analysis of the Commission on the point that following the accession of Croatia to the Union in 2013 less sugar will be available to the Union from Croatia. The notifying party only puts forward with regard to the competitive constraints by West-Balkan sugar producers that sugar prices adhere to the international market

461 The preferential import quota will be valid only for a period of up to three marketing years following Croatia's accession at an import duty of EUR98 per tonne.

462 Reply by [...]* ([...]*) (reply to questions 93 and 95) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) ([...]*).

price and in consequence there is a "*high competitive pressure*" from the Balkans without however putting forward new element as compared to the Form CO.

(d) Conclusion

(514) Following the detailed examination of the arguments put forward by the Parties and the results of the market investigation, it is concluded that the sugar producers / suppliers established outside Italy (in the Union or Balkans) are not able to expand their output in Italy and following the Croatian accession to the Union further scarcity in sugar will be observed in the Union potentially leading to higher prices.

(vii) Others (wholesalers)

(515) The notifying party puts forward that[463] there is an additional category of suppliers, the "wholesalers", to whom the Parties attributed 20% of the market for sales to industrial processors and 18% of the market for sales to retailers in Italy.

(516) However, as extensively explained above the arguments submitted by Südzucker for the attribution of sales to Italian "wholesalers" in the Italian markets for the sale of white sugar to industrial processors and to retailers cannot be accepted within the course of the assessment of the proposed transaction. First, the second phase market investigation largely infirmed the notifying party's view. Second, wholesalers in principle do not source sugar from suppliers which are outside the normal Italian supply circle. In the limited occasions that they do so, it is for limited quantities and, even then, wholesalers still depend on existing Italian players for the vast majority of their supplies. Third, no internal documents of the Parties present wholesalers as a competitive force. On the contrary, internal documents of the Parties present wholesalers as pure intermediaries between them and the end-customers[464].

(viii) Imports from ACP/LDC countries and regulatory measures

(517) The notifying party puts forward in its reply to the Statement of Objections that additional competitive pressure can be exercised by ACP/LDC countries and in times of significant scarcity the Commission "*may*" release out-of-quota sugar and authorise additional imports in the Union.

(518) In particular, the notifying party argues[465] that in the hypothesis of the European sugar price inferior to international market price ACP/LDC exporters would have incentive to export more raw cane sugar into the Union.

(519) In this respect it has to be underlined that it is a hypothetical scenario. Currently, the Union and Italian sugar markets are characterized by significant sugar scarcity.[466] The alleged hypothetical market condition is not evidenced to be likely to take place and under current market conditions there is no ability and incentive for the

463 Annex 4 of Südzucker's answer to the 3rd RFI in Phase I.
464 See recitals (309) to (331) of this Decision.
465 Paragraphs 216 – 218 of the reply of the notifying party to the Statement of Objections.
466 Paragraphs 73 or 75 of the Statement of Objections.

APC/LDC producers to import more sugar into the Union. This is precisely one of the reasons for the current significant sugar shortage in the Union[467].

(520) As for the regulatory measures the notifying party submits[468] that the Commission constantly monitors prices and quantities in the sugar market and that the producers have to report prices and three months in advance their expected sales. Imbalances are instantly traced and the Commission can react to any perceived scarcity of supply by using its regulatory instruments. According to Article 186 of Regulation (EC) No 1234/2007 the Commission "*may*" take the necessary measures in situations disturbing or threatening to disturb the markets with regard to among others sugar, where the prices on the Community market rises or falls significantly.

(521) In fact, in accordance with Article 186 of the Regulation (EC) No 1234/2007, "*The Commission **may** take the necessary measures in the case of the following situations, when those situations are likely to continue, thereby disturbing or threatening to disturb the markets: (a) with regard to the products of the sugar (…), where the **prices on the Community market** for any of those products rise or fall significantly (…)*" (emphasis added).

(522) In this respect it has to be emphasized that the Commission is not obliged to systematically take such measures, it has the possibility to do so but it does not mean that it proceeds systematically this way. Then, any exceptional Commission intervention would be only for a limited duration and quantities while it concerns price falls and increases in the Community as a whole and not necessarily in Italy.

(523) Therefore, Article 186 of the Regulation 1234/2007 does not constitute a sufficient legal protection in order to systematically counteract on a permanent basis the continuous negative effects of the proposed transaction on the market for the supply of white sugar to industrial processors in Italy.

Conclusion

(524) In the light of the above, the Commission takes the view that notwithstanding the fact that some market players are well established in terms of infrastructure, customer relationship or specific partnership with a sugar supplier, they are unlikely to increase supply in the event of price increases by the merged entity on the market for the supply of white sugar to industrial processors in Italy. Indeed, the Italian sugar market is a highly deficit market coupled with fixed production quotas. Moreover, as a result of the Croatian accession expected for 2013 further important input quantities will disappear while no additional quantities are foreseen to be imported from Algeria or Sudan in the foreseeable future. Most importantly, all major competitors in Italy ([sugar producers]*) or outside Italy ([sugar producers]*) have expressly indicated to the Commission that they are not in a position to expand in the Italian sugar market in case the proposed transaction takes place, while wholesalers would not constitute a competitive constraint on the post-merger entity.

(525) On the basis of the above, the arguments invoked by the notifying party do not amount to significant competitive pressure within the meaning of paragraphs 32 – 35

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467 Recitals (69) and (70) of this Decision.

468 Paragraphs 228 and 229 of the reply of the notifying party to the Statement of Objections.

of the Horizontal Merger Guidelines to counteract the negative effects of the proposed transaction.

6.1.4.4. Countervailing buying power

Views of the notifying party

(526) In the notification, the notifying party does not invoke the existence of countervailing buying power to argue that despite the high market shares of the Parties on the market for supply of white sugar in Italy, the proposed transaction does not raise competition concerns.

(527) However the notifying party refers to certain elements indicating countervailing buyer power. Indeed, it submits that with respect to the customers' size, some customers both in the industry and retail segments are big multinational companies with considerable buyer power. Furthermore, it is argued that the customers' European scope allows them to negotiate package deals and they have intimate knowledge of European and world sugar markets, making them powerful and sophisticated procurers of sugar. On the other hand, it is put forward that smaller customers are more inclined to source sugar from "Italian sources"[469].

(528) The notifying party therefore makes the distinction between large and smaller customers in terms of buyer power before adding that security of supply is one of the main characteristics that industrial customers and retail customers are seeking from suppliers. Südzucker assumes that its main competitors in Italy can guarantee security of supply to a similar extent as itself. It is put forward that Südzucker's strategy for ensuring security of supply for its customers in sugar deficit countries is based on two pillars: (i) sufficient storage facilities and (ii) sound management decisions about allocation of sales to a specific destination (including stock levels required)[470].

(529) Concerning switching, the notifying party also puts forward that there are no specific purchasing patterns according to customer groups. Across customer groups, contracts are usually negotiated on a year's basis, allowing customers to switch between suppliers whenever they deem it profitable and/or necessary to avoid dependency on one supplier. Customers are highly price-sensitive and therefore willing to switch suppliers if the current contractual partner intends to raise prices above the competitive level. Since brands do not play a role in the sugar business, industry and retail customers find it easy to switch between suppliers. Moreover, sugar is a commodity and supply sources are therefore easily replaceable. Furthermore, many customers, even small customers, employ multisourcing strategies by splitting their demand among several suppliers to avoid dependency on one supplier[471].

469 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 59, sent by e-mail of 1 December 2011 (19:33).

470 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 58, sent by e-mail of 1 December 2011 (19:33).

471 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, pages 58 - 59, sent by e-mail of 1 December 2011 (19:33).

No buyer power of customers

(530) Amongst other elements, as discussed below, the result of the second phase market investigation indicates that customers do not consider that they have buyer power in the negotiations with their sugar suppliers. Even the biggest multinational customers underlined that fact. Customers stress that on a high deficit market such as Italy customers need security of supply above all and are therefore dependent on their suppliers.

(531) In this respect the significant scarcity of white sugar is emphasized by [a large customer]* in the following terms: "*all refineries in Europe will struggle to compete on a lasting basis given the current restrictions on the import of raw cane sugar. Supply from preferential regions/CXL is not enough to fulfil the refining capacity in Europe*"[472] or "*there is clearly a big deficit between supply and demand*"[473].

(532) The lack of countervailing buyer power mainly results from the significant lack of white sugar available to industrial processors the fact that industrial processors do not switch suppliers and the fact that industrial processors need to multi-source for reasons of security of supply.

(533) As a result of the 2006 sugar reform, Italy has become a largely deficit Member State[474].

(534) All the respondents to the in-depth market investigation indicated to the Commission that security of supply is important irrelevant the size and economic weight of the customer. Respondents underline the deficit character of the Italian sugar market and that security of supply constitutes a clear factor. To depict only one or two quotations from the largest customers: ([a large customer]*) "*[y]es there is clearly a big deficit between supply and demand [...]* security of supply is of key importance*"[475] or ([a large customer]*) "*[y]es,* [security of supply]* *is really critical*"[476]. Large customers such as [a large customer]*[477] or [a large customer]*[478] underline the possibility of concluding long-term contracts (annual) while others underline the importance of having several sugar suppliers[479].

(535) The results of the in-depth second phase market investigation have also confirmed that customers consider that they have very limited buyer power in respect of their

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472 Paragraph 389 of the Statement of Objections.

473 Reply by [...]* ([...]*) (reply to question 23) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

474 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, pages 4 and 5, sent by e-mail of 1 December 2011 (19:33).

475 Reply by [...]* ([...]*) (reply to question 23) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

476 Reply by [...]* ([...]*) (reply to question 23) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

477 Reply by [...]* ([...]*) (reply to question 23) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

478 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

479 Reply by [...]* ([...]*) (reply to question 23) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II) or Reply by [...]* ([...]*) (reply to question 23) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

sugar suppliers irrespective of their size, economic power or geographic situation essentially due to the absence of raw material. Some large customers or smaller customers[480] (approximately 20% of the respondents) indicated that they have buyer power to a limited extent; however the majority of the customers, including both large[481] and smaller customers[482], made reference to no negotiation power at all or to a very limited one. [...]*, an Italian wholesaler, underlined that they cannot even negotiate on "*total final volume*"[483] while [a large customer]* also indicates that it does not get any discount[484].

No switching by customers

(536) The results of the in-depth second phase market investigation have also indicated that customers do not switch suppliers.

(537) Indeed, customers replying to the market investigation affirmed that, given the significant sugar scarcity on the Italian sugar market, they multisource while they do not often switch suppliers and, in any event, they would not be able to source from abroad.

(538) Against that background, in its reply to the Statement of Objections the notifying party questions the results of the market investigation[485].

(539) According to paragraph 67 of the Horizontal Merger Guidelines: "*Countervailing buyer power cannot be found to sufficiently off-set potential adverse effects of a merger if it only ensures that a particular segment of customers, with particular bargaining strength, is shielded from significantly higher prices or deteriorated conditions after the merger*". In the case at hand, 89% of the end-customers that replied to the market investigation indicated that they do not purchase directly from abroad[486]; moreover, in the last five years no customer responded to a price increase by 5-10% on the Italian sugar market by purchasing sugar directly from abroad[487]. In

480 Reply by [...]* ([...]*) (reply to question 69) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II) or Reply by [...]* ([...]*) (reply to question 69) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

481 For example Reply by [...]* ([...]*) (reply to question 69) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

482 Reply by [...]* ([...]*) (reply to question 69) (Non-Confidential and Confidential Versions – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 45) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 69) (Confidential and Non-Confidential Versions – Questionnaire to sugar customers in Italy – Phase II), Reply by [...]* ([...]*) (reply to question 69) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II) .

483 Reply by [...]* ([...]*) (reply to question 69) (Non-Confidential Version – Questionnaire to sugar customers in Italy – Phase II).

484 Reply to Question 71 of the Questionnaire to sugar customers in Italy – Phase II. See exchange of emails between Mr [...]* and Mr [...]* on 30 March 2012, at 08:44.

485 Paragraph 237 of the reply of the notifying party to the Statement of Objections.

486 Questionnaire to sugar customers in Italy – Phase II, question 22.

487 Questionnaire to sugar customers in Italy – Phase II, question 38(e). When asked whether, in case of a price increase of 5 to 10% by the main sugar suppliers in Italy, they would consider buying sugar directly from abroad (question 38(a), the majority of customers replied positively. However, their reply has to be nuanced. If customers would be willing to source directly from abroad, some explain that this would be very difficult to achieve or even unlikely, notably because of the logistics/transport costs. Almost one third of the customers who replied positively would be willing to do so provided they

this respect it has to be underlined that the outlined conditions in the questionnaire were a significant price increase in Italy.

(540) Against this background, the notifying party in its reply to the Statement of Objections underlines that multisourcing means, in the context of the Italian sugar market, that the customer 'changes its supplier' without actually switching[488] since it implies that by keeping several suppliers it is possible to select occasionally between those several suppliers. Therefore, according to the notifying party, no importance should be attributed to the replies on 'switching', prices are lower in Italy than in other deficit countries and it is so because of competitive pressure from competitors and countervailing buyer power[489] and some customers buy from outside Italy, in particular [a large customer]*[490].

(541) On the other hand the notifying party did not contest that even significant customers negotiating transnationally are required to pay Italian prices for their purchases in Italy as described in recital (173) of this Decision: "*even in the rare cases that the overall negotiations take place in a regional or EEA level, prices are set for each Member State separately, according to the market situation in each case (with respect to Italy, the market participants explained that the scarcity of sugar is the most important factor determining the prices they have to pay)*" and even [a large customer]* indicates that it does not get any discount[491].

(542) The notifying party does not contest either that in the past Italian sugar customers have not switched sugar suppliers.

(543) The notifying party does not contest that sugar demand is price inelastic. On the contrary EDFM's internal document states that "*Total EU-27 sugar consumption is relatively static at around 16.5 million tonnes, and moreover, **sugar demand, both industrial demand and retail demand, in the EU is markedly income and price inelastic***"[492] (emphasis added).

(544) And most importantly, the notifying party does not even contest the significant sugar scarcity in the Union and in Italy. On the contrary it indicates that this scarcity is only due to the regulatory measures taken by the Commission and that "*every ton of quota sugar finds its way to the customers*"[493].

Conclusion

(545) Since the Italian sugar market is in deficit, the Italian sugar prices are high as compared to sugar prices in other Member States and security of supply is crucial for customers in terms of both quantity and quality, Italian sugar customers do not hold

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would be able to conclude long term contracts. However, no customer responded by purchasing sugar directly from abroad to a price increase by 5-10% on the Italian sugar market.

488 Paragraph 233 of the reply of the notifying party to the Statement of Objections.

489 Paragraph 235 of the reply of the notifying party to the Statement of Objections.

490 Paragraph 232 of the reply of the notifying party to the Statement of Objections.

491 Reply to Question 71 of the Questionnaire to sugar customers in Italy – Phase II. See exchange of emails between Mr [...]* and Mr [...]* on 30 March 2012, at 08:44.

492 Page 17 of the European Sugar Logistics Study prepared for the Ethiopian Sugar Development Agency by ED&F Man, 16 February 2010.

493 Paragraph 202 of the reply of the notifying party to the Statement of Objections.

important buyer power vis-à-vis their sugar suppliers and their possibilities of switching sugar suppliers are very limited.

(546) On the basis of the considerations above, the Commission takes the view that very little, if any, countervailing buyer power can be attributed to Italian sugar customers in the relationship with their sugar suppliers and they therefore do not exercise competitive pressure on the Italian sugar producers / suppliers including the Parties within the meaning of paragraphs 64 to 67 of the Horizontal Merger Guidelines.

6.1.4.5. No sufficient competitive constraint from entry

(547) According to paragraph 68 of the Horizontal Merger Guidelines, *"entry analysis constitutes an important element of the overall competitive assessment. For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger"*.

High barriers to entry

(548) According to paragraph 71 of the Horizontal Merger Guidelines, barriers to entry can take various forms, including regulatory barriers, tariff and non-tariff trade barriers[494], difficulties to obtain essential input materials or the closeness of relationships between suppliers and customers[495]. Entry barriers are elements that are likely to expose potential competitors to risks and costs sufficiently high to deter them from entering the market or make entry particularly difficult for them[496].

Views of the notifying party

(549) The notifying party argues there are no relevant barriers to enter the markets for the supply of white sugar in Italy.

(550) The notifying party takes the view that the regulatory entry barriers have been reduced with the new sugar market regime since the European sugar market experiences an intensification of the trade flows since its adoption[497].

(551) It is also put forward that no unusual non-tariff barriers apply to the Italian sugar market. Indeed, it is argued that only the usual challenges of cross border trade, such as language barriers, different legal systems, cultures and habits apply. Most customers prefer to have a local partner to communicate with and to solve logistical issues[498].

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494 Commission Decision 2002/174/EC in Case COMP/M.1693 — Alcoa/Reynolds, OJ L 58, 28.2.2002, recital 87

495 Commission Decision 2002/156/EC in Case COMP/M.2097 — SCA/Metsä Tissue, OJ L 57, 27.2.2002, p. 1, recitals 83-84

496 Case T-282/02 Cementbouw v Commission [2006] ECR II-319, paragraph 219

497 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 8, sent by e-mail of 1 December 2011 (19:33).

498 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 40, sent by e-mail of 1 December 2011 (19:33).

(552) However, the in-depth market investigation does not confirm the notifying party's views.

Results of the market investigation

(553) According to the competitors of the Parties, the main market entry barriers are the access to input[499], the necessary infrastructure[500], established customer relationship[501] or distribution network[502] while the sugar supply business is a highly capital intensive market[503].

High investments costs

(554) As already pointed out, the market investigation largely confirmed that the sugar market necessitates high investments costs and the importance of logistics. Some market players also indicated that it is possible to enter the Italian sugar market without Italian production and storage facilities, like did Tereos. However, Tereos supplies the Italian sugar market through its French facilities[504].

Importance of local knowledge and distribution channels and access to input

(555) The market investigation also confirmed that the sugar market necessitates local knowledge and distribution channels, while access to input is the most crucial element.

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499 Reply by [...]* ([...]*) (reply to question 127) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2817), Reply by [...]* (reply to questions 126 and 127) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), Reply by [...]* ([...]*) (reply to question 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), Reply by [...]* ([...]*) (reply to question 125) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to questions 126 and 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) or Reply by [...]* ([...]*) (reply to question 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2584).

500 Reply by [...]* ([...]*) (reply to question 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to question 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), Reply by [...]* ([...]*) (reply to question 127) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) ([...]*).

501 Reply by [...]* ([...]*) (reply to question 125) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

502 Reply by [...]* ([...]*) (reply to question 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), Reply by [...]* ([...]*) (reply to question 125) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), "Phase II - reply to RFI – raw cane sugar – IT and Greece Market – conf and non conf" by [...]* ([...]*) (reply to question 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II), Reply by [...]* ([...]*) (reply to question 128) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) ([...]*).

503 Reply by [...]* ([...]*) (reply to question 127) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) or Reply by [...]* ([...]*) (reply to question 127) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) (ID 2364)

504 Reply by [...]* (reply to question 9) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

Reply of the notifying party to the Statement of Objections and assessment

(556) The notifying party submits that the Commission should have "*chased up*" more the respondents which have not replied to the questions in the questionnaire because they are not active on the Italian market. Special reference is made to [a sugar producer]* and [a sugar producer]*. However, it is observed that even though [a sugar producer]*, it is not active on the Italian white sugar market, it replied to the questions about market entry as the notifying party itself notes in paragraph 202 of its reply to the Statement of Objections. Indeed, [a sugar producer]* indicated that it is not aware of any entry plans in the Italian sugar market for the next two years and that entering the Italian white sugar market is difficult without local infrastructure, local market position and local know-how[505].

(557) The replies to the questions about market entry appear plausible and are provided by well-established players with experience on the Italian market.

(558) In general, the notifying party argues[506] that market entry barriers are low since it is enough to enter the Italian white sugar market as Tereos did in the mid-2000 alone or by teaming up with a wholesaler, as Südzucker has done with MAXI or with an incumbent sugar producer as Pfeifer & Langen has done.

(559) As already mentioned, according to paragraphs 68 to 75 of the Horizontal Merger Guidelines a "*potential entry*" must be likely, timely and sufficient. In the case at hand all market players have credibly indicated that they see no ability or incentive to enter the Italian white sugar market (see recital (566) of this Decision). Therefore, there is no likely potential market entry in the market for supply of white sugar to industrial processors in Italy. In addition to the main market entry barriers identified above (necessary infrastructure, established customer relationship, or distribution network, the sugar supply business being a highly capital intensive market) **<u>access to input</u>** is considered to be an important market entry barrier. While it is true that Tereos entered the Italian white sugar market, in particular the market for supply to industrial processors, from France in the mid-2000, Tereos itself expressly stated that such market entry was possible only with sufficient sugar quantities while, under the current market conditions, especially taken into account the severe scarcity of sugar in the Union and Italy, "*access to input*" constitutes a high market entry barrier.

(560) In this context it has to be emphasized once again that Tereos' Italian market entry stemmed from the fact that "*[t]he decrease of Italian production had to be compensated by higher French inflows as forecasted by the Commission*" and such entry was easy in view of the sugar deficit created by the 2006 sugar reform.[507] while Tereos is not considered to be a competitive player, for example, by [a sugar producer]* as it is indicated to only follow the policy of Südzucker and without "*disturb*[ing]" the latter's market approach[508].

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505 Reply by [...]* ([...]*) (reply to questions 127 and 130) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II) ([...]*).

506 Paragraph 222 of the Reply to the Statement of Objections.

507 Reply by [...]* ([...]*) (reply to question 62) (Non-Confidential Version – Questionnaire to sugar suppliers / producers Italy – Phase II).

508 Reply by [...]* ([...]*) (reply to question 45) (Confidential and Non-Confidential Versions - Questionnaire to sugar customers in Italy – Phase II).

Conclusion

(561) Contrary to the notifying party's submission the Italian white sugar market for the supply of white sugar to industrial processors is characterized by relatively high market entry barriers within the meaning of paragraphs 71 to 75 of the Horizontal Merger Guidelines.

<u>Entry unlikely to occur</u>

Views of the notifying party

(562) The notifying party only submitted a single example of entry, by Tereos[509].

(563) In the context of possible entries in the Italian white sugar market, the notifying party also takes the view that further expansion, and not entry, is possible on the Italian white sugar market by the operators already having supplies on the Italian market (Eridania/Cristal Union, Italia Zuccheri/COPROB/Pfeiffer & Langen or Tereos); as a result of the Minerbio development by Eridania/Cristal Union; by the Cristal Union Algerian refinery which is to be launched at the end of 2012, by the 2014 Sudanese refinery with a capacity of 500,000 tonnes/year by Eridania; other sugar producers in the Union such as Suiker Unie or Vermandoise; or by the Balkan producers. In this context, as already mentioned, entry of new competitors is not to be confused with expansion of existing ones. The examples quoted above are related to expansion and not to market entry.

Results of the market investigation: entry unlikely to occur

(564) The notifying party does not indicate that any economic entity is considering entering the Italian white sugar market post-merger following the proposed transaction.

(565) The market test has not revealed either any entity able to or interested in entering the Italian market for the supply of white sugar to industrial processors post-merger.

(566) On the contrary, the Italian white sugar market is rather characterized by market exits, in particular the exit of Nordzucker or the one of Tate & Lyle in 2011, due to scarcity of essential input.

(567) Against this background, the notifying party in its reply to the Statement of Objections, therefore, puts forward new entry plans in the market for supply of white sugar to industrial processors in Italy.

(568) Indeed, the notifying party puts forward[510] that it is furthermore "*widely expected*" that imports will increase during the next years. The high international market prices have fostered and sped up the building-up of new sugar production facilities, even in the context of the worldwide financial crisis, and capacity increases especially in the ACP/LDC-countries (cf. the project of Eridania in Sudan with an initial capacity of 500,000 tonnes and ultimately 1 million tonnes or the expansion plans of Tongaat

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509 Answers to 3rd Request for Information to Südzucker 1/2 [GL-AM.FID10603463], Form CO – Italy, page 62, sent by e-mail of 1 December 2011 (19:33).

510 Paragraph 22§ of the reply of the notifying party to the Statement of Objections.

Hullet which plans to expand production in Zimbabwe by 225,000 by 2014/15 and in Mozambique by 200,000 tonnes by 2014/15). Union-wide, ACP/LDC countries will be likely to reach an expected import level of up to 3.1 million tonnes "*with a large part expected to go into deficit areas such as Italy*". In addition, the Union has agreed to a new free trade agreement with Central and South American countries which will lead to additional imports of 300,000 tonnes, probably already from 2012/13 on.

(569) As for the expansion plans of Tongaat Hullet in Zimbabwe and in Mozambique, these plans, only based upon a presentation available on the internet website of Tongaat Hullet, would seem to be realised in a timeframe outside the scope of the definition of timeliness within the meaning of Paragraph 74 of the Horizontal Merger Guidelines (i.e 2 years).

(570) As for the agreement with the Central and South American countries leading to additional imports of 300,000 tonnes in the Union, it has to be recalled that for the time being this plan is a Commission proposal only, which still needs to be adopted by the Council and the European Parliament before ratification by the competent legislative assemblies of the concerned Central and South American countries (Panama, Colombia and Peru). However, even if the entry into force of such an agreement were to be considered likely[511] and timely, and even in the extreme case that that all of these new volumes could be secured by producers / suppliers willing to import into Italy, it is to be noted that the effect of these new volumes would, to a significant extent, be offset by a reduction of volumes by the impact of the Croatian accesion to the Union in March 2013 as analysed and explained in recitals (510) and (511) of this Decision leading to question the sufficiency of these quantities.

Conclusion

(571) Therefore, market entry is not likely, timely and sufficient to offset the anticompetitive effects of the proposed transaction in the Italian white sugar market in the near future within the meaning of paragraphs 69 – 71 of the Horizontal Merger Guidelines.

6.1.4.6. Conclusions on the Italian market for the supply of sugar to industrial processors

(572) The Commission concludes that the proposed transaction has the following characteristics and consequences: (i) Südzucker is the most important player on the Italian market for the supply of white sugar to industrial processors, (ii) EDFM is an important player on the same market, (iii) the increment added by the proposed transaction is significant[512], (iv) the post-merger market shares are very high (superior to [50-60]*%)[513], (v) Südzucker and EDFM are close and dynamic competitors and are the two competitors that can most easily adapt their quantities/sales in the Italian market[514], (vi) post-merger the merged entity would have the incentive and be in a position to withdraw quantities from Italy, thereby

511 As for the likelihood of the agreement it has to recall that for the time being this plan is a Commission proposal, therefore the Commission proposal still needs to be adopted by the Council and the European Parliament before ratification by the competent legislative assemblies of the concerned Central and South American countries (Panama, Colombia and Peru).

512 Horizontal Merger Guidelines, paragraph 27.

513 Horizontal Merger Guidelines, paragraph 27.

514 Horizontal Merger Guidelines, paragraphs 28-30.

raising prices, (vii) the competitors of the merged entity, established in Italy or outside Italy, face capacity constraints and therefore are unlikely to increase supply if prices increase, and therefore to counteract such market behaviour[515], (viii) countervailing buyer power appears unlikely to constrain the ability of the merged entity to increase prices post transaction, especially in periods of overall shortage of sugar supply[516], and (ix) following the market investigation, entry in the relevant market is not likely and timely and sufficient to offset the anticompetitive effects of the proposed transaction[517]. The Commission concludes that as a result of all the elements enumerated above, the proposed transaction would also result in the creation of a dominant position.

(i) Supply of white sugar to retailers in Italy

(573) With respect to the market for the supply of white sugar to retailers, it has to be examined whether the proposed transaction creates competitive concerns in Italy as it leads to the creation of a market leader. The market investigation has however demonstrated that these competition problems do however not reach the threshold of significant impediment of effective competition.

(574) In particular, the following table below shows the sales of white sugar (in metric tonnes) to industrial processors and to retailers in Italy from 1 January 2011 to 31 October 2011:

515 Horizontal Merger Guidelines, paragraphs 32-35.
516 Horizontal Merger Guidelines, paragraphs 64-67.
517 Horizontal Merger Guidelines, paragraphs 68-70.

	sales to industrial processors		sales to retailers		sales to industrial processors and retailers	
	Volume	market share	volume	market share	Volume	market share
Südzucker[518]	[...]*	[30-40]*%	[...]*	[10-20]*%	[...]*	[30-40]*%
EDFM (incl. Brindisi)[519]	[...]*	[10-20]*%	[...]*	[10-20]*%	[...]*	[10-20]*%
Südzucker/EDFM combined	**[...]***	**[40-50]*%**	**[...]***	**[30-40]*%**	**[...]***	**[40-50]*%**
COPROB/Italia Zuccheri/Pfeifer & Langen[520]	[...]*	[20-30]*%	[...]*	[10-20]*%	[...]*	[20-30]*%
Tereos[521]	[...]*	[10-20]*%	[...]*	[5-10]*%	[...]*	[10-20]*%
Eridania/Cristal Union [522]	[...]*	[5-10]*%	[...]*	[30-40]*%	[...]*	[10-20]*%
Zuccherificio del Molise[523]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Société Vermandoise[524]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Sunoko[525]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Total volume of competitors	**[...]***	**[40-50]*%**	**[...]***	**[60-70]*%**	**[...]***	**[50-60]*%**
Total market volume	**1,013,039**	**100%**	**363,182**	**100%**	**1,377,028**	**100%**

(575) Moreover, the following table below shows the forecasted sales of white sugar (in metric tonnes) to industrial processors and to retailers in Italy for the campaign year 2011/2012 (i.e. from October 2011 to September 2012):

518 Südzucker's answer to the 6th RFI in Phase II.
519 Confidential information provided by SFIR.
520 Questionnaire to sugar competitors in Italy – Phase II.
521 Questionnaire to sugar competitors in Italy – Phase II.
522 Questionnaire to sugar competitors in Italy – Phase II.
523 Questionnaire to sugar competitors in Italy – Phase II.
524 Questionnaire to sugar competitors in Italy – Phase II.
525 Questionnaire to sugar competitors in Italy – Phase II.

	sales to industrial processors		sales to retailers		sales to industrial processors and retailers	
	Volume	market share	volume	market share	volume	market share
Südzucker[526]	[...]*	[30-40]*%	[...]*	[20-30]*%	[...]*	[30-40]*%
EDFM (incl. Brindisi)[527]	[...]*	[10-20]*%	[...]*	[10-20]*%	[...]*	[10-20]*%
Südzucker/EDFM combined	**[...]***	**[50-60]*%**	**[...]***	**[30-40]*%**	**[...]***	**[40-50]*%**
COPROB/Italia Zuccheri/Pfeifer & Langen[528]	[...]*	[20-30]*%	[...]*	[10-20]*%	[...]*	[20-30]*%
Tereos[529]	[...]*	[10-20]*%	[...]*	[0-5]*%	[...]*	[10-20]*%
Eridania/Cristal Union[530]	[...]*	[5-10]*%	[...]*	[30-40]*%	[...]*	[10-20]*%
Zuccherificio del Molise[531]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Société Vermandoise[532]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Sunoko[533]	[...]*	[0-5]*%	[...]*	[0-5]*%	[...]*	[0-5]*%
Total volume of competitors	**[...]***	**[40-50]*%**	**[...]***	**[60-70]*%**	**[...]***	**[50-60]*%**
Total market volume	**1,278,112**	**100%**	**453,827**	**100%**	**1,731,939**	**100%**

526 The forecast of overall sugar sales of [...]* tonnes for the campaign year 2011/2012 is based in the internal document submitted as Annex 6 in Südzucker's answer to the 3rd RFI in Phase I. This figure is then attributed between sales to industrial processors and sales to retailers on the basis of the ratios provided in Südzucker's answer to the 6th RFI in Phase II (including the clarification received by email on 13 January 2012).

527 Internal document entitled as "ESI's sales forecast for 2012" and submitted by EDFM on 13 January 2012.

528 Questionnaire to sugar competitors in Italy – Phase II.

529 Questionnaire to sugar competitors in Italy – Phase II.

530 Questionnaire to sugar competitors in Italy – Phase II.

531 Questionnaire to sugar competitors in Italy – Phase II.

532 Questionnaire to sugar competitors in Italy – Phase II.

533 Questionnaire to sugar competitors in Italy – Phase II.

(576) It follows from the above table that in particular Südzucker, but also EDFM have lower individual and combined market shares in the market for supply of white sugar to retailers than in the market for the supply of white sugar to industrial processors in Italy.

(577) Their combined market shares remain lower than 40%. In its case practice the Commission has only in some instances found there to be a dominant position with market shares below 40%[534].

(578) In the Italian market for the supply of white sugar to retailers, contrary to the market for the supply to industrial processors, branding and national consumer preferences play an important role and the established Italian market players are stronger competitors.

(579) In particular the current market leader Eridania would have post-merger a similar strength to the Parties with a market share of [30-40]*%. Eridania has the most significant Italian brand "Zefiro", which benefits from consumers' loyalty. Furthermore, COPROB with [10-20]*% market shares also holds an important market position and has a well-established brand on the Italian market. In reality, the current market leader, Eridania, would face post-merger an equally strong competitor, Südzucker/EDFM. The market investigation confirms the impression that the proposed transaction does not create competitive concerns, since six out of seven retail customers did not claim that the proposed transaction would have negative effects on their business[535].

(580) In addition, an independent study from 2009/2010 showed that in terms of penetration in household, the competitors' brands performed much better than Parties' brands. For instance the Zefiro brand (Eridania) had a penetration of 88,2% on the Italian market while the two other Eridania brands, Eridania and Tropical, reach respectively 64,7% and 41,2% of penetration. Comparatively Notadolce (SFIR) had a penetration of 35,3%. Südzucker was too small to be considered in this study[536].

(581) In view of the above, the proposed transaction does not significantly impede effective competition in the market for the supply of white sugar to retailers in Italy.

(ii) Greece

(582) The proposed transaction does not significantly impede effective competition in Greece under the narrowest possible geographic market definition.

(583) Indeed, should the proposed transaction be assessed under a <u>national</u> geographic market definition, as is likely to be the case in Greece[537] in the Commission's view, the combined market shares of the Parties would remain unaffected, since there

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534 See Paragraph 17 of the Horizontal Merger Guidelines.

535 Questionnaire to sugar customers in Italy – Phase II, questions 77 *et seq*.

536 Ricerca esclusiva MARK UP "Grocery: il mercato dello zucchero ricerca un elemento di rivitalizzazione".

537 Questionnaire to sugar customers in Greece – Phase II question 17 to 39 - Questionnaire to sugar competitors in Greece – Phase II, question 25 to 46.

would be no increment added by the proposed transaction and there is no indication that EDFM is likely to enter the Greek sugar market[538].

(584) As already analysed above, EDFM does not currently have sales of white sugar in Greece[539]. It was also confirmed by competitors and customers that EDFM has no sales of white sugar in Greece. As submitted by the notifying party and confirmed by [a large Greek sugar producer]*[540], [description of Greek operations between the two sugar producers]*[541].

(585) As stated in paragraph 60 of the Horizontal Merger Guidelines: "*For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger*".

(586) With respect to the likelihood that EDFM could constitute a potential competitor in Greece, there is no evidence at all that EDFM is likely to enter the Greek white sugar market(s) in the near future. It is true that in an internal document dated March 2009, EDFM was indicated to intend to sell [...]* tonnes from the Brindisi refinery's production to Greece. However, (i) no further internal documents mention any plans with regard to sales in Greece, (ii) since the beginning of the operation of the Brindisi refinery in December 2010 no white sugar sales have taken place in Greece, and (iii) the internal document in question was drawn up under the hypothetical assumption of a [...]* tonnes per year of production. At present therefore, there are no concrete plans indicating that EDFM plans to enter the Greek sugar market. Therefore, it is not likely that EDFM will enter the Greek white sugar markets and if it were to be likely, there is no indication either that it would occur within a reasonable time.

(587) Furthermore, it is not likely that EDFM will supply sugar in Greece through the purchase of [a large Greek sugar producer]*. The international bid for the sale of [a large Greek sugar producer]* was announced in June 2011 and, at present, [a large Greek sugar producer]* is interviewing the companies that have expressed interest. After the completion of this stage, candidates will submit their economic offer and the whole procedure is expected to be concluded in June 2012. Although EDFM is one of the 10 official candidates, there is no indication at present that EDFM will be the final purchaser of [a larger Greek sugar producer]*.[542]

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538 Horizontal Merger Guidelines, paras 58-60.

539 Südzucker's reply to the 3rd RFI in Phase II, Annex 35-1 Form CO Greece, page 15.

540 Südzucker's reply to Questions 6 and 11 of the Questionnaire to Sugar Suppliers/Producers in Greece – Phase II.

541 Südzucker's reply to the 3rd RFI in Phase II, Annex 35-1 Form CO Greece, page 14.

542 E-mail by [...]* entitled "ΕΠΙΣΤΟΛΗ ΣΤΟΝ k. [...]* 17-02-12" and received on 17 February 2012 at 13:00.

(588) In view of the above, EDFM does not exert significant constraining influence in Greece and there is no significant likelihood that it will grow into an effective competitive force in Greece.

(589) Therefore, the proposed transaction does not significantly impede effective competition in the Greek sugar market.

6.2. SUPPLY OF PREFERENTIAL RAW CANE SUGAR INTO THE UNION

(590) The supply of raw cane sugar is an upstream market to the production and supply of white sugar in the Union. Both Parties are active in the supply/delivery of raw cane sugar to European refineries (upstream) and in the production and supply of white sugar into the EEA (downstream).

6.2.1. Product market definition

(591) In its ABF/Azucarera[543] Decision, the Commission distinguished between sugar beet and sugar cane. Sugar cane can only be grown in tropical climate, while sugar beet favours more temperate climatic conditions like those in the northern Hemisphere. Because of these different growing conditions supply-side substitution is clearly not possible.

(592) At the same time demand-side substitutability seems to be limited as raw cane sugar refiners would have to invest a significant amount of money and time to be able to refine beet as well[544].

(593) White sugar production from raw cane sugar is mainly done in specialized refineries, that is to say refineries that are optimized for raw cane sugar and in which sugar cannot be produced from processing sugar beet. This is the case for EDFM's refinery in Brindisi as well as Südzucker's refinery in Marseille.

(594) It is possible to refine raw cane sugar in factories that are mainly dedicated to beet processing but this requires some significant modifications. In the Union some beet sugar factories have been equipped in such way. This is the case for example in a factory of the Eridania group in Minerbio (Italy) and Südzucker's refineries in Romania.

(595) However, the production costs of refineries that can process both cane and beet can differ in a significant way mainly due to input costs as stated by Tate & Lyle *"in the current sugar marketing year, cane refiners face over EUR 200 of extra raw material costs relative to beet processors,[...]* [t]he divested business* [SRB]*, like all cane sugar refiners in Europe, will find it very difficult to compete on a lasting basis on the Italian sugar market. This is because it will face unfair terms of competition for its raw material – raw cane sugar for refining – relative to the terms on which beet processors are able to secure raw material".*

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543 Commission Decision of 30 March 2009 in Case No COMP/M.5449 – ABF / AZUCARERA.

544 Indeed, as already explained sugar production from beet involves extracting the beet sugar content with water into a raw juice solution which is then filtered, purified and evaporated to remove moisture and impurities and then concentrated until crystallisation occurs. With regard cane sugar, the first stage of processing is carried out in factories close to or in the growing area. The cane is cleaned, crushed and shredded and sprayed with hot water in order to extract the juice.

(596) In addition, the supply/procurement of sugar beet within the EEA is strictly regulated by the Common Market Organisation in the sugar sector. The quota system currently in place does not allow production of sugar from beet beyond the allocated beet quota. Consequently, producers can only generate sugar from beet if they own the required quota. The procurement of raw cane sugar for refining has a different legal framework.

(597) Therefore, it is considered that the supply of raw cane sugar represents a separate relevant product market to be distinguished from the one for sugar beet.

6.2.2. Geographic market definition

(598) The analysis of the relevant geographic market for the supply of raw cane sugar has to take into account the current regulatory environment.

(599) It cannot be excluded that a further distinction should be made between preferential raw cane sugar (including raw cane sugar from ACP/LDC countries, CXL and TRQ quotas and schemes) and other schemes.

(600) In theory, imports of raw cane sugar originating from non-ACP countries and non-LDCs beyond the limited amount set by the quota are possible. However, that sugar imported from the world market under most favoured nation (MFN) conditions include costly appropriate import duties, namely 339 EUR/tonne for raw sugar for refining, plus additional special safeguard (SSG) duties.

(601) In comparison, ACP and LDC countries have duty-free-quota-free ("DFQF") access to the markets in the Union[545], subject to the transitional safeguard mechanism for sugar of 3.5 million tonnes per annum. CXL sugar quota set by the Commission (around 600,000-700,000 tonnes per year) can currently be imported at a rate of duty of EUR 98/tonne from countries like Brazil, Australia and Cuba. Finally, special rules have been agreed for exceptional tariff rate quotas (TRQs) for sugar, these exceptional quotas being deemed necessary from time to time by the Commission in case of exceptional market conditions.

(602) On the basis of the market investigation, it is considered that imports of raw cane sugar which benefit from DFQF or low duties (such as TRQs and CXL) are the only sustainable imports for refineries in the Union while raw cane sugar purchased on the world market is only for complementary volumes when the refineries do not manage to source sufficient quantities of preferential raw cane sugar.

[...]*[546]

[...]*

*[...]**

(603) As a result, the relevant geographic market for the market for the procurement of preferential raw cane sugar covers at least the ACP/LDC countries which are allowed

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545 Under the EPA and EBA schemes

546 Presentation to the Commission by Südzucker 02 December 2011.

to have quota-free and duty-free access to the EEA and could also comprise the main countries providing raw cane sugar under CXL and TRQ preferential quotas and duties such as Brazil, Cuba and Australia. However, the question whether the market could be even wider – eventually world-wide – can be left open as in any event the proposed transaction does not raise serious doubts irrespective of the exact scope of the relevant geographic market.

6.2.3. Effects on competition

(604) The changes brought about by the Union sugar market reform have led to an increasing need for imported raw cane sugar from qualified producers.

(605) In the sugar marketing year 2010/11 the expected use of sugar in the EU was around 17.2 million tonnes. Thereof 13.8 million tonnes were supplied by beet quota sugar production of the marketing year and 1.1 million tonnes by CXL and Balkan import quotas. The 700,000 tonnes under CXL quotas consisted almost exclusively of raw cane sugar for refining while the 400,000 tonnes imported from the Balkans was white sugar for direct consumption

(606) The remaining 2.3 million tonnes were partially covered by 1.5 million tonnes of imports from ACP/LDC producers, 90% of which being raw cane sugar for refining and 10% white sugar for direct consumption[547].

(607) Therefore, for the marketing year 2010/2011, about 2.5 million tonnes of preferential raw cane sugar for refining (including raw sugar from ACP/LDC countries and raw sugar under CXL quotas) were imported into the EEA. This is less than what was necessary to close the gap with European demand. One reason for this gap was that international market prices were briefly and for the first time higher than prices in the Union. Another reason was that the ACP and LDC countries were not able to expand their sugar production as fast as initially expected. It is for that reason that the Commission allowed the release of 0.8 million tonnes of extraordinary tariff reduced imports (TRQ's)[548].

(608) Cane sugar refineries are currently operating well below capacity in the EEA, a situation that can be economically difficult for any sugar processor, beet or cane, given the high fixed costs of sugar refining plants.

(609) Therefore, there is a high demand for preferential raw cane sugar for refining in the Union and there is raw cane sugar excess refining capacity in the EEA.

The Parties do not have the ability to foreclose access to preferential raw cane sugar

(610) For the marketing year 2010/2011, EDFM has imported around [...]* tonnes of preferential raw cane sugar into the EEA[549] while Südzucker imported around [...]* tonnes of raw cane sugar, mainly from [...]*[550].

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547 See 3rd request for information to EDFM. 10 December 2011.

548 See Form CO and 4th request for information to Südzucker 14 October 2011.

549 3rd request for information to Südzucker 9 October 2011and 2nd request for information to EDFM/ Annex 9A Phase II.

(611) The Parties' combined market share represents around [30-40]*% of the whole amount of preferential raw cane sugar that entered into the EEA. Their combined shares would be lower if the raw cane sugar imported under exceptional measures (TRQ's) were taken into account. Südzucker did not import raw cane under this scheme in 2011 while EDFM imported around [...]* tonnes (representing less than [10-20]*% of sugar available under TRQ contracts).

(612) Out of the [...]* tonnes of preferential raw cane sugar imported into the EEA by EDFM, only [...]* tonnes were delivered to third party refineries while the remaining [...]* tonnes were consumed captively by the refineries in which EDFM has a participation in (Brindisi and DAI). [...]*.

(613) Südzucker is also primarily a captive user. It delivers preferential raw cane sugar mainly to its own [...]*[551]. Therefore, Südzucker no longer has specific access to preferential raw cane sugar.

(614) To summarize, out of the total preferential raw cane sugar brought by the Parties into the EEA, more than [80-90]*% was captive and directly supplied to the refineries where they have participations.

(615) Another important preferential raw cane sugar importer into the EEA is Tate & Lyle which has raw cane sugar refining capacities of more than 1.3 million tonnes. According to the notifying party, Tate & Lyle imported between 700,000 and 800,000 tonnes of preferential raw cane sugar for its two United Kingdom based refineries. Therefore, it would represent around 30% of the total import of preferential raw cane sugar. The remaining preferential raw cane sugar that entered into the EEA was mainly imported by British Sugar (ABF) for its Spanish refineries (around 80,000 tonnes)[552], by Litex (Bulgaria), by CristalCo and Tereos (France) or by Pfeifer & Langen (refinery in Romania).

EDFM's role as independent supplier of raw cane sugar has [...] over time*

(616) The Parties estimate that 10 major long term supply contracts were negotiated with ten ACP/LDC countries, covering an estimated three quarters of available supplies in the 2011/12 marketing year and a similar share of annual quantities until 2015. Those ten ACP/LDC countries are Belize ([...]*), Fiji ([...]*), Guyana ([...]*), Jamaica ([...]*), Malawi ([...]*), Mauritius [...]*), Mozambique ([...]*), Swaziland ([...]*), Zambia ([...]*) and Zimbabwe ([...]*)

(617) As can be seen, EDFM is the only "trader" having [...]* agreements with raw cane sugar suppliers in ACP/LDC countries ([...]*) and good relationships in "CXL" countries such as Brazil. For that reason, some refiners raised concerns that post-transaction the main independent supplier/trader of raw cane sugar, EDFM, could have the incentive to stop supplying other refineries.

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550 1st request for information to Südzucker 26 September 2011. Confirmed in the Response to 6.1(c) decision 17/11/2011.

551 4th request for information to Südzucker 14 October 2011 and Annex Q3 A1 [...]*

552 But also for a number of other refineries in the Union though its joint venture Mitra that it holds with Illovo which controls a significant amount of raw cane in Malawi, Zambia, Swaziland, Mozambique and Tanzania.

(618) Even though EDFM has supplied preferential raw cane sugar to third party refineries in the past, the quantities have [...]* in the last years, in particular due to [...]*.

(619) In September 2008, EDFM acquired a [...]*% interest in the DAI refinery. Prior to that, it had no interest in - or agreement to provide raw cane sugar to - any refinery in the EEA. Therefore, in FY2007/2008 (i.e. the year ending 31 September 2008), 100% of the [...]* tonnes that EDFM brought into the EEA were "independent" volumes to which any EEA refiners could have access[553].

(620) In the FY2008/2009, [...]* tonnes were delivered to DAI and were therefore no longer available for the merchant market. Therefore, in FY 2008/2009, EDFM was involved in bringing in [...]* tonnes of independent raw cane sugar.

(621) In the FY2009/2010, EDFM brought [...]* tonnes of raw cane sugar into the EEA Excluding the [...]* tonnes delivered to DAI, [...]* tonnes of independent raw cane sugar were brought into the EEA by EDFM. Even if EDFM acquired its stake in Brindisi's SRB in December 2008, SRB only started producing in December 2010, therefore not requiring raw cane sugar supplies in FY 2009/2010. However, if one were to take the view that any volumes provided to SFIR (the joint venture party in SRB) were already not independent, then EDFM would have brought only [...]* tonnes into the EEA in that period (i.e. less the [...]* tonnes delivered to [...]*).

(622) By FY2010/2011, Brindisi was already producing and the amount of non-captively consumed raw cane sugar which EDFM brought into the EEA ([...]*) was [...]* tonnes. The customers for this "independent" raw cane sugar were [...]*[554],.

(623) Therefore, the role of EDFM as "independent" raw cane sugar supplier into the EEA has been [...]* over the past three years.

(624) Moreover, the quantities of preferential raw cane sugar delivered by EDFM to third party refineries represent usually less than 10% of those refinery's needs for raw cane sugar. Therefore, even though EDFM has provided preferential raw cane sugar to a number of refineries in the Union which do not all have long term contracts with ACP/LDC countries, most of those refineries only relied on EDFM for a small proportion of their needs, mainly as additional supplies that allowed refineries (temporarily) to operate at full capacity[555].

(625) With regard to CXL sugar, which require the payment of some duties, even though EDFM delivered more than [...]* of its quantities available to third party refineries, the raw cane sugar imported under this scheme does not request long term contacts and is mainly imported on spot basis. That explains why most of the refiners argue that if EDFM, after the proposed transaction, decided not to supply third party refineries with CXL sugar, they could find alternative volumes with other traders

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553 See 3rd request for information to Südzucker 09 October 2011.

554 See 3rd request for information to EDFM. 10 December 2011. [...]*.

555 See 3rd request for information to Südzucker 09/10/2011, Annex 6 corrected and 3rd request for information to EDFM - 10/12/2011

such as Cargill, Dreyfus, Bunge, Czarnikow or Sucden[556]. These players can readily replace EDFM:

- Cargill has extensive operations in corn, sugar cane and soya operations around the world and most notably in USA. EDFM estimates that Cargill accounted for around 10 million tonnes of total sugar traded in 2010/2011.

- Louis Dreyfus is a large cereal and sugar trading and producing company, which is privately held. Louis Dreyfus has extended its activities into sugar production in Brazil and is increasing its trading operations. EDFM estimates that Louis Dreyfus accounted for around 2.6 million tonnes of total sugar traded in 2010/2011.

- Bunge is a cereal company that has expanded in recent years to sugar operations, both in terms of trading and production, with investments in Brazil. Bunge acquired the trading desk of Tate & Lyle and has maintained the skills base of the old Tate & Lyle operations. EDFM estimates that Bunge accounted for around 4 million tonnes of total sugar traded in 2010/2011.

- Sucden almost exclusively trades sugar with investments in Russia and Brazil. EDFM estimates that Sucden accounted for around 2 to 5 million tonnes of total sugar traded in 2010/2011.

- Czarnikow is a brokerage trading business with exclusive links to the Australian sugar industry. It was amongst the largest brokers of raw sugar to the Union market until these operations were undermined by regulatory changes in Australia and the demise of brokerage activities in general. EDFM estimates that Czarnikow still accounted for around 5 million tonnes of total sugar traded in 2010/2011.

- Glencore is multinational company in metals, oil, and soft commodities. Although its sugar operations have not expanded significantly over the years, it is estimated that Glencore accounted for around 1.5 million tonnes of total sugar traded in 2010/2011.

(626) A majority of those sugar traders, which are either already present in the supply of preferential raw cane sugar in the Union like Czarnikow and Sucden or preparing an entry and expansion strategy such as Glencore and Louis Dreyfus argued they compete with EDFM for the supply of raw cane sugar, with some of them even arguing they could replace EDFM if it left the market[557]. That mainly applies for CXL countries (Brazil, Australia, Latin America) in which these competing traders have strong ties.

(627) This is also confirmed by [a sugar trade]* which stated "*where the availability of sugar import licenses to the EU is controlled by the sugar refinery (erga omnes, special quotas, ipr) allowing the refinery to freely purchase world market sugar for import into the EU, we would be currently able to replace the quantities* [delivered

[556] Questionnaire to raw cane sugar suppliers– Phase II, questions 32-44-46-48

[557] Questionnaire to sugar suppliers– Phase I, questions 26; Questionnaire to raw cane sugar suppliers– Phase II, questions 38

by EDFM]*"[558]. In addition, the presence of alternative traders was confirmed by [a sugar trade]* which stated "*Companies such as Cargill, Sucden and Czarnikow are all credible suppliers because of their long-standing relationships*"[559].

(628) Given the [...]* presence of the Parties on the overall supply of preferential raw cane sugar into the EEA, and in particular the [...]* present merchant market position as a result of [...]* and given the number of other refiners having directly access to preferential raw cane sugar, it seems unlikely that the Parties could foreclose the access to this raw material.

Lack of incentive to foreclose access to raw cane sugar

(629) The Parties submit that there is no risk of foreclosure because raw cane sugar producers in the ACP/LDC countries would oppose the Parties engaging in such foreclosure strategies. In fact, any refusal by EDFM to supply Südzucker's competitors would result in the producers of raw cane sugar losing significant profits.

(630) According to the Parties, it is likely that the raw cane sugar producers will react in either two ways: (i) choosing another trader/broker or (ii) importing the raw cane sugar to the independent sugar refineries themselves.

(631) The Commission's market investigation has indicated that both scenarios are realistic and would be effective. As confirmed by EDFM's competitors[560], the trade and brokerage of raw cane sugar into the EEA is currently a very profitable activity. Therefore, EDFM's main activity being trading, there would be no reason that EDFM would halt the import of small quantities of preferential cane sugar to independent refineries that it is currently doing. If EDFM stopped those imports, as already explained above, other traders/ brokers would be a ready substitute to EDFM. Furthermore, the raw cane sugar producers have developed strong ties with the main refineries and already now increasingly arrange all aspects of logistics, employing their own freight-forwarding companies.

(632) In any event, Südzucker is currently not amongst the most important EEA customers for raw cane sugar. Südzucker currently has four raw cane sugar refineries with an annual output of [...]* tonnes in total. [...]*[561] [...]*.

No effect on competition

(633) Despite the genuine scarcity of preferential raw cane sugar available for the EEA and despite the fact that EDFM is an important independent player on this market, the proposed transaction is unlikely to have an impact on the other players given (i) the low quantities and percentage of Parties' preferential raw cane sugar currently delivered to third Parties, (ii) the presence of a wide number of already vertically integrated players, (iii) the [...]* role of EDFM as an -independent trader over the last years (iv) the presence of alternative well-establish traders, in particular for the supply of CXL sugar that could readily replace EDFM in case it would stop

558 Questionnaire to sugar suppliers– Phase I, questions 25
559 Questionnaire to raw cane sugar suppliers– Phase II, questions 45
560 Questionnaire to raw cane sugar suppliers– Phase II, questions 16-28
561 Südzucker also has three refineries in Romania, each with an annual capacity of around [...]* tonnes.

supplying its current quantities to third party refineries and (v) the potentially low demand from Südzucker in DFQF raw cane sugar for its refineries.

(634) In the light of the above, it is concluded that the merged entity would have neither the ability nor the incentive to foreclose access to preferential raw cane sugar input to its competitors in the downstream market for the production of white sugar. In addition, given the high percentage of the Parties captive sales and the scarcity of preferential raw cane sugar, the merged entity would have neither the incentive nor the ability to foreclose access to EEA customers of preferential raw cane sugar.

6.3. MOLASSES

6.3.1. Description of molasses

(635) Molasses is a by-product of the sugar refining process, and is not subject to a regulatory regime. There are two types of molasses, derived from either sugar cane processing (cane molasses) or sugar beet processing (beet molasses). The notifying party estimates that roughly 70% of the Union demand for molasses is beet molasses and 30% cane molasses[562].

(636) As molasses is a by-product of sugar refining, sugar producers such as Südzucker are the "natural suppliers" of molasses. In the context of the sugar industry reform, sugar producers had to reduce their output, which led to a decrease in the production of molasses in the Union. As the consumption in the Union of molasses is significantly higher than its production, imports are necessary. According to the Parties, roughly one quarter of the molasses consumed in the EEA are imported cane (for example from Pakistan, Thailand, India, Morocco, Guatemala, El-Salvador, Mauritius, Florida) and beet (from, among others, Egypt, Morocco, Ukraine, Russia, Balkan countries, etc.) molasses[563], mainly brought in and sold by traders such as EDFM.

(637) Südzucker stores molasses in tanks at its respective sugar factories and sells it to the customers usually on terms agreed once a year. Whilst beet molasses are in general marketed locally by Südzucker's entities in the production countries, significant volumes are also shipped cross-border. For example, [...]*[564].

(638) EDFM is a trader of molasses, buying beet molasses within the EEA or importing beet and cane molasses on its own account. In the campaign year 2009/2010, EDFM imported into the EEA [...]* tonnes of cane molasses (mainly from [...]*) and [...]* tonnes of beet molasses (mainly from [...]*)[565].

(639) There are three sizeable international traders that import molasses (mainly cane molasses) into the EEA, namely EDFM, United Molasses and Peter Cremer Traders also buying beet molasses from sugar producers within the EEA in order to deliver it to customers, which can be located within or outside the Member State of the production. In that respect, a trader will react to occasional imbalances of supply and demand.

562 Form CO, p.112.
563 Form CO, p. 90.
564 Form CO, p. 133.
565 Form CO, Annex 7.5.a.

6.3.2. *Product market definition*

(640) Molasses is mainly used in the fermentation industry or incorporated in animal feed products. The most important sectors of the fermentation industry using molasses are yeast, citric and amino acid, alcohol and increasingly the bioethanol industry. With respect to the animal feed industry, one could distinguish between, on the one hand, direct sales to farmers that buy molasses to mix it with other feedstuff and feed it directly to their own animals and, on the other hand, sales to compound feed producers, who manufacture animal feed from different feedstuffs (including molasses) and resell the resulting animal feed to farmers, their cooperatives, or animal feed wholesalers and distributors. In very small quantities molasses is also used for special purposes in the chemical, pharmaceutical, cement and tobacco industry.

6.3.2.1. Commission's findings in previous cases

(641) In case ABF/Azucarera[566] the Commission found that within molasses, there is a degree of substitution between beet and cane molasses, and that this degree varies between the customer groups considered: animal feed producers can easily substitute the two types when adding them into their final animal feed products, while customers from the fermentation industry have certain limitations to switch between the two types notably because (i) there are certain limitations for usage of cane molasses depending on the plants' constitution (differences in the composition of beet and cane molasses affect the effluent water quality and therefore additional investments would be required to switch to cane molasses); (ii) additional equipment is necessary for processing cane molasses (separator/centrifuges). In general, due to these constrains, these producers showed reluctance to switching from beet to cane molasses above a certain proportion.

(642) The market investigation in this previous case found that certain molasses customers can substitute molasses altogether. Animal feed producers indicated that they can switch to materials like glycerol or sugar syrups without any investments, and they in fact compare the prices of alternative nutritional inputs and switch swiftly. Yeast producers can also use alternative materials to molasses. In fact, due to a general shortage of molasses in the recent years (caused inter alia by reduction of sugar beet quota in the Union) resulting in increased prices for molasses, yeast producers adapted by partly switching to industrial sugar (produced either off-quota in the Union, or imported from third countries). However, when industrial sugar reaches a certain proportion of the mix with molasses, additives have to be used which increase the cost of the primary material. Therefore, yeast producers prefer to keep the proportion of industrial sugar below a certain percentage[567].

(643) The Commission however finally decided to leave open the precise scope of the relevant product market in that case[568].

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566 Commission Decision of 30 March 2009 in Case No COMP/M.5449 - ABF/Azucarera.

567 Questionnaire to molasses competitors, Phase II, question 16-17 and 42.

568 In the absence of any competition concerns, it has not been considered necessary to reach a conclusion on the precise scope of the relevant product market, and the questions of whether beet and cane molasses belong to the same market, and whether the market also comprises alternative materials such

6.3.2.2. View of the notifying party

(644) The notifying party is of the opinion that the relevant product market encompasses the supply of both beet and cane molasses, irrespective of the end-use application. This is because both products represent a source of energy as well as providing a means of binding other ingredients together, where this is necessary. The notifying party, therefore, submitted that beet and cane molasses are completely interchangeable within each client group[569].

(645) The notifying party also puts forward that it is not appropriate to consider customer groups for molasses as being distinct markets and points to the considerable degree of demand substitutability of molasses with alternative inputs[570].

6.3.2.3. Commission findings in the case at hand

(646) The market investigation conducted in the present case has not revealed any element that would contradict the Commission's previous findings. In fact, it confirms that customers in the fermentation industry, such as yeast and citric acid, can substitute beet and cane molasses only to a limited extent. The degree of substitution between molasses and other products (e.g. grains for the animal feed industry including farmers; industrial sugar for yeast producers) also varies between the different customer groups: the animal feed industry seems to be more able than yeast producers to substitute molasses with other products. For example, one animal feed producer explained that molasses is used *"as an energy ingredient. From the moment the molasses comes to expensive, it will disappear from our feed product.[...]* it will be replaced by cereals (corn, wheat, …), fats, oils,… all depending on the prices for all these products"*[571].

(647) Internal documents submitted by the Parties also support the proposition that there are different switching prices for different customer groups, as can be seen from the [...]* :

[...]*

(648) Internal documents submitted by the Parties point to some degree of segmentation of the market. Indeed, when EDFM assesses its position as a supplier of molasses it distinguishes between beet and cane molasses, as well as between different customer groups, or even further within a customer group (e.g. EDFM assesses its competitive position also with respect to only "yeast" or "farms" customer groups). Moreover, EDFM explicitly refers in its internal documents to "markets for molasses".

(649) However, for the purpose of this Decision, the question of whether the market for molasses has to be further delineated can be left open as no competition concerns would arise irrespective of the precise product market definition.

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as industrial sugar have been left open. See Case COMP/M.5449 - ABF/Azucarera – decision of 30 March 2009, paragraph 39.

569 Form CO, p.54 and 59.

570 Form CO, p.61 and 62.

571 Questionnaire to molasses customers, Phase I, question 38.

6.3.3. Geographic market definition

6.3.3.1. Commission's findings in previous cases

(650) In case ABF/Azucarera, the Commission left open the precise scope of the relevant geographic market[572]. The Commission stated that the market investigation showed that the purchasing scope of beet molasses seemed to be more limited compared to cane molasses, for which there is no EEA production and all of which is imported from outside Europe. However, whereas the majority of beet molasses was still supplied locally where beet production still existed, imports of beet molasses (via specialized traders) were increasing significantly in regions where beet quota reduction led to less domestic production.

(651) In 2002, the French competition authority considered, but ultimately left open the question of whether the market is EEA-wide or even worldwide[573].

6.3.3.2. View of the notifying party

(652) The notifying party is of the opinion that the market for molasses is at least EEA-wide, on the grounds that the European market suffers from a structural deficit that requires significant imports and that there is lively trade between different Member States. Even though molasses produced in the Union are typically transported around the production facilities due to the limited intrinsic value of molasses and the subsequent need to optimize transport costs, the notifying party argues that a significant amount crosses national borders, for instance in train wagons[574].

(653) In this respect, the Parties refer to F.O.Licht statistics on cross boarder molasses trade, and particularly to the "World Molasses and Feed Industry Report" published on 14 November 2011 in order to demonstrate that there is a lively trade across borders to and from the neighbouring Member States[575]. Based on the F.O.Licht data for the period October 2009 to September 2010, the Parties have provided a map of the Central Europe region (i.e. the areas of concerns in the first phase market investigation[576]) showing that Member States are connected to each other when it comes to the supply of molasses[577].

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572 Commission Decision of 30 March 2009 in Case No COMP/M.5449 - ABF/Azucarera. .

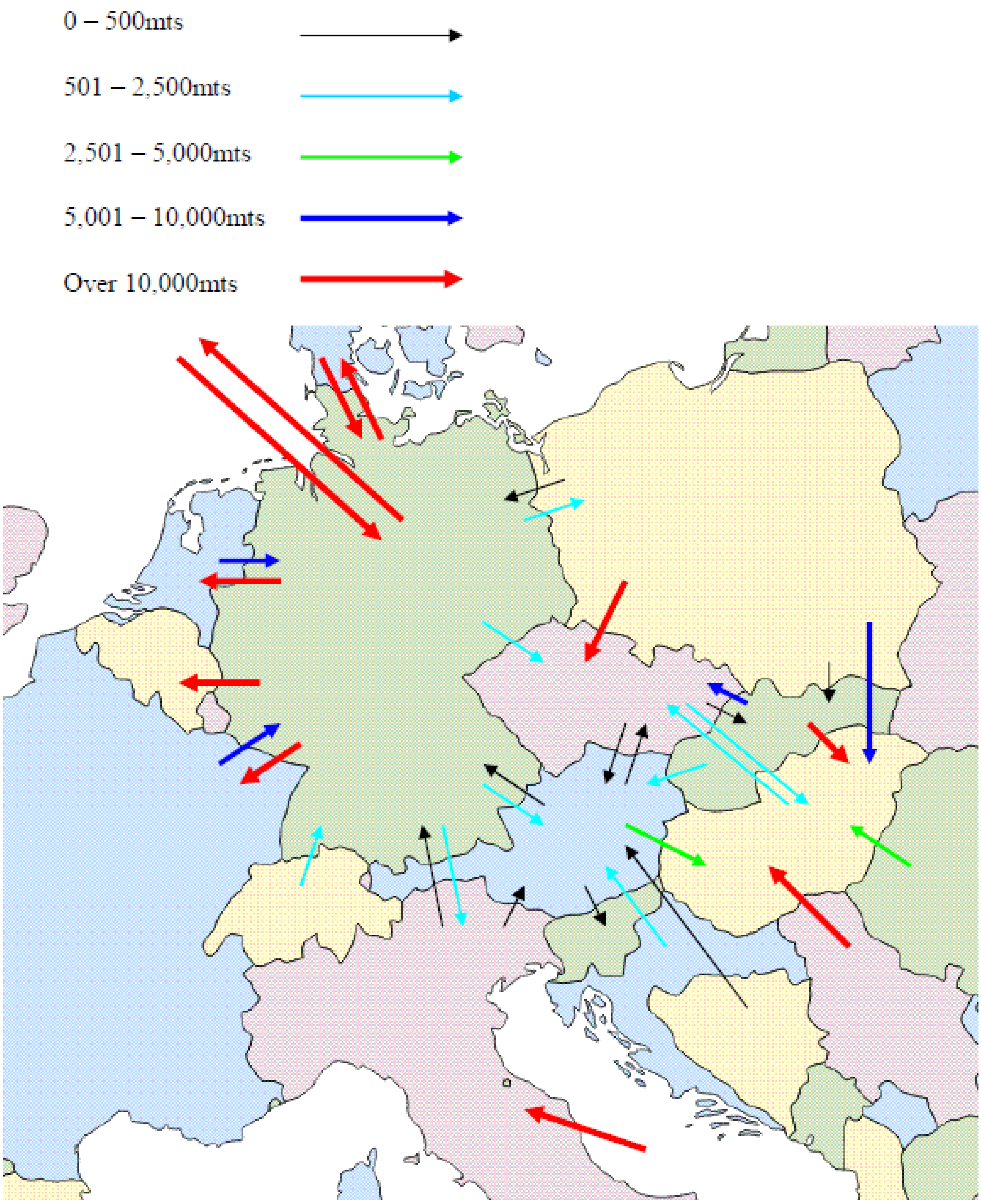
573 Lettre du ministre de l'économie, des finances et de l'industrie du 5 décembre 2002 aux conseils du groupe de l'Union des sucreries et distilleries agricoles et de la société Union des planteurs de betteraves à sucre (Union SDA/Union BS/ Béghin-Say).

574 Form CO, p.76 and 77.

575 See reply to the 8th RFI to Sudzucker and EDFM, Phase II, p. 10.

576 At the end of Phase I, the Commission had as preliminary conclusion that the concentration raised doubts as to its compatibility with the internal market, with respect to the market(s) for molasses in Austria, Czech Republic and Slovakia. It was not excluded that the transaction also raises doubts with respect to the market(s) for molasses in Germany or alternatively southern Germany and Italy. The main reason for these doubts were (i) the high market shares of the parties post-transaction, (ii) the elimination of an competitive pressure on Südzucker/EDFM, (iii) the limited ability of remaining competitors to hinder the merger entity market power, and (iv) the significant barriers to entry and expansion.

577 See reply to the 8th RFI to Sudzucker and EDFM, Phase II, p. 11.



6.3.3.3. Commission findings in the case at hand

(654) The market investigation conducted by the Commission in this case was not conclusive with respect to the geographical scope of the market. Although it provided some indications that the market could – at least for beet molasses - be narrower than the EEA as submitted by the notifying party, it also clearly shows that, from a customer perspective, national borders are not relevant when looking for supplies.

(655) On the one hand, respondents to the Commission's requests for information explained that transport costs are high in proportion to the value of molasses, since

they may represent, according to some respondents, up to 20% of the final price of molasses. For that reason, customers try to source their molasses from suppliers located in proximity, in particular from nearby beet sugar refineries. That is evidently the case during the sugar processing season (lasting 3 months) when sugar producers need to sell molasses in large volumes as it otherwise blocks the sugar production process[578].

(656) As regards the imports of molasses (both cane and beet), accessibility and proximity to the port facilities are important factors determining the extent to which customers can source imported molasses. In areas away from the sea, imports of molasses are therefore rather limited. In the Czech Republic, for example, there are no imports of cane molasses[579].

(657) The concentration of demand and supply around ports and sugar refineries does however not imply that the market should be defined as national or even local. The market investigation provided evidence supporting a larger than national definition of the relevant geographic market based on a chain of substitution effect. The natural geographical area of supply of a given molasses production or storage facility can be represented by concentric circles with various lengths of radiuses determined by transport costs. In this light the various supply areas can be seen as a series of overlapping circles with their centres at the sugar plants and molasses storage tanks. Given the number and dispersion at least in northern and central Europe of the individual molasses supply points, price effects seem to be transmitted from one circle to the other. Moreover, some suppliers and customers also seem to supply and buy molasses over much quite long distance beyond the radiuses of the 'natural' supply areas. Finally, large molasses customers such as the fermentation industry have significant coastal storage capacity from which smaller inland terminals are supplied. There appears therefore to be a ripple-through effect of prices which would mean that, as such, the limitations imposed by the limited distance over which molasses can be transported by truck do not exclude the finding of a much broader relevant geographic scope of the market[580].

(658) The results of the market investigation were as follows. First, the geographic overview of how supply and demand are organised in Europe, and in particular in Austria, the Czech Republic, Germany, southern Germany and Slovakia (i.e. the areas of concerns in the first phase investigation) shows that even though molasses is typically transported around the production facilities, molasses producers and traders are to varying extents[581] involved in cross-border sales. For example, one competitor (a trader active in several Member States) explained that from its storage location in Bremen, cane molasses is delivered into Germany, Netherlands, Austria, Switzerland

578 Questionnaire to molasses customers, Phase II, questions 42-46, 61-66 ; Questionnaire to molasses competitors, Phase II, question 6-17

579 Questionnaire to molasses customers, Phase II, questions 42-46, 61-66 ; Questionnaire to molasses competitors, Phase II, question 6-17

580 Questionnaire to molasses customers, Phase II, questions 42-46, 61-66 ; Questionnaire to molasses competitors, Phase II, question 6-17

581 See replies to Questionnaire to molasses competitors, Phase II, question 6. Some of the respondents also explained that they have chosen a different business model, preferring to focus only on national sales.

and Poland[582]. Another competitor, a molasses producer, explained that it also sells molasses from the Member State of production to other Member States[583].

(659) The Parties follow a similar business model with respect to their distribution of molasses. Although most of the molasses sold in a given Member State were produced or sourced locally, molasses are also transported beyond the boundaries of the Member State of production. For example, [...]*[584]. [...]*

(660) In that respect, the replies to the Request for Information sent during the second phase market investigation also indicate that national boundaries may not be the appropriate way to assess the geographic scope of the market for molasses[585]. Indeed, with one exception, the customers explained that national borders are not important when looking for a molasses supplier[586].

(661) Secondly, customers do not seem to highly value the local presence of a supplier. Only a limited number of customers responding to the second phase questionnaires consider purchasing molasses only from a supplier that has production/storage facilities in the Member State where they operate[587].

(662) Thirdly, in contrast to the sugar markets, the vast majority of molasses are supplied directly by producers, importers and traders, without the need for an intermediary that supplies the molasses through wholesale operations or national/local distribution centres.

(663) Fourthly, the market investigation confirmed the notifying party's submission that some customers (e.g. in the fermentation industry) import molasses directly into the EEA, although this practice is limited to a few customers with high volume demands[588].

(664) Fifthly, internal documents of Südzucker show that the management of the molasses business attaches great importance to the prices of Molasses 'ex tank' in Bremen. This shows that prices in the north of Germany are of importance for pricing negotiations and pricing strategies in the south of Germany.

(665) However, while the market investigation shows that the market may be Union wide, for the purpose of this Decision, the question of the precise scope of the geographic market definition for molasses can be left open as no competition concerns would arise irrespective of the geographic market definition retained (i.e. Union-wide markets or national).

[582] Questionnaire to molasses competitors, Phase II, question 6.
[583] Questionnaire to molasses competitors, Phase II, question 6.
[584] See reply to the 8th RFI to Südzucker and EDFM, Phase II, p. 12.
[585] Questionnaire to molasses competitors, Phase II, question 15; Questionnaire to molasses customers, Phase II, questions 64 and 67.
[586] Questionnaire to molasses customers, Phase II, questions 64.
[587] Questionnaire to molasses customers, Phase II, questions 65.
[588] Questionnaire to molasses customers, Phase II, question 89.

6.3.4. *Effects on competition*[589]

(666) The Parties' activities overlap with respect to the supply of molasses to both fermentation customers and farmers / animal feed customers. Depending on the geographic market definition, affected markets would arise at both the EEA and national levels[590].

(667) During the first phase investigation, several competitors and customers of the Parties as well as the Confederation of EU Yeast Producers complained with respect to the negative effects arising from the proposed transaction. However, on the basis of the in-depth investigation, it has been considered that these initial concerns are not well-founded as will be further demonstrated.

(668) In addition to the arguments specifically developed for each affected market, the following considerations on the dynamics of the molasses markets need to be considered when assessing the effects of the proposed transaction.

(669) First, Südzucker sells most[591] of its molasses directly to customers, without the intervention of traders or other intermediaries (only 5-10% of cross-border sales are directed to traders)[592]. This is a characteristic of the industry. As explained by another major sugar/molasses producer, it also prefers to sell directly to customers. That molasses producer also explained that, in the last years, it increased the proportion of its direct sales while decreasing its sales through traders[593].

(670) Secondly, customers confirmed that they prefer to source directly from molasses producers. The direct supply relationships are more important for customers from the fermentation industry as this enables them to track quality and origin of the molasses which are critical to the fermentation production processes. Such a relationship does not appear important for farmers and animal feed producers[594]. It therefore appears that the role of traders is focussed on molasses imports and spot sales rather than continued supply relations with customers.

6.3.4.1. Assessment on the basis of an EEA-wide market[595]

(671) Should the market be defined as EEA-wide, the combined entity would hold a market share of [30-40]*%[596] on the overall molasses market (i.e. comprising beet

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589 The market shares referred to in this Decision are the Parties' best estimates provided in the Form CO, pp.81-83 and Annex 7.3d.

590 Given the limited overlap between the Parties, Slovenia and Italy will not be further considered for the purpose of this Decision (EDFM had sales of only [...]* tonnes of beet molasses in Slovenia; Südzucker sold in Italy [...]* tonnes of beet molasses). Form CO, Annex 7.3d.

591 In [...]*, for example, only [...]* of its production has been sold through traders since out of the [...]* tonnes of molasses produced in the campaign year 2009/2010, almost [...]* were delivered directly to customers ([...]* tonnes), and [...]* ([...]*) was used internally.

592 See reply to the 2nd RFI to both Parties, Phase II, question 2.

593 Questionnaire to molasses competitors, Phase II, question 17(d) and (e).

594 Questionnaire to molasses competitors, Phase II, question 65; Questionnaire to molasses customers, Phase II, question

595 Südzucker does not sell molasses in any EEA Member State (Iceland, Liechtenstein, Norway). EDFM as well, does not sell molasses in Norway, Liechtenstein and Iceland (deliver around [...]* tonnes of molasses on a CIF basis to Norwegian ports, which volumes are then imported into the EU by the relevant customer). See reply to the 2nd RFI to both Parties, Phase II, question 1.

and cane molasses) for all applications. On the basis of a narrower market definition (i.e. distinguishing between beet and cane molasses), the proposed transaction would lead to a combined market share of [20-30]*% on the potential market for the supply of beet molasses (Südzucker [10-20]*%; EDFM [10-20]*%)[597].

(672) Should the market be delineated according to the molasses application, Südzucker would not be an important supplier to farmers ([0-5]*%) and to compound feed producers ([0-5]*%). EDFM is a more important supplier with respectively [20-30]*% and [40-50]*%. The proposed transaction would thus bring no important change to the market structure for the highly volatile demand for molasses in animal feed. Other traders such as United Molasses and Peter Cremer are considered by the market as ready alternatives. It is to be noted that Peter Cremer is part of one of Europe's largest compound feed manufacturer Peter Cremer Holding GmbH & Co. KG.

(673) In any case, farmers can and do switch between different animal feed products in order substitute molasses. According to the information submitted by the Parties, of all raw materials used for animal feed in the EEA, less than 2% would be represented by molasses[598]. Moreover, farmers account for less than 5% of the European molasses consumption[599].

(674) With respect to the supply of molasses to the fermentation industry, comprising yeast, citric acid and alcohol producers, the combined entity would have a combined market share of around [40-50]*% (Südzucker [20-30]*% and EDFM [10-20]*%). Within the fermentation industry, especially the yeast producers are important customers for Südzucker, as the latter sells almost all its molasses directly to the yeast industry, trying to avoid any involvement of traders[600]. Other sugar producers such as Nordzucker ([5-10]*%), but also molasses traders such as United Molasses ([5-10]*%) are suppliers to the fermentation industry.

(675) Fermentation customers are usually multi-national companies, who follow a multi-sourcing strategy, yet prefer sourcing directly from producers instead of passing through traders. This is mainly because *"a trader has no specific knowledge and no control over product quality compared to a sugar producer who can try to improve the quality of its product if needed"*[601]. The second phase market investigation also revealed that fermentation customers have some experience with using other input materials than molasses, such as industrial sugar which can notably be imported from outside the EEA.

(676) During the market investigation no substantiated concerns were expressed with respect to the impact of the proposed transaction for fermentation customers. On the contrary, the second phase market investigation indicated that, if there is a concern

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596 Form CO, p.81.

597 Südzucker operates also two raw cane refineries in the EEA. Should a distinct market for the supply of cane molasses be considered, Südzucker's market share will be less than [0-5]% (Südzucker does not import cane molasses into the EEA; Form CO, p.114). Therefore, this market is not further addressed in this Decision.

598 Form CO, p.106.

599 Form CO, p.105.

600 Form CO, p.96.

601 Questionnaire to molasses competitors, Phase II, question 58.

about access to molasses, this is not merger specific, but rather a consequence of the scarcity of molasses due to the sugar reform and the development of the bioethanol industry[602]. In addition, one customer who complained about the effects of the proposed transaction during the first phase investigation confirmed that it could switch from molasses to glucose for which it has its own production facilities (molasses is cheaper than sugar glucose but it requires a more expensive multi-stage process in order to be converted into the fermented product). Moreover, this customer confirmed that it has its own molasses storage facilities and is therefore capable of buying molasses at favourable prices when sugar manufacturers need to sell off this by-product of sugar production[603]. Whilst third party storage bears an important cost that cannot be compensated through the limited intrinsic value of molasses, large customers have their own dedicated molasses storage capacity.

6.3.4.2. Assessment on the basis of national markets

(677) When considered on the basis of national markets, the market structure in those countries where the proposed transaction leads to affected markets is as follows:

Austria

(678) In Austria, Südzucker is the only sugar manufacturer. Consistent with the limited economic rationale to transport molasses over long distances it also holds a high market share in relation to the supply of molasses. In Austria, 82% of molasses demand is met by beet molasses, with cane molasses accounting for the remainder.

(679) In addition to Südzucker's [70-80]*% market share, EDFM accounts for [10-20]*% of the market of the overall molasses market (i.e. including beet and cane molasses). If considering only the supply of beet molasses, Südzucker accounts for [70-80]*% of the market, while EDFM accounts for no more than [5-10]* of the market. The Parties' activities in Austria overlap only with respect to the supply of molasses to compound feed producers. In line with its overall market position, the new entity's accounts for [90-100]*%, with an increment of [10-20]*% brought about by EDFM. Despite the increment, EDFM has very limited activities in Austria, [...]*[604] [...]*. As EDFM [...]*, there is no reason why competing traders located in neighbouring countries such as United Molasses or Peter Cremer would not be able to replace EDFM's (for example, during the second phase market investigation one compound feed producer indicated that it could source from another supplier, able to provide better long term access to beet molasses and more reliable than EDFM)[605]. In addition, the market investigation has indicated that EDFM's role is merely one of buying molasses surplus and transporting it to Austrian customers. EDFM has no dedicated molasses storage capacity in Austria and thus would face high storage costs when renting third party storage currently used for more valuable commodities (such as vegetable oils). As such, the role of traders is mainly that of distributing the product which limits their ability to play an important role in the market.

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602 See non-confidential minutes of a conference call with a third party of 1 December 2011.

603 Questionnaire to sugar and molasses competitors, Phase I - Questionnaire to molasses competitors, Phase II

604 See reply to the 8th RFI, Phase II, p. 18 and Annex Q19-2.

605 Questionnaire to molasses customers, Phase II, question 66.

(680) Compound feed manufacturers could readily organise such transport from Germany themselves without the intervention of a trader. In addition, the compound feed producers who replied to the second phase market investigation consider that the proposed transaction would not affect their access to molasses or the price of it[606].

(681) As to fermentation customers, the second phase market investigation revealed that they do not perceive EDFM as exerting competitive constraints over Südzucker[607]. If the merged entity were to request a higher price for molasses following the proposed transaction, fermentation customers explain that they would not accept such a change but would rather start buying on spot, source from other molasses producers (for example from Slovakia) or increase the use of alternative input[608]. Given the importance of fermentation customers as a stable and reliable source of demand, it is unlikely that the merged entity would be in a position to behave independently from its customers and competitors.

(682) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in Austria.

The Czech Republic

(683) In the Czech Republic, Südzucker operates two sugar factories and consequently accounts for a significant part of the molasses market as well ([30-40]*% of the overall market). At present there is no consumption of cane molasses in the Czech Republic. EDFM's market share is limited ([0-5]*%), which leads to a combined market share of [30-40]*%. The vast majority of EDFM's molasses sales are to farmers for animal feed production.

(684) EDFM and Südzucker do not closely compete with each other as EDFM primarily sells molasses blends (molasses mixed with vinasses/glycerol) to farmers while Südzucker sells pure molasses. This was indicated by the market investigation[609]. Apart from a limited investment in the form of a mobile blending operation, EDFM has no other storage or logistics infrastructure in the Czech Republic, and as such there is no reason why competing traders would not be able to replace EDFM's activities. In any case, EDFM's lack of dedicated molasses storage capacity in the Czech Republic limits its ability to play an important role in the market other than that of distributing the product.

(685) No substantiated concerns were expressed during the market investigation.

(686) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in the Czech Republic.

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606 Questionnaire to molasses customers, Phase II, question 116 and 117.
607 Questionnaire to molasses customers, Phase II, question 68.
608 Questionnaire to molasses customers, Phase II, question 79.
609 Questionnaire to molasses customers, Phase II, question 114.

Belgium and Luxembourg

(687) Although Südzucker is the only sugar manufacturer in Belgium, it accounts for only one third of the beet molasses marketed in Belgium (including Luxembourg) and for around [20-30]*% of all molasses (i.e. including beet and cane molasses) in that area. EDFM has a comparably strong position ([20-30]*% of all beet molasses and [20-30]*% of overall molasses) due to storage and import capacity in Belgian ports.

(688) Südzucker and EDFM supply different customers. Südzucker supplies primarily the fermentation customers that require origin traceability and value supplier relationships. Südzucker hold shares of [30-40]*% in the supplies of molasses to fermentation customers (that have significant production volumes in Belgium). On the same market, EDFM accounts for [10-20]*%. Fermentation customers have alternative suppliers (United Molasses [20-30]*%). In addition, due to their high volume requirements, these customers have acquired know-how to organise alternative supplies from third parties or to source directly from countries of origin outside the EEA. The market investigation indicated[610] that these customers already follow a multi sourcing strategy (for example, one fermentation customer who complained about the effects of the proposed transaction is currently supplying molasses from several other suppliers than the Parties, and indicated as potential suppliers three molasses producers all located in neighbouring Member States).

(689) When considering a distinct market for the use of molasses in animal feed, EDFM accounts for [30-40]*% of that market whilst Südzucker holds [5-10]*. Other traders, and in particular United Molasses ([30-40]*%) account for the remainder.

(690) No substantiated concerns were expressed during the market investigation by any customer group.

(691) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in Belgium and Luxembourg.

France

(692) EDFM's presence in France is very limited ([0-5]*% of overall molasses sales), which adds to Südzucker's [20-30]*% market share. All of Südzucker' sales are to the fermentation industry, a market for which it holds a share of [40-50]*%. EDFM holds less than [0-5]*%. The combined entity's main competitors are Tereos ([10-20]*%) and United Molasses ([20-30]*%). Südzucker has no sales of molasses for animal feed. EDFM accounts for less than [0-5]*%.

(693) No substantiated concerns were expressed during the market investigation with respect to the effects of the proposed transaction.

(694) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in France.

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610 Questionnaire to molasses customers, Phase II.

Germany

(695) In Germany, the Parties account for [10-20]*% (Südzucker [10-20]*% and EDFM [5-10]*) of the overall molasses (cane and beet molasses) market. They face competition from both sugar producers such as Nordzucker ([5-10]*%) and Pfeifer & Langen ([5-10]*%) as well as from traders such as Peter Cremer ([10-20]*%). Concerning the supply of beet molasses in Germany, the proposed transaction would lead to a combined market shares of [20-30]*% (Südzucker [10-20]*% and EDFM [10-20]*%).

(696) Südzucker serves primarily the fermentation industry ([20-30]*%), and only accounts for [0-5]*% of the molasses supplied to German customers to be used in the animal feed production (*i.e.* both compound feed producers and farmers)[611]. EDFM also accounts for only a small percentage of the molasses sold for animal feed production ([5-10]*%). With respect to molasses supplied to the fermentation industry, the Parties are both present (Südzucker [20-30]*% and EDFM [10-20]*%) and face competition of comparable strength, such as Nordzucker ([20-30]*%) and Pfeifer & Langen ([20-30]*%).

(697) During the market investigation, customers from the fermentation industry complained about the possible effects of the proposed transaction in Germany. On the basis of the investigation conducted during the second phase of the procedure, it is considered that the concerns that were voiced are not merger specific but rather related to the scarcity of molasses flowing from reduced sugar production due to the sugar reform and the increased demand for molasses as a result of the uptake of bioethanol production. The market investigation has therefore focused on the question whether as a result of the evolution in the supply/demand balance of molasses, a reduction in the number of readily available molasses suppliers as brought about by the proposed transaction could negatively impact competition. The results of the market investigation do not support such a conclusion.

(698) All the fermentation customers who replied to the second phase Request for Information confirmed that they currently multisource their molasses needs[612]. Some of them source directly from abroad and one explained it switched from purchasing molasses from EDFM to a producer[613]. In all cases where companies had entered into a supply relationship with EDFM, these supplies were highly fluctuating in importance and were on an occasional basis. This is significantly different from the structural, long-standing and stable relationship that these customers have with sugar producers. Moreover, when asked how they will react in case the merged entity were to request a higher price for molasses, the majority of customers explained that they would not accept such a change and look for alternative suppliers[614].

(699) With respect to the yeast customers, they largely confirmed that EDFM does not exert a significant competitive constraint on Südzucker due to EDFM's limited role

611 Within the "animal feed" group of customers, the Parties will hold a combined market share above [10-20]% only with respect to the supply of molasses to farmers ([30-40]*%).

612 Questionnaire to molasses customers, Phase II, question 29, 56 and 66.

613 Questionnaire to molasses customers, Phase II, question 75.

614 Questionnaire to molasses customers, Phase II, question 79.

as a facilitator in matching occasional demand and supply[615]. As to the customers using molasses for the animal feed production, only one raised concerns which relate to the existing market situation of short supply of molasses rather than merger specific elements. Moreover, this customer explained that he would be able to find alternative suppliers.

(700) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in Germany.

Southern Germany

(701) During the first phase market investigation, some respondents voiced concerns with respect to the effects of the proposed transaction, and these concerns were concentrated for the southern Germany region, where Südzucker accounts for [60-70]*% of the beet molasses supplied to customers. The second phase market investigation did not confirm these initial concerns.

(702) In southern Germany, the Parties would hold post-transaction a market share of [70-80]*% on the potential market for the supply of beet molasses), with an increment of [5-10]*% brought by EDFM.[616] Südzucker primarily supplies the fermentation industry ([70-80]*% of market share) and more particularly the yeast customers while EDFM accounts for [10-20]*% of the sales to the fermentation industry, again in particular the yeast customers). Despite what the increment may suggest, EDFM's presence in southern Germany is rather limited, as it only serves [...]* customers, [...]* yeast producers. The market investigation indicated the limited role of EDFM in southern Germany. One of the competitors, another trader active in Germany and south of Germany, even stated that *"EDFM has no function"* in the southern Germany region[617]. Moreover, this competitor does not expect the proposed transaction to change anything in this respect. As for Südzucker, all the molasses supplied to the yeast industry are supplied directly to the customers.

(703) EDFM's limited role in southern Germany is determined by its lack of dedicated molasses storage capacity in that region. Faced with high storage costs when renting third party storage, EDFM's role is mainly that of distributing surplus capacity molasses.

(704) During the market investigation, no customers expressed substantiated concerns with respect to the effects of the proposed transaction in southern Germany.

(705) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in southern Germany.

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615 Questionnaire to molasses customers, Phase II, question 68.

616 The combined market share will be the same even considering a potential market for beet and cane molasses.

617 Questionnaire to molasses traders/brokers, Phase II, question 9.

Slovakia

(706) In Slovakia, the Parties will account for [20-30]*% on the beet molasses market. There is no consumption of cane molasses in Slovakia. The Parties' activities primarily overlap with respect to the supply of molasses to farmers (no overlap arises with respect to the supply to compound feed producers), where EDFM holds a market share of [80-90]*% and Südzucker accounts for the rest [10-20]*% of the supplies. The proposed transaction will therefore bring together the only two suppliers of beet molasses to farmers. However, on the overall market for the supply of beet molasses, the combined entity's market share is limited to [20-30]*%, since Nordzucker accounts for [70-80]*% of the market. Therefore, there is no risk that the merged entity would be able to act independently from its customers and the much stronger Nordzucker, if this segment of the market were to be considered.

(707) EDFM and Südzucker are not closely competing with each other: EDFM primarily sells molasses blends (molasses mixed with vinasses/glycerol) to farmers, while Südzucker sells pure molasses. The limited competition between suppliers of pure molasses and suppliers of molasses blends was also indicated by the market investigation[618].

(708) Furthermore, farmers can and do switch away from molasses to other feed components: indeed, of all raw materials used for animal feed in Slovakia, less than [0-5]*% would be represented by molasses.[619] In addition, no substantiated concerns were expressed during the market investigation.

(709) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in Slovakia.

Input foreclosure

(710) During the market investigation, one competitor of EDFM raised concerns about a foreclosure of access to molasses (both within the EEA and outside the EEA) for traders.

(711) On the basis of the market investigation; it is considered that these concerns are not well founded. Indeed, the market investigation shows that Südzucker sells most of its molasses directly to customers without using traders. With respect to the imports of molasses from outside the EEA, these represent only 3% of the world-wide molasses production (if distinguishing between beet and cane molasses, imports into the EEA represent 6% of the beet molasses produced world-wide, while imports of cane molasses represent 3% of the world-wide production). EDFM accounts for [20-30]*% of the imports of molasses into the EEA ([10-20]*% for beet molasses; [20-30]*% for cane molasses). United Molasses for example also accounts for 15-25% of the imports (20-30% for cane molasses)[620]. Another molasses trader indicated that there are no problems regarding the access to cane molasses at the moment and that the proposed transaction will not change this. On the contrary, according to this

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618 Questionnaire to molasses customers, Phase II, question 106.

619 Form CO, p. 107.

620 See reply to the 2nd RFI to both Parties, Phase II, question 6.

competitor, the sugar production will increase in Russia and Ukraine and therefore the quantities of available (beet) molasses will also increase[621]. Moreover, the investigation of the internal documents provided by the Parties did not reveal any such plans.

6.3.5. Conclusion

(712) In the light of the above elements, it is concluded that the proposed transaction is not likely to lead to competition concerns with respect to the supply of molasses in the EEA or at national level.

6.4. OTHER PRODUCTS

(713) The proposed transaction also results in reportable markets; however they do not amount to affected markets[622]. Those reportable markets are (i) the market for bioethanol, (ii) the market for biofuel and (iii) the market for Feedstuff, DGGS and vinasses/CMS.

6.4.1. Bioethanol

(714) Bio-ethanol is ethanol that is produced from the fermentation of sugars derived from plants (as opposed to synthetic ethanol produced from natural gas or naphtha)[623]. Ethanol is manufactured by fermenting sugars into alcohol. These sugars can come from a variety of agricultural sources such as sugar cane, grains/cereals, sugar beet, potatoes, other crops, and increasingly even organic waste materials[624].

(715) In its case-practice, the Commission has considered whether there could be different product markets according to the use of bioethanol, for example fuel or non-fuel bioethanol, such as alcoholic beverages[625], however without concluding on this point whether it is separate from the market for the production and supply of biobutanol, another blending component for bio-fuels[626].

(716) While Südzucker produces and markets bioethanol in the EEA, EDFM does not sell bioethanol in the EEA.

(717) With regard to vertical effects stemming from input such as sugar beet and molasses the notifying party puts forward that only 4% of the Union bioethanol production derive from sugar and molasses while the rest from grains and Südzucker's market shares in the EEA was only [10-20]*% ([10-20]*% for fuel bioethanol and [0-5]*% for non-fuel bioethanol) in 2010[627].

(718) The proposed transaction does not lead to horizontally and vertically affected markets in the segment of bioethanol. Therefore, no competition concern arises from the proposed transaction as regards bioethanol.

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621 Questionnaire to molasses competitors, Phase II, question 32 and 40.
622 Horizontal Merger Guidelines, paragraph 18.
623 Case COMP/M.4798 – *BP / Associated British Foods / JV*, paragraph 12.
624 Page 64 of the Form CO.
625 Case COMP/M.4798 – *BP / Associated British Foods / JV*, paragraph 12.
626 Case COMP/M.5550 - *BP/DuPont/JV*, paragraph 15.
627 Page 64 of the Form CO and Annex 6.3-C of the Form CO.

6.4.2. *Biofuel*

(719) The oil industry is divided into "upstream" and "downstream activities. "Upstream" activities include crude oil exploration and production, whereas "downstream" activities include crude oil refining and the marketing and distribution of refined products.

(720) The Commission has considered biodiesel to be part of the fuel market. Indeed, Bio-ethanol is added to traditional fuels (under current fuel specifications up to 5%) to constitute so-called bio-fuels which are sold through the same channels as "non-bio" gasoline blends. In line with previous Commission practice[628], the market for the sale of motor fuels and therefore by assimilation for the sale of bio-fuels, can be further sub-divided in a market for retail sales and a market for non-retail sales. While retail sales of fuels involve sales to motorists through service stations forecourts, the non-retail sales consist principally of sales to three categories of customers, i.e. non-integrated retailers, independent resellers and industrial and commercial consumers[629].

(721) The Commission's approach has consistently been that there is a relevant product market of the retail sale of motor fuels, with no need for a further distinction between different types of fuel[630].

(722) The notifying party submits that the proposed transaction does not lead to horizontally affected market since EDFM supplies negligible quantities of biofuel in the EEA, with approximately [0-5]*% of the market shares on the market for biofuel[631]. On the other hand the market for fuel is wider and Südzucker does not sell biofuel in the EEA but only supplies bioethanol to biofuel producers in the EEA with a market share of [10-20]*% in 2010. Therefore, the vertical effects are also negligible.

(723) The proposed transaction does not lead to horizontally and vertically affected markets in the segment of biofuel. Therefore, no competition concern arises from the proposed transaction as regards bioethanol.

6.4.3. *Feedstuff, DDGS, CMS*

(724) The Commission assumed a market for corn gluten animal feedstuffs, which is a by-product of starch and sugar production, while leaving it open whether other animal feedstuffs have to be considered part of this market[632] and was considered to be national[633].

(725) In other cases the Commission tended to assume a uniform market for animal feedstuff additives containing protein, which are not grain based (so called NGFI,

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628 Case COMP/M.1383 – *Exxon/Mobil*.

629 Case COMP/M.4798 – *BP / Associated British Foods / JV*, paragraph 24.

630 Case COMP/M.5846 - *Shell/Cosan/JV*, paragraph 16 or Case COMP/M.5781 - *Total Holdings Europe SAS/ERG SPA/JV*, paragraph 16.

631 E-mail of Alexander Fritzsche of 24 February 2012, entitled "AW: M.6286 - PHASE II: 8th Request for Information to Südzucker [GL-AM.FID10620522]", at 22:45.

632 COMP/M.2029 – *Tate & Lyle/Amylum*, paragraph 13.

633 COMP/M.2029 – *Tate & Lyle/Amylum*, paragraph 14.

e.g. by-products of the production of oil, bioethanol (DDGS), starch, fish meal, soy flour and corn gluten) and compound feed, which is to be distinguished from other ingredients such as minerals, vitamins or grain[634].

6.4.3.1. Feedstuff

(726) Südzucker markets an animal feedstuff called ProtiGrain ([...]* tonnes sold in 2010) which is a by-product of bioethanol production. ProtiGrain consists of CMS (also called vinasses) and the remainder of the grain used in the fermentation process. EDFM does not sell animal feedstuffs in the EEA which would use molasses as an input other than pure molasses or blends of molasses and vinasses[635].

6.4.3.2. DDGS

(727) EDFM does not sell DDGS in the EEA while Südzucker's market share is negligible[636].

6.4.3.3. Vinasses/CMS

(728) CMS is a by-product of all fermentation processes where molasses or green syrup is used.

(729) Both Südzucker and EDFM sell CMS or vinasses in small quantities. In 2009/2010 the Südzucker sold [...]* tonnes of vinasses ([...]* tonnes to beet farmers, [...]* tonnes to processors) achieving a turnover of EUR [...]* million. These sales took place in France[637].

(730) EDFM sold approx. [...]* tonnes in 2009/2010 in the Union but not in France. Südzucker estimates that vinasses/CMS consumption in the EEA amounts to more than 850,000 tonnes annually[638].

(731) The Parties therefore account for well less than 15% of the CMS sales in the EEA.

(732) If the market were to be considered as national, no overlap would occur.

(733) The proposed transaction therefore does not lead to horizontally and vertically affected markets in the segment of feedstuff, DDGS and vinasses/CMS. Therefore, no competition concerns arise from the proposed transaction as regards bioethanol.

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634 COMP/M.4042 – *Toepfer/Invivo/Soulès*, paragraphs 14 et seq.

635 Page 71 of the Form CO.

636 Page 71 of the Form CO.

637 Pages 71-72, Form CO and E-mail of Alexander Fritzsche of 24 February 2012, entitled "AW: M.6286 - PHASE II: 8th Request for Information to Südzucker [GL-AM.FID10620522]", at 22:45.

638 Pages 71-72, Form CO and E-mail of Alexander Fritzsche of 24 February 2012, entitled "AW: M.6286 - PHASE II: 8th Request for Information to Südzucker [GL-AM.FID10620522]", at 22:45.

7. ASSESSMENT OF THE REMEDIES

7.1. First remedy package

7.1.1. The remedies proposed by the Parties on 24 January 2012

(734) On 24 January 2012 the Parties submitted a first remedy package with commitments to address the competition concerns in the market for the supply of white sugar to industrial processors in Italy ("the First Remedy Package"). The proposed commitments consisted of:

(a) the divestment of all the shares currently held by EDFM in the Brindisi refinery, SRB, (the "Divestment Shareholding"); and

(b) the transfer of the three existing contracts for the supply of raw cane sugar to Brindisi[639], namely [Supplier A]* Contract, the [Supplier B]* Contract and the [Supplier C]* Contract (together the "Raw Cane Contracts").

(735) The Parties committed that if EDFM were unable to transfer the Raw Cane Contracts as such, EDFM would supply or procure to supply Brindisi with volumes of raw cane sugar [at market prices]*, equivalent to those volumes that are projected to be supplied to Brindisi [...]*.

(736) The Parties also specified certain purchaser requirements, including the capability to source sufficient volumes [at market rates]*.

(737) In order to avoid dependency of SFIR on EDFM via the supply of raw cane sugar to DAI, the Parties also committed that EDFM would use its best efforts to supply, or procure to supply, DAI with volumes of raw cane sugar, [at market rates]*, equivalent to those volumes that EDFM supplied to DAI during the relevant reference period.

7.1.2. Market test of the First Remedy Package

(738) The Commission launched a market test on 25 January 2012[640] to gather the opinion of competitors, customers, raw cane sugar suppliers and SFIR on the proposed remedies.

7.1.2.1. The response of competitors, customers and raw cane sugar suppliers

(739) The majority of the respondents found[641] that the proposed commitments with regard to the Divestment Shareholding could, in principle, be appropriate to address the competition concerns in the market for the supply of white sugar to industrial processors in Italy.

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639 [Supplier A]* contract ([...]* tonnes/year), [Supplier B]* contract ([...]* tonnes/year) and [Supplier C]* contract ([...]* tonnes/year).

640 M.6286 – Südzucker / ED & F Man - questionnaires to customers and competitors market test remedies of 25 January 2012.

641 M.6286 – Südzucker / ED & F Man - questionnaires to customers and competitors market test remedies of 25 January 2012.

(740) While respondents could not be provided with the precise terms and conditions of the Raw Cane Contracts, which are confidential, nevertheless some respondents stressed that the price, quantities and duration are key elements of such supply contracts and that, in order to maintain the viability of the divested business, these key features should not be deteriorated as a result of the transfer.

(741) For example, a raw cane sugar supplier, [...]*, indicated that *"the key element* [for the viability of the divested business]* *is the transfer of raw sugar supply contracts"*. This statement was confirmed by [sugar trader]*. Raw cane sugar supplier [...]* also pointed out that *"[t]he value of these contracts, and the new enterprise's ability to be competitive/viable will depend on the transfer value/tonnage/timing of these contracts"*. According to [large sugar producer]*, *"[t]he key challenge that the divested business will face in competing effectively will be in securing enough raw material at a competitive price to operate the plant sustainably and thus be able to compete effectively on the Italian white sugar market"*[642].

(742) Some respondents also stated that the remedy package must address the issue of SFIR's dependency on EDFM via the supply of raw cane sugar to the DAI refinery in Portugal.

7.1.2.2. The response of SFIR

(743) During the market test, SFIR expressed the following concerns on the proposed commitments: [Description of SFIR's concerns]*

(744) [Description of SFIR's concerns]*.

7.1.3. Assessment of the First Remedy Package in the Statement of Objections

(745) On 14 February 2012, a Statement of Objections was adopted, where the preliminary view was expressed that the proposed transaction would significantly impede effective competition in the market for the supply of white sugar to industrial processors in Italy.

(746) The Commission considered that the First Remedy Package could not address these competition concerns, because it could not ensure with sufficient certainty that the Brindisi refinery would remain a viable and competitive force in the Italian market for the supply of white sugar to industrial processors.

7.1.3.1. The Raw Cane Contracts are a key element for the continued viability and competitiveness of the Brindisi refinery

(747) It is true that the Divestment Shareholding was capable of contributing to address the competition concerns by ensuring in a durable way that the Parties would not be able to influence the operation of the Brindisi refinery and its sales policy in Italy post-merger.

642 M.6286 – Südzucker / ED & F Man – questionnaire to competitors market test remedies of 25 January 2012.

(748) However, the effective transfer of the Raw Cane Contracts was also a key element for the continued viability and competitiveness of the Brindisi refinery. Given (i) the significant scarcity of preferential raw cane sugar as an essential input in the Union, [...]*, the First Remedy Package failed to ensure that the Brindisi refinery would continue to constitute a viable and competitive force on its competitors in Italy, and in particular on Südzucker.

(749) The price formula of the Raw Cane Contracts is [Description of the Raw Cane Contracts]*. [Description of the Raw Cane Contracts]* prices for preferential raw cane sugar. Indeed, prices under the Raw Cane Contracts and current market prices differ significantly. By way of example, in campaign year 2011/2012 the Brindisi refinery paid EUR [...]* per tonne of raw cane sugar from the [Supplier A]* Contract[643], while for smaller quantities of preferential raw cane sugar going beyond the Raw Cane Contracts (around [...]* tonnes) SRB had to pay current market prices of approximately EUR [...]* per tonne[644].

7.1.3.2. The First Remedy Package could not ensure the transfer of the economic benefit of the Raw Cane Contracts

(750) [Description of the Raw Cane Contracts]*, the First Remedy Package did not secure at a sufficient level the transfer of the economic benefit of the Raw Cane Contracts.

(751) Since market prices for preferential raw cane sugar are currently much higher than the prices obtained under the Raw Cane Contracts, [Description of the Raw Cane Contracts]*.

(752) The [Supplier B]* and [Supplier C]* Contracts contain [Description of the Raw Cane Contracts]*.

(753) [Description of the Raw Cane Contracts]*.

7.1.3.3. The proposed alternative commitment did not ensure the competitiveness and viability of the Brindisi refinery

(754) As an alternative commitment, the Parties proposed that, should the transfer of the Raw Cane Contracts fail, EDFM would supply the Brindisi refinery with volumes of raw cane sugar equivalent to those projected to be supplied from the [Supplier A]* Contract as well as the [Supplier B]* and [Supplier C]* Contracts, [at market prices]*.

(755) This alternative commitment would secure only the *volume* of preferential raw cane sugar provided under the Raw Cane Contracts. However, it did not provide any guarantee as to the [Raw Cane Contracts prices]*.

(756) [Description of the Raw Cane Contracts]*.

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643 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

644 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

(757) Therefore, the alternative commitment to supply raw cane sugar to the Brindisi refinery [at market prices]* would not create a viable competitor once implemented.

7.1.3.4. Additional concerns from the existing structural and commercial links between EDFM and SFIR

(758) In the Statement of Objections the following concerns were also noted: (i) the uncertainties of the implementation of the divestiture could increase by virtue of rights that SFIR might exercise under the JV Agreement, such as [Description of SRB]*[645]; (ii) the ability of the Brindisi refinery to act as an independent competitive force in Italy should not be hampered by the dependency of SFIR upon EDFM via the DAI refinery; and (iii) during the divestiture period EDFM should not pose practical impediments to the operation of the Brindisi refinery.

7.2. Second Remedy Package

(759) In order to address the competition concerns expressed in the Statement of Objections, the Parties submitted significantly improved commitments on 16 March 2012 (the "Second Remedy Package"). The proposed commitments now consist in:

(a) the divestment of all the shares currently held by EDFM in the Brindisi refinery, SRB, (the "Divestment Shareholding");

(b) the transfer to an eventual purchaser of the *economic benefit* of the three existing contracts for the supply of raw cane sugar to Brindisi[646], namely the [Supplier A]* Contract, the [Supplier B]* Contract and the [Supplier C]* Contract (together "the Raw Cane Contracts");

(c) the alternative commitment that, if EDFM is unable to transfer the economic benefit of the [Supplier A]* Contract, EDFM will supply or procure to supply Brindisi with volumes of preferential raw cane sugar [on the basis of certain guarantees that EDFM undertakes regarding the Supplier A Contract]*; and

(d) with respect to the [Supplier B]* Contract and the [Supplier C]* Contract, to the extent that EDFM is unable to transfer the economic benefit of these two contracts, EDFM will supply or procure to supply Brindisi with the respective volumes of preferential raw cane sugar [on the basis of certain guarantees that EDFM undertakes regarding the Supplier B and Supplier C Contracts]*. [...]*

(760) The Parties have also specified certain purchaser requirements, including the proven expertise and incentive to maintain and develop Brindisi as a viable and active competitive force in competition with the Parties and other competitors, and in particular the capabilities to source sufficient volumes of preferential raw cane sugar to enable Brindisi to operate at full capacity.

(761) In order to avoid dependency of SFIR on EDFM via the supply of raw cane sugar to DAI, the Parties have also committed that EDFM would use its best efforts to supply,

645 [...]*.

646 [Supplier A]* contract ([...]*tonnes/year), [Supplier B]* contract ([...]*tonnes/year) and [Supplier C]* contract ([...]*tonnes/year).

or procure to supply, DAI with volumes of preferential raw cane sugar [at market prices]*, equivalent to those volumes that EDFM supplied to DAI during the relevant reference period.

(762) A final set of the proposed commitments with certain clarifications and the addition of a fast-track arbitration clause was submitted on 30 March 2012.

7.3. SFIR's response on the currently proposed commitments

(763) The improvements of the Second Remedy Package as compared to the First Remedy Package concerned the conditions, mechanisms and guarantees for the transfer of the economic benefit of the Raw Cane Contracts. They include elements pointing towards the detailed operation and cost of input of the Brindisi refinery. Such business secrets were already confidential towards all market players that were not partners in the Brindisi Joint Venture during the market test of the First Remedy Package. Therefore, the improvements of these elements in the Second Remedy Package could not be subject to a meaningful market test with suppliers other than SFIR. Consequently, only SFIR's opinion was sought on the improvements of the Second Remedy Package through a questionnaire sent on 20 March 2012.

(764) SFIR expressed the following concerns with respect to the Second Remedy Package: [Description of SFIR's concerns]*

7.4. Assessment of the currently proposed commitments

7.4.1. Introduction

(765) According to the Commission Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Notice on Remedies")[647], the Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent significant impediment of effective competition[648]. According to the Merger Regulation and established case law of the Court of Justice of the European Union, commitments have to eliminate competition concerns entirely[649] and have to be comprehensive and effective from all points of view[650]. Indeed, the Court of Justice's judgment in *Cementbouw* stated that *"in order to be accepted by the Commission [...]* the parties' commitments must not only be proportionate to the competition problem identified by the Commission in its decision but must eliminate it entirely"*[651].

(766) In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise. The most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening

[647] OJ C267, 22 October 2008, p.1.
[648] Notice on Remedies, paragraph 9.
[649] Recital 30 of the Merger Regulation.
[650] See, for example, the case-law cited in the Notice on Remedies, notably paragraphs 10 to12.
[651] Judgment of the Court of Justice in case C-202/06P, *Cementbouw Handel & Industrie BV v Commission of the European Communities*, paragraph 307.

of existing competitors via divestiture by the merging Parties. The divested activities must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern[652].

(767) The divested business has to be viable as such. Therefore, the resources of a possible purchaser or even a presumed future purchaser are not taken into account by the Commission at the stage of assessing the remedy[653].

(768) In certain cases *"the implementation of the parties preferred divestiture option (of a viable business solving the competition concerns) might be uncertain, in view for example of third parties' pre-emption rights or uncertainty as to the transferability of key contracts or [...]* the uncertainty of finding a suitable purchaser"*[654]. In such circumstances the Commission cannot take the risk that, in the end, effective competition will not be maintained[655].

(769) The Commission will only accept such divestiture commitments if two conditions are fulfilled: (a) absent the uncertainty, the first divestiture proposed in the commitments would consist of a viable business, and (b) the merging parties will have to propose an alternative divestiture which the merging parties will be obliged to implement if they are not able to implement the first commitment within the given time frame for the first divestiture[656]. Therefore, the merging parties have to propose an alternative divestiture which they will be obliged to implement if they cannot implement the first commitment. According to the Commission's remedy policy such an alternative remedy (i) must create a viable competitor once implemented, (ii) should not involve any uncertainties as to its implementation, and (iii) should be capable of being implemented quickly[657].

(770) The Notice on Remedies makes also clear[658] that, in case there is uncertainty as to the implementation of the divestiture due to third party rights or as to finding a suitable purchaser, both (i) an alternative commitment[659] or (ii) an upfront buyer solution[660] are in principle capable of addressing the concern in question and that therefore the merging parties may choose between both structures.

(771) In this case, in order to address the uncertainty regarding the transfer of the economic benefit of the Raw Cane Contracts, the Parties have chosen an alternative commitment[661] solution, namely (i) the [certain guaratees provides by EDFM regarding the Supplier A Contract]* for the supply of preferential raw cane sugar to

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652 Notice on Remedies, paragraph 23.
653 Notice on Remedies, paragraph 30.
654 Notice on Remedies, paragraph 44.
655 Notice on Remedies paragraph 45.
656 Notice on Remedies, paragraph 45.
657 Notice on Remedies, paragraph 45.
658 Notice on Remedies paragraph 46.
659 Notice on Remedies, paragraph 45. Such an alternative commitment normally should be at least as good as the first proposed divestiture in terms of creating a viable competitor once implemented, it should not involve any uncertainties as to its implementation and it should be capable of being implemented quickly in order to avoid that the overall implementation period exceeds what would normally be regarded as acceptable in the conditions of the market in question.
660 See on upfront buyer solutions paragraph 53 to 55 of the Notice on Remedies.
661 Notice on Remedies, paragraph 45.

the Brindisi refinery, and (ii) the [certain guaratees provides by EDFM regarding the Supplier B and Supplier C Contracts]* for the supply of preferential raw cane sugar to the Brindisi refinery.

7.4.2. *Aim and scope of the remedy package*

(772) In the present case, the aim of the remedy package is to ensure, post-merger, the presence of a viable competitor to Südzucker/EDFM on the market for the supply of white sugar to industrial processors in Italy. In particular, in order to entirely eliminate competition concerns in compliance with paragraph 23 of the Notice on Remedies, the remedy package must ensure that the Brindisi refinery continues to be on a lasting basis a strong competitive constraint on the suppliers of white sugar in Italy, especially on Südzucker which imports in Italy beet sugar from its factories in Germany, France and Belgium.

(773) The first element of the divestiture, i.e. the divestment of all the [...]* shares in Brindisi currently held by EDFM and corresponding to [...]* of the outstanding shares of Brindisi (the Divestment Shareholding), is capable of contributing to address the competition concerns. The divestiture of the shareholding ensures in durable way that the Parties will not be able to influence the operation of the Brindisi refinery and its sales policy in Italy post-merger.

(774) The second element of the divestiture, i.e. the effective transfer of the economic benefit of the Raw Cane Contracts, is also a key element for the continued viability and competitiveness of the Brindisi refinery. The Parties undertake the primary obligation to transfer the *economic benefit* of the Raw Cane Contracts to the new purchaser [Descriptions regarding the transfer of the Raw Cane Contracts]*.

(775) However, uncertainties as to the effective implementation of the Parties' primary obligation cannot be completely excluded, since it involves third parties, namely the suppliers of preferential raw cane sugar under the Raw Cane Contracts.

(776) Given (i) the significant scarcity of preferential raw cane sugar as an essential input in the Union, and (ii) [Descriptions regarding the transfer of the Raw Cane Contracts]*, the proposed commitments include the alternative commitment of the [certain guarantees provided by EDFM regarding the Supplier A, Supplier B and Supplier C Contracts]* for the supply of preferential raw cane sugar to the Brindisi refinery. This alternative commitment does not involve any uncertainties as to its implementation, creates a viable competitor once implemented and can be implemented quickly.

(777) Under the proposed commitments, [certain guarantees provided by EDFM regarding the Supplier A Contract]* ([...]* of Brindisi's contracted input) and [certain guarantees provided by EDFM regarding the Supplier B and Supplier C Contracts]* ([...]* of Brindisi's contracted input) are triggered if the transfer of the economic benefit fails, and not solely as a result of the divestiture of EDFM's shareholding. The scope of the "trigger-clause" of the [certain guarantees provided by EDFM regarding the Supplier A Contract, Supplier B and Supplier C]* effectively covers all merger-related possible failures to transfer the economic benefit of the Raw Cane Contracts.

7.4.3. Brindisi's viability and competitiveness under the primary commitment to transfer the economic benefit of the Raw Cane Contracts

(778) Following the exit of Tate & Lyle from Italy all remaining competitors of the Brindisi refinery in Italy are essentially beet sugar producers. Only the newly upgraded facility in Minerbio is capable of refining quantities of raw cane sugar that are comparatively small. This is also confirmed by internal documents of EDFM stating that *"[m]ain competition inside the EU can only come from beet sugar producers, as there are no other refiners in or near the Italian market"*[662].

(779) Based on Südzucker's actual total production costs[663] in the campaign year 2010/2011[664], a beet sugar producer is able to supply white sugar to industrial processors in Italy starting from a total production cost of EUR [...]* per tonne. On the basis of Südzucker's forecasted total production costs in the campaign year 2011/2012, a beet sugar producer is able to supply white sugar to industrial processors in Italy starting from a total production cost of EUR [...]* per tonne[665].

(780) At present, the Brindisi refinery is an efficient cane refinery with production costs that are almost as efficient as those of sugar beet factories. With a refining cost of approximately EUR [...]* per tonne[666], the input price of raw cane sugar for the Brindisi refinery accounts for the greatest part of its production costs. In the campaign year 2011/2012, SRB's average input price was EUR [...]* per tonne [Description of the Raw Cane Contracts]*[667].

(781) [Description of the Raw Cane Contracts]*[668] [Description of the Raw Cane Contracts]*.

(782) According to SFIR[669], on the basis of these pricing formulas in campaign year 2010/2011 the Brindisi refinery paid EUR [...]* per tonne of raw cane sugar from the [Supplier A]* Contract. EDFM has put forward similar figures[670]: in campaign year 2010/2011 the Brindisi refinery paid EUR [...]* per tonne of raw cane sugar from the [Supplier A]* Contract. In campaign year 2011/2012, according to SFIR[671], the Brindisi refinery paid EUR [...]* per tonne of raw cane sugar from the [Supplier A]*

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662 Annex 5.b of EDFM's reply to the 2nd RFI in Phase I.

663 Total production costs refer to all input, production and transport costs.

664 Annex 23-1 of Südzucker's answer to the 3rd RFI in Phase II.

665 Annex Q1-b of Südzucker's reply to the RFI in Phase II, sent by email entitled "AW: M.6286 - PHASE II: Request for Information to Südzucker [GL-AM.FID10620522]" received on 2 March 2012 at 15:24.

666 Südzucker's reply to the 4th RFI in Phase I indicated refining costs of EUR [...]* per tonne, whereas in its reply to the Statement of Objections (at footnote 146) Südzucker stated that EDFM's most recent estimates for 2011/2012 indicate refining costs of EUR [...]* per tonne. The Brindisi refinery also has unit fixed costs of EUR [...]* per tonne (Südzucker's reply to the Statement of Objections, para. 312) allocated over a yearly quantity of [...]* tonnes, and thus expected to be reduced when the produced quantity increases.

667 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

668 OJ L 58, 28.2.2006, p. 1.

669 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

670 Reply by EDFM dated 9 February 2012 and entitled "M.6286 - PHASE II - URGENT REQUEST" received at 11:27.

671 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

Contract, while EDFM puts forward that in campaign year 2011/2012 the Brindisi refinery paid EUR [...]* per tonne of raw cane sugar from the [Supplier A]* Contract[672].

(783) By contrast, in campaign year 2011/2012, for smaller quantities of preferential raw cane sugar for the Brindisi refinery going beyond the Raw Cane Contracts (around [...]* tonnes), SFIR puts forward that SRB had to pay current market prices of approximately EUR [...]* per tonne[673]. In its reply to the Statement of Objections, Südzucker also estimated an average spot price of EUR [...]* per tonne for the purchase of raw cane sugar[674].

(784) [Description of the Raw Cane Contracts and SRB]*[675].

(785) Therefore, although in practice currently the Brindisi refinery [Description of the Raw Cane Contracts and SRB]*, it constitutes a viable and competitive force on the Italian market for the supply of white sugar to industrial processors. Thus, the Commission considers that the viability and competitiveness of the Brindisi refinery would remain ensured, if it were to benefit from the economic benefit of the [Supplier A]* Contract and of the [Supplier B]* and [Supplier C]* Contracts.

(786) Consequently, [...]*, the Parties' primary obligation to transfer the economic benefit of the Raw Cane Contracts ensures the viability and competitiveness of the Brindisi refinery.

*7.4.4. Brindisi's viability and competitiveness under the alternative commitment to [provide certain guarantees regarding the Supplier A, Supplier B and Supplier C Contracts]**

7.4.4.1. The alternative commitment to [provide certain guarantees regarding the Supplier A, Supplier B and Supplier C Contracts]* strikes the right balance between eliminating the competition concerns entirely and the principle of proportionality

(787) Under the alternative commitment, the Brindisi refinery will benefit with certainty from [certain guarantees provided by EDFM regarding the Supplier A Contract]*. The [Supplier A]* Contract provides for approximately [...]* tonnes of preferential raw cane sugar per year, i.e. [...]* of the total volume under the three Raw Cane Contracts. In campaign year 2011/2012 the Brindisi refinery paid EUR [...]* per tonne of raw cane sugar from the [Supplier A]* Contract[676].

(788) In addition, the Brindisi refinery will also benefit with certainty from the [certain guarantees provided by EDFM regarding the Supplier B and Supplier C Contracts]*., i.e. approximately [...]* tonnes of preferential raw cane sugar per year. [...]*[677].

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672 Reply by EDFM dated 9 February 2012 and entitled "M.6286 - PHASE II - URGENT REQUEST" received at 11:27.

673 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

674 Südzucker's reply to the Statement of Objections, para. 310.

675 EDFM's submission of 2 February 2012.

676 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

677 Reply by SFIR dated 8 February 2012 and entitled "M.6286 - Phase II - URGENT REQUEST #2" received at 17:56.

(789) [Description of the Raw Cane Contracts]*[678], [Description of the Raw Cane Contracts and SRB]*.

(790) Therefore, the alternative commitment to [provide certain guarantees regarding the Supplier A, Supplier B and Supplier C Contracts]* ensures with certainty the viability and competitiveness of the Brindisi refinery, should the transfer of the economic benefit of the Raw Cane Contracts not be possible. It follows that a hypothetical requirement that the Parties also [provide certain guarantees regarding the Supplier B and Supplier C Contracts]* would be disproportionate, [...]*.

7.4.4.2. A hypothetical alternative commitment to [provide certain guarantees regarding the Supplier A, Supplier B and Supplier C Contracts]* cannot be imposed upon the Parties

(i) Since no competition concern has been identified in the white sugar markets of Portugal and Spain, the Notice on Remedies does not require that the proposed commitments ensure a viable and competitive DAI refinery

(791) The proposed commitments are subject to a different test with respect to, on the one hand, their effects on the Brindisi refinery and, on the other, their effects on the DAI refinery.

(792) With respect to the Brindisi refinery, in the Italian market for the supply of white sugar to industrial processors where competition concerns have been identified, the proposed commitments have to eliminate these competition concerns entirely[679] and have to be comprehensive and effective from all points of view[680]. Therefore, the proposed commitments must ensure that the Brindisi refinery will be a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis[681].

(793) However, in Portugal, no competition concerns have been identified as a result of the proposed transaction. While Südzucker is present in Portugal, EDFM has no activity at all in Portugal and negligible ([0-5]*%) sales in Spain. While it is true that, EDFM has a [...]* share in the DAI refinery in Portugal, this minority shareholding does not provide EDFM with control over the sales of DAI. Furthermore, there is only one customer of the DAI refinery in relation to sugar to be sold in the EEA: Azucarera Ebro. Since 2006 Azucarera Ebro and DAI have entered into an agreement under which Azucarera Ebro would commercialise 100% of DAI's sugar production to be sold in the EEA with absolute discretion to establish the sale price[682].

(794) Therefore, given that competition concerns have been identified only with regard to Italy but not to Portugal, the proposed commitments must at most ensure that no dependency of SFIR upon EDFM via the DAI refinery will jeopardise the competitiveness of the Brindisi refinery.

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678 Reply by EDFM dated 13 January 2012 entitled "M.6286 - PHASE II: request for document" received at 17:20.
679 Recital 30 of the Merger Regulation.
680 See, for example, the case-law cited in the Notice on Remedies, notably paragraphs 10 to12.
681 Notice on Remedies, paragraph 23.
682 Reply by EDFM to the 4th RFI in Phase I.

(795) Therefore, since no competition problem has been identified in Portugal or Spain, it cannot be imposed upon the Parties that the proposed commitments ensure as well the competitiveness of the DAI refinery through [...]*.

(ii) The proposed commitments guarantee the *status quo* in Brindisi and even a more competitive situation

(796) [Description of the Raw Cane Contracts and SRB]*. The proposed commitments guarantee the *status quo* in Brindisi and even a more competitive situation, since post-merger the Brindisi refinery will also benefit from (and use) [the certain guarantees provided by EDFM regarding the Supplier B and Supplier C Contracts]*.

(797) SFIR claims that the [Supplier B]* and [Supplier C]* Contracts were originally entered into under the clear intent that the raw cane sugar could and would be supplied to Brindisi as a matter of priority[683].

(798) [Description of the Raw Cane Contracts]*.

(799) [Description of the Raw Cane Contracts]*[684], [Description of the Raw Cane Contracts]*.

(800) [Description of the Raw Cane Contracts]*[685]. [Description of the Raw Cane Contracts]*[686], [Description of the Raw Cane Contracts]*.

(801) Therefore, the Brindisi refinery [Description of the Raw Cane Contracts and SRB]* the [Supplier B]* and [Supplier C]* Contracts, and thus the proposed commitments guarantee at least the *status quo* in terms of Brindisi's current competitiveness. By contrast, with respect to the DAI refinery, it cannot be required that the proposed commitments maintain its present competitiveness.

(iii) [Description of the Raw Cane Contracts]*

(802) [The]* request that EDFM should [Description of the Raw Cane Contracts]* of the [Supplier B]* and [Supplier C]* Contracts would go beyond the contractual protection of SFIR under the relevant contracts.

(803) Under clause [...]* of the [Supplier C]* Contract and clause [...]* of the [Supplier B]* Contract, [Description of the Raw Cane Contracts]*.

(804) It follows that it is not the proposed commitments but EDFM's decision to partner with Südzucker in combination with SFIR's insufficient contractual protection that [Description of the Raw Cane Contracts]*.

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683 SFIR's reply to Question 4 of the Remedies Questionnaire, received on 23 March 2012.

684 EDFM's comments to SFIR's reply to the Remedies Questionnaire, received on 29 March 2012.

685 This is evidenced by the information provided by SFIR in document with ID 3591, which shows that [...]* tonnes were sourced for [...]* from [Supplier C] [...]* tonnes of these were supplied under the [Supplier C] Contract: [...]*. See also the Response of EDFM of 9 February 2012 to the Phase II RFI of 7 February 2012.

686 EDFM's comments to SFIR's reply to the Remedies Questionnaire, received on 29 March 2012.

(805) The purpose of the proposed commitments is to safeguard competition in the Italian market for the supply of white sugar to industrial processors. Although not being the purpose of the proposed commitments, these proposed commitments do offer to SFIR a more advantageous contractual situation with respect to the Raw Cane Contracts, since [Description of the Raw Cane Contracts]*.

(iv) The Notice on Remedies requires that the proposed commitments ensure that the viability and competitiveness of the Brindisi refinery will not be jeopardised because of SFIR's dependence upon EDFM via the DAI refinery

(806) According to the Notice on Remedies, the proposed divestiture must result in a viable and competitive business and *"a viable business is a business that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period"*[687].

(807) In the case at hand, the proposed remedies must safeguard the independence of the Brindisi refinery *inter alia* in relation to the supply of raw cane sugar by EDFM to the DAI refinery, where SFIR has a shareholding of [...]*%. In order to avoid any dependency of SFIR upon EDFM via the DAI refinery, the Parties have proposed to commit that EDFM will supply, or procure to supply, DAI until [...]* with volumes of preferential raw cane sugar, [at market prices]*, equivalent to those volumes that EDFM supplied to DAI during the period from [...]* to [...]*. [Description of the Raw Cane Contracts]*.

(808) Therefore, EDFM cannot actively disrupt the operation of the DAI refinery, and thus the independence of the Brindisi refinery *vis-à-vis* the Parties is ensured. By contrast since no competition problem has been identified in Portugal or Spain, it cannot be imposed that the proposed commitments ensure as well the competitiveness of the DAI refinery.

(v) EDFM has incentives to deliver raw cane sugar to the DAI refinery at the lowest possible price

(809) EDFM participates in the profits and losses of the DAI refinery with a significant shareholding of [...]*%. [...]*, and (ii) a strong incentive to provide itself [...]* raw cane sugar to the DAI refinery at the best possible terms.

(810) Furthermore, EDFM has an incentive to continue supplying DAI at the best available rates not only because of its [...]*% shareholding in DAI but also because it benefits from certain additional payments for the logistics services it provides in this respect to DAI. SFIR itself has also stated that *"EDFM has no interest in jeopardising its own business"*[688].

(811) Therefore, EDFM has strong incentives to ensure and provide sufficient volumes of raw cane sugar to the DAI refinery at the lowest possible price, in order to maintain it profitable and operational.

[687] Notice on Remedies, paragraph 32.

[688] SFIR's reply to Question 11 of the Remedies Questionnaire, received on 23 March 2012.

(vi) In any event, the risk that the proposed commitments allegedly pose for the profitability of the DAI refinery is overstated [...]*

(812) [Description regarding the DAI refinery]*[689].

(813) [...]* the DAI refinery has for a long time, since it started refining raw cane in 2006 until 2009, operated with raw cane supplied to it at market rates. Indeed, this is how the DAI refinery was conceived: at the moment its refining capacity was created, the [Supplier C]* and [Supplier B]* Contracts had not yet been concluded. The fact that the DAI refinery now benefits from these contracts [Description regarding the DAI refinery]*.

(814) Furthermore, as stated by shareholder EDFM[690], [Description regarding the DAI refinery]*.

(815) [Description regarding the DAI refinery]*[691].

(816) [Description regarding the DAI refinery]*.

(817) [Description regarding the DAI refinery]*[692]. [Description regarding the DAI refinery]*[693].

(818) [Description regarding the DAI refinery]*[694] [Description regarding the DAI refinery]*.

(819) [Description regarding the DAI refinery]*[695] [Description regarding the DAI refinery and SRB]*.

(820) [Description regarding the DAI refinery and SRB]*.

(vii) No quantities from the [Supplier A]* Contract can be diverted to the [...]* refinery

(821) SFIR has claimed that [...]*, it might need to direct volumes of the [Supplier A]* Contract from the Brindisi refinery to [...]*.

(822) Nevertheless, such a scenario would be highly unlikely in practice, [...]*.

(823) Under an at this stage hypothetical scenario according to which SFIR can prove that it fulfils the purchaser requirements, especially the capability to source sufficient volumes of preferential raw cane sugar to enable Brindisi to operate at full capacity, and is accepted as the purchaser of the Divestment Shareholding, this acceptance would also need to be based on the requirement of clause 15(b) of the proposed commitments to *"maintain and develop Brindisi as a viable and active competitive force in competition with the Parties and other competitors"*. This requirement would

689 SFIR's reply to Question 4 of the Remedies Questionnaire, received on 23 March 2012.
690 EDFM's comments to SFIR's reply to the Remedies Questionnaire, received on 29 March 2012.
691 EDFM's comments to SFIR's reply to the Remedies Questionnaire, received on 29 March 2012.
692 SFIR's reply to Question 4 of the Remedies Questionnaire, received on 23 March 2012.
693 EDFM's comments to SFIR's reply to the Remedies Questionnaire, received on 29 March 2012.
694 EDFM's comments to SFIR's reply to the Remedies Questionnaire, received on 29 March 2012.
695 SFIR's reply to Question 4 of the Remedies Questionnaire, received on 23 March 2012.

not be satisfied if SFIR directed quantities of the [Supplier A]* Contract from the Brindisi refinery to [...]*.

(824) [Description of the Raw Cane Contracts]*[696].

(825) Therefore, it can be excluded that under the proposed commitments SFIR would be able to direct quantities of the [Supplier A]* Contract from the Brindisi refinery to [...]*.

7.4.4.3. The proposed commitments ensure that EDFM cannot pose practical impediments to the Brindisi refinery during the divestiture period

(826) SFIR has claimed that the divestiture period could cause serious disruptions to the operation of the Brindisi refinery. For instance:

(a) EDFM could delay or deny financing facilities that it currently provides to SRB for the raw cane sugar delivered; or

(b) EDFM could disrupt the supply of raw cane sugar or vegetable oil (fuel) to the Brindisi refinery.

(827) In order to address such concerns common to all cases involving divestiture periods, the Commission's model texts on remedies provide for (i) the Parties' obligation to preserve the viability, marketability and competitiveness of the divested business, (ii) hold-separate obligations of the Parties, and (iii) ring-fencing measures. All the abovementioned safeguards have been incorporated in paragraphs 5 to 9 of the proposed commitments.

(828) In the case at hand, given that the risk of disruptions to the divested business during the divestiture period is slightly higher[697] than in other cases involving divestiture periods, the abovementioned safeguards are sufficient to ensure against the risk of such disruptions. This is even more so, given that there is no element of EDFM's past behaviour towards SFIR or other companies to base such an increased risk of disruption. SFIR, on its part, has also admitted that it has no interest in disrupting the divestiture process[698].

(829) Therefore, the abovementioned Parties' obligation to preserve the viability, marketability and competitiveness of the divested business, the Parties' hold-separate obligations and the ring-fencing measures effectively ensure that the divestiture period will not cause disruptions to the operation of the Brindisi refinery, e.g. in case EDFM would delay or deny financing facilities that it currently provides to SRB for the raw cane sugar delivered or in case EDFM would disrupt the supply of raw cane sugar or vegetable oil (fuel) to the Brindisi refinery.

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696 EDFM's comments to SFIR's reply to the Remedies Questionnaire, received on 29 March 2012.

697 [...]*.

698 SFIR's reply to Question 10 of the Remedies Questionnaire, received on 23 March 2012.

7.4.4.4. A requirement for an upfront buyer solution is not necessary and would be disproportionate

(830) The Notice on Remedies makes clear[699] that, in case there is uncertainty as to the implementation of the divestiture due to third party rights or as to finding a suitable purchaser, both (i) an alternative commitment[700] or (ii) an upfront buyer solution[701] are in principle capable of addressing the concern in question and that therefore the merging parties may choose between the two possibilities.

(831) In this case, in order to address the uncertainty regarding the transfer of the economic benefit of the Raw Cane Contracts, the Parties have chosen a satisfactory alternative commitment[702] solution, namely (i) [certain guarantees provided by EDFM regarding the Supplier A Contract]* for the supply of preferential raw cane sugar to the Brindisi refinery, and (ii) [certain guarantees provided by EDFM regarding the Supplier A Contract]* for the supply of preferential raw cane sugar to the Brindisi refinery.

(832) Indeed, according to paragraph 9 of the Notice on Remedies, *"[u]nder the Merger Regulation, the Commission only has power to accept commitments that are deemed capable of rendering the concentration compatible with the common market so that they will prevent a significant impediment of effective competition. The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled"*. In addition, paragraph 53 of the Notice on Remedies states that an upfront buyer solution is <u>only</u> envisageable when no other solution *"will allow the Commission to conclude with the requisite degree of certainty that the business will be effectively divested to a suitable purchaser"*.

(833) In the case at hand, the proposed commitments eliminate the competition concerns identified by the Commission, therefore an upfront buyer is not the only effective solution envisageable.

7.4.5. Conclusion

(834) In view of the above, the commitments proposed by the Parties on 30 March 2012 sufficiently address the competition concerns in the market for the supply of white sugar to industrial processors in Italy.

8. CONCLUSION

(835) For the reasons outlined above the proposed transaction, as modified by the commitments proposed by the Parties on 30 March 2012, should be declared compatible with the internal market and with the EEA Agreement pursuant to Article

[699] Notice on Remedies paragraph 46.
[700] Notice on Remedies, paragraph 45.
[701] See on upfront buyer solutions paragraphs 53 to 55 of the Notice on Remedies.
[702] Notice on Remedies, paragraph 45.

8(2) of the Merger Regulation, subject to compliance with the Commitments in the Annex to this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The proposed transaction whereby Südzucker acquires sole control of EDFM within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the internal market and the EEA Agreement.

Article 2

Article 1 is subject to compliance with the conditions set out in Section B including Annexes 1, 2 and 3 (Schedule 1) to the commitments.

Article 3

Südzucker shall comply with the obligations set out in the sections of the commitments not referred to in Article 2 of this Decision.

Article 4

This Decision is addressed to:

Südzucker AG Mannheim/Ochsenfurt

Maximilianstraße 10, D-68165 Mannheim

Germany

Done at Brussels, 16.5.2012

(signed)

For the Commission
Joaquín ALMUNIA
Vice-President

By hand and by fax: 00 32 2 296 4301
European Commission – Merger Task Force
DG Competition
Rue Joseph II 70 Jozef-II straat
B-1000 BRUSSELS

Case M.6286 – Südzucker / ED&F Man

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Articles 8(2) and 10(2) of Council Regulation (EC) No 139/2004 (the "***Merger Regulation***"), Südzucker AG Mannheim/Ochsenfurt ("***Südzucker***") and ED&F Man Holding Limited ("***EDFM***") (together, the "***Parties***") hereby provide the following Commitments (the "***Commitments***") in order to enable the European Commission (the "***Commission***") to declare the acquisition of control within the meaning of Article 3(1)(b) of the EU Merger Regulation of EDFM by Südzucker (the "***Transaction***") compatible with the common market and the EEA Agreement by its decision pursuant Article 8(2) of the Merger Regulation (the "***Decision***").

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of EU law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by one of the Parties and/or by the ultimate parents of the one of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004.

Brindisi: SFIR Raffineria di Brindisi S.p.A., a **[CONFIDENTIAL]*** joint venture between EDFM and SFIR, with its registered office at Via Benedetto Croce 7, 47521, Cesena, Italy and registered with the Register of Companies of Forli-Cesena under number 03673640409.

Closing: the date on which the Divestment Shareholding is divested by EDFM.

[CONFIDENTIAL]*

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties and who has received from EDFM the exclusive Trustee Mandate to sell the Divestment Shareholding to a Purchaser at no minimum price.

Divestment Business: the Divestment Shareholding and accompanying supply arrangements as defined in Section B that the Parties commit to divest.

Divestment Shareholding: **[CONFIDENTIAL]*** shares in Brindisi currently held by EDFM corresponding to **[CONFIDENTIAL]*** of the outstanding shares of Brindisi.

EDFM: ED&F Man Holding Limited, with its registered office at Cottons Centre, Hays Lane, London SE1 2QE, UK.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of **[CONFIDENTIAL]*** months from the Effective Date.

[CONFIDENTIAL]*

Hold Separate Manager: the person appointed by the Parties to exercise EDFM's rights in relation to the operation of Brindisi following the Effective Date.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties, and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

Parties: refers jointly to EDFM and Südzucker.

Personnel: all personnel currently employed by Brindisi and shared personnel.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Shareholding in accordance with the criteria set out in Section D.

Raw Cane Contracts: **[CONFIDENTIAL]***

SFIR: Società Fondiara Industriale Romagnola, SpA.

Südzucker: Südzucker AG Mannheim/Ochsenfurt, with registered office at Theodor-Heuss-Anlage 12 D-68165 Mannheim, Germany.

[CONFIDENTIAL]*

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: the period of **[CONFIDENTIAL]*** months from the end of the First Divestiture Period.

[CONFIDENTIAL]*

Section B. The Divestment

Commitment to divest

1. In order to maintain effective competition, the Parties commit that EDFM will divest or procure the divestment of, the Divestment Business by the end of the Trustee Divestiture Period to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 16. To carry out the divestiture, the Parties commit that EDFM will find a Purchaser and enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If EDFM has not entered into such an agreement at the end of the First Divestiture Period, EDFM shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 25 in the Trustee Divestiture Period.

2. The Parties shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, EDFM has entered into a final binding sale and purchase agreement, if the Commission approves the Purchaser and the terms in accordance with the procedure described in

paragraph 16 and if the closing of the sale of the Divestment Business takes place within a period not exceeding 3 months after the approval of the Purchaser and the terms of sale by the Commission.

3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of **[CONFIDENTIAL]*** years after the Effective Date, not acquire direct or indirect influence over the whole or part of Brindisi, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over Brindisi is no longer necessary to render the proposed concentration compatible with the common market.

Structure and definition of the divestment

4. The object of the divestment is the Divestment Shareholding and the transfer of the Raw Cane Contracts. **[CONFIDENTIAL]***

Section C. Related Commitments

Preservation of Viability, Marketability and Competitiveness

5. From the Effective Date until Closing, the Parties shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular the Parties undertake:

    (a) not to carry out any act upon their own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of Brindisi; and

    (b) to continue to make available resources for the development of Brindisi, alongside SFIR, on the basis and continuation of the existing business and projections.

Hold-separate obligations of Parties

6. The Parties commit, from the Effective Date until Closing, to keep the Divestment Business and EDFM's participation in Brindisi separate from the remainder of their businesses and to ensure that personnel involved in the operation of Brindisi, as well as the Hold Separate Manager, have no involvement in any business retained and vice versa. The Parties shall also ensure that the Personnel do not report to any individual of the Parties.

7. Until Closing, the Parties shall assist the Monitoring Trustee in ensuring that Brindisi is managed separately from the businesses retained by the Parties. The Parties shall appoint a Hold Separate Manager who shall be responsible for EDFM's participation in the management of Brindisi, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall act independently and in the best interest of Brindisi with a view to ensuring its continued economic viability and competitiveness and its independence from the businesses retained by the Parties.

8. To ensure that the Divestment Business is held and managed separately, the Hold Separate Manager shall exercise EDFM's rights as shareholder in Brindisi (except for its rights for dividends that may be due before Closing), with the aim of acting in the best interest of the business, determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling the Parties' obligations under the Commitments. Furthermore, the Hold Separate Manager shall have the power to exercise all rights relating to Brindisi, including those relating to the appointment and replacement of members of the board who have been appointed on behalf of EDFM.

Ring-fencing

9. The Parties shall implement all necessary measures to ensure that they do not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to Brindisi, **[CONFIDENTIAL]***. In particular, the participation of Brindisi in a central information technology network accessible by the Parties shall be severed to the extent possible, without compromising the viability of Brindisi. EDFM may obtain information relating to Brindisi which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to the Parties is required by law. In this regard, the Parties shall implement, under the supervision of the Monitoring Trustee, all necessary measures to ensure that information relating to Brindisi which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to the Parties is required by law is disclosed to only EDFM (and not to Südzucker), and that Südzucker personnel would not have access to such information.

Non-solicitation clause

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Personnel of Brindisi for a period of two years after Closing.

Due Diligence

11. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business and Brindisi, EDFM shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process, provide to potential purchasers sufficient information as regards the Divestment Business.

Reporting

12. The Parties shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

13. The Parties shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

[CONFIDENTIAL]*

14. **[CONFIDENTIAL]***

Section D. The Purchaser

15. In order to ensure the maintenance of effective competition, the Purchaser, in order to be approved by the Commission, must:

    (a) be independent of and unconnected to the Parties (the mere fact that a party has, or has had, a supply arrangement with EDFM would not as such preclude it from being potentially considered as independent of and unconnected to the Parties);

(b) have the financial capabilities, proven expertise and incentive to maintain and develop Brindisi as a viable and active competitive force in competition with the Parties and other competitors and in particular have the capabilities to source sufficient volumes of preferential raw cane sugar for refining at Brindisi to enable Brindisi to operate at full capacity; and

(c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the purchaser hereafter the "***Purchaser Requirements***").

16. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When the Parties have reached an agreement with a purchaser, they shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. The Parties must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Shareholding is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of part of the Divestment Business or **[CONFIDENTIAL]*** or not all the Personnel if this does not affect the viability and competitiveness of Brindisi after the sale, taking into account the proposed purchaser.

Section E. Trustee

I. <u>Appointment Procedure</u>

17. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If the Parties have not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a Purchaser proposed by the Parties at that time or thereafter, the Parties shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

18. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Shareholding, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

19. No later than one week after the Effective Date, the Parties shall submit a list of one or more persons whom they propose to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, the Parties shall submit a list of one or more persons whom they propose to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraphs 18 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;

(b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;

(c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

20. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations, such approval not being unreasonably withheld. If only one name is approved, the Parties shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Parties shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

21. If all the proposed Trustees are rejected, the Parties shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 17 and 20.

Trustee nominated by the Commission

22. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom the Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

23. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or the Parties, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

24. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

(ii) oversee the on-going management of EDFM's participation in Brindisi the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness, and monitor compliance by the Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

(a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 5 and 6 of the Commitments;

(b) supervise the Hold Separate Manager's participation in the management of Brindisi in accordance with paragraph 7 of the Commitments.

(c) (i) in consultation with the Parties, determine all necessary measures to ensure that the Parties do not after the Effective Date obtain any business secrets, knowhow, commercial information, or any other information of a confidential or proprietary nature relating to Brindisi, in particular strive for the severing of Brindisi's participation in a central information technology network to the extent relevant and possible, and (ii) review the information to be disclosed to the Parties as the disclosure is reasonably necessary to allow the Parties to carry out the divestiture or as the disclosure is required by law;

(iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(iv) propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability and competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

(v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to Personnel;

(vi) provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the shareholding is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with these Commitments;

(vii) within one week after receipt of the documented proposal referred to in paragraph 16, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of Brindisi after the sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of part of the Divestment Business or **[CONFIDENTIAL]**** or not all the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

Duties and obligations of the Divestiture Trustee

25. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 16. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of

the Parties, subject to the Parties’ unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

26. In the Trustee Divestiture Period (or otherwise at the Commission’s request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

27. The Parties shall provide and shall cause their advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties’ books, records, documents, management or other personnel, facilities, sites and technical information in relation to Brindisi as is in the Parties’ hands as may be necessary for fulfilling its duties under the Commitments and the Parties shall provide the Trustee upon request with copies of any document. The Parties shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

28. The Parties shall provide the Monitoring Trustee with the support that it may reasonably request in respect of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. The Parties shall provide and shall cause their advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and other information granted to potential purchasers in the due diligence procedure. The Parties shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of developments in the divestiture process.

29. The Parties shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, the Parties shall cause the documents required for effecting the sale and the Closing to be duly executed.

30. The Parties shall indemnify the Trustee and its employees and agents (each an “***Indemnified Party***”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

31. At the expense of the Parties, the Divestiture Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Parties’ approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 30 shall apply mutates mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served the Parties during

the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

32. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:

(a) the Commission may, after hearing the Trustee, require the Parties to replace the Trustee; or

(b) the Parties, with the prior approval of the Commission, may replace the Trustee.

33. If the Trustee is removed according to paragraph 32, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 17-22.

34. Beside the removal according to paragraph 32, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The Review Clause

35. The Commission may, where appropriate, in response to a request from the Parties showing good cause and accompanied by a report from the Monitoring Trustee:

(i) grant an extension of the time periods foreseen in the Commitments, or

(ii) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

36. Where the Parties seek an extension of a time period, they shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall the Parties be entitled to request an extension within the last month of any period.

Section G. Fast Track Dispute Resolution

37. In the event that either the Purchaser or SFIR claims that the Parties or an Affiliated Undertaking is failing to comply with the commitments set out in paragraphs 4 **[CONFIDENTIAL]*** and/or 14, the fast track dispute resolution procedure as described herein shall apply.

38. If the Purchaser or SFIR wishes to avail itself of the fast track dispute resolution procedure (a "***Requesting Party***"), it shall send a written request to the Parties (the "***Request***") (with a copy to the Monitoring Trustee) setting out in detail the reasons leading the Requesting Party to believe that the Parties are failing to comply with the requirements of paragraphs 4 **[CONFIDENTIAL]*** and/or 14. The Requesting Party and the Parties will use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding fifteen 15 working days after receipt of the Request.

39. The Monitoring Trustee shall present its own proposal (the "***Trustee Proposal***") for resolving the dispute within eight 8 working days after receipt of the Request, specifying in writing the action, if

any, to be taken by the Parties or an Affiliated Undertaking in order to ensure compliance with the commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.

40. Should the Requesting Party and the Parties (together the "***Parties to the Arbitration***") fail to resolve their differences of opinion in the consultation phase, the Requesting Party shall serve a notice (the "***Notice***"), in the sense of a request for arbitration, to the International Chamber of Commerce (the "***ICC***"), (hereinafter the "***Arbitral Institution***"), with a copy of such Notice and request for arbitration to the Parties.

41. The Notice shall set out in detail the dispute, difference or claim (the "***Dispute***") and shall contain, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by the Parties (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.

42. The Parties shall, within 10 working days from receipt of the Notice, submit their answer (the "***Answer***"), which shall provide detailed reasons for their conduct and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which the Parties proposes to undertake vis-à-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

Appointment of the Arbitrators

43. The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; the Parties shall nominate their arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by the Parties shall, within five working days of the nomination of the latter, nominate the chairman, making such nomination known to the Parties to the Arbitration and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators.

44. Should the Relevant Party or Parties fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, the default appointment(s) shall be made by the Arbitral Institution.

45. The three-person arbitral tribunal are herein referred to as the "***Arbitral Tribunal***".

Arbitration Procedure

46. The Dispute shall be finally resolved by arbitration under the rules of the Arbitral Institution, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the "***Rules***"). The arbitration shall be conducted in Paris, France, in the English language.

47. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.

48. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-table

shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.

49. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Parties to the Arbitration agree.

50. The Arbitral Tribunal shall not disclose confidential information and apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, and outside counsel and experts of the opposing party.

51. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Requesting Party unless the Parties can produce evidence to the contrary.

Involvement of the Commission

52. The Commission shall be allowed and enabled to participate in all stages of the procedure by:

    (a) Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
    (b) Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
    (c) Giving the Commission the opportunity to file amicus curiae briefs; and
    (d) Being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.

53. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.

54. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

Decisions of the Arbitral Tribunal

55. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and the laws applicable to the Raw Cane Contracts without reference to the respective rules of conflicts of laws. The Arbitral Tribunal shall take all decisions by majority vote.

56. Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.

57. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by the Parties or an Affiliated Undertaking in order to comply with the commitments vis-à-vis the Requesting Party (e.g. specify a contract including all relevant terms and conditions). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

58. The final award shall, as a rule, be rendered within six months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitments if asked by the Arbitral Tribunal.

59. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.

60. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation.

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duly authorised for and on behalf of
ED&F Man Holding Limited

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duly authorised for and on behalf of
Südzucker AG Mannheim/Ochsenfurt

Schedule 1

[CONFIDENTIAL]*