



EUROPEAN COMMISSION  
DG Competition

*Case M.7573 - DMK /  
DOC KAAS*

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 03/03/2016

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## EUROPEAN COMMISSION

Brussels, 03.03.2016  
C(2016) 1473 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

### **To the notifying party:**

Dear Sir/Madam,

**Subject: Case M.7573 - DMK/DOC Kaas  
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004<sup>1</sup> and Article 57 of the Agreement on the European Economic Area<sup>2</sup>**

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ L 1, 3.1.1994, p. 3 ("the EEA Agreement").

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- (1) On 5 November 2015, the European Commission (the "Commission") received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking DMK Deutsches Milchkontor GmbH ("DMK", Germany) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of DOC Kaas B.V ("DOC Kaas", the Netherlands) by way of conclusion of a swap and purchase agreement<sup>3</sup>("the Transaction").
- (2) Following the discovery by the Commission that significant information was missing from the notification, the Parties withdrew their notification and notified again the Transaction on 28 January 2016.
- (3) DMK is referred to in this decision as the "the Notifying Party" and DMK and DOC Kaas are hereinafter designated as the "Parties", while the undertaking resulting from the Transaction is referred to as "the merged entity."

## **1. THE PARTIES**

- (4) DMK is a dairy company based in Germany which produces a diversified range of dairy products including basic milk products, cheese, whey-based products, baby food, ice cream, health products and dairy ingredients for food manufacturing. As regards cheese, DMK and its subsidiaries not only produce hard and semi-hard cheese, but also soft cheese (such as mozzarella), fresh cheese and curd cheese/quark. DMK is the operating company of, and is ultimately controlled by, Deutsches Milchkontor eG ('DMK eG'), a cooperative of approximately 8,900 German dairy farmers.
- (5) DOC Kaas is a Dutch cheese producer based in the Netherlands, which produces hard and semi-hard cheese for out-of-home ("OOH") customers,<sup>4</sup> industry customers and, to a smaller extent, retail customers. DOC Kaas is the operating company of DOC Kaas B.A., a cooperative of currently 878 Dutch and 112 German dairy farmers based in Hoogeveen, the Netherlands. DOC Kaas' core product is Gouda. DOC Group also produces small quantities of Edam, Maasdam, Emmental and other types of hard and semi-hard cheese. Furthermore, DOC Group distributes cream and whey deriving from the cheese production to industrial customers and produces and distributes whey-based products.

## **2. THE OPERATION**

- (6) On 30 July 2015, the Parties concluded a swap and purchase agreement, by which DMK intends to acquire sole control over DOC Kaas. The concentration will be implemented on the basis of a swap and purchase agreement by which DOC Kaas B.A. will receive 10% of the shares in DMK against contribution in kind (transferring its operating activities as well as its shareholding in DOC Kaas to DMK). The Transaction will thus result in the combination of the operating companies of the cooperatives DMK eG and DOC Kaas B.A. while the cooperatives themselves will remain independent.

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<sup>3</sup> Publication in the Official Journal of the European Union No C 375, 12.11.2015, p. 8 and then C 41, 4.2.2016, p. 33.

<sup>4</sup> OOH customers encompass restaurants, hotels, etc.

- (7) In view of the above, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

### **3. UNION DIMENSION**

- (8) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>5</sup>(DMK: EUR 5,323 million; DOC Kaas: EUR 658 million). Each of them has an Union-wide turnover in excess of EUR 250 million (DMK: EUR [...] million; Doc Kaas: EUR [...] million). DOC Kaas achieves more than two thirds of its Union turnover in the Netherlands but DMK does not. The notified operation therefore has an Union dimension under Article 1(2) of the Merger Regulation.

### **4. MARKET DEFINITIONS**

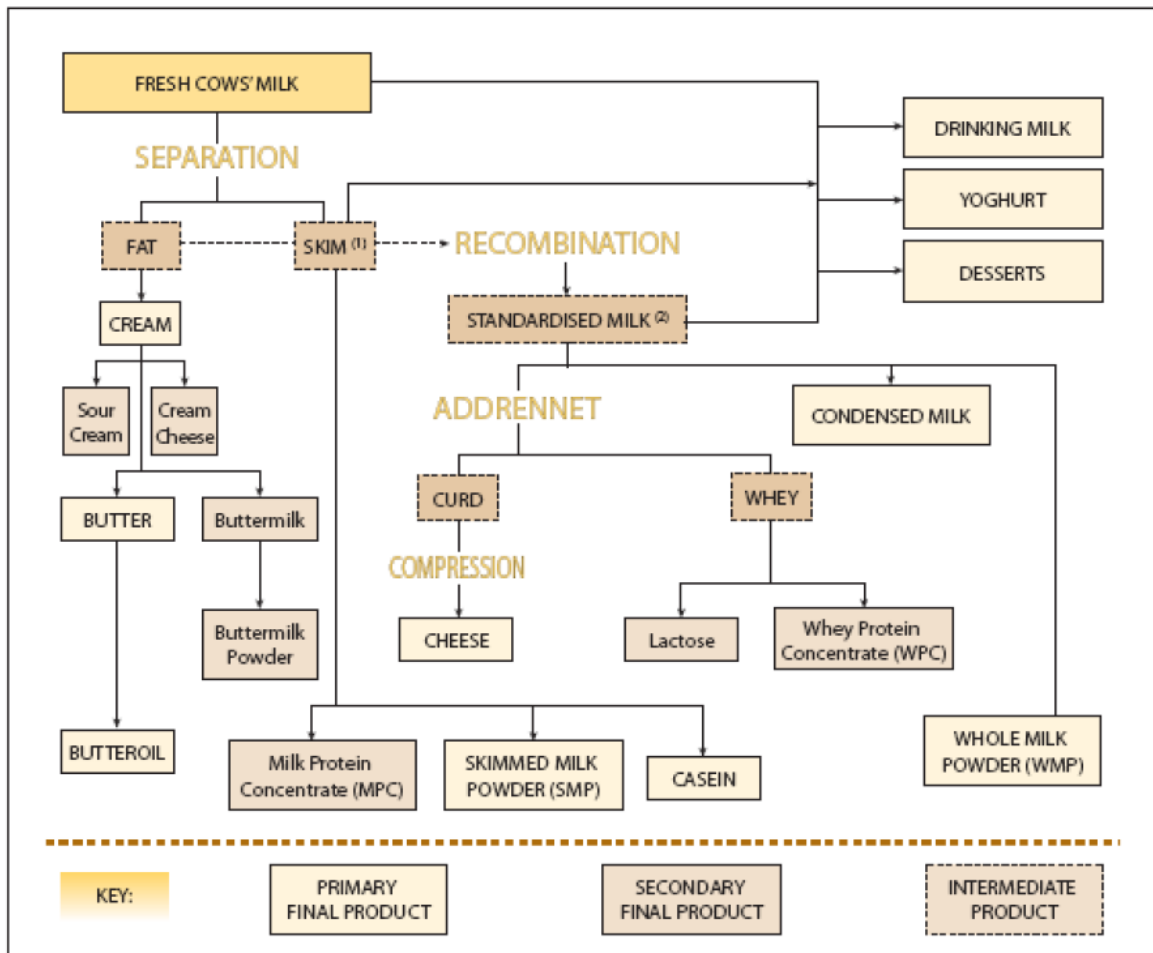
#### **4.1. Description of the industry**

- (9) Both Parties are active in the dairy sector. Their activities overlap in i) the procurement of raw cow's milk in Germany; ii) the production and sale of cheese (notably Dutch-type cheese) and iii) the supply of whey-related products.<sup>6</sup>
- (10) The dairy sector comprises a series of interrelated product markets, reflecting the wide variety of milk-based end products. The typical business model for dairy companies, notably dairy co-operatives, is to process the raw milk collected from farmers into a wide variety of dairy products. The fact that the raw material - raw milk – is common to these products leads to prices of dairy products following similar trends. Raw milk consists of several nutritional components: fat, proteins, lactose (milk sugar) and minerals. For some dairy products, only the non-fat components (notably proteins and lactose) are used. Other products, notably butter and cream, are made from the milk fat. Many key products such as cheese and milk contain a mix of fat and non-fat components. Some products – in particular cream, buttermilk and whey – are, in essence, by-products resulting from the production of the primary dairy products such as drinking milk and cheese. The diagram below shows how the fat and non-fat components of raw milk can be used for different applications.

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<sup>5</sup> Turnover calculated in accordance with Article 5 of the Merger Regulation.

<sup>6</sup> The Parties' activities also overlap in the production and sale of cream derived from cheese production. Most of the cream produced by DMK is used internally for the production of butter and a small amount is sold to third parties. The same is true for DOC Kaas. The Parties have indicated that their combined market share for cream is below 20% under any plausible product market definition both in Germany and in the Netherlands individually as well as on a wider geographic market, comprising Germany and the Benelux. According to paragraph 18 of the Horizontal Merger Guidelines, "*concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. [...] An indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 %.*"



<sup>(1)</sup> SKIM = protein + other solids (lactose + minerals) + water

<sup>(2)</sup> STANDARDISED MILK = of a fat content adjusted by the addition of skim or cream

Source: Trevor Smith - dairy industry consultant

**Figure 1: The different applications of milk components**

- (11) Most dairy products are household consumer products, normally sold on the retail market whereas some dairy products are bought by industrial customers to be processed into finished products. The dynamics of these different dairy markets are not identical and competitive conditions may differ depending on product characteristics (for example, perishability) and the existence of strong brands. In many European markets, liquid milk has become a low profit product, with a large proportion of private label products which are sold under distributors' brands.
- (12) For many decades, the Common Agricultural policy (CAP) for milk and dairy products maintained a quota system by Member State for the production of milk. This quota system raised the price of milk for European farmers above world market prices. This quota system was protected by a system of import duties and export restrictions. The abolition of this system in March 2015 has led milk prices to now be set entirely by market mechanisms. Since then, milk prices in EU have dropped by 5.4%.<sup>7</sup>

<sup>7</sup> According to the data from Milk Market Observatory, between March 2015 and January 2016.

- (13) Effects of recent events in international affairs such as the Russian embargo, as well as the fall in demand for European dairy products in China have significantly reduced traditional markets for European milk and dairy producers. Both of these factors put further downward pressure on milk prices in Europe. In this context, the Parties submit they need to rationalise costs in order to offer a competitive milk price to their farmers.

## **4.2. Relevant market definitions**

### **4.2.1. Procurement of Raw Milk**

#### *4.2.1.1. Relevant product market*

- (14) Raw milk is milk which has not undergone any treatment (other than cooling) and has a perishable nature. It is produced by dairy farmers, who normally milk cows twice a day. Raw milk is subsequently stored in milk storage cool tanks at the farm which reduces its temperature from 37° C to 4° C. The raw milk is collected at least once every three days by milk trucks which deliver it to processing facilities, where it is stored for a maximum duration of 36 hours prior to further processing.
- (15) In previous decisions, the Commission considered that the procurement of raw milk should be split between the procurement of conventional raw milk and organic raw milk.<sup>8</sup> The Commission has also considered a further sub-segmentation according to species (cow, goat and sheep) because of limited substitutability of the downstream end-products but eventually left that question open.<sup>9</sup>
- (16) The Parties do not object to the above-mentioned product market definition.

#### *4.2.1.2. The Parties' activities*

- (17) Both DMK and DOC Kaas procure raw milk from farmers, which they then process into consumer and industrial dairy products. They are dairy cooperatives and hence mainly collect raw milk from member farmers of the cooperatives DMK e.G. and DOC Kaas B.A., respectively.<sup>10</sup>
- (18) The Parties' activities only overlap in the procurement of conventional raw cow's milk in Germany. Therefore, for the purpose of this decision, the exact market definition can be left open and the competitive assessment of the Transaction will focus on the narrowest plausible level of the affected product market, that is to say the procurement of conventional raw cow's milk.

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<sup>8</sup> M.5046 – Friesland/Campina, paragraph 52.

<sup>9</sup> M.6242 – Lactalis/Parmalat, paragraph 9.

<sup>10</sup> Form CO, Para 78-9: "DMK eG has only German members and only purchases milk from German farmers. In particular, DMK eG does not have any Dutch members. In 2014, DMK eG purchased approx. [...] tonnes of milk from its German members. In contrast, the large majority of the members of DOC Kaas B.A. are, and have been in the past, Dutch farmers. In 2014, DOC Kaas B.A. collected [...] tonnes of milk from Dutch farmers ([80-90]%) and only approx. [...] tonnes of milk from its German members ([10-20]%)".

#### 4.2.1.3. *Relevant geographic market*

- (19) In previous cases,<sup>11</sup> the Commission left open whether the geographic scope of the markets for the procurement of raw milk could be national or narrower, i.e. regional or even local. As regards the German market, the Commission left open whether the relevant market for the procurement of raw milk should be defined as narrower than national because raw milk is perishable in nature and the maximum storage duration prior to further processing is limited. The German Federal Cartel Office (FCO) has defined smaller regional markets for the procurement of raw milk in Germany, based on a 120 to 200km radius around each specific dairy processing unit.<sup>12</sup>
- (20) On that basis, the Parties submit that the markets for the procurement of raw milk are generally national in scope and can in some cases include neighbouring regions in other jurisdictions as can be seen from the geographic footprint of DOC Kaas B.A (i.e. the fact that it not only has Dutch members, but also a substantial percentage of German members).
- (21) For the purpose of this decision, the precise geographic market definition can be left open as it would have no impact on the competitive analysis since the Parties' activities only overlap in the procurement of conventional raw cow's milk in certain areas of Germany.
- (22) In light of the above and for the purposes of this decision, the competitive assessment of the Transaction will be carried out at the narrowest level possible of affected product and geographic market: procurement of conventional raw cow's milk in Germany (and to a certain extent, in limited areas of Germany).

#### 4.2.2. *Cheese*

##### 4.2.2.1. *Activities of the Parties*

- (23) The activities of the Parties overlap in the production of hard and semi-hard cheese made of cow milk, notably Dutch-type cheese.<sup>13</sup>

##### 4.2.2.2. *Relevant product markets*

- (24) The Commission has previously distinguished between different categories of cheeses such as "*hard/semi-hard cheese*", "*soft cheese*" and "*fresh cheese*". It is also clear from previous Commission practice that a further subdivision of these categories into different types of cheese might be necessary in Member States which have a strong tradition for a particular cheese type.<sup>14</sup>

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<sup>11</sup> M.5875 – Lactalis/Puleva Dairy; M.6119 – Arla/Hansa; M.6611 – Arla Foods/Milk Link; M.6627 – Arla Foods/Allgäuland; and M.6441 – Senoble/Agrial/Senagral JV.

<sup>12</sup> Bundeskartellamt, B2-15510-Uz-127/98 – MZO Oldenburger Milch eG/Milch-Erfassung-Nordmilch eG, B2-15500-Fa-214/08 – Bayernland eG/Käserei Bayreuth eG.

<sup>13</sup> Such as Gouda, Edam, and Maasdam.

<sup>14</sup> M.4761 – Bongrain/Sodiaal/JV, paragraph 23.



a. *Dutch-type cheese*

- (25) The Parties submit that there is a separate market for the distribution of hard and semi-hard cheese and that, with respect to the Netherlands; there might be a separate market for Dutch-type cheese. The Parties submit that, in other European countries and in particular Germany, Dutch-type cheese does not have a role as prominent compared to other types of hard and semi-hard cheese as in the Netherlands.<sup>15</sup>
- (26) In *Friesland Food/Campina*, the Commission concluded that Dutch-type cheese forms part of a separate market from other hard/semi-hard cheeses. On the demand side, the Commission found that Dutch-type cheese is not in competition with other hard/semi-hard cheeses in the Netherlands in particular due to consumer preferences for Dutch-type cheeses and strong differences in taste and price. On the supply side, the Commission found that a switch from the production of Dutch-type cheese to non-Dutch-type cheese would have not been sufficiently immediate and effective. As regards other geographical areas, the market investigation was inconclusive as to whether the preferences of, for instance, German and Belgian customers would lead to the existence of a separate market for Dutch-type cheese.<sup>16</sup>
- (27) The market investigation in the present case has confirmed that a majority of customers, whether they are retail customers or industry customers, do not consider non-Dutch-type cheese as substitutable in terms of characteristics, taste and price with Dutch-type cheese.<sup>17</sup>
- (28) As regards supply-side substitutability, the Parties submit that producers of hard and semi-hard cheese which currently produce rather small volumes of Dutch-type cheese could easily increase their output of Dutch-type cheese by using their existing production lines. Indeed, the semi-hard and hard cheese production lines are suitable for the production of all types of cheese with less than 63% water in the fat free dry matter.<sup>18</sup>
- (29) The Parties consider that the fact that both DMK and DOC Kaas produce Dutch-type cheese as well as other types of hard and semi-hard cheese on the same production lines and regularly switch from the production of Dutch-type cheese to the production of other types of hard and semi-hard cheese on the same production line from one day to another or even within a day is a clear evidence that switching between different types of hard and semi-hard cheese is possible without facing any significant obstacles. The market investigation has indeed indicated that supply-side substitutability is possible, but only to some degree.<sup>19</sup>

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<sup>15</sup> Form CO, paragraph 134.

<sup>16</sup> M.5046 – *Friesland/Campina*, paragraph 500 to 504 and M.6722 – *FrieslandCampina/Zijerveld*, paragraph 23 to 27.

<sup>17</sup> Replies to question 7 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese customers (Q.10). Replies to question 8 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>18</sup> Form CO, paragraph 98.

<sup>19</sup> Replies to questions 10, 11 and 12 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

- (30) In view of the above, the Commission concludes that there is a separate market for the supply of Dutch-type cheese in the Netherlands.
- (31) As regards Germany, some respondents to the market investigation underlined that the difference between Dutch and non-Dutch-type cheese may not be as clear-cut as in the Netherlands. 7 out of 9 cheese producers in Germany responding to the market investigation answered that customers view Dutch-type cheese as substitutable (in terms of characteristic, taste, pricing, etc.) with non-Dutch-type cheese.<sup>20</sup> One cheese producer in Germany in particular explained that: "*Especially in the German market consumers are very price-conscious. We estimate that a lot of German consumers would especially substitute Maasdam cheeses with e.g. Emmental cheeses in case of (relevant) price differences (at least in the Private Label Segment).*"<sup>21</sup>
- (32) Therefore, as regards Germany, a potential separation for the market for Dutch-type and non-Dutch-type hard and semi-hard cheese can be left open, given that serious doubts would not arise even under the narrowest market definition.
- b. Main varieties of Dutch-type cheese*
- (33) The Parties submit that with respects to the Netherlands, it can be left open whether the main varieties of Dutch-type cheese, Gouda, Edam and Maasdam, belong to one product market or whether they form several products markets.
- (34) With respects to the German market, the Parties submit that no distinction needs to be made between the three types of cheese because of similar products characteristics, the similar demand patterns by German consumers and their comparable prices. Moreover, they submit that German cheese producers are generally able to produce all three types of Dutch-type cheese.
- (35) The Commission left open in previous decisions whether the main varieties of Dutch-type cheese (namely Gouda, Maasdam and Edam), at least in the Netherlands, constitute separate markets.<sup>22</sup>
- (36) During pre-notification contacts and the market investigation, no particular competition concerns emerged in relation to any of the three specific varieties of Dutch-type cheese.
- (37) For the assessment of this Transaction, the question of whether different varieties of Dutch-type cheese belong to the same market can be left open, given that serious doubts would not arise even under the narrowest market definition.

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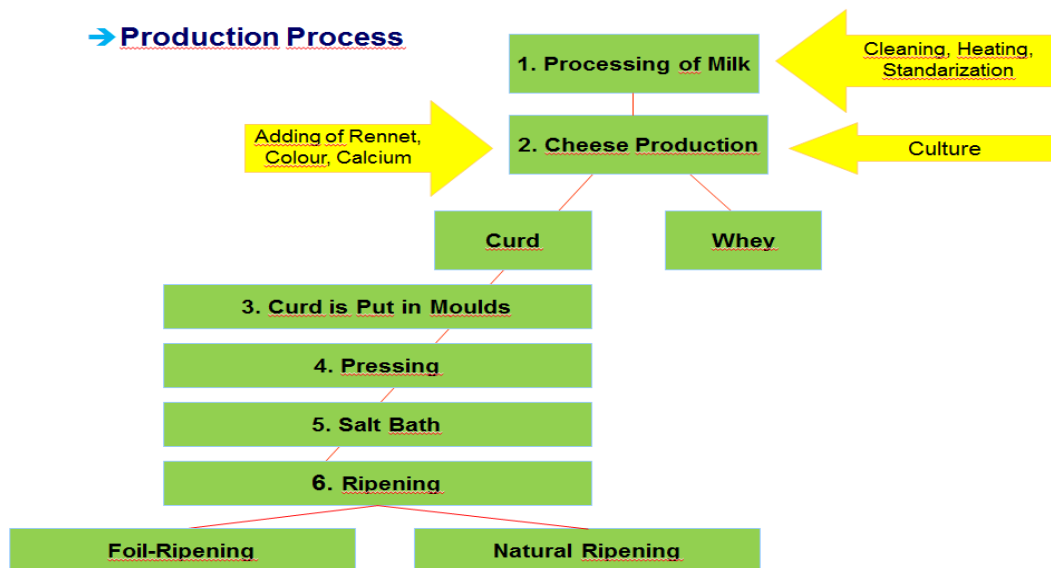
<sup>20</sup> Replies to question 10 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese producers in Germany (Q.4).

<sup>21</sup> Non-confidential reply by one cheese producer in Germany to the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese producers in Germany (Q.4).

<sup>22</sup> M.5046 – Friesland/Campina, paragraph 505.

c. *Nature cheese and rindless cheese*

- (38) Dutch-type cheese can be either naturally matured cheese (henceforth "nature cheese") or rindless cheese. Nature cheese has a rind and is capable of maturing for up to one year and longer. Rindless cheese is wrapped in plastic foil when it is young and does not mature any further.<sup>23</sup>
- (39) [...].<sup>24</sup>
- (40) Despite such differences, the beginning of the production process for both nature and rindless cheese is very similar: raw milk is pre-treated (standardised or pasteurised) and the water in the milk is partly removed to increase the proportion of dry matter in the milk. The milk is thickened with the help of rennet and a starter culture is added to help shape the flavour of the milk. The process produces curds and a mass of solid cheese lumps with whey as by-product. After processing, the cheese is put into a brine bath.
- (41) After the cheese is removed from the brine bath, however, the production processes of nature and rindless cheese differ considerably.



**Figure 2 - Production process for nature and rindless Dutch-type cheese, Form CO, p. 33**

- (42) At the last stage of the production, rindless cheese is packed in plastic bags (foil) immediately after it has left the brine bath and it is stored in a regular cooling environment (4-6 degrees C) for about 4 weeks. It is normally made available to the consumers at 28-day maturity.
- (43) In contrast, the last stage of production of nature cheese entails coating of the rind, where it is dipped in paraffin to ripen it after it has left the brine bath. It is matured in special maturing facilities where temperature and handling are carefully monitored and the cheese needs to be turned regularly and recoated.

<sup>23</sup> M.5046 – Friesland Campina, paragraph 490.

<sup>24</sup> [...].

- (44) The Parties consider that natural cheese and rindless cheese present some degree of substitutability from both a demand-side and supply-side perspectives. However, the Parties accept that natural and rindless cheese may constitute two distinct product markets.<sup>25</sup>
- (45) In previous cases, the Commission has established that nature and rindless cheese have different characteristics in terms of taste, quality and price.<sup>26</sup> There are also differences in terms of production process. At the last stage of production rindless cheese is packed in plastic bags (foil) immediately after it has left the brine bath and it is stored in a temperature controlled environment for about 4 weeks. In contrast, nature cheese can be moved from the production location at the earliest 15 days after production and is then matured by cheese producers or wholesalers in special maturing facilities where temperature and handling are carefully monitored and the cheese needs to be turned regularly and recoated.
- (46) In *Friesland Foods/Campina* and *FrieslandCampina/Zijerveld*, the Commission evaluated differences between natural and rindless Dutch-type cheese in quality, taste, structure and colour on the one hand and a possible supply-side substitution. However, the question was ultimately left open.<sup>27</sup>
- (47) During the market investigation, a large majority of Dutch and German cheese producers confirmed that customers perceive nature and rindless Dutch-type cheese as having different characteristics.<sup>28</sup> All the Dutch customers (both retail and wholesalers) confirmed a lack of substitutability from a demand-side perspective.<sup>29</sup> German customers (industry and OOH) all confirmed the lack of substitutability between rindless and nature Dutch-type cheese<sup>30</sup> but results were more mixed with German customers (retail).<sup>31</sup>
- (48) The difference between nature and rindless Dutch-type cheese may be less clear-cut in Germany than in the Netherlands. One large cheese producer in Germany indicated that "*German market trends clearly show that modern retail – which accounts for the overwhelming majority of consumer sales – increasingly focuses on pre-packed cheese only, because consumers increasingly tend to buy more convenience products. Pre-packed cheese in slices can be either rindless or*

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<sup>25</sup> Form Co, paragraph 158.

<sup>26</sup> M.5046 – *Friesland Foods/Campina*, paras. 508 et seqq., 523; M.6722 – *FrieslandCampina/Zijerveld & Veldhuyzen and den Hollander*, paras. 33 et seqq.

<sup>27</sup> M.5046 – *Friesland Foods/Campina*, paragraph 508 et seqq., 523; M.6722 – *FrieslandCampina/Zijerveld & Veldhuyzen and den Hollander*, paragraph 33 et seqq.

<sup>28</sup> Replies to question 15 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Dutch cheese producers (Q.1); replies to question 14 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to German Cheese producers (Q.3).

<sup>29</sup> Replies to question 12 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Dutch cheese customers (wholesalers) (Q.2); replies to question 12 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Dutch cheese customers (retail) (Q.3).

<sup>30</sup> Replies to question 11 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to German cheese customers (industry and OOH) (Q.6).

<sup>31</sup> Replies to question 13 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to German cheese customers (retail) (Q.5).

*nature cheese, whereby the consumer often cannot even detect from the appearance of the cheese whether it is nature or rindless cheese.*"<sup>32</sup> The same cheese producer also added that "*German consumers have a strong preference for "young" cheeses (< 2 months ripened). As such, particularly when packaged in slices, there is limited differentiation in taste-profile between rindless and nature cheeses at this age of cheese.*"<sup>33</sup>

- (49) For the assessment of this Transaction, the market definition can be left open given that competition concerns do not arise, whether the market be defined as encompassing both nature and rindless, or at the narrower level of nature Dutch-type cheese on the one hand and rindless Dutch-type cheese on the other hand. In any event, the markets for nature and rindless Dutch-type cheese will be considered as separate as they represent the narrowest plausible segmentation.

*d. Distribution channel*

- (50) The Parties submit that applying a strict classification of cheese producers, specialized cheese wholesalers, retail customers and OOH/industry customers is artificial and does not reflect market realities and ignores the pluralistic roles of most market players and numerous alternatives of supply and demand that exist throughout the markets for hard and semi-hard cheese.

*(i) Distribution channel: Specialised cheese wholesalers in the Netherlands*

- (51) In previous cases concerning the Netherlands, the Commission concluded that there is a separate market for the supply of Dutch-type cheese to specialised cheese wholesalers.<sup>34</sup> In the Netherlands, specialised cheese wholesalers form an intermediate level between the production and downstream levels: they buy cheese from producers and process it (ripening, slicing, packaging) before it is re-sold to retailers or exported.
- (52) Indeed, in the Netherlands, many wholesalers buy Dutch-type cheese which is 15-day-old (and thus not yet ready for consumption) from the Notifying Parties and other cheese producers in order to further mature it within their own maturing facilities. In addition, some wholesalers are specialised in cutting, slicing and packaging services. After maturing and/or slicing and packaging the cheese, wholesalers sell it to downstream distribution channels in the Netherlands (to retail, OOH or industry customers; the competitive strength of wholesalers differs across these channels) or export it. In doing so, they often focus on supplying smaller volumes targeted at the specific needs of their customers.<sup>35</sup> Dutch cheese producers therefore have two channels to the downstream markets in the Netherlands and abroad: (i) through direct sales and (ii) through specialised cheese wholesalers.

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<sup>32</sup> Reply by one competitor to question 14 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese producers in Germany (Q.4).

<sup>33</sup> Reply by one competitor to question 15.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese producers in Germany (Q.4).

<sup>34</sup> M.5046 – Friesland Foods/Campina, para 530-534.

<sup>35</sup> M.5046 – Friesland/Campina, para 532.

(ii) *Distribution channel: Specialised cheese wholesalers in the Netherlands – 15-days old cheese and older*

- (53) In *Friesland /Campina* and *FrieslandCampina/Zijerveld*, the Commission considered a distinction between the supply to specialised cheese wholesalers of 15-days-old nature cheese and nature cheese older than 15 days. The Commission noted that 15-days-old nature cheese constitutes a semi-finished product which is not yet ready for consumption and whose maturing is a fundamental part of the commercial activities of specialised cheese wholesalers which is why it does not satisfy the same demand as matured cheese.<sup>36</sup> Ultimately, the question was left open.
- (54) The Parties have questioned the relevance of the 15-days threshold as an appropriate marker for the difference between non-matured and mature cheese. The Parties note that the 15-days marker might be relevant when it comes to determine transportability of nature cheese as a semi-finished product. However, the 15-days marker is not indicative of how much further ripening will be needed, and is not a relevant marker in terms of price.<sup>37</sup>
- (55) The market investigation was inconclusive on this point. A large majority of Dutch cheese producers considered that their customers source 15-days old cheese and more than 15-days old cheese for the same applications and purposes.<sup>38</sup> A Dutch cheese producer explained that "*cheese that is younger than 15 days cannot be transported over long distances considering that it is not yet a stable product. Therefore 15-day-old cheese is typically stored at the production facility until it is stable enough to be transported to another storage facility for further ripening. Other than that there is no difference in the storage facilities of 15-day-old and older-than-15-days Dutch type cheese.*"<sup>39</sup>
- (56) In any event, for the assessment of this Transaction, the question of whether distinct product markets exist for nature cheese of more or less than 15 days can be left open as no competition concerns would arise under any of these possible definitions. The markets for sale of nature Dutch-type cheese 15-days-old or older to specialised cheese wholesalers will be considered as separate as it represents the narrowest possible segmentation.

(iii) *Distribution channel: other channels – out-of-home companies and industrial customers, retail customers*

- (57) Moreover, the Commission considered that the supply to retailers needs to be distinguished from the supply to out-of-home ("OOH") companies and industrial customers, with the latter two belonging to the same market.

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<sup>36</sup> M.5046 – *Friesland Foods/Campina*, paras. 559; M.6722 – *FrieslandCampina/Zijerveld & Veldhuyzen and den Hollander*, paras. 48.

<sup>37</sup> Form CO, paragraph 161 qq.

<sup>38</sup> Replies to question 21 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Cheese producers in Netherlands (Q.1).

<sup>39</sup> Replies to question 20 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Cheese producers in Netherlands (Q.1).

- (58) The Commission has also in its previous decision practice distinguished the sale of daily consumer goods through modern types of retail from the sale of such goods by other outlets at retail level such as specialised shops.<sup>40</sup> As regards Dutch-type cheese, the Commission has considered that it is appropriate to define a separate market for the sale of Dutch-type cheese to modern types of retail.<sup>41</sup>
- (59) The market investigation has confirmed that the distribution channel may be distinguished into two categories: specialised cheese wholesalers and direct sales to consumers.<sup>42</sup> It has also confirmed the differentiation in direct sales segment for the supply to retailers between out-of-home ("OOH") companies and industrial customers.<sup>43</sup>
- (60) As regards supply to retailers in particular, the Parties submit that it can be left open whether modern retail and classic retail form two distinct markets since neither DOC Kaas nor DMK sell cheese to classic retail in the Netherlands (cheese specialty shops, weekly markets).
- (61) In any event, and for the purposes of assessing this Transaction, the question of whether distinct product markets exist for cheese supply to cheese wholesalers, retail customers and OOH/industry customers (irrespective of whether it is modern or classic) can be left open as no serious doubts as to the compatibility of the Transaction with the internal market arise under any of these possible definitions. The markets for cheese supply to, respectively, cheese wholesalers, retail customers and OOH/industry customers (irrespective of whether it is modern or classic) will be considered as separate as it represents the narrowest possible segmentation.

#### 4.2.2.3. *Relevant geographic markets*

##### *a. Nature Dutch type cheese in the Netherlands and Germany*

##### *(i) Netherlands*

- (62) The Parties submit that the market for the distribution of nature Dutch-type cheese to specialised wholesalers and retail in the Netherlands is national in scope.

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<sup>40</sup> M.4590 – Rewe/Delvita, paragraph 12 and M.5112 – Rewe/Plus Discount, paragraph 17; M.5047 – Rewe/Adeg, paragraph 24.

<sup>41</sup> M.5046 – Friesland Foods/Campina, para 558.

<sup>42</sup> Replies to question 23 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese producers in the Netherlands (Q.1).

<sup>43</sup> Replies to question 24 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese producers in the Netherlands (Q.1).

*"Sales to retail and industry / OOH are part of different routes to market due to the fact that (i) customers are different parties, (ii) packaging of cheese differs, (iii) contracting and sales negotiation follow different patterns and (iv) the cheese is used for different applications (e.g. further ripening, industrial processing, onwards selling) and can therefore have different specifications"*  
From Royal FrieslandCampina - (Netherlands).

- (63) In previous decisions, the European Commission defined the market as national in scope for the distribution of natural Dutch-type cheese to specialised cheese wholesalers and retail in the Netherlands.<sup>44</sup> As regards the Dutch markets, the presence of specialised cheese wholesalers (among whose core activities is the maturing of nature cheese) is a particular feature of the Dutch cheese market which clearly distinguishes the structure of the nature Dutch-type cheese market in the Netherlands from all other Member States that the notifying Parties claim to belong to the same geographic market.
- (64) Furthermore, consumption patterns in the Netherlands differ considerably from those of neighbouring Member States and these differences at downstream level have repercussions at the sourcing level, in particular as far as sales to modern types of retail are concerned: while most cheese in Belgium and Germany is consumed as young aged cheese (often without rind), the demand for older cheese is considerably higher in the Netherlands where Gouda is sold in all ages and variations.<sup>45</sup>
- (65) No element of the market investigation suggests that these specificities did not also apply to sales to OOH and industry. Therefore, for the assessment of this Transaction the market for the distribution of nature Dutch-type cheese to i) specialised wholesalers, ii) retail iii) OOH and industry in the Netherlands will be considered as national as it represents the narrowest possible segmentation.

(ii) *Germany*

- (66) By analogy the market for the distribution of nature Dutch-type cheese to OOH wholesalers, industry customers and retail in Germany will be considered as national as it represents the narrowest possible segmentation.

*b. Rindless Dutch-type cheese*

- (67) As regards the markets for hard and semi-hard cheese in general, the Parties submit that these are, irrespective of the relevant distribution channel, at least EEA-wide in scope. They consider that the transport cost does not constitute a significant barrier for cross border trade and that they are no trade barriers within the EU.
- (68) In a past case, the Commission considered that the markets for the sale of rindless Dutch-type cheese to specialised cheese wholesalers and modern types of retail are wider than national and include at least the Netherlands and Germany because "*quality, taste and consumer preferences play a less important role and modern types of retail source almost 50% of their rindless cheese from abroad*".<sup>46</sup>
- (69) The market investigation has confirmed that the geographic market of rindless Dutch-type cheese is wider than national, including at least Germany and the Netherlands.<sup>47</sup> Moreover, almost all German cheese industry (out-of-home

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<sup>44</sup> M.5046 – Friesland Foods/Campina, para 563.

<sup>45</sup> M.5046 – Friesland Foods/Campina, para 563.

<sup>46</sup> M.5046 – Friesland Foods/Campina, paragraph 583.

<sup>47</sup> Replies to question 25 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Cheese producers in Netherlands (Q.1) and replies to question 24 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Cheese producers in Germany (Q.4); and replies to question 16 of the Commission's request for



distributors, wholesalers and industrial customers) purchase some rindless Dutch-type cheese from the Netherlands.<sup>48</sup>

- (70) Therefore, for the purposes of this decision, the market for the distribution of rindless Dutch-type cheese to i) specialised wholesalers, ii) retail iii) OOH and industry will be defined as including at least the Netherlands and Germany.

*c. Conclusion*

- (71) In light of the results of the market investigation, the Commission concludes that the markets for the sale of nature Dutch-type cheese to specialised cheese wholesalers, retail and OOH and industry are national in scope. In contrast, the markets for the sale of rindless Dutch-type cheese to specialised cheese wholesalers, retail and OOH and industry are wider than national and include at least the Netherlands and Germany.
- (72) No element of the market investigation has indicated that this conclusion should be different (i) if each of those markets is defined more narrowly, that is, only comprising Gouda, Edam or Maasdam or (ii) if the markets for the sale of Dutch-type cheese to specialised cheese wholesalers are in addition defined more narrowly, that is, only comprising 15-day-old cheese.

**4.2.3. Whey and Whey-Based Products**

*4.2.3.1. Activities of the Parties*

- (73) The whey that DMK Group and DOC Group derive from their cheese production is either sold to third parties or, mainly by joint ventures with third parties, further processed into different whey-based products. The Parties' activities overlap with respect to the production and distribution of (i) whey powder, (ii) permeate and (iii) WPC (whey protein concentrate).<sup>49</sup>
- (74) Raw whey is a by-product of cheese production. Whey can be used for the production of more valuable products like proteins, permeate and lactose, through an ultra-filtration process which separates the proteins from lactose, minerals and other constituents. Retentate (protein) and permeate (lactose and minerals) are stored as separate product streams.
- (75) The retentate is then processed into whey powder or whey proteins concentrate ('WPC'), which is usually characterized on the basis of its content of proteins (WPC 35-50 contains 35-50% of proteins, WPC 60-80 contains 60-80% of proteins, WPI contains more than 80% of proteins). With respect to WPC, the

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information pursuant to Article 11 of Merger Regulation addressed to Cheese customers retail in Germany (Q.5).

<sup>48</sup> Replies to question 14 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to Cheese customers industry and "OOH" customers (Q.6).

<sup>49</sup> The Parties also submit that their activities overlap as regards the production of raw whey. However, the large majority of the whey deriving from the cheese production by DMK Group and DOC Group is used intra-group. Such captive use does not reflect a market position and should therefore not be considered. Based on their very limited sales of raw whey to third parties, the parties submit that their combined market share remains below 20% under any possible market definition.



- (80) The Parties consider that permeate can be substituted with other commodities such as whey powder, milk powder or lactose. Moreover, DMK also submits that producers can easily switch between the manufacturing of these different ingredients.
- (81) The market investigation has not led to refute the DMK claim that permeate can in some cases be substituted with other commodities such as whey powder, milk powder or lactose, which have different lactose content.<sup>52</sup>
- (82) For the assessment of this Transaction, the issue whether permeate constitutes a distinct market can be left open as it has no impact on the competitive assessment of the case. The market for permeate will be considered as separate as it represents the narrowest possible segmentation.
- (83) As regards *whey powder*, the Commission has so far left open whether it constitutes a separate product market or part of a wider ingredients market. In a past case, the Commission reviewed whey powder and skimmed milk powder as ingredients of calf milk replacer and left open whether they form part of a wider product market.<sup>53</sup>
- (84) The market investigation has not allowed the Commission to conclude whether the whey powder constitutes a separate market or a part of a wider ingredients market.<sup>54</sup> For the assessment of this Transaction, the issue whether whey powder constitutes a distinct market can be left open as it has no impact on the competitive assessment of the case. The market for whey powder will be considered as separate as it represents the narrowest possible segmentation.
- (85) As regards *WPC*, the Commission found it appropriate in *Arla Foods/Allgäu*land to subdivide the WPC market according to the protein content of WPC since WPC 35-50, WPC 60-80 and WPC above 80 (i.e. WPI) have different production properties and usages.<sup>55</sup> (WPC 60-80 are higher value added products used for protein fortification in sports, infant and clinical nutrition. They are also used in processed meat and fish products, and in the dairy industry for certain types of processed cheeses, yogurts and desserts. The majority of these products contain 80% protein level). However, in *Arla Foods/Milk Link*, the Commission left this question open.<sup>56</sup>

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<sup>52</sup> Replies to question 6 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate competitors (Q.7) and question 7 to whey permeate customers (Q.7).

<sup>53</sup> M.3535 – Van Drie/Schils, paragraph 11.

<sup>54</sup> Replies to question 7.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8) and question 6.1 to whey permeate customers (Q.7).

<sup>55</sup> M.6348 – Arla Foods/Allgäu

<sup>56</sup> M.6611 – Arla Foods/Milk Link, paragraph 48.

- (86) The market investigation has confirmed that the WPC production requires specific equipment with proper know-how and advanced technology. Nevertheless, the market investigation has not been conclusive regarding the potential segmentation within WPC.<sup>57</sup>
- (87) However, the question whether whey powder and WPC 60-80 should be considered as a separate market can be left open as it has no bearing on the competitive assessment of the Transaction. The market for WPC 60-80 will be considered as separate as it represents the narrowest possible segmentation.
- (88) In this case, the market definition can be left open, given that serious doubts would not arise even under the narrowest market definition.

#### 4.2.3.3. *Geographic market definition*

- (89) The Parties submit that regarding the market for whey related-product geographic it can be left open whether any such market would be national or wider than national in scope.
- (90) As regards *whey permeate*, the Commission also left open in previous cases whether the market for permeate powder is EEA-wide or even worldwide in scope as permeate can be transported over significant distances and has a shelf life of 18 months.<sup>58</sup>
- (91) The market investigation has confirmed that the permeate powder market is at least EEA-wide in scope.<sup>59</sup> Only a small majority of whey permeate customers have indicated that they restrict their purchases to their Member States. The majority of customers purchases permeate on an EEA-wide basis or in neighbouring Member states.<sup>60</sup> Therefore, the market for permeate powder will be considered as EEA-wide.
- (92) As regards *whey powder*, the Commission has previously left open whether the relevant geographic market is national or EEA-wide in scope.<sup>61</sup> Therefore, for the assessment of this Transaction, the market for whey powder will be considered at EEA-wide and national level
- (93) As regards *WPC*, the Commission left open whether the market is EEA- wide or worldwide.<sup>62</sup> It considered EEA-wide market shares of WPC 60-80 in

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<sup>57</sup> Replies to question 22 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate competitors (Q.7) and replies to question 22 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>58</sup> M.6348 – Arla Foods/Algäulland.

<sup>59</sup> Replies to question 9 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8) and question 11 to whey permeate competitors (Q.7).

<sup>60</sup> Replies to question 9 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>61</sup> M.3535 – Van Drie/Schils, paragraph 11; also see M.6119 – Arla/Hansa, paragraph 41; M.6348 – Arla Foods/Allgäulland, paras. 71, 76 et seq.; M.6611 – Arla Foods/Milk Link, paragraph 77, 80 et seqq.

<sup>62</sup> M.6348 - Arla Foods/Algäulland.

*Arla/Allgäu*land but did not decide the matter. Therefore, for the assessment of this Transaction, the market for WPC including WPC 60-80 will be considered as EEA-wide, the narrowest possible level.

### **4.3. Competitive assessment**

#### **4.3.1. Overview**

(94) Using the market definitions as set out above in section 4.2, the markets where the Parties' activities overlap are:

- a. For the procurement of conventional raw cow milk in Germany (and certain sub-parts of Germany).
- b. For nature Dutch-type cheese:
  - i. in the Netherlands:
    1. The market for the supply of nature Dutch-type cheese to specialised wholesalers (in particular the segment for cheese older than 15 days);<sup>63</sup>
  - ii. In Germany:
    1. The market for the supply of nature Dutch-type cheese to OOH and Industry customers, and retailers (classic and modern);<sup>64</sup>
- c. For rindless Dutch-type cheese:
  - i. The market for rindless Dutch-type cheese in the Netherlands and Germany, in all possible sub-segmentations thereof.
- d. For whey-base products :
  - i. The market for permeate in the EEA;
  - ii. The market for whey powder in the EEA;
  - iii. The market for WPC 60-80 in the EEA and on a national basis.

#### **4.3.2. Procurement of conventional raw cow milk in Germany and certain parts thereof**

(95) Regarding conventional raw cow milk, the Parties' activities only overlap in Germany. The table below provides the combined market share of the Parties in the German market for conventional raw cow milk.

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<sup>63</sup> There are no overlaps on the market for the supply of nature Dutch-type cheese to OOH and Industry customers, or to retailers (classic and modern) as DMK is absent from these segments.

<sup>64</sup> There are no overlaps in the supply of nature cheese to specialised wholesalers (there exist no German comparable segments to the Netherlands).

Procurement of Conventional Raw Cow Milk		
Germany 2014	Volumes in tons	Share in %
DMK eG	[...]	[10-20]%
DOC KAAS B.A.	[...]	[0-5]%
Combined	[...]	[10-20]%
<b>Total Market</b>	<b>30.360.000<sup>65</sup></b>	<b>100%</b>

**Figure 4: Procurement of Conventional Raw Cow Milk, form CO, p. 25**

(96) The Parties' combined share in the market of conventional raw cow milk in Germany would be [10-20]% after the Transaction. According to paragraph 18 of the Horizontal Merger Guidelines<sup>66</sup>, "*concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. [...] An indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 %*". In addition, the increment in market concentration in this case would be very small, with DOC Kaas having only [0-5]% of the relevant market.

(97) At a more regional level, the German members of DOC Kaas B.A. are located in the following six areas in North-Western Germany: Emden/Oldenburg, Bremerhaven, Oberhausen, Münster, Osnabrück and Duisburg. DMK eG collects raw milk in each of these six areas, with the exception of Duisburg. The Parties have not been able to submit market shares for the five areas of Germany where their procurement activities overlap. They consider however that market shares in some of these areas would likely be above 20%, but lower than 50%.

#### 4.3.2.1. Nature of competition in the market for procurement of conventional raw cow milk

(98) As dairy cooperatives, both DMK and DOC Kaas have with their member-farmers a dual relationship. First, the member-farmers of both DMK and DOC Kaas are the owners of their respective cooperatives since the cooperatives "capital" has been supplied by those members. Most of this "capital" stems from retained earnings. Second, farmers are also suppliers to the cooperatives. According to the respective articles of association, member-farmers are obliged to deliver all their raw milk to the cooperatives and both DMK and DOC Kaas are obliged to collect all the raw milk that their members produce, irrespective of market conditions. The result of this reciprocal obligation is that there is a continuous flow of raw milk from farmers to dairy plants that the cooperatives collect and process into dairy products. Cooperatives may purchase additional milk from non-members but this additional procurement may not replace the milk procured from the members.

(99) The basic milk price paid by DMK and DOC Kaas to their members is calculated on the basis of [...]. The calculations are updated monthly on the basis of rolling

<sup>65</sup> For 2014, German Milchindustrie-Verband e.V. indicated that the total market was 31,300,000 tonnes of cow's milk of which only approx. 3% were organic, see <http://www.milchindustrie.de/marktdaten>.

<sup>66</sup> OJ C 31, 05.02.2004, p. 3.

(yearly and monthly) forecasts and consequently influence the monthly determination of the milk price paid to farmers.<sup>67</sup>

- (100) Therefore, competition in the procurement of conventional raw cow's milk largely depends on a competitor's ability to attract farmers to become members of its cooperative. This competition is price based (farmers have an incentive to move to cooperatives that will offer them the best price for their milk) since cooperatives have an obligation to purchase a farmer's entire production.

*4.3.2.2. Numerous alternative sources of demand for dairy farmers outside the Parties*

- (101) The Parties submit that there are numerous alternative sources of demand for dairy farmers apart from them. They argue that a milk producer who decides to terminate his membership with the merged undertaking will always be able to find an alternative buyer for his milk. In the areas of Germany where the Parties' activities overlap, several cooperatives are competing for farmers' milk in all these areas, such as Molkerei Rücker, Molkerei Ammerland, Molkerei Wiesehoff Hochwald. Other competitors, such as Paul Mertens Molkerei, Privatmolkerei Naarmann and Berliner Milcheinfuhr-Gesellschaft are present in some of the areas in which the Parties, activities overlap.<sup>68</sup> In addition, the Parties further submit that other German cooperatives could step in and compete with the Parties in those areas.

*4.3.2.3. The Parties are not close competitors*

- (102) The Parties also submit that while the potential procurement areas of DOC Kaas B.A. and DMK eG overlap to some extent, they do not compete very intensively between each other to attract new members. The Parties submit that, in the past five years, there have been [...] farmers who have switched from DOC Kaas B.A. to DMK eG, and only [...] farmers (out of nearly 9,000) have switched from DMK eG to DOC Kaas B.A.<sup>69</sup> This indicates that, prior to the Transaction, the Parties were not close competitors in the procurement of conventional raw cow's milk in Germany.

*4.3.2.4. Procurement of conventional raw cow's milk in areas of Germany where the activities of the Parties overlap*

- (103) As explained at paragraph (19) the Commission and the German FCO have previously left open whether the geographic market for the procurement of raw milk in Germany could be defined at a narrower than national level (regional or local). Using this possible narrower geographic market definition, as mentioned above, there are only five zip-code areas in North-Western Germany where both DMK and DOC Kaas collect conventional raw cow's milk: Emden/Oldenburg (zip-code area 26); Bremerhaven (zip-code area 27); Oberhausen (zip-code area 46); Münster (zip-code area 48); and Osnabrück (zip-code area 49).<sup>70</sup> The Parties were unable to provide market data regarding the total volumes of

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<sup>67</sup> Form CO, paragraph 91.

<sup>68</sup> Form CO, paragraph 83.

<sup>69</sup> Form CO, paragraph 85.

<sup>70</sup> Form CO, paragraph 81 – the Parties have used zip code areas as a proxy for a narrower geographic market.

conventional raw cow's milk collected in these areas individually but they estimated that their combined market share in each of these zip-code areas would be above 20% but below 50%.<sup>71</sup>

- (104) The competitive assessment as regards the procurement of conventional raw cow's milk in Germany applies equally to those areas. Market dynamics between farmers and cooperatives are similar. The Parties have confirmed that Molkerei Rücker, Molkerei Ammerland and Molkerei Wiesehoff are also procuring milk in those areas. The Parties indicate that alternative sources of demand for the farmers in these areas include Hochwald, Paul Mertens Molkerei, Privatmolkerei Naarmann GmbH and B.M.G. Berliner Milcheinfuhr-Gesellschaft.<sup>72</sup> The data indicating that the Parties are not close competitors discussed above at paragraph (102) is specific to those areas of overlapping activities.
- (105) During pre-notification contacts and the market investigation, no competition concerns were raised with regards to the market for the procurement of conventional raw cow's milk in Germany, regardless of whether the market is defined at a national or at a narrower level.

*4.3.2.5. Comments related to procurement of conventional raw cow's milk in the Netherlands are not supported by facts and do not seem to be related to this Transaction*

- (106) Respondents to the market investigation have not expressed substantiated concerns regarding the impact of the Transaction on the procurement of conventional raw cow's milk in Germany.
- (107) One market player claimed to experience structural difficulties as regards access to conventional raw cow's milk in the Netherlands. According to this player, prices for conventional raw cow's milk in the Netherlands are high and there are barriers to access large volumes of raw conventional milk. This allegedly hinders this player's ability to reach full production capacity.
- (108) This alleged issue appears unrelated to the Parties' behaviour on the market and is not merger specific. The Transaction will likely have no impact on the market for the procurement of conventional raw cow's milk in the Netherlands, since the geographic market is national and that the Parties' activities only overlap in Germany.

*4.3.2.6. Conclusion*

- (109) On the basis of the considerations in paragraphs (95) to (108) and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for the procurement of conventional raw cow's milk in Germany, regardless of whether the market is defined at a national or at a narrower level.

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<sup>71</sup> Form CO, paragraph 83.

<sup>72</sup> Form CO, paragraph 83.



### 4.3.3. *Cheese*

#### 4.3.3.1. *Introduction; regarding the completeness of the data*

- (110) For the Netherlands, the Parties were able to produce total market sizes and market share data for all the possible product and geographic market definitions, and sub-segments thereof. Therefore, the Commission's competitive assessment is based partly on this data, and was completed by the market investigation. The Commission's investigation concludes that the proposed Transaction will not raise serious doubts as to its compatibility with the internal market for nature Dutch-type cheese in the Netherlands, as well as its possible sub-segmentations in various distribution channels.
- (111) In contrast, for Germany, the Parties have been unable to provide total market sizes for all the possible product and geographic market definitions, and sub-segments thereof. The Parties were able to provide a corresponding breakdown of their own sales according to those market definitions and sub-segmentations but in the absence of relevant market sizes, no market shares can be derived.
- (112) The Parties have only been able to offer total market sizes for different segmentations, at a wider level (e.g. total market size for Dutch-type cheese in Germany, but not segmented between nature and rindless, or between the various distribution channels).
- (113) This lack of data or tracking of market sizes may indicate that this segmentation is slightly less relevant in Germany than in the Netherlands. This absence of data has, however, proven to be a challenge for the competitive assessment of this Transaction in the markets for nature Dutch-type cheese in Germany (and all possible sub-segmentations in terms of various distribution channels), as well as for rindless Dutch-type cheese on a geographic area covering both the Netherlands and Germany (and all possible sub-segmentations in terms of various distribution channels).
- (114) In the absence of such data, the Commission has organized a wide outreach exercise to customers and competitors during pre-notification, and carried an investigation targeted at the level of all possible market definitions and sub-segments thereof for those markets. The Commission's market investigation has not revealed any serious doubts as to the Transaction's compatibility with the internal market for nature Dutch-type cheese in the Netherlands and Germany (and potential sub-segmentations in terms of various distribution channels), and with the internal market for rindless Dutch-type cheese in the Netherlands and Germany (and potential sub-segmentations in terms of various distribution channels).

#### 4.3.3.2. *Nature cheese*

##### *a. Netherlands*

##### *(i) Supply of nature Dutch-type cheese older than 15 days to specialised wholesalers in the Netherlands*

- (115) The main area of overlap between the Parties' activities in nature Dutch-type cheese in the Netherlands relates to sales to specialised cheese wholesalers in the Netherlands of cheese 15-days old and older. As explained above in paragraph (52), wholesalers play a special role in the Netherlands. They buy

15-days old<sup>73</sup> nature Dutch-type cheese from producers (as younger nature Dutch-type cheese is usually not transportable) and ripen it until it is suitable for consumption, sometimes adding their know-how and/or brand in the process (and therefore capturing part of the added value), and are also active in exporting matured nature Dutch-type cheese.

*1. Likelihood of horizontal non-coordinated effects*

- (116) The Parties have provided their best estimates for volumes of 15-days-old nature Dutch-type cheese their competitors sell to specialized cheese wholesalers in the Netherlands, and estimated their own and their competitors' market shares. This is the narrowest possible level of market definition for these products.

<b>Sales of at least 15-Days-Old Dutch-Type Cheese to Specialized Cheese Wholesalers 2015</b>		
<b>Cheese Producer</b>	<b>Volume in Tons</b>	<b>Share in %</b>
DMK	[...]	[0-5]
DOC Kaas	[...]	[5-10]
Combined	[...]	[10-20]
A-ware	[...]	[10-20]
FrieslandCampina	[...]	[30-40]
De Graafstroom (Bleskensgraaf)	[...]	[20-30]
Other Producers	[...]	[5-10]
<b>Total Market</b>	[...]	<b>100.0</b>

**Figure 5: Sales of 15-Days-Old Dutch-Type Cheese to Specialised Cheese Wholesalers in 2015, form CO, p. 104**

- (117) The combined share of the Parties in the supply of nature Dutch-type cheese (15 days and older) to specialised wholesalers in the Netherlands would be [10-20]%, with a modest increment of [0-5]% (DMK's current market share). According to paragraph 18 of the Commission's Horizontal Merger Guidelines under the Merger regulation, a combined market share below 25% indicates a presumption of compatibility with the internal market.

*Firstly: Numerous alternative producers*

- (118) As is apparent from the market share table above, there are several other cheese producers selling 15-days-old nature Dutch-type cheese to specialised cheese wholesalers.
- (119) FrieslandCampina is the largest competitor of the Parties and will remain more than three times as large a competitor after the Transaction, with a [30-40]% market share in 2015. De Graafstroom is the second largest competitor of the Parties and will remain twice as large a competitor after the Transaction, with a [20-30]% market share in 2015.

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<sup>73</sup> "15-days-old" is used in this Decision to indicate cheese of 15 days old and older.

- (120) The third largest competitor in this market, A-ware, has started its own production of cheese in December 2014. A-ware has added new production capacity of up to [...] tonnes to the market, and has already produced an estimated volume of [...] tonnes of Dutch-type cheese in 2015. While A-ware started as an independent specialised wholesaler, it does not ripen all of its cheese on its own, and has already supplied significant volumes of 15-days-old nature Dutch-type cheese to specialised cheese wholesalers in 2015.<sup>74</sup>
- (121) In addition, there are numerous additional suppliers from the Netherlands such as Cono, Fromagerie Bel, and Rouveen. The Parties claim that all have either the capacities or at least the ability to extend their capacities in order to meet a significant part of the demand of specialised cheese wholesalers. In particular, Cono and Rouveen have each just recently significantly increased their capacities.<sup>75</sup> The example of A-ware's recent successful entry and expansion would tend to confirm the Parties' views.

*Secondly: Specialised wholesalers' ability to switch*

- (122) The Commission found in *FrieslandCampina/Zijerveld* that specialised cheese wholesalers could easily switch to other suppliers without any significant constraints.<sup>76</sup> In particular, specialised cheese wholesalers usually do not have any long-term relationships or minimum purchasing commitments with suppliers so that they can easily switch volumes from one supplier to another.<sup>77</sup>
- (123) Finally, specialised cheese wholesalers also have the possibility to switch to cheese producers outside the Netherlands, notably because transport costs are generally low.<sup>78</sup> Specialised cheese wholesalers hence have the opportunity to purchase Dutch-type cheese of equal or very similar quality from many different suppliers outside the Netherlands. The fact that DMK, a German producer, supplies specialised cheese wholesalers in the Netherlands may indicate that specialised cheese wholesalers are no longer dependent on Dutch cheese producers. More than 25% of the volumes sold by DMK to specialised cheese wholesalers in the Netherlands are nature Dutch-type cheese (the rest being rindless Dutch-type cheese and other types of rindless hard and semi-hard cheese). Another German cheese producer, Sachsenmilch, supplies 15-days-old natural Dutch-type cheese to specialised cheese wholesalers in the Netherlands. The Parties state that other German producers which can supply specialized cheese wholesalers in the Netherlands include Molkerei Ammerland and Molkerei Rucker. In addition to

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<sup>74</sup> Form CO, paragraph 369.

<sup>75</sup> Form CO, paragraph 512.

<sup>76</sup> Replies to questions 24 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese customers wholesalers in the Netherlands (Q.2): a large majority of the cheese wholesalers confirm that they can easily switch between the various suppliers.

<sup>77</sup> Replies to questions 23 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese customers wholesalers in the Netherlands (Q.2): a large majority of cheese wholesalers have a contract period of up to 12 months.

<sup>78</sup> Replies to questions 18 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese customers wholesalers in the Netherlands (Q.2): the market investigation show that the transport cost are up to 3% of the total price. The difference between transport cost for Germany and for the Netherlands is on average lower than 1%.

German producers, there are several cheese producers from other EU member states which are able to supply specialised cheese wholesalers in the Netherlands.<sup>79</sup>

- (124) In fact, in 2015, the Parties have reportedly lost significant volumes compared to 2014 and their combined market share regarding sales of hard and semi-hard cheese to specialised cheese wholesalers has decreased [...] even on the basis of the conservative assumption that the total market volume has not increased in 2015.<sup>80</sup> This evidences switching of suppliers by specialised cheese wholesalers.

*Thirdly: Possibility of Entry*

- (125) As discussed above, the recent entry of A-ware shows that market players which currently act as specialised cheese wholesalers, or producers other types of Dutch-type, or even hard or semi-hard cheese, can start their own production of nature Dutch-type cheese within a reasonable time-frame.

*Conclusion*

- (126) On the basis of the considerations above and in light of the results of the market investigations, the Commission considers that transaction does not raise serious doubts as to its compatibility with the internal market for nature Dutch-type cheese in the Netherlands, as well as its possible sub-segmentations in various distribution channels or 15-days old and older.

*2. Likelihood of input foreclosure*

- (127) During pre-notification, some specialised wholesalers have expressed concerns about the reduction in the number of suppliers of nature Dutch-type cheese. Their concern was that the new entity would not focus on the activity of selling 15-days old cheese to wholesalers any longer, but rather concentrate on rindless cheese, particularly for exports. An alternative concern was that the merged entity would use DMK's in-house facility for ripening, thereby foreclosing specialised wholesalers 15-days old nature Dutch-type cheese.
- (128) For the reasons set out below and in light of the results of the market investigation, the Commission considers that those concerns do not appear to be justified. As explained by the Commission at paragraph 31 of its guidelines on the assessment of non-horizontal mergers:<sup>81</sup> *"Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may lead the merged entity to profitably increase the price charged to consumers, resulting in a significant impediment to effective competition."* Paragraph 32 of the same guidelines explain that: *"In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it*

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<sup>79</sup> Form CO, paragraph 402, 408 and 412 qq.

<sup>80</sup> Form CO, paragraph 364.

<sup>81</sup> OJ 2008/C265/07.

would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream."

*Firstly: No ability to foreclose*

- (129) The merged entity will not have the ability to foreclose input of nature Dutch-type cheese for specialised wholesalers because: (i) it will not have the in-house capacity to absorb their own need for ripening; and (ii) specialised wholesalers have enough alternative suppliers of 15-days old nature Dutch-type cheese to keep the merged entity from recouping lost sales to them via direct sales.
- (130) First, post-Transaction, the Parties will have no capacity in-house to absorb all of their nature Dutch-type cheese ripening needs. DOC Kaas does ripen cheese itself and does not have capacity for ripening cheese beyond 15 days.<sup>82</sup> DOC Kaas is therefore dependent on specialised cheese wholesalers who will further ripen the natural cheese and sell it to the downstream channels and to third parties who provide ripening services.
- (131) This will not change post-Transaction, since the ripening capacities of DMK<sup>83</sup> are currently fully utilized for the cheese produced by DMK. Consequently, post-Transaction the combined entity will continue to be dependent on specialised cheese wholesalers in the Netherlands in order to ripen at least part of its nature Dutch-type cheese production.
- (132) Second, specialised wholesalers have enough alternative suppliers of nature Dutch-type cheese to defeat any input foreclosure strategy by the Parties. As explained above at paragraph (118), there are numerous suppliers in the Netherlands able to deliver 15-days-old cheese to specialised wholesalers. As discussed above at paragraph (123), switching costs are low and there are no long term contracts between suppliers and specialised wholesalers. Therefore, any input foreclosure would be defeated by the specialised wholesalers switching, and it is unlikely that the merged entity would be able to raise specialised wholesalers' costs by foreclosing input to its Dutch-type nature cheese.

*Secondly: Lack of incentive to foreclose*

- (133) The merged entity will have (i) no incentive to reduce its output of nature Dutch-type cheese, and (ii) no incentive to cease supplying this output to specialised wholesalers.
- (134) First, the merged entity has no incentive to reduce its output of Dutch-type cheese. The abolition of milk quotas pushes farmers in the Netherlands to produce more milk (to compensate for a price in freefall). The merged entity cannot reject these volumes due to its obligations as a cooperative. Therefore it is looking to fully utilize its Dutch-type cheese production capacities to transform that milk.

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82 [...].

83 [...].

- (135) [...].<sup>84</sup> Internal documents of the Parties show that their intention is to specialise the DOC plant in Hoogeveen (Netherlands) in the production of Dutch-type nature cheese.<sup>85</sup> This is a profit maximizing strategy, given that nature Dutch-type cheese offers higher margins than rindless Dutch-type cheese, at equivalent volumes.
- (136) Second, the Parties have an incentive to keep supplying nature Dutch-type cheese to specialised wholesalers for ripening. The outsourcing of Dutch-type nature cheese maturing is a longstanding model in the Netherlands. This model is efficient because it allows the transfer of the economic risk to the specialised wholesaler early into the production process.
- (137) As discussed above at paragraph (131), DMK's ripening facility is capacity constrained and cannot absorb DOC Kaas' current production of nature Dutch-type cheese. However, even ignoring this fact, transferring the ripening of DOC Kaas' Dutch-type nature cheese to DMK would mean losing the various available Protected Geographic Indications ("PGI") for protected name cheese (i.e. "Gouda Holland", "Edam Holland").<sup>86</sup> Dutch customers are sensitive to and ready to pay a premium for Dutch-origin Gouda or Edam. DOC Kaas has no incentive to sacrifice this premium, and this will not change post-Transaction.
- (138) On the basis of the considerations and in light of the results of the market investigation, the Commission considers that input foreclosure regarding the supply of nature Dutch-type cheese to specialised wholesalers is unlikely that Transaction does not raise competition concerns of a vertical nature. Therefore, the Transaction does not raise serious doubts as to its compatibility with the internal market for nature Dutch-type cheese in the Netherlands, as well as its possible sub-segmentations in various distribution channels.

*b. Germany*

*(i) Supply of nature Dutch-type cheese to OOH and Industry customers, and retailers (classic and modern)*

- (139) The Parties' activities overlap in the supply of nature Dutch-type cheese in Germany, in all possible sub-segments thereof (supply to OOH and Industry customers, and supply to retailers – classic and modern). In Germany, there is no specific sub-segment for specialised wholesalers playing a role comparable to that of the Dutch specialised wholesalers.

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<sup>84</sup> Form CO, paragraph 451.

<sup>85</sup> Annex 16-04 of the Form CO, which relates to strategies, synergies and the cooperation of DMK and DOC Kaas post-Transaction, explicitly states on pages 17, 18 and 21 that the Parties intend to concentrate the production of natural cheese at the DOC Kaas production facility in Hoogeveen; fully utilize the capacities for the production of natural cheese in Hoogeveen; increase the share of Dutch-type cheese including natural Dutch-type cheese produced in the Netherlands and, for such purpose further invest in the Hoogeveen production facility.

<sup>86</sup> Form CO, paragraph 109. The concept of the protected names has been initiated by Dutch cheese producers in order to make consumers aware of the fact that Gouda and Edam originally come from the Netherlands (namely the Dutch towns of Gouda and Edam). Dutch cheese producers have obtained the right to use European Commission designated PGIs for "Gouda Holland" and "Edam Holland". In order to be able to use these PGIs, producers must comply with a given set of requirements. For example, the PGI for "Gouda Holland" requires producers of Dutch Gouda to use Dutch cows' milk, to follow a traditional Dutch recipe, and to ripen the Gouda on Dutch wooden shelves for a minimum of four weeks.

1. No likelihood of horizontal non-coordinated effects

Firstly: Market shares

- (140) As explained above at paragraphs (111) *et seq.*, the Parties were unable to provide estimated market sizes for the supply of nature Dutch-type cheese in Germany (even less so for sub-segmentations by distribution channel (OOH and Industry customers, retailers). The Parties were, however, able to provide a breakdown of their sales in volume and value according to these sub-segmentations.<sup>87</sup>
- (141) The Parties were able to provide estimated market sizes for total production, imports, exports and consumption of Dutch-type cheese in Germany in 2014, based on Eurostat data and information and estimates from the ZMB Zentrale Milchmarkt Berichterstattung GmbH.<sup>88</sup>

Germany 2014	Dutch-Type Cheese			
	Gouda	Edam	Maas-dam	Total
<b>Production</b>	277,583	223,454	-	501,037
<b>Imports</b>	135,348	30,392	-	165,740
<b>Exports</b>	148,063	136,883	-	284,946
<b>Consumption</b>	264,868	116,963	-	381,831

- (142) Based on the figures for total consumption of Dutch-type cheese in Germany, and based on the breakdown of their sales in Germany, the Parties provide the below table as a proxy for their market shares at the level of all Dutch-type cheese, not distinguishing between rindless and nature cheese.

Germany 2014	Distribution of Dutch-Type Cheese	
	Volume in Tons	Share in %
DMK	[...]	[30-40]
DOC Kaas	[...]	[5-10]
Combined	[...]	[40-50]
<b>Total Market</b>	<b>381,831</b>	<b>100.00</b>

<sup>87</sup> Form CO, annex 43.

<sup>88</sup> Form CO, Annex 40.

- (143) Based on the same Eurostat figures, the Parties also provide their estimated market shares based on the distribution of all Hard and Semi-Hard cheese in Germany in 2014.

Germany 2014	Distribution of Hard and Semi-Hard Cheese	
	Volume in Tons	Share in %
DMK	[...]	[20-30]
DOC Kaas	[...]	[0-5]
Combined	[...]	[20-30]
<b>Total Market</b>	<b>852,044</b>	<b>100.00</b>

*Market shares - Distinction rindless / nature Dutch-type cheese*

- (144) The Parties do not provide any data distinguishing the sale of nature and rindless Dutch-type cheese. As explained above at paragraph (48), this distinction may be less pronounced in Germany.
- (145) During the Commission's pre-notification contacts with nature Dutch-type cheese customers in Germany, no competition concerns arose.

*Market shares – Distinction between channels of distribution*

- (146) The Parties are logically not able to provide any data either distinguishing sales of nature Dutch-type cheese according to the various distribution channels. They do, however, propose the following data for the distribution of hard and semi-hard cheese to German retailers on the one hand, and German OOH wholesalers and industry customers on the other hand. This data is the Parties' estimate based on their own computation of third party data from market research firms GfK and AC Nielsen.

Germany 2014	Supply of Hard and Semi-Hard Cheese to Retailers	
	Volume in Tons	Share in %
DMK	[...]	[20-30]
DOC Kaas	[...]	[0-5]
Combined	[...]	[20-30]
<b>Total Market</b>	<b>446,771</b>	<b>100.0</b>

Germany 2014	Supply of Hard and Semi-Hard Cheese to OOH and Industry Customers	
	Volume in Tons	Share in %
DMK	[...]	[20-30]
DOC Kaas	[...]	[0-5]
Combined	[...]	[20-30]
<b>Total Market</b>	<b>405,273</b>	<b>100.0</b>



(147) The data above does not expose any striking differences between the Parties' market positions based on distribution channels. In addition, the Commission targeted its market investigation towards separate groups of customers in Germany according to distribution channels (retailers on the one hand, OOH wholesalers and industrial customers on the other hand). No competition concerns arose from either group.

(148) This incomplete data set does not point to any horizontal competition concerns regarding the supply of nature Dutch-type cheese in Germany. No complaint related to this market emerged during pre-notification contacts or the market investigation, regardless of the sub-segment targeted.

*Secondly: Numerous alternative sources of supply*

(149) The Parties are unable to provide any market share estimates at any level for other cheese producers in Germany, and in particular producers of nature Dutch-type cheese.

(150) However, the Commission's market investigation has confirmed the availability of numerous alternative sources of supply for nature Dutch-type cheese in Germany. FrieslandCampina will remain the primary competitor of the Parties. There will also be numerous additional producers in particular from Germany such as Sachsenmilch and Ammerland, and Molkerei Rucker.

*Thirdly: Parties are not each other's closest competitors*

(151) The data provided by the Parties as to their respective activities in the area of nature Dutch-type cheese in Germany show that they do not focus with equal intensity on the same distribution channels.

a. Indeed the data shows that, out of all its supply of nature Dutch-type cheese in Germany in 2014, DMK sold [more than 50]% of its volumes to retailers, and [...] % of its volumes to OOH and industrial customers.

b. By contrast, out of all its supply of nature Dutch-type cheese in Germany in 2014, DOC Kaas sold [...] % of its volumes to retailers, and [more than 50] % of its volumes to OOH and industrial customers.

(152) This shows that the intensity of competition between DMK and DOC Kaas for the supply of nature Dutch-type cheese in Germany is limited, as they target a different customer base.

*Fourthly: Customers' ability to switch*

(153) Much like in the Netherlands, customers usually do not have any long-term relationships or minimum purchasing commitments with suppliers so that they can easily switch volumes from one supplier to another.<sup>89</sup>

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<sup>89</sup> Replies to questions 24 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese customers in the Netherlands (Q.3): a large majority of cheese customers have a period contract up to 24 months.

- (154) In addition, it would appear that, German end-consumers of nature Dutch-type cheese are very price conscious. German customers might well respond to a price increase by switching their demand to other types of Hard or Semi-Hard-Cheese (e.g. Emmental).<sup>90</sup>

*Fifthly: Potential entry of cheese producers from neighbouring countries*

- (155) In addition, as demonstrated by DOC Kaas' established presence in Germany, cheese producers from the Netherlands, such as A-ware, DeGraafstroom, and Cono, Fromagerie Bel, and Rouveen, could enter the German market and become alternative sources of supply.
- (156) Similarly, competitors from outside the Netherlands and Germany, such as Arla, will continue to exercise significant competitive pressure on the Parties in a market where customers are less sensitive to the origin of Dutch-type nature cheese than in the Netherlands.

*Conclusion*

- (157) On the basis of these considerations and in light of the results of the market investigations, the Commission considers that Transaction does not raise serious doubts as to its compatibility with the internal market for nature Dutch-type cheese in Germany, as well as its possible sub-segmentations in various distribution channels.

*4.3.3.3. Rindless Cheese*

- (158) The Parties submit that the total volume of rindless Dutch-type cheese produced by European producers in 2014 amounted to at least 1,049,695 tonnes (789,695 tonnes produced by German and Dutch producers and 260,000 tonnes produced by other European producers).
- (159) On such basis, the combined position of DMK and DOC Kaas in 2014 in the production of rindless Dutch-type cheese would amount to approx. [20-30]% in the EEA and [30-40]% of the combined Dutch and German production.

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<sup>90</sup> Non-confidential reply by one cheese producer in Germany to the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to cheese producers in Germany (Q.4).

Production of Rindless Dutch-Type Cheese 2014		
Total Market	By European Producers	By German and Dutch Producers
	Estimate of Parties	Estimate of Parties
	1,049,695	789,695
Combined Production of the Parties	[...]	
Combined Share of Parties	[20-30]%	[30-40]%

Figure 6: Production of Rindless Dutch-type cheese, form CO, p. 79

a. Likelihood of horizontal non-coordinated effects

- (160) According to paragraphs 24 and 27 of the Horizontal Merger Guidelines, "a merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. (...) The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power."
- (161) The Parties argue that the production of rindless Dutch-type cheese has grown significantly since 2014 and that their relative market shares as decreased as a consequence. First, the Parties submit that this increase is due to the abolition of European milk quotas in April 2015. As a consequence, dairy cooperatives have been supplied with more raw milk resulting in larger cheese production.
- (162) Second, the Parties submit that they face strong competition and new entrants. The market investigation has confirmed that A-ware has started a Dutch-type cheese production activity at the end of 2015 and it has produced 30,000 tonnes of rindless Dutch-type cheese in 2015.<sup>91</sup> The market investigation has also confirmed that the Parties face strong and numerous competitors (notably FrieslandCampina with a market share of 22.8%): indeed, more than twelve significant Dutch or German competitors are currently active on the market.<sup>92</sup>
- (163) Moreover, the Parties submit that the producers of hard and semi-hard cheese which currently produce rather small volumes of Dutch-type cheese could easily increase their output of Dutch-type cheese by using their existing production lines. The Parties submit that the steps in the production of various types of hard and semi-hard cheese including Dutch-type cheese are similar to a large extent and that they require similar technical equipment (see Annex A). This is confirmed by rindless cheese producers in the market investigation to some extent. Rindless cheese producers considered that "the process is similar, with other starters and

<sup>91</sup> Replies to questions 20 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>92</sup> Fromagerie Bel, de Graafstroom, Ammerland, Bayernland, Gut von Holstein, Sachsenmilch, Bayerische Milchindustrie, Heinrichsthaler, Milchwerke Schwaben, Molkerei Rucker.

cultures"<sup>93</sup>. Another explains more specifically that "*[it] depends on the kind of cheese. The following type cheeses Maasdam, Gouda and Edam (these are Dutch-type cheeses) and Goya, Emmental, Cagliata (these are non-Dutch type hard and semi hard cheeses) can be produced on the same production lines. However the production of for example Cheddar cheese (=non-Dutch type cheese) is not possible on the same production lines.*"<sup>94</sup>

- (164) Almost half of rindless cheese producers confirmed that they could produce rindless Dutch-type cheese on the same production lines and use the same production process.<sup>95</sup> A quarter of them had already achieved a transition to rindless Dutch type cheese production from other types of hard and semi-hard cheese.<sup>96</sup> A very large majority indicated that they had access to the required starter cultures in order to produce rindless Dutch-type cheese<sup>97</sup> as "*they are available from major starter producers such as Hansen, DSM or others*" and "*the availability of starter culture [...] today is good.*"<sup>98</sup> Another producer explains that "*There is no problem with availability of starter culture and the cost of its purchase is minimal in total costs of cheese production.*"<sup>99</sup>
- (165) Moreover, producers have indicated that switching production from rindless non-Dutch type cheese to rindless Dutch type cheese entails minimal costs if they are already producing comparable cheeses.<sup>100</sup> As a consequence, only a minority of them has indicated that they would switch volumes from rindless non-Dutch-type cheese to rindless Dutch-type cheese following a definitive price-increase of around 10% of rindless Dutch-type cheese.<sup>101</sup> A producer explains that "*depending on the market situation, [they] can produce both types of cheese*". Another explains that "*[they] produce the most profitable cheese. If Dutch-type cheese is increasing, we will switch and produce only Dutch-type cheese*".<sup>102</sup> Moreover, a very large

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<sup>93</sup> Replies to question 9 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>94</sup> Replies to question 9 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>95</sup> Replies to question 10 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9). 8 out of 17 (removing the non-producer of the respondent's list) cheese producers could produce rindless Dutch-type cheese and rindless non-Dutch-type cheese on the same production lines and use the same production process.

<sup>96</sup> Replies to question 11 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>97</sup> Replies to questions 12 and 12.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>98</sup> Replies to questions 12 and 12.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>99</sup> Replies to questions 12.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>100</sup> Replies to questions 16 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>101</sup> Replies to questions 17 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>102</sup> Replies to questions 17.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

majority of rindless cheese producers consider that there are no other obstacles that would prevent them from entering the Dutch-type cheese market.<sup>103</sup>

- (166) On the basis of the results of the market investigation,<sup>104</sup> the Commission considers that the Parties face numerous competitors on the wider segment for rindless hard and semi-hard cheese producers which have capacity to produce rindless hard and semi-hard cheese and could switch their production to rindless Dutch-type cheese. The table below provides the estimated capacities of the Parties' competitors for hard and semi-hard cheese (including Dutch-type cheese).

<b>Cheese Producer</b>	<b>Capacity for the Production of Rindless Hard and Semi-Hard Cheese in Tons</b>
Friesland Campina	[...]
Fromagerie Bel	[...]
A-ware <sup>105</sup>	[...]
De Graafstroom (Bleskensgraaf)	[...]
Rouveen	[...]
Sachsenmilch	[...]
Ammerland <sup>106</sup>	[...]
Molkerei Rucker	[...]
Gut von Holstein	[...]
Bayerische Milchindustrie (BMI)	[...]
Bayernland	[...]
Milchwerke Schwaben	[...]
Heinrichsthaler	[...]
Others	[...]
<b>Total</b>	[...]
<b>Total including DMK and DOC Kaas</b>	[...]

**Figure 7: Capacity in Germany and the Netherlands for the production of rindless hard and semi-hard cheese, form CO, p. 138**

<sup>103</sup> Replies to questions 18 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>104</sup> Replies to questions 14 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese customers (Q.10). A large majority of cheese customers have assessed their capacity to find alternative suppliers as being strong.

<sup>105</sup> The parties estimate that, in 2015, A-ware produced approx. [...] tons of Dutch-type cheese, thereof approx. [...] tons of natural ripened cheese and [...] tons of rindless cheese. A-ware has invested in capacity of 100,000 tons to 120,000 tons and will therefore be able to produce even more (Dutch-type) cheese in the future. The parties estimate that the production of A-ware will amount to approx. [...] tons of natural and [...] tons of rindless Dutch-type cheese.

<sup>106</sup> Please note that Ammerland has announced to increase its capacities for the production of rindless cheese by 40,000 tons during the course of 2016.

- (167) As regards the impact of the Transaction on the market for rindless Dutch-type cheese, the market investigation showed there were little concerns among market players about the impact of the Transaction on competition. A large majority of rindless cheese producers did not consider that the Transaction would have an impact on their business or on the market for rindless Dutch type cheese.<sup>107</sup> A large supplier explains that "*it faces intense competition [...] the Transaction will in any event not fundamentally alter the dynamics of what is in effect an oversupplied market*".<sup>108</sup> As regards, the impact on the market, a supplier explains that "*this will not fundamentally alter the competitive dynamics due to the low entry barriers and the multiple players already active in the market*". Other points out "*the big surplus in cheese production on the European market*".<sup>109</sup>
- (168) Furthermore, the market investigation has not given any indication that the market shares of the Parties in the possible submarkets consisting of different distribution channels are specifically high in some channels.
- (169) In the light of the recent entry of A-ware, the ability of rindless non-Dutch type cheese producers to easily switch production to rindless Dutch-type cheese and the opinion of market participants on the impact of the Transaction, the Commission considers that no competition concerns will arise on the market for the distribution of rindless Dutch-type cheese.

*b. Conclusion*

- (170) On the basis of the above considerations and in light of the results of the market investigation, the Commission considers that no competition concerns will arise under any possible market definition of Dutch-type rindless cheese and that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the market for the supply of cheese products.

**4.3.4. Whey-related products**

- (171) Whey sales by DMK Group and DOC Group are either achieved through third parties or, mainly by joint ventures with third parties which further process the whey into different whey-based products. The Parties' activities overlap with respect to the production and distribution of whey powder, permeate and WPC (whey protein concentrate).
- (172) As regards whey production, DMK Group is active through ArNoCo GmbH ("ArNoCo"), a joint venture of DMK and Arla Foods, and Wheyco GmbH ("Wheyco"). Most of the raw whey deriving from DMK Group's cheese production is used in intra-group. The DOC KAAS raw whey is sold and processed by a joint venture with Volac International Limited ("Volac International"), namely "DV Nutrition".

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<sup>107</sup> Replies to questions 23 and 24 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>108</sup> Replies to questions 23.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to rindless cheese producers (Q.9).

<sup>109</sup> Replies to questions 24 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate competitors (Q.7).



#### 4.3.4.1. Permeate

- (173) As regards permeate, the Parties have estimated their market shares for permeate in the EEA at [20-30]% on the basis of a total permeate market of 230 000 tonnes.

Production of Permeate in the EEA		
2014	Volumes in tons	Share in %
Wheyco (DMK)	[...]	[5-10]%
DV Nutrition (DOC KAAS)	[...]	[10-20]%
Combined	[...]	[20-30]%
<b>Total Market</b>	[...]	<b>100%</b>

Figure 8: Production of permeate in the EEA, form CO, p. 65

- (174) Whereas this market share is not negligible, the market investigation has shown that there is significant demand-side substitutability within the family of whey-based products and this reduces any potential market power resulting from the combined market share of the Parties. A large majority of whey permeate customers has explained that they would be able to use whey powder instead of permeate powder for the same end applications.<sup>110</sup> A large majority of whey permeate customers also indicated that they would be able to use lactose instead of permeate powder for the same end applications.<sup>111</sup> A majority of customers has also submitted that permeate could be substituted by milk powder.<sup>112</sup> As a consequence, some market participants have replaced permeate with a substitute over the last three years for instance with dextrose in animal feed.<sup>113</sup> While a minority of permeate customers had switched suppliers over the last three years,<sup>114</sup> a large majority of them has alternative permeate suppliers.<sup>115</sup>
- (175) Furthermore, market participants do not expect the Transaction to have a significant effect on competition. Almost all of them expect that it will not have any impact on their company.<sup>116</sup> One supplier explained that "*[they] think that with the volume of Permeate from DMK / DOC the market will not change that much. We think the share from DMK/DOC in Permeate production EU-28 is 25 %. This*

<sup>110</sup> Replies to question 7.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>111</sup> Replies to question 7.2 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>112</sup> Replies to question 7.3 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>113</sup> Replies to questions 16 and 16.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>114</sup> Replies to question 24 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>115</sup> Replies to question 21 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>116</sup> Replies to question 28 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

means 75 % is left over for other producers".<sup>117</sup>A very large majority do not consider that the Transaction will have an effect on prices of permeate in the EEA either.<sup>118</sup> One customer explains that "the merger will have no effect on prices, because there are many producers of whey permeate powder in Europe." Another explains that "there are enough suppliers and alternatives for Permeate."<sup>119</sup> Additionally, as regards innovation, a very large majority of customers expect the Transaction to have no effect and the rest believes that the impact may be positive.<sup>120</sup>

- (176) Due to this limited market share, the possibility for customers of switching supply to other whey-based or starch-based products and the result of the market investigation as to the perceived impact of the Transaction, the Transaction raises no concerns on the potential market for permeate.

#### 4.3.4.2. Whey powder

##### a. Whey powder at EEA level

- (177) As regards whey powder, the Parties estimate that their combined position on a hypothetical EEA-wide market for whey powder is well below 10% in 2014. Moreover, the volume of sales of whey powder made by Doc Kaas () is negligible.

Sales of Whey Powder in the EEA		
2014	Volume in Tons	Share in %
DMK Group	[...]	[0-5]
DOC Kaas	[...]	[0-5]
Combined	[...]	[0-5]
<b>Total Market</b>	[...]	<b>100.00</b>

Figure 9: Production of whey powder in the EEA, form CO, p. 65

##### b. Whey powder at national level

- (178) As regards the market for whey powder at a national level, DOC Kaas does not sell any whey powder outside of the Netherlands and its sales are extremely limited in volume ([...] tons in 2014). As regards DMK, [...]. Moreover, there is strong demand-side substitutability between whey powder and other products such as lactose, milk powder and permeate powder.<sup>121</sup>

<sup>117</sup> Replies to question 28.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>118</sup> Replies to question 29 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>119</sup> Replies to question 29.1 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>120</sup> Replies to question 30 of the Commission's request for information pursuant to Article 11 of Merger Regulation addressed to whey permeate customers (Q.8).

<sup>121</sup> M.6348 – Arla Foods/Allgäu, paragraph 52 et seq.



#### 4.3.4.3. WPC 60-80

- (179) As regards WPC, the Parties' activities also overlap with respect to WPC 60-80. However, the combined market share of DMK and DOC KAAS, DV Nutrition on the basis of production in the EEA would amount to [10-20]%. Due to this limited market share, the Transaction raises no concerns on the potential market for WPC 60-80 at EEA level.

Production of WPC 80 in the EEA		
2014	Volume in Tons	Share in %
DMK Group	[...]	[0-5]
DV Nutrition	[...]	[10-20]
Combined	[...]	[10-20]
<b>Total Market</b>	[...]	<b>100.00</b>

Figure 10: Production of WPC 80 in the EEA, form CO, p. 67

- (180) On the basis of the above considerations in paragraphs (95) to (108) and in light of the results of the market investigation and taking particular account of the Parties' limited market share, the Commission considers that the Transaction raises no serious doubts as to its compatibility with the internal market with respect to the market for the supply of (i) permeate and WPC at EEA level, and (ii) the supply of whey powder both on a national and EEA-wide scope.

## 5. CONCLUSION

- (181) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission*

*(signed)*  
*Margrethe VESTAGER*  
*Member of the Commission*