

EN

*Case No COMP/M.5677 -
Schuitema/ Super de Boer
Assets*

Only the English text is available and authentic.

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

Article 9 (3)
Date: 25/01/2010



EUROPEAN COMMISSION

Brussels, 25.01.2010
C(2010) 477

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PUBLIC VERSION

COMMISSION DECISION

of 25.01.2010

referring case No COMP/M.5677 – Schuitema/Super de Boer Assets

to the competent authorities of the Kingdom of The Netherlands,

pursuant to Article 9 of Regulation (EC) No 139/2004

COMMISSION DECISION

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**referring case No COMP/M.5677 – Schuitema/Super de Boer Assets
to the competent authorities of the Kingdom of The Netherlands,
pursuant to Article 9 of Regulation (EC) No 139/2004**

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings¹ ("EC Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by Schuitema B.V. pursuant to Article 4 of the EC Merger Regulation,

Having regard to the request of the Nederlandse Mededingingsautoriteit (the Dutch competition authority; "NMa") of 18 December 2009,

WHEREAS:

I. INTRODUCTION

1. On 4 December 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of the EC Merger Regulation by which the undertaking Schuitema B.V. ("Schuitema", The Netherlands), ultimately controlled by CVC Capital Partners ("CVC", Luxembourg), would acquire from Jumbo Groep Holding ("Jumbo", The Netherlands), sole control over assets related to Super de Boer N.V. stores ("SdB Assets", The Netherlands) within the meaning of Article 3(1)(b) of the Council Regulation, by way of purchase of assets.
2. On 18 December 2009, the NMa requested the referral to its competent authorities of the proposed concentration in its entirety with a view to assessing it under the Dutch national competition law, pursuant to Article 9(2) of the EC Merger Regulation ("the request"). The NMa considers that the notified transaction affects competition in 11 local markets for the retail sale of daily consumer goods, which present all the characteristics of distinct markets and do not constitute substantial parts of the common market. In addition, the NMa submits that the notified transaction also threatens to significantly affect competition in the relevant retail market this market also presenting the characteristics of a distinct market.
3. The notifying party was informed on 21 December 2009 of the referral request made by the NMa and received a copy of the request at the same time. In its letter of 4 January 2010, the notifying party supported the NMa's request for an entire referral of the case.

¹ OJ L 24, 29.1.2004, p.1

4. On 7 January 2010, the NMa stated that the referral decision may be taken in another language than in Dutch.

II. THE PARTIES

5. **Schuitema** is engaged in the procurement, wholesale and retail supermarket business in The Netherlands. Schuitema is to a large extent a wholesale organization, which supplies goods and services to approximately 330 stores operated by franchisees (under Schuitema's store formula C1000). Schuitema also operates 39 of its own stores.
6. **SdB Assets** consist of 21 own supermarkets and 59 franchise supermarkets, currently operating in The Netherlands under the Super de Boer franchise formula.

III. THE OPERATION

7. On 5 November 2009 Jumbo and Schuitema signed a back-to-back agreement for the sale and purchase of certain Super de Boer assets. Jumbo, that is also active in retail sales of daily consumer goods in The Netherlands had recently acquired, following the NMa clearance of 4 December 2009, all assets and liabilities from Super De Boer.
8. The transaction notified to the Commission consists of those Super De Boer assets being sold on to Schuitema, i.e. 21 Super de Boer supermarkets, and franchisor rights for further 59 supermarkets. These assets constitute a business with a market presence, to which a market turnover can be clearly attributed.
9. As a result of the current transaction, Schuitema will acquire sole control of the SdB Assets i.e. of the 21 Super de Boer supermarkets, and franchisor rights for further 59 supermarkets.

IV. CONCENTRATION

10. The proposed concentration is an acquisition of sole control for the purposes of Article 3(1)(b) of the EC Merger Regulation.

V. COMMUNITY DIMENSION

11. The undertakings concerned have an aggregate worldwide turnover of more than EUR 5 billion (CVC: EUR [...] million; SdB Assets: EUR [...] million). The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million (CVC: EUR [...] million; SdB Assets: EUR [...] million) for 2008. CVC does not achieve more than two thirds of its Community turnover in one Member State.

VI. ASSESSMENT

12. As noted above, the NMa has made a request under Article 9(2)(b) seeking a referral of the whole of the notified concentration on the basis that the concentration in question affects competition in a number of markets within The Netherlands, which present all the characteristics of distinct markets and which do not constitute a substantial part of the common market. Alternatively, the NMa requested a referral under Article 9(2)(a) of the EC Merger Regulation.
13. The Commission has assessed, firstly, whether the conditions for a referral on the basis of Article 9(2)(a) were met, i.e. (i) whether the markets present all the characteristics of distinct markets within The Netherlands and (ii) whether the concentration threatens to affect significantly competition in the relevant markets. Secondly, the Commission has assessed whether the conditions for a referral according to Article 9(2)(b) were met i.e. (i) whether the markets present all the characteristics of distinct markets within The Netherlands, (ii) whether these markets constitute a substantial part of the common market, and (iii) whether the transaction affects competition in these distinct markets.

A Market definition

14. Both Schuitema and the SdB Assets are active in the supermarkets sector, in the retail, franchise, procurement and wholesale markets. In addition, Schuitema (via its parent, CVC), is active in the vertically related market to the retail market for confectionary goods and waste disposal.

Retail market for daily consumer goods

15. The referral request focuses on the retail market for daily consumer goods.

Product market definition

16. The notifying party, in line with the Commission's and the NMa's practice, submits that the relevant product market is the market for retail of daily consumer goods carried out by retail outlets such as supermarkets, hypermarkets and discount chains.²
17. The market investigation confirmed that the retail market for daily consumer goods through supermarkets, hypermarkets and discount chains should be considered as the relevant product market for this transaction.
18. Indeed, the market investigation confirms that the supermarkets, hypermarkets and discount chains compete with respect to their food and non food product range, marketing strategy and customer approach. These distribution channels, all offer the consumers the possibility to purchase all their daily groceries in one shop. This is however not the case for specialized shops, petrol service stations or kiosks which were identified by respondents in the market investigation as fulfilling a convenience,

² Case M.5112 – Rewe/Plus Discount, par. 17, M.4590 – Rewe/Delvita, par.12; M.3905 – Tesco/Carrefour, par. 15; and NMa's cases 2198 / Schuitema – Sperwer, 2668 / Sperwer – Laurus, and 6145 / Sperwer – Sligro – Spar – Meermarkt Attent.

a specialist function and therefore should not be part of the relevant market for retail sales of daily consumer goods.

19. Based on the above, it can be concluded that the product market definition applied by the Commission in previous cases is also relevant for The Netherlands. The relevant product market for the purposes of this decision is therefore the retail market for daily consumer goods limited to hypermarkets, supermarkets and discounters.

Geographic market definition

20. In previous Commission cases the geographic market for the retail sale of daily consumer goods has been delineated, according to demand side arguments, by the boundaries of a territory where the outlets can be reached easily by consumers (radius of approximately 20 to 30 minutes driving time).³ In some cases,⁴ the Commission found on the basis on specific circumstances (for instance homogeneous price-setting, advertising or assortment) that the retail markets could be wider than local in scope.
21. The NMa, in its referral request, indicated that its standard practice has been to define the geographical scope of the market starting with an area within a 15 minutes radius (travel time by car). The NMa argues that the Commission approach from previous cases should not be applied because of the Dutch specific circumstances such as the fact that the consumers in the densely populated Netherlands are not willing to travel more than 15 minutes by car for their groceries.⁵ The NMa has so far not defined whether the retail market is regional/local or national in scope (should the radiuses defined by the different travel times across all the local markets overlap). The NMa argues that the Commission approach from previous cases should not be applied because of the Dutch specific circumstances.
22. The delineation of each local area can only be undertaken on a case-by-case basis by taking into account specific local circumstances.⁶ Indeed, during the market investigation in the present case, competitors indicated that customers prefer to shop in their own locality. Moreover, the market investigation supported the NMa's previous findings with regard to a geographic scope of the retail market based on a 15 minutes car drive approach. Some respondents to the market investigation also indicated that the travel time can be considered as even lower than 15 minutes. In particular, some competitors considered that in the agglomerate areas in The Netherlands, the travel time allocated for purchase of the daily groceries cannot be longer than 5 to 10 minutes.
23. From a demand side this market seems to be local in scope. Supply-side wise, the retail market might be wider than local in scope. Moreover, at this stage, there is no clear evidence in support of homogeneous competition conditions across the entire territory of The Netherlands.

³ Case M.5112 – Rewe/Plus Discount, par. 20; M.1221 – Rewe/Meinl, par. 18.

⁴ COMP/M.1221 – REWE/Meinl par. 20, M.5047 – Rewe/Adeg, par 27.

⁵ NMa's cases 6145 – Sperwer/Spar/Meermarkt/Attent and 5586 – Ahold/Konmar, and the most recent, 6802 – Jumbo/Super de Boer.

⁶ M.4590 – Rewe/Delvita, par. 18; M.3905 – Tesco/Carrefour, par. 18; M.2161 – Ahold/Superdiplo, par. 16.

24. Therefore, for the purpose of this decision, the geographic dimension of the retail market for daily goods is defined on the basis of a radius of 15 minutes car drive, as plausibly suggested by the NMa. However, this does not exclude that the transaction may threaten to affect significantly competition in a geographically wider market.

B Assessment under Article 9(2)(a)

25. The NMa argues that the conditions of Article 9(2)(a) of the EC Merger Regulation are fulfilled for 11 local markets where the combined market share of the parties exceeds 50%.

26. Under Article 9(2)(a), a concentration has to threaten to affect significantly competition in a market within a Member State, which presents all the characteristics of a distinct market. If these criteria are fulfilled, the Commission can exercise its discretion to refer the case or not.

Distinct market

27. As discussed above, the geographic dimension of the retail market has been considered for the purpose of the present decision as local in scope. This applies to all 11 markets indicated by the NMa in its referral request i.e. to Beneden Leeuwen; Bennekom; Bunde; Bunschoten Spakenburg; Damwoude; Dinxperlo; Nieuwegein; Vessem; Vianen; Vlagtwedde en Onstwedde, and Westerbork.

28. It can be therefore concluded that these 11 localities represent markets within a Member State (The Netherlands) which present all characteristics of a distinct market.

Impact on Competition

29. In its referral request, the NMa indicated the following 11 markets where the notified concentration threatens to affect significantly competition within the meaning of Article 9(2)(a). They reflect the NMa's own calculation of the market shares based on its constant previous practice of considering the geographical scope of the market on the basis of 15-minutes drive time and taking into account the sales' floor area of the stores (verkoopvloerooppervlakte, "VVO").

Nr.	City / Area	Supermarkets + vvo in m2 according to Supermarktgid	Combined market share of the parties according to Supermarktgid	Supermarkets + vvo in m2 according to Supermarktpocket	Combined market share of the parties according to Supermarktpocket
1.	Beneden Leeuwen	C1000 [...] Super de Boer [...] Aldi [...]	[70-80]%	C1000 [...] Super de Boer [...] Aldi [...]	[80-90]%
2.	Bennekom	C1000 [...] Super de Boer [...] Albert Heijn [...]	[60-70]%	C1000 [...] Super de Boer [...] Albert Heijn [...]	[60-70]%
3.	Bunde	C1000 [...] Super de Boer [...]	[90-100]%	C1000 [...] Super de Boer [...]	[90-100]%
4.	Bunschoten Spakenburg	C1000 [...] C1000 [...] Super de Boer [...] Aldi [...]	[80-90]%	C1000 [...] C1000 [...] Super de Boer [...] Aldi [...]	[80-90]%
5.	Damwoude	C1000 [...] Super de Boer [...] Lidl [...]	[80-90]%	C1000 [...] Super de Boer [...] Lidl [...]	[80-90]%
6.	Dinxperlo	C1000 [...] Super de Boer [...] Aldi [...]	[70-80]%	C1000 [...] Super de Boer [...] Aldi [...]	[80-90]%
7.	Nieuwegein	C1000 [...] Super de Boer [...] Albert Heijn [...] Nettorama [...] Plus [...] Lidl [...] EmTé [...] Coop [...]	[50-60]%	C1000 [...] Super de Boer [...] Albert Heijn [...] Nettorama [...] Plus [...] Lidl [...] EmTé [...] Coop [...]	[50-60]%
8.	Vessem	C1000 [...] Super de Boer [...]	[90-100]%	C1000 [...] Super de Boer [...]	[90-100]%
9.	Vianen	C1000 [...] Super de Boer [...] Albert Heijn [...]	[50-60]%	C1000 [...] Super de Boer [...] Albert Heijn [...]	[50-60]%
10.	Vlagentwede en Onstwedde	C1000 [...] Super de Boer [...] Aldi [...]	[70-80]%	C1000 [...] Super de Boer [...] Aldi [...]	[70-80]%
11.	Westerbork	C1000 [...] Super de Boer [...]	[90-100]%	C1000 [...] Super de Boer [...]	[90-100]%

30. In its notification of 4 December 2009, the notifying party indicated that the concentration will lead to affected markets in the following 8 local markets. The table below presents the market shares of the new entity, as submitted by the notifying party, throughout different radiuses (based on the surface, i.e. the worst hypothesis compared to an evaluation based on the number of stores).⁷

⁷ The NMa explained that the significant differences in the market shares are due to different studies used as basis for the calculation of the market shares by the NMa and the notifying party. Whereas the

	15-minute drive time			20-minute drive time			30-minute drive time		
	Schuitema	SdB Assets	Combined	Schuitema	SdB Assets	Combined	Schuitema	SdB Assets	Combined
Bunschoten Spakenburg De Ziel	[30-40]%	[5-10]%	[40-50]%	[10-20]%	[5-10]%	[20-30]%	[10-20]%	[0-5]%	[10-20]%
Ens Baan	[20-30]%	[5-10]%	[30-40]%	[20-30]%	[5-10]%	[20-30]%	[20-30]%	[0-5]%	[20-30]%
Lage Zaluwe Past v. Hooijdonklaan	[10-20]%	[20-30]%	[40-50]%	[0-5]%	[10-20]%	[20-30]%	[5-10]%	[5-10]%	[10-20]%
Musselknaal Dirk de Ruitersstraat	[20-30]%	[5-10]%	[30-40]%	[20-30]%	[5-10]%	[20-30]%	[10-20]%	[5-10]%	[20-30]%
Vianen Ursulinenof	[30-40]%	[5-10]%	[40-50]%	[20-30]%	[5-10]%	[20-30]%	[10-20]%	[0-5]%	[10-20]%
Vlagtwedde Dr.P.Rinsemastraat	[10-20]%	[20-30]%	[40-50]%	[20-30]%	[5-10]%	[30-40]%	[20-30]%	[5-10]%	[20-30]%
Vollenhove Voorpoort	[20-30]%	[20-30]%	[50-60]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[0-5]%	[20-30]%
Westerbork Burg.G.Van Weezelplein	[40-50]%	[10-20]%	[60-70]%	[30-40]%	[10-20]%	[40-50]%	[10-20]%	[0-5]%	[20-30]%

31. The notifying party's submission supports the NMa's submission that there are several local markets where the transaction will give rise to high combined market shares. Therefore, independently of the used source of calculation of the market shares, the concentration threatens to affect significantly competition in 8 (according to the notifying party's estimations) or 11 local markets (on the basis of the NMa estimations).
32. The notifying party argues that a 15 minutes drive approach for calculating the geographical scope of the market would be too restrictive, and even if one considered it, still there would be other competitors in the market such as Albert Heijn or Aldi.
33. However, as clearly results from the table provided by the NMa, the transaction will result in a significant reduction of competition [...]. Indeed, some respondents to the market investigation have also raised concerns as to the possible restriction of consumer choice in the retail market in a post transaction scenario.
34. It is therefore concluded that the concentration threatens to affect significantly competition in the retail market of daily consumer goods in supermarkets, supermarkets and discount stores in a number of distinct markets within The Netherlands, in the meaning of Article 9(2)(a) of the EC Merger Regulation.

NMa considered the two studies "Supermarktguids" and "Supermarktpocket" as basis for their calculations, the notifying party used another study for retail information ("Locatus").

C Assessment under Article 9(2)(b)

35. The NMa considers that the conditions of Article 9(2)(b) of the EC Merger Regulation are also fulfilled for the 11 local markets where the combined market share of the parties exceeds 50%.
36. Under Article 9(2)(b), a concentration has to affect competition in a market within a Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

Distinct market

37. As discussed above, the 11 retail markets for daily consumer goods via supermarkets, hypermarkets and discount chains present all characteristics of distinct markets within The Netherlands.

Non-substantial Part of the Common Market

38. When assessing whether any market forms a substantial part of the common market, the Commission, in the past,⁸ considered factors such as the economic importance of the services and territories concerned, the volume of cross-border trade, as well as general geographic factors.
39. Such situations are generally limited to markets with a geographical scope narrower than national. This is the case for the 11 local markets, indicated by the NMa in its referral request. These are all local markets, situated within one single Member State, The Netherlands. Furthermore, there is virtually no cross-border trade as among these 11 localities, only one, Dinxperlo, is situated in the immediate vicinity to another Member State. Moreover, the number of inhabitants, potential customers of the parties in these localities is limited. These localities are indeed small. Nieuwegein is the largest city with a population of 61,200 inhabitants. The other localities are substantially smaller, with population varying between 2,200 inhabitants (in Vessem), 5,600 (in Damwoude), and 18,700 inhabitants in Bunschoten Spakenburg, the second largest city among those affected by the current transaction.
40. In light of the above, the Commission considers that there are strong indications that this criterion of Article 9(2)(b) is met. However, it can ultimately be left open whether these local markets individually or (some of them) taken together constitute a substantial part of the common market within the meaning of Article 9(2)(b) of the EC Merger Regulation, since the requirements of Article 9(2)(a) are also fulfilled and the Commission will refer the concentration to the Dutch authorities on that basis, as explained below.

Impact on Competition

41. As discussed above, the concentration threatens to affect significantly competition in the retail market of daily consumer goods in hypermarkets, supermarkets and discount stores in a number of distinct markets within The Netherlands.

⁸ M.4522 – Carrefour/Ahold Polska, para 36, M. 5112 – Rewe Plus/Discount, para.32.

42. It is therefore concluded that the concentration also affects competition in those markets in the sense of Article 9(2)(b) of the EC Merger Regulation.

D Discretion

43. The Commission, under the Article 9(2)(a) of the EC Merger Regulation can exercise its discretion to refer the case to the competent authorities of The Netherlands. According to the Notice on Referrals, in exercising its discretion the Commission determines whether the competition authority requesting the referral is in the best position to deal with the case⁹. The Commission considers that, given the local scope of the markets affected by the transaction, the NMa is better placed to carry out a thorough investigation of the whole case.

44. Firstly the operation is entirely located in The Netherlands. Indeed, the concentration does not have any significant impact on competition on markets in other Member States, since the SdB Assets are exclusively located within the Dutch territory.

45. Secondly, the NMa has a thorough and very up-to-date knowledge of the markets at stake. Indeed, the NMa has recently analyzed the acquisition of Super de Boer (300 stores) by Jumbo. The NMa is in this regard particularly aware of the current market conditions, as well as of some specificity in relation with the functioning of the retail and franchising markets in The Netherlands. As to the vertically related markets the NMa, in its referral request, mentions that it is convinced that is capable of including them in its investigation and rule on them as well.

46. Therefore, for efficiency reasons and in order not to split the current transaction, the Commission considers that the case should be referred in its entirety.

VII. CONCLUSION

47. From the above it follows that the proposed concentration should be referred in its entirety to the NMa, which is better placed to assess the effects of the operation.

⁹ Commission Notice on Case Referral, at par. 37, OJ, C 56, 05.03.2005, p. 2-23.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration whereby Schuitema would acquire sole control of the Super de Boer Assets is referred in its entirety to the competent authority of the Kingdom of The Netherlands, pursuant to Article 9(3) of Council Regulation (EC) No 139/2004.

Article 2

This decision is addressed to the Kingdom of The Netherlands.

Done at Brussels, 25/01/2010

For the Commission
(signed)
Neelie KROES
Member of the Commission