

***Case No COMP/M.6321-  
BUITENFOOD / AD VAN  
GELOVEN HOLDING / JV***

Only the English text is available and authentic.

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

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Article 9(3)  
Date: 13.1.2012



EUROPEAN COMMISSION

Brussels, 13.1.2012  
C(2012) 202 final

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PUBLIC VERSION

## COMMISSION DECISION

of 13.1.2012

**addressed to the competent authorities of the Kingdom of the Netherlands,  
relating to Article 9 of Regulation (EC) No 139/2004  
referring to case No COMP/M.6321-BUITENFOOD / AD VAN GELOVEN HOLDING /  
JV**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the "TFEU")<sup>1</sup>,

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings<sup>2</sup> (the "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by NPM Capital and Lion Capital on 16 November 2011, pursuant to article 4 of the said Regulation,

Having regard to the request by the Kingdom of the Netherlands of 8 December 2011 to refer to De Nederlandse Mededingingsautoriteit (hereinafter "the NMa") the part of the concentration that relates to the Parties' activities in the Netherlands,

Whereas:

- (1) On 16 November 2011 the Commission received notification of a proposed concentration by which the undertakings NPM Capital N.V. ("NPM"), a subsidiary of SHV Holdings N.V. (together "SHV", the Netherlands) and Lion Capital LLP ("Lion", United Kingdom) acquire, according to the notification within the meaning of Article 3(1)(b) of the Council Regulation, joint control of a newly created joint venture ("the JV", the Netherlands) controlling Buitenfood B.V. ("Buitenfood", the Netherlands), previously owned by SHV, and Ad van Geloven Holding B.V. ("AvG", the Netherlands), previously owned by Lion, by way of purchase of shares. Buitenfood and AvG are designated hereinafter as "the Parties".
- (2) By letter dated 8 December 2011, the Kingdom of the Netherlands requested the referral to its competent authorities of the proposed concentration with a view to

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<sup>1</sup> OJ C115, 9.8.2008, p.47.

<sup>2</sup> OJ L 24, 29.1.2004, p.1. 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.

assessing it under the national competition law of the Netherlands, pursuant to article 9(2)(a) of the Merger Regulation (“the request”).

## 1. THE PARTIES

- (3) Buitenfood is the holding company of Royaan B.V., Willie Dokter Snacks B.V. en Tjendrawasih B.V. ("Royaan"). Royaan produces branded and private label frozen snacks, for the retail market and the out of home ("OOH") market (through wholesalers) mainly in the Netherlands and Belgium. In the retail market Royaan sells frozen snacks under brand names such as Van Dobben, Bakker, Mayam and Tjendrawasih. In the OOH market, Royaan sells frozen snacks under brand names such as Van Dobben, Buitenhuis, Kwekkeboom, Laan Snacks, Mayam, KB and Willie Dokter. In addition, Royaan produces frozen snack foods for retailers and foodservice wholesalers which then sell them under private label.
- (4) AvG produces branded and private label frozen snacks for the retail market and the OOH market (through wholesalers), mainly in the Netherlands and Belgium. In the retail market AvG sells frozen snacks under brand names such as Hebro, Mora and De Bourgondiër. In the OOH market AvG sells frozen snacks under the brand names Ad van Geloven, Welten Snacks, Van Lieshout Snacks and Van Geloven Meestercroquette. In addition, AvG produces frozen snacks for retailers and foodservice wholesalers which then sell them under private label.
- (5) NPM and its parent company SHV do not have participations in companies active in frozen snacks other than Buitenfood. Lion has a participation in the Findus Group ("Findus") and the Picard Group ("Picard"). Findus is a producer of frozen food. According to the Parties, Findus has negligible activities in the Netherlands and Belgium where its main product categories are fish, ready meals, vegetables and pancakes, which are not produced by the Parties. Picard is active in the retail distribution of frozen food through its own distribution network of specialised shops<sup>3</sup>, almost exclusively in France and Italy.

## 2. THE OPERATION AND THE CONCENTRATION

- (6) Following the proposed transaction, NPM and Lion will respectively own [...] % and [...] % of the shares in the JV and exercise joint control over it. Joint control will result from the fact that:
- (i) The management board will consist of [...] members. [...] will be nominated by NPM, [...] will be nominated by Lion. [...];
  - (ii) NPM and Lion have agreed that each of them will have a veto right on a number of reserved matters, including: [...].<sup>4</sup>
- (7) The Parties claim that the operation constitutes the acquisition of joint control in accordance with Article 3(1)(b). However, the merged entity is created by SHV and

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<sup>3</sup> Case COMP/M.5975-Lion Capital/Picard Groupe, Commission Decision of 27 October 2010.

<sup>4</sup> Form CO, Annex 10, p.80, [...].

Lion contributing assets (Royaan and AvG respectively) which SHV and Lion previously owned individually. The proposed transaction brings them under a holding company which subsequently will be jointly controlled by SHV and Lion.

- (8) Consequently, in view of recital 92 of the Commission's Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings<sup>5</sup>, the acquisition has all characteristics of the creation of a joint venture within the meaning of Article 3(4) of the Merger Regulation.

### **3. EU DIMENSION**

- (9) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>6</sup> (SHV: EUR 16 008 million, Lion: EUR [...] million). Each of them has an EU-wide turnover in excess of EUR 250 million (SHV: EUR [...] million, Lion: EUR [...] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

### **4. THE ARTICLE 9 REQUEST**

- (10) By letter dated 8 November 2011, received on the same day, the Dutch Competition Authority informed the Commission pursuant to Article 9(2)(a) of the Merger Regulation that the notified operation would threaten to significantly affect competition in the Dutch OOH and retail markets for frozen snacks.
- (11) Having carried out a preliminary investigation based on available information, including the data from the notification and previous assessments of concentrations in the frozen snack foods sector, the NMa came to the conclusion that it is prima facie expected that the planned concentration could have a significant impact on competition in The Netherlands. The transaction would lead to high combined on one or more (possible) national markets for frozen snack foods as defined by the NMa in previous decisions. In addition, the NMa is of the opinion that it is the more appropriate authority to carry out this investigation, taking into consideration its experience of concentration cases in the market for frozen snacks.

### **5. RELEVANT MARKETS**

- (12) Frozen snacks are such items such as bitterballen, chicken wings, cheese soufflés, burgers, frikandellen, croquettes, bami/nasi snacks, satay, spring rolls, sausage rolls, hot dogs and toasted ham and cheese sandwiches (breaded snacks).
- (13) Frozen snacks are sold through two sales channels: the food retail channel ("Retail") and the foodservice channel, also referred to as the OOH channel. Retail encompasses mainly outlets that sell the products to end-consumers such as

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<sup>5</sup> OJ C 95, 16.4.2008, p. 1.

<sup>6</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

supermarkets, hypermarkets and discount chains. These outlets all offer consumers the possibility to purchase all their daily groceries in one shop.<sup>7</sup> OOH involves hotels, restaurants, pubs, fast-food outlets (*friteries*), company restaurants, canteens, hospitals, schools, etc., which prepare snacks and meals for end-consumers.<sup>8</sup> The distribution in the OOH channel is performed by foodservice wholesalers which carry a broad range of food and non-food products.

- (14) Frozen snacks are sold both under manufacturers' brands ("branded products") as well as under private label brands. The Parties sell both private label and branded products to retailers and OOH wholesalers.
- (15) In the Netherlands, the proposed transaction leads to horizontal overlaps with regards to the supply of frozen snacks in the Retail and OOH channel<sup>9</sup>.

## 6. PRODUCT MARKETS

- (16) The Parties argue that the following markets should be defined: i) a market for the sale of snack food products (including frozen snacks and non-frozen snacks) to retailers in the Netherlands; ii) a market for the sale of snack food to foodservice wholesalers in the Netherlands; and iii) a market for the production of private label products for retailers and foodservice wholesalers. The Parties also consider subdivisions of either of the markets mentioned under i) and ii) into either: a) a market for frozen snacks only, excluding non-frozen snacks; or b) individual markets for each category of frozen snacks.

### 6.1. Precedents

- (17) No Commission precedents exist for frozen snacks. However, in 2006 the Dutch competition authority dealt with the merger between AvG and Mora. In its decision<sup>10</sup>, the NMa:
- did not consider the possibility of a wider market for snack food that would also include non-frozen snacks and considered only the market for frozen snacks and its possible subsegments.
  - considered separate markets for frozen snack for the retail and OOH sales channels as customers in these sales channels are different, have different purchasing practices and have different requirements as to packaging, size, price and quality. However, since the products are in essence the same in both channels and production capacity can easily be redeployed between sales channels, the NMa ultimately left the market definition open. No further

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<sup>7</sup> Form CO, p. 38.

<sup>8</sup> Form CO, p. 42.

<sup>9</sup> Outside the Netherlands, the proposed transaction leads to horizontal overlaps in Belgium with regard to the supply of frozen snacks to foodservice wholesalers. The assessment of these aspects of the proposed concentration is however dealt with in a distinct Commission's decision in relation to the same case (COMP/M.6321-BUITENFOOD / AD VAN GELOVEN HOLDING / JV).

<sup>10</sup> NMa decision 54999, Ad van Geloven – Mora, 17 February 2006.

distinction by end-customer categories within the OOH channel was considered.

- suggested that frozen snacks should be distinguished further by type of frozen snack as demand-side as well as supply-side substitutability was found to be low, although no final view was reached in the decision.
- did not make a distinction between sales of private label and branded frozen snacks as they were found substitutable from a consumer point of view. Producers were also found to compensate for the decline in demand for branded frozen snacks by an increase in supply for private label, pointing to supply side substitutability at least from branded to private label production.
- considered a potential market for the production of frozen snacks for private label, since producers of branded products (i) do not decide on the positioning of the private label (ii) do not require a distribution network for the distribution of private label products and (iii) do not require (financial) means and marketing for its distribution. In the case of private label products, this is provided for by the retailer or OOH wholesalers. On the other hand, the NMA considered that supply side substitutability exists, in particular, between the production of frozen snacks from branded to private label (although not the other way around).

## **6.2. Distinction between the retail and OOH sales channels**

- (18) The Parties argue that a distinction should be made between the retail channel and the OOH channel.<sup>11</sup>
- (19) The Parties sell branded products in both the Retail and OOH channel but largely under different brand names. In addition, customers in these sales channels are to a large extent different. Data analysis carried out by the Commission on the basis of the Parties' transaction data<sup>12</sup> also indicated that [...]. Finally, most suppliers that responded to the market investigation considered it difficult to start supplying retail customers when they are initially active in the OOH market, while this is easier the other way around.<sup>13</sup>
- (20) The Commission considers that, on the basis of the market investigation, support is provided for a finding that frozen snacks sold through the retail channel and frozen snacks sold through the OOH channel are not part of the same product markets in the Netherlands. However, for the purpose of this decision, it can be left open whether the OOH and retail channels belong to the same product market or not since the concentration threatens to affect significantly competition in the Netherlands in both the retail and OOH channels, as well as in a wider market comprising both the retail and OOH channels.

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<sup>11</sup> Form CO, p. 38.

<sup>12</sup> Datasets provided by the Parties on 11 October 2011.

<sup>13</sup> Replies to the Commission's request for information to suppliers of frozen snack products of 22 November 2011, question 28.

### 6.3. Distinction between frozen snacks and other food products

- (21) The Parties argue that frozen snacks produced and sold by the Parties compete in a wider market for snack food that includes non-frozen snacks.
- (22) As regards demand-side substitutability, the Parties consider that the main distinguishing feature of frozen snacks is their long shelf-life. In the Parties' view, consumers that want to store snack products for long periods can also purchase fresh snacks and freeze them at home, or they can purchase ambient snacks with a long shelf-life. Moreover, the Parties argue that customers often intend to consume snacks within a relatively short period of time, which means that it is not necessarily a decisive feature that the snack is frozen.
- (23) As regards supply-side substitutability, the Parties claim that it is easy for producers to switch between frozen and non-frozen snack food products. According to the Parties, to produce frozen instead of non-frozen snacks, all that needs to be added is an industrial freezing stage at the end of the production process.
- (24) The Parties add that foodservice wholesalers tend to carry a wide range of snack products, which include both frozen and fresh and ambient snacks. According to the Parties, in the OOH channel, end-consumers do not know how the products are stored and therefore they do not compare between frozen and non-frozen products: that decision is made by the end outlets. In the Parties' view, because foodservice wholesalers tend to make frequent deliveries, foodservice outlets can more easily switch between frozen and non-frozen products than customers in the retail channel.
- (25) With regard to the Netherlands, however, the Commission considers that, on the basis of the market investigation, the Parties' submission that frozen snacks are part of a larger products market that also comprises non-frozen snacks is not confirmed: (i) fresh alternatives to frozen snacks are generally bought for consumption shortly after purchase rather than regularly frozen by customers themselves<sup>14</sup>; (ii) in the retail channel, equivalent fresh/ambient snacks, if they exist in the first place, tend to be more expensive than frozen ones<sup>15</sup>; (iii) credible fresh/ambient alternatives and demand-side substitutability is deemed to exist only for hamburgers and breaded snacks in the OOH and retail channels<sup>16</sup>; (iv) there is no supply-side substitutability between frozen snacks and fresh/ambient food from the supplier's point of view: most of them do not produce non-frozen snacks and do not consider switching between frozen and non-frozen products.<sup>17</sup>

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<sup>14</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 2.

<sup>15</sup> Replies to the Commission's request for information to retailers in the Netherlands on frozen snacks of 22 November 2011, question 3.

<sup>16</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 5.

<sup>17</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 9. Replies to the Commission's request for information to suppliers of frozen snack products of 22 November 2011, questions 7 and 17.



- (26) The Commissions therefore considers that, on the basis of the market investigation, clear support is found, with the possible exception of hamburgers and breaded snacks, that frozen and non-frozen snacks are not part of the same product markets in the Netherlands. The assessment will thus be made on the basis of frozen snacks only.<sup>18</sup>

#### **6.4. Distinction between frozen snacks themselves by type of frozen snack**

- (27) Contrary to the NMa, the Parties consider that the various types of frozen snacks are substitutable from a consumer point of view.
- (28) According to marketing studies submitted by the Parties, however, [...] % of retail consumers that seek to purchase frozen snacks have already decided at home what type of snack will be bought.<sup>19</sup> The same applies in the OOH channel, where [...] % of customers enter the snackbar knowing exactly what they will order<sup>20</sup> and little variation exists as to what they will order<sup>21</sup>. The type of snack is the overriding distinguishing product characteristic determining consumer choice.<sup>22</sup> Internal documents also referred to experiments whereby switching conduct was measured in response to the consumers' first choice being 'out of stock' or increased in price. These showed that consumers to a very large extent switch to products from the same frozen snack category<sup>23</sup> and only to a limited extent switch to different types of frozen snacks<sup>24</sup>.
- (29) These elements point to a very limited degree of demand side substitutability between types of snacks. The market investigation confirmed this with regard to the Netherlands: in case all prices in a given category of frozen snack were permanently increased by 5-10% in the OOH and retail channel, few customers would switch, they would rather continue to buy the same type of frozen snacks.<sup>25</sup>
- (30) The Parties also argue that supply side substitutability between categories of frozen snacks is high. They emphasize that switching production between different types of

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<sup>18</sup> It should be mentioned that even if non-frozen alternatives were considered relevant for the assessment of hamburgers and/or breaded snacks, this could not bring into question the overall conclusion that the transaction threatens to significantly impede effective competition in the Netherlands since these threats also relates to other snack categories.

<sup>19</sup> Form CO, Annex 23 (Simstore), slide 8.

<sup>20</sup> Form CO, Annex 26 (GfK), slide 16.

<sup>21</sup> Form CO, Annex 26 (GfK), slides 44-47.

<sup>22</sup> Form CO, Annex 23 (Simstore), slides 45-46.

<sup>23</sup> Form CO, Annex 23 (Simstore), slides 52-55.

<sup>24</sup> Even if consumers seek to purchase a mix of frozen snacks, substitution primarily takes place to other offers of mixed frozen snacks (Form CO, Annex 21 (Simstore), slides 30-31). If substitution takes place for mixes, this substitution tends to go to other mini-snack categories (Form CO, Annex 23 (Simstore), slides 44-47).

<sup>25</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 7.

snacks requires a low investment. In the market investigation, most suppliers confirmed that switching does not require large investments or amounts of time.<sup>26</sup>

- (31) On the other hand, some suppliers indicated that the difficulty of switching a product line depends mainly on the type and shape of the snacks. Switching from croquettes to bitterballen or to frikandellen is, for example, relatively easy, while switching to a spring roll or sausage roll takes more time.<sup>27</sup> In addition, substantial investments are required to create brand awareness and a brand image. For example, Mora is the best known brand for snack foods and one of the few with high brand awareness for all product segments (together with the other "generalist" brands such as Beckers) due to strong and regularly repeated advertising campaigns.<sup>28</sup> Customers also pointed to limited supply-side substitution with regard to branded products for which expansion of a brand into a new category is either rarely tried or often unsuccessful.<sup>29</sup>
- (32) The Commission, on the basis of the market investigation, therefore considers that support is provided for a finding that the various types of frozen snacks belong to separate product markets in the Netherlands. However, for the purpose of this decision, it can be left open whether the various types of frozen snacks belong to separate product markets or not since the concentration threatens to affect significantly competition in the Netherlands regardless of whether frozen snacks are considered to constitute a single relevant product market or whether narrower markets by type of snacks are retained.

#### **6.5. Distinction between private label products and branded products**

- (33) According to the Parties, demand side substitutability exists between branded snacks and those offered under private labels, in particular in the OOH channel. The Parties argue that brands do not play an important role in the foodservice channel, because their brands are not visible to the final consumer and foodservice outlets placing orders with the foodservice wholesalers are professional buyers who will be attracted by product characteristics, price and quality, rather than brand image. Accordingly, in the Parties' view, private label products of the foodservice wholesalers compete on an even stronger footing with supplier-branded products than in the retail channel.<sup>30</sup>
- (34) The Commission considers that, on the basis of the market investigation, it is confirmed that, at the level of end-consumers, some demand side substitutability exists between branded snacks and those offered under private label, since private label are very similar in terms of quality and do offer a credible cheaper alternative to

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<sup>26</sup> Replies to the Commission's request for information to suppliers of frozen snack products of 22 November 2011, question 16.1.

<sup>27</sup> Replies to the Commission's request for information to suppliers of frozen snack products of 22 November 2011, question 16.1.

<sup>28</sup> Form CO, p. 56.

<sup>29</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 27.

<sup>30</sup> Form CO, p. 67.

branded products.<sup>31</sup> Consumers seem willing to switch between private label and branded products, as evidenced by the increasing shares of private label products in recent years.<sup>32</sup> In addition, at the consumer's level, brands cannot be fully replaced by private label frozen snacks as some consumers stick to branded products (e.g. as a result of effective marketing and of consumers' higher "emotional involvement" related to certain product segments).<sup>33</sup> The Parties state that AvG's Mora is the best known brand for frozen snacks due to strong and regularly repeated advertising campaigns.<sup>34</sup> Royaan's van Dobben and Bakker brands are also well established.

- (35) When viewed on the level of retailers and OOH wholesalers, it must be considered moreover that, in the competition to get on the customer's shelves, private label products cannot fully substitute branded products since a number of frozen snack brands are highly demanded by customers and are therefore considered as "must-stock" items.<sup>35</sup>
- (36) The Commission, on the basis of the market investigation, also considers that supply side substitution from branded frozen snacks to private label exists on the production level since switching production from branded to private label products does not require large investments or a long time, at least when the same types of snacks are considered.<sup>36</sup> In addition, the main producers of branded frozen snacks are also supplying frozen snacks for sale under private labels. The Parties further indicate that it occurs that the conditions regarding the sale of branded and private label products are included in one and the same contract.<sup>37</sup>
- (37) However, significant barriers to introducing new brands as well as extending existing brands to new product categories appear to exist, which render supply-side substitutability one-sided i.e. only from the supply of branded snacks to private label frozen snacks.<sup>38</sup>

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<sup>31</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, questions 10 and 11.

<sup>32</sup> Form CO, Annex 20 (Nielsen), slides 27-28.

<sup>33</sup> See for a similar reasoning case COMP/M.4533 – SCA/P&G European Tissue Business, Commission Decision of 5 September 2007, recital 167.

<sup>34</sup> Form CO, p. 56.

<sup>35</sup> Retailers mainly mention frikandellen, croquettes, bitterballen, hamburgers and mini snacks as must-stock items for AvG, while croquettes, bitterballen and cheese soufflés are mostly considered must stock items for Royaan. OOH wholesalers consider AvG's frikandellen, croquettes, bitterballen, chicken snacks, bami/nasi snacks, Asian snacks, hamburgers, mini snacks and breaded snacks to be must must-stock items, while Royaan's frikandellen, croquettes, bitterballen, cheese soufflés, chicken snacks, bami/nasi snacks, hamburgers and mini snacks are also considered must-stock items. Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 44.

<sup>36</sup> Replies to the Commission's request for information to suppliers of frozen snack products of 22 November 2011, questions 16, 29 and 30.

<sup>37</sup> Form CO, p. 39.

<sup>38</sup> Replies to the Commission's request for information to suppliers of frozen snack products of 22 November 2011, question 29.

- (38) Branded products and private label products can therefore be considered to belong to a single differentiated product market where they exert on each other some degree of competitive pressure.

## 7. GEOGRAPHIC MARKETS

- (39) The Parties claim that all markets are national in geographical scope, except the market for the production of private label products for retailers and OOH wholesalers. The latter market would at least include the Netherlands, Belgium, Germany and France.<sup>39</sup> They do remark, though, that there are no substantial differences in characteristics between the Dutch and Belgium OOH markets and that the Dutch and Belgian OOH markets are gradually integrating.<sup>40</sup>
- (40) In previous cases in the food sector<sup>41</sup>, the Commission has consistently considered the relevant geographic market definition for food products to be national for both the retail and OOH market. In *Unilever/Bestfood*<sup>42</sup>, although the market investigation indicated tendencies towards a widening in the scope of food service markets in the EEA, the Commission concluded that "both from a demand side perspective and a supply-side perspective food service markets to date remain predominantly national".
- (41) In its decision regarding the merger between AvG and Mora<sup>43</sup>, the NMa considered all frozen snack markets to be national, with the exception of the potential market for supply of private label frozen snacks, for which it was left open whether this market could be wider. Markets were deemed national as sales channels, distribution, logistics and purchase agreements are primarily national. Brand reputation and tastes were found to be also national in nature. The Parties also indicate that Royaan considered the possibility to enter the Belgian retail market in the past but decided against it because Royaan's main products are croquettes, cheese soufflés and bapao sandwiches, which are typical Dutch snack products for which the demand in the Belgian retail market is quite limited: the potential market for Royaan's main products thus did not justify the substantial investments required in advertising and promotion.<sup>44</sup>
- (42) In the present case, the Commission considers that, on the basis of the market investigation, the OOH and retail markets for the supply of frozen snacks are still national in scope with respect to the Netherlands. In particular, Dutch customers: (i) decide on their marketing strategy at national level<sup>45</sup>, (ii) consider that tastes, consumer habits, brand awareness and brand presence for frozen snacks are primarily

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<sup>39</sup> Form CO p. 47.

<sup>40</sup> Form CO p. 47.

<sup>41</sup> COMP/M.1990 – *Unilever/Bestfoods*, Commission Decision of 28 September 2000, paras. 8-54 and COMP/M.3658 – *Orkla/Chips*, Commission Decision of 3 March 2005, paras. 9-15.

<sup>42</sup> COMP/M. 1990 – *Unilever/Bestfood*, Commission Decision of 28 September 2000, paras. 58-59.

<sup>43</sup> NMa, decision 54999, Ad van Geloven – Mora, 17 February 2006.

<sup>44</sup> Form CO, p. 47 (footnote 29).

<sup>45</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 12.

national<sup>46</sup>, (iii) generally purchase branded frozen snacks and frozen snacks for sale under private labels in the Netherlands only.<sup>47</sup> In Belgium, while OOH wholesalers do sometimes buy from outside of Belgium, they decide nationally on marketing strategy for frozen snacks and consider that tastes, consumer habits, brand awareness and brand presence for frozen snacks are primarily national.<sup>48</sup>

- (43) Data analysis carried out by the Commission on the basis of the Parties' transaction data<sup>49</sup> also shows that [...].
- (44) A large majority of the Dutch retailers and OOH wholesalers purchase both their branded and private label frozen snacks products mainly nationally and consider that frozen snack products are typical for demand in the Netherlands to such an extent that production of such frozen snacks is located only in the Netherlands.<sup>50</sup>
- (45) In any event, the existence of imports and potential foreign entrants is not sufficient to conclude that the relevant geographic market is wider than national: while some suppliers may be active on a scale which is wider than national, most of them decide on their marketing strategy on a national level and agree that tastes, consumer habits, brand awareness and brand presence for frozen snacks are primarily national<sup>51</sup>. Royaan for instance is almost not active in the production of private labels in Belgium. More generally, private label sales also play a less important role in Belgium than in the Netherlands for the Parties. [...].
- (46) In addition, the analysis of the transactional data provided by the Parties shows that [...].
- (47) For the reasons given above, the Commission concludes that the relevant geographic scope of the market for the supply of frozen snacks (including both private label and branded frozen snacks) and its possible subsegments is national.

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<sup>46</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 13.

<sup>47</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, questions 15 and 16.

<sup>48</sup> Replies to the Commission's request for information to OOH wholesalers in Belgium on frozen snacks of 22 November 2011, questions 13 and 14.

<sup>49</sup> Datasets provided by the Parties on 11 October 2011.

<sup>50</sup> Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, questions 15, 16 and 17. Furthermore, a majority of the Dutch retailers indicated that they have not purchased private label frozen snacks from outside the Netherlands in the last three years, while a majority of the Dutch OOH wholesalers has purchased private label products outside the Netherlands in the last three years (Replies to the Commission's request for information to retailers and OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, question 76).

<sup>51</sup> Replies to the Commission's request for information to suppliers of frozen snack products of 22 November 2011, questions 20 and 21.

## 8. ASSESSMENT OF THE REFERRAL REQUEST

- (48) Article 9(2)(a) requires that a concentration threatens to significantly affect competition in a market within the Member State, which presents all the characteristics of a distinct market.
- (49) The findings of the NMa with regard to the geographic scope of these markets are consistent with the results of the market investigation which indicates that the Dutch market for frozen snacks is not wider than national and is distinct from geographical areas outside of the Netherlands. Frozen snacks, as sold in the Dutch retail and OOH markets are considered by both suppliers and customers as national in scope, in particular because of the Dutch consumer preferences for the frozen snack varieties sold by the Parties. In addition, sales channels, branding and distribution are organised on a national basis. It can therefore be concluded that the retail and OOH markets for frozen food snacks are not wider than national and are distinct from geographical areas outside of the Netherlands.
- (50) Whilst the NMa considered in a previous decision the possibility that the market for the production of private label frozen snacks would be wider than national as Belgian, German or French producers could supply these non-branded products to Dutch retailers and food service companies, it did not conclude on the geographic scope of that market. The Commission's market investigation in the present case showed that branded and private label frozen snacks sold in the Netherlands belong to a single product market and that this market is not wider than national. Regarding private label frozen snacks specifically, the analysis of the transactional data provided by the Parties shows that the [...]<sup>52</sup>. [...].
- (51) In addition, most production facilities of the Parties are located in the Netherlands, with the single exception of AvG's Mol facility which account for only [...] % of AvG's production in volume<sup>53</sup>.
- (52) Second, the *prima facie* concerns explained by the NMa are consistent with the results of the market investigation and it can be concluded that the proposed concentration threatens to significantly affect competition in frozen snacks in the Netherlands.

### *Retail channel*

- (53) In the retail channel, when all frozen snacks are considered together, the Parties' branded products would have a high combined share of the overall market (comprising both branded and product labels) of [30-40] % in volume and [40-50] % in value.
- (54) Market shares are also high in a number of individual categories of frozen snacks where the Parties overlap (Table 1), such as croquettes, cheese snacks (although with a relatively small increment), mini-snacks and bami/nasi snacks. Several Dutch retailers consider that the merger is likely to create competition problems and that the

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<sup>52</sup> [...].

<sup>53</sup> Form CO, Annex 65 (ii).

Parties, post-operation, will be able to raise their prices, decrease quality or reduce choice.<sup>54</sup>

**Table 1: Shares of Royaan and AvG in branded, private label and production of frozen snacks by type of snack, in the Dutch retail channel (in volume, 2010)**

In %	Branded				Private label manufactured by			Parties combined :	
	Royaan	AvG	Beckers	Other branded suppliers	Royaan	AvG	Other private label suppliers	share of sales (branded products only)	share of production (branded & private label)
All frozen snacks	[5-10]	[20-30]	[5-10]	[0-5]	[0-5]	[10-20]	[30-40]	[30-40]	<b>[50-60]</b>
Categories									
Mini snacks	[5-10]	[30-40]	[0-5]	[5-10]	[0-5]	[10-20]	[30-40]	[30-40]	<b>[50-60]</b>
Asian snacks	[0-5]	[30-40]	[0-5]	[5-10]	[0-5]	[30-40]	[20-30]	[30-40]	<b>[60-70]</b>
Breaded snacks	[20-30]	[10-20]	[5-10]	[0-5]	[20-30]	[0-5]	[10-20]	<b>[40-50]</b>	<b>[70-80]</b>
Burgers	[0-5]	[20-30]	[5-10]	[0-5]	[0-5]	[10-20]	[50-60]	[20-30]	[30-40]
Frikandellen	[0-5]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[60-70]	[20-30]	[20-30]
Croquettes	[10-20]	[20-30]	[0-5]	[0-5]	[0-5]	[40-50]	[5-10]	[30-40]	<b>[80-90]</b>
Bami/nasi snacks	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	[10-20]	[5-10]	[30-40]	<b>[50-60]</b>
Cheese snacks	[40-50]	[0-5]	[0-5]	[0-5]	[40-50]	[0-5]	[0-5]	<b>[50-60]</b>	<b>[90-100]</b>
Chicken snacks	[0-5]	[60-70]	[0-5]	[5-10]	[0-5]	[20-30]	[0-5]	<b>[60-70]</b>	<b>[80-90]</b>
Varied	[0-5]	[70-80]	[5-10]	[5-10]	[0-5]	[0-5]	[10-20]	<b>[70-80]</b>	<b>[70-80]</b>

- (55) In addition, the position of AvG as the most important supplier will be reinforced, with only one significant producer of branded products, namely Beckers, remaining. However, the Beckers brand has limited consumer appeal<sup>55</sup> and has low market shares in all product segments other than bami/nasi snacks. Other branded product manufactures have insignificant (often [0-5]%) market shares and/or only have a significant presence in one or a few types of snacks.
- (56) Since Royaan and especially AvG are both producers of private label products, the merger will also create a frozen snacks producer that accounts for [50-60]% of all Dutch retail sales in volume. However, the Parties claim that the market shares of the private label products that they manufacture themselves should not be attributed to them. They rely on case *Kaysersberg v. Commission*, in which the General Court held that, when assessing the market strength of an undertaking, the market shares of the products which it manufactures as a sub-contractor for retailers which resell those products under their private labels cannot, in principle, be imputed, in whole or in part, to the market share held by that undertaking in regard to similar products which it sells under its own brand. Since the retailers sell those products under their private brands in order to compete with the branded products, the market share which they

<sup>54</sup> Replies to the Commission's request for information to retailers in the Netherlands on frozen snacks of 22 November 2011, questions 83 and 84.

<sup>55</sup> Annexe 23, Simstore.

hold as a result of those sales must, as a general rule, be attributed to them for the purposes of assessing the competition to which the manufacturers of premium and secondary brands are subject.<sup>56</sup>

- (57) It must be noted however that, in the same case, the General Court also stressed that if the subcontractor manufactured a large part of the products sold under private brands, the failure to take any account of that share of production would result in an underestimation of the actual strength of the manufacturer, in particular if the manufacturer was the main source of supply for retailers in regard to the products which they sell under their private brands.<sup>57</sup>
- (58) Consequently, to understand whether the competitive pressure exerted by private label products on the branded products may be limited as a result of this situation, it needs to be analysed to which extent wholesalers are dependent on the Parties for their purchases of products to be sold under private labels.<sup>58</sup>
- (59) The data provided by the Parties and depicted in Table 1 allows to assess the importance of the Parties in the production of private label frozen snacks only. In a market for frozen snacks sold through the retail channel, the Parties produce [30-40]% of the private label frozen snacks. This share is however much higher in some segments: the Parties produce for instance [80-90]% of the croquettes sold under private label and [90-100]% of the cheese snacks sold under private label in the Dutch retail channel.
- (60) Furthermore, if private label sales were to be considered as an independent competitive constraint on the Parties - even if produced by the Parties themselves - it would be more informative to focus on market shares in value terms (Table 2). Value shares reflect better that brands with high market power can be priced at a higher level than generic private label products. It therefore provides a picture of the direct competition that the Parties' branded products face from private label in the retail outlets where both branded and private label are sold.

**Table 2: Market shares by type of snack, in the Dutch retail channel (in value, 2010)**

In %	Royaan	AvG	Total Parties	Beckers	Private labels	Other
All frozen snacks	[5-10]	[30-40]	<b>[40-50]</b>	[5-10]	[40-50]	[5-10]
Minisnacks	[5-10]	[20-30]	[30-40]	[0-5]	[40-50]	[10-20]
Burgers	[0-5]	[20-30]	[20-30]	[10-20]	[50-60]	[0-5]
Frikandellen	[0-5]	[20-30]	[20-30]	[10-20]	[50-60]	[0-5]
Croquettes	[10-20]	[20-30]	<b>[40-50]</b>	[5-10]	[40-50]	[0-5]
Bami/nasi	[10-20]	[20-30]	[30-40]	[20-30]	[20-30]	[10-20]
Cheese snacks	[50-60]	[5-10]	<b>[50-60]</b>	[0-5]	[40-50]	[0-5]
Chicken snacks	[0-5]	[60-70]	[60-70]	[0-5]	[20-30]	[5-10]

<sup>56</sup> Judgement of the Court of First Instance in Case T-290/94. *Kaysersberg SA v Commission*, 27 November 1997, paras. 172-174.

<sup>57</sup> *Idem*, paras. 175-177.

<sup>58</sup> Such an approach is in line with the Commission's practise in case COMP/M.5046-Friesland/Campina, Commission Decision of 17 December 2008.



- (61) Even on this basis, it appears that the proposed merger gives rise to overlaps and high market shares for all frozen snacks considered together ([40-50]%) and when individual product categories are considered, in particular for croquettes ([40-50]%) and cheese snacks ([50-60]%).
- (62) In their defence, the Parties argue that the Dutch retail sector is concentrated. It is comprised of five retail chains and purchase consortia to which the products are sold, namely AH (a retail chain), Bijeen, Super Unie (purchase consortia<sup>59</sup>) and two deep discounters, Aldi and Lidl, which do not carry branded goods. The Parties claim that their market power is constrained by the buying power of these retail chains and purchase consortia and will continue to be constrained post-merger.
- (63) The Commission considers that, on the basis of the market inquiry, retailers appear to have a certain degree of purchasing power (in particular when compared with the OOH channel). Retailers however frequently characterised Royaan's Van Dobben (for croquettes and bitterballen) and Bakker brands (for cheese soufflés) and AvG's Mora brand (croquettes, Hanburgers, mini-snacks) as "must-stock" brands. For such brands, retailer buying power is more limited.

#### *OOH channel*

- (64) In the OOH channel, in a market comprising all frozen snacks (including private labels and branded products), the combined market share of the Parties' branded products stands at [20-30]% in volume and [20-30]% in value (Table 3). In addition, when individual categories of frozen snacks are considered, the combined market share of the Parties' products is high (above [40-50]%) in bami/nasi snacks, cheese soufflés and mini-snacks.

**Table 3: Shares of Royaan and AvG in branded, private label and production of frozen snacks by type of snack, in the Dutch OOH channel (in volume, 2010)**

In %	Parties' branded products		Private label frozen snacks manufactured by the Parties		Others (branded and private label frozen snacks)	Parties combined :	
	Royaan	AvG	Royaan	AvG		share of sales (branded products only)	share of production (branded & private label products)
All frozen snacks	[10-20]	[10-20]	[0-5]	[20-30]	[40-50]	[20-30]	<b>[50-60]</b>
Categories <sup>60</sup>							
Frikandellen	[0-5]	[10-20]	[0-5]	[40-50]	[40-50]	[10-20]	<b>[50-60]</b>
Minced meat snacks	[10-20]	[10-20]	[0-5]	[5-10]	[60-70]	[20-30]	[30-40]
Bami/nasi snacks	[5-10]	[40-50]	[0-5]	[10-20]	[40-50]	<b>[40-50]</b>	<b>[50-60]</b>
Croquettes	[10-20]	[10-20]	[0-5]	[10-20]	[40-50]	[30-40]	<b>[50-60]</b>
Chicken snacks	[0-5]	[20-30]	[0-5]	[0-5]	[60-70]	[20-30]	[30-40]

<sup>59</sup> The two super market chains that use this purchasing consortium have recently announced their intention to merge. As they were already purchasing collectively prior to this announcement, this cannot significantly affect the assessment of the present case.

<sup>60</sup> For data reasons, the categories do not completely match those used in the retail channel.

Cheese soufflés	[30-40]	[0-5]	[40-50]	[0-5]	[10-20]	<b>[40-50]</b>	<b>[80-90]</b>
Minisnacks	[30-40]	[5-10]	[10-20]	[0-5]	[40-50]	<b>[40-50]</b>	<b>[50-60]</b>
Other	[5-10]	[10-20]	[5-10]	[10-20]	[60-70]	[20-30]	[30-40]

- (65) In their defence, the Parties consider that, post-transaction, sufficient competitive pressure will remain from other branded snack food producers. This was not confirmed by the market investigation as most Dutch OOH wholesalers, especially the smaller ones (which arguably have less buyer power) consider that Royaan and AvG will be able, due to the merger, to raise their prices, reduce choice and/or decrease discounts while the potential benefits brought about by the transaction will not be passed on to final customers<sup>61</sup>.
- (66) In addition, the combined share of the Parties in the production of frozen snacks (including the production of private label snacks) is just above [50-60]%. When individual categories of frozen snacks are considered, the combined market share of the Parties' products is also above [50-60]% when private label sales are included in bami/nasi snacks, cheese soufflés, mini-snacks and croquettes/bitterballen. However, the data provided by the Parties and depicted in Table 3 does not allow to assess the market shares of the Parties in the production of private label frozen snacks only.
- (67) Furthermore, if private label sales were to be considered as an independent competitive constraint on the Parties - even if produced by the Parties themselves - it would be more informative to focus on market shares in value terms (Table 4). Even on this basis, it appears that the proposed merger gives rise to overlaps and high market shares when individual product categories are considered, in particular for croquettes ([40-50]%) and cheese soufflés ([40-50]%).

**Table 4: Market shares by type of snack, in the Dutch OOH (in value, 2010)**

In %	Royaan	AvG	Total Parties	Other <sup>62</sup>
All frozen snacks	[10-20]	[10-20]	<b>[20-30]</b>	[70-80]
Frikandellen	[0-5]	[10-20]	[10-20]	[80-90]
Minced meat snacks	[20-30]	[10-20]	[30-40]	[60-70]
Bami/nasi snacks	[5-10]	[20-30]	[30-40]	[60-70]
Croquettes	[30-40]	[10-20]	<b>[40-50]</b>	[50-60]
Chicken snacks	[0-5]	[10-20]	[10-20]	[80-90]
Cheese soufflés	[40-50]	[0-5]	<b>[40-50]</b>	[50-60]
Minisnacks	[30-40]	[0-5]	[30-40]	[60-70]
Other	[5-10]	[10-20]	[20-30]	[70-80]

- (68) The Parties consider that OOH wholesalers have significant countervailing buyer power and will continue to have so post-transaction. Brand loyalty in the OOH segment is also claimed to be low. This was however not confirmed by the market

<sup>61</sup> Replies to the Commission's request for information to OOH wholesalers in the Netherlands on frozen snacks of 22 November 2011, questions 82, 86 and 87.

<sup>62</sup> The data provided by the Parties does not allow to distinguish within this category between brands and private labels.

investigation. Many OOH wholesalers are small and do not believe that they would be able to exert countervailing buyer power on the Parties as they will not have enough alternatives after the merger. In that regard, paragraph 67 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings<sup>63</sup> emphasizes that "countervailing buyer power cannot be found to sufficiently off-set potential adverse effects of a merger if it only ensures that a particular segment of customers, with particular bargaining strength, is shielded from significantly higher prices or deteriorated conditions after the merger". Finally, most Dutch OOH wholesalers consider that no longer selling either AvG's or Royaan's brands would be prohibitively costly in terms of loss of turnover and/or loss of customers.

(69) [...].

*Potential wider market comprising the OOH and retail channels*

(70) In a potential wider market for all frozen snacks (including private labels and branded products) comprising both the retail and OOH channels, the combined market share of the Parties' branded products stands at [20-30]% in volume (Table 5) and [30-40]% in value in 2010<sup>64</sup>. However, this market share does not account for the higher combined share of the Parties in the production of frozen snacks (including the production of private label snacks), which is [50-60]% in a market comprising both the retail and OOH channels.

(71) In addition, when individual categories of frozen snacks are considered, the combined market share of the Parties' products is high (above [40-50]%) in bami/nasi snacks and cheese soufflés when looking only at branded shares, and very high (above [50-60]%) in these categories when private label sales are included<sup>65</sup>. However, the data provided by the Parties and used in Table 3 does not allow to assess the market shares of the Parties in the production of private label frozen snacks only.

(72) Finally, as explained above, the Parties hold "must-stock" brands which limit the OOH wholesalers' and retailers' countervailing buyer power, and several Dutch wholesalers and retailers have expressed concerns regarding the competitive impact of the transaction.

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<sup>63</sup> OJ C 31, 5 February 2004, p. 5.

<sup>64</sup> Commission's calculations based on the data submitted in the Form CO (Table 7-1 and 7-13).

<sup>65</sup> In addition, since market shares are very high (above [50-60]% when private label sales are included) in relation to croquettes and mini snacks in both the retail and OOH channels, they would also be very high (above [50-60]%) regarding mini snacks and croquettes in a market comprising both retail and OOH

**Table 5: Shares of Royaan and AvG in branded, private label and production of frozen snacks by type of snack, in a market comprising both the Dutch OOH and retail channels (in volume, 2010)**

In %	Parties' branded products		Private label frozen snacks manufactured by the Parties		Others (branded and private label frozen snacks)	Parties combined :	
	Royaan	AvG	Royaan	AvG		share of sales (branded products only)	share of production (branded & private label products)
All frozen snacks	[5-10]	[20-30]	[0-5]	[10-20]	[40-50]	[20-30]	<b>[50-60]</b>
Categories <sup>66</sup>							
Frikandellen	[0-5]	[10-20]	[0-5]	[20-30]	[50-60]	[10-20]	<b>[40-50]</b>
Bami/nasi snacks	[5-10]	[30-40]	[0-5]	[10-20]	[40-50]	<b>[40-50]</b>	<b>[50-60]</b>
Chicken snacks	[0-5]	[30-40]	[0-5]	[5-10]	[50-60]	[30-40]	[40-50]
Cheese soufflés	[40-50]	[0-5]	[40-50]	[0-5]	[5-10]	<b>[40-50]</b>	<b>[90-100]</b>

- (73) The Commission therefore concludes that *prima facie* competition concerns exist regardless as to whether relevant product markets (i) comprise both the retail and OOH channels or are considered separately (ii) comprise all types of frozen snacks or should be assessed separately for each type of frozen snacks.
- (74) The two requirements for an Art. 9(2)(a) referral are therefore fulfilled.
- (75) Under Article 9(3), the Commission has discretion as to whether to refer a case to a national competition authority.
- (76) In this regard, it must first be mentioned that the market investigation conducted by the Commission in this case has now provided sufficient indications that the merger will not affect competition outside the Netherlands and that this part can be cleared unconditionally by the Commission<sup>67</sup>. Consequently, a referral to the Netherlands will not negatively affect the one-stop shop principle that ensures the Parties of an efficient merger assessment.
- (77) Moreover, the NMa is the most appropriate authority to review the Dutch part of the case since it has dealt with all previous cases involving the Parties to the proposed transaction in the market for frozen snacks. Moreover, the NMa is well placed to assess the effects of a merger involving products and brands that are well known by Dutch consumers in markets characterized by specific national customer preferences and traditions.

<sup>66</sup> For data reasons, not all categories are reported in this table since the categories used to report sales do not completely match in the retail and OOH channels. For instance bitterballen are included in the mini snacks category regarding retail while they are included in the croquettes category regarding OOH.

<sup>67</sup> By decision of today, the European Commission has decided to declare compatible with the internal market and with the EEA Agreement the parts of the transaction that are not related to the Netherlands.

## 9. CONCLUSION

- (78) From the above it follows that the conditions to request a referral under Article 9(2)(a) Merger Regulation are met. The Commission also considers that (i) given the local scope of the markets affected by the transaction, the competent authorities of the Kingdom of the Netherlands are better placed to carry out a thorough investigation of the whole case and (ii) the fact that in this case a referral would not affect the efficiency of the merger assessment process, it is appropriate for the Commission to exercise its discretion under Article 9(3)(b) Merger Regulation so as to grant the referral.

HAS ADOPTED THIS DECISION:

### *Article 1*

The notified concentration resulting in the acquisition by SHV and Lion of joint control of a newly created joint venture to which they will respectively contribute Buitenfood and AvG is referred to the competent authority of the Kingdom of the Netherlands, pursuant to Article 9(3)(b) of Council Regulation (EC ) No 139/2004, as regard the affected markets in the Netherlands.

### *Article 2*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 13.1.2012

*For the Commission*

*signed*  
*Joaquín ALMUNIA*  
*Vice-President*