EN

Case No COMP/M.6813 - MCCAIN FOODS GROUP/ LUTOSA BUSINESS

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) in conjunction with Art 6(2)
Date: 28/05/2013

In electronic form on the EUR-Lex website under document number 32013M6813

Office for Publications of the European Union
L-2985 Luxembourg

EUROPEAN COMMISSION

Brussels, 28.5.2013
C(2013) 3289 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 No COMP/M.6813 – MCCAIN FOODS GROUP/ LUTOSA BUSINESS Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004[1]

1. On 3 April 2013 the European Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4 of the Merger Regulation by which the undertaking McCain Foods Group Inc. ("McCain", Canada), through its subsidiary McCain UK H2 Ltd ("McCain Foods", United Kingdom) acquires within the meaning of Article 3(1)(b) of the Merger Regulation, sole control of G&L Van den Broeke-Olsene N.V. (Belgium), Vanelo N.V.(Belgium), and Lutosa France SARL (together "Lutosa") by way of purchase of shares.[2] G&L, Vanelo, Lutosa France and their subsidiaries together form "Lutosa" and are hereinafter referred to as "the Target". McCain is hereinafter referred to as "the notifying party" while McCain and the Target are hereinafter referred to as "the Parties".

I. THE PARTIES AND THE TRANSACTION

2. McCain is an internationally operating private company with headquarters in Toronto, Ontario, Canada. McCain and its subsidiaries are active in the production, processing and sale of frozen, chilled and dehydrated potato products, pizza, appetizers, oven meals, juice and desserts. McCain sells its products in the retail, food service, and industry sectors in countries around the world. In Europe McCain has a division for Continental Europe and a division for Great Britain and Ireland. The European

1 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.

2 Publication in the Official Journal of the European Union No C 102, 09.04.2013, p.6.

divisions sell inter alia frozen potato products in 45 countries, including most of the countries of the European Union and have 13 potato production sites in Belgium, France, the Netherlands, Poland and the United Kingdom. In 2012, McCain achieved a worldwide turnover of EUR 4.8 billion, of which EUR 1.3 billion was achieved in the EEA.

3. G&L, Vanelo N.V. and Lutosa France and their subsidiaries together form the Lutosa. They are subsidiaries of PinguinLutosa ("PinguinLutosa"), which is an internationally operating food company headquartered in Belgium. Lutosa currently produces and sells frozen, chilled and dehydrated potato products dedicated to the food service, retail and industry sector. Prior to 1 January 2013, Lutosa also sold frozen vegetables dedicated to the food service, industry and retail sector. However, these activities were carved out as of 31 December 2012 and McCain will only acquire the potato business. Lutosa has two production sites in Waregem and Leuze (both in Belgium) and its activities span 103 countries, including most EU Member States.

4. On 19 October 2012, McCain Foods Belgium and PinguinLutosa signed a share purchase agreement (the "SPA") with respect to the acquisition of all shares of companies constituting the Lutosa business. Therefore, the transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

II. EU DIMENSION

5. The notified concentration does not have a Union dimension within the meaning of Article 1 of the Merger Regulation. However, on 04.02.2013, the notifying party informed the Commission in a reasoned submission pursuant to Article 4(5) of the Merger Regulation that the concentration was capable of being reviewed under the national competition laws of at least three Member States, namely Cyprus, Germany, Portugal, Spain and the United Kingdom, and requested the Commission to examine it. None of the Member States competent to examine the concentration indicated its disagreement with the request for referral within the period laid down by the Merger Regulation.

6. Therefore the concentration is deemed to have a Union dimension pursuant to Article 4(5) of the Merger Regulation.

III. COMPETITIVE ASSESSMENT

III.1. INTRODUCTION TO THE POTATO INDUSTRY

7. In Europe, there is one region where potatoes are mass-produced for the purpose of the potato industry: the EU-5 Region, which includes Benelux, the UK, Germany and Northern France. 27 million tons of potatoes are produced yearly in the EU-5 region, of which roughly 14 million tons are processed by the potato industry. Usually a producer will generally need 2 kg of raw potatoes for 1kg of potato products (e.g. French fries). The production costs for potatoes in the EU-5 region are among the lowest in the world, due to several factors: large scale and high quality production of raw materials, high regional consumption and a large number of strongly competing producers in a relatively small region.

8. As a result, there has been a significant development in processing capacity of potatoes in the EU-5 region in the last 4 years from 4.9 million tons in 2008 to 5.5

million tons of potato products in 2011. This increase in capacity is mainly linked to increasing exports but it is also due to a slight growth in potato consumption in the EEA in the last two years, despite the fact that prices have risen by 10% on average in the same period.

9. The Parties are active in the area of production and sale of frozen, chilled and dehydrated potato products. The processing of frozen or chilled potato products is similar, except for the cooling or freezing and the packaging. Frozen products can be stored approximately 18 months and should be stored in a freezer at -18°Celsius while chilled products have a shelf life of only 21 days on average and should be stored at 0 –4°Celsius. Moreover, due to the higher storage temperature, chilled products generally need shorter frying time and allow for faster preparation.

10. When they are sold to the food service market, frozen potato products can be either premium quality or non-premium quality. Premium quality refers in particular to the product characteristics that provide added value for the food service operator, such as shorter frying time, different coating, a bright yellow color and a higher content of dry solids which determines the crispiness of the product.

11. Potato products could broadly be divided into French fries, potato specialties and flakes. French fries may differ from other potato products notably as to size, shape, texture and the use of coatings. The category of specialties includes a wide variety of potato products, including cut specialities (wedges, potato slices, cubes) and non-cut specialities (croquettes, noisettes, etc.). Flakes are mainly used for the preparation of mashed potato, gnocchi and chips and as an emulsifier for soups and sauces.

12. McCain and Lutosa both supply their products, mainly through distributors, to the general food service market and to the retail sector. In the industry sector potato products (mainly flakes) are used as an ingredient for, among others, potato chips, soups, ready meals and gnocchi

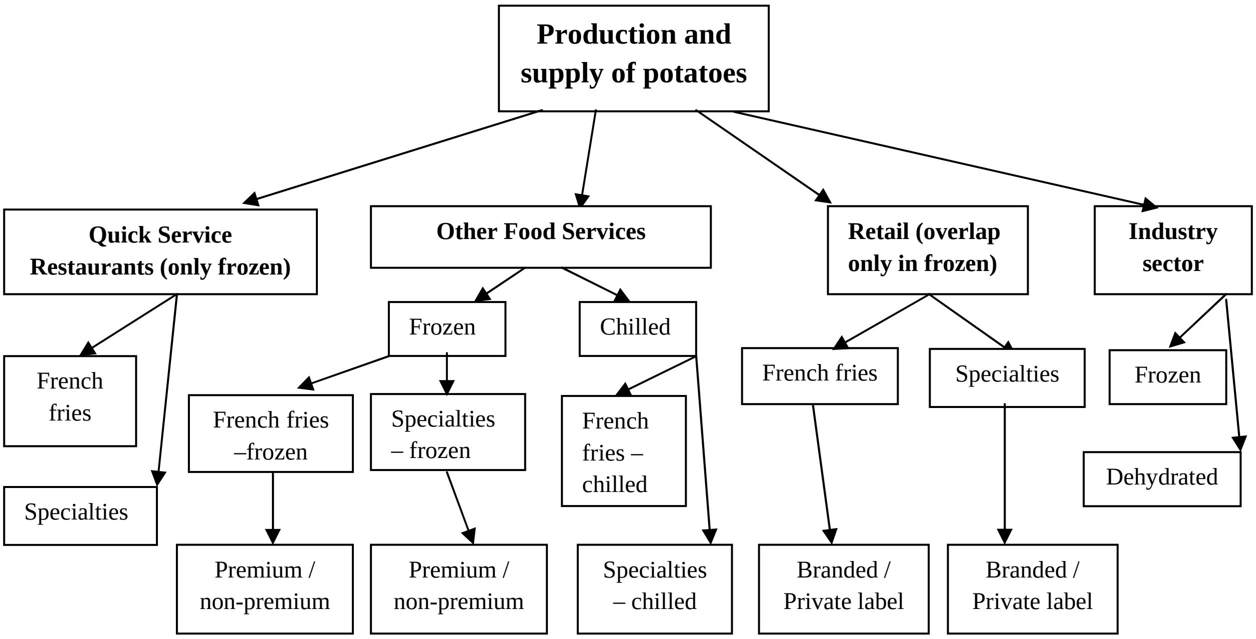
III.2. RELEVANT PRODUCT MARKET

13. As mentioned above, the activities of the Parties overlap in the production and commercialisation of frozen, chilled and dehydrated potato products, dedicated to the food service, retail and industry sectors.[3] These categories comprise a number of different products and product varieties which could broadly be divided into French fries, potato specialties and flakes.

14. Chart 1 below illustrates the segmentation of the market for the supply of potato products.

3 Neither of the parties have significant upstream (breeding of potatoes) or downstream (supply of leftover material to animal feeding) activities.

Chart 1 – Segmentation – Production and supply of potatoes



15. In previous decisions related to food products, the Commission has distinguished the sale of food products dedicated to the food service sector from the sale of food products dedicated to the retail sector,[4] because of distinguishing features including a service dimension, separate sales forces, different price structures and packaging sizes. In *LWM/RWI/F&F*, the Commission upheld this distinction with regard to the production and sale of potato products.[5]

16. The notifying party submits that this market delineation is still valid today.

17. Respondents to the Commission's requests for information confirmed that the food service sector and the retail sector constitute separate product markets. In view of the above, the Commission considers that separate relevant product markets exist for the food service sector and for the retail sector.

III.2.1 Food service sector

18. The food service sector comprises the supply to out-of-home eating (e.g. restaurants, hotels, snack bars, etc.), institutional catering (factory and office canteens, hospitals, schools, etc.) and the Quick Service Restaurants (QSR) segment.

19. The notifying party submits that the supply of frozen potato products[6] to QSR should be considered as a separate market from the supply of potato products to the other food service (OFS) sector. In particular, products for fast food chains would need to meet very high and strict quality requirements as regards their preparation and size (length and thickness). Moreover, some fast food chains also require their French

4 See e.g. Case COMP/M.5286 *Lion Capital / Foodvest*, Case COMP/M.3658 *Orkla / Chips*, Case COMP/M.2302 *Heinz / CSM*, Case COMP/M.1990 *Unilever / Bestfoods.*

5 Case COMP/M.5902 *LWM / RWI / F&F*.

6 QSR products are exclusively frozen whereas potato products sold to OFS are either chilled or frozen.

fries to have a special coating. Finally QSR customers are international players (limited number) with uniform requirements across a wide geographic spread and in large volumes (Mc Donald's, Burger King, KFC, etc.).

20. In *LWM/RWI/F&F*, the Commission left this question open although it confirmed that QSR chains had stricter requirements as regards size and preparation notably targeted at facilitating high speed of operation in the restaurants.

21. Respondents to the Commission's requests for information indicated that the product market for the production and sale of potato products dedicated to the QSR and the OFS sectors constitute separate sub-markets. In view of the above, the Commission considers that separate relevant product markets exist for the QSR sector and for the OFS sector.

III.2.1.A Quick service restaurants (QSR)

22. In the QSR sector, there' is no need to assess whether frozen and chilled products belong to different product markets since potato products sold to QSR are exclusively frozen.

23. In *LWM/RWI/F&F*, the Commission considered that a segmentation between French fries and specialties could be justified (in particular for QSR) due to a limited supply side substitutability but left the question open.

24. The notifying party submits that it is not necessary to subdivide the product market for the production and sale of potato products dedicated to QSR into smaller segments, like French fries and specialties. The notifying party also submits that a high degree of supply-side substitutability can be found between specialty products and French fries across distribution channels, and that virtually all manufacturers of French fries have production lines dedicated to specialties, and will switch between various applications.

25. Respondents to the Commission's requests for information provided indications that French fries could be considered a separate market. However, the market investigation also showed that undertakings active in the production of frozen French fries are generally also active in the production of frozen potato specialties, although through different lines of production.[7]

26. For the purpose of the assessment of the present transaction, the question whether French fries should be considered a separate market in QSR can be left open, given that the proposed transaction does not raise any competition concerns under any alternative market definition for QSR.

III.2.1.B Other food services

III.2.1.B.a Distinction between frozen and chilled products

27. The distinction between frozen and chilled food products has been envisaged in the Commission's decisional practice.[8]

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7 See replies to questions 8 of Questionnaire Q3 Competitors in Other Food service, QSR and industry.

8 See Case COMP/M.3658 *Orkla / Chips*.

28. The notifying party submits that no distinction is warranted between chilled and frozen potato products mainly because the production and processing of frozen and chilled potato products are nearly identical, save for the packaging. The Parties acknowledge, however, that from a demand-side perspective, frozen and chilled products have certain distinct features.

29. Respondents to the Commission's requests for information indicated that, for OFS, frozen potato products and chilled potato products are distinct products fulfilling different needs, with significant price differences.[9] Respondents to the market investigation also stated that from a supply side perspective substitutability is limited due to the fact that tunnels specifically designed for chilling are not capable of freezing and that frozen and chilled products require different packaging.

30. Therefore, the Commission considers that, for OFS, frozen potato products and chilled potato products constitute separate relevant product markets.

III.2.1.B.b Distinction between French fries and specialties

31. French fries may differ from other potato products notably as to the content of dry solids,[10] size and shape, texture and the use of coatings. The category of specialties includes a wide variety of potato products, including cut specialities (wedges, potato slices, cubes) and non-cut specialities (croquettes, noisettes, etc.).

32. In *Orkla/Chips*, the Commission concluded that the category of frozen potato products included all side dishes based on potatoes (French fries or specialties) without further segmentation.[11] In *LWM/RWI/F&F*, the Commission suggested that further segmentation could be justified but left the exact market definition open.[12]

33. The notifying party submits that it is not necessary to make a distinction between French fries and other specialities for OFS; according to the Parties this is even more evident in OFS than in QSR, as the degree of demand side substitutability is higher in OFS.

34. Respondents to the Commission's requests for information indicated that, for OFS, French fries and specialties are distinct products fulfilling different needs, with different prices per Kg.[13] This conclusion is valid for both frozen and chilled products. Despite pointing out some degree of supply-side substitutability, the majority of respondents did not indicate the existence of an overall market for potato products including French fries and specialties for OFS. In view of the above, the Commission

9 See replies to questions 9 and 10 of Questionnaire Q4, Food Service Customers; questions 16 and 17 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

10 The percentage of dry solids in a potato product refers to the non-water component of the potato (i.e. the solid potato and oil).

11 Case COMP/M.3658 *Orkla / Chips*.

12 Case COMP/M.5902 *LWM / RWI / F&F*.

13 See replies to questions 7 and 8 of Questionnaire Q4, Food Service Customers; questions 14 and 15 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

considers that, for OFS, French fries and specialties constitute separate relevant product markets.

III.2.1.B.c Distinction between premium and non-premium frozen potato products

35. The notifying party submits that a distinction should be made in the OFS sector between "premium" quality products and "non-premium" quality products. As mentioned above, premium quality refers in particular to the product characteristics that provide added value for the food service operator, such as shorter frying time, different coating and a bright yellow color.[14] Moreover, only producers of premium quality potato products are able to cut potatoes in a manner that can ensure that all French fries are of the exact same size. With respect to the defects, premium quality potato products contain substantial lower number of defects per kilogram than non-premium quality potato products. Finally, premium quality potatoes have a higher content of dry solids which determines the crispiness of French fries. These differences enable premium quality producers to charge prices which are 20-30% higher than regular quality products.

36. There are no Commission precedents dealing specifically with premium and non-premium potato products.

37. From the demand side, respondents to the Commission's requests for information stated that premium potato products and non-premium products are distinct products fulfilling different needs. The majority of customers replied that they would not switch to non-premium products further to a 5% permanent price increase of premium products.[15]

38. From the supply side, respondents to the market investigation indicated that, although the technical production process for producing premium products is similar to that of non-premium products, a different sourcing strategy and therefore different investments are required in order to have potatoes more in line with the requirements of premium products.

39. The relatively high price differences between premium and non-premium products were confirmed during the market investigation by the analysis of transaction data of the Parties.

40. In view of the above, the Commission considers that, for OFS, premium frozen potato products and non-premium frozen potato products constitute separate relevant product markets.

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14 According to the Parties, the same techniques developed to produce high quality products for QSR are also applied to produce premium quality products for the OFS market. As a result, only those manufacturers that are able to meet the high and strict quality requirements for QSR, such as McCain and Lambweston, are able to produce premium quality products dedicated to the OFS market.

15 See replies to questions 12, 13 and 14 of Questionnaire Q4, Food Service Customers; questions 19, 20 and 22 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

III.2.1.B.d Potential segmentation between branded and private label products

41. With respect to the issue of brands and private labels, in a recent decision, the Commission considered that in the food service channel there is demand side substitution between branded and private label products.[16] The Commission in *Buitenfood / Ad van Geloven Holding / JV* concluded that, for the food service channel, branded products and private label products can be considered to belong to a single differentiated product market.

42. The notifying party submits that it is not necessary to further sub-divide the market for the production and supply of potato products to the OFS sector between branded potato products and private label potato products.

43. The market investigation did not provide any evidence for the Commission to depart from its precedent. Therefore, for the assessment of this case, the Commission considers that, for OFS, branded products and private label products belong to a single differentiated product market.

III.2.1.B.e Conclusion

44. The Commission will therefore analyse the concentration's effects on relevant product markets in the OFS distribution channel for frozen potato products according to the distinction between French fries and specialties and between premium and non-premium products; for chilled potato products, the analysis will also be performed according to the distinction between French fries and specialties.[17]

III.2.2 Retail

45. In previous decisions,[18] the Commission envisaged, with respect to the retail channel, potential distinctions between specialty products and French fries, and between private label and branded products. However, in the most recent decision, both questions were ultimately left open.

46. The Parties submit that the retail markets could primarily be divided into three main segments: (i) frozen potato products, (ii) chilled potato products and (iii) dehydrated potato products.

47. In the *LWM/RWI/F&F* decision,[19] the Commission based its assessment on a separate market for the supply of frozen potato products, though without concluding on the relevance of this product market definition. In this respect, the Commission notes from the outset that the Parties' activities do not overlap in chilled products and only marginally overlap in dehydrated products.[20] Therefore the assessment will focus on

16 See Case COMP/M.6321 *Buitenfood / Ad van Geloven Holding / JV*.

17 The segmentation premium/non premium applies only to frozen potato products and, therefore, not to chilled products.

18 See Case COMP/M.5902 *LWM / RWI / F&F* and Case COMP/M.3658 *Orkla/Chips*.

19 See Case COMP/M.5902 *LWM / RWI / F&F*.

20 Lutosa does not supply chilled potato products to the retail sector and its market share in dehydrated products is very low regardless of the geographic market definition (below 1%).

frozen potato products where both McCain and Lutosa sell branded and private label French fries and other potato specialties such as wedges, croquettes, potato slices and roast potatoes.

III.2.2.A Distinction between specialty products and French fries

48. In the *Orkla/Chips* decision[21], the Commission concluded that the category of frozen potato products included all side dishes based on potatoes without further segmentation. However, the Commission stressed that its conclusions were only relevant for the purposes of the case as the consumption habits for frozen potato products appeared to vary between Member States.[22]

49. In the LW*M/RWI/F&F* decision[23], the Commission left open the question of whether the market for deep-frozen potato products for the retail sector should include both French fries and the different specialities, although it confirmed that retailers considered the two product ranges as not substitutable, notably due to price differences.

50. The notifying party submits that potato specialties are indeed slightly more expensive than French fries, mainly due to a more elaborate production process. Moreover, demand-side substitutability is in its opinion low due to clear-cut consumer preferences at the time of purchase. However, the notifying party also submits that retailers will generally purchase a wide range of potato products, including French fries and various specialty products.

51. The Parties also submit that, similarly to the food service sector, a high degree of supply-side substitutability can be found between specialty products and French fries.

52. From the demand side, it results from the market investigation that potato specialties cannot be substituted to French fries.[24] A majority of retailers and of competitors thus considers French fries and potato specialties as distinct products fulfilling different needs by end consumers. Moreover, a majority of retailers and of competitors also considers that French fries and specialties exhibit significant differences in terms of consumption patterns, prices, targeted consumer groups, etc. Despite confirming some degree of supply-side substitutability,[25] the majority of respondents did not indicate the existence of an overall market for frozen potato products including French fries and specialities.

53. In view of the above, the Commission considers that separate relevant product markets exist for frozen French fries and specialty products for the retail sector.

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21 See Case COMP/M.3658 *Orkla/Chips*.

22 The activities of the parties overlapped only in Sweden.

23 See Case COMP/M.5902 *LWM / RWI / F&F*.

24 See replies to questions 5 and 6 of Questionnaire Q2 customers retail, questions 8 and 9 of Questionnaire Q1 Competitors retail.

25 See replies to questions 14 and 15 of Questionnaire Q1 Competitors retail.

III.2.2.B Distinction between branded and private label products

54. In the *LWM/RWI/F&F* decision,[26] where the activities of the parties overlapped only regarding private label products in Austria, the Commission left open the question of whether private label and branded products should be included in the same product market for frozen potato products for the retail sector the transaction did not raise any competitive issues irrespective of the product market definition.

55. In the retail sector in general, producers sell frozen potato products to retailers which, in turn, sell these products to end consumers. There are therefore two stages in the supply chain: the upstream level (production and supply of frozen potato products to retailers) and the downstream retail level (sale of products to consumers). The Parties are only active at the upstream production and supply level. In recent consumer goods cases,[27] the Commission distinguished the upstream level where retailers source their products from a downstream level where the products are sold to the final customer. The same approach is followed in the present case for the different frozen potato products.

56. To assess the existence and degree of competitive interaction between between brands and private labels at that upstream level, the Commission analyses whether brands and private labels are from the perspective of retailers more complements or substitutes, in other words whether retailers can and will substitute branded products with private labels in case of a small price increase of brands.

57. For example, in a previous case involving dairy products[28], the Commission found that for <u>fresh and long life milk</u>, which are largely commoditised, brands and private labels were included in the same product markets. On the other hand, as regards dairy desserts and dairy drinks, the Commission considered in the same case that brands and private labels belonged to separate product markets, given the existence of brand loyalty of consumers and from the perspective of the retailer "must have" brands, i.e. brands that retailers need to carry because otherwise they would lose substantial sales of the category.

58. The notifying party submits that at both the *upstream* and the *downstream* level the production and supply of branded potato products and private label potato products belong to the same product market, in light of the significant competition between these products at retail level. Regarding private label products, the notifying party also submits that the upstream market is characterised by high competitive pressure as a result of the limited amount of customers, the generic nature of the products and the overcapacity in production.

59. The notifying party also indicates that private label products have been growing their share of the market and currently account for between 65-70% of the overall sales of potato products in the retail sector in continental Europe and approximately 50% of the overall sales in the United Kingdom.

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26 See Case COMP/M.5902 *LWM / RWI / F&F*.

27 See case COMP/M.4533 *SCA/P&G* and M.5644 *Kraft Foods/Cadbury*.

28 See Case COMP/M.5046 Friesland/Campina.

60. With respect to demand-side substitution, the Commission's investigation has shown that a large majority of potato product manufacturers observe in general a growing presence of private labels in frozen and chilled potato products.[29] Nevertheless, as far as the Belgian retail sector is concerned, information submitted by the Parties shows that the total volume share of private labels in the production of frozen potato products dedicated to the retail sector (including private label product sales by the Parties) has remained almost constant from 2008 ([60-70]%) to 2012 ([60-70]%).

61. The Parties' submissions also show that prices for branded products are significantly higher than prices of private label products available in retailer outlets since branded products prices are on average 100-150% higher than private label products. This conclusion is valid for both French fries and specialty products.

62. It appears thus that contrary to, for example, the milk markets in the *Friesland Foods/Campina* case,[30] the market investigation has shown that private label products are only present at the low end of the price range for either frozen French fries or specialties, thereby limiting the competitive pressure they exert on branded products in retailers 'choice.

63. Furthermore, a majority of retailers active on the Belgian market have indicated that they consider both brands active on the market on an on-going basis (McCain and Lutosa) as 'must-have' brands, for both French fries and specialty products.[31] These brands are therefore very difficult to replace by private labels.

64. Regarding supply-side substitution, as outlined in the *Friesland Foods/Campina* decision, in situations where the bulk of both the private label and the branded products are supplied by the same firms, it can be presumed that these firms would take into account, when supplying retailers, the substitutability of private label and supplier brands among end customers. The extent to which the market actors producing private label products are also significant suppliers of branded products is therefore of particular relevance.

65. In this respect, although both Parties are also slightly active in the production of private label products, the Commission's investigation has shown that other actors in the Belgian market exclusively focus on the supply of private label frozen potato products to the retail and OFS sectors.[32] As a result, the competitive interaction at the procurement level between producers of branded products and producers of private labels is asymmetric and very partial: the former can exert competitive pressure on the latter, but not vice-versa.[33] Moreover, parties' margins are typically

29 See replies to questions 25 and 30 of Questionnaire Q1 Competitors retail.

30 See Case COMP/M.5046 *Friesland Foods/Campina*. In its decision, the Commission had concluded that "*The existence of a high and low-level private label indicates that retailers consider and condition their private labels in relation to supplier brands*".

31 See replies to questions 19 of Questionnaire Q2 Consumers retail.

32 See replies to question 6 of Questionnaire Q1 Competitors retail.

33 See Case COMP/M.6455 *SCA/Georgia pacific*, recital 136.

higher for branded potato products than for private label products.[34] Potato product manufacturers producing both branded and private labels would therefore normally prefer to use their capacity for production of branded products. As a result, the owners of strongly positioned potato products have an incentive to focus on branded potato product production and to mostly produce private labels to the extent necessary to utilise spare production capacity and gain economies of scale.

66. With respect to sourcing processes by retailers, the results of the market investigation are in line with the Parties' submission that private label products manufacturers are sourced differently from branded products. Indeed, branded products tend to be sourced through bilateral negotiations while private label products tend to be sourced through tenders.

67. In view of the above, the Commission considers, for the purposes of the present case, that branded and private label products constitute separate relevant product markets.

III.2.2.C Conclusion

68. The Commission will therefore analyse the concentration's effects on relevant product markets in the retail distribution channel for frozen potato products according to the distinction between French fries and specialties, and between branded and private label products.

III.2.3 Industry

69. In previous decisions considering the various markets for the supply of potato products, the Commission did not have the opportunity to assess the food industry sector as a distinct product market.[35] The notifying party submits, however, that the industry sector should be distinguished from the food service sector and the retail sector since food industry customers are very different from their counterparts in food service and retail and have specific needs. Customers in the industry sector are large manufacturers of food products and therefore use potato products as an ingredient (for example potato flakes for chips or used as an emulsifier for soups), unlike customers in retail and food service who use them as end-products. In the food industry sector products are sold in bulk or in big bags of 50 kg, whereas in food service and retail smaller packages (between 750 g and 2.5 kg) are customary. Respondents to the Commission's market segmentation endorsed this distinction between the industry, the OFS and the retail sectors.[36]

70. In the industry sector, market players sell frozen, chilled and dehydrated potato products to customers who manufacture soups and sauces, chips, gnocchi and ready meals or salads. As Lutosa does not supply chilled products, the activities of the parties overlap only as regards frozen and dehydrated potato products for industry customers. The notifying party submits in that regard that frozen and dehydrated products should be assessed separately since their final applications are different: dehydrated products are processed further to prepare crackers, gnocchi and soups

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34 See Annex 9 to form CO, p.34.

35 As it did in the sauce market, cf - COMP/M.1802 *Unilever/Amora-Maille*.

36 Replies to question 3 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

whereas frozen products are mainly potato specialties used in ready meals or salads as side dishes. Respondents to the Commission's market investigation confirmed this distinction.[37]

71. In the light of the above, the Commission considers that in the industry sector, frozen potato products and dehydrated potato products constitute distinct product markets.

III.3. RELEVANT GEOGRAPHIC MARKET

III.3.1 Food service sector

III.3.1.A Quick service restaurants (QSR)

72. In *LWM/RWI/F&F*, the Commission left the exact definition of the geographic market open, although confirming a growing trend towards harmonization and Europeanization as regard the supply of potato products in the food service sector.

73. The notifying party submits that the geographic market is probably world-wide, but at least European in scope. On the supply side, French fries and specialties supplied to QSR are homogeneous and do not differ in taste or quality from country to country. QSR customers only certify a potato producer if it can guarantee implementation in all factories, regardless of geographic spread, of such quality specifications. Only large, internationally operating producers of high-quality potato products are able to supply QSR customers. McCain and LambWeston, the two large suppliers of the QSR sector, have production facilities all over the world and have a centralised sales force dedicated to the QSR sector. The demand side of the QSR sector is dominated by a few large, internationally operating fast-food chains such as McDonald's, Burger King, and Kentucky Fried Chicken, which are increasingly purchasing by way of centralised, global tenders.

74. The responses to the Commission's requests for information indicated that QSR customers based in the EEA purchase across the whole EEA territory and both customers and competitors sell the same frozen potato products in all EEA countries.[38]

75. In view of the above, the Commission concludes that the market for the supply of potato products to QSR is EEA wide.

III.3.1.B Other food services (OFS)

76. In previous decisions, the Commission concluded that both from a demand-side and a supply-side perspective a food service market is predominantly national in scope, although the Commission confirmed that there are tendencies towards a widening in the scope.[39] In *LWM/RWI/F&F*, the Commission left the exact definition of the geographic market open, although confirming a growing trend towards harmonization

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37 Replies to question 25 of Questionnaire Q3, Other Food Service, QSR and industry Competitors. Replies to question 7 of Questionnaire Q5, Industry customers.

38 See replies to questions 10 and 11 of Questionnaire Q6, QSR Customers; question 26 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

39 See Case COMP/M.5046 *Friesland Foods / Campina*, Case COMP/M.1990 *Unilever / Bestfoods* and Case COMP/M.3658 *Orkla / Chips*.

and Europeanization as regard the supply of potato products in the food service sector.

77. With respect to the OFS sector, the notifying party argues that the geographic market is at least European in scope. Potatoes are produced in the EU-5 region and shipped throughout and beyond the EEA. Products are sold across Europe under the same brand and the same packaging (although the product range differs from country to country) and local distributors are used to deal with centralised or sales forces of potato producers, which make the use of national sales forces "*largely unnecessary*".[40]

78. On the one hand, the responses to the Commission's requests for information indicated that, according to the majority of OFS customers and competitors, there are differences among EEA countries in terms of consumption habits and wholesale prices for frozen non-premium French fries, frozen non-premium specialties and chilled specialties.[41] The Parties' activities do not overlap in premium potato products[42] and in chilled French fries.[43]

79. The relatively high price differences across Member States were confirmed during the market investigation by the analysis of transaction data of the Parties for frozen non-premium French fries, frozen non-premium specialties and chilled specialties.

80. […]

81. On the other hand, respondents to the market investigation indicated that products are sold across Europe under the same brand and with the same packaging.

82. In view of the above, the Commission concludes that it is likely that the relevant geographic markets for OFS for frozen non-premium French fries, frozen non-premium specialties and chilled specialties are national in scope. In any event, for the purpose of the assessment of the present transaction, the exact definition of the relevant geographic markets for OFS can be left open, given that the proposed transaction does not raise any competition concern under any alternative market definition for OFS.

III.3.2 Retail

83. In past decisions, the Commission considered the relevant geographic market definition for the supply of food products to the retail sector to be national based on the following considerations: differences as regards the tastes of consumers and their consumption pattern, national sales channels, negotiations of supply contracts on national level, pricing on a national level, national distribution and logistics, different brands in different Member States and a considerable degree of divergence in the shares of the

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40 Form CO, paragraph 170.

41 See replies to questions 17 and 18 of Questionnaire Q4, OFS Customers; questions 32 and 33 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

42 Lutosa is not active in the production and sale of premium potato products.

43 McCain is not active in the production and sale of chilled French fries.

relevant suppliers in the different Member States.[44] However, in the *LWM/RWI/F&F* decision,[45] the geographic market definition was ultimately left open, although a growing trend towards harmonization and Europeanization was observed as regards the supply of deep-frozen potato products in the retail sector. In that regard, it is worth noting that the activities of the parties in this case only overlapped in retail with respect to private label products.

84. The notifying party submits that the geographic scope of the markets for the supply of frozen French fries and frozen specialties to the retail market is wider than national, possibly EEA-wide. The Parties argue that production plants are concentrated in the EU-5 region from where potato manufacturers supply their products to retailers throughout and beyond the EEA, and that large retailers have broadened their activities beyond national borders.

85. The Commission first of all notes that price information submitted by the Parties shows that retail prices differ widely on a national basis across the EEA, for both French fries and specialties, and for both branded and private label products. Moreover, it results from the market investigation that a majority of retailers experience differences in potato product consumption habits across the EEA.[46]

86. As regards more specifically branded products, while certain brands, such as McCain and, to a lesser extent, Lutosa, are active with similar products across the EEA, it results from the market investigation[47] that a majority of retailers consider that different brands are active in different European countries. For example, Findus is present in France and Spain but not in Belgium. Moreover, Belgium exhibits a large difference in terms of market structure compared to the rest of the EEA, as Lutosa enjoys a strong position in retail branded frozen potato products for both French fries ([30-40]% in value)[48] and specialties ([20-30]% in value).[49]

87. As regards the supply of private label frozen potato products, the market investigation is less conclusive.[50] Whilst a majority of producers have stated that their retail customers procure frozen potato products from any plant in Europe regardless of the country where they are located, a majority of retailers active in Belgium does not share that view. Similarly, while the Parties have submitted an example of a cross-border supply agreement and a majority of producers indicated that their sales forces are organized on

44 See Case COMP/M.5046 *Friesland Foods/Campina*, Case COMP/M.4824 *Kraft/Danone Biscuits*, Case COMP/M.3658 *Orkla/Chips*, Case COMP/M.1990 *Unilever/Bestfoods*.

45 See Case COMP/M.5902 *LWM / RWI / F&F*.

46 See replies to Question 11 of Questionnaire Q2 customers retail.

47 See replies to Question 10 of Questionnaire Q2 customers retail.

48 The only other countries where Lutosa has a market share higher than 10% in value for the supply of branded frozen French fries are Lithuania ([70-80]%) and Estonia ([10-20]%), which both account for a significantly smaller value than the Belgian market.

49 The only other countries where Lutosa has a market share higher than 10% in value for the supply of branded frozen potato specialty products are Lithuania ([80-90]%), Poland ([10-20]%) and Estonia ([10-20]%), which all account for a significantly smaller value than the Belgian market.

50 See replies to Questions 11, 16 and 17 of Questionnaire Q1 Competitors retail, and replies to Question 9 of Questionnaire Q2 Consumers retail.

an international level for private label products, the market investigation suggests that the procurement procedures put in place by retailers are often organized on a national basis.

88. In view of the above, and bearing in mind that the Parties' activities mainly overlap in Belgium in retail markets for branded frozen French fries and specialties the Commission will assess the competitive impact of the transaction in the markets for retail branded frozen potato products (French fries and specialties) on a national basis. As regards the markets for private label French fries and specialties, the Commission considers that the precise geographic market definition can be left open for the purposes of the present case, as the transaction is unlikely to raise serious doubts irrespective of the precise geographic market definition.

III.3.3 Industry

89. The Notifying Party considers that the relevant geographic market for the sale of potato products (either frozen or dehydrated) dedicated to the industry sector is world-wide, but at least European in scope. It argues that both McCain and Lutosa sell across Europe and their customers are large, internationally, operating companies who purchase directly from the manufacturer through a single (international) tender.

90. Respondents to the Commission's market investigation broadly indicated that purchasing patterns for potato products dedicated to the industry sector have a cross-border nature[51] in Europe and that there are no national specificities in trade flows or consumption patterns that would justify national markets. For example, it transpired from the market investigation that Lutosa directly deliver dehydrated and frozen potato products from its facilities in Belgium to customers processing them in plants located in Germany, Italy and Ireland.

91. In the light of the above the Commission will assess the competitive impact of the transaction in the industry-sector at EEA-wide level.

III.4. COMPETITIVE ASSESSMENT

92. The Commission has assessed the impact of the horizontal overlaps of the proposed transaction for the production and supply of potato products in the following possible markets: (1) QSR in the EEA; (2) OFS both at national and EEA levels; (3) retail at national level; and (4) industry in the EEA.

III.4.1 Food service sector

III.4.1.A Quick service restaurants

93. In QSR, the proposed transaction would lead to a horizontally affected market with a combined market share, according to the notifying party estimates, at EEA level of [40-50]% in volume, although with an increment of only [0-5]% brought by Lutosa (see Table 1). The activities of the Parties overlap only in France and in Ireland.

51 Replies to question 35 and 36 of Questionnaire Q3, Other Food Service, QSR and industry Competitors; replies to question 8 and 9 of Questionnaire Q5, Industry customers.

94. Even in the narrower potential product market for French fries and the potential market for potato specialties, the increment brought by Lutosa is negligible (less than 1% market share in the EEA).

Table 1 – Shares of the market for the supply and production of potato products dedicated to QSR based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) at EEA level in 2012

In 2012	**McCain tons**	**Lutosa tons**	**McCain %**	**Lutosa %**	**Combined %**
Total QSR	[…]	[…]	[40-50]	[0-5]	**[40-50]**
FF QSR	[…]	[…]	[40-50]	[0-5]	**[40-50]**
SPE QSR	[…]	[…]	[40-50]	[0-5]	**[40-50]**

Source: Form CO

95. According to the notifying party, McCain and Lutosa cannot be considered as competing in the QSR market. While McCain focuses on the supply to QSR customers and achieves a significant part of its revenues in this market segment, Lutosa has no focus on the QSR market at all and does not have the production facilities that would allow it to meet the product specification of large QSR customers such as McDonalds and Burger King. In addition, also after the proposed transaction, McCain will face sufficient competition from the other manufacturers active in the QSR market, amongst others, LambWeston, Farm Frites and Aviko.

96. All customers and the majority of competitors replying to the Commission's requests for information did not express concerns that the proposed transaction will result in a reduction of competition and increase of prices.[52]

97. In addition, even post-transaction, the Parties will continue to face competitive pressure from the remaining competitors, and notably from LambWeston (market share: [20-30]% in the EEA).

98. In view of the above, the Commission considers that the proposed transaction does not raise serious doubts in any market for the supply and production of potato products dedicated to the QSR in the EEA.

III.4.1.B Other food services

99. When considering the segmentations of the overall market for the production and sale of potato products to the OFS, the proposed transaction would result in several affected markets both at EEA and national levels, in particular with regard to the supply of non-premium frozen French fries and of non-premium frozen specialties. These are considered separately below. The Parties' activities do not overlap in premium potato products[53] and in chilled French fries.[54] Regarding chilled specialties the proposed transaction would not lead to any affected market.[55]

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52 See replies to questions 22 and 23 of Questionnaire Q6, QSR Customers; questions 71 and 72 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

53 Lutosa is not active in the production and sale of premium potato products.

100. The notifying party submits that it has relied on trade statistics and on its local knowledge to estimate volumes for the OFS market sizes. For OFS the notifying party argues that it cannot rely on data purchased from agencies. According to the notifying party, it is therefore difficult to estimate competitor volumes and the size of markets. The notifying party was not able to provide the Commission with competitors' market shares split into French fries and specialties for frozen potato products.

101. The Commission during the market investigation reconstructed the market for non-premium frozen French fries for the following Member States: Belgium, Cyprus, France, Greece, Italy, the Netherlands, Poland, Portugal and Spain, where the combined market shares, according to the notifying party's estimates, were the highest and the size of the markets the largest. The proposed transaction would result in technically affected markets also in Finland, Lithuania, Slovenia and Sweden.

102. According to the notifying party, the proposed transaction will not result in anticompetitive effects in any market for OFS.

103. Only a minority of customers and competitors, active in OFS, replying to the Commission's requests for information has expressed concerns as regard the competitive effects of the proposed transaction.[56]

104. Respondents to the market investigation indicated that in every Member State, and therefore as well at EEA level, the markets for the production and sale of potato products to the OFS have some common features.

105. First, also post-transaction, the Parties will continue to face strong competition from strong international players present almost in all Member States, like LambWeston, Aviko, FarmFrites and Agristo and a number of smaller competitors.

106. Second, all players in the market can relatively easily expand their capacity. Internal documents of the notifying party show that in the last decade the capacity within the EU5-region has increased significantly and will further increase in the near future. Many Belgian and Dutch manufacturers, like Aviko, Agristo, Mydibel and Clarebout, increased their capacity by building additional production lines. Clarebout increased its capacity with one additional production line in 2009 and will further increase its capacity by building another production line in 2013.

107. Third, regarding non-premium frozen potatoes, all producers are able to offer the same product specifications. All suppliers are able therefore to produce the products where the activities of the Parties overlap.

108. Fourth, the majority of the customers replying to the Commission's requests for information stated that food service operators can easily switch between different

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54 McCain is not active in the production and sale of chilled French fries.

55 There would be a [0-5]% overlap only in Belgium with a combined market share of [5-10]% in Belgium.

56 See replies to question 44 of Questionnaire Q4, OFS Customers; question 73 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

suppliers and that they switched suppliers in the past,[57] barriers to entry are low and the normal duration of contracts with suppliers is one year.[58]

109. Fifth, the majority of customers answering the Commission's requests for information stated that they usually multi-source from more than one supplier.[59]

110. The above mentioned features of the markets for OFS apply to the assessment both at EEA level and at national level. Therefore, the Commission considers, despite relatively high market shares in some Member States[60] (analysed below in details), that the proposed transaction would not raise serious doubts on any markets for OFS.

III.4.1.B.a EEA

111. Table 2 below displays the Parties' market shares per product market in the EEA.

Table 2 – Shares of the market for the supply and production of frozen non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) at EEA-level in 2012

In 2012	***FF frozen non-premium (%)***	***SPE frozen non-premium (%)***
McCain	[10-20]	[0-5]
Lutosa	[10-20]	[10-20]
Combined	**[20-30]**	**[10-20]**
Others	[70-80]	[80-90]
Total	100	100

Source: Form CO

112. A majority of respondents to the market investigation at EEA level have indicated that they are able to multi-source their products and that the concentration will not have an impact on their business.

57 See replies to questions 34 and 35 of Questionnaire Q4, OFS Customers.

58 See replies to question 24 of Questionnaire Q4, OFS Customers.

59 See replies to question 33 of Questionnaire Q4, OFS Customers.

60 e.g. Belgium, Cyprus and Greece.

113. Respondents to the market investigation have also indicated that the merged entity will continue to face competition from a number of significant competitors at EEA level, such as Aviko, Lambweston and Farmfrites.[61]

114. In view of the above, the Commission considers that the proposed transaction does not give rise to serious doubts as regards its compatibility with the internal market in relation to potential EEA (as a whole) markets for frozen non-premium French fries dedicated to OFS and for frozen non-premium specialties dedicated to OFS.

III.4.1.B.b National level

Belgium

115. Table 3 below shows the sales of the Parties to the OFS in Belgium.

Table 3 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in 2012

In 2012	***FF frozen non-premium %***	***SPE frozen non-premium %***
McCain	[0-5]	[0-5]
Lutosa	[70-80]	[20-30]
Combined	**[70-80]**	**[20-30]**
Others	[20-30]	[70-80]
Total	100	100

Source: Form CO and market reconstruction

116. The main competitors post-transaction in non-premium frozen French fries would be FarmFrites (share in the range of 10-15%), Aviko (share in the range of 5-10%) and Mydibel (share in the range of 5-10%).

117. The Commission also notes that the increment brought about by McCain in the market share of the combined entity in the market for frozen non-premium French fries is *de minimis*, corresponding to […] tons; by way of comparison the overall volumes of processed potato (including both French fries and specialties) produced in Belgium amount to around […] tons. Furthermore, it should be borne in mind that McCain does not have any frozen potato production facility in Belgium.

118. A majority of customers replying to the market investigation indicated that they are able to multi-source their products and that the proposed transaction will not have an impact neither on their business nor on prices.[62]

61 According to the Parties, at EEA level, Aviko, Lambweston and Farmfrites have respectively [10-20]%, [0-5]% and [5-10]% market shares in the overall frozen non-premium segment for OFS.

119. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries and non-premium frozen specialties, for OFS, in Belgium.

Cyprus

120. Table 4 below shows the sales of the Parties to the OFS in Cyprus.

Table 4 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) for French fries (FF) in 2012

In 2012	***FF frozen non-premium %***
McCain	[10-20]
Lutosa	[30-40]
Combined	**[50-60]**
Others	[50-60]
Total	100

Source: Market reconstruction

121. The Parties' activities do not overlap in non-premium frozen specialties in Cyprus.[63]

122. The main competitors post-transaction in non-premium frozen French fries would be Agristo (share in the range of 30-35%), Mydibel (share in the range of 10-15%) and LambWeston (share in the range of 5-10%). Therefore, the […] tons ([10-20]%) sold by McCain could be easily supplied by any other of those competitors.

123. Customers replying to the market investigation indicated that the proposed transaction will not have an impact on prices due to the presence of many strong competitors in OFS in Cyprus.[64]

124. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries, for OFS, in Cyprus.

Finland

125. Table 5 below displays the Parties' market shares per product market in Finland.

62 See replies to questions 45 and 46 of Questionnaire Q4, OFS Customers.

63 McCain is not active in the production and sale of non-premium frozen specialties in Cyprus.

64 See minutes of the call with A&G Sevenseas Seafood on 26 April 2013.

Table 5 – Shares of the market for the supply and production of frozen non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in Finland in 2012

In 2012	***FF frozen non-premium (%)***
McCain	[10-20]
Lutosa	[0-5]
Combined	**[10-20]**
Others	[80-90]
Total	100

Source: Form CO

126. The Parties' activities do not overlap in a potential Finnish market for frozen non-premium specialties dedicated to OFS.[65] The Commission also notes that the increment brought about by Lutosa on the market share of McCain in the market for frozen non-premium French fries is extremely minor.

127. Respondents to the market investigation have also indicated that the merged entity will continue to face competition from a number of significant competitors in Finland, such as Aviko and Farmfrites.[66]

128. In view of the above, and in the absence of significant concerns raised during the market investigations, the Commission considers that the proposed transaction does not give rise to serious doubts as regards its compatibility with the internal market in relation to potential Finnish markets for frozen non-premium French fries dedicated to OFS.

France

129. Table 6 below shows the sales of the Parties to the OFS in France.

65 McCain is not active in the supply and production of frozen non-premium specialties dedicated to OFS in Finland.

66 According to the Parties, in Finland Aviko and Farmfrites enjoy respectively [10-20]% and [10-20]% market shares in the overall frozen non-premium segment for OFS.

Table 6 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in 2012

In 2012	***FF frozen non-premium %***	***SPE frozen non-premium %***
McCain	[20-30]	[5-10]
Lutosa	[10-20]	[10-20]
Combined	**[30-40]**	**[20-30]**
Others	[60-70]	[70-80]
Total	100	100

Source: Form CO and market reconstruction

130. The main competitors post-transaction in non-premium frozen French fries would be Agristo (share in the range of 35-40%), LambWeston (share in the range of 20-25%) and Aviko (share in the range of 0-5%).

131. A majority of respondents to the market investigation indicated that they are able to multi-source their products and that the concentration will not have an impact on their business and on prices.

132. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries and non-premium frozen specialties, for OFS, in France.

Greece

133. Table 7 below shows the sales of the Parties to the OFS in Greece.

Table 7 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) for French fries (FF) in 2012

In 2012	***FF frozen non-premium %***
McCain	[20-30]
Lutosa	[30-40]
Combined	**[60-70]**
Others	[30-40]
Total	100

Source: Market reconstruction

134. The Parties' activities do not overlap in non-premium frozen specialties in Greece.[67]

135. The main competitors post-transaction in non-premium frozen French fries would be FarmFrites (share in the range of 10-15%), LambWeston (share in the range of 10-15%), Aviko (share in the range of 5-10%) and Mydibel (share in the range of 5-10%).

136. A majority of customers replying to the market investigation indicated that the proposed transaction will not have an impact on their business.[68] In Greece there are two main categories of customers: the relatively small ones which have only one single supplier, and the bigger ones which usually have more than two suppliers.

137. Customers indicated that there are no high switching costs involved in the OFS market and that they could therefore easily obtain non-premium frozen potato products from other suppliers such as Lambweston, Aviko and FarmFrites. Furthermore, according to them, there are almost no barriers to entry in the OFS market in Greece.[69]

138. Lutosa is only selling its products in Greece through a single agent: […]. Lutosa does not have any sales people on the ground in Greece. Therefore, in principle, it could be relatively easy for a potential entrant to penetrate the Greek market by establishing a business relation with such an agent.

139. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries, for OFS, in Greece.

Italy

140. Table 8 below shows the sales of the Parties to the OFS in Italy.

Table 8 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in 2012

In 2012	***FF frozen non-premium %***	***SPE frozen non-premium %***
McCain	[5-10]	[5-10]
Lutosa	[20-30]	[30-40]
Combined	**[20-30]**	**[30-40]**
Others	[70-80]	[60-70]
Total	100	100

Source: Form CO and market reconstruction

67 McCain is not active in the production and sale of non-premium frozen specialties in Greece.

68 See replies to question 46 of Questionnaire Q4, OFS Customers.

69 See minutes of the call with Zaco AEBE on 29 April 2013 and with Kallas-Papadopoulos on 2 May 2013.

141. The main competitors post-transaction in non-premium frozen French fries would be Aviko (share in the range of 40-45%), LambWeston (share in the range of 15-20%) and FarmFrites (share in the range of 5-10%).

142. A majority of respondents to the market investigation indicated that the concentration will not have an impact on their business and on prices.

143. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries and non-premium frozen specialties, for OFS, in Italy.

Lithuania

144. Table 9 below displays the Parties' market shares per product market in Lithuania.

Table 9 – Shares of the market for the supply and production of frozen non-premium potato products dedicated to OFS based on volume (in tonnes) for French fries (FF) in Lithuania in 2012

In 2012	***FF frozen non-premium (%)***
McCain	[10-20]
Lutosa	[20-30]
Combined	**[30-40]**
Others	[60-70]
Total	100

Source: Form CO

145. The Parties' activities do not overlap in a potential Lithuanian market for frozen non-premium specialties dedicated to OFS.[70]

146. A majority of respondents to the market investigation indicated that the concentration will not have an impact on their business and on prices.

147. Respondents to the market investigation have also indicated that the merged entity will continue to face competition from a number of significant competitors in Lithuania, such as Aviko, Lambweston and especially Farmfrites.[71]

148. In view of the above, the Commission considers that the proposed transaction does not give rise to serious doubts as regards its compatibility with the internal market in relation to a potential Lithuanian market for frozen non-premium French fries dedicated to OFS.

70 McCain is not active in the supply and production of non-premium specialties dedicated to OFS in Lithuania.

71 According to the Parties, in Lithuania Aviko, Lambweston and Farmfrites enjoy respectively [10-20]%, [5-10]% and [20-30]% market shares in the overall frozen non-premium segment for OFS.

The Netherlands

149. Table 10 below shows the sales of the Parties to the OFS in the Netherlands.

Table 10 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) for French fries (FF) in 2012

In 2012	***FF frozen non-premium %***
McCain	[10-20]
Lutosa	[5-10]
Combined	**[20-30]**
Others	[70-80]
Total	100

Source: Market reconstruction

150. The Parties' activities do not overlap in non-premium frozen specialties in the Netherlands.[72]

151. The main competitors post-transaction in non-premium frozen French fries would be LambWeston (share in the range of 25-30%), Agristo (share in the range of 20-25%), FarmFrites (share in the range of 10-15%) and Aviko (share in the range of 10-15%).

152. A majority of respondents to the market investigation indicated that the concentration will not have an impact on their business and on prices.

153. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries, for OFS, in the Netherlands.

72 McCain is not active in the production and sale of non-premium frozen specialties in the Netherlands.

Poland

154. Table 11 below shows the sales of the Parties to the OFS in Poland.

Table 11 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) for French fries (FF) in 2012

In 2012	***FF frozen non-premium %***
McCain	[10-20]
Lutosa	[10-20]
Combined	**[20-30]**
Others	[70-80]
Total	100

Source: Market reconstruction

155. The Parties' activities do not overlap in non-premium frozen specialties in Poland.[73]

156. The main competitors post-transaction in non-premium frozen French fries would be FarmFrites (share in the range of 45-50%), Aviko (share in the range of 15-20%) and LambWeston (share in the range of 5-10%).

157. A majority of respondents to the market investigation indicated that the concentration will not have an impact on their business and on prices.

158. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries, for OFS, in Poland.

Portugal

159. Table 12 below shows the sales of the Parties to the OFS in Portugal.

73 McCain is not active in the production and sale of non-premium frozen specialties in Poland.

Table 12 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in 2012

In 2012	***FF frozen non-premium %***	***SPE frozen non-premium %***
McCain	[10-20]	[5-10]
Lutosa	[20-30]	[30-40]
Combined	**[30-40]**	**[30-40]**
Others	[60-70]	[60-70]
Total	100	100

Source: Form CO and market reconstruction

160. The main competitors post-transaction in non-premium frozen French fries would be FarmFrites (share in the range of 20-25%), Agristo (share in the range of 15-20%), LambWeston (share in the range of 10-15%) and Mydibel (share in the range of 10-15%).

161. Customers indicated they switched suppliers in the past in a relatively short time frame and that, when switching, there were alternative suppliers available (e.g. Mydibel, Aviko, FarmFrites, Lambweston).[74]

162. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries and non-premium frozen specialties, for OFS, in Portugal.

Slovenia

163. Table 13 below displays the Parties' market shares per product market in Slovenia.

Table 13 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in Slovenia in 2012

In 2012	***FF frozen non-premium (%)***
McCain	[30-40]
Lutosa	[0-5]
Combined	**[30-40]**
Others	[60-70]
Total	100

Source: Form CO

164. The Parties are not active in a potential Slovenian market for frozen non-premium specialties dedicated to OFS. The Commission also notes that the increment brought

[74] See minutes of the call with Frustock on 29 April 2013.

about by Lutosa on the market share of McCain in the market for frozen non-premium French fries is extremely minor.

165. Respondents to the market investigation have also indicated that the merged entity will continue to face competition from a number of significant competitors in Slovenia, such as Aviko, Lambweston and Farmfrites.[75]

166. In view of the above, the Commission considers that the proposed transaction does not give rise to serious doubts as regards its compatibility with the internal market in relation to a potential Slovenian market for frozen non-premium French fries dedicated to OFS and for frozen non-premium specialties dedicated to OFS.

Spain

167. Table 14 below shows the sales of the Parties to the OFS in Spain.

Table 14 – Shares of the market for the supply and production of non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in 2012

In 2012	***FF frozen non-premium %***	***SPE frozen non-premium %***
McCain	[10-20]	[0-5]
Lutosa	[10-20]	[10-20]
Combined	**[30-40]**	**[10-20]**
Others	[70-80]	[80-90]
Total	100	100

Source: Form CO and market reconstruction

168. The main competitors post-transaction in non-premium frozen French fries would be Agristo (share in the range of 20-25%), Farmfrites (share in the range of 20-25%), LambWeston (share in the range of 10-15%) and Aviko share in the range of 10-15%.

169. A majority of respondents to the market investigation indicated that the concentration will not have an impact on their business and on prices.

170. In view of the above, the Commission concludes that the proposed transaction does not raise serious doubts in relation to the supply and production of non-premium frozen French fries and non-premium frozen specialties, for OFS, in Spain.

75 According to the Parties, in Slovenia Aviko, Lambweston and Farmfrites enjoy respectively [20-30]%, [10-20]% and [10-20]% market shares in the overall frozen non-premium segment for OFS.

Sweden

171. Table 15 below displays the Parties' market shares per product market in Sweden.

Table 15 – Shares of the market for the supply and production of frozen non-premium potato products dedicated to OFS based on volume (in tonnes) and split between French fries (FF) and other specialties (SPE) in Sweden in 2012

In 2012	***FF frozen non-premium (%)***
McCain	[5-10]
Lutosa	[10-20]
Combined	**[20-30]**
Others	[70-80]
Total	100

Source: Form CO

172. The Parties' activities do not overlap in a potential Swedish market for frozen non-premium specialties dedicated to OFS.[76]

173. Respondents to the market investigation have also indicated that the merged entity will continue to face competition from a number of significant competitors in Sweden, such as Aviko and Farmfrites.[77]

174. A majority of respondents to the market investigation indicated that the concentration will not have an impact on their business and on prices.

175. In view of the above, the Commission considers that the proposed transaction does not give rise to serious doubts as regards its compatibility with the internal market in relation to a potential Swedish market for frozen non-premium French fries dedicated to OFS.

III.4.1.C Conclusion

176. In the light of the above, the Commission considers that the proposed transaction does not raise serious doubts on any markets dedicated to the food service channel (QSR and OFS).

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76 McCain is not active in the supply and production of non-premium specialties dedicated to OFS in Sweden.

77 According to the Parties, in Sweden Aviko and Farmfrites enjoy respectively 18% and 15% market shares in the overall frozen non-premium segment for OFS.

III.4.2 Retail

177. As mentioned above, in the retail sector, the activities of the parties only overlap to a substantial extent with respect to frozen potato products. Both McCain and Lutosa produce and sell branded frozen potato products and private label fozen potato products to retail stores.

III.4.2.A Private label markets

178. With respect to sale of private label products, the transaction does not lead to any affected markets at the EEA level regardless of the geographic market definition: the combined market share is [10-20]% frozen fries and [10-20]% for frozen specialties.

179. At national level, the transaction leads to affected markets in Italy with a modest combined share of [20-30]% for frozen fries (Mc Cain: [20-30]%, Lutosa: [0-5]%) and [10-20]% for frozen specialties (Mc Cain: [10-20]%, Lutosa: [0-5]%) and in Slovenia for frozen fries only[78] with [50-60]% (McCain: [5-10]%, Lutosa: [40-50]%). Nevertheless, the parties have not been in direct competition as regards supply of private label products in Slovenia since Lutosa delivered its volumes to distributor […], with whom Lutosa has a long-standing relationship, and McCain sold them to another distributor, […]. These volumes have not been attributed as the result of tenders and therefore the parties did not compete against each other in this context. Furthermore, it is worth noting that the overlap brought about by the transaction is tiny ([…] tons) and could easily be supplied by any other market player active in Slovenia (such as Aviko which has already a market presence and customers contacts in branded retail in Slovenia).

180. In the light of the above, the Commission takes the view that the proposed transaction does not raise serious doubts in any market for the supply of private label potato products to the retail sector in the EEA.

III.4.2.B Branded markets outside Belgium

181. With respect to sale of branded products, the transaction leads to horizontally affected markets in the following countries: Denmark with a combined share of [20-30]% in frozen fries (McCain : [10-20]%, Lutosa : [10-20]%) : France with a combined share of [80-90]% in frozen fries and [40-50]% in frozen specialties but the overlap is insignificant (respectively [0-5]% and [0-5]%) ; Germany with a combined share of [70-80]% in frozen fries and [30-40]% in frozen specialties but the overlap is tiny ([0-5]% in each market) ; Italy with a combined share of [20-30]% in frozen fries and [20-30]% in frozen specialties but the overlap is small (respectively [0-5]% and [0-5]%) ; Portugal with a share of [30-40]% in frozen fries and [20-30]% in frozen specialties (and an overlap of respectively [5-10]% and [0-5]%) ; Spain with a combined share of [70-80]% in frozen fries and [30-40]% in frozen specialties but the overlap is small (respectively [0-5]% and [0-5]%). It appears therefore that in Denmark, France, Germany, Italy, Portugal and Spain, the transaction leads to modest combined shares and/or very small increments.

78 There is no overlap in frozen specialties.

182. In Ireland, post-transaction, the combined market share of the Parties in the retail segment for branded frozen fries would amount to [90-100]% (McCain: [90-100]%, Lutosa: [5-10]%). However, Lutosa's share of [5-10]% brings a small market share increment, which corresponds to […] tons and McCain was already a strong player pre-transaction. The Parties will continue to face potential competition from strong international players present almost in all Member States and in Ireland as well, like LambWeston, Aviko, and FarmFrites, which could easily supply those volumes as barriers to entry are relatively low and there are no long-term contracts in this market. Moreover, the notifying party submits that limited sales of Lutosa's frozen fries in retail in Ireland are attributed to two local distributors[79] who import them mainly for food service purposes and resell them to one retail chain on a sporadic basis. These are Lutosa's only accounts in Ireland and Lutosa does not have any plans or incentives to develop sales there beyond this relationship. It therefore appears that Lutosa's competition to McCain in the branded retail frozen French fries market in Ireland is very limited since Lutosa's market presence is limited to a single region of the country and one retail chain, with no plans to develop or increase it further. In view of the above, the Commission considers that the transaction does not raise serious doubts as regards the retail market for branded frozen French fries in Ireland because Lutosa has not been aiming at substantially competing in the retail market in Ireland.

183. In the light of the above, the transaction does not raise serious doubts as regards branded markets of frozen French fries or frozen specialties in the retail sector in any EEA Member States outside Belgium. In any event, the remedy submitted by the notifying party covers the whole of the EEA and does eliminate any overlap between the Parties in branded retail sector in the EEA.

III.4.2.C Branded markets in Belgium

184. According to the Nielsen data provided by the notifying party in 2012, the branded frozen fries market in Belgium had a total volume of roughly […] tonnes and the branded specialties market in Belgium had a total volume of roughly […] tonnes. Market shares in volumes of the Parties and their main competitors are shown in the table below[80]

79 One is located in Mayo county and the other one in Sligo county, in the north-western part of the country.

80 Source: Nielsen data. Market shares in value are of the same magnitude.

Table 16 – Shares of the market for branded frozen potato products in Belgium in 2012

IN 2012 VOLUME[81]	**Companies**	**Market shares**
French fries	McCain	[50-60]
	Lutosa	[30-40]
	Combined	**[90-100]**
	Iglo	[5-10]
	Others (Weight watchers)	[0-5]
Specialties	McCain	[60-70]
	Lutosa	[20-30]
	Combined	**[90-100]**
	Iglo	[5-10]
	Others	[0-5]

Source: Nielsen data

185. In branded French fries and specialties, the transaction will therefore lead to a combination of the two main suppliers of frozen potatoes, with a market share above 90% and Iglo as a very distant follower. In the light of this market structure, all major retail chains have expressed concerns as regards the competitive impact of the transaction and the risk of price increases in the retail sector in Belgium.[82]

186. The notifying party however submits in the notification that no competition concerns will arise on these markets for the following reasons: [83](i) Market share of private label products is already very significant (more than 70% of the overall market) and growing; (ii) Mc Cain and Lutosa are not in direct competition in retail stores since Mc Cain is an international brand available everywhere and Lutosa has a more Belgian appeal and is only present with a wide range of products at Colruyt (iii) Mc Cain is not in a position to influence the retail pricing for its products because of the significant buyer power of supermarkets, which bear the responsibility to set retail prices.

Private label products do not exert a sufficient competitive constraint

187. First, it does not appear that the new entity will be sufficiently constrained by private label (PL) products. Although respondents to the market investigation indicated that branded and private label products compete on the shelves and end-consumers take

81 The parties estimated their combined market share at [80-90]% for frozen fries and [80-90]% for frozen specialties but they were unable to estimate the market share of competitors and it was thus unclear to whom the remaining [10-20] and [10-20]% should be attributed. Nielsen data, submitted in the course of the investigation, seem to provide a more accurate picture.

82 See replies to question 40, 41 and 42 of Questionnaire Q2, customers retail. Non-confidential minutes of conference calls ith Delhaize and Carrefour dated 29 April 2013.

83 See notes from the notifying party dated 25 April and 8 may 2013.

them into account when making their purchasing decision, price data shows private label products are distant competitors of branded products in terms of price positioning. Whereas branded products (MC Cain, Lutosa, Iglo) are sold at a price between 2.20 and 2.70 euros/kg, PL products are sold at a price comprised between 0.75 and 0.95 euros/kg. Therefore, in case of a price increase of a branded product by 5-10%, it is unlikely that an end-consumer, who already accepts to pay a higher price despite the presence of cheaper alternatives, will switch to private label products.

188. Private label products today represent slightly less than 70% of the volumes of frozen potatoes (either in fries or in specialties) sold in the retail Belgian market, but less than 50% in value. Moreover, data submitted by the notifying party does not confirm that private label products increased their market share in Belgian retail stores in the last 5 years: in 2008, this share was [60-70]% and [60-70]% in 2012. While it is true that sales of private labels products have increased in absolute terms in value in 2011 and 2012 (+10.7% between 2010 and 2012), this growth occurred in a context of a general development of the frozen potato category in retail, which explains why the share of private labels is not increasing as the notifying party claims.

189. What is more, private labels' penetration had no impact on the market presence of Lutosa. Between 2010 and 2012, Lutosa's sales increased by [10-20]% while McCain's sales decreased by [0-5]% in the same period and Iglo collapsed (-[30-60]%). Lutosa was the only branded player to increase its sales in this context of general decline of brands in the potato market. This element shows that the rise in sales of private label products did not impact at all on Lutosa's market position and that when private label products took share from other players Lutosa was not impacted. This reflects that Lutosa has on the market a brand equity (thanks to its marketing and brand positioning) which is sufficiently strong to resist to an increase of private label products. This decline of alternative brands such as Iglo has been reported by respondents to the market investigation.[84] As a result, Carrefour, the only remaining retailer still carrying Iglo, has decided to delist the brand as of September 2013.[85]

190. Moreover, respondents to the market investigation indicated that they do not have the intention to reduce consumers' choices to private label only, since the availability of brands provides consumers with a sense of familiarity and choice. It appears that retailers cannot do without strong brands and they do not have the intention to replace on a larger scale the currently available strong brands by private labels. As a Belgian retailer puts it "*Seemingly we are not going to delist Lutosa and McCain branded products to replace them with our brand*".[86]

191. Given the above, it cannot be concluded that the Belgian market is characterised by strong competitive constraints exerted by private labels on branded products that could dispel the serious doubts raised by the market investigation as regards the impact of the proposed transaction on branded fries and specialties.

Competition between McCain and Lutosa is fierce

84 See replies to question 26 of Questionnaire Q2, customers retail.

85 See non-confidential minutes of a conference call with Carrefour of 29 April 2013.

86 "*A priori nous ne remplacerons pas des produits de la marque Lutosa ou McCain pour les remplacer par notre marque*". Reply from Carrefour to question 29 of Questionnaire Q2, customers retail.

192. The market investigation provided strong evidence that McCain and Lutosa are in direct competition with each other although both brands have a slightly different positioning.

193. All Belgian retailers confirmed during the investigation that Lutosa is the closest competitor to McCain as regards French fries and specialties and represent the only genuine branded alternative.[87] They presented McCain as a very strong brand with a wide awareness among end-consumers and Lutosa as its main challenger with a significant potential due to its marketing efforts, its slightly lower price positioning and its Belgian roots.

194. Carrefour for example confirmed that both manufacturers offer similar products, even if some differences in presentation and marketing exist. This is established by the launch by McCain of "*Belgian cut*" fries, which are directly targeted at competing with Lutosa on this particular positioning. Although McCain claims that this product is not a success Carrefour submitted that it considers this McCain's product as a positive entry for McCain and the category as a whole.[88]

195. Another Belgian retailer Delhaize began listing Lutosa "*Belgian cut*" fries in its stores in 2012 and Lutosa's croquettes in January 2013. Immediately after this listing of fries, Delhaize noticed an increase of the frequency of McCain promotion of special packs offering 300 gr for free for a 2 kg pack.[89] This timely reaction of McCain is also evident from the evolution of its average prices in Delhaize's supermarkets[90] and confirms the significant competitive interaction between McCain and Lutosa in Belgium.

196. Internal documents from McCain confirm that Lutosa is perceived as a credible threat to McCain's market position. […][91] […].

197. Likewise, McCain […][92] identified a limited decline of McCain's market position due to competition from private label products (mainly in fries) but also from Lutosa […]. These elements show that Lutosa's market presence is not restricted to Colruyt but stretches to other retailers such as Carrefour[93] and Delhaize.

198. […].

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87 See replies to question 22 of Questionnaire Q2, customers retail.

88 See minutes of a conference call with Carrefour of 29 April 2013.

89 See minutes of a conference call with Delhaize of 29 April 2013.

90 See […], annex 3 of the note submitted by the notifying party on 26.4.2013.

91 […].

92 […].

93 With respect to Carrefour, the notifying party finally explained in its note dated 26.4.2013 that Carrefour lists several SKUs in fries such as Frites Belges as well as regular 10/10 and 6/6 and a thick variant 10/18 (page 7).

Lack of sufficient countervailing buyer power

199. The Parties argued that retailers have strong buyer power. In Belgium 90% of overall sales of frozen potato products are made through only three retailers: Carrefour, Delhaize and Colruyt.[94] According to the notifying party, they can reduce the available promotional slots that are a key factor for driving sales and can easily switch to increasing their private labels' offers at the expense of branded products as consumers' choice is largely dependent upon price.

200. The analysis of buyer power must address the question whether and to what extent the buyers would be in a position to resist a potential price increase from a dominant supplier. If the buyer is able to withstand price increases through shifting of supplies, upstream vertical integration or delistings,[95] the exercise of bargaining power is likely to prevent the merged entity to increase prices post-merger. If retailers are not in a position to switch to sufficient alternatives or delist because some of the supplier's products are "must-have" brands (brands with few relevant alternatives which need to be kept on the shelves to avoid loss of substantial sales), it is unlikely that countervailing buyer power will counteract anticompetitive effects of the merger. As mentioned above, the market investigation revealed that a majority of retailers in Belgium considered McCain and Lutosa as must-have brands.

201. It appears therefore that the transaction will combine two must-carry brands in Belgium in the hands of a single supplier. It is thus not surprising all retailers in Belgium have indicated[96] the merger would trigger limited competition and fewer alternatives to the detriment of final customers. All the retailers negotiate with McCain and Lutosa for the procurement of frozen potato products and they display both brands in their shelves. The merger would eliminate the leverage given by competition between these two brands. Retailers explained in this context that various anti-competitive outcomes were possible, such as an increase in wholesale net-net price or a lessening of promotions organised by the supplier.

202. It is in any event not sufficient that buyer power (if any) exists prior to the merger; it must also exist and remain effective following the merger. This is because a merger between two suppliers may reduce buyer power if it thereby removes a credible alternative.[97] In the Commission's view, a significant supply alternative will be removed after the merger. The loss of negotiation power would increase the risk that the wholesale price would go up.

203. In conclusion post-merger countervailing buyer power does not seem sufficiently strong to offset the potential adverse effects resulting from this transaction.

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94 See the note submitted by the notifying party on 26.4.2013, page 3.

95 Lutosa was indeed delisted in Carrefour between January and June 2011 […]. This delisting takes place however when Iglo was still available as a third brand in Carrefour's stores.

96 See replies to questions 85 to 89.2 of the Commission’s request for information pursuant to Article 11 of Council Regulation (EC) No 139/2004 addressed to Consumer Tissue customers – The Netherlands (Q. 6), dated 16 May 2012.

97 Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5, para. 67.

III.4.2.D Conclusion

204. In view of the above, the Commission considers that the transaction as originally notified raises serious doubts as to its compatibility with the internal market with respect to the market branded French fries and branded specialties in Belgium..

III.4.3 Industry

205. In the industry sector, the proposed transaction would lead to horizontally affected markets in frozen potato products with a combined market share of [0-5]% in volume in the EEA. The increment brought about by the transaction is not significant ([0-5]%). The activities of the Parties overlap only with respect to customers located in Poland and in the United Kingdom.

206. As shown in the table below, the combined market share of the parties in dehydrated potato products art EEA level is lower –[10-20]%. The activities of the parties overlap only with respect to customers located in France and Italy

Table 17 – Shares of the market for the supply and production of frozen and dehydrated products dedicated to industry based on volume (in tonnes) at EEA level in 2012

In 2012	**McCain %**	**Lutosa %**	**Combined %**	**Market size tons**
Industry frozen	[0-5]	[20-30]	**[30-40]**	**[…]**
Industry dehydrated	[5-10]	[5-10]	**[10-20]**	**[…]**

Source: Form CO

207. The notifying party claims that neither McCain nor Lutosa have a strategic focus on the industry sectors and the turnover both companies generate in this sector is negligible compared to the retail and OFS sectors. In the frozen markets, Aviko and Farm Frites are present with a share which is more significant than McCain's ([5-10]% each) as well as Lambweston. In the dehydrated markets, the market investigation yielded that McCain and Lutosa are also facing competition from other suppliers than specialized potato producers such as Emsland Foods (potato starch) and Nestlé. All the industrial customers having responded to the market investigation indicated that in case of a 5-10% price increase, they would immediately switch their volumes (or a significant part thereof) to other players.[98] Competitors confirmed that gains and losses of contracts happen on a regular basis and that reasons for switches in either direction may be based on price, quality, service levels, relationship and trade programs (not exhaustive).[99]

98 See replies to question 23 of Questionnaire Q5, industry customers.

99 See replies to question 65 of Questionnaire Q5, Questionnaire Q3, Other Food Service, QSR and industry Competitors.

208. The majority of competitors and customers replying to the Commission's requests for information did not express specific concerns that the proposed transaction will result in a reduction of competition or price increases in the industry sector.[100] Those who did submitted reservations on the size of the new entity in general, without targeting the industry sector in particular.

209. In view of the above, the Commission considers that the proposed transaction does not raise serious doubts in any market for the supply of frozen and dehydrated potato products dedicated to industry sector in the EEA.

IV. REMEDIES

210. In order to render the concentration compatible with the internal market, the Parties have modified the notified concentration by entering into commitments in relation to the markets for branded French fries and specialties in the retail sector in Belgium. The commitments are annexed to this Decision and form an integral part thereof.

IV.1. PROPOSED REMEDIES

211. In order to restore effective competition McCain commits in the final (second) package submitted on 21 May 2013 to divest the branded potato business dedicated to the retail sector in the EEA operated under the brand "Lutosa" (the "Divestment Business") to a suitable purchaser ("the Purchaser").

212. According to the final package submitted on 21 May 2013, the Purchaser will be granted an irrevocable, royalty-free and exclusive licence for the brand "Lutosa" for use in the retail sector in the EEA for a period of seven years. This license will be granted with the purpose of rebranding the Lutosa brand. Moreover, McCain commits not to reintroduce the "Lutosa" brand in the retail sector in the EEA for a period of eight years ("black-out period") after the expiration of the seven-year period.

213. In addition, the Purchaser will be provided, on an exclusive basis, tangible and intangible assets necessary for the operation of the Divestment Business, including full access to secret know-how used in the operation of the Lutosa brand in the retail sector (notably product formulae and recipes). It will be transferred all advertising and promotional materials (including copyrights thereto), purchase orders, co-branding and other contracts, customer lists (Annexes 4a and 4b to the annexed commitments) and other records related to the Divestment Business. Annex 7 to the annexed commitments contains further information about the registered brands and sub-brands. Annex 5 to the annexed commitments contains the technical data sheets for Lutosa branded French fries Allumettes, Lutosa branded Frites Belges, Lutosa branded seasoned mashed potato and Lutosa branded Croquettes Belges. McCain will furthermore assign and transfer the copyrights pertaining to the packaging currently used for the Divestment Business. Lutosa will retain a royalty-free licence to continue to use these packagings for the sales of branded potato products to customers outside the EEA for a period of […] year. Key Personnel will also be transferred.

100 See replies to questions 27 and 28 of Questionnaire Q5, industry Customers; questions 75 and 76 of Questionnaire Q3, Other Food Service, QSR and industry Competitors.

214. The Purchaser will be offered by McCain, for a transitional period of up to […] year after the transfer of the Divestment Business and on reasonable commercial terms and conditions, customer services, sales support and distribution services as well as brand marketing services. McCain will supply the Purchaser for a transitional period of up to […] years after the transfer of the Divestment Business and on reasonable cost-based terms Lutosa branded potato products to allow the Purchaser to be immediately present in the retail market. In addition, McCain will provide during this transitional period and at cost all technical support required by the Purchaser to enable him to transfer the production of products forming part of the product portfolio of the Divestment Business to its own production facilities or production facilities of third parties (on the basis of subcontracting or co-packing arrangements to be entered into by the Purchaser with such third parties).

215. Finally, McCain will grant during the aforementioned […] period and against a reasonable fee to the Purchaser the availability of the general director and the marketing director of Lutosa with a view to ensuring the adequate and complete transfer to the purchaser of the marketing know-how relating to the Divestment Business.

216. In order to be approved as a suitable purchaser of the Divestment Business, the Purchaser should have the required financial resources, in particular also to carry out a rebranding operation and the proven expertise and incentive to maintain and develop the Divestment Business, in particular by having proven expertise with rebranding operations and co-packaging arrangements or by having direct access to Belgian potatoes or potato products, with the aim to ensure the continued viability of the Divestment Business.

IV.2. ASSESSMENT OF THE PROPOSED REMEDIES

217. Where a concentration raises serious doubts as to its compatibility with the internal market, the Parties may undertake to modify the concentration so as to remove the grounds for the serious doubts identified by the Commission with a view to having the transaction approved in phase I of the merger review procedure.

218. As set out in the Commission Notice on Remedies,[101] the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view and must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.[102]

219. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which the competition concerns arise.[103]

101 Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004, Official Journal C 267, 22.10.2008, p. 1-27.

102 Commission Notice on remedies, paragraph 9.

103 Commission Notice on remedies, paragraph 12.

220. Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps.[104] Other commitments (such as licensing) may be suitable to resolve competitive concerns if those remedies are equivalent to divestitures in their effects. The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the Merged Entity on a lasting basis and that is divested as a going concern.[105]

221. The business must include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which are currently employed or which are necessary to ensure the business' viability and competitiveness. Personnel and assets which are currently shared between the business to be divested and other businesses of the parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, must also be included. Otherwise, the viability and competitiveness of the business to be divested would be endangered. Therefore, the divested business must contain the personnel providing essential functions for the business such as, for instance, group R&D staff — at least in a sufficient proportion to meet the on-going needs of the divested business.[106]

IV.2.1 The first remedy package

222. The Parties submitted an initial commitments proposal regarding the retail Belgian market on 2 May 2013. In this initial submission, McCain proposed to grant to a suitable purchaser an irrevocable, royalty-free and exclusive licence for the brand "Lutosa" for use in the retail sector in Belgium only for a period of five years. Likewise, the initial commitments proposal included a black-out period of five years.

223. The purchaser was also granted all tangible and intangible assets necessary to operate the Divestment Business in Belgium, as well as customer services, sales support, distribution services and the technical support required by the purchaser to enable him to transfer the production to its own production facilities or production facilities of third parties (on the basis of subcontracting or co-packing arrangements).

224. As regards Purchaser requirements, the first remedy package did not foresee specific prerequisites to be fulfilled by a suitable Purchaser over and beyond its independence from the Parties, its ability and incentive to maintain and develop the divested business, and the absence of *prima facie* competition concerns.

IV.2.2 Results of the market test and the modifications proposed by McCain

225. The Commission launched a market test regarding the proposed first remedy package on 7 May 2013. The main purpose of the market test was to check whether the proposed commitments were sufficient to clearly rule out the serious doubts identified by the Commission. In particular, the market test aimed at verifying whether a remedy solution based on rebranding of the Lutosa brand constitutes a clean, workable and effective remedy capable of creating a viable rival to compete with McCain in the Belgian

104 Commission Notice on remedies, paragraph 17.

105 Commission Notice on remedies, paragraph 23.

106 Commission Notice on remedies, paragraph 25 and 26.

market. The objective of the market test was also to find out whether additional safeguards, if any, were necessary to reinforce the effectiveness of the rebranding remedy if it was considered suitable.

226. Overall, the market test yielded scepticism as regards the effectiveness and the viability of the limited license of the Lutosa brand as it was initially proposed by McCain. While most of the respondents to the market test indicated that in principle a remedy solution based on rebranding could be effective, they insisted on several conditions for a successful rebranding of the Lutosa brand.

227. First, competitors and customers considered that it was necessary to extend the license of the Lutosa brand to the whole of the EEA. In particular, these respondents highlighted that substantial investments in marketing and advertising are necessary for a successful rebranding and that a license limited to Belgium entailed the risk of significant sunk investments without realistic potential for the Purchaser to recoup them. They feared that this limitation could diminish the incentives of the Purchaser to invest into the brand, in particular if it has no possibilities to expand the brand beyond Belgium before 10 years. Customers were also concerned that a geographic split of Lutosa may not be workable and could endanger the equity of the Lutosa brand.

228. Secondly, respondents to the market test stated that the duration of the licence and the black-out periods were too short to enable the Purchaser to carry out a successful rebranding and maintain a viable competitor in Belgium. McCain's strong market position in the Belgium would enable it to reintroduce the Lutosa brand immediately after the expiration of the 5-year black-out period, which would limit the incentives of the Purchaser to develop the newly-acquired business.

229. Finally, in the context of a rebranding remedy, the identity of the potential licensee as well as its ability and its incentives to carry out the re-branding exercise are key factors for the success of the commitments.[107] Customers and competitors in general submitted that the purchaser ought to have financial resources to carry out the rebranding exercise. Given that re-branding is a process that requires experience and know-how, presence in the affected markets would help in the achievement of the goal. Some respondents also considered it of importance that the purchaser has sufficient access to Belgian-grown potatoes or experience in co-packing arrangements with Belgian producers.

230. The concerns expressed in the market test were communicated to McCain.

231. Consequently, McCain submitted on 21 May 2013 a new set of commitments in which it extended the license of the Lutosa period to the whole of the EEA. The duration of the license and the black-out period were prolonged to respectively seven and eight years (fifteen years in total). Furthermore, the remedies now state that the Divestment Business will be sold to a Purchaser with sufficient financial resources to carry out the rebranding, and either proven expertise with rebranding operations and co-packaging arrangements or by having direct access to Belgian potatoes or potato products.

232. Finally, McCain agreed to make available to the Purchaser the general director and the marketing director of Lutosa with a view to ensuring the adequate and complete transfer to the purchaser of the marketing know-how relating to the Divestment Business.

107 Commission Notice on remedies, paragraphs 42.

233. The licensing of Lutosa for the whole of EEA and longer license and black-out periods constitute a workable and effective remedy capable to create a viable and effective competitor. This solution addresses all viability concerns expressed during the market test. First, the integrity and coherence of the Lutosa brand will be preserved in all retail markets, with no limitation for its development outside Belgium. Second, the Purchaser will be able to fully invest into the brand and to foster the success of Lutosa without being threatened by an immediate re-entry of a Lutosa brand owned by McCain.

234. Finally, strong purchaser requirements will guarantee that a Purchaser with proven track record on rebranding and the incentives to carry out such an exercise will be selected. In particular, it is crucial the Purchaser has significant financial resources to invest in brand awareness to successfully complete the rebranding process. Companies fulfilling these conditions have already made known their interest in acquiring the Divestment Business.

235. For the reasons outlined above, the Commission concludes that the commitments entered into by the notifying party as regards the Belgian markets for branded French fries and specialties (commitments annexed) are sufficient to remove the serious doubts as to the compatibility of the transaction with the internal market as regards retail markets in Belgium. .

V. CONDITION AND OBLIGATION

236. Under the first sentence of the second subparagraph of Article 6(2) of the EC Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

237. The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission’s decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the EC Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the EC Merger Regulation.

238. In accordance with the basic distinction described above, the decision in this case is conditional on the full compliance with Section B and the Schedule of the commitments dated 21 May 2013. The remaining requirements set out in the other Sections of the said commitments are considered to constitute obligations.

VI. CONCLUSION

239. For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions contained in Section B and the Schedule of the commitments dated 21 May 2013, relating to the markets for branded French fries and specialties in the retail sector in Belgium, annexed to the present decision, and with the obligations contained in the other Sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

For the Commission
(signed)

Joaquín ALMUNIA
Vice-President

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European Commission
DG Competition
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1210 Saint-Josse-ten-Noode / Sint-Joost-ten-Node
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CASE M. 6813 – MCCAIN / LUTOSA

COMMITMENT TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 (the "**Merger Regulation**"), McCain UK H2 Limited ("**McCain**") hereby provides the following Commitment (the "**Commitment**") in order to enable the European Commission (the "**Commission**") to declare the acquisition of the Lutosa Business by McCain compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation of the Merger Regulation (the "**Decision**").

The Commitment shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitment is attached as conditions and obligations, in the general framework of Union law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98.

SECTION A. DEFINITIONS

For the purpose of the Commitment, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by the Parties and / or McCain Foods Group Inc., whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Commission Notice on the concept of concentration under Council Regulation (EEC) No. 4064/89.

Closing: the transfer of the legal title of the Divestment Business to the Purchaser.

Divestment Business: the branded processed potato business dedicated to the retail sector in the EEA operated under the brand "Lutosa", as further defined in Section B and the Schedule, which McCain commits to divest.

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by McCain and who has received from McCain the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of [***Confidential***] from the Effective Date.

Hold Separate Manager: the person appointed by McCain for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Indemnified Party: has the meaning as defined in paragraph 27.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Business, listed in the Schedule.

Lutosa Business: G&L Van den Broeke-Olsene N.V., Vanelo N.V. and Lutosa France SARL and their subsidiaries together.

McCain: McCain UK H2 Limited with its registered office at Havers Hill, Scarborough, North Yorkshire, YOll 3BS, United Kingdom.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by McCain, and who has the duty to monitor McCain's compliance with the conditions and obligations attached to the Decision.

Parties: McCain and the Lutosa Business.

Personnel: all personnel currently employed by the Divestment Business, including Key Personnel and the additional personnel listed in the Schedule.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

Purchaser Requirements: the criteria for the Purchaser as described in paragraph 12.

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: the period of [***Confidential***] from the end of the First Divestiture Period.

SECTION B. THE DIVESTMENT BUSINESS

Commitment to divest

1. In order to restore effective competition, McCain commits to divest or to procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 13. To carry out the divestiture, McCain commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If McCain has not entered into such an agreement at the end of the First Divestiture Period, McCain shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 22 within the Trustee Divestiture Period.

2. McCain shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, McCain has entered into a final binding sale and purchase agreement, if the Commission approves the Purchaser and the terms in accordance with the procedure in paragraph 13 and if the closing of the sale of the Divestment Business takes place within a period not exceeding [***Confidential***] after the approval of the Purchaser and the terms of sale by the Commission.

3. In order to maintain the structural effect of the Commitment, the Parties shall, for a period of [***Confidential***] after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the common market.

Structure and definition of the Divestment Business

4. The Divestment Business relates to the branded processed potato business dedicated to the retail sector in the EEA operated under the "Lutosa" brand, used for frozen French fries and frozen potato specialties. The Divestment Business, described in more detail in the Schedule, includes:

   (a) all intangible assets (notably intellectual property rights and secret know-how), which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;

   (b) all contracts (including but not limited to contracts with suppliers), commitments and customer orders of the Divestment Business;

   (c) all customer, credit and other records of the Divestment Business;

(d) the Personnel exclusively or predominantly responsible for the marketing and sales of the Divestment Business, in accordance with Belgian labour law;

(e) the benefit, for a period of [***Confidential***] after Closing and on reasonable commercial terms and conditions, of all arrangements under which McCain or Affiliated Undertakings supply customer services, sales support and distribution services as well as brand marketing services for the Divestment Business, unless otherwise agreed with the Purchaser;

(f) the benefit, for a transitional period of [***Confidential***] after Closing and on reasonable cost-based terms, of sourcing arrangements under which McCain or Affiliated Undertakings supply the Purchaser with Lutosa branded potato products, unless otherwise agreed with the Purchaser; and

(g) the provision during the aforementioned transitional period and at cost of all technical support reasonably required by the purchaser to enable the purchaser to transfer the production of products forming part of the product portfolio of the Divestment Business to its own production facilities or production facilities of third parties (on the basis of subcontracting or co-packing arrangements to be entered into by the purchaser with such third parties).

(h) the availability during the aforementioned period and against a reasonable fee, to the extent reasonably required by the purchaser, of the general director and the marketing director of Lutosa with a view to ensuring the adequate and complete transfer to the purchaser of the marketing know-how relating to the Divestment Business.

SECTION C. RELATED COMMITMENT

5. From the Effective Date until Closing, McCain shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular McCain undertakes:

(a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy associated with the Divestment Business;

(b) to make available sufficient resources for the development of the Divestment Business, on the basis and continuation of existing business plans; and

(c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business.

Hold-separate obligations of Parties

6. McCain commits, from the Effective Date until Closing, to keep the Divestment Business separate from the businesses it is retaining and to ensure that Key Personnel of the Divestment Business – including the Hold Separate Manager – have no involvement in any business retained and vice versa. McCain shall also ensure that the Personnel does not report to any individual outside the Divestment Business with respect to the Divestment Business.

7. Until Closing, McCain shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed distinct and separate from the brands and businesses retained by the Parties. McCain shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the business retained by the Parties.

Ring-fencing

8. McCain shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without comprising the viability of the Divestment Business. McCain may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to McCain is required by law. Moreover, McCain will ensure that during the period from the Effective Date until the end of the transitional period referred to in paragraph 4(h), the general director and the marketing director of Lutosa will have no involvement with the retail business of McCain in Belgium.

Non-solicitation clause

9. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of five years after Closing.

Due Diligence

10. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, McCain shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
    (a) provide to potential purchasers sufficient information as regards the Divestment Business; and
    (a) provide potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

11. McCain shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

12. McCain shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

SECTION D. THE PURCHASER

13. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:

    (a) be independent of and unconnected to the Parties;

    (b) have (i) the required financial resources, in particular also to carry out a rebranding operation; and (ii) the proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors in particular by having proven expertise with rebranding operations and co-packaging arrangements or by having direct access to Belgian potatoes or potato products all of this with the aim to ensure the continued viability of the retail portfolio of the Divestment Business that is typically aimed at Belgian consumers; and

    (c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitment will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the Purchaser hereafter the "**Purchaser Requirements**").

14. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When McCain has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. McCain must be able to demonstrate to the Commission that the proposed purchaser meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitment. For the approval, the Commission shall verify that the Purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitment. The Commission may approve the sale of the Divestment Business without one or more assets or not all of the Personnel as described in the Schedule, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

SECTION E. TRUSTEE

I. Appointment Procedure

15. McCain shall appoint a Monitoring Trustee to carry out the functions specified in the Commitment for a Monitoring Trustee. If McCain has not entered into a binding sales and purchase agreement [***Confidential***] before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by McCain at that time or thereafter, McCain shall appoint a Divestiture Trustee to carry out the functions specified in the Commitment for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

16. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

17. No later than one week after the Effective Date, McCain shall submit a list of one or more persons whom McCain proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than [***Confidential***] before the end of the First

Divestiture Period, McCain shall submit a list of one or more persons whom McCain proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 15 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under this Commitment;

(b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and

(c) an indication whether the proposed Trustee is to act as both Monitoring Trustee an Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

18. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, McCain shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, McCain shall be free to choose the Trustee to be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

19. If all the proposed Trustees are rejected, McCain shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 14 and 17.

Trustee nominated by the Commission

20. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom McCain shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. <u>Functions of the Trustee</u>

21. The Trustee shall assume its specified duties in order to ensure compliance with the Commitment. The Commission may, on its own initiative or at the request of the

Trustee or McCain, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

22. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;

(ii) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by McCain with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

(a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business and Businesss retained by the Parties, in accordance with paragraphs 4 and 5 of the Commitment;

(b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 6 of the Commitment;

(c) (i) in consultation with McCain, determine all necessary measures to ensure that McCain does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular strive for the severing of the Divestment Business's participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to McCain as the disclosure is reasonably necessary to allow McCain to carry out the divestiture or a the disclosure is required by law; and

(d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and McCain or Affiliated Undertakings;

(iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(iv) propose to McCain such measures as the Monitoring Trustee considers necessary to ensure McCain's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

(v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Personnel;

(vi) provide to the Commission, sending McCain a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the business is held in a manner consistent with the Commitment and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending McCain a non-confidential copy at the same time, if it concludes on reasonable grounds that McCain is failing to comply with this Commitment;

(vii) within one week after receipt of the documented proposal referred to in paragraph 13, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestment Business without one or more assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser;

(viii) during the transitional period referred to in paragraph 4(h) monitor the transfer of the marketing know-how of the Divestment Business to the Purchaser and to give binding instructions to McCain if in its opinion insufficient efforts are made to ensure the adequate and complete transfer of the marketing know-how relating to the Divestment Business.

Duties and obligations of the Divestiture Trustee

23. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the Purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 13. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of McCain, subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

24. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

25. McCain shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of McCain's or the Divestment Business's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitment and McCain and the Lutosa Business shall provide the Trustee upon request with copies of any document. McCain and the Lutosa Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

26. McCain shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. McCain shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. McCain shall inform the Monitoring Trustee on possible purchasers, submit a list of potential

purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.

27. McCain shall grant or procure the Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, McCain shall cause the documents required for effecting the sale and the Closing to be duly executed.

28. McCain shall indemnify the Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to McCain for any liabilities arising out of the performance of the Trustee's duties under the Commitment, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

29. At the expense of McCain, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to McCain's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should McCain refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard McCain. Only the Trustee shall be entitled to issue instruction to the advisors. Paragraph 27 shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served McCain during the First Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. <u>Replacement, discharge and reappointment of the Trustee</u>

30. If the Trustee ceases to perform its functions under the Commitment or for any other good cause, including the exposure of the Trustee to a conflict of interest:

(a) the Commission may, after hearing the Trustee, require McCain to replace the Trustee; or

(b) McCain, with the prior approval of the Commission, may replace the Trustee.

31. If the Trustee is removed according to paragraph 29, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has

effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 14 - 19.

32. Beside the removal according to paragraph 29, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitment with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

SECTION F. THE REVIEW CLAUSE

33. The Commission may, where appropriate, in response to a request from McCain showing good cause and accompanies by a report from the Monitoring Trustee:

    (i) Grant an extension of the time periods foreseen in the Commitment, or

    (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in this Commitment.

Where McCain seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall McCain be entitled to request an extension within the last month of any period.

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duly authorised for and on behalf of
McCain UK H2 Limited

SCHEDULE

1. Further to Section B of the Commitment, the following describes the Divestment Business. The Divestment Business consists of the branded processed potato business dedicated to the retail sector in the EEA operated under the "Lutosa" brand. The Lutosa brand is used for the sale of frozen French fries and frozen potato specialties. The Lutosa Business sold in its financial year 2011 approx. [***Confidential***] of Lutosa branded products to the retail sector in the EEA which generated a turnover of approx. EUR [***Confidential***].[108]

2. Following paragraph 4 of this Commitment, the Divestment Business includes, but is not limited to:

   (a) all tangible assets exclusively related to the Divestment Business, including outstanding product orders from suppliers and in-store communication materials;

   (b) the following intangible assets used in the operation of the Divestment Business:

      (i) an exclusive, irrevocable, royalty-free license of the brand "Lutosa" for use solely in the retail sector in the EEA for a period of seven years from Closing;

      (ii) access on an exclusive basis to the secret know-how used in the operation of the Divestment Business, notably relevant product formulae and recipes, as well as all slogans, advertising and promotional materials (including the copyrights thereto) used in relation to the Divestment Business at the Effective Date; and

      (iii) the copyrights relating to the packaging used as per the Effective Date for the products supplied by the Divestment Business to the retail sector.

   (c) all purchase orders, contracts, agreements and other obligations exclusively related to or necessary for the operation of the Divestment Business (including the agreement with a marketing agency relating to the marketing of the Lutosa brand within the Belgian retail market and the co-packaging agreement for the production of pommes Dauphine);

108 [***Confidential***].

(d) copies of all the books, records and other documents exclusively related to or necessary for the operation of the Divestment Business (including, without limitation, customer and supplier lists and files, distribution lists, mailing lists, sales materials, operating, production and other manuals, plans, files, specifications, process drawings, computer programs, data and information, manufacturing and quality control records and procedures, market research and intelligence, advertising and promotional materials);

(e) the following Key Personnel: [***Confidential***], currently employed by the Lutosa Business and exclusively responsible for the marketing and sales of the Divestment Business;

(f) the following Personnel: [***Confidential***], currently employed by the Lutosa Business and as sales manager responsible for amongst others the sales of the Divestment Business, unless otherwise agreed with the Purchaser;

(g) the availability during a period of [***Confidential***] after Closing and against a reasonable fee, to the extent reasonably required by the purchaser, of the general director and the marketing director of Lutosa with a view to ensuring the adequate and complete transfer to the purchaser of the marketing know-how relating to the Divestment Business, unless otherwise agreed with the Purchaser;

(h) the benefit, for a period of [***Confidential***] after Closing and on reasonable commercial terms and conditions, of all arrangements under which McCain or affiliated undertakings supply customer services, sales support and distribution services as well as brand marketing services for the Divestment Business, unless otherwise agreed with the Purchaser;

(i) the benefit, for a transitional period of [***Confidential***] after Closing and on reasonable cost-based terms, of sourcing arrangements under which McCain or the Affiliated Undertakings supply the purchaser with Lutosa branded potato products, unless otherwise agreed with the Purchaser; and

(j) the provision during the aforementioned transitional period and at cost of all technical support reasonably required by the Purchaser to enable the Purchaser to transfer the production of products forming part of the product portfolio of the Divestment Business to its own production facilities or production facilities of third parties (on the basis of subcontracting or co-packing arrangements to be entered into by the purchaser with such third parties).

3. The Divestment Business shall not include:

   (a) assignment of or license to any future patents, trademarks or other intellectual property rights to be filed by McCain and/or the Affiliated Undertakings after the Effective Date;

   (b) any right, title or interest in the "Lutosa" brand outside the retail sector in the EEA.

4. Parties will commit to the Purchaser not to reintroduce the "Lutosa" brand in the retail sector in the EEA for a period of fifteen years following Closing (eight years following rebranding).

5. With respect to the copyrights relating to the packaging, the Purchaser will grant McCain an exclusive, royalty free, irrevocable license for the continued use of the aforementioned retail packaging in the retail sector outside the EEA for a transitional period of [***Confidential***].