EN

Case No COMP/M.2337 - NESTLE / RALSTON PURINA

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REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(2) NON-OPPOSITION
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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(2) DECISION

To the notifying party:

Subject : Case No COMP/M.2337 – Nestlé / Ralston Purina

Date of notification : 15.06.2001 pursuant article 4 of Council regulation n°4064/89

1. On 15 June 2001, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which the undertaking Nestlé S.A. (« Nestlé », Switzerland) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Ralston Purina Company (« Ralston Purina », USA) by way of purchase of shares.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market.

I. THE PARTIES

3. Nestlé is the ultimate parent company of the Nestlé Group. The Nestlé Group is and has traditionally been involved primarily in the production, marketing and sale of a large variety of food products, including pet food. In May 1998, Nestlé acquired Spillers Pet Food business from Dalgety Plc, increasing substantially its presence in the pet food market. That proposed concentration was notified to the Commission on 27 February 1998, and was declared compatible with the Common Market by Commission's decision of 2 April 1998 (Case No IV/M. 1127 Nestlé/Dalgety).

4. Ralston Purina is an American based company. The principal activities of Ralston Purina are the manufacture and sale of pet foods and cat box fillers. Ralston Purina is primarily active in the United States and Canada. In Europe, Ralston Purina is active through

undertakings, which are under its direct or indirect control. In Spain, Ralston Purina is active through Gallina Blanca Purina S. A., Barcelona, a joint venture company owned on a 50 : 50 basis by Ralston Purina and Agrolimen S. A., a Spanish privately held company. Gallina Blanca Purina S. A. owns a production facility in Spain and sells directly in Spain the whole range of Ralston Purina pet food products, produced either in its own factory in Spain or in other European factories of Ralston Purina.

II. CONCENTRATION

5. The concentration concerns the acquisition by Nestlé of sole control of Ralston Purina Company according to Article 3 (1) (b) Regulation 4064/89. The proposed transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover[1] of more than EUR 2.5 billion (in 2000 Nestlé […], Ralston Purina […]). In each of France, Italy, Spain and the United Kingdom, the combined aggregate turnover of the parties is more than EUR 100 million, and the aggregate turnover of each of the parties is also in excess of EUR 25 million in each of the above Member States. Finally, the aggregate Community-wide turnover of each of the parties is more than EUR 100 million (in 2000 Nestlé […], Ralston Purina […]), and the undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The operation therefore has a Community dimension. It does not constitute a co-operation case under the EEA Agreement.

7. According to Article 8.3(b) of the EEA Agreement and Protocol 3 to that Agreement, pet food products are among those that are not covered by the EEA Agreement. Consequently, this decision does not relate to the effects of the notified transaction in Norway, Iceland and Lichtenstein.

IV. THE RELEVANT MARKETS

RELEVANT PRODUCT MARKETS

8. The principal categories of pet food affected by the operation are industrial dog and cat food. In addition, as a supplement to their cat and dog food business, Nestlé and Ralston Purina both sell pet food accessories. This category includes a wide variety of products such as cat litter, cat and dog hygiene products, cat and dog toys and leatherwear, bird care, fish care etc. Whether the pet food accessory category constitutes one or several separate relevant product markets can be left open, since irrespective of the product market definition chosen the concentration does not create or strengthen a dominant

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1 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area. In the following the focus is, therefore, exclusively on dog and cat food.

9. Within the pet food family, but aside from dry dog food, wet dog food, dry cat food and wet cat food there is a broad variety of dog and cat snacks and treats. These products are used between meals mainly as a reward. Most of these products do not offer a complete and balanced diet. Therefore they cannot substitute dog and cat food and are typically priced much higher. These products form two separate product markets of snacks and treats for dogs and snacks and treats for cats.

A. CAT / DOG PETFOOD

10. The market investigation carried out in this case has confirmed that industrial dog food and industrial cat food cannot be substituted for each other and belong to separate product markets. Dogs and cats have different nutritional requirements. (See also Commission's decision of 13.03.1995, Case No IV/M. 554 Dalgety Plc./The Quaker Oats Company; Commission's decision of 2.4.1998, Case No IV/M. 1127, Nestlé/Dalgety).

B. WET / DRY PET FOOD (WHITHIN CAT AND DOG)

11. The parties submitted that the relevant product market should be defined on the basis that there is a separate market for industrial dog food and another one for industrial cat food, leaving open whether wet and dry formulations of cat and dog food are to be regarded as separate markets. Nevertheless, they underlined a series of differences and factors pointing at the existence of separate markets for each type of dog and cat food. For example, they stated that production processes, ingredients, appearance, texture, aroma, palatability, and packaging utilized differ significantly between wet and dry products, as well as average nutritional values.

12. The market investigation carried out for the purpose of this case has largely indicated that a subdivision of the cat and dog food markets into wet and dry formulations is justified, as wet and dry formulations do not appear to be substitutable on the demand side. Wet and dry products normally satisfy different nutritional needs. The wet food for dogs and cats is also generally more expensive than the dry variants, due to the different average nutritional values and to the higher packaging costs for wet pet food. The market structure for each category is also different in terms of the market position of each supplier. It may therefore be concluded that dry dog, wet dog, dry cat, wet cat products each constitute a separate product market.

13. To some extent manufacturers of industrial pet food offer their products as "economy", "mainstream" or "premium". These categories, which do not have a clearly defined scope generally connote quality differences and lower, medium and higher prices. Pricing, however, appears to be on a continuum with no clear break points. Moreover, price promotions often obscure price differences between these products, of which retailers normally strive to offer a full range. Given the full substitutability of these products to serve the nutritional and dietary needs of dogs and cats the parties submit that a further segmentation of the relevant product markets is not justified. The market investigation carried out in this case has not indicated that a further subdivision would lead to materially different conclusions and the question can therefore be left open for the purpose of the decision.

14. Pet food is generally sold through two channels of distribution, namely grocery and non-grocery outlets (pet shops, veterinarians, etc.). It has been indicated that the latter types of outlets are normally aimed at offering products which are recognised by veterinary and specialised magazines as being the best in terms of nutritional value. On the contrary, the typical grocery outlet is more aimed at customers wishing to save time and money while appreciating a one stop shop facility for the family's needs. However, the distinction between grocery and non-grocery can be left open for the purpose of the decision, since the assessment of the competitive impact of the operation would not be affected, irrespective of whether this distinction were to be maintained.

C. BRANDED PRODUCTS / PRIVATE LABEL PRODUCTS

15. Industrial pet food is offered to the end user as branded products or private label products. The latter consists of retailer labels and brands that are owned by retailers and that are sold on the same shelf next to other branded products.

16. According to the parties, private label pet food directly competes with branded pet food. The investigation has provided confirmation that this is true for retail level sales (i.e. at end-consumer level). The increasing entrance of private label, especially in the grocery sector, is related to the emerging power of large retailers. Such retailers normally target customers that normally purchase economy and mainstream brands.

17. At the wholesale level, pet food manufacturers are the main suppliers of private label owners[2],while retailers represent the customer base. At this level of trade, it must be concluded that branded products are not substitutable to un-branded ones, seen from the perspective of the retailer who wants to offer products under his own label. Thus, although retailers are the main buyers of both types of product, there is a clear distinction in how they are used.

18. There are also differences in how the two types of product are purchased. For branded products, the retailer chooses to stock a brand depending on a combination of factors, which influence the brand’s downstream market position, such as consumer loyalty, price and promotional activity. For private label products, however, the retailer determines the quality and quantity of the product, and the supplier produces to order. The marketing is left to the retailer who decides on issues such as packaging, promotional effort, etc. Compared to branded products, this process allows retailers more readily to switch private label volume between various manufacturers with spare capacity. In this respect, a private label contract could be viewed as a toll-manufacturing arrangement where the contract is awarded through a bidding process. This also means that a producer of private label products does not necessarily have to already be present with sales or a distribution channel in a certain area in order to be considered a realistic potential supplier.

19. The Commission therefore considers that branded and private label pet food products can compete with each other at the retail level, while being in separate markets at the wholesale level.

RELEVANT GEOGRAPHIC MARKETS

2 Between the main European suppliers of private label owners are: Continentale Nutrition, Nestlé, Doane, Saturn, Eyckeler&Malt, Ralston Purina.

A. BRANDED PRODUCTS

20. The Parties consider that the relevant geographic market for dry dog food, wet dog food, dry cat food, wet cat food and snacks and treats for dogs and cats is the European Economic Area (or, alternatively, the Scandinavian countries / the remainder of the EEA). They argue that there is no justification to look at these markets on a country-by-country basis. In particular, the Parties have submitted that the major pet food products are present in almost all Member States, that pet food producers sell essentially the same products in all Member States and that prices are converging, indicating that the product markets are wider than national.

21. While it is true that the Commission in two previous decisions has indicated that the relevant geographic market for industrial pet food is EEA-wide[3], a closer examination of the market condition that has been conducted in this case has revealed that the markets remain national in scope. In particular, the investigation has demonstrated that the purchasing pattern even of internationally active retailers is predominantely national, and that significant price differences exist among the Member States. Furthermore, it has revealed that very little cross-border trade in these products is customer-driven.

PURCHASING PATTERNS

22. First of all, the purchasing pattern of retailers is still predominately national. A number of leading retail chains (Sainsbury, Delhaize, Aldi, Esselunga, country-based subsidiaries of Carrefour and of Auchan, etc.) have confirmed that the majority of their purchases in the pet food sector are nationally sourced. It appears that even international hypermarkets chains limit their international procurement policies to private label purchases, whilst negotiating their purchases of branded product at a national level. In addition, it appears that there are important price differences in their purchase prices in different European countries. These differences at wholesale level are then translated in different end-price to the consumers in the various European countries. From the above, it stems that pan-European purchasing negotiations and sourcing processes are still not a common practice even for the main European retail-chains.

23. As far as specialty shops are concerned, the market investigation has clearly highlighted that they purchase their pet food requirements almost exclusively at national level.

DIFFERENTIAL IN PRICES AMONG MEMBER STATES

24. The parties have provided price comparisons only as far as the retail level is concerned, arguing that average net sales prices to retailers are not available or comparable. Nevertheless, the parties have confirmed that "the overall net sales price to retailers has developed in parallel" to consumer prices.

25. This means that prices, although converging, still present significant differences. In particular, the brands of the parties are sold at considerably different prices in different Member States. For instance, the indicated retail level price/kg charged for Vital Balance dry cat food in Spain is about half of the price charged for the same product in the UK. Furthermore, information provided by the parties (relative weighted average

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3 Commission's decision of 13.03.1995, Case No IV/M. 554 Dalgety Plc. / The Quaker Oats Company; Commission's decision of 2.4.1998, Case No IV/M. 1127, Nestlé / Dalgety

prices per country, adjusted by deducing VAT and inflation) shows clearly that the price differential between the different European countries is significant. As examples of such differences, it can be mentioned that the average realised price/kg for dry dog food is more than 50% higher in Greece than in Italy, while the price for dry cat food is more than 40% higher in Spain than in France.

26. The presence of substantial price differentials for the same most important brands marketed in various European countries has been further confirmed by studies submitted by competitors. In particular, in the absence of significant transport costs accounting for these differentials/margins, significant price differences provide a clear evidence on the capability of incumbent firms to apply different prices in different countries, depending on the local conditions of competition.

NATURE OF CROSS-BORDER TRADE FLOWS

27. The product flow within the EEA is increasing, but the production in pet food is still mainly domestic. The existence of significant petfood trade flows could be interpreted as evidence of a EU-wide geographical market, if it would be customer-driven (i.e. if retailers are significant importers) or if producers would not face significant impediments to commercialize imported products on countries of destination. However, it appears that trade flows respond to a geographic specialization carried out by petfood producers as a result of economies of scale in production and relatively low transport costs rather than evidence on retailers' European wide procurement policies. For example, figures provided by a third party have indicated that around 90% of all imports into Spain of branded pet food result from activities by the incumbent producers (while only about 10% would stem from importers, retailers etc.). Such figures cannot be seen as an indication of a market that is wider than national, as the trade-flows are generally not directed towards the customers, but normally reach subsidiaries or platforms for distribution within the supplier's own business organisation (being thus mainly intra-company trade, where companies do not have manufacturing facility, in a specific country). This import pattern also demonstrates the need for pet food suppliers to maintain national distribution systems, which in itself is an indication of national markets.

DIFFERENT MARKET STRUCTURES PER COUNTRY

28. In addition to the above-described factors, the various EEA countries have significantly different historical traditions concerning dry and wet pet food. In particular, there are countries such as Spain where the dry sector is predominant (approximately 80% of the market) and other countries such as Germany which are instead mainly wet food oriented. This phenomenon is largely depending on the original choice between wet and dry products made by the first mover in the different national markets.

29. The existence of national relevant geographic markets is also inferred by the existence of very different market structures - which reflect specific demand characteristics as well - in the various European countries. In the case of the pet food, the market positions of the various players are particularly asymmetric across the countries.

30. The main suppliers have a scattered presence in various European markets. For example, according to the data provided by the parties, with respect to dry dog food, Mars and Nestlé have a more limited presence in Spain and Italy, whereas they account for significant market shares in some other EU countries (for instance in the UK and

Ireland). Mars, Nestlé and Royal Canin are the leading suppliers in France. Royal Canin is active in Spain, (where Gallina Blanca Purina is the market leader) but its position is that of a secondary player. Very different pictures emerge across various European countries, for other types of pet food.

CONCLUSION

31. In the light of all the factors above, it can be concluded that the relevant geographic market for the identified pet foods is national in scope.

B. PRIVATE LABEL

32. The parties and other major pet food manufacturers are the main suppliers to private label owners. The market investigation has shown that the relevant geographic market for the supply of private label at wholesale level is larger then national and could be even EEA-wide. In particular, private label manufacturers supply their customers (the retail chains) across Europe. For instance, Continentale Nutrition, which is the leading producer of private label pet food, essentially supplies its various European customers from its production sites in France. The same is true for Doane, another US leading producer of private label, whose production facility are located in Spain and Denmark. In the case of private label the cross border trade-flows, unlike the ones that for branded products, appear to be customer-driven.

33. This difference stems from the fact that private label products are not advertised by their supplier, as any advertising for private label products is done by the retailer. Producers may therefore afford higher transport costs and still offer the product at competitive prices compared to the branded pet food. Therefore, manufacturers of private label can competitively sell such products throughout an extensive area, which is wider than national. Some international hypermarket chains (for the reasons set out above) tend to carry out their procurement policies for private label purchases in a context which is wider than national.

34. In the light of the foregoing, it can be concluded that the relevant geographic market for the supply of private label at wholesale level is larger than national.

V. COMPETITIVE ASSESSMENT OF THE TRANSACTION

35. The proposed operation will result in horizontal overlaps accounting for a market share of more than 15% in several EC countries. In some of these countries (i.e. Belgium/Luxembourg, Finland, France, Ireland, The Netherlands and Sweden), the increment in market share post-concentration is relatively small and there are strong competitors with substantial shares of sales in wet and dry pet food products.

36. In particular, in Belgium/Luxembourg the affected markets are: Dry cat food, Snacks and treats for cats and Snacks and treats for dogs. Post-merger, the combined market shares in all these markets will be below 35%, while, in any event, other major competitors are actively present (for instance, Mars has [45-55]% market share in Snacks and treats for dogs and [50-60]% market share in Snacks and treats for cats.

37. In Finland the affected markets are: Dry dog food, Dry cat food, Snacks and treats for dogs. Post-merger, the combined market shares will be always below 35%, and the increments of

Nestlé's share of sales are small ([1-5]% in Dry dog food) or *de minimis* (in Dry cat food and in Snacks and treats for dogs).

38. In France, the affected markets where post-transaction market shares will be above 35% of the total are: Dry cat food and Wet cat food. In both markets the increment of Nestlé shares of sales (due to the acquisition) is small or *de minimis*. In Wet cat food Nestlé will only add [0-5]% (passing from [30-40]% to [30-40]%). In Dry cat food, the overall position of the merged entity will be important ([40-50]%), but Nestlé will only add [1-5]% to its previous share of sales (passing from [40-50]% to [40-50]%). This increment will not significantly strengthen a dominant position, since other active competitors exists, namely Mars (with around [10-20]% in the last three years), Royal Canin ([10-20]%, with increasing trend in the last three years), P&G (with stable [1-10]%, in the last three years), Private label ([10-20]%, with slightly increasing trend in the last three years).

39. In Ireland, the combined market shares of the merged entity will never be above 25% on each product market. In the Netherlands, the only market where the combined share of sales will be above 25% is Dry cat food, where Nestlé will add [1-5]% to its actual market share, therefore passing from [25-35]% to [30-40]%; nevertheless, it will not have any dominance since Mars has [20-30]%, P&G has [1-10]%, Royal Canin [1-10]%.

40. In Sweden, the only affected market is Dry cat food, where post-transaction the merged entity will have [25-35]% market share (Nestlé [20-30]%, Ralston Purina [1-10]%), but will not have any dominance, due to *inter alia* the presence of important players such as Mars ([15-25]%), P&G ([10-20]%), Royal Canin ([1-10]%).

41. With regard to the UK, although the combined market share in Dry cat food is relatively high ([40-50]%, of which Nestlé [30-40]% and Ralston Purina [1-10]%), there are a number of significant competitors (in particular Mars with [10-20]% and P&G with [15-25]%, both quite stable over the last three years). Therefore, the proposed concentration is not likely to create or strengthen a dominant position in the UK. Concerning Portugal, the combined market share in dry cat food – which is [35-45]% - is not likely to confer dominance to the Parties due to, *inter alia,* the competitive force of Mars ([10-20]%, stable over the past three years) and Royal Canin ([1-10]%, stable over the past three years) in this country.

42. Therefore, in the above-mentioned countries, the proposed concentration is not likely to create or strengthen a dominant position.

43. There are, however, three national markets where the proposed concentration would create or strengthen a dominant position enjoyed by the parties. These countries are Spain, Greece and Italy.

SPAIN

	Nestlé	Ralston Purina	Nestlé + Ralston Purina	Mars	Private Label
Dry dog food	[1-10] %	[30-40] %	**[30-40] %**	[1-10]%	[5-15] %
Wet dog food	[10-20] %	[1-10] %	[10-20] %	[25-35] %	[30-40] %
Dry cat food	[10-20] %	[20-30] %	**[40-50] %**	[1-10] %	[10-20] %
Wet cat food	[20-30] %	[10-20] %	[30-40] %	[30-40] %	[20-30] %
Snacks and treats for dogs	[1-10] %	[10-20] %	[10-20] %	[15-25] %	-
Snacks and treats for cats	[1-10] %	[40-50] %	**[50-60] %**	[1-10] %	-

	Royal Canin	Procter & Gamble	Other manufacturers
Dry dog food	[1-10] %	[1-10] %	[30-40] %
Wet dog food	0,0 %	[1-5] %	[10-20] %
Dry cat food	[1-10] %	[1-10] %	[20-30] %
Wet cat food	0,0 %	[0-5] %	[5-15] %
Snacks Dogs	N/A	N/A	N/A
Snacks Cats	N/A	N/A	N/A

44. With regard to the Spanish markets for pet food, the proposed concentration is likely to lead to creation of a dominant position of the combined entity Nestlé/Ralston Purina in the markets for Dry Dog Food, Dry Cat Food and Snacks and Treats for Cats.

DRY DOG FOOD

45. In the Dry Dog Food market, Ralston Purina is already the leading player with a market share of [30-40]%. Nestlé, which has currently a [1-10]% market share, will have post-concentration a market share of around [30-40]%. The combined entity's market position would become particularly strong in the grocery sector ([40-50]%), while Nestlé' s presence in the non-grocery sector would increase from only [1-10]% to [25-35]%.

46. There are no other suppliers with significant market shares in Spain. Mars is a very small competitor ([1-10]%) and its market share has remained unchanged over the last three years. The market share of Royal Canin has also considerably decreased over the last three years. P&G has a market share below 5%. The remaining competitors in the market are small local producers, none of which appear to be a significant competitive constraint for the new entity.

47. The only element of dynamics in the Spanish market for Dry Dog Food is constituted by private label, which has grown in the past years, increasing its share up to [5-15]%. However, both Nestlé and Ralston Purina, contrary to Mars and P&G, are important suppliers to private label owners (in the year 2000, about one third of the supply of private label dry dog food). This feature could increase the risk of dependence of the private label owners on the commercial strategy of the new combined entity Nestlé/Ralston Purina.

DRY CAT FOOD

48. In the Dry Cat Food market, Ralston Purina is already the leading player with a market share of [20-30]%. Nestlé, which is currently the second largest player in the market

with a [10-20]% market share, will have post-concentration a market share of around [40-50]%. In particular, through the proposed acquisition of Ralston Purina, Nestlé would achieve a market share of 58% in the grocery sector and will significantly reinforce its position in the non-grocery sector, increasing its market share from [1-10]% to [20-30]%.

49. Again, the lack of any sizeable competitors in the market has to be noted. Mars appears to be a small competitor ([1-10]%) and its market share has been decreasing over the last three years. Apart from Mars, all the other major competitors active in the Spanish market (i.e. Royal Canin and Procter & Gamble) for Dry Cat Food have a market share below 5%. The remaining competitors in the market are small local producers, none of which appear to be a significant competitive constraint for the new entity.

50. As in the case of Dry Dog Food, the only element of dynamics in the Spanish market for Dry Cat Food is constituted by private label, which has grown in the past years, increasing its share up to [10-20]%. Both Nestlé and Ralston Purina are however, differently from Mars and P&G, among the most important suppliers to private label owners (in 2000, almost half of the supply of private label dry cat food). The transaction could therefore create a risk of dependence of the private label sector on the commercial strategy of the new combined entity Nestlé/Ralston Purina.

SNACKS AND TREATS FOR CATS

51. With regard to the snacks and treats for cats, the proposed operation is likely to create a dominant position of Nestlé/Ralston Purina ([50-60]%) in Spain. Mars, which is relatively a strong competitor in snacks and treats for cats in a number of EEA countries, is particularly small in Spain ([1-10]%).

52. The market investigation has provided further confirmation that the proposed operation is likely to create a dominant position of Nestlé/Ralston Purina. On the basis of Nielsen figures for Spain in 2000 and 2001 - figures which refer to grocery outlets and to branded products only - the market shares of Nestlé/Ralston Purina branded products would be above [85-95]% of the total branded market for Cat snacks, both in volume and in value. This picture, although neither covering the totality of the products in the market (for instance it excludes the unbranded products), nor the totality of the distribution channels (it excludes the non-grocery outlets) must still be considered a clear indication of the parties' market power giving rise to serious doubts in the market for Cat snacks.

GREECE

	Nestlé	Ralston Purina	Nestlé + Ralston Purina	Mars	Private Label
Dry dog food	[20-30] %	[10-20] %	**[40-50] %**	[20-30] %	[1-10] %
Wet dog food	[20-30] %	[0-5] %	[20-30] %	[25-35] %	[10-20] %
Dry cat food	[40-50] %	[10-20] %	**[55-65] %**	[20-30] %	[1-10] %
Wet cat food	[30-40] %	[0-5] %	[30-40] %	[30-40] %	[1-10] %
Snacks and treats for dogs	*0,0 %*	*[10-20] %*	*[10-20] %*	*[1-10] %*	-
Snacks and treats for cats	0,0 %	0,0 %	0,0 %	0,0 %	-

	Royal Canin	Procter & Gamble	Other manufacturers

Dry dog food	[10-20] %	[1-10] %	[10-20] %
Wet dog food	0,0 %	[0-5] %	[30-40]%
Dry cat food	[0-5] %	[1-10] %	[1-10] %
Wet cat food	0,0 %	[0-5] %	[10-20] %
Snacks Dogs	N/A	N/A	N/A
Snacks Cats	N/A	N/A	N/A

DRY CAT FOOD

53. As far as the market for Dry Cat Food is concerned, the proposed operation will give rise to a significant overlap and Nestlé will significantly reinforce its position of market leader. The combined entity Nestlé/Ralston Purina will have a market share of around [55-65]% and the position of Nestlé will be predominantly reinforced in the non-grocery sector, where it will achieve a combined market share of more than [60-70]%.

54. Moreover, the transaction will eliminate Ralston Purina as an active competitor, which in the last three years has grown to become the third largest player in the market with a market share above [5-10]% (and more than [20-30]% in the non-grocery sector).

55. Thus following the notified transaction, Mars will be the only player left in the market with a substantial market share ([20-30]%). Royal Canin ([0-5]%) and P&G ([1-10]%) are insignificant competitive forces, which have not been able to expand their market position in the last three years. As underlined for Dry Dog Food, it should be also considered that the private label sector is almost non existent ([1-10]%).

56. The proposed concentration thus leads to a significant concentration of supply and therefore raise serious doubts as to the Greek market for dry cat food.

ITALY

	Nestlé	Ralston Purina	Nestlé + Ralston Purina	Mars	Private Label
Dry dog food	[1-10] %	[10-20] %	[20-30] %	[1-10] %	[1-10] %
Wet dog food	[10-20] %	[0-5] %	[10-20] %	[25-35] %	[10-20] %
Dry cat food	[20-30]%	[10-20] %	**[40-50] %**	[10-20] %	[1-10] %
Wet cat food	[30-40] %	[0-5] %	[30-40] %	[30-40] %	[10-20] %
Snacks and treats for dogs	[20-30] %	[1-10] %	[20-30] %	[30-40] %	-
Snacks and treats for cats	*[1-10] %*	*[1-10] %*	*[1-10] %*	*[30-40] %*	-

	Royal Canin	Procter & Gamble	Other manufacturers
Dry dog food	[5-15] %	[20-30] %	[20-30] %
Wet dog food	[0-5] %	[0-5] %	[30-40] %
Dry cat foods	[1-10] %	[1-10] %	[20-30] %
Wet cat foods	0,0 %	[0-5] %	[10-20] %
Snacks Dog	N/A	N/A	N/A
Snacks Cat	N/A	N/A	N/A

DRY CAT FOOD

57. As far as the Dry Cat food market is concerned, Nestlé, which is already the leading player with a market share of about [20-30]%, will incorporate Ralston Purina, which is player number two in the market with a market share of around [10-20]%. Therefore, as a consequence on this transaction, Nestlé/Ralston Purina will have a market share of more than [40-50]%, which is likely to lead to the creation of a dominant position. In particular, through the proposed acquisition of Ralston Purina, Nestlé would achieve a market share of [50-60]% in the grocery sector and will significantly reinforce its position in the non-grocery sector, tripling its market share from [10-20]% to [30-40]%.

58. Mars does not appear to be a particularly strong competitor and its market share has been decreasing substantially over the last five years (since 1996 its market share has decreased from [20-30]% to [10-20]%). Apart from Mars, all the other major competitors active in the Italian market (i.e. Royal Canin, P&G and Hill´s) for Dry Cat Food have a market share significantly below 10%. In addition, the private label sector is marginal and has not been significantly increasing in the last three years. The rest of the pet food manufacturers active in the Italian market for Dry Cat Food are small and highly fragmented.

VI COMMITMENTS SUBMITTED BY THE PARTIES

59. On 09 July 2001, the parties offered certain commitments to remove the competition concerns identified by the Commission on the Spanish markets (dry dog and cat food, snacks), the Greek market for dry cat food and the Italian market for dry cat food. These commitments were subsequently improved. The full text of the final commitments is annexed and will form an integral part of this decision.

A. SUMMARY OF THE COMMITMENTS

60. The parties have committed that Nestlé and Ralston Purina will divest to one third party suitable purchaser per country the following assets:

SPAIN

61. The divestment includes Nestlé's branded dry cat food, dry dog food, wet cat food, wet dog food, cat and dog snacks and treats and accessories businesses or, alternatively, the shareholding of Ralston Purina in the Gallina Blanca Purina JV with Agrolimen S.A.

62. The divestment of Nestlé's branded product dry cat food and dry dog food businesses in Spain encompasses exclusive licenses for the brands Friskies and Vital Balance. Nestlé will also divest its production site in Castellbisbal and related distribution, sales and marketing activities.

63. In alternative , Nestlé will divest, the 50% shareholding of Ralston Purina in the Spanish joint venture with Agrolimen S.A. (Gallina Blanca Purina JV).

GREECE

64. The divestment includes the Ralston Purina dry cat food and dry dog food branded product businesses operated under the brands Cat Chow, Dog Chow, Kitten Chow and Puppy Chow, as well as Cat Meal and Dog Meal, for which the purchaser will be

granted an exclusive license and the divestment of related goodwill and the distribution relationships.

ITALY

65. The divestment includes the Ralston Purina dry cat food and dry dog food business operated under the brands Cat Chow, Dog Chow, Kitten Chow and Puppy Chow , for which the purchaser will be granted an exclusive license and the divestment of related goodwill, distribution, sales, marketing assets.

B. ASSESSMENT OF THE COMMITMENTS

66. The market test performed by the Commission has confirmed that the proposed remedies, including the need for re-branding constitute viable solutions to the identified concerns. In particular, respondents have pointed out that re-branding is feasible in the pet food industry, assuming that the new player has a sufficient time-frame during which he will have full control over the acquired brands. It results from the market test that the time-frame (in terms of licence and non-competition) as well as the scope of remedy (in terms of including whole brand families) satisfy these criteria.

SPAIN

a. First alternative

67. The divestiture of the Nestlé's family brand of Friskies pet food products (dry dog and dry cat and all other categories of Friskies products found in a retail shelf), together with Vital Balance for both Dry cat and Dry dog food rules out any issue of single dominance in the respective product markets. The divested brands are well-known brands, and they account for significant sales (both in quantity and in value) in Spain. The divestiture would remove the overlap created by the transaction and would leave the combined entity with market shares not higher than those held by Ralston Purina before the transaction ([30-40]% in dry dog and [20-30]% in dry cat). Moreover, the factory to be divested in Castellbisbal is a recently built modern factory, with sufficient spare capacity for the purchaser to grow its market presence. It will also be complemented with new investments (already budgeted) by the end of the year, rendering it capable to produce not only "economy" products (as it actually does), but also "mainstream" products in the dry cat and dry dog product markets. The overall business to be divested appears therefore a stand-alone business which would allow the purchaser to viably and effectively compete with the merged entity and other competitors.

68. Moreover, the divestiture of other products within the Friskies family brand rules out the possibility of the divestiture not being a viable business for a purchaser, because of indirect portfolio effects. The inclusion of the entire Friskies portfolio means that the purchaser will be in a good position to re-brand the acquired products as he will not encounter an indirect competition from the same brand remaining in the hands of the merged entity. The duration of the exclusive licence for the brands, coupled with the additional period covered by the merged entity's restriction of the use of the brands (overall nearly eight years), should therefore be sufficient for the purchaser to establish and develop its business as a competitive force in the relevant Spanish markets.

b. Second alternative

69. The divestment of the 50% shareholding of Ralston Purina in the Spanish joint venture with Agrolimen S.A. (Gallina Blanca Purina JV) would remove the overlap and is pro-competitive since it enables the creation of a new independent player, which is likely to strongly compete in the various relevant markets in Spain (and possibly in other EEA countries). A restriction on the use of the Purina brands will also protect for a certain period the purchaser of the 50% shareholding as has been described, under the first option, for the Nestlé brands.

GREECE

70. Greece is a small market in total size if compared to other European countries, and Ralston Purina has no production facility there, but mainly imports pet food products from other European countries. The divestiture of Ralston Purina's dry cat food and dry dog food branded product businesses concerns the brands Cat Chow, Dog Chow, Kitten Chow and Puppy Chow, as well as Cat Meal and Dog Meal. These brands are well known and established ones. The proposed divestiture would remove the overlap which would result from the transaction, both in dry cat and in the dry dog product markets. The licensing period should allow the purchaser the necessary time for re-branding, while for the following period should allow it to consolidate its business as it will enjoy a certain protection for its activities, due to the parties' commitment not to reintroduce the relevant brands in the Greek market. Although the Parties do not have a production facility to divest, they will transfer to the purchaser the existing commercial relationships between the divested business and its distributors and customers, and they offer to supply the purchaser with the relevant products at cost during the license period.

ITALY

71. The divestiture of Ralston Purina dry cat food branded product businesses concerns the brand Cat Chow, Dog Chow, Kitten Chow and Puppy Chow . These brands are known and established ones. As for Greece, the licensing period should allow the purchaser the necessary time for re-branding, while for the following period when the brands will not be re-introduced in the Italian market should allow the purchaser to consolidate its business. The fact that Ralston Purina does not have a production plant in Italy dedicated to the divested business, and, thus, that no such plant will be divested, is dealt with in the same manner as for Greece. The divestiture will remove most of the overlaps created by the transaction in dry dog and dry cat markets and leave the combined entity with a market share not significantly higher than the pre-existing share of Nestlé ([20-30]% in dry cat food). For the same reason as has been set out in relation to the Friskies divestiture in Spain, the divestiture of Dry dog "Chow" branded products within the "Chow" product family protects the continued viability of the divested business.

C. CONCLUSION ON THE COMMITTMENTS

72. In the light of the above, the Commission concludes that the commitments submitted by the parties are sufficient to remove the competition concerns identified by the Commission during its investigation of the proposed operation on condition that the parties comply with the following commitments which are subject to change by the Commission pursuant to paragraph 24 of the Annex:

(a) the commitment relating to the divestiture of various Friskies brands in Dry cat and Dry dog food and in snacks, treats and accessories in Spain or the 50% shareholding in the Gallina Blanca Purina JV, as set out in paragraph 1a) and 2a) of the Annex;

(b) the commitment relating to the divestiture of various Ralston Purina brands in Dry cat and Dry dog food in Greece as set out in paragraphs 1b) and 2b) of the Annex;

(c) the commitment relating to the divestiture of various Ralston Purina brands in Dry cat food and Dry dog food in Italy as set out in paragraph 1c) and 2c) of the Annex;

(d) the commitment relating to the exclusive licensing of recipes and intellectual property rights as set out in paragraph 2d) of the Annex;

(e) the commitment relating to the goodwill and the going concern of the various divested businesses and as set in the whole paragraph 3 and 4 of the Annex;

(f) the commitment relating to the Preservation of viability, Hold-separate and Ring-fencing set out in paragraph 6, 7, 8, 9, 10 of the Annex;

(g) the commitment relating to the Non-solicitation clause as set out in paragraph 11 of the Annex;

(h) the commitment relating to the supply by the parties to the purchasers, at cost plus terms concerning the products of the divested brands in each country where the exclusive license is given, as set out in paragraph 12 of the Annex;

(i) the commitment relating to the Restriction of use of the brands as set out in paragraph 13 of the Annex;

(l) the commitment relating to the completion of the divestment procedure as set out in paragraphs 14 of the Annex;

(m) the commitment relating to the suitable Purchaser as set out in paragraph 17, 18 of the Annex, and

(n) the compliance with any measure imposed by the Trustee to make the parties comply with their commitment as indicated in paragraph 22 (iv) of the Annex.

73. The above mentioned commitments constitute conditions, as only by fulfilling them (subject to any change pursuant to paragraph 24 of the Annex), can the structural change on the relevant market be achieved.

74. The remaining commitments constitute obligations (subject to any change pursuant to paragraph 24 of the Annex), as they concern the implementing steps which are necessary to achieve the structural change that is sought. In particular, this relates to:

(a) the provisions relating to the "Monitoring Trustee" with the exception of any measure imposed by the trustee to make the parties comply with their commitment as indicated in paragraph 22 (iv) of the Annex;

VII CONCLUSION

75. The Commission concludes that the commitments submitted by the parties during the course of the proceedings are sufficient to address the competition concerns raised by this concentration. Accordingly, subject to full compliance with these undertakings, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market. This decision is adopted in application of Articles 6(1)(b) and 6(2) of Council Regulation (EEC) No 4064/89.

For the Commission,

Case COMP/M. 2337

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EEC) No. 4064/89 as amended (the "Merger Regulation"), Nestlé S. A. ("Nestlé") and Ralston Purina Company ("Ralston Purina") hereby give the following commitments in order to enable the European Commission to declare the acquisition by Nestlé of sole control of Ralston Purina compatible with the common market and the EEA Agreement pursuant to Article 6(1)(b) of the Merger Regulation. All commitments are conditional to the actual closing of the notified transaction. However, the commitments mentioned under B. shall take effect upon the date of the Commission's decision declaring the notified transaction compatible with the common market and the EEA Agreement pursuant to Article 6(1)(b) of the Merger Regulation (the "Effective Date").

For the avoidance of doubt, where in the commitments below both Nestlé and Ralston Purina are mentioned, these commitments apply to Nestlé to the extent that the business to be divested is a Nestlé business and to Ralston Purina to the extent that the business to be divested is a Ralston Purina business. Nestlé procures that, after the time of closing, Ralston Purina will comply with the commitments below.

A. The Divested Business

1. Nestlé and Ralston Purina agree to divest

   a) the Nestlé dry cat food and dry dog food branded product businesses in Spain and the entire portfolio of the pet food business under the brands Friskies and Felix in Spain (first alternative) or, alternatively, the shareholding of Ralston Purina in the Gallina Blanca Purina JV with Agrolimen S. A. (second alternative) and

   b) the Ralston Purina dry cat food and dry dog food branded product businesses in Greece to the extent that they are operated under the brands Cat Chow, Dog Chow, Kitten Chow, Puppy Chow, Cat Meal and Dog Meal and

   c) the Ralston Purina dry cat food and dry dog food branded product businesses in Italy to the extent that they are operated under the brands Cat Chow, Dog Chow, Kitten Chow, and Puppy Chow

   to one third party per country ("the Purchaser(s)"). This divestment, if operated by (a) suitable purchaser(s), should guarantee effective competition on a permanent basis in the markets for branded products for pet food in the EEA thereby rendering the notified transaction compatible with the common market and the EEA Agreement.

2. The Divested Business consists

   a) of assets of Nestlé's branded product dry cat food, dry dog food, wet cat food, wet dog food, cat and dog snacks and treats and accessories businesses in Spain. This encompasses exclusive licenses

      - for the brands Friskies Grand Menu, Felix, Friskies Menu and Vital Balance Dry Cat for use in dry cat food and

- the brands Friskies Mainstream Dry Dog, Friskies Classic, Friskies Menu Economy Dry Dog and Vital Balance Dry Dog for use in dry dog food and

- for the entire further product portfolio under the Friskies and Felix brands which include Friskies wet dog products, Friskies and Felix wet cat products, Friskies cat and dog snacks and treats products and Friskies accessories products for small animals such as birds, rodents and fish,

each for use solely in Spain for a period of three years, including the goodwill and the assets and facilities used for these businesses at the production site of Castellbisbal. This encompasses the production and distribution facilities and the sales, marketing, commercial, finance, R&D, HR, IT and general management departments of Nestlé's branded product businesses used for these businesses at the production site of Castellbisbal together with the relevant personnel,

or, alternatively, according to Nestlé's own free choice of

the 50% shareholding of Ralston Purina in the Gallina Blanca Purina JV, including a commitment (vis-à-vis the Commission) that the Gallina Blanca Purina JV can use all the brands which are currently licensed to the Gallina Blanca Purina JV by Ralston Purina under their current contractual obligations for a period of up to three years on an exclusive basis in Spain.

b) <u>and</u> of Ralston Purina's branded product dry cat food and dry dog food businesses in Greece to the extent they are operated under the brands Cat Chow, Dog Chow, Kitten Chow and Puppy Chow (Ralston Purina does not have any other Chow brand relating to pet food in Greece) as well as Cat Meal and Dog Meal by way of exclusive license of the brands Cat Chow, Dog Chow, Kitten Chow, Puppy Chow, Cat Meal and Dog Meal for the period of three years for use solely in Greece including the "goodwill" and the distribution relationships for the above-mentioned business in Greece,

c) <u>and</u> of Ralston Purina's branded product dry cat food and dry dog food businesses in Italy to the extent they are operated under the brands Cat Chow, Dog Chow, Kitten Chow and Puppy Chow (Ralston Purina does not have any other Chow brand relating to pet food in Italy) by way of exclusive license of the brands Cat Chow, Dog Chow, Kitten Chow, Puppy Chow for the period of three years for use solely in Italy including the goodwill, the distribution facilities and the sales, marketing, commercial, finance, HR, and IT of Ralston Purina in Italy together with the relevant personnel all inasmuch as it is located in Italy.

d) and for all products which are part of the Divested Business of exclusive licenses of all current recipes, formulations and intellectual property rights for the duration of the exclusive brand licenses mentioned in paragraphs 2. a) – 2. c) above and the periods mentioned in paragraph 13 below and for the country concerned. Afterwards, the parties will grant the Purchaser(s) non-exclusive licenses of all recipes, formulations and intellectual property rights on an arms length basis at the request of the Purchaser(s).

3. The "goodwill" as referred to in these commitments shall comprise the independent customers of the Divested Business with whom:

♦ the Divested Business did business in the year 2000,

♦ the Divested Business did business in the year 2001 up to the date a binding agreement is entered into for the sale of the Divestment Business, and

♦ the Divested Business has had a framework agreement in the years 2000 or 2001 up to the Closing Date for the supply of products which are part of the Divested Business.

4. The Divested Business will be divested as a going concern. Where applicable, the divestment shall include the transfer of the personnel currently employed by the Divested Business, in accordance with the Council Directives on collective redundancies[4], on safeguarding employees rights in the event of transfers of undertakings[5] and on informing and consulting employees[6] as well as with national provisions implementing these Directives.

5. The divestment will not include:

   a) the assignment of brands (trademarks), since the purchaser shall re-brand the products concerned during the period of the license;

   b) any right of the licensees of the licensed brands to use the brands in other countries than those which are specified in the respective licensing agreement.

   For the avoidance of doubt, Nestlé and Ralston Purina are entitled to use the licensed brands after expiry of the license agreements and of the period referred to in paragraph 13 below (again and also) for the products concerned and the countries concerned by the licenses.

B. Related commitments

Preservation of Viability, Marketability and Competitiveness

6. Nestlé and Ralston Purina undertake to preserve the full economic viability, marketability and competitiveness of the Divested Business pending divestiture, in accordance with good commercial practice, as will be monitored by the Trustee in accordance with paragraph 22. In this regard Nestlé and Ralston Purina undertake to reduce to the minimum any possible risk of loss of competitive potential of the Divested Business resulting from the uncertainties inherent to the transfer of a business. Pending divestiture, Nestlé and Ralston Purina will manage the Divested Business in the best interest of the business. In particular, Nestlé and Ralston Purina undertake not to carry out any act upon their own authority which may have a significant negative impact on the economic value, the management or the competitiveness of the Divested Business until the date of divestiture. Until that date, Nestlé and Ralston Purina also undertake not to carry out upon its own authority any act which may be of such a nature as to alter the nature of or the scope of activity of the Divested Business, or the industrial or commercial strategy or the investment policy of the Divested Business. Sufficient resources shall be made available for the Divested Business to develop until the divestiture, based on the approved strategic and (annual) business plans.

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[4] *Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.*

[5] *Council Directive 77/187/EC of 14 February 1977 1998 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of a business as amended by Council Directive 98/50/EC.*

[6] *Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended by Directive 97/74/EC.*

Hold-separate obligations

7. Nestlé and Ralston Purina commit to keep the Divested business to be divested separate from their other retained businesses and they will ensure that employees of the business to be divested have no involvement in any other retained business and vice versa and they will also ensure that the employees of the business to be divested do not report to any individual outside of the business.

8. Prior to the completion of the sale of the Divested Business, Nestlé and Ralston Purina shall assist the Trustee in ensuring that the Divested Business is managed as a distinct and saleable entity separate from the businesses of Nestlé and Ralston Purina. The Trustee shall in particular ensure that the Divested Business shall have its own management which shall be under instructions to manage the Divested Business on an independent basis and to ensure its continued viability, marketability and independence from the businesses of Nestlé and Ralston Purina.

9. To ensure that the Divested Business is managed as a separate entity, its participation in central purchasing arrangements, international marketing efforts, the central internet system and other central operational functions will be terminated as quickly as possible, while preserving the full economic viability, marketability and competitiveness of the Divested Business.

Ring-fencing

10. Nestlé and Ralston Purina shall implement all necessary measures to ensure that they shall not obtain from the management of the Divested Business any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divested Business, with the exception of information reasonably necessary for the divestiture of the business.

Non-solicitation clause

11. Nestlé and Ralston Purina shall take all reasonable steps, including appropriate incentive schemes, to cause all staff currently employed by the Divested Business to remain with the Divested Business. All personnel […] is available for the purchaser(s) of the Divested Business at their discretion. The incentives shall be agreed with the Commission upon recommendation of the Trustee and shall be determined on the basis of industry practice, seniority and the qualifications of the staff members. Nestlé and Ralston Purina undertake not to solicit, and, in case the shareholding of Ralston Purina in the Gallina Blanca Purina JV in Spain is retained, to procure that the Gallina Blanca Purina JV will not solicit, the staff transferred with the Divested Business for a period of two years after the Closing Date.

12. To the extent that, according to A.1. and A.2 above no production facilities are divested where the products to be sold under the divested brands can be manufactured, Nestlé and Ralston Purina commit to supply these products up to a duration of the exclusive license period as laid down in the respective license agreement at cost plus terms (cost plus terms for arrangements set out in this letter shall mean terms agreed between the seller and the Purchaser to cover all the divesting parties' costs and expenses directly or indirectly related to its manufacture and supply and a reasonable administration charge; the seller and Purchaser(s) shall agree on a method to establish and control the costs in the supply agreement).

Restriction of Use of Brands

13. Nestlé and Ralston Purina commit not to re-introduce or promote the licensed brands to the countries for which the license has been granted according to paragraph 2 of this letter within

a period of four years and nine months after the termination of the license agreements or after the time the purchaser actually stopped to use the brands for the products in question in the respective country, whichever comes first.

With regard to the brands concerning the second alternative of the commitment for Spain, Nestlé and Ralston Purina commit not to re-introduce or promote the licensed brands to Spain for four years and nine months following the termination of the licensing agreement or the termination of use of the licensed brands by the Gallina Blanca Purina JV, whichever comes first; however, this commitment (the second paragraph of no. 13) shall in any case terminate at the latest on 31st December 2007.

C. The Divestment Procedure

14. Nestlé and Ralston Purina shall be deemed to have complied with this undertaking if, within a period not exceeding […] from the date of the closing of the notified transaction, they have entered into a binding agreement for the sale of the Divested Business, provided that the closing of the sale takes place within three months.

15. If Nestlé chooses for the commitment under A.1.a) and A.2.a), the first alternative, it has to comply with this undertaking before the closing of the notified transaction but in no case later than […]. This means that Nestlé has entered into a binding agreement for the sale of the Divested Business (subject to the closing of the notified transaction and the approval of the Commission) and that the Purchaser and the purchase agreement have been approved by the Commission according to the provisions under D. below. In case the conditions described above are not fulfilled by the time of closing of the notified transaction, Nestlé is precluded from choosing the first alternative for the obligation under A.1.a) and A.2.a).

16. Nestlé and Ralston Purina shall report in full in writing in English to the Commission and the Trustee on developments in the negotiations with potential purchasers of the Divested Business within 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

D. The Purchaser

17. The Purchaser shall be a viable existing actual or potential competitor independent of and unconnected to Nestlé and Ralston Purina, possessing the financial resources, proven expertise and having the incentive to maintain and develop the Divested Business as an active competitive force in competition with Nestlé and Ralston Purina, and, in Spain, the Gallina Blanca Purina JV, and other competitors. In addition, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant competition and other regulatory authorities for the acquisition of the Divested Business. However, in case Nestlé and Ralston Purina choose, for the commitment under A.1.a) and A.2.a), the second alternative, it is sufficient that the purchaser of the shares is committed to support the continuing business of the Gallina Blanca Purina JV and must reasonably be expected to obtain all necessary approvals from the relevant competition and other regulatory authorities for the acquisition of the Divested Business.

18. Nestlé and Ralston Purina must be able to demonstrate to the European Commission that the purchaser meets the requirements of the commitments and that the business is sold in a manner consistent with these commitments. In order to maintain the structural effect of these commitments, the Parties will not subsequently acquire influence over the whole or part of the Divested 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 Divested Business is no longer necessary to render the concentration compatible with the common market.

19. When Nestlé or Ralston Purina have or are about to reach an agreement with the Purchaser referred to in the paragraph above, they will submit a fully documented and reasoned proposal enabling the Commission to verify that the criteria above with regard to the identity of the Purchaser are fulfilled and that the divestment package is sold in a manner consistent with the commitment. For the avoidance of doubt, the verification that the divestiture package is sold in a manner consistent with the commitment includes an approval of the Purchaser and of the final binding sale and purchase agreement. Nestlé and Ralston Purina shall send simultaneously to the Trustee a copy of the sale and purchase agreement in order to enable it to perform its duties in accordance with paragraph 22.

E. The Monitoring Trustee

20. Nestlé and Ralston Purina shall appoint an independent trustee or trustees (the "Trustee"), such as an investment bank or consultant or auditor, subject to approval by the Commission. The Trustee shall be independent of Nestlé and Ralston Purina, possess the necessary qualifications to carry out the task and shall not be, or become, exposed to a conflict of interest. Nestlé and Ralston Purina shall propose a trustee or list of proposed trustees and the terms of the mandate for approval to the Commission with adequate information for the Commission to verify that the Trustee fulfils these requirements. This proposal shall be made at the latest two weeks after the date of the Commission Decision. The Trustee will be remunerated in such a way as not to impede its independence and effectiveness in fulfilling the mandate. The mandate must include all provisions necessary to enable the Trustee to fulfil its duties under the commitments accepted by the Commission.

21. The Trustee shall assume its specified duties in order to ensure compliance in good faith with the commitments on behalf of the Commission and taking into account the legitimate interest of Nestlé and Ralston Purina.

22. The Trustee shall, following its appointment:

   a) oversee the on-going management of the Divested Business with a view to ensuring its continued viability and marketability and monitor the compliance by Nestlé and Ralston Purina with the conditions and obligations under these commitments. Therefore the Trustee shall:

      (i) in consultation with Nestlé and Ralston Purina, determine the best management structure to ensure that the obligation of non-disclosure of competitively sensitive information is observed by the Parties;

      (ii) monitor that Nestlé and Ralston Purina maintain the viability and marketability of the assets and/or businesses to be divested in accordance with this undertaking, and the management and operation of the assets or businesses in the normal course of business, in accordance with past practice, until divestiture;

      (iii) monitor, where applicable, that no competitively sensitive information concerning the assets or the businesses to be divested is disclosed to the Parties (except in so far as necessary to allow the Parties to prepare the divestiture);

      (iv.)propose to Nestlé and Ralston Purina such measures as the Trustee considers necessary to ensure compliance with the conditions and obligations under these commitments, in particular the maintenance of the viability or marketability of the Divested Business and the non-disclosure of competitively sensitive information by Nestlé and the Trustee shall be entitled to impose such measures (with the approval of the Commission) in the event that Nestlé and Ralston Purina do not comply with the Trustee's proposals within the timeframe set by the Trustee;

(v.) monitor the parties' compliance with paragraph 13 above.

b) provide to the Commission, with a simultaneous non-confidential copy to Nestlé and Ralston Purina, a written report within 10 days after the end of every month concerning the monitoring of the operation and management of the Divested Business in order to assess whether the business is held in a manner consistent with these commitments. In addition to these reports, the Trustee shall promptly report in writing to the Commission if the Trustee concludes on reasonable grounds that Nestlé or Ralston Purina is failing to comply with any of the conditions or obligations under these commitments. Nestlé and Ralston Purina shall receive a simultaneous non-confidential copy of any such additional reports;

c) assess the suitability of the proposed purchaser and the viability of the Divested Business after the sale to the purchaser and give its opinion to the Commission on whether the proposed divestment complies with the conditions and obligations under these commitments;

d) cease to act as Trustee after the Commission has discharged it from its duties, following a request from the Trustee made after all the commitments with which it has been entrusted have been implemented.

e) Notwithstanding the discharge having been given, the Commission may require the reappointment of the Trustee if subsequently it appears to the Commission that the relevant commitments might not have been fully and properly implemented provided:

(i) the relevant Purchaser has first submitted to the Commission a reasoned explanation in writing why it considers the relevant commitment not to properly have been implemented;
(ii) the Commission has considered carefully the relevant Purchaser's written explanation, has fully discussed the position with the parties (who shall be supplied with a copy of the written explanation and who shall have been given the opportunity also to submit a written response within ten working days of such discussions) and the Commission has concluded that the relevant commitment might not have been fully and properly implemented;
(iii) any such reappointment shall take place within one calendar year from the date of the original discharge of the Trustee by the Commission, as referred to in the two sentences above; and
(iv) for the avoidance of doubt, any reappointment shall be for the purposes of ensuring that the commitments are fully and properly implemented only and shall not be permitted for any other purpose.

23. Nestlé and Ralston Purina shall provide the Trustee with all such assistance and information, including copies of all relevant documents, as the Trustee may reasonably require to monitor compliance with the conditions and obligations under these commitments. Nestlé and Ralston Purina shall be available for regular meetings with the Trustee, according to a timetable agreed between them, in order to provide the Trustee, either orally or in document form, with all information necessary for the completion of his task. At the request of the Trustee, Nestlé and Ralston Purina shall provide the Trustee with access to sites which are being divested. Nestlé and Ralston Purina shall provide all managerial and administrative support which may reasonably be requested by the Trustee on behalf of the management of the Divested Business.

F. The review clause

24. The Commission may, upon request from Nestlé or Ralston Purina showing good cause and after hearing the Trustee, and where relevant allow for:

a) an extension of the Divestment Period, or

b) the sale of the Divested Business to a purchaser proposed to the Commission without one or more assets, facilities, contracts or other rights or obligations that are part of the divested Business, or

c) waive one or more of the conditions and obligations in these commitments.

Except in exceptional circumstances, Nestlé and Ralston Purina shall address any request for an extension of time periods no later than one month prior to the expiring of such time period, showing good cause.

Vevey, 26th July 2001

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duly authorised for and on behalf of Nestlé

Brussels, 26th July 2001

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duly authorised for and on behalf of Ralston Purina