NON-CONFIDENTIAL VERSION

PROPOSED ACQUISITION OF METLAC HOLDING S.R.L. AND METLAC S.P.A. BY AKZO NOBEL COATINGS INTERNATIONAL B.V.

Initial Submission from the Metlac Group

June 14, 2012

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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A. EXECUTIVE SUMMARY

1. This Initial Submission sets out the views of the Metlac Group on the proposed acquisition of *de iure* control of Metlac Holding S.r.l. ("HoldCo") and Metlac S.p.A (together with HoldCo and other group entities, "Metlac") by Akzo Nobel Coatings International B.V., a wholly owned subsidiary of Akzo Nobel N.V. ("Akzo" and, together with Metlac, the "Parties") (the "Transaction").

2. In this Submission, Metlac sets out the bases for its view that the Transaction is likely to give rise to a substantial lessening of competition ("SLC") in the UK through unilateral effects in the relevant EEA-wide metal packaging coatings markets. In short, Metlac considers that unilateral effects are highly likely to arise post-Transaction, as compared to the *status quo* counterfactual because:

   - The metal packaging coating sector is highly concentrated and would be further concentrated by the Transaction (just three suppliers would remain in some segments, with an ineffective fringe);
   - The Transaction would eliminate "*the most competitive supplier overall*";[1] it would also remove a very close competitor to Akzo the effect of which is that a price increase by Akzo would be significantly less costly);
   - [CONFIDENTIAL];
   - High switching costs and inelastic demand limit customers' ability to frustrate a price increase;
   - Entry is highly unlikely and would not, in any event, be timely (*i.e.*, it would not effectively defeat a price rise); and
   - Customers do not have sufficient countervailing buyer power to counteract the SLC.

3. On the basis of these factors, Metlac strongly believes that the Transaction would result in an SLC in the UK (and across Europe), and that the Competition Commission should prohibit the Transaction.

B. THE PARTIES

I. Akzo

4. Akzo is a multinational group of companies headquartered at Strawinskylaan 2555, 1077 ZZ Amsterdam, the Netherlands. It manufactures and sells chemical products, paints, and a wide variety of coatings (including metals packaging coatings). Akzo employs approximately 60,000 employees in more than 80 countries worldwide. It has more than 30 production plants in several EU and non-EU countries.

5. Akzo entered into the packaging coating business through the 2008 acquisition of Imperial Chemical Industries plc ("ICI"), which had an established business and had

[1] *See* OFT's decision on reference under Section 33(1) of the Enterprise Act 2002 (the "Act") dated May 23, 2012, in case ME/5319/12 (the "OFT's Decision"), para. 73.

traditionally been the market leader. As part of its acquisition of ICI, Akzo also acquired a minority shareholding in HoldCo and Metlac S.p.A. The acquisition of ICI by Akzo was approved by the European Commission on December 13, 2007.[2] In 2010, Akzo acquired the powder coating business of Rohm and Haas Chemicals LLC,[3] as well as Lindgens Metal Decorating Coatings & Inks AB, whose activities focus on solutions of coatings and inks for the metal packaging industry. Further information on Akzo is available on its website: www.akzo.com.

II. Metlac

1. History

6. The Metlac group was founded in 1986. It resulted from the acquisition of IVI's metal packaging business from PPG by three Italian families (the Bocchio, [CONFIDENTIAL] and [CONFIDENTIAL] families). In addition to the three families, Coates Brothers plc acquired a minority shareholding in the company. The company was originally called Coates Italia S.p.A.

7. In 1994, Total S.A. acquired Coates Brothers plc and thereby obtained the minority shareholding in Coates Italia S.p.A.

8. In 1996, Total S.A. sold Coates Brothers plc to Valspar Corporation and sold its minority interest in Coates Italia S.p.A. to the three Italian families mentioned above.

9. In 1997, the three Italian families sold a part of their shares in Coates Italia S.p.A. (a 44.44% stake) to Mortar Investments International Limited, a subsidiary of ICI. As part of this transaction, ICI was granted a call option[4] for the remaining shares (the 55.56% controlling stake) in Coates Italia S.p.A. (belonging to the Bocchio, [CONFIDENTIAL], and [CONFIDENTIAL] families). This option was exercisable at [CONFIDENTIAL].

10. In 1998, the company changed its name to Metlac S.p.A.[5]

11. In 2007, the members of the [CONFIDENTIAL] and [CONFIDENTIAL] families wished to sell their shares in Metlac S.p.A., but the members of the Bocchio family did not. The corporate structure of the Metlac Group was therefore changed with the agreement of ICI. This was effected by creating HoldCo, a company whose shareholding was owned as to 51% by the Bocchio family[6] and as to 49% by ICI Italia S.p.A. The shareholdings of the three Italian families were transferred to that company. As part of this transaction, ICI and the Bocchio family agreed to amend the

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2 *See* decision of the European Commission of December 13, 2007, Case COMP/M.4779, *Akzo Nobel/ICI*.

3 *See* decision of the European Commission of April 21, 2010, Case COMP/M.5745, *AkzoNobel/Rohm and Haas Powder Coating Business*.

4 *See* Article 7.9 of the Shareholders Agreement of November 14, 1997 (attached as Annex 1.1 to Metlac's letter of May 31, 2011). [CONFIDENTIAL ANNEX]

5 In the same year, Metlac acquired Sicra S.r.l., a company active in the manufacture of coatings for collapsible tubes and monobloc aerosols, then incorporated into Metlac S.p.A.

6 17.87% being held by Mr. Pier Ugo Bocchio; 16.56% by Mr. Davide Bocchio; and 16.56% by Mr. Diego Bocchio.

call option over Bocchio's shareholding: it would now be exercisable in the period between October 1, 2011 and September 30, 2012 (the "Call Option").[7]

12. In 2008, Akzo acquired ICI. As part of that transaction, ICI Italia S.p.A.'s shareholdings in HoldCo, together with the Call Option, were transferred to an Akzo subsidiary, Akzo Nobel Coatings International B.V. Similarly, Mortar Investments International Limited, including its 44.44% stake in Metlac S.p.A., became part of the Akzo group.

2. Corporate Structure

13. At present, the Metlac group comprises the following entities:

- ***HoldCo***, the holding company of the group, with no activities other than holding a 55.56% interest in Metlac S.p.A.;
- ***Metlac S.p.A.***, the operating company of the Metlac Group, which manufactures and sells coatings used for the protection and decoration of metal packaging, mostly containing food and beverages ("packaging coatings"). Metlac operates its packaging coating business through a single factory located in Bosco Marengo (Alessandria), Italy;
- ***Ce.ri.tec. S.r.l.***, a company specializing in R&D, wholly-owned by Metlac S.p.A. Ceritec S.r.l.'s premises are located in Bosco Marengo, adjacent to Metlac S.p.A.'s production site; and
- ***Metinks S.r.l.***, a company active in the manufacturing and sale of liquid inks used on top of coatings for the external decoration of metal cans ("metal decorating inks"), wholly-owned by Metlac S.p.A. Metinks S.r.l.'s plant is located in Cava dei Tirreni (Salerno), Italy.

14. A graphical illustration of the structure of the Metlac group was provided as Annex 1.4 to Metlac's letter of May 31, 2012.

C. THE TRANSACTION

15. This Transaction concerns the exercise of the Call Option. The exercise of the Call Option was effected by written notice pursuant to Article 8.5.2 (b) of HoldCo's Quotaholders' Agreement and sent to Mr. Pier Ugo Bocchio on December 23, 2011. A copy of the letter was provided as Annex 1.6 to Metlac's letter of May 31, 2012. [CONFIDENTIAL ANNEX]

16. As stated by the OFT,[8] Akzo currently has a minority shareholding in Metlac through which it is able to exert material influence.[9] The exercise of the Call Option would

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[7] *See* Article 8.5.2 (a) of the agreement entered into by HoldCo's Quotaholders on September 30, 2007 (attached as Annex 1.2 to Metlac's letter of May 31, 2012). At the same time, on December 4, 2007, Metlac S.p.A.'s shareholders entered into a new Shareholders Agreement (provided as Annex 1.3 to Metlac's letter dated May 31, 2012). [CONFIDENTIAL ANNEXES]

[8] *See* OFT's Decision, paras. 6-10.

[9] The reply to question 9 in Metlac's letter of May 31, 2012 explains why the rights conferred to Akzo fall within those typically granted to minority shareholders to protect their investments.

confer *de iure* control over Metlac on Akzo. More specifically, Akzo Nobel Coatings International B.V. would directly hold 100% of HoldCo's quotas, and indirectly hold 100% of the shares of Metlac S.p.A., thereby acquiring *de iure* control of HoldCo and Metlac S.p.A., together with the other Metlac group entities.

D. THE COATINGS INDUSTRY

I. Products

17. The Parties' activities overlap in the manufacturing and sale of metal packaging coatings (*i.e.*, used for interior and exterior application to metal cans mostly containing food and beverages) and metal decorating ink.

18. As recognized by the OFT, metal packaging coatings and metal decorating ink (which are manufactured using raw chemical materials) are both intermediate products in the production of metal packaging, principally cans for food and beverage content and fillings. Metal packaging coatings provide a thin film bonded to a base metal packaging that provides a barrier designed to protect the package content from reacting with the packaging and/or external contaminants, and also to protect the external surfaces from deterioration. In contrast, ink is designed solely to decorate and embellish the packaging. Ink requires exterior coatings before and after application, in addition to the ink itself.

19. Metal packaging coatings can be used both internally and externally in a wide range of applications, including food cans, beer and beverage containers, easy open ends, caps and closures, and tubes. Examples of these products are illustrated below.

Food

Easy-Open Ends

General Line

Beer and Beverage

Tubes

Caps and Closures

20. Packaging is generally coated with different types of coatings, namely enamels and clear varnishes on its external side, and enamels and lacquers on its internal side. The manufacturing processes differ as between enamels, on the one hand, and clear varnishes and lacquers, on the other:

    - Enamel is manufactured by dispersion (pigments, such as titanium dioxide, used in the production of white enamels, *i.e.*, the most common ones, are usually dispersed through high-speed dispersers and/or sand mills); and

    - Clear varnishes and lacquers are usually manufactured by mixing different resins, solvents, and additives.

21. In addition, different raw materials are used in the production process. Some coatings are produced using water-based technologies, whereas different technologies use other solvents. Resins used include epoxy, polyester, acrylic, and organosol.

22. Coatings may also vary by (1) the end-use, including the type of metal (aluminium and steel), (2) interior or exterior application, (3) application process (application to the sheet, coil or cylindrical can), and (4) the content or filling (beer and other beverages, food, aerosol, collapsible tubes, caps and closures). Accordingly, the product supplied to a particular customer is typically highly specialized and tailored to that customer's individual needs.

II. Supply Chain

23. Metal packaging coating services are typically provided to consumer packaging manufacturers. These companies provide packaging (in coated form) to their customers, typically food and beverages companies such as Coca-Cola and Heinz, but also for other end-uses, such as paint manufacturers' tins (including Akzo's downstream operations). The four largest European consumer packaging customers (namely Rexam, Crown Cork, Ardagh, and Ball) make up significantly more than 50% of European demand.

24. As noted by the OFT,[10] major customers of metals packaging companies have very specific approvals and certification processes that a supplier of coatings must satisfy to become qualified. This process involves:

- ***Testing*** the supplier's coatings in their factories and requesting necessary adjustments to the chemical composition of the coating based on the type of infrastructure/technology being used. This process can take up to one year and is costly.

- ***Adapting*** the coatings to the specific needs of the packaging companies' own individual customers. Such users stipulate the exact composition, shape and appearance of the packaging, including its internal and external coatings and this is a costly process. Examples of final customers of packaging coated with Metlac's products that have specific product requirements include Coca Cola, Nestlé, Mars, Red Bull, Masterfood, Heineken, Heinz, Unilever, and the Bolton group.

- "***Certifying***" the suppliers through complex approval procedures that include not only tests on the quality of the products and their responsiveness to the customer's requirements (*e.g.*, in terms of content, applied film, and performance), but also the very characteristics of the supplier, such as environmental policy, health and safety program, disaster recovery, capacity, and records control. Packaging coating customers typically carry out audits directly at the premises of their suppliers to check the compliance to their standards. Given that, for most of their purchases, major customers only switch between certified suppliers, certification is a key element to a supplier's growth and competitive strength.[11]

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10 *See* OFT's Decision, paras. 33-35, and 95.

11 More specifically, in case of approved/certified suppliers, the time required to approve a new product may be somewhat shorter for coatings for external use in less sophisticated packaging, such as general line (about four months) and food (between six to twelve months). Caps and closures and beer and beverages external coatings are more complex and the approval of new products usually requires around one year. By contrast, the time period required for the approval of internal coatings usually exceeds one year. If the incoming supplier is not already certified, and assuming he already has the prerequisites in terms of safety, capacity and quality to pass the complex approval producers, the switching process is much longer and "*can take up to three or four years*" (OFT's Decision, para. 95). Metlac also notes that switching is not only time-consuming, but also very expensive. By way of example, based on feedback from customers, and taking into account the overall period from testing in the laboratories to trials along the production lines, the cost to approve a new beer and beverages product could easily exceed € [CONFIDENTIAL]. This is also due to the fact that testing new coatings requires dedicating the production line of a beer and beverages can manufacturer to the trial,

25. These requirements mean that many suppliers (in particular smaller suppliers) often find it challenging to achieve certification at customers.

26. As explained in greater detail below, customers increasingly demand new and innovative products to satisfy the needs of their customers. For example, Coca-Cola, a leader and trend setter in the packaging industry, requires bisphenol-A free coatings,[12] and Metlac has invested heavily in R&D to develop solutions to this request.

III. Parties' Activities In Coatings

27. ***Metlac.*** Metlac is active in the production of a complete range of coatings for food, caps and closures ("C&C"), and general line ("GL") applications. It also offers a complete range of exterior coatings for beer and beverages ("B&B") containers. In 2011, Metlac offered for sale [CONFIDENTIAL] different coatings, significantly more than any of its competitors including Akzo (see Annex 1, which categorises Metlac's offering by end-use; and Annex 2, by the combination of technology/principal raw materials employed in the production process and products' end-use [CONFIDENTIAL ANNEXES]).[13] [CONFIDENTIAL].

28. ***Akzo.*** Akzo's coatings business includes coatings for several end-use applications. These include coatings to decorate buildings, paint aircrafts or ships, applied to plastics or used in the production of steel and aluminium coil. Akzo is also active in the supply of packaging coatings and offers a wide range of products (though its portfolio is not as wide as Metlac), covering also B&B inside spray.

29. [CONFIDENTIAL]

E. MARKET DEFINITION

30. As explained above, the Parties' activities overlap in the manufacturing and sale of packaging coatings. The Parties' activities also overlap with respect to metal decorating inks.

I. Relevant Product Markets

1. Packaging Coatings

31. To the best of Metlac's knowledge, the UK competition authorities have not previously considered the relevant markets for metals packaging coatings or metal decorating ink. In *PPG/Sigmakalon*, the European Commission considered whether the metals packaging coatings sector should be sub-divided by end-use (beverage cans, food cans, closures and others) and, within these segments, by target area (*i.e.*,

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inevitably resulting in a period of interruption and loss of production. (Typically, a production line processes thousands of cans per minute.)

12 Bisphenol A is an organic compound that has been shown to exert hormone-like properties.

13 Metlac's 2010 and 2011 packaging coating sales by country, in volume and value (attached as Annex 10.1 to Metlac's letter of May 31, 2012). [CONFIDENTIAL ANNEX]

internal or external).[14] However, it preliminarily decided that the relevant market for the purposes of that concentration should be the overall market for packaging coatings "*given the strong supply-side substitutability (switching of the production between various sub-segments can be done in short time at virtually no cost) and similar technologies used in the production process of all sub-segments*."[15]

32. ***Demand-side.*** As regards demand-side switching, different end-uses require different coatings. For example, coatings for B&B cans have to be resistant to highly aggressive content. C&C coatings have to be resistant to high temperatures and subsequently capable of opening and resealing. Moreover, as explained above, the requirements of Metlac's direct and indirect customers are highly specialized and the coatings prepared are typically tailored accordingly. Accordingly, two specific coatings are not necessarily substitutable from the demand-side (*e.g.*, coatings produced for Coca-Cola would not be substitutable with coatings produced for Heinz Baked Beans) and customers could not and would not switch, at the margin, even if the supplier were to impose a significant price increase.

33. ***Supply-side.*** As regards supply-side switching, the Merger Assessment Guidelines state that:

> "*the boundaries of the relevant product market are <u>generally determined by reference to demand-side substitution alone</u>. However, there are circumstances where the Authorities may aggregate several narrow relevant markets into one broader one on the basis of considerations about the response of suppliers to changes in prices. They may do so when:*
>
> - *Production assets can be used by firms to supply a range of different products that are not demand-side substitutes, and the firms have the ability and incentive quickly (generally within a year) to shift capacity between these different products depending on demand for each; and*
>
> - *The same firms compete to supply these different products and the conditions of competition between the firms are the same for each product; in this case aggregating the supply of these products and analysing them as one market does not affect the Authorities' decision on the competitive effect of the merger*".[16] [Emphasis added]

34. Metlac acknowledges that there may be a degree of supply-side substitutability associated with the production of certain packaging coatings (mostly those for food cans, C&C, and GL, while, as explained below, B&B coatings should be treated separately). However, Metlac considers that it is not cheap or quick to switch production lines dedicated to different end-uses.

35. In particular, major customers have become more demanding and conscious of the risks arising from cross-contamination. They often dictate that a separate production

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[14] *See* decision of the European Commission of December 10, 2007, Case COMP/M.4853, *PPG/Sigmakalon*, para. 40.

[15] *Id*., paras. 40-41.

[16] *See* Merger Assessment Guidelines, para. 5.2.17.

line should be used for each end-use, even where coatings are based on the same chemical formulation (for example, epoxy).[17] Coatings intended for a given segment are typically produced separately from coatings intended for other segments and, in any case, Metlac's manufacturing operations are organised according to that principle.

36. Metlac considers that supply-side switching is made more difficult by the development of new technologies. For example, the ultra-violet technology, based on specific resins that are cured through the use of ultra-violet lights, can only be used for the manufacture of coatings that do not get in touch with food or beverages. Similarly, new processes that eliminate chemical agents perceived as dangerous for human health such as Bisphenol A, phenol, formaldehyde, and melamine require entirely separate manufacturing processes and different quality raw materials than has been traditionally employed in the industry.

Specific Characteristics Of B&B

37. There is evidence suggesting that coatings for internal B&B cans should, in any event, be treated as distinct from C&C, food, and GL coatings (also known as "FCG" coatings). The reasons supporting such a segmentation were recognised by the OFT[18] and can be summarised as follows:

- ***Different processes to coat the packaging***. B&B cans are generally manufactured as a two-piece can (the can itself plus can end), while FCG cans are generally made of three pieces (base, walls and lid).[19] Therefore, the application process used to coat B&B cans differs from that employed to coat other types of metal packaging. In particular, FCG coatings are applied on flat sheets through a roller-coating process (customers coat sheets on both the internal and external sides, sheets are put in ovens for about 20 minutes, and the coated sheets are then shaped depending on the type of packaging needed). B&B coatings are applied to the internal surface of beverage cans through a technology called "inside-spray", which involves coating each can separately from the other using guns which inject airless spray into the can for about one second. The can is then coated on the external surface by directly roller-coating the cylindrical cans (and not the

[17] For example, while internal coatings for food and for GL may be based on epoxies, their production is kept separate in order to avoid cross-contamination. More broadly, it is generally impossible to switch capacity between a product line dedicated to a given formulation (*e.g.*, water-based enamels) to producing coatings based on another formulation (*e.g.*, solvent-based enamels). By contrast, it is theoretically possible to switch the capacity between product lines set up to produce C&C, food, and GL coatings, assuming both are based on the same technology/raw materials. However, in order to do so, it would be necessary to undertake a complete and thorough "clean down" and decontamination of the line, and possibly also to replace pipes. In addition, it would be necessary to reconfigure the software that controls the process according to the new formulation. [CONFIDENTIAL].

[18] *See* OFT's Decision, para. 29.

[19] In Europe, B&B cans are only sold as two-piece cans (B&B three-piece cans may eventually be found in some shops specialised in importing food from Far East countries, like China). While food packaging is generally made of three pieces, two-piece packaging for food is becoming commonly used for small-sized cans, such as those used for sardines, tuna, and snacks. In any case, there remains an important difference between two-piece B&B cans and other types of two-piece cans, namely that B&B cans are coated internally through the inside-spray technology and externally by roller-coating the cylindrical cans, while other types of two-piece cans for food are still coated with a roller on flat sheet (inside and outside).

flat-sheets as for FCG packages). Given that each can is coated separately from the other, the B&B coating process runs much faster than the roller-coating process used for FCG sheets (B&B can manufacturers dedicate separate lines to B&B coatings running 24 hours per day). Therefore, coating suppliers need to ensure a much higher and prompt level of assistance to B&B manufacturers, in order to allow them to react instantly and effectively to any possible difficulties and ensure continuity in the production process.

- ***Different technologies***. All B&B coatings (except those for EOE and UV external rim) are produced using water-based technologies, while the vast majority of FCG coatings are manufactured through solvent-based technologies. This makes it very difficult, without spending very significant time and resources, to switch capacity from lines dedicated to B&B coatings to other end-uses, or vice-versa, given the different technologies used (*i.e.*, water-based for B&B and mostly solvent-based for FCG coatings). Production lines dedicated to B&B coatings are kept entirely separate from other production lines and are located in separate areas fully dedicated to the production of B&B coatings. In the context of the OFT's market test, one customer also noted that the development of products that exclude certain chemical agents perceived as dangerous for human health (such as BPA) creates additional differences between B&B and non-B&B products.[20]

- ***Different chemical properties***. B&B coatings have chemical properties which differ significantly from those of FCG coatings, the latter being more durable and chemically resistant, *e.g.*, in terms of dry solid[21] (around 20% for B&B coatings and between 35-65% for FCG coatings), shelf-life (in Europe, B&B's shelf life is of 6-12 months, while that of FCG packages is of at least 24 months and it can even be significantly higher), and polymer properties (given that FCG sheets are coated in ovens for approximately 20 minutes, polymers contained therein are more cross-linked, and thus much more resistant, than polymers contained in B&B coatings). In this respect, some respondents to the OFT's market test noted that, given that B&B cans often have aggressive content, B&B coatings need to pass different regulatory and customer requirements and tests, such as acidity tests, pack storage tests, *etc.*[22]

- ***Margins.*** [CONFIDENTIAL]

- ***Suppliers.*** [CONFIDENTIAL]

- ***Higher barriers to entry into the manufacturing of B&B coatings***. While the overall packaging coating sector is generally characterized by high barriers to entry, barriers to entry into the manufacturing of internal B&B coatings are even

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20 *See* OFT's Decision, para. 29.

21 "Dry solid" is a terminology used to indicate the amount of liquid coating that actually sticks to the packaging after its application. In fact, when applied, most of the liquid coating evaporates and only part of it remains on the packaging to form the coated internal or external surface. In addition, customers generally evaluate the price of a given coating by referring to so called "dry-prices", *i.e.*, by comparing the price to the coating's dry solid performance.

22 *See* OFT's Decision, para. 29.

higher. There are several reasons why very few coating manufacturers have so far invested in the traditional inside-spray technology, including:

(i) The technology is partially protected by patents;

(ii) The production of B&B coatings requires significant investment in resources and time (€ [CONFIDENTIAL] million, and at least one year);

(iii) Customers are unwilling to undertake a burdensome switching process (up to two years) unless the new supplier is able to guarantee a significant price reduction, which is difficult in circumstances where the supplier has just invested heavily in the development of the technology and needs to recoup that investment. In this respect, it is worth noting again that prices, and margins, for internal B&B coatings are the lowest in the entire sector; and

(iv) In light of the continuous coating process (B&B manufacturers' plants are active 24 hours per day), risks associated with B&B coatings are significantly higher: an error in the formulation of the coating is capable of spreading in a very short period to an extremely high number of cans. Accordingly, even a small mistake by manufacturer of B&B coatings can result in liability for very significant damages.

38. [CONFIDENTIAL]

2. Metal Decorating Inks

39. Metlac notes that, in terms of applications, inks are used for decorative purposes on top of coatings. Given that the technologies and raw materials used in the production of inks are different from those employed in the production of packaging coatings, inks cannot be used as substitutes of coatings. The European Commission has held that inks used in the packaging industry belong to the separate market for packaging inks.[23]

II. Relevant Geographic Markets

1. Packaging Coatings

40. In its previous decisions concerning the coatings industry, the European Commission preliminarily held that the geographic market was EEA-wide, or at least EEA-wide, but ultimately left the precise market definition open.[24]

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[23] See, *e.g.*, decision of the European Commission of August 25, 2005 in Case COMP/M.3886, *Aster 2/Flint Ink*, para. 8, where the European Commission noted that liquid inks, generally used in the packaging industry, belong to a separate market to paste inks, used for printing packages. This is given the very limited substitutability from the demand and supply side between paste and liquid inks. *See also* decision of the European Commission of September 27, 2005 in Case COMP/M.3939, *Electra/CVC/CPI*, para. 16.

[24] *See* Decision *PPG/Sigmakalon*, cit., para. 44; decision of the European Commission of June 30, 1998 in Case COMP/M.1182, *AkzoNobel/Courtaulds*, para. 14; decision *AkzoNobel/Rohm and Haas Coating Business*, cit., para. 23.

41. Metlac considers that the relevant geographic market cannot be wider than EEA-wide. This is because:

- As recognized, by the European Commission, "[m]*any customers, however, highlighted the importance of* [...] *having a local presence in the various EEA Member States in which the customer was located citing reasons such as technical assistance and short delivery times*".[25] This in turn requires the presence of the supplier's technicians onsite, as well as ongoing training of the customers' personnel (high-quality suppliers offer tailor-made solutions, *i.e.*, developed for specific customers and applications). This is evidenced by reference to Metlac's own operations (given that Metlac does not have a presence outside the EEA that would allow it to provide an effective customer service, the vast majority of its total production (in 2011, approximately [>80]%) is sold to customers in the EEA, and a further substantial portion of its output is sold into adjacent countries, such as [CONFIDENTIAL]).

- The quality of the packaging coatings manufactured for European customers is generally different than for customers in other regions.[26] This is also due to the fact that in some EU Member States the manufacture of coatings is subject to particularly strict requirements.[27]

- In addition to higher transportation costs, exports from the EEA to other regions in the EMEA are often subject to the payment of custom duties and require formalities, such as health certificates. As a result, according to Metlac's estimates, the European production of packaging coatings satisfies around [>90]% of the demand of European customers, while imports are negligible.

- Finally, prices differ significantly between the EEA and other regions (for products having equivalent quality standards, EEA prices are more than 10% to 12% lower than prices in, for example, the United States).

42. These factors support Metlac's view that the relevant markets are EEA-wide in scope. Metlac has therefore concentrated its analysis at the EEA-wide level but has also provided data on a UK-wide basis where relevant.

2. Metal Decorating Inks

43. In line with the European Commission's conclusion that "*ink markets are EEA-wide in scope*",[28] Metlac considers that geographic market should be defined as EEA-wide.

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25 *See* Decision *AkzoNobel/Rohm and Haas Coating Business*, cit., para. 24.

26 A six month shelf-life is generally sufficient in the United States for a B&B can, while packaging coatings sold in the EEA should have a longer shelf-life.

27 *E.g.*, France has recently adopted legislation to ban the use of bisphenol A, an organic compound of the resins currently used to coat cans.

28 *See, e.g.*, decision *Aster 2/Flint Ink*, para. 13.

F. UNILATERAL EFFECTS

44. Metlac considers that the Transaction is highly likely to give rise to unilateral effects in the European metal packaging coatings industry as compared to the *status quo* counterfactual. This reflects the following considerations.

I. Levels Of Concentration

45. The metals packaging coating markets have experienced significant consolidation in recent times. For example, Akzo acquired ICI in 2008 and Lindgens in 2011, PPG acquired SigmaKalon in 2010, and Valspar acquired Coates Brothers plc in 1998 and DIC Coatings India Limited in 2007. Today, the major suppliers of packaging coating are Akzo, Metlac, Valspar Corporation ("Valspar"),[29] and PPG Industries, Inc ("PPG").[30] Following the Transaction, there will only be three major suppliers in most segments. In addition to the major players, there exist a limited number of smaller suppliers.[31] These smaller competitors do not constitute a strong fringe because:

- They do not typically offer a complete range of coatings (they typically specialize in certain types of coatings or are predominantly active in the manufacture of other products[32]);
- They have limited productive and spare capacity;
- They do not typically have significant R&D capabilities;
- They are not always active on a pan-European basis; and
- They are not typically certified by major customers, who represent the majority of demand, and are unlikely to be certified in the relevant timeframe for merger control purposes.

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29 Valspar is a multinational company headquartered in the United States. It provides coatings for a wide range of applications, including aerosols and specialty cans, beverages, caps and closures, drums and pails, food cans, plastic containers, and tubes. In 2011, 86% of Valspar's sales were generated outside Europe.

30 PPG is a multinational company headquartered in the United States. It is a global supplier of coatings, inks, compounds, pre-treatment chemicals and lubricants for metal and plastic containers for the beverage, food, cosmetic, pharmaceutical, paint and chemical industries. In 2011, 83% of PPG's revenues were generated outside Europe.

31 Among smallest suppliers, the main ones are: (i) W.R. Grace & Co., including its branch Darex and the recently acquired Spanish company Sistiga ("Grace-Darex"), (ii) Salchi Metalcoat S.r.l., which acquired Rembrandtin Lack GmbH Nfg. KG in 2011 ("Salchi-Rembrandtin"), (iii) Actega Rhenania GmbH ("Actega Rhenania"), belonging to the Altana group, and (iv) Schekolin AG ("Schekolin"). In addition, the market may comprise negligible quantities sold in Europe by other suppliers having a presence limited to single territories (with EEA packaging coating revenues generally not exceeding € 1 million), such as the U.S. company Watson Standard that, in the past, has rarely exported limited quantities of packaging coatings to Europe.

32 For example, Metlac understands that Actega Rhenania and Grace Darex are predominantly active in the sealant/compound market (which is separate from the packaging coating market) and have only small activities in the manufacture of packaging coatings in the EEA.

46. Metlac does not believe that any industry report contains accurate and complete share data on the relevant markets (and sets out in Annex 3 the reasons why it believes that third party reports produced by Irfab and the information collected by the Bundeskartellamt are unreliable [CONFIDENTIAL ANNEX]). Metlac has used its own industry knowledge (including data provided from customers representing over [CONFIDENTIAL]% of the industry in terms of volumes produced[33]) and industry consultants to produce data that it believes to be reliable. The following tables provide Metlac's estimates of total EEA-wide sales of packaging coatings by end-use segment in 2010 and 2011, with an indication of Akzo's and Metlac's combined share of sales.

Table 2 - Metlac's estimates of EEA-wide sales of packaging coatings

Volume (Tons) - 2010 - EEA					
	Akzo[34]	**Metlac**	**Akzo + Metlac**	**Total EEA Sales**	**Combined Share**
B&B	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
C&C	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Food	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
GL	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Total	**[50,000-100,000]**	**[0-50,000]**	**[50,000-150,000]**	**[<300,000]**	**[50-60]%**

Volume (Tons) - 2011 - EEA					
	Akzo[39]	**Metlac**	**Akzo + Metlac**	**Total EEA Sales**	**Combined Share**
B&B	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
C&C	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Food	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
GL	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Total	**[50,000-100,000]**	**[0-50,000]**	**[50,000-150,000]**	**[<300,000]**	**[50-60]%**

Value (€) - 2010 - EEA					
	Akzo[39]	**Metlac**	**Akzo + Metlac**	**Total EEA Sales**	**Combined Share**
B&B	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
C&C	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Food	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
GL	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Total	**[150,000,000-200,000,000]**	**[50,000,000-100,000,000]**	**[200,000,000-300,000,000]**	**[<600,000,000]**	**[45-55]%**

33 This figure is assessed based on: market reports, such as "The Metal Packaging Market 2011-2021" by Visiongain (attached as Annex 26.2 to Metlac's letter dated May 31, 2012); general market information provided by clients; and, for beverage cans, on "The Canmaker", www.canmaker.com, a magazine specialized in the relevant downstream packaging market, or reports available on the website of Beverage Can Makers Europe, www.bcme.org.

34 Estimates of Akzo's sales are based on the information provided by Akzo to the *Bundeskartellamt* on its total sales.

Value (€) - 2011 - EEA					
	Akzo[39]	**Metlac**	**Akzo + Metlac**	**Total EEA Sales**	**Combined Share**
B&B	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
C&C	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Food	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
GL	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Total	**[150,000,000-200,000,000]**	**[50,000,000-100,000,000]**	**[200,000,000-300,000,000]**	**[<600,000,000]**	**[45-55]%**

47. Based on Metlac's estimates, the other competitors' 2011 shares of the EEA market for packaging coatings are as follows:

- Valspar: [15-25]%;
- PPG: [10-20]%;
- Other smaller competitors: collectively approximately [10-20]%.[35]

48. As may be seen from these data, Akzo would, post-Transaction, be the strongest player in the European market by some distance. It would have shares greater than [45-55]% in all segments, except B&B.

49. Metlac believes that the Parties' combined shares of supply are significantly higher at the UK level. [CONFIDENTIAL]. According to Metlac's calculations,[36] Akzo's combined share post-Transaction would be [65-75]% by value (increment of [1-10]%) and [65-75]% by volume (increment of [1-10]%).

50. [CONFIDENTIAL].

II. The Transaction Would Eliminate A Significant Competitive Force

51. The Merger Assessment Guidelines recognize that unilateral effects are more likely where the transaction eliminates a significant competitive force in the market.[37] The Transaction eliminates a company described by the OFT as "*the most competitive* [metal packaging coating] *supplier overall*."[38] In the following sections, Metlac explains why Metlac's current share of supply significantly underestimates its competitive position and why the removal of Metlac from the market will diminish price competition and competition in innovation.

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35 Metlac wishes to note that Table 1 b) at page 13 of the OFT's Decision does not reflect its current estimates given that Metlac had corrected its initial estimates in its February 14, 2012 submission to the OFT, by acknowledging that Valspar and PPG had higher shares of sales. At the same time, the table overestimates the share of sales of the remaining competitors, which, as discussed above, account for a significantly lower proportion of the EEA market.

36 Metlac estimates that total UK-wide sales of packaging coatings amounted to around [0-50]kt/€ [0-50] million in 2011. Metlac's 2011 sales of packaging coatings in the UK were approximately [0-5]kt/€ [0-5] million. Metlac estimates that Akzo's 2011 sales of packaging coatings amounted to approximately [10-20]kt/€ [20-30] million.

37 *See* Merger Assessment Guidelines, paras. 5.4.5 and 5.4.12.

38 *See* OFT's Decision, para. 73.

1. Metlac Has Seen Strong Growth And Expects To Grow Significantly In The Future

52. Metlac's growth over the last decade has outstripped its competitors by a significant margin. By way of example, between 2003 and 2011, Metlac almost doubled its output (from [15-20]kt to [25-35]kt) and [CONFIDENTIAL].[39]

53. In addition, and as a necessary consequence of its growth in output, Metlac has increased exports outside of Italy from [20-30]% of sales in 2003 to around [50-60]% in 2011, with a forecasted growth to [60-70]% by the end of 2012.

54. By contrast, Akzo, Valspar, PPG, and smaller players have not expanded their sales in the same way as Metlac.

55. Metlac's growth has been recognized and facilitated by the major customers in the industry, namely [CONFIDENTIAL]. As demonstrated below, the growth has typically come at the expense of Akzo and to some extent at the expense of Valspar and PPG.[40] As shown in the table below, Metlac's sales to major customers more than doubled in the period 2007-2011.

Table 3 – The growth of Metlac's sales to the three major customers

[CONFIDENTIAL]

56. Metlac's more recent performance provides timely evidence of its effectiveness as an efficient and agile competitor and demonstrates why its historical market share may underestimate its true competitive position. More specifically:

- As shown in Annex 5 [CONFIDENTIAL ANNEX], Metlac's EEA sales in the first quarter of 2012 have increased by [10-20]% as compared to sales in the first quarter of 2011;
- Metlac's 2011 EBIDTA amounted to [15-25]%, while Akzo's amounted only to [10-20]%;
- Metlac's 2011 sales in the UK increased by [15-25]% as compared to 2010 and in the first quarter of 2012, Metlac's UK sales have increased by an additional [15-25]% by comparison to the corresponding quarter in 2011 (the volume of sales has increased by [25-35]%, mostly due to a different mix of products sold to [CONFIDENTIAL]);[41]
- [CONFIDENTIAL]; and
- [CONFIDENTIAL].

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39 [CONFIDENTIAL]

40 Annex 4 provides examples of customers that have switched from Akzo, Valspar and PPG to Metlac in the period 2009-2011. [CONFIDENTIAL ANNEX]

41 Please refer to Annex 24.1 to Metlac's letter of May 31, 2012. [CONFIDENTIAL ANNEX]

57. These statistics show that Metlac is a company poised for aggressive expansion, in particular given that these growth figures were likely dampened by the uncertainty generated by the Transaction.[42]

2. Metlac Has A Reputation For Aggressive Price Cutting

58. The Merger Assessment Guidelines note that unilateral effects are more likely where a transaction involves the elimination of a competitor with a reputation for aggressive price cutting.[43]

59. As noted by the OFT and supported by customers, "*the merger would result in increased prices due to the loss of a lower priced competitor*."[44] The OFT has recognised[45] that Metlac's prices are generally lower than those of its main competitors' (*i.e.*, Akzo, Valspar, and PPG) and, generally, Metlac has a reputation for high quality. Metlac believes, based on customer feedback, that:

- Its absolute prices are lower than the prices charged by Akzo, Valspar and PPG (as noted by the OFT, "*Akzo Nobel (along with Valspar and PPG)* [which] *is perceived to be significantly less price competitive*"[46]);

- The usage costs of Metlac's products are generally [CONFIDENTIAL] lower than those resulting from competitors products;

- Its payment terms are generally longer and more favourable than those offered by its competitors; and

- It is more transparent as to its costs *vis-à-vis* customers than competitors ([CONFIDENTIAL]).

60. [CONFIDENTIAL].

61. Metlac's strategy of supplying quality products at highly competitive prices explains its recent success and the reasons why it was able to win business away from its competitors, including the market leader, Akzo. This is demonstrated by the proxy diversion ratios calculated by the OFT, which show that Metlac won [65 to 75] per cent of the total value of all the contracts lost by Akzo.[47] Similarly, Annex 6 shows the quantities won by Metlac from Akzo in 2011 and in the first quarter of 2012, across all market segments. [CONFIDENTIAL ANNEX] Therefore, it is evident that the Parties closely compete against each other and that "*this evidence of switching points to a significant competitive constraint exerted by Metlac on Akzo Nobel, which would be lost as a result of the transaction*".[48] If the Transaction were allowed to

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42 [CONFIDENTIAL].

43 *See* Merger Assessment Guidelines, para. 5.4.5.

44 *See* OFT's Decision, para. 92.

45 *Id.*, paras. 64-67.

46 *Id.*, para. 65.

47 *See* OFT's Decision, para. 84.

48 *Id.*, para. 91.

proceed, Akzo would not be subject to this constraint and a price increase would be significantly less costly in terms of diversion.[49]

3. Metlac Competes Vigorously On Innovation

62. Metlac considers that, should the Transaction be allowed to proceed, metals packaging coating innovation would decelerate considerably because innovation competition between the two leading innovators would cease to exist. As demonstrated below, Metlac competes vigorously with Akzo in innovation and this competition has both fostered Metlac's growth and benefited customers more generally.

63. Metlac believes that its innovativeness is one reason why important customers, such as [CONFIDENTIAL], who attach most importance to innovation, security and quality, have progressively switched significant portions of their demand away from Akzo and to Metlac. Metlac's innovativeness goes beyond its significant R&D spend; it encompasses a series of additional aspects, such as investment in product range, perfecting its production processes (in terms of full automation, and disaster recovery), and client service. Examples of Metlac's innovativeness are set out below.

64. ***BPA-NI***. Metlac considers that it has the technological edge in Bisphenol A free ("BPA-NI") products. This edge results from the fact that (1) unlike other players, it has developed a complete range of BPA-NI products for all packaging coating segments ([CONFIDENTIAL]),[50] and (2) Metlac's products are BPA-NI but also free of a number of other chemical agents that are perceived as dangerous for human health (*e.g.*, phenol, formaldehyde, and melamine).[51] Based on feedback from customers, Metlac understands that its competitors have focused on products that eliminate only some of the chemical agents mentioned above. Metlac's new products, which are based on [CONFIDENTIAL], are therefore "cleaner" than competitors' products. The following table contains Metlac's sales of BPA-NI coatings by volume in 2011, divided by segment. As may be seen from this table, Metlac's sales of BPA-NI products are significant.

Table 4 - Metlac's sales of BPA-NI coatings by volume (tons) in 2011

[CONFIDENTIAL]

65. Annex 7 contains a list of all the trial samples of new BPA-NI products sent to customers for industrial approval in 2011 and the first quarter of 2012. [CONFIDENTIAL ANNEX]

66. ***Product range***. Metlac's R&D activities are not limited to product quality. They extend to product range, which is a key part of innovation competition (*i.e.*, innovating to produce a wider range than that offered by competitors). As shown in Annex 1 [CONFIDENTIAL ANNEX], in 2011 Metlac offered [CONFIDENTIAL]

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49 *See* Merger Assessment Guidelines, paras. 5.4.7 – 5.4.9.

50 While Metlac's BPA-NI products already cover the main uses within each segment, it is also currently investing in the development of new products to satisfy more specific needs of its customers.

51 [CONFIDENTIAL]

different packaging coatings, capable of satisfying any possible customer needs.[52] This is a result of Metlac's policy of working with each of its customers and also their customers (*i.e.*, purchasers of packaging), in order to customize the product to meet the specific requirements. By contrast, other players have more standardized product offerings, with the aim of maximizing internal efficiencies and margins. In particular, smaller suppliers have typically focused on certain products that could be used for a more limited number of applications. Larger competitors, such as Akzo, Valspar, and PPG, have larger portfolios, although not on a scale comparable to Metlac's portfolio, as these suppliers tend not to customize as much their products.

67. [CONFIDENTIAL][53]

68. ***Production and sales process***. Metlac believes that its production processes are "best in class." In 2002, Metlac introduced a mostly automated manufacturing and storage system that has consistently been improved over time (*e.g.*, as regards environmental protection, health, and safety) – to date, it remains the most automated manufacturing site in the industry. The automated production and storage system ensures the perfect dosage of the compound mixture and minimizes human error. It also requires fewer employees, which means that Metlac's variable cost-base is lower than its competitors'.

69. In addition, Metlac owns the largest plant in Europe (c. 53,000 square metres) in a greenfield location with easy expansion possibilities, equipped with tanks and pumps for fully automated storage and delivery of its products, including:

- [CONFIDENTIAL]

70. These investments resulted in an increase of Metlac's productive capacity up to [CONFIDENTIAL] tons per day (based on three shifts per day). The automated system enables a single employee to monitor more blending operations at the same time. Metlac's investments are therefore structured in a way that production can be increased by [CONFIDENTIAL]% by hiring only new personnel.

71. ***R&D and efficiency***. Metlac provides further evidence of its market leading R&D facilities (and the reasons why it can bring product and process innovations to market more quickly than competitors) in Annex 8. [CONFIDENTIAL ANNEX]

III. [CONFIDENTIAL]

72. [CONFIDENTIAL]

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52 In 1998, shortly after the acquisition by ICI of a minority stake in Metlac, ICI and Metlac entered into two reciprocal licensing agreements covering all their products, with the sole exception of ICI's internal-spray technology. However, both agreements were terminated in 2006 and never renewed. Since 2006, Metlac and ICI (and then Akzo) have fiercely competed also on their respective R&D efforts and Metlac has developed a wider product range. Some customers mentioned these license agreements (*see* OFT's Decision, para. 83). However, customers failed to remark that the agreements were reciprocal.

53 More generally, Metlac's strategy is to develop products that will respond to the most sophisticated needs of each customer. Metlac is thus very much "customer-oriented", while the other main players qualify as "product-oriented", because they prefer to focus on large volume products from which they derive higher profits.

73. [CONFIDENTIAL]

74. [CONFIDENTIAL]

75. [CONFIDENTIAL]

76. [CONFIDENTIAL]

IV. High Switching Costs And Inelastic Demand Will Limit A Customer's Ability To Frustrate A Price Increase

77. The Merger Assessment Guidelines make clear that unilateral effects are more likely where customers have little choice of alternative supplier, for example because of the level of switching costs.[54] The Guidelines also make clear that unilateral effects are more likely where customers are insensitive to changes in price.[55]

78. As noted by the OFT, the packaging coatings industry is characterised by the presence of significant switching costs. Based on the switching information submitted by Akzo, the OFT estimated that switching in the market is very low (around 15% of the total market is contested annually).[56]

79. The specific steps of qualification and certification are described above (see paragraphs 23-26). The complexity and duration of these steps make it highly unlikely that customers could or would effectively be able to counteract a price rise by switching to suppliers that are not certified.

80. The presence of significant switching costs exacerbates the competition concerns arising from the merger by making unilateral effects more likely to occur,[57] especially in a scenario where some of the main packaging coating customers currently source a considerable portion of their EEA demand from the Parties ([CONFIDENTIAL]).

81. As regards competition between certified suppliers, the OFT notes that a feature of the industry is that customers multi-source.[58] Key drivers of any multi-sourcing strategy are security of supply (*i.e.*, being able to purchase products from another manufacturer in the event that those currently satisfying the customer's requirements need to suspend their production) and obtaining products of the desired quality. According to Metlac, the main customers (representing the vast majority of the total EEA demand) require a minimum number of three suppliers in order to apply an effective multi-sourcing policy. Accordingly, the Transaction will force all major customers to satisfy all their requirements (except for low technology products) from the three remaining large suppliers. In this scenario, an SLC is likely because suppliers know

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54 *See* Merger Assessment Guidelines, para. 5.4.5.

55 *Id.*, para. 5.4.9.

56 *See* OFT's Decision, para. 97.

57 *Id.*, para. 139.

58 *Id.*, para. 94.

that customers prefer to certify three suppliers and the absence of credible competitors for one of those spots will lead to less competitive pressure on price.[59]

V. Other Supplies Do Not Represent a Significant Competitive Constraint to Akzo

82. After the Transaction and removal of Metlac as an independent competitor, the three largest remaining suppliers of packaging coatings (Akzo, Valspar, and PPG) would cover well above [75-85]% of the EEA market, and approximately the same percentage at the worldwide level. (Akzo is the leading player in Europe, PPG is particularly strong in Asia, while Valspar mostly focuses on America.) Metlac is the only competitor that has shown itself capable of challenging the position of these suppliers, as witnessed by its considerable growth over recent years, its competitive pricing and its efforts in innovation.

83. As to smaller competitors, they do not have the ability to expand their capacity and output in response to a price increase. Given their capacity constraints and lack of significant R&D efforts, they have traditionally played a limited role on the market and this situation is not expected to change in the foreseeable future. In any case (as noted below), even assuming that certain small suppliers had sufficient spare capacity, in Metlac's view, the most important constraint to an expansion of the production is represented by the complex approval procedures established by the main customers. The burden of such approval process lies not only with suppliers, but also with customers, who are therefore reluctant to initiate new testing.

84. Metlac notes that, thus far, it is the only player able to gain significant sales to the detriment of Akzo, Valspar, and PPG, because no other player has been able to meet these customers' needs. It is highly unlikely that any of the smaller players would be able to satisfy the approval procedures required (except in relation to low technology products), or even have the opportunity to attempt to do so. As a consequence, none of them would be able to replace Metlac's role in competing for major customers.

VI. Entry Is Highly Unlikely And Would, In Any Event, Not Be Timely Or Sufficient

85. There has been no successful new entry into the EEA market in the past 10 years. In addition, Metlac considers that entry is unlikely. This is because the market for packaging coatings is characterized by substantial barriers to entry, including:

- The specific know-how required to compete effectively. Given the importance of safety and quality in this market, it is difficult for any new firm to enter quickly, build a reputation and a track record of reliability, and gain trust from customers naturally preferring to opt for well-established brands. Difficulties of switching suppliers identified during the OFT investigation also provide strong evidence of the existence of high entry barriers.

- The ISO qualification procedures, which can be long and costly, and the lead time and investments necessary for starting up a new packaging coating facility (on average, more than two years).

[59] *Id.*, para. 100.

- In terms of regulation applicable to the production process, as a minimum industry standard, packaging coating manufacturers must comply with the detailed regulatory requirements on resinous and polymeric coatings set out by the U.S. Food and Drug Administration.[60] At the EU level, additional legal safety standards are set out in broader terms for all plastic and other materials intended to come into contact with food in Regulation No. 1935/2004 and Regulation No. 10/2011.[61] Packaging coatings must also comply with any supplementary rules imposed by EU Member States.

- Access to raw materials is generally not problematic.[62] However, since raw materials are similar across most types of coatings, coating manufacturers that are active in several markets (*e.g.*, not only packaging but also industrial, coil, marine, etc.) may benefit from quantity discounts, which may confer them cost advantages.[63]

86. Given the high barriers to entry and expansion and the absence of successful entry in the past 10 years, Metlac considers that no credible theory of entry exists that would be likely, timely, and sufficient to counteract a putative price increase.

VII. Customers Do Not Have Sufficient Countervailing Buyer Power To Counteract The SLC

87. Although it is true that certain customers (*e.g.*, [CONFIDENTIAL]) are large, sophisticated corporations able to design procurements to secure competitive prices, it is not the case that they are immunised against price increases. Their negotiating power will be significantly worsened post-Transaction given that fewer certified suppliers will be active in the relevant markets.[64] This is particularly so given that it will typically be less costly to accept the price rise than qualify a new supplier. Given that there would be more "large" customers than suppliers post-Transaction, it is unlikely to be the case that there will be mutual dependency[65] or equilibrium (*i.e.*, customers will likely be more dependent on suppliers than *vice-versa*, which suggests that they will, under normal circumstances, be required to accept and/or pass on the price increase).

88. Further, the Merger Assessment Guidelines make clear that countervailing buyer power will only be sufficient to negate or make less likely an SLC finding where it has the potential to protect all customers.[66] This "umbrella effect" is more likely to be the case where there are no bilateral negotiations between suppliers and customers,

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60 The most recent U.S. rules on food contact substances are set out in section 175.300 of Title 21 of the Code of Federal Regulations.

61 Although EU rules apply to both internal and external coatings, tests are generally stricter for internal coatings, as these come into direct contact with food (as opposed to GL coatings, for example).

62 Suppliers of raw materials are large global corporations (*e.g.*, [CONFIDENTIAL]). These corporations supply to Metlac and its main competitors.

63 [CONFIDENTIAL]

64 *See* Merger Assessment Guidelines, para. 5.9.3.

65 *Id.*, para. 5.9.5.

66 *Id.*, para. 5.9.1.

and the market price of the input is transparent to all suppliers and customers.[67] Countervailing buyer power is unlikely to be sufficient where prices are negotiated bilaterally or individually.[68] In the metal packaging coatings sector, negotiations are always bilateral and secret. The likelihood that the prices secured by larger customers will protect smaller customers is remote. Accordingly, countervailing buyer power will not be sufficient to counteract the SLC.

VIII. Counterfactual

89. As outlined above, if the Transaction does not proceed, Metlac would continue to compete as vigorously with Akzo (and others) as it has to date. It would remain a significant competitive force, expected to grow in all segments [CONFIDENTIAL], and continue to innovate. This would be a more competitive outcome, ultimately to the benefit of customers and consumers.

G. CONCLUDING REMARKS

90. For all of the reasons set out in this Initial Submission, Metlac submits considers there is strong evidence that the Transaction is likely to result in an SLC in packaging coatings the UK, and that the Competition Commission should prohibit the Transaction.

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67 *Id.*, paras. 5.9.6. and 5.9.7.

68 *Id.*, para. 5.9.6.