NON-CONFIDENTIAL VERSION

AKZONOBEL / METLAC MERGER INQUIRY

AkzoNobel's Response to the Competition Commission's Provisional Findings

10 October 2012

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1. INTRODUCTION

1.1 AkzoNobel fundamentally disagrees with the conclusions reached by the Competition Commission ("CC") in its Provisional Findings. We have serious reservations about the CC's assessment of the evidence available to it in this case and, more generally, on the CC's respect for due process in respect of some aspects of the inquiry to date.

1.2 The Provisional Findings provisionally conclude that "*the proposed merger may be expected to result in a substantial lessening of competition in the markets for supply of metal packaging coatings for B&B and FCG, and this effect on competition in this market will also affect competition in the UK*".[1] Two factors were highlighted as particularly relevant to this assessment,[2] namely:

- that Metlac "*provides a significant competitive threat to other firms in the market by virtue of having a novel business model and a record of offering low prices*"; and

- "*a significant proportion of large and small customers which provided us with evidence indicated that they have significant concerns about the transaction*". In this regard, the CC "*invited a wide range of interested third parties to comment on the merger*", "*sent detailed questionnaires to 39 customers and ten competitors", and "gathered oral evidence through nine hearings with selected third parties*".

1.3 In reaching its Provisional Findings, the CC has given insufficient weight to, mischaracterised, or ignored entirely, the large amount of evidence submitted by and on behalf of AkzoNobel. That evidence demonstrates that the transaction does not give rise to any prospect of a substantial lessening of competition for metal packaging coatings in the UK. The CC has instead relied heavily on a limited selection of unsubstantiated assertions by Metlac and on subjective and anecdotal opinions from a relatively small number of customers which have existing business relationships with Metlac. It has failed to undertake proper analysis to test those assertions and opinions. The Provisional Findings are in fact notable for the complete lack of rigorous economic analysis typically associated with in-depth merger inquiries of this nature.

1.4 AkzoNobel urges the CC to re-evaluate the evidence before it, as well as new evidence that is being made available to it, with a view to reaching a final conclusion that the proposed transaction will not give rise to an SLC in the UK. Mr Bocchio has gone to considerable lengths to oppose AkzoNobel's acquisition of full control of Metlac, despite the fact that a full merger of the two businesses has been envisaged since the time that he (and a number of other Italian investors) first established the Metlac joint venture with ICI in 1997 and that he had willingly agreed to grant the call option that AkzoNobel

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[1] Summary of Provisional Findings, at paragraph 54.

[2] *Ibid.* at paragraph 40.

is seeking to enforce. Arbitration proceedings are pending between AkzoNobel and Mr Bocchio in Italy, which may yet take some time to be resolved, but only the CC's clearance is awaited to enable AkzoNobel to take steps to put the full merger into effect.[3]

1.5 In this Response we address the following issues:

- The Provisional Findings do not give sufficient regard to the context of the transaction – including the fact that Metlac is already 71.7% economically owned by AkzoNobel. Furthermore, they do not give sufficient regard to the fact that metal packaging coatings are intermediate products (sold to and used by sophisticated customers) and that their total cost is negligible for end consumers across Europe, even though they play an important role in ensuring that the final products are delivered in a safe and attractive manner. Moreover, the CC has failed to give sufficient regard to the fact that the UK accounts for only a very small proportion of Metlac's sales and the transaction has been approved by the competition authorities elsewhere within and outside Europe. These issues are also addressed at Part 2.

- The Provisional Findings of an SLC are not based on a proper evaluation of the evidence, in particular the economic data to which the CC has had access (from the parties and third parties). They do not provide AkzoNobel with a sufficient understanding of the basis on which the CC has completely rejected the economic analysis and evidence provided by AkzoNobel in these proceedings. Furthermore, they are based on a partial interpretation of evidence obtained from selected customers and competitors, derived from questionnaires sent by the CC. AkzoNobel has serious reservations regarding the way in which those questionnaires were framed, as well as the CC's interpretation of the answers given on key issues. These issues are addressed at Part 3.

- The Provisional Findings do not take account of the numerous countervailing factors which prevent an SLC arising from AkzoNobel's acquisition of full control of Metlac. In particular, the CC has failed to consider the extensive buyer power of the merged group's immediate customers in the B&B sector and the low barriers to expansion in the FCG sector. These issues are addressed in Part 4.

1.6 The proposed transaction concerns the exercise by a Dutch company (Akzo Nobel Coatings International BV) – which is in turn wholly-owned by another Dutch company (Akzo Nobel NV, the parent company of the AkzoNobel group) – of the 51% of the

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[3] The CC's apparent willingness to give Mr Bocchio the benefit of the doubt (as regards various matters of dispute between him and AkzoNobel) may to an extent reflect the Bocchio family's recent record of appealing to the courts (as they have done in Germany). That said, AkzoNobel wishes to make it clear that it would appeal to the Competition Appeal Tribunal any final CC decision that sought to prohibit the transaction. Although the protracted uncertainty that all these proceedings involve is not good for the business or for the parties' customers, AkzoNobel is determined to ensure that its rights in respect of Metlac are respected, and we can see no legitimate basis for the competition and merger control rules being used against AkzoNobel to frustrate that objective.

shares it does not already own in the Italian company, Metlac Holding Srl. Even if the CC were to maintain its Provisional Findings, it would be unlawful, as well as disproportionate, for the CC to prohibit AkzoNobel from acquiring full control of Metlac through its exercise of the call option under the revised contractual arrangements agreed between ICI and the Bocchio family in 2007. The issue of remedies is addressed in the separate initial submission provided by AkzoNobel to the CC on 3 October 2012 (as published in full on the CC's website on 5 October 2012).

2. THE TRANSACTION IN CONTEXT

2.1 The Provisional Findings do not give due regard to the context in which this transaction arises. Instead, the CC pursues a theory of harm based on Metlac's assertions that it operates a novel business model; that does not reflect the reality of the market, as recognised by a number of other competition authorities, including the European Commission (in *PPG/SigmaKalon*) and the Bundeskartellamt (BKartA) in its review of this transaction. In this section, AkzoNobel highlights the following issues:

(i) This CC investigation arises in the context of an ongoing dispute between AkzoNobel and the other investors in Metlac, i.e. the Bocchio family, who have vehemently resisted the exercise of AkzoNobel's call option. This is clearly an important context against which to weigh the evidence presented by Mr Bocchio and Metlac;

(ii) Metlac is currently 71.7% owned by AkzoNobel, and that will remain the case if the proposed transaction does not proceed. The present shareholding structure (which is not likely to change in at least the medium term if the call option is not enforced) generates uncertainty for customers, particularly with regard to the long-term future of Metlac and AkzoNobel's existing wholly-owned packaging coatings business, ANPG (Akzo Nobel Packaging Group);

(iii) Contrary to the depiction of the company in the Provisional Findings, Metlac is not a global supplier of metal packaging coatings, similar in scale to ANPG, Valspar and PPG. It produces metal packaging coatings at just one plant in Italy and is one of a number of smaller and intermediate sized suppliers operating in the EEA. It is only active in one of the three segments in B&B and has a complementary product portfolio to ANPG in FCG;

(iv) Metlac has only a minimal presence in the UK. It does not have any manufacturing facilities or sales offices in the UK (unlike ANPG, Valspar and PPG) and its sales to the UK are relatively insignificant. The vast majority of its total UK sales (of only €[**CONFIDENTIAL**] in 2011) were accounted for by just one customer – Rexam. The transaction will therefore not have any substantial impact on the supply of metal packaging coatings in the UK; and

(v) The CC has failed to give due regard to the wider European context of this transaction and the metal packaging coatings market. This transaction has been unconditionally approved by every other competition authority which has reviewed the case (leaving aside the OFT's first phase review). The CC is the <u>only</u> authority to have identified a competition concern and its decision is directly opposed to that of the BKartA which reviewed the merger on the same EEA-wide basis. Moreover, the Provisional Findings run contrary to the decision of the European Commission in *PPG/SigmaKalon*, both in terms of market definition and on the level of competition in the market.

(i) The exercise of the call option is the subject of ongoing dispute

2.2 The CC has dismissed the history of ICI and AkzoNobel's involvement with the Bocchio family, the ongoing dispute between the parties in relation to the exercise of the AkzoNobel's call option and the future governance arrangements of the company as all being "*essentially irrelevant*" to its analysis of the transaction.[4]

2.3 The background against which this merger inquiry is being conducted and the present ownership arrangements concerning Metlac are, however, important factors in the assessment of the transaction. The CC must take this context into account both (i) in relation to the weight to be attached to the evidence of the Bocchio family and Metlac (and some of Metlac's customers who have been encouraged by the Bocchio family to be more active in expressing concerns than they would have been if the merger had had the full support of the Bocchio family); and (ii) from the point of view of the analysis of both the counterfactual and the extent of current and future competition between Metlac and ANPG.

2.4 As AkzoNobel has repeatedly stated, the CC's inquiry is being conducted against the background of a serious and protracted dispute between the Bocchio family and AkzoNobel regarding AkzoNobel's right to exercise from a certain point in time its long-held and contractually-agreed call option to acquire the remaining shares in Metlac Holding. This campaign of opposition first manifested itself with the unilateral, hostile notification of the proposed transaction by Mr Bocchio, purportedly acting on behalf of Metlac, to a number of merger control authorities (including the OFT) across Europe in late 2011 and early 2012. It has also resulted in arbitration proceedings in Italy commenced by AkzoNobel to protect its call option rights.

2.5 It is self-evident that the Bocchio family, for financial or other reasons, do not wish AkzoNobel to acquire full ownership and control of Metlac through the exercise of its call option, at least in its present terms, and that they have a vested interest in seeing the transaction prohibited. The submissions made by the Bocchio family on behalf of Metlac must be assessed in this light and treated with a healthy degree of scepticism. Similarly, the submissions of customers with whom Mr Bocchio has developed close links, notably Rexam, should be treated in the same fashion. In its Provisional Findings, the CC has clearly not done so. It has instead accepted, almost without reservation, the assertions made by Bocchio/Metlac and customers such as Rexam, in most cases without any form of corroborating evidence or analysis (and despite evidence to the contrary submitted by and on behalf of AkzoNobel).[5] This contrasts markedly with the stance taken by the BKartA, which had cause to censure Metlac's lawyers for orchestrating co-ordinated opposition to the transaction from a number of customers,

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[4] Comments of the Inquiry Chairman, Transcript of AkzoNobel's Hearing with the CC, 18 August 2012, at page 10.

[5] Examples of this, discussed further below, include Metlac's unsupported statement that switching costs are in the order of €1 million (paragraph 8.58), that customers would tolerate a price rise rather than switch (paragraph 9.134) and that ANPG is Metlac's closest competitor (paragraph 8.75). The CC acknowledges that Metlac provides no evidence to support any of these assertions, but accepts their validity.

including Rexam. The Decision Division considered this consultation to be too far-reaching and required that it be stopped immediately.[6]

(ii) Metlac is already 71.7% owned by AkzoNobel

2.6 AkzoNobel's current 71.7% economic interest in Metlac is a critical part of the counterfactual analysis. The Provisional Findings conclude that, in the absence of the transaction, Metlac "*would continue to grow at its current pace with its current business strategy*".[7] The CC also concludes that AkzoNobel would have insufficient control to direct the strategy of Metlac and rejects the possibility that AkzoNobel would act as a "disruptive shareholder". However, the Provisional Findings do not set the ownership of Metlac in the appropriate context.

2.7 First, the present governance arrangements with respect to Metlac were always intended to be temporary. The latest and final shareholders' agreements, agreed between ICI and the Bocchio family in 2007, and the subsequent actions of AkzoNobel in permitting the Bocchio family to run the Metlac business in a quasi-autonomous fashion, allowed Metlac to continue to develop as a business prior to AkzoNobel acquiring full control in 2012. AkzoNobel has no intention of selling its stake to the Bocchio family, whose actual level of interest in acquiring the company[8] and ability to raise the necessary finance is in any event highly dubious. Moreover, neither it nor ICI have ever envisaged or intended to be in a position at the expiry of the FQA and SHA of not being able to acquire 100% ownership and control of the Metlac business. Maintaining the *status quo* is a relatively unattractive position for AkzoNobel and, in particular, for Metlac's customers, who are faced with the long-term alternative prospect of Metlac being operated through uncertain corporate governance arrangements (following the expiry of the FQA and SHA on 5 December 2012), while at the same time losing the benefit of the synergies that would arise from the proposed merger.

2.8 Secondly, the Provisional Findings ignore completely the issue of succession planning. The only solid basis for succession planning for the management of Metlac is that envisaged by the exercise of the call option and the ability of AkzoNobel to take full control of Metlac. Despite holding the majority economic interest in Metlac, AkzoNobel is not aware of any formal succession plans having been devised for the period after Mr Bocchio and his long-serving team step down or otherwise leave their current positions. The CC has not provided evidence of any succession plan being in place, instead relying (without any apparent supporting evidence) on the following assertion: "*Mr*

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[6] Translation of BKartA Decision, at paragraph 16.

[7] Provisional Findings, at paragraph 6.29.

[8] [**CONFIDENTIAL**].

Bocchio assured us that there was a good team of younger staff being prepared to take over".[9]

2.9 In the absence of any evidence of a clear succession plan, the CC's conclusion that Metlac will continue to grow at its current pace is not credible. Mr Bocchio will be 70 years old in December 2012 and his mandate as Managing Director will expire during the first half of 2014. [**CONFIDENTIAL**]. For the past 25 years, Mr Bocchio has presented himself (with a tightly controlled management team) as the focal point of Metlac. Indeed, in his "*preliminary, non-binding manifestation of interest*", Mr Bocchio describes the "*industrial history of Metlac*" as "*centred on the figure of myself and a strict group of collaborators*" [**CONFIDENTIAL**].

2.10 In the absence of the succession plan contemplated by the call option, with Metlac folded into the ANPG structures, it is clear only that the governance of Metlac will progressively become more difficult under the current ownership arrangements, such that the status quo will in particular be a less attractive option for customers compared with the proposed merger.

(iii) Metlac is a far less significant competitor than Valspar and PPG

2.11 The Provisional Findings characterise Metlac as a major supplier of metal packaging coatings and as one of the "*four leading coatings suppliers*", along with ANPG, Valspar and PPG,[10] reinforcing this characterisation by referring to the Metlac Group "*supplying metal packaging products globally from its Bosco Marengo site in Northern Italy*".[11] The Provisional Findings also assert that Metlac is uniquely positioned to challenge Valspar, PPG and ANPG across both the B&B and FCG markets.

2.12 In reality, Metlac is a regional supplier of packaging coatings, operating from a single capacity-constrained site in Northern Italy, with the overwhelming proportion of its business conducted in EMEA and almost half conducted in Italy (where AkzoNobel is essentially not currently active – other than via its 71.7% economic interest in Metlac). Metlac is just one of a number of small and medium-sized operators on the market for packaging coatings in the EEA. In terms of global turnover, geographic scope and manufacturing locations, Metlac is not comparable to ANPG, Valspar or PPG and is

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[9] Provisional Findings, paragraph 6.28. The Provisional Findings makes no further reference as to the identity of this "*good team*", nor is AkzoNobel aware of whom this team comprises.

[10] Provisional Findings, paragraph 7.17.

[11] Provisional Findings, paragraph 3.11. The "Metlac Group" consists of Metlac Holding Srl, whose sole function is to hold the shares of AkzoNobel and the Bocchio family in Metlac SpA and Ceritec Srl, a holding company for Metlac's R&D functions and to "licence that technology". There are only two operating companies, Metlac SpA (packaging coatings) and Metinks Srl (inks). AkzoNobel estimates that coatings accounted for 96% of Metlac's revenues in 2010. The "Metlac Group" does not have any offices or manufacturing locations outside Italy.

closer in scale (in Europe) to Grace, Actega, Salchi and others.[12] It is not a global player – in contrast to AkzoNobel, Valspar, PPG, Grace and Actega.

(v) Metlac has only a minimal presence in the UK

2.13 In the summary of its hearing with the CC, Disostyl states that "*Metlac is probably not a very significant competitor in the UK and therefore [Disostyl] would struggle to see why there would be any significant [affect on] competition within the UK should AkzoNobel acquire Metlac*".[13] AkzoNobel agrees with that assessment.

2.14 Metlac has only a peripheral presence in the UK.[14] Metlac's sales to the UK are extremely small, amounting to just [**CONFIDENTIAL**] kt by volume or €[**CONFIDENTIAL**] by value in 2011.[15] According to the data in the Provisional Findings, Metlac's UK sales accounted for less than [**CONFIDENTIAL**]% of its total turnover for 2011 and just 0.4% of the total EEA-wide metal packaging coatings market by value and volume.

2.15 Of Metlac's *de minimis* sales into the UK, the vast majority were accounted for by sales to a single customer, Rexam, in the B2E segment. As with the rest of Europe, Metlac does not supply coatings to any customer in the B2I or BE segments of the B&B sector in the UK. AkzoNobel estimates that Metlac's sales in the FCG segment in the UK were no more than €[**CONFIDENTIAL**] in 2011, with no sales at all in the "Food" segment and only minimal sales in C&C and GL.

2.16 Unlike Valspar, PPG and ANPG, Metlac does not have any manufacturing facilities in the UK, nor does it have any branch or representative office offering sales or technical support to UK customers. It aims to serve all of its customers from a single site in Northern Italy. This may be adequate for the UK needs of large pan-European or global customers such as Rexam and Crown (and Metlac is clearly well placed to meet the diverse and varied needs and technical requirements of customers in Italy, in particular producers of metal packaging for the FCG sector). However, Metlac's lack of technical support is a critical issue for smaller UK-based customers. This is confirmed by the decision of UK-based metal packaging manufacturer Caldicot not to use Metlac. Caldicot stated at its hearing with the CC that:

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[12] See paragraph 3.9 *et seq* below.

[13] Summary of Diostyl's hearing with the CC, 13 June 2012, at paragraph 19. The paragraph in the CC summary states "*area of competition*", but this appears to mean "*affect on*".

[14] This is in marked contrast to ANPG which has a well-established infrastructure (developed in the face of strong competition, from Valspar and PPG in particular) which can service the needs of customers in the UK, large and small.

[15] Provisional Findings, paragraph 3.11.

"*it was important that its suppliers had production facilities and technical support based in the UK. Caldicot therefore would not consider Metlac as one of its suppliers as it was not a UK-based supplier and due to its size, was unlikely to be able to provide Caldicot with the technical support that larger companies could.*"[16]

2.17 The CC does not refer to any of these factors in its Provisional Findings and instead asserts that the concerns it identifies on the EEA-wide market are likely to give rise to a substantial lessening of competition in the UK. In light of Metlac's marginal activities in the UK and the available evidence of smaller UK-based customers, this conclusion cannot be sustained.

(vi) The European and global context

2.18 Metal packaging coatings are intermediate products sold to sophisticated customers for industrial application which in turn sell their packaging products to other businesses which likewise exercise countervailing buyer power. These customers include giant consumer goods manufacturers, such as Coca-Cola, PepsiCo, Heineken, AB InBev, Unilever, Henkel and others. Metal packaging coatings play an important role in ensuring that the final products (food, drink, toiletries, paints, chemicals, etc.) are delivered in a safe and attractive manner.

2.19 While the Bocchio family have succeeded in drumming up some support from among its existing customer base, on closer inspection that support for the Metlac business does not translate into opposition to the proposed full merger of Metlac into the AkzoNobel group. This has been understood by the other competition authorities which have investigated the transaction, in particular the BKartA, which conducted an in-depth Phase II investigation before granting unconditional clearance.[17]

2.20 The CC's Provisional Findings are therefore completely at variance with those of every other competition authority that has reviewed the merger (including in jurisdictions where Metlac has a greater presence than it does in the UK). The CC has also departed from the views of the European Commission, which assessed the metal packaging coatings market in its 2007 unconditional Phase I approval of the *PPG/SigmaKalon* merger – a decision in which Metlac is not mentioned once.[18] Contrary to all other authorities, the CC has:

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[16] Summary of Caldicot's hearing with the CC, 19 June 2012, at paragraph 8. The CC apparently dismisses this view as irrelevant, asserting at paragraph 7.31 of the Provisional Findings that "*the fact that Metlac supplies support to customers throughout EMEA, including in the UK, from its plant in Italy would seem to counter [the need for supplier to have local support teams]*".

[17] The transaction has also been cleared by other authorities in Europe (Austria and Cyprus), as well as a number of authorities elsewhere in the world.

[18] Case M.4853 *PPG/SigmaKalon* (10 December 2007). The Commission identified "*two strong*" (Valspar, PPG) and "*several small*" competitors (namely Salchi, Lindgens, DIC and Grace) (paragraph 70).

(i) identified separate markets for metal packaging coatings for the B&B and FCG sectors, on the basis of different technological requirements and differences in the time and cost of qualification between customers in the two sectors; and

(ii) concluded that competitors (especially Valspar and PPG) would be unable to constrain the merged entity and, in fact, would be likely to follow any price increase.

2.21 As set out in Section 3 below, there is no credible evidence to support these conclusions. This helps explain why no other competition authority has reached the same conclusions. Moreover, there are no special UK circumstances that warrant such a departure from the pan-European interpretation of the market.[19] Metlac's sales in the UK are less than [**CONFIDENTIAL**] those of its sales in Germany, where the transaction has been approved,[20] and only around [**CONFIDENTIAL**]% of its sales in Italy,[21] where the merger control thresholds are not even met.

2.22 The CC's departure from the BKartA's findings is all the more unusual, given that (i) both the BKartA and the CC have reviewed the same transaction by reference to exactly the same EEA-wide geographic markets; and (ii) the CC relies to a substantial degree on a partial set of evidence from customers who responded during the BKartA's Phase II investigation,[22] yet draws the opposite conclusions from the same responses.[23]

2.23 This is the first time that the CC has moved to prohibit a transaction that has been approved by authorities elsewhere in Europe. There is no reasonable basis for doing so. This is an international transaction involving two foreign companies, with very limited impact on customers in the UK, some of whom have submitted to the CC that they would not use Metlac in any event. The CC's provisional findings and proposed remedy of global prohibition of the transaction are entirely incongruous with the views of other competition authorities around the world.

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[19] The CC acknowledges at paragraph 7.32 of the Provisional Findings "*in relation to the UK, there appear to be no specific UK customer preferences and no significant differences to supply to the UK*".

[20] Translation of BKartA decision, at paragraph 6, which states Metlac's turnover in Germany in 2010 to be in the range of €5-10 million.

[21] Metlac's sales in Italy in 2011 were approximately €[**CONFIDENTIAL**].

[22] The CC did not review the full set of responses in the BKartA file. See in particular Provisional Findings, Appendix L at paragraph 25, where the CC states "*we do not have access to the full set of customer responses from the BKartA. We do have copies of the BKartA responses containing evidence from ten customers…"*. This sample represented just 33% of the 30 responses received by the BKartA to its market investigation and less than 20% of the total number of customers to whom a questionnaire was sent by the BKartA. The CC also disregarded customers which did not source one of their five most important packaging coatings from Metlac, as these "*cannot be used to compare Metlac's prices*".

[23] The CC quotes the findings of the BKartA that "*the analysis of individual prices reveals that the prices of Metlac are not always the best compared with AkzoNobel, PPG and Valspar*", but does not explain why it draws a different conclusion. See Provisional Findings, Appendix L, at paragraph 24.

3. EVIDENCE DOES NOT SUPPORT PROVISIONAL FINDING OF SLC

(i) Overview

3.1 A merger gives rise to a substantial lessening of competition (SLC) when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or to become more efficient and innovative.[24] The CC is required to determine, on a balance of probabilities that it is more likely than not that an SLC will result in the UK because of the transaction.[25]

3.2 The Provisional Findings provisionally conclude that "*the proposed merger may be expected to result in a substantial lessening of competition in the markets for supply of metal packaging coatings for B&B and FCG, and this effect on competition in this market will also affect competition in the UK*".[26] Two factors were highlighted as particularly relevant to this assessment,[27] namely:

- that Metlac "*provides a significant competitive threat to other firms in the market by virtue of having a novel business model and a record of offering low prices*"; and

- "*a significant proportion of large and small customers which provided us with evidence indicated that they have significant concerns about the transaction*". In this regard, the CC "*invited a wide range of interested third parties to comment on the merger*", "*sent detailed questionnaires to 39 customers and ten competitors", and "gathered oral evidence through nine hearings with selected third parties*".

3.3 When viewed against the requirements of the Merger Assessment Guidelines, a proper examination of the evidence submitted by AkzoNobel and a proper assessment of both the economic data and third party evidence available, should confirm that this provisional conclusion is unsustainable and must be re-evaluated by the CC. In this section, AkzoNobel addresses again the evidence submitted which demonstrates that the proposed putting into effect of the contractual call option, under which AkzoNobel will acquire full ownership and control of Metlac, will not result in an SLC in the UK, while highlighting the flaws in the CC's current analysis. In support, AkzoNobel has also provided the following documents as annexes to this Response:

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[24] CC Merger Assessment Guidelines (CC2) at paragraph 4.1.3.

[25] *Ibid*. at paragraph 2.12.

[26] Summary of Provisional Findings, at paragraph 54.

[27] *Ibid*. at paragraph 40.

(i) Annex 1 is a critique, prepared by RBB Economics, of the economic analysis presented in the Provisional Findings; it includes a redacted version of the RBB Dataroom Report;[28]

(ii) Annex 2 is a comprehensive mark-up of the Provisional Findings, which highlights in detail the evidence submitted by AkzoNobel and others during the course of the Inquiry that the CC has failed to take proper account of, or conclusions reached by the CC that are not sustained by reference to the available evidence; and

(iii) Annex 3 sets out AkzoNobel's observations on the CC's use of third party evidence. This evidence shows that, of the nine third parties to have hearings with the CC, six expressed no reservations about the transaction. Only two, Rexam and Crown, appear to have expressed any significant concerns about the merger. No competitor (large or small) in either the FCG or B&B segments appears to have expressed any concern with the merger, and indeed there are indications that they would see a full merger of ANPG and Metlac as providing them with an opportunity to improve their positions with current customers of the parties.

(ii) AkzoNobel is providing additional evidence to the CC

3.4 Since the publication of the Provisional Findings, AkzoNobel has sought to obtain and provide further evidence to the CC that the transaction does not give rise to an SLC in the UK.

3.5 First, RBB Economics has had access to the Metlac transaction database, in order to review the conclusions drawn from this data by the CC in impugning the accuracy of the MIS database.[29] AkzoNobel has provided a revised analysis at Annex 1 of this Response. The original conclusions to be drawn from the MIS data remain fundamentally unchanged – that the number of customers potentially adversely affected by this transaction is very small.[30] [**CONFIDENTIAL**]. In light of the revised analysis provided, AkzoNobel urges the CC to re-evaluate its assessment of the MIS data.

3.6 Second, there have been significant deficiencies in the CC's market investigation on which the CC has very extensively relied to reach its provisional conclusion that the transaction is likely to give rise to an SLC. AkzoNobel has three principal concerns, namely:

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[28] The unredacted version of RBB's Dataroom Report has been provided directly to the CC staff. The CC - including the Members of the Inquiry Group - should consider that unredacted version (rather than the attached unredacted version).

[29] As explained to the CC in RBB's Dataroom Report, the accuracy of sales volumes is not required in order to assess the degree of overlapping products supplied by both parties.

[30] Annex 1 at page 6.

(i) The CC draws its market-wide conclusions from only a small sample of customers: The CC sent questionnaires to 39 customers; this compares to a total ANPG customer pool of [**CONFIDENTIAL**] recorded in the MIS database, and a pool of 54 customers surveyed by the BKartA as part of its Phase II inquiry.[31] Moreover, the CC received responses from less than half of those surveyed – only 18 customers out of 39 (a rate of 46%), representing only [**CONFIDENTIAL**]% of ANPG's customer pool. This compares with 30 responses received by the BKartA (a rate of 55%). It is not sufficient for the CC to base its strident conclusions on such a small sample of responses, particularly when the responses are inevitably biased towards existing customers of Metlac (who may have been encouraged by the Bocchio family to raise objections).

(ii) The CC's key questions in relation to the cost of switching (which the CC identifies as a major barrier to expansion) are vague and unclear: The CC asked customers to provide, for both new[32] and existing[33] suppliers their view of "*the relative ease of market entry in terms of costliness (cheap/medium/expensive)*" in each of the Food, FCG, GL and B&B interior and B&B exterior categories. The CC does not define or give any guidance to customers as to what is meant by cheap, medium or expensive. This is in contrast to the CC's questions in relation to the relevant timescale, where customers are provided with ranges of 0-6 months, 6-12 months, 12-24 months and 24 months+.

(iii) The key questions on price, closeness of competition and bargaining power were highly likely to direct respondents towards particular outcomes:

- In relation to closeness of competition, the CC asked customers:

  "*Please identify the product categories in which you see AkzoNobel and Metlac as close competitors. In particular, please identify if there are sub-segments of the categories set out in Question 1 in which AkzoNobel and Metlac are close competitors.*"[34]

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[31] Translation of BKartA decision, at paragraph 11.

[32] CC Customer Questionnaire, Question 18.

[33] CC Customer Questionnaire, Question 19.

[34] CC Customer Questionnaire, Question 7.

- In respect of the bargaining power of customers, the CC asked:

  "*To what extent does the bargaining power lie with you and to what extent does the bargaining power lie with the supplier?*"[35]

- In relation to pricing, the CC asked the following question:

  "*Please provide us with details of any instances in the past 5 years where Metlac's lower pricing is a factor you have used in pricing discussions with other metal packaging coatings suppliers, in order to successfully drive a lower price from those other suppliers.*"[36]

None of these questions, in particular the question relating to price, conforms to the principles set out in the CC's own "Good Practice in the Design and Presentation of Consumer Survey Evidence in Merger Inquiries".[37] The Good Practice Guidelines state that "*a question that is presented in a way that leads consumers to one response in preference to another (irrespective of their actual view) is biased, and unlikely to be of evidential value.*"[38]

3.7 To address these concerns, [**CONFIDENTIAL**].

3.8 The acquisition of full control of Metlac by AkzoNobel does not give rise to an SLC and the merger will not result in any detriment to customers. The evidence (as well as the findings of other competition authorities which have reviewed this case) supports AkzoNobel's view that:

(1) Metlac (which is already 71.7% economically owned by AkzoNobel) is not ANPG's closest competitor. ANPG interacts far more, and across all product segments, with Valspar and PPG than any other metal packaging coatings supplier. Metlac is one of a number of smaller suppliers that ANPG encounters less frequently and only in certain segments;

(2) The merged group will continue to face intense competition from a wide range of suppliers – including the two major global suppliers, Valspar and PPG – in addition to a large number of suppliers active in the FCG sector, including Grace and Actega (which are both global players), Salchi, Diostyl, Schekolin, IPL, VPL and others;

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[35] CC Customer Questionnaire, Question 16.

[36] CC Customer Questionnaire, Question 30.I.

[37] CC2com1, March 2011 (referred to in this response as the "Good Practice Guidelines"). While designed to address consumer surveys, the principles in the Good Practice Guidelines are also of clear relevance in this case, as the CC has relied so heavily on the views of third parties.

[38] CC Good Practice Guidelines, at paragraph 3.27.

(3) Non-pricing factors, such as quality, product reliability and technical support are crucial factors for customers in purchasing metal packaging coatings; and

(4) The merger will not result in any detriment to customers – in terms of price, product quality, range or innovation. In fact, customers will benefit strongly from the synergies derived from the combined group.

(iii) ANPG and Metlac are not closest competitors

3.9 The CC has not undertaken any form of analysis recognised under the Merger Assessment Guidelines in determining the closeness of competition for producers of differentiated products.[39] The CC has not, for example, calculated diversion ratios from the product of one of the merger parties to the other, as recommended by the Guidelines. It has instead relied on fragments of information from a variety of sources on individual instances of competitive interaction between ANPG and Metlac, supplemented with anecdotal evidence from a limited number of third parties.

3.10 AkzoNobel does not dispute the fact that it currently competes with Metlac in a number of segments (notwithstanding the fact that it already holds a 71.7% economic interest in Metlac).[40] The extent of overlap between the two is however limited to the B2E segment for B&B coatings (as Metlac is not active at all in the supply of B2I or BE coatings) and to the segments of the FCG sector.[41]

3.11 However, the Provisional Findings draw very strong conclusions as to the closeness of competition between ANPG and Metlac, i.e. that Metlac is a "*strong constraint*" on Valspar, PPG and ANPG in particular. Metlac has provided no evidence that ANPG is its closest competitor. Although it states this as a fact, the CC admits that "*we do not have internal documents from Metlac evidencing its views on closeness of competition with AkzoNobel*".[42]

3.12 These conclusions are based on (i) the incomplete evidence contained in the list of "procurement events" supplied by AkzoNobel to the OFT and (ii) a sample of win/loss information provided by Metlac.

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[39] CC2 at paragraph 5.4.9.

[40] The Provisional Findings cite several examples of "evidence" that Metlac and ANPG compete, including comments from customers, and that there will be a reduction in the number of competitors following the merger. AkzoNobel does not dispute this fact, but this does not have a bearing on whether a substantial lessening of competition arises in the UK.

[41] The level of competitive interaction is low, as demonstrated by a proper analysis of the MIS database – see Annex 1 at page 6.

[42] Provisional Findings, at footnote 60. Metlac's excuse for this is entirely implausible and, if true, likely to be in breach of Italian company law – that it does not prepare board papers containing any analysis of competitors, as it does not want these to be shown to the AkzoNobel members of the board. As the CC is aware, these directors [**CONFIDENTIAL**] are not part of, and do not share information with, ANPG.

3.13 The CC accepts that neither of these sources of information is complete[43] and it has therefore had to rely on the views of third parties in order to support its analysis. The CC has also made reference to the evidence placed before the BKartA during the course of its Phase II investigation, although the CC draws the opposite conclusions from its analysis of a sub-set of the data provided to the German competition authority.

3.14 AkzoNobel submits that all of the evidence available to the CC, properly assessed, shows that while ANPG and Metlac are competitors, there is a far lower level of competitive interaction between ANPG and Metlac than there is between ANPG and Valspar and PPG respectively.

(a) Examples of procurement events do not indicate close competition

3.15 The "procurement events" table provided by AkzoNobel to the OFT provides only a limited overview of the metal packaging coatings market – particularly in relation to the FCG sector, with a coverage rate of approximately 6%.[44] Notwithstanding these deficiencies, the CC uses the procurement information as a basis for its analysis[45] and subsequent conclusion that Metlac is a "*strong competitive constraint on the other suppliers where it competes*".[46]

3.16 The procurement information provided does not support this assertion. Metlac participated in just 19 out of the [**CONFIDENTIAL**] procurement events identified by AkzoNobel for the period 2008-2011 – in more than 72% of the examples provided, Metlac did not participate at all. The CC also accepts that Metlac did not compete in [**CONFIDENTIAL**] of [**CONFIDENTIAL**] events in the B&B sector (81%) and in [**CONFIDENTIAL**] of the [**CONFIDENTIAL**] events in the FCG sector (71.4%).[47]

3.17 The 19 procurement events in which Metlac participated accounted for approximately €[**CONFIDENTIAL**] million by value over the period.[48] Although it was awarded business in each of the procurement events in which it participated, Metlac did not win

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[43] Provisional Findings, at paragraph 8.90. The CC states at paragraph 26 of Appendix L that "*given the small sample size and the fact that this is only a selection of switching data provided by Metlac, it is difficult to draw any conclusions from [the data provided]*", but goes on to say at paragraph 31 that the Metlac data "*provides support to the idea that Metlac has the potential to impose a significant and increasing competitive constraint on AkzoNobel, PPG and Valspar in the segments in which it is active*".

[44] The CC's claim that it has not been able to replicate this analysis is at odds with its previous comments to AkzoNobel's advisers that it was able to do so.

[45] Provisional Findings, paragraph 8.85(a) and Appendix K.

[46] Provisional Findings, Appendix K, at paragraph 11 in respect of B&B coatings. The CC admits at paragraph 14 that given the limited coverage of the procurement events estimates, it is unable to draw any conclusions on the extent of competition between the parties in FCG coatings.

[47] Provisional Findings, paragraph 8.87.

[48] CC Working Paper on Competitive Effects, Table 22.

all of the business in each case.[49] Of the procurement events in which Metlac participated, €[**CONFIDENTIAL**] million (86.6% by value) related to formal multi-year tenders conducted by a single large customer – Rexam. Excluding that Rexam business, Metlac participated in only approximately 7% of the procurement events covered by the data, with the largest single contract won by Metlac amounting to just €[**CONFIDENTIAL**] million (a combined contract for the delivery of inks and B2E coatings for [**CONFIDENTIAL**] in [**CONFIDENTIAL**]).

3.18 The procurement event information compiled by AkzoNobel for the OFT is far less robust a data source than the MIS database maintained by the ANPG business as part of its ongoing global marketing operations. The procurement events listed are not a comprehensive source (as AkzoNobel has repeatedly stated to the OFT and CC) of competitive interaction between ANPG, Metlac and other market participants, particularly in relation to the FCG sector. Moreover, it is not switching data, of the type that could be used to calculate diversion ratios to determine the closeness of competition between ANPG and Metlac. The CC has not sought to perform that analysis. Nevertheless and in spite of the acknowledged limitations of this data (and the equally incomplete win/loss data provided by Metlac), the CC has drawn extremely strong, and ultimately unsubstantiated, conclusions in its Provisional Findings.

(b) No reason to dismiss the analysis of the MIS database

3.19 In its Provisional Findings the CC has essentially disregarded the evidence submitted by AkzoNobel, based on an analysis of the MIS database. AkzoNobel maintains this database as a separate marketing database for use by ANPG in the ordinary course of business. This database contains information on essentially all can-making lines worldwide and, for every product that is used at each line, the actual coating supplier is recorded every year with annual volumes estimated as well. AkzoNobel submitted that:

> "*By far the most important competitors to ANPG are Valspar and PPG. Combinations of products and customer locations that account for* [**CONFIDENTIAL**]*% of the market have been supplied by both ANPG and Valspar,* [**CONFIDENTIAL**]*% by ANPG and PPG.* [**CONFIDENTIAL**]*% of the total market volume relate to products at customers that have only ever been supplied by Valspar and ANPG; this number is* [**CONFIDENTIAL**]*% for PPG. Much more distant competitors are Actega, Grace, Schekolin and Metlac, where this proportion is between* [**CONFIDENTIAL**]*%,* [**CONFIDENTIAL**]*%* [**CONFIDENTIAL**]*% and* [**CONFIDENTIAL**]*%, respectively.*"[50]

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[49] See AkzoNobel's response to Question 5 of the Market Questionnaire and Appendix L of the Provisional Findings.

[50] Response to Question 25 of the Market Questionnaire, updated by the "Economic Issues considered at the Hearing" paper submitted on 22 August 2012.

3.20 As explained in the RBB critique at Annex 1, the CC is wrong to discount this overall analysis on the basis of alleged "serious concerns" regarding its supposed inaccuracy.[51] Even if the actual volumes recorded for Metlac are different to AkzoNobel's estimates (as would be expected, given the lack of price transparency in the market and the fact that Metlac is operated as a separate business from ANPG), the analysis of the extent of competitive interaction remains sound.[52]

3.21 The MIS analysis correlates very closely with the results of the switching analysis conducted by the BKartA, which concluded that:

> "*There is no close competitive relationship between Akzo and Metlac … this is confirmed by the supplier switching analysis. This has revealed the number of changes overall (based on 26 responses) is very low. From the supplier switching analysis it would appear that with respect to the turnover of the manufacturers seen in pairs in the years 2009-2011, only* [**CONFIDENTIAL**]*% was incurred by customers switching to Akzo from Metlac. The changes between Valspar and Metlac on the other hand are higher and are between* [**CONFIDENTIAL**]*%. The highest switching quota was for 2010 in which the quota of customers switching from Valspar to Metlac was* [**CONFIDENTIAL**]*%.*" [53]

3.22 Contrary to the BKartA's approach, which reviewed a sample pool of 26 customers, the CC bases the limited amount of empirical analysis of "switching" conducted on the responses of just <u>six</u> FCG customers. The CC notes that it cannot draw any strong conclusions from such a limited data set, but then goes on to assert that "*Metlac is already a strong competitor in the markets for B2E coatings and FCG coatings*".[54]

(c) Customer feedback is not conclusive

3.23 An analysis of customer reaction to the degree of closeness of competition between ANPG and Metlac does not show any clear consensus, save that a majority of respondents consider ANPG and Metlac to be competitors.

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[51] Provisional Findings, at paragraph 8.83. The MIS database was submitted to the CC in response to the Market Questionnaire on 3 July 2012; RBB's initial paper analysing that data was provided to the CC on 10 July 2012. The CC only raised the present "serious concerns" regarding the accuracy of the MIS database in terms in the Provisional Findings. In the 12 weeks that the CC had to review the data, these "serious concerns" were not addressed in the CC's Working Papers, in discussions between AkzoNobel's advisers and the CC staff, or by any of the Panel Members at the Main Parties' Hearing on 18 August 2012.

[52] Annex 1 to this Response, at page 6.

[53] Translation of BKartA decision, at paragraph 85. The CC refers to this final statistic, at footnote 66 of the Provisional Findings, but does not disclose that the switching occurs between Metlac and Valspar. Similarly, the CC refers to the BKartA's finding that there is little switching in the industry, but does not refer to the fact that there is particularly low levels of switching between ANPG and Metlac.

[54] Provisional Findings, paragraph 8.95.

3.24 As noted above, customers were asked directly by the CC to identify the categories and sub-segments in which they saw ANPG and Metlac as "*close* competitors". Of the 39 customers to whom a questionnaire was sent, just 8 (20.5%) explicitly said they saw Metlac and ANPG as "close" competitors, despite the leading nature of the question.[55] No more than three customers identified Metlac and ANPG as competitors in any one segment (this was described as the "*production of lacquers and inks*").[56]

3.25 Furthermore, the reliability of some of the responses is questionable, with one customer suggesting that Metlac and ANPG compete in a number of categories "*including internal and external beverage coatings*". Metlac is not, and never has been, active in the supply of B2I coatings and cannot be a close competitor to ANPG in this segment.

(iv) ANPG/Metlac will face intense competition from Valspar, PPG and others

3.26 The CC has provisionally found that, following the merger, AkzoNobel "*would be able to increase prices and that Valspar and PPG were unlikely to compete vigorously on price*"[57] in both the B&B and FCG sectors. This provisional finding is manifestly without foundation and shows a lack of understanding of the market for metal packaging coatings.

3.27 The CC's provisional conclusions are based on two factors: (i) that Valspar and PPG have not grown in the period since 2009;[58] and (ii) that Valspar and PPG do not compete aggressively on price with ANPG. In support of these assertions, the CC relies entirely on the opinions of a limited number of third parties as evidence of the "*previous behaviour*" of Valspar and PPG. The CC is equally quick to dismiss the competitive constraint of other competitors of similar scale to Metlac – notably Salchi, Actega, Grace and Schekolin, on the basis that "*none of these smaller competitors has shown the same appetite to grow aggressively as Metlac*". While the Bocchio family have gone to great lengths to assert that they are hungry to grow the business rather than sell to AkzoNobel, it is not clear on what basis the CC has provisionally concluded that other similar scale competitors do not share the appetite to compete with the merged group.[59]

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[55] This figure still accounted for less than half of the customers who actually responded to the questionnaire.

[56] Summary of Customer Reponses to the CC Questionnaire, provided to AkzoNobel on 28 September 2012, at page 1.

[57] Provisional Findings, summary, paragraph 45 and 46.

[58] See Annex 1, at pages 19-21.

[59] Particularly as Salchi has said it wishes to do so. Salchi's appetite for growth is evident from its plans to build a new plant on its existing land (and this decision was independent of the AkzoNobel/Metlac merger): Summary of CC's hearing with Salchi, 20 June 2012, at paragraph 7.

3.28 As described in Annex 1, both large and small competitors will continue to provide effective competition to the combined ANPG/Metlac business across all segments post-merger.[60]

3.29 In respect of the largest competitors, Valspar and PPG, the CC's findings are seriously flawed and do not accord with market reality. The Provisional Findings do not explain how Valspar and PPG could maintain their respective market positions if they did not provide effective competitive offerings to customers. Furthermore, serious doubts as to the validity of the Provisional Findings become clear once its logical implications are understood: if neither Valspar nor PPG were to represent an effective competitive constraint on ANPG, then that would imply that a merger between ANPG and either Valspar or PPG would not raise competition concerns.[61]

3.30 The CC's findings on the competitive constraint of smaller customers (which are closer in scale to Metlac) are equally unsustainable:[62]

(i) The CC has not conducted any proper competitive assessment on the likely effects of the proposed transaction and by its own admission cannot quantify the proportion of cases where new products would have to be qualified as opposed to switching to already qualified products;

(ii) The CC's observation that smaller suppliers do not (according to the Provisional Findings) supply a wide range of products across the FCG segment is therefore, even if true, irrelevant to the competitive assessment. The fact that a smaller supplier only supplied products in a particular segment does nothing to undermine the competitive significance of that supplier in that particular segment;

(iii) The Provisional Findings contain no evidence or reasoning as to why smaller suppliers would be less able and less willing to develop and supply a substitute product relative to ANPG/Metlac, Valspar and PPG. Indeed certain suppliers, such as Schekolin, are growing at a faster rate than the average in the food segment.

(v) Non-price factors play a crucial role

3.31 The core of the CC's provisional conclusion that the transaction is likely to result in an SLC is the finding that Metlac is a low-cost supplier of metal packaging coatings, with an allegedly "novel business" and aggressive pricing strategy. This contention is addressed in detail in the RBB critique at Annex 1 to this Response.

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[60] Annex 1, Section 5, at page 20.

[61] *Ibid.* at page 3.

[62] *Ibid.* Section 5, at pages 20-24.

(a) No convincing evidence that Metlac is uniquely low cost

3.32 The CC's provisional finding that Metlac is a uniquely low-cost supplier is not supported by any credible economic evidence. To the contrary, the CC readily admits that it has not conducted any analysis at all of Metlac's costs base by comparison with ANPG or any other competitor in the market.[63] Instead, the CC relies exclusively on the assertions of Metlac that it is a low cost supplier (without any corroborating evidence for this assertion) and on the "*general industry perception*" that Metlac is a low-cost supplier.

3.33 It is unclear from where the CC divines this "*general industry perception*" (other than perhaps from Metlac, the Bocchio family and perhaps some customers with whom they have good connections). There appears to be very limited, if any, credible evidence to support such an assertion:

(i) Customers were not asked by the CC in the market questionnaire to comment on Metlac's costs. Even if they were to do so, it would be impossible for those customers (or competitors) to know with any accuracy the cost base of Metlac's metal packaging coatings operations;

(ii) In its Phase II investigation of this transaction, the BKartA made no reference to a "general industry perception" that Metlac is a uniquely low cost supplier. The responses received by the BKartA in respect of Metlac's pricing was inconclusive (as is the case with the responses to the CC's own questionnaire) and the BKartA determined that pricing was not a determinative factor for customers in selecting their supply;

(iii) Similarly, in its unconditional clearance of the *PPG/SigmaKalon* merger, the European Commission did not identify Metlac as a uniquely low cost supplier or novel business model. Indeed, as noted above, Metlac is not mentioned at all in the Commission's decision; and

(iv) The independent [**CONFIDENTIAL**] report, which was a comprehensive review of the metal packaging coatings industry conducted in 2009, does not identify Metlac as having a low cost base. Instead, [**CONFIDENTIAL**] refers to Metlac as a well-regarded regional supplier, with a strong focus on product quality and customer service, principally in Italy.[64]

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[63] Notwithstanding this acknowledged lack of analysis, the CC relies on Metlac being a low-cost supplier continuously throughout the Provisional Findings. For example, the CC dismisses the prospect of timely and sufficient entry into the FCG sector on the basis that "*we do not consider that this entry/expansion would be timely and sufficient across the market to replace the constraint Metlac currently places on the other suppliers in the FCG market, particularly given Metlac's ability to compete at low prices due to its efficient production*" (Provisional Findings, at paragraph 9.118, emphasis added).

[64] [**CONFIDENTIAL**]. [**CONFIDENTIAL**] also identifies in the same category Grace Darex, Actega, Schekolin, Salchi and certain suppliers subsequently acquired, including Lindgens and DIC.

(b) Non-pricing factors are crucial

3.34 While the CC accepts that non-pricing factors, such as product quality and technical support, are critical factors for purchasers of metal packaging coatings, the CC's analysis manifestly fails to consider these factors in the context of Metlac's competitive offering.

3.35 AkzoNobel has previously submitted that if price were a decisive factor for customers in choosing their supplier of metal packaging coatings, Metlac's share of the various market segments would be expected to be rapidly increasing. In fact, that is not the case. Metlac's shares in both the B&B and FCG sectors have remained relatively static in the period from 2009-2012, when the CC asserts Metlac was enjoying its greatest growth levels. These market share trends may indicate the importance of non-pricing factors to customers; a point which was decisive in the BKartA's assessment of the impact of Metlac's perceived lower pricing:

> "*[Metlac's pricing] is not reflected in a clear increase in market share in the period under investigation. As the market as a whole is growing, it was also possible for the other well-established suppliers of metal packaging coatings to increase their turnover. Clearly, no particular importance can be attributed to the ability of Metlac to be able to offer particularly low prices compared with the other competition criteria.*"

3.36 The CC offers no explanation for this fact. Instead, it appears to accept, without any form of sceptical analysis, the unverified and contradictory statement by Metlac that its failure to grow market share was because "*it could not expand more quickly in case it endangered quality and service standards. [Metlac] emphasised that customer trust was paramount and therefore growth had to be at a pace which did not risk customer relationships.*"[65] This explanation is particularly implausible given the CC's concurrent finding that Metlac's "*appetite for growth seems to be Metlac's particular strength*".[66]

3.37 The CC identifies no detriment to product service and quality in the B&B sector as a result of this merger. The CC accepts that "*it is unlikely that the merger would have any significant effect on [service and product quality], due to the stringent reliability requirements of the B&B sector*".[67] Nevertheless, the CC attaches no weight to these critical non-pricing factors in its provisional finding of an SLC in the B&B sector, which is based entirely on the removal of Metlac as a pricing constraint.

3.38 As regards the FCG sector, however, the CC provisionally finds the merger is likely to result in negative effects in respect not only of pricing, but also of non-pricing factors.

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[65] Provisional Findings, at paragraph 8.28.

[66] Provisional Findings, at paragraph 8.139.

[67] Provisional Findings, at paragraph 9.28.

The basis for the CC's finding of a likely SLC concerning non-price factors seems either to indicate a perception that customers in the FCG segment are more lax about reliability and product quality than those in B&B, or to be based on the views of a limited number of customers. The CC admits in relation to the FCG sector that "*we note that some large food can producers did not respond to our questionnaire*".[68]

3.39 There is no credible basis for concluding that these non-pricing factors may mean that the proposed merger will give rise to a detriment to customers in the FCG sector or more generally, for the reasons set out in the following section.

(vi) No evidence to support post-merger detriment to customers

3.40 The CC's theory of harm identifies three potential negative effects for customers following the proposed ANPG/Metlac merger:

(i) ANPG is likely to increase prices, as the current pricing constraint offered by Metlac as a "stick" for customers to use is removed;

(ii) Metlac's current product portfolio would be rationalised to such an extent that a number of customers of niche products in the FCG segment would lose their current supplier; and

(iii) Metlac's R&D capabilities would be degraded, simply by virtue of its integration into ANPG.

3.41 There is no credible evidence to support any of these alleged negative effects.

(a) No convincing evidence that prices will increase

3.42 In relation to the first assertion - that the merger is likely to result in price increases - the CC provides no economic evidence whatsoever.[69] To the contrary, the CC admits in the Provisional Findings that "*we have not been able to use the margin data provided to carry out a merger impact analysis, given the different bases on which margins were calculated by suppliers.*"[70] Despite this statement, the CC observes that contribution margins, which it incorrectly equates with gross margins, across the industry are "*not low*".[71] This impression of contribution margins appears to have contaminated the CC's

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[68] Provisional Findings, footnote 84. It is also notable that the CC did not choose to conduct hearings with some of the largest manufacturers in the FCG segment, notably Mivisa [**CONFIDENTIAL**] and Massilly.

[69] See Annex 1 to this Response, which shows that customers across all segments would find it more profitable to qualify a new supplier than to accept a [**CONFIDENTIAL**] price increase from the combined ANPG/Metlac post-merger.

[70] Provisional Findings, at paragraph 8.40.

[71] Provisional Findings, at paragraph 8.38. The characterisation of margins as "not low" is in apparent contradiction with the views of Rexam, which stated in its hearing with the CC that new entry was unlikely because of the "*low margins to be made in these markets*". Summary of CC's hearing with Rexam, 22 June 2012, at paragraph 22.

views on the likelihood of price increases following the merger and ignores AkzoNobel's previous submission that contribution margins are meaningless as a measure of profitability, notably that [**CONFIDENTIAL**].[72]

3.43 There is no evidence in any of AkzoNobel's internal documents relating to the transaction that suggests that ANPG would seek to increase prices following the merger. To the contrary – [**CONFIDENTIAL**].[73]

3.44 Similarly, there is no objective evidence that Valspar and PPG would have either the ability or incentive to follow any ANPG price increase, even if ANPG could raise prices. The CC has accepted that prices in the market are not transparent.[74] As neither Valspar nor PPG would have any knowledge of ANPG's bidding price, any increase in prices would simply reduce Valspar and PPG's chances of winning a particular contract.[75]

3.45 Instead, the CC's provisional finding that the merger would result in price increases is based on the unverified speculation of a small number of customers responding to the CC's market questionnaire. As noted above, the CC's question to customers on pricing was deeply unsatisfactory in terms of its framing and was highly likely to have produced biased and directed outcomes, of little evidential value. The CC asked customers:

> "*Please provide us with details of any instances in the past 5 years where Metlac's lower pricing is a factor you have used in pricing discussions with other metal packaging coatings suppliers, in order to successfully drive a lower price from those other suppliers.*"[76]

3.46 The CC has placed enormous reliance on the limited responses received to this leading question, which it claims demonstrates an industry consensus that Metlac was used by customers across both the FCG and B&B sectors as the mechanism to extract better terms for customers even where the customers do not switch to Metlac.

3.47 In spite of the manifestly leading nature of the question asked, the actual responses received from customers paint a different picture. The CC received 20 responses to this

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[72] See paper on the "Economic Issues Considered at the Hearing", submitted on 22 August 2012, at page 10. [**CONFIDENTIAL**].

[73] [**CONFIDENTIAL**].

[74] Provisional Findings, at paragraph 9.130. In fact, the CC relies on the lack of price transparency in the market as its basis for concluding that any buyer power in the FCG segment would be incapable of protecting smaller customers.

[75] See Annex 1, at page 23.

[76] CC Customer Questionnaire, Question 30.I, emphasis added. The second part of the question asked customers to estimate the proportion of pricing discussions where Metlac's pricing is referred to and the total proportion of volume of metal packaging coatings that is affected by these discussions. The question then asked "*alternatively, if Metlac's pricing is not used as a negotiating factor with your other suppliers any more frequently than other metal packaging coatings supplier's prices, please indicate this*". The CC appears to believe that this additional wording captures the full market; given the leading nature of the first question, this is highly unlikely to be the case.

question – of which 17 were from Metlac customers. Of the 20 responses received, only half (i.e. 10 customers) appear to have indicated that they have at some point used Metlac's quotes to lower the prices of other suppliers. Looking at Metlac customers only, more than 42% of those who responded to the questionnaire appear to have confirmed that they have never used Metlac as a pricing "stick" in any contract negotiations in the past five years.

3.48 Of the 10 that said they had used Metlac in this way, only one customer (5% of respondents) stated that in all cases it used Metlac's quotes to lower prices. One other customer provided a vague answer that Metlac's pricing stimulates the competitiveness of other suppliers and this "*had a beneficial effect on the whole of its supply*".[77] The remaining eight customers either did not respond to the question on the proportion of volumes when Metlac's pricing was used as a stick, or provided a "*generic indication*", mentioning isolated episodes, "*sometimes*" or "*in certain occasions*".

3.49 This is a highly unreliable basis for the CC to make such a strident provisional finding in relation to pricing. The basis for a conclusion that prices are likely to rise post-merger is equally unconvincing. As noted above, the CC has not conducted any econometric modelling on the pricing effects of the merger – not even basic IPR or UPP analysis or merger simulation – and AkzoNobel's internal papers do not give any indication that it intends to (or would be capable of) raising prices post-merger.

3.50 The finding of "likely price rises" is instead based entirely on the views of a small number of customers to a leading question – in this case, just 8 respondents to the CC's question asking for opinions on the effects the merger would have on competition generally (and in the B&B and FCG segments). These include some of ANPG's largest customers in the B&B sector, which exercise very significant buyer power and have proven themselves to be capable of quickly and easily switching large volumes between suppliers, including in segments where Metlac is not active (such as B2I).

(b) No convincing evidence that ANPG will rationalise product range to detriment of customers

3.51 The CC identifies the rationalisation of Metlac's product portfolio and discontinuance of niche products as a non-pricing detriment to customers arising from the merger. The CC has sought to present this in its Provisional Findings as meaning that AkzoNobel would seek to discontinue "*unprofitable*" product lines, as "*this is what customers told us that the large suppliers do*".[78]

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[77] Summary of responses to the CC Questionnaire, at page 8.

[78] Provisional Findings, at paragraph 9.12. The reference to profitability appeared in the final sentence of paragraph 9.12 of the version of the Provisional Findings sent to AkzoNobel on the evening of 20 September 2012. The sentence originally stated "*AkzoNobel acknowledged that some product rationalisation would occur, but said it would not stop supplying profitable products where there was customer demand for them.*" As described below, AkzoNobel has never submitted to the CC that profitability was a determinative factor in the post-merger combination of the ANPG and Metlac product portfolios. When this was highlighted to the CC by AkzoNobel, the word "profitable" was

3.52 The CC has pointed to no corroborating evidence for this speculation on the part of a small number of customers. According to the CC's summary of responses, only one of the 14 customers which responded to the question on the competitive effects of the merger indicated that it had concerns with the risk of product range rationalisation in the non-beverage category.[79] As previously noted, the CC did not receive responses from a number of the largest customers in the FCG category – which appears consistent with a low level of concern on the part of these customers too.

3.53 While AkzoNobel would naturally seek to achieve synergies following its acquisition of Metlac, (i) it is highly unlikely that Metlac is operating large numbers of, or any, unprofitable product lines; (ii) there is no evidence in any of its internal documents to support the CC's assertion that it would discontinue lines in the face of customer demand for the relevant products or leave customers in a position where they no longer had any supply. To the contrary, it can clearly be demonstrated that AkzoNobel has not adopted such a strategy following its recent acquisitions in the industry. For example, it did not immediately discontinue product lines following its acquisition of Lindgens in 2009, and still maintained a large number of Lindgens brands and products alongside those of ANPG in response to customer demand.

Table 3.1
Lindgens products pre- and post- acquisition by AkzoNobel

Product category	Pre-acquisition position	Post-acquisition position
Inks for 2 piece cans	[**CONFIDENTIAL**]	[**CONFIDENTIAL**]
Inks for 3 piece cans	[**CONFIDENTIAL**]	[**CONFIDENTIAL**]
FCG coatings	[**CONFIDENTIAL**]	[**CONFIDENTIAL**]

Source: AkzoNobel.

3.54 It would make no business sense for the merged group to discontinue products which are performing well within the combined portfolio; for products that are performing poorly, the merger may provide opportunities for improvement through cost reductions or reformulation, or customers may be attracted to shifting to alternative products in the combined portfolio with equal or better performance. This point was addressed during AkzoNobel's hearing with the CC, where AkzoNobel stated that following the ANPG/Metlac merger it would seek to understand customer preferences in this regard and seek to provide the most appropriate product (ANPG or Metlac) for their needs. The CC directly asked AkzoNobel if it would rationalise product lines post-merger. In response, Mr Bradford stated on behalf of AkzoNobel:

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deleted from the published version; the remainder of that sentence was unchanged. It seems clear that, despite the deletion of this key word, the conclusions reached in paragraph 9.12 were not reconsidered.

[79] Summary of responses to the CC Questionnaire, Question 24, at page 6.

> "*there would be rationalisation of products but we would choose the products that perform best and provide the best benefit to the customers. … You have to work with [customers] to get their agreement.* [**CONFIDENTIAL**]. *We would look to rationalise the portfolio to bring the best products forward, whichever company they come from.*" [80]

3.55 There is also no prospect of AkzoNobel ceasing to supply profitable niche products currently produced by Metlac, a point AkzoNobel also made clear at its hearing with the CC. AkzoNobel was asked, given that Metlac also supplies a number of niche products to smaller customers (albeit not currently in the UK, as far as we are aware), whether it would expect some of those will be completely rationalised, i.e. discontinued as product lines. Mr Bradford replied on behalf of AkzoNobel:

> *"No, I don't expect that. One, let's not forget AkzoNobel has,* [**CONFIDENTIAL**] *SKUs. If my memory is right we have* [**CONFIDENTIAL**] *SKUs within EMEA alone. So it does demonstrate that there is a long process since we've brought the businesses together in rationalising SKUs. It also shows that we do specialise our products for customers as well.'*[81]

(c) No convincing evidence of deterioration in Metlac's R&D post-merger

3.56 The CC accepts that it "*saw no reason for AkzoNobel to seek to denigrate Metlac's strengths post-merger, particularly in relation to innovation, an area where AkzoNobel has been perceived to be lagging behind.*"[82]

3.57 However, extraordinarily, the CC goes on to find that "*Metlac's innovative and dynamic qualities might be severely weakened or even removed <u>merely through the process of its absorption into a large multinational company</u> with different aims, processes and procedures for product development, sales and R&D and through the loss of key personnel*".[83]

3.58 The CC has no credible basis for making such an assertion, particularly as it has found that AkzoNobel would not actively seek to run down Metlac's R&D functions. ANPG has one of the largest, best resourced and most active R&D groups in the global metal packaging industry. Metlac's access to these larger resources would act only as a benefit to customers.[84] This is even more the case for Metlac, as a large proportion of

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[80] Transcript of AkzoNobel's Hearing with the CC, 18 August 2012, at page 20-21.

[81] Transcript of AkzoNobel's Hearing with the CC, 18 August 2012, at page 21.

[82] Provisional Findings, at paragraph 9.10

[83] Provisional Findings, at paragraph 9.11. Emphasis added. The CC does not elaborate on what it means by "different aims", but ANPG aims to produce high-quality, consistent, reliable and cost effective coatings for customers.

[84] AkzoNobel provided extensive information on its RD&I capabilities, including budgets, staffing levels and pipeline projects to the CC during the site visit at Vilafranca, Spain.

its product portfolio derives from legacy ICI technology. There is no question of Metlac's R&D operations being downgraded, simply because Metlac becomes fully merged within ANPG.

3.59 Moreover, AkzoNobel explained to the CC at its Hearing that it was [**CONFIDENTIAL**]. This would reinforce and strengthen the current R&D efforts at Bosco Marengo rather than weaken them.

4. COUNTERVAILING FACTORS

4.1 As with the CC's analysis of the competitive effects of the transaction, the consideration given to countervailing factors constraining the combined ANPG/Metlac post-merger is manifestly inadequate, and the conclusions reached are again marked by a lack of credible supporting evidence. The CC provisionally concluded that:

(i) In the B&B sector, it was unlikely that the four largest customers of the parties would be sufficiently powerful to keep prices down following the disappearance of Metlac. Moreover, even if they were likely to sponsor new entry, this would not replace the constraint currently provided by Metlac;[85]

(ii) In the FCG sector, while entry/expansion into some segments was likely, particular with customer support, it was not clear that such entry or expansion would occur at a sufficient level to constrain the merged ANPG/Metlac business, given evidence of past growth of smaller suppliers and qualification requirements.[86]

4.2 These findings do not accord with the realities of the metal packaging coatings market. More specifically:

(i) In the only segment of the B&B sector in which the CC identifies an SLC, i.e. B2E coatings, the suppliers of metal packaging coatings are dealing with a concentrated customer base, with large, well-resourced and highly sophisticated buyers who have shown their ability to play each of the suppliers off against each other in order to obtain the best terms;

(ii) In the FCG sector, where there are a large number of suppliers of metal packaging coatings, barriers to expansion across segments are much lower than expressed by the CC in the provisional findings – with customers frequently lending support to suppliers expanding into new product areas.

4.3 These factors are assessed further in this section.

(i) Powerful customers in the B&B sector constrain suppliers

4.4 The CC has provisionally found that, in respect of BE and B2I, while Metlac is a likely entrant in certain circumstances, the removal of Metlac does not, of itself, give rise to an

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[85] Provisional Findings, Summary at paragraph 51.

[86] Provisional Findings, Summary at paragraph 49-50.

SLC.[87] Therefore, the only segment of relevance in the analysis of the actual effects on competition arising from the merger is the B2E segment.

4.5 In relation to buyer power, the CC's Merger Assessment Guidelines provide that "*if all customers of the merged firm possess countervailing buyer power post-merger, then an SLC is unlikely to arise.*"[88] The Guidelines explain that:

> "*Buyer power can be generated by different factors. An individual customer's negotiating position will be stronger if it can easily switch its demand away from the supplier, or where it can otherwise constrain the behaviour of the supplier … Typically the ability to switch away from a supplier will be stronger if there are several alternative suppliers to which the customer can credibly switch, or the customer has the ability to sponsor new entry or enter the supplier's market itself by vertical integration.*"[89]

4.6 The CC's analysis of the countervailing power of customers in the B2E segment pays only lip-service to the Merger Assessment Guidelines and instead relies primarily on the assertions of Metlac and the views of Rexam and Crown to support its findings.

4.7 The CC provisionally concludes that "*the removal of Metlac will decrease these customers' buyer power. Customers rely on having Metlac as an option in their negotiations with B2E suppliers. Following the removal of Metlac, we have seen no indication that customers could use their negotiation power to keep prices down.*"[90] This provisional conclusion does not withstand any level of proper scrutiny – the customers in the B2E segment exert extensive buyer power, which will be undiminished as a result of the transaction, and are well placed to counter any reduction in the competitive offering of the merged group.

(a) Customers highly unlikely to accept price rise rather than qualify new supplier

4.8 Metlac submitted that customers were more likely to accept a price rise than qualify a new supplier. The CC acknowledges that *"Metlac provided no evidence to support the*

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[87] Provisional Findings, paragraphs 9.90 and 9.95. In relation to BE coatings, the CC provisionally found that "*whether or not Metlac's entry into the BE segment would be at a scale sufficient to constrain the current suppliers will depend on whether there is demand for BPA-NI BE. It is unclear whether beverage ends manufacturers would begin purchasing BPA-NI in the absence of legislation*". In relation to B2I coatings, the CC provisionally found that "*there are a number of factors […] over which we do not currently have sufficient clarity to be able to state that entry is sufficiently certain such that its removal is unlikely, on its own, to create an SLC.*"

[88] Merger Assessment Guidelines, at paragraph 5.9.1.

[89] *Ibid.* at paragraphs 5.9.2 and 5.9.3.

[90] Provisional Findings, at paragraph 9.136.

proposition in relation to the costs of qualifying a new product versus accepting a price rise",[91] but nevertheless draws effectively the same conclusion at paragraph 9.138.

4.9 A proper analysis of the economic evidence confirms that Metlac's assertion has no credible basis. Under the terms of certain contracts - e.g. [**CONFIDENTIAL**].

4.10 For other contracts, the costs of qualification are not such that customers would accept a price increase. As further explained in the RBB critique at Annex 1, "*qualification costs are unlikely to be significant for most customers – qualifying a new supplier would be profitable even in response to very modest price increases – and therefore it is unlikely that a hypothetical monopoly supplier to a given customer-pair would find it profitable to increase prices by 5% to 10%.*"[92]

(b) Four powerful customers account for virtually all EEA demand for B2E coatings

4.11 Just four customers account for virtually all demand for B2E coatings in the EEA and therefore provide the only access to market for the suppliers of external coatings for 2-piece cans.[93] These four customers - Rexam, Crown, Ball and Can-Pack - are among the largest, best-resourced and most sophisticated packaging manufacturers in the world – each generating revenues in excess of $1.4 billion annually and producing more than 150 billion cans per annum in total.[94]

4.12 Each of Ball, Crown, Rexam and Can-Pack exploits its significant buyer power through procurement processes. These are designed to ensure that these customers obtain best terms on both price and service quality. Rexam, Ball and Can-Pack each engage in formal tendering, awarding contracts of between one and three years' duration. Crown adopts a rolling procurement model as it explained to the CC during its Hearing and "*did not generally award contracts of longer than three to six months, because its suppliers were unable to guarantee prices beyond that time frame due to recent volatility in raw materials costs.*"[95] Negotiations take place within the procurement framework designed by the customers for their own benefit, which further enhances their already strong bargaining power.

4.13 The power of these customers in negotiations was confirmed by the comments of all suppliers in the B2E segment, with the exception of Metlac. Indeed, the Provisional Findings concede that:

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[91] Provisional Findings, paragraph 9.134.

[92] Annex 1, at section 2.3.1.

[93] The CC refers at paragraph 9.135 of

[94] See AkzoNobel Initial Submission, at paragraph 6.16.

[95] Summary of Crown's hearing with the CC, 4 July 2012, at paragraph 4.

> "*Competitors also told us that the large customers had buyer power. Valspar and Actega told us that customers had a very strong negotiating position, due to the small number of major customers and the fact they generally had at least two suppliers qualified for all applications. PPG stated that customers were sophisticated and wielded considerable buyer power.*"[96]

4.14 This statement is relegated to a footnote in the Provisional Findings, and the CC appears not to have made any attempt to test or challenge the views of competitors, which accord with those of AkzoNobel.[97] Instead, the CC leaps to a conclusion on the lack of customer buyer power, based on an unverified hypothesis on Metlac's importance in the market, primarily driven by Metlac's assertions and the views of a few customers. Those customers have mixed opinions regarding the transaction.

(c) The CC has exaggerated extent of customer concerns

4.15 It is notable that the CC has not disclosed to AkzoNobel the nature of the alleged "*significant concerns raised by three of the four"* customers in the B2E segment.[98] Indeed, Ball, who with Crown is the largest can manufacturer by revenue in the world, has raised no competition concerns whatsoever. According to the summary of its hearing with the CC, "*Ball said that the acquisition of Metlac by AkzoNobel would lead to a reduction in the number of qualified suppliers able to provide Ball […]. However, it had no competitive concerns regarding the transaction as sufficient competition would remain.*"[99]

4.16 Furthermore, as regards the other three customers in the B2E segment, Can-Pack did not even have a hearing with the CC, nor has the CC referred to any submissions from Can-Pack raising significant concerns. This would seem to indicate that Can-Pack likewise does not have any competitive concerns with the proposed transaction.

4.17 Heavy reliance is placed in the Provisional Findings on the views of Crown and Rexam. The CC's contention of Metlac being used as a "stick" with which to discipline competitors seems to be derived from a comment made by Crown during its hearing with the CC. There Crown stated that it "*had <u>occasionally</u> used Metlac as a 'stick' to improve the pricing of AkzoNobel, PPG and Valspar*".[100] Crown's ultimate views as to

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[96] Provisional Findings at footnote 63.

[97] None of these competitors mentioned that it expected the loss of Metlac to strengthen its hand in future negotiations with customers in the B2E segment.

[98] Provisional Findings, at paragraph 9.138.

[99] Summary of CC's hearing with Ball, 3 July 2012, at paragraph 15.

[100] Summary of CC's hearing with Crown, 4 July 2012, at paragraph 20. Emphasis added. As noted in paragraph 3.47 above, the overall customer reaction on this point is inconclusive, with only 10 of 17 Metlac customers stating they use Metlac to drive price negotiations at all and only <u>one customer</u> stating that it used Metlac in all circumstances.

whether or not the transaction should proceed are redacted and have not been disclosed to AkzoNobel.

4.18 Rexam has stated that "*the acquisition of Metlac ('the market price and innovation driver, and the go-getter') by AkzoNobel would affect competition in the external coatings market.*"[101] Indeed, it would appear that Metlac has been successful in enlisting the support of Rexam in its concerted efforts to frustrate AkzoNobel's exercise of its call option. In this regard, [**CONFIDENTIAL**].

4.19 Rexam has proven itself to be very active in the past three years in playing suppliers off against each other and switching large volumes between different suppliers, as discussed in paragraph 4.25 below. [**CONFIDENTIAL**].

(d) Customers do not rely on Metlac

4.20 In effect, the CC asserts that the buyer power of customers in the B2E segment in the EEA is contingent on Metlac continuing to be available (under the 71.7% economic ownership of AkzoNobel) as an alternative supplier to ANPG, Valspar and PPG. The CC's assertion that customers rely on Metlac as a constraint in their negotiations with the three major suppliers dramatically overstates the competitive significance of Metlac and is not supported by any credible evidence.

4.21 If it were the case that Metlac's presence was crucial, one would expect to find stagnant competition and higher prices in market segments where the same buyers face off against the same suppliers, but where Metlac is not present. In the adjacent B2I segment, however, the same customers (Rexam, Ball, Crown and Can-Pack) are supplied by just three competitors: ANPG, Valspar and PPG. Metlac is not active in the segment and, in the absence of an imminent switch to BPANI coatings for inside spray, and building a new production facility to produce resins for internal spray (which would in practice likely require consent from AkzoNobel as its largest shareholder), it cannot enter that segment in the medium term. It therefore cannot be a relevant consideration for B2I coatings customers in their negotiations with suppliers.[102]

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[101] Summary of CC's hearing with Rexam, 22 June 2012, at paragraph 29.

[102] The CC has identified four significant challenges facing Metlac as a potential entrant into the B2I segment – notably its lack of qualified products, dependency on customer demand for BPANI internal coatings and uncertainty regarding legislative changes in this regard. AkzoNobel also identified potential customer unwillingness to take the risk of being supplied from a small manufacturer operating from a single plant in the event of a catastrophe or failure of the coatings. The CC stated in was "*unclear to us why this would apply differently to B2I than to B2E, which Metlac already produces.*" (Provisional Findings at paragraph 9.81). The answer to that question is simple – the failure of an internal coating, which is in contact with beverages consumed by humans, inherently gives rise to greater liability issues as human health is at risk; this is combined with the fact that B2I cans are produced and sprayed at very high speeds (and rapidly dispatched to downstream B&B customers), so a defect in a B2I coating could necessitate the recall of a very high number of finished consumer products at great expense with high negative publicity. Except in extreme cases, the same human health risks do not arise from a failure of the external coatings (which are essentially decorative). Any such failure would in any case would be obvious from a cursory examination and quality check of the can, meaning mass product recalls would be less likely.

4.22 However, instead of torpid levels of competition in B2I coatings, the opposite is in fact the case. The segment is characterised by high levels of [**CONFIDENTIAL**]. It is also characterised by considerably lower [**CONFIDENTIAL**] than in either the B2E segment or the FCG sector, where Metlac is active and allegedly exercising a decisive pricing constraint.

4.23 In the Provisional Findings, the CC accepts the nature of competition in the B2I segment, stating that it had seen evidence of "*dynamic competition*" between Valspar and ANPG in the segment.[103] However, it makes no effort to reconcile how such dynamism occurs in the absence of Metlac (which is crucial to its theory of harm in the overall B&B sector), or why Valspar and ANPG would be uniquely competitive in B2I, but not in B2E or FCG.

4.24 There are two reasons for the observed "*dynamic competition*" in B2I coatings: (i) Valspar and ANPG (as well as PPG) compete aggressively with each other across all segments in which they compete and not just in B2I; and (ii) customers of B2I and B2E coatings wield very significant levels of countervailing power and are ready and willing to use that power in order to drive the best terms from suppliers.

4.25 The CC largely ignores the clearest recent example of this buyer power[104] – the switching by [**CONFIDENTIAL**] of its B2I contract from [**CONFIDENTIAL**] to [**CONFIDENTIAL**] in 2010, principally on the basis of price. This single switch (completed in just five months) resulted in a marked decline of [**CONFIDENTIAL**]% by volume and [**CONFIDENTIAL**]% by value in Valspar's share of the B2I segment between 2010 and 2011. The segment share trends reflect the power of a single customer, in this case Rexam:

Table 4.1
B2I segment volumes of ANPG, Valspar and PPG (EEA, 2009-2011)

[**CONFIDENTIAL**]

Source: AkzoNobel estimates, updated from Provisional Findings.

4.26 As is clear from the B2I segment, the presence of Metlac is not relevant to the buyer power exercised by the major customers. It is also clear that the three largest suppliers of coatings compete dynamically with each other, whether Metlac is present or not. This is also the case in B2E. Moreover, each of the four customers in the B2E segment have alternative suppliers, already qualified, to which they can quickly and easily switch large volumes within a short timeframe.

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[103] Provisional Findings, at paragraph 8.117.

[104] The CC does not make reference to this example at all in the section on buyer power.

4.27 The position of buyers in the B2E segment fulfils the CC's test for establishing buyer power sufficient to prevent an SLC, as set down in the Merger Assessment Guidelines. Moreover, as discussed in the following section, B2E customers also have the power to sponsor entry and expansion into the segment to counteract any lessening in competition.

(e) Customer-sponsored entry would be likely, timely and sufficient to constrain combined group post-merger

4.28 The Provisional Findings conclude that "*it seems unlikely that there would be new entry into the external beverage segment in a timely manner on a sufficient scale following a merger of AkzoNobel and Metlac*", although the CC did consider it possible it would happen.[105] It based this finding on the views of customers regarding small suppliers' willingness to expand into the B2E segment, giving rise to a significant "*reputational barrier*" on entry occurring on a sufficient scale within a two-year period.[106]

4.29 The CC's assessment of potential sponsorship of expansion into the B2E segment lacks any form of rigorous analysis and is internally inconsistent. The CC states that "*the fact that two customers sponsored new entry into the B&B market indicates that they would not view a market of three suppliers, post-merger, as sufficient*".[107] Yet despite this incentive and track record, the CC concludes that any entry, though possible, would not be timely or sufficient.

4.30 The CC gives insufficient weight to (i) the clear incentive and ability of customers to sponsor entry and their history of doing so; (ii) the fact that such entry into the B2E segment would be well within the two-year timeframe set down in the Merger Assessment Guidelines and in previous CC decisions; and (iii) that, once qualified, customers would source significant volumes from the new supplier – quickly giving it critical mass to compete with ANPG, PPG and Valspar.

<u>Highly likely B2E customers will sponsor new entry</u>

4.31 It is clear from the feedback received from customers that they can and do sponsor expansion and would in fact be likely to do so again in this case:

(i) In its hearing with the CC, Crown stated categorically that "*if the AkzoNobel–Metlac merger were to proceed, [it] would attempt to develop the smaller suppliers in the market further in order to take some business away from a combined AkzoNobel–Metlac business.*"[108]

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[105] Provisional Findings, at paragraph 9.126.

[106] Provisional Findings, at paragraph 9.125.

[107] Provisional Findings, at paragraph 9.136.

[108] Summary of CC's hearing with Crown, 4 July 2012, at paragraph 18. [**CONFIDENTIAL**].

(ii) In its hearing, Rexam said that it "*had sought to assist a number of coatings manufacturers to enter the market*"[109] – this included Metlac and unidentified others.[110]

4.32 Apparently relying on Rexam's statement that smaller suppliers would not be interested in entering the B2E segment, the CC rules out sponsored expansion into the segment. In particular, the CC discounts the prospect of Salchi as a credible entrant in the B2E segment, despite Salchi's statement that "*it did not rule out re-entry into the beer and beverage external coatings sector in the future*".[111] Salchi added that "*AkzoNobel's acquisition of Metlac would create space in the market and customers would look for alternative suppliers. If customers needed to source more products from Salchi, as a consequence of the merger, Salchi would try to meet this demand and, if needed, consider moving capacity.*"[112]

4.33 Salchi is a very highly regarded supplier within the industry, with good quality products across the entire FCG sector. The [**CONFIDENTIAL**] report describes Salchi as being "*frequently mentioned as a competitor to Metlac in the Italian market, Salchi also produces a very full line of metal packaging coatings, including coatings for steel pails*".[113] [**CONFIDENTIAL**] adds "*especially in the Italian market, both Metlac and Salchi Metalcoat are important suppliers of all the major coatings used in the production of food cans, with the exception of powder side seam sealers.*"[114]

4.34 It is clear then that at least one well-established alternative Italian supplier, similarly regarded to Metlac (but without any ownership links to AkzoNobel) is positioning itself to re-enter the B2E sector; thus Salchi appears to recognise that the merger offers it an ideal opportunity to present itself to current Metlac customers as a truly independent alternative to AkzoNobel. Crown has specifically stated that it would look to develop smaller players in order to take business away from the combined AkzoNobel/Metlac. Given the clear incentive and ability to do so, the Provisional Findings are wrong to conclude that expansion by Salchi and others into the B2E segment is unlikely.

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[109] Summary of CC's hearing with Rexam, 22 June 2012, at paragraph 21.

[110] Ball appears not to have been asked if it would sponsor expansion or new entry and Can-Pack did not have a hearing with the CC.

[111] Summary of CC's hearing with Salchi, 20 June 2012, at paragraph 4. Salchi stated that at paragraph 8 that "*it did not believe that the barriers to entry were substantial. Salchi's development in a relatively short space of time was an example of this*". Salchi was also "*in full agreement*" with the decision of the BKartA to allow the merger.

[112] Summary of CC's hearing with Salchi, 20 June 2012, at paragraph 16.

[113] [**CONFIDENTIAL**].

[114] *Ibid.* at page 74.

Sponsored expansion into B2E is likely to be timely

4.35 The CC discounts customer-sponsored expansion on the basis that it would not be done within a timeframe capable of constraining the combined ANPG/Metlac group post-merger.

4.36 The Merger Assessment Guidelines indicate that entry or expansion that occurs within a period of two years is likely to be regarded as timely.[115] The CC appears to accept the two-year limit as the appropriate measure in the case of B2E coatings.[116]

4.37 The views of all respondents to the CC's market investigation overwhelmingly considered that entry into the B2E segment would be achieved within two years, including time to develop and qualify products fully. In relation to ease of expansion by an existing metal packaging coatings supplier not active in B2E, the CC received the following responses:

Table 4.2
Customer views on time required for expansion into B2E coatings

Time required for expansion	Responses received	Responses received (%)
More than 24 months	1	12.5
12-24 months	3	37.5
6-24 months	2	25.0
6-12 months	1	12.5
0-6 months	1	12.5
Total	**8**	**100%**

Source: Competition Commission.

4.38 As is clear from the responses received, 7 out of the 8 responses received from customers (87.5%) consider that a supplier could expand into the B2E segment in less than the two-year timeframe set down under the Merger Assessment Guidelines.

4.39 Competitors confirmed the views of customers in their hearings with the CC. For example, Salchi noted:

> "*The development of a new product could take a few months, followed by 12 to 18 months to get the coatings qualified with customers. However, the length of time depended largely on the interests of the customer: if for whatever reason*

[115] Merger Assessment Guidelines, at paragraph 5.8.11. The CC has confirmed the two-year benchmark as the appropriate measure of timely entry in a number of cases, including *Zipcar/Streetcar* and *BATS Trading/Chi-X Europe*.

[116] Provisional Findings, at paragraph 9.125.

the customer needed to have a new supplier or product it could easily shorten this to a few months."[117]

Sponsored expansion is likely to be sufficient

4.40 The CC fails to set out in detail what it means by "sufficiency" with regard to the prospect of sponsored entry in the B2E segment. It instead refers to technical challenges in producing some types of external coatings and reputational barriers for new entrants into the B&B sector as reasons for concluding that any expansion into the B2E segment, if it were to occur, would not be sufficient.

4.41 The Merger Assessment Guidelines provide more clarity: "*to be considered a competitive constraint, entry or expansion should be of sufficient scope to deter or defeat any attempt by the merged firm to exploit any lessening of competition resulting from the merger*".[118]

4.42 Although *de novo* unsupported entry into the B2E segment by a supplier with no existing presence in metal packaging coatings may not be sufficiently likely as to act as an effective competitive restraint, the CC has not produced any evidence to show that this is the case. However, the expansion of a credible existing player from the FCG sector, such as Salchi, which already manufactures high-quality products and is seeking to expand capacity, is a realistic possibility. If any one of the four customers in the B2E segment were to encourage or sponsor such expansion, then additional capacity could enter the market relatively quickly.

4.43 As noted in paragraph 4.11 above, the four customers in the B2E segment account for virtually 100% of demand. It is implausible that if they were to go to the effort of sponsoring and qualifying a new entrant into the B2E segment, they would not then look to move significant volumes to that entrant if the combined ANPG/Metlac business sought to raise prices or reduce service quality post-merger.

4.44 As submitted in Annex 1 to this Response, the threshold price increase from the combined ANPG/Metlac business at which point it becomes profitable for a customer to qualify a new supplier is extremely low. For example, in B2E if qualification costs were [**CONFIDENTIAL**] then a price increase of [**CONFIDENTIAL**] or more would make it profitable for [**CONFIDENTIAL**] to qualify a new supplier.[119]

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[117] Summary of CC's hearing with Salchi, 20 June 2012, at paragraph 11. AkzoNobel has continuously made this point to the CC and referred to examples of its conversion of [**CONFIDENTIAL**] B2I production lines with [**CONFIDENTIAL**] in less than [**CONFIDENTIAL**] months in 2011 and, more recently, its supply to [**CONFIDENTIAL**] of coatings for [**CONFIDENTIAL**], which took [**CONFIDENTIAL**] months from provision of the first lab sample to first order delivery (Response to CC's Barriers to Entry Working Paper, at paragraph 5.3).

[118] Merger Assessment Guidelines, at paragraph 5.8.10.

[119] See Annex 1, at paragraph 2.3.2.

4.45 Should a customer choose to qualify a new supplier (in the wake of a price rise), it will logically switch volumes to that new supplier. Relatively minor shifts in volume would give rise to very substantial market share fluctuations, particularly with respect to customers such as Rexam, [**CONFIDENTIAL**]. A relatively small amount of the volume of one of these customers directed away from ANPG/Metlac to a new supplier would result in substantial market share changes for both parties.

(ii) There are low barriers to expansion across segments in the FCG sector

4.46 The FCG segment is characterised by the presence of a large number of suppliers, each of which is active across each of the segments in the FCG sector. In addition to the merging parties, the CC has identified at least seven other competitors with material shares: Actega, Diostyl, Grace Darex, PPG, Salchi, Schekolin and Valspar.[120] Each of these competitors is active in the Food, C&C and GL segments.

4.47 Despite the presence of this large group of competitors, the CC has provisionally concluded that none of them exerts a sufficient constraint on the combined ANPG/Metlac in the event the merged group sought to lower its competitive offering. This provisional finding, in itself, is completely unsustainable and AkzoNobel has highlighted the failures of the CC's analysis in this regard in paragraphs 3.26 above and the RBB critique at Annex 1 to this Response.

4.48 The CC's conclusion that barriers to expansion across the FCG segment are prohibitively high for competitors to constrain the parties post-merger is principally based on the views of a small number of customers, largely in response to leading questions. These views have generally been uncorroborated. The Provisional Findings fail to take account of three critical factors:

(i) There are virtually no circumstances where only ANPG and Metlac are qualified to supply coatings to particular customers. Indeed, the CC has admitted that "*we cannot quantify the proportion of cases where new products would have to be qualified as opposed to switching to already qualified products.*"[121] Qualification of new products is therefore a relatively minor concern for customers in the FCG segment post-merger;

(ii) In addition to ANPG and Metlac, there are already at least seven other suppliers in the EEA active across all segments of the FCG sector, including the internal food segment. Like ANPG and Metlac, these suppliers offer a wide range of high quality products;

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[120] Provisional Findings, Appendix G.

[121] Provisional Findings, at paragraph 9.25.

(iii) As noted in the RBB critique at Annex 1, it is more profitable for customers to qualify new suppliers than it would be to accept a modest price increase from the combined ANPG/Metlac business.[122] This indicates that:

- ANPG and Metlac are highly unlikely to profitably increase prices post-merger, as customers could readily qualify an alternative supplier; and
- qualification costs are not a substantive barrier to expansion.

4.49 The low barriers to expansion are evidenced by the large number of suppliers active in the sector and the migration of those customers from GL coatings (where barriers are particularly low), to C&C and then to food coatings, both internal and external. Examples of companies that have expanded in this way include Diostyl[123] and VPL.

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[122] Annex 1, section 2.3.1.

[123] Summary of CC's hearing with Diostyl, 13 June 2012, at paragraph 4. Diostyl *"chose to enter the general line market first where the time taken to qualify a product was shorter than for food contact coatings"*, but was now active across all segments of the FCG sector. Moreover, it was able to expand in this way through toll manufacturing.

5. CONCLUSION

5.1 The CC's Provisional Findings manifestly fail to meet the evidential standard required to sustain a finding that an SLC is likely on a balance of probabilities. The CC has conducted no proper economic analysis to support any of the strident conclusions its draws in the Provisional Findings. Instead, ignoring in large part the evidence provided by AkzoNobel and the commercial circumstances of the transaction itself, it has relied on the unverified assertions of Metlac and the inconsistent responses of a small number of third parties (based in part on questions which are framed in a biased manner).

5.2 The CC has relied largely on responses from just two of the largest and most powerful customers in the global metal packaging industry, both of whom are well-placed to respond to (and indeed have already been able to prepare for) the now long-awaited acquisition by AkzoNobel of full control of the Metlac business (in which it has held a 71.7% interest since its 2008 takeover of ICI).

5.3 AkzoNobel welcomes the fact that the CC has extended the statutory timetable by up to the maximum of an additional eight weeks. We urge the CC to re-evaluate its provisional findings. AkzoNobel remains willing to work constructively with the CC during the course of the coming weeks, with a view to the CC's adopting a clearance decision that will stand-up to scrutiny by the Competition Appeal Tribunal. In this regard, while the CC's revised administrative timetable envisages that the CC will adopt its final report by the end of November 2012 (i.e. before the expiry of the FQA and SHA on 4 December 2012), AkzoNobel confirms that it would have no objections to the CC using the month of December to finalise its report.

10 October 2012

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