RBB | Economics

# AkzoNobel/Metlac: A Critique of the Economic Analysis presented in the Provisional Findings

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# Contents

# 1. Introduction

The Provisional Findings ('PFs') conclude that the proposed acquisition by ANPG of Metlac will give rise to a substantial lessening of competition. That finding is based largely on the finding that Metlac has a novel business model which enables Metlac to engage in a low price strategy.[1] Furthermore, other suppliers are held not to compete vigorously on price (including the second and third largest suppliers in the market) and, due to, in the PFs' view, significant customer switching costs, face significant barriers to expansion. The removal of Metlac is therefore held to give rise to unilateral effects in all segments of the metal packaging coatings industry.

This paper provides a critique of the economic analysis that purports to support those findings.

Our general critique can be summarised as follows.

- **The evidence to support a finding of a substantial lessening of competition is, to say the least, scant.** Great weight is given by the Competition Commission to a poorly composed customer questionnaire that contains leading questions and suffers from severe selection bias. Furthermore, the interpretation of the small number of responses to that questionnaire is partial; responses that do not accord with the Competition Commission's theory of harm are disregarded.

- **The PFs' economic assessment ignores important consequences of its own findings.** The PFs find that most segments of the metal packaging coatings industry are characterised by significant customer switching costs caused by the need to qualify additional suppliers of products for certain end use. However, even assuming that that is the case, the PFs' own analysis of the likely competitive effects of the proposed transaction fails to take into account the impact of those switching costs. As explained in Section 2, the existence of such switching costs implies that it is only customers that have qualified both ANPG and Metlac for the supply of products for the same end use that might potentially be adversely affected by the proposed transaction. The Competition Commission has simply no idea as to which customers fall into this category, nor whether those particular customers also have other readily available alternative suppliers to meet their requirements for products so affected.

  Of course, if barriers to expansion were low i.e. customers could readily switch to other suppliers that are already active in the appropriate segment, then customers will continue to have a number of suppliers from which to choose and are therefore extremely unlikely to be adversely affected by the proposed transaction.

- **Contrary to the PFs' claim, Metlac's growth is unexceptional.** As section 4 demonstrates, Metlac's growth is not exceptional when compared to other suppliers in

[1] The PFs also rely on the statements of a selection of customers, stating that "*a significant proportion of large and small customers **which provided us with evidence***" (emphasis added) indicated that they had significant concerns about the transaction and that these customers did not consider that other firms would be able to replicate the competitive force that Metlac brings to the markets.

the industry. Indeed, the PFs recognise that act.[2] Furthermore, the PFs are internally inconsistent: if one were to accept the PFs' findings regarding Metlac's exceptional growth, it is odd that Metlac has not grown significantly faster than observed. Instead, the observed market evidence on growth indicates that Metlac doesn't provide an effective alternative to the majority of customers, as implicitly implied by the PFs' findings.

- **There is no convincing support for the finding that Metlac has greatly different incentives to other suppliers of metal packaging coatings and is therefore a uniquely aggressive competitor on price.** The PFs provide no reasoning to support why Metlac might uniquely pursue a low pricing strategy. Indeed, no evidence is provided to suggest that Metlac's incremental cost of supply is lower than its competitors and even Metlac claims only that it is among the lowest cost suppliers i.e. Metlac accepts that it faces equally or more efficient competing suppliers.[3]

  Furthermore, as explained in more detail below, the survey evidence relied upon by the CC is extremely partial; respondents who state that Metlac is a low price firm amount to approximately 7% of all customers across the EEA. More importantly, it appears (but we are unable to confirm due to restriction that the Competition Commission have placed on us) that these 10 customers are all or in the main Metlac customers. It is therefore unsurprising that these customers would consider Metlac to be low priced (at least for the specific products they are purchasing from Metlac); if that were the not the case, these customers would surely have turned to other sources of supply!

- **The PFs' finding that neither large suppliers (i.e. Valspar and PPG) nor smaller suppliers provide an effective competitive constraint is not supported by the available evidence.** That finding simply doesn't accord with market reality: how could Valspar and PPG maintain their respective market positions if they did not provide effective competitive offerings to customers? Furthermore, serious doubts as to the validity of the PFs' finding become clear once its logical implications are understood: if neither Valspar nor PPG were not to represent an effective competitive constraint on ANPG, then that would imply that a merger between ANPG and either Valspar or PPG would raise no competition concerns; and the same would be true for a merger between Valspar and PPG. *Reductio ad absurdum.*

The remainder of this paper is organised as follows. We discuss and critique in turn the key building blocks of the theory of harm presented in the PFs. These are as follows:

- Section 2 addresses the PFs' finding that switching between suppliers is, at least in Food and B&B, difficult for customers.

- Section 3 addresses the PFs' finding that Metlac has incentives to pursue a pricing strategy that involves offering lower prices than any other supplier.

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[2] See Appendix H, paragraph 12 where the PFs acknowledge that Valspar, PPG, Grace and Schekolin have in the Food segment, like Metlac, grown at a rate higher than the segment average.

[3] We note that the theory of harm presented in the PFs is one of unilateral effects.

- Section 4 addresses the PFs' finding that Metlac's competitive advantages are reflected in its growth.
- Section 5 addresses the PFs' finding that first, Valspar and PPG and then smaller players do not provide effective competitive alternatives for customers in relation to one or more products.

# 2. PFs' Finding on Barriers to Customer Switching Implies Limited Scope for Competitive Harm

The PFs argue that qualification represents a significant barrier to switching.[4] *"Our provisional view is that supply is characterised by relatively significant costs and time to switch to a previously unqualified product"*[5] That finding has important implications for the potential scope for customers to be harmed by the proposed transaction as the following explains.

Assuming that timely switching (i.e. can take place within 2 years) is not feasible then how are individual customers likely to be affected by the proposed transaction?[6] Customers can be divided into the following four categories.[7]

- **First, consider those customers that have not qualified either Metlac or ANPG for the supply of products for the same end use**. It is unarguable that the proposed transaction can give rise to no adverse effects for these customers.

- **Second, consider those customers that have qualified Metlac but not ANPG for the supply of products for the same end use.** The proposed transaction is therefore extremely unlikely to give rise to adverse effects for these customers.[8]

- **Third, consider those customers that have qualified ANPG but not Metlac for the supply of products for the same end use**. Again as above, the proposed transaction is therefore extremely unlikely to give rise to adverse effects for these customers.[9]

- **Fourth, consider those customers that have qualified both ANPG and Metlac for a products for the same end use.**[10] These customers are potentially adversely affected by the proposed transaction since these customers might not have effective alternatives to turn to without qualifying a new supplier.[11] The likely impact of the proposed transaction on these customers therefore requires further analysis.

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[4] Paragraph 9.49. However, elsewhere, the PFs appear to argue that such switching barriers are low in General Line, external food coatings and external C&C sub-segments. See paragraph 9.109.

[5] Paragraph 8.62.

[6] The PFs appear to suggest that the time period for assessing timeliness of expansion is less than 2 years in this case. No reasoning is provided to support this deviation from the Competition Commission's merger guidelines which state that a response within 2 years would constitute a timely response.

[7] A customer may fall into more than one category since typically customers will have multiple product requirements and, potentially, have qualified different suppliers for different products.

[8] Only if Metlac is the sole supplier and ANPG is the uniquely most likely potential supplier for the product in question could there be a potential competition concern. However, that is extremely unlikely to be the case for the vast majority of customers since (a) most customers pursue a multi-sourcing supply strategy i.e. they have more than one qualified supplier and (b) there is no reason why in general ANPG would be the most likely to qualify a product rather than another supplier.

[9] Only if ANPG is the sole supplier and Metlac is the uniquely most likely potential supplier for the product in question could there be a potential competition concern. However, as noted in footnote 5, this is extremely unlikely to be the case for the large majority of customers.

[10] For example, both ANPG and Metlac provide coatings for internal coating of tuna cans supplied by given customers.

[11] See paragraph 9.25: *"In our view, this detriment occurs particularly in situations where a customer needs to qualify new products as there are qualification barriers to suppliers expanding in a timely manner to counter any such price increases".*

In assessing whether those customers that have qualified competing products of ANPG and Metlac would be adversely affected by the proposed transaction, we need to address the following critical questions.

- First, which customers fall into this category?
- Second, how many of those customers have not qualified any other supplier?

We assess the extent to which the PFs have addressed each of these questions in turn.

## 2.1. No assessment of how many customers are potentially adversely affected by the proposed transaction

Throughout the PFs, the Competition Commission makes no attempt to identify those customers, which according to its own analysis might potentially be adversely affected by the transaction, whether in the UK or elsewhere in the EEA. This is despite the fact that the PFs acknowledge that this central to its theory of harm.

> *"In our view, this detriment occurs particularly in situations where a customer needs to qualify new products (rather than switching to already qualified products or to products it has previously used) as there are qualification barriers to suppliers expanding in a timely manner to counter any such price increase".*[12]

However, the PFs are unable to determine which customers would be so affected. At paragraphs 9.25 and 9.55, respectively, the PFs state the following.

> *"We cannot quantify the proportion of cases where new products would have to be qualified as opposed to any switching to already qualified products".*
>
> *"[T]here are so many products in this market we have been unable to assess whether there are qualified substitutes for each product or smaller suppliers active in adjacent products could develop and produce competitive new products".*

In other words, the PFs acknowledge that the Competition Commission's analysis is based on mere guess work and is therefore seriously flawed.

The following evidence would indicate that such overlap customers are likely limited.

First, since we know that, in aggregate, Metlac accounts for only a small proportion of total sales, the overlap in customers in the EEA supplied with products by both Metlac and ANPG for the same end use will likely be limited.

Second, that conclusion is supported by ANPG's MIS database - the only data available to the Competition Commission that permit any insights into this critical issue. The MIS database shows that Metlac and ANPG overlap for customer-product pairs that account for approximately **[0-10 per cent]** of all sales volumes in the EEA excluding Italy. The PFs seek to dismiss the

[12] Paragraph 9.25.

MIS database as unreliable on the basis that ANPG's estimates of Metlac sales do not correspond in a number of instances with Metlac's sales.[13] **However, as explained in the RBB Dataroom Report, the accuracy of sales volumes is not required in order to assess the degree of overlap in the products supplied by both parties**.[14]

The Competition Commission has sought to argue that the MIS database understates the degree to which Metlac provides a competitive constraint because the MIS database does not take into account instances where suppliers are qualified but have not made any sales to the customer during the six year period 2006 to 2011. But, as explained in ANPG's Main Parties' Hearing, the number of instances where firms have been qualified but not made any sales to a particular customer for the particular product is likely to be small. Indeed, the PFs refer to only a limited number of instances where Metlac claims to have qualified products without making any sales. Furthermore, there is no reason, and certainly no evidence, to suggest that Metlac has significantly more products that have been qualified but have yet to make any sales relative to other suppliers. This implies that from the perspective of a given customer, it is no more likely to have qualified Metlac without making sales than another supplier.

Therefore to the extent that the MIS database suffers from this perceived drawback, it is (a) likely to be limited and (b) will not only understate the overlap between ANPG and Metlac but also between each of the parties and all other suppliers.

In summary, the available evidence strongly indicates that the number of customers across the EEA that are even potentially adversely affected by the proposed transaction is small. The number of such customers in the UK is even smaller still. The Competition Commission has no evidence to reach the contrary conclusion.

## 2.2. No analysis of likely competitive effects for affected customers

Even if the Competition Commission were correct in its unsubstantiated conjecture that Metlac has a large number of qualified products that compete directly with those of ANPG but are not included in the MIS database, the Competition Commission's competitive assessment would still be fundamentally weakened by the fact that it has no means to properly assess the consequences arising from the loss of rivalry between the two parties. In order to do so, the Competition Commission would need to know which other firms also have qualified products for that customer for the same end use and to assess whether those firms would prevent the merged entity from increasing prices above prevailing levels.

A complete competitive assessment would consider for each affected customer the following questions.

- First, does the customer have other qualified suppliers of products for the same end use as those supplied by ANPG and Metlac?

[13] Paragraph 8.81.

[14] See Appendix A.1 for a Non-confidential version. The Competition Commission has access to the Confidential version along with all our workings.

- Second, where customers do have pre-existing qualified alternatives to ANPG and Metlac, what is the competitive ranking of those alternative suppliers?[15]

These are important questions which one would need to address before concluding that the proposed transaction would give rise to genuine competition concerns. Unfortunately, the PFs do not address these questions. Indeed, the evidence on which the Competition Commission relies is simply unable to address these questions.

## 2.3. Implications if barriers to customer switching are low

In the foregoing discussion, we have assumed the position adopted in the PFs; namely, that customer switching costs are significant. In this section, we examine that assumption in more detail and in so doing re-visit the conclusions that can be drawn from our analysis of ANPG's MIS database.

We first consider the implications of the existence of customer switching costs for market definition and then assess how the magnitude of customer switching costs - i.e. the amount of money that would be incurred in order to qualify a new supplier - affects by how much currently qualified suppliers could increase prices before switching would be profitable.[16] We find that in most instances that the price increase threshold for profitable switching is below **[CONFIDENTIAL]**. However, it should be noted that in practice, an increase in the price charged by ANPG to a given customer will lead to that customer switching to other qualified suppliers. This explains why competition between qualified suppliers is the most immediate.

Obviously, if customer switching costs are low (or certainly lower than the CC considers them to be) then the ability of suppliers to expand will be much greater. In consequence, there will also be greater scope for ANPG and Metlac to compete directly for the business of particular customers. However, it will also be the case that Valspar, PPG and other suppliers will be as easily able to expand particularly when considering the FCG segment.

### 2.3.1. Implications of customer switching costs

The existence of customer switching costs implies that the most direct competition will take place between suppliers that have qualified products with the same customer for the same end use. That would appear to be both intuitive and uncontroversial.

That being the case, the RBB analysis of the MIS database identifies the extent to which ANPG and Metlac overlap in terms of customer-product pairs. As that analysis shows, ANPG overlaps

[15] For example, a customer might have qualified Metlac, ANPG and Valspar for a particular end use. The competitive effects of merging Metlac and ANPG for this particular customer will depend on whether Valspar represents a significantly less attractive alternative to both Metlac and ANPG. If that is not the case, and the PFs have no evidence to assess this issue, then the proposed transaction is unlikely to give rise to competition concerns.

[16] This exercise has parallels with the Hypothetical Monopolist Test i.e. its asks by how much could existing suppliers increase price before a customer would find it profitable to switch away.

with Metlac in only a small proportion of customer-product pairs and in practically all cases where there is overlap between the two parties, there are other qualified suppliers.[17]

However, contrary to some comments by the Competition Commission, the existence of customer switching costs does not imply that each customer-pair represents a separate relevant product market.[18] As noted above, 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% i.e. the relevant product market would be wider than that customer-pair.

### 2.3.2. Estimating price increase thresholds for profitable customer switching

In this section we consider the implications of customer switching costs on the ability of existing qualified suppliers to increase prices. ANPG estimate that to qualify a product that has been qualified by another customer would cost no more than **[CONFIDENTIAL]**. However, we have adopted a conservative approach and also considered the implications if qualification costs were somewhat higher.

In assessing the impact of qualification costs on the likelihood of a customer to switch in response to a price increase, account must be taken of the fact that qualification costs represent a one-off fixed cost. Therefore, the greater the volumes over which those qualification costs are spread, the more likely a customer is to switch to a given price increase, *ceteris paribus.* In the analysis below, we present the price increase thresholds for each of ANPG's largest customers in each sub-segment in 2011, assuming that switching costs are spread over three years for a range of qualification costs: Table 1 shows qualification costs ranging from **[CONFIDENTIAL]**

**Table 1. Price increases triggering switching (highest volume ANPG customers in 2011)**

**[CONFIDENTIAL]**

*Note: switching costs are spread over 3 years.*

Table 1 shows that even for qualification costs as high as €200,000, the price increase threshold at which a customer would find it profitable to qualify a new supplier is below **[CONFIDENTIAL]**. For example, if qualification costs were **[CONFIDENTIAL]** for a **[CONFIDENTIAL]**, a price increase of only **[CONFIDENTIAL]** would make it profitable to qualify

[17] The PFs dismiss the validity of the MIS database for assessing the likely competitive effects of the proposed transaction on two grounds: first, that are inaccuracies in the MIS database as relating to volumes supplied by Metlac; and second, that the MIS database excludes suppliers that have qualified products but have not made any sales during the period 2006 to 2011. However, as set out in Appendix 1 to this document, neither of these points undermine the general findings of the RBB analysis.

[18] Transcript of the AkzoNobel main parties' hearing , 18 August 2012, pages 33 *et seq.*.

a new supplier. Similarly, **[CONFIDENTIAL]** if qualification costs were **[CONFIDENTIAL]** then a price increase of **[CONFIDENTIAL]** or more would make it profitable for **[CONFIDENTIAL]** to qualify a new supplier.

Table 2 examines the same issue from the perspective of more ANPG customers in each sub-segment assuming qualification costs of **[CONFIDENTIAL]**. In practically all cases, the price increase threshold is below **[CONFIDENTIAL]**. The exceptions relate to customers that are currently supplied with small volumes by ANPG, which would tend to indicate that those customers have alternative qualified suppliers.

**Table 2. Price increase making the customers of ANPG indifferent to switching (customers with different volumes)**

**[CONFIDENTIAL]**

*Note: switching costs are spread over 3 years.*

Of course, the price increase thresholds presented in Tables 1 and 2 assume that ANPG is the only qualified supplier to each customer considered (or equivalently, that other qualified suppliers increase their prices by exactly the same amount so as to make the customer indifferent to switching between qualified suppliers). However as noted above, in practice, an increase in the price charged by ANPG to a given customer will lead to that customer switching to other qualified suppliers. This explains why competition between qualified suppliers is the most immediate.

Furthermore, Tables 1 and 2 do not take into account supplies made under formal contracts e.g. **[CONFIDENTIAL]**. In such cases, ANPG has no ability to increase prices within the life of the supply contract.

# 3. Limited Evidence to Support Finding that Metlac Consistently Offers Lower Prices Relative to Competitors

The evidence that is central to the PFs' finding that the proposed transaction will give rise to a substantial lessening of competition relates to Metlac's alleged low pricing behaviour: the PFs state that, "*we have placed most weight on the evidence provided regarding Metlac's low pricing strategy*".[19]

This section examines that evidence and what valid inferences can be drawn from it. We note the following points.

- First, throughout the PFs the Competition Commission makes the assertion that Metlac has significantly different incentives to other suppliers of metal packaging coatings as regard its pricing behaviour. However, the source of those differences is nowhere articulated other than vague, unsubstantiated references to Metlac's "novel business model". In particular, no evidence is provided to suggest that Metlac has uniquely lower marginal operating costs that would, according to standard economics, be required to support the Competition Commission's conjecture. We note that even Metlac did not appear to have believed that it was uniquely placed in this respect.[20,21]

- Second, the survey evidence upon which the PFs rely heavily is acknowledged by the Competition Commission to be extremely limited.[22] A number of questions are clearly leading. Moreover, the respondents are predominately customers that are currently supplied by Metlac. It would be indeed be surprising if these respondents did not consider Metlac to be a low priced supplier: if that were not the case, they would presumably have chosen other suppliers for the products concerned. Third, despite suffering from severe selection bias, half the respondents give answers that contradict the conclusions that the Competition Commission wishes to reach.

- Third, even if one were, *arguendo,* to assume that Metlac were a uniquely cost effective supplier that consistently priced lower than its competitors, this by itself would be insufficient to conclude that the proposed transaction will give rise to a substantial lessening of competition. As noted above, only customers that are supplied by both ANPG and Metlac are likely to be adversely affected by the proposed transaction. Furthermore, even for those customers, competition concerns will only arise if Metlac were to represent the next lowest priced supplier after ANPG.

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[19] Paragraph 40

[20] PFs Paragraph 8.101: *"However, [Metlac] also noted that it believed it had a lower cost base than some of its competitors."* The implication is that Metlac has a lower cost basis than some, but not all of its competitors.

[21] However, Metlac has altered its position in its Response, Metlac delights in referring to how the SLC provisionally identified by the Competition Commission "is based *inter alia* upon the uniqueness of Metlac as a competitor (*i.e.*, the fact that its management is dynamic and customer-focused, and that its strategy is to be low-cost / low priced). Such uniqueness is a feature of, and enabled by, a number of factors in combination. Identification of this combination (which competitors have not to date been able to match) poses a number of insuperable difficulties." It also relies on the CC's conjecture to rule out the possibility of alternative remedies: "The unique qualities of Metlac identified by the Competition Commission (*e.g.*, its flexibility, innovativeness, customer service, and track record of reliability) are by definition dynamic and any attempt to delineate behavioural measures for these characteristics would give rise to significant specification and circumvention risk."

[22] Paragraph 9.6. *"We acknowledge that we have only received responses from a selection of customers in the industry".*

We expand on each of these points in more detail below.

## 3.1. Lack of reasoning to explain the source of Metlac's alleged cost efficiency

The PFs claim that Metlac's ability to price aggressively is due to its low cost operation.[23] However, the PFs are silent on the source of such cost efficiencies relative to other suppliers active in the market. The PFs merely assert that Metlac is perceived in the industry as a low cost operation based on production efficiencies.[24] No source for that perception is provided, nor whether that perception has been expressed by a small number of customers or a large number. (We address the deficiencies of relying upon the limited number of customer responses to the Competition Commission's questionnaire in the next sub-section).

Furthermore, by themselves, such perceptions provide no basis for the PFs' finding. Rather, one would expect the PFs' finding to be grounded in sound economics and to be supported by observed market evidence. Standard economics tells us that a firm's pricing decisions are determined by its marginal cost. Hence, if Metlac's pricing strategy was genuinely different i.e. lower than its competitors, one ought to be able to establish that Metlac has lower marginal costs of supply relative to its competitors.

There are therefore pertinent questions that one would have expected a full, impartial analysis to address before drawing any conclusions on this issue.

**First, what is the source of Metlac's production efficiencies?** The PFs vaguely allude to Metlac's "novel business model". But differences in business model are only relevant to the extent that they affect marginal cost of production.[25] Since the production technologies have been well established for many years, it is extremely unlikely that Metlac's business model benefits from production efficiencies. Indeed, it is likely that ANPG, Valspar and PPG, as larger volume suppliers, benefit from production efficiencies arising from the internal production of resins and likely more able to secure better procurement terms from raw material suppliers; efficiencies that are not available to Metlac.

**Second, do the PFs provide support for the conjecture that Metlac has lower marginal costs?** The simple answer is that the PFs contain no such evidence. Indeed, the PFs acknowledge that the Competition Commission has not compared cost information of suppliers.[26] Therefore, any impartial review of the evidence cannot rule out that other suppliers are as or more efficient than Metlac especially when considering the supply of individual products. Indeed, even Metlac does not consider itself to be the uniquely lowest cost producer.[27]

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[23] See for example, paragraph 9.118.

[24] Paragraph 9.8.

[25] Metlac claims that its operations require fewer employees. However, even to the extent that this claim is true (and there is no supporting evidence in the PFs), this would not necessarily affect the *marginal cost* of production.

[26] See paragraph 8.97 "*We have not been able to compare cost information for ANPG and Metlac".* Furthermore, no comparison has been made with respect to the cost positions of other suppliers.

[27] PFs Paragraph 8.101 (see footnote 21)

## 3.2. Survey evidence upon which the PFs rely is unreliable

Appendix L of the PFs presents "information provided by customers" that the PFs rely upon to support its finding that Metlac's low pricing strategy has played a key role in its recent success.[28] There are three sources of evidence considered by the Competition Commission: responses of customers to questions posed in Oral Hearings, responses to a questionnaire sent by the Competition Commission and data gathered by the Bundeskartellamt. We discuss each in turn.

### 3.2.1. Oral Hearings

A significant number of redactions have been made to this section (see paragraphs L7 to L12 inclusive). It is therefore extremely difficult to assess the validity of the arguments presented and the data room contained no information relating to Appendix L. However, we note that the comments presented in Appendix L suffer from severe selection bias i.e. the sample of customers relates to those supplied by Metlac for a significant share of their demand.[29] The fact that these are customers that have chosen Metlac as an important supplier, one would expect Metlac to be the lowest priced supplier; otherwise, these customers would have turned to other suppliers. The conclusions drawn by the Competition Commission from such data are therefore clearly flawed.

### 3.2.2. Responses to Q30 of CC questionnaire

The Competition Commission sent a follow-up questions to the 39 customers initially contacted. 20 responded to this question. We note the following.

- First, the follow-up question is extremely leading [and does not comply with the Competition Commission's own standards on designing surveys for merger inquiries.
- Second, the sample of respondents are practically all customers that are currently supplied by Metlac. We understand that this is the case for 17 out of the 20 respondents. The selection bias comments made above on the original survey therefore apply equally and perhaps with even more force.
- Third, given that one would expect customers currently supplied by Metlac to be predisposed to saying that Metlac is a low price supplier, it is striking that 50% of respondents do not support the arguments that the Competition Commission is seeking to advance.

It is also interesting to note the following: "*Metlac told us that in some instances the low pricing may be used as an incentive to persuade a supplier to switch to it.*"[30] In other words, it does not appear that Metlac is consistently pricing low. Furthermore, there is no evidence that would

[28] Appendix L, paragraph 1.

[29] Paragraph L8 states: *Metlac was often mentioned as the lowest-priced supplier* ***by customers that purchase a substantial share of their demand from it***." (emphasis added).

[30] Paragraph 8.97

imply that this statement does not apply equally to other suppliers active in the market. Indeed, the fact that other suppliers do win (and lose) customers over time strongly indicates that this also applies more widely i.e. other suppliers also compete vigorously on price.

Furthermore, we comment on the following statement:

> "*This [low pricing] constraint will not always show up in switching data as Metlac's prices may be used to bring down prices of other suppliers, in situations where no switch to Metlac occurs*".[31]

But of course, the fact that other firms are able to respond to such pricing offers necessarily indicates that these firms are able to compete on price. And if they can compete effectively in response to Metlac's offers, then this implies that they are also able to make low pricing offers when seeking to win new business. The PFs present no evidence on this issue.

### 3.2.3. Evidence from the Bundeskartellamt and submissions to the CC

The redactions in this section make it extremely difficult to comment and in particular in relation to Tables 1 to 3. Those tables purport to demonstrate that Metlac's prices are significantly below those of competing suppliers, sometimes as much as 25 per cent.

However, we would raise the following serious potential problem with that analysis.

- Are the customer comparisons made by matching products used for the same end use?
- Are the price comparison made at the same point in time?
- Do the price comparisons take into account differences in volumes delivered?
- Do the comparisons take into account different characteristics of the contracts such as indexing of raw material prices and length of contract?

We are concerned that this analysis may have been undertaken at an aggregated level, not taking into account the issues raised above. If that is the case, then any such price comparisons are likely to be meaningless since it will not comprise a like-for-like comparison. Having been denied access to such information in the dataroom, we are in no position to demonstrate whether or not this is the case.

Furthermore, we are concerned that any such price comparisons also seek to compare prices at different times; again, this would result in an apples and pears comparison. The same is true if no account is taken of potential differences in the volumes delivered by the different suppliers contained in the sample and different contracts.

[31] Paragraph 8.96.

## 3.3. A finding that Metlac pursues a low pricing strategy is insufficient for a finding of competitive harm

Even if one were, *arguendo,* to assume that Metlac were a uniquely cost effective supplier that consistently pursued a low pricing strategy (and in particular priced lower than its competitors), this by itself would be insufficient to conclude that the proposed transaction will give rise to a substantial lessening of competition for the following reasons.

- First, as noted above, the customers that are most likely to have the potential to be adversely affected by the proposed transaction are supplied by both ANPG and Metlac with products for the same end use. As noted in Section 2, the PFs acknowledge that the Competition Commission has no way of identifying such customers.

- Second, even for those customers, competition concerns will only arise if Metlac were to represent the next the most important pricing constraint on ANPG.[32] Such an assessment would necessarily need to take place on a customer by customer basis: different customers will have different qualified suppliers for different end uses and different suppliers will have differing strengths across customers. The PFs contain no reliable evidence on this matter and reliance on arguments that are to be applied across all customers is clearly deficient.

[32] We note that a supplier offering the next most attractive price does not necessarily imply that that supplier represents the most attractive alternative. As the PFs note, other non-price factors may affect a customer's supplier decisions.

# 4. Evidence does not support PFs' finding that Metlac has exhibited exceptional market growth

## 4.1. Overview

The PFs argue that Metlac's competitive strengths are reflected in its exceptional growth observed in recent years: *"overall, the evidence showed strong growth by Metlac in various categories of the metal coatings markets, suggesting that Metlac is a significant competitor in the relevant markets."*[33] Furthermore, according to the PFs, such growth underpins Metlac's low pricing strategy.[34]

A distinction needs to be made between growth in B&B where larger tender contracts characterise most customer relationships and FCG where tenders are uncommon and the volume requirements of many customers are small. We address competition in each of these broad segments in turn in Section 5. This section instead focuses on the claim that Metlac has experienced exceptional growth.[35]

As this section demonstrates, the data do not support such a position. Metlac's observed growth is driven primarily by winning the B2E contract of Rexam. Metlac's growth in the FCG segment is comparable to that of ANPG and other smaller suppliers (as the PFs acknowledge).

## 4.2. The source of Metlac's growth

When considering Metlac's total metal packaging coating volume in the EEA excluding Italy, Metlac can be seen to have grown from **[CONFIDENTIAL]** kt in 2007 to **[CONFIDENTIAL]** kt in 2011, i.e. an increase of **[CONFIDENTIAL]** kt. As shown in Figure 1, Metlac's EEA volumes outside Italy grew by **[CONFIDENTIAL]** kt in B2E, and by **[CONFIDENTIAL]** kt in FCG. Metlac's growth in FCG from 2010 to 2011 is largely due to Crown switching a significant part of its production from Valspar to Metlac.

**Figure 1: Metlac Metal Packaging Coating Sales Volume, 2007-2011, EEA excluding Italy**

***[CONFIDENTIAL]***

***Source: [CONFIDENTIAL].***

First, it should be noted that while the growth appears significant, Metlac's EEA sales outside Italy were very low in 2007 - it is not particularly surprising to see a strong growth in percentage terms when starting from a low base.

[33] Appendix H, paragraph 5.

[34] Appendix H, paragraph 26.

[35] This section updates Section 2 of the RBB paper, 28 August 2012.

In B2E, it is likely that the vast majority of the increase in volumes comes from sales to **[CONFIDENTIAL]**. As indicated in the list of formal tenders in B&B submitted by RBB in response to question 25 of the market questionnaire, Metlac won **[CONFIDENTIAL]**% of **[CONFIDENTIAL]** tender for **[CONFIDENTIAL]**. The total tender volume was **[CONFIDENTIAL]** kt annually; it should be noted that it would cover all of the EMEA rather than the EEA only. Metlac's share of **[CONFIDENTIAL]**% therefore represent **[CONFIDENTIAL]** kt. With actual Metlac B2E EEA volumes (excl. Italy) being **[CONFIDENTIAL]** kt in 2007, **[CONFIDENTIAL]** kt in 2008, **[CONFIDENTIAL]** kt in 2009 and **[CONFIDENTIAL]** kt in 2010, it is likely that the vast majority of the growth in B2E can be entirely attributed to the **[CONFIDENTIAL]** contract. **[CONFIDENTIAL]** ramped up its purchases from Metlac over the years and was likely putting **[CONFIDENTIAL]**% of its B2E business to Metlac by 2010.

**[CONFIDENTIAL]** further increased its purchases from Metlac by awarding it **[CONFIDENTIAL]%** of the **[CONFIDENTIAL]** tender for **[CONFIDENTIAL]**, and **[CONFIDENTIAL]**% for **[CONFIDENTIAL]**. These win contracts would be equivalent to EMEA volumes of **[CONFIDENTIAL]** kt annually (although ANPG noted that Metlac was not able to fulfil its contract for **[CONFIDENTIAL]** and **[CONFIDENTIAL]** continues to supply significant amounts to **[CONFIDENTIAL]**. In any case, it is likely that the vast majority of Metlac's 2011 B2E volumes represent sales to **[CONFIDENTIAL]** only.

The picture for the EEA including Italy is similar (see Figure 2). The data show that Metlac increased its B2E sales between 2009 and 2011 by only **[CONFIDENTIAL]** kt. However, ANPG's sales increased by **[CONFIDENTIAL]** kt, and Valspar's sales by **[CONFIDENTIAL]** kt - only PPG suffered a reduction in volume (of **[CONFIDENTIAL]** kt).

**Figure 2: Metal Packaging Coating Sales Volume in B2E, 2009-2011, EEA**

***[CONFIDENTIAL]***

***Source: [CONFIDENTIAL].***

These numbers are difficult to reconcile with Metlac allegedly representing the lowest priced supplier. If Metlac's prices really were consistently lower than the prices of the others, one would have expected a rapid expansion of sales at the expense of the other competitors.[36] That has not been the case.

In FCG, the picture is similar. Using the market share data in the provisional findings, we find that between 2009 and 2011, Metlac's FCG volumes in the EEA (including Italy) increased by **[CONFIDENTIAL]** kt (of which **[CONFIDENTIAL]** kt were outside Italy). However, this growth is by no means exceptional. ANPG increased its sales by **[CONFIDENTIAL]** kt between 2009 and 2011, Valspar by **[CONFIDENTIAL]** kt, Grace by **[CONFIDENTIAL]** kt and Actega by **[CONFIDENTIAL]** kt. To give a perspective, the total FCG EEA market grew by **[CONFIDENTIAL]** kt between 2009 and 2011.

[36] Or alternatively that non-price factors are also important in determining customers' choices of suppliers.

**Figure 3: Metal Packaging Coating Sales Volume in FCG, 2009-2011, EEA**

***[CONFIDENTIAL]***

***Source: [CONFIDENTIAL].***

As in B2E, the fact that Metlac has not increased its volumes to a much larger degree than the other competitors in absolute terms is at odds with the claim that it is a competitor that offers the lowest prices and scores highly on product quality. If those claims were uniquely true, one would expect Metlac's sales volumes to have increased significantly at the expense of rival firms. On the contrary, Metlac appears to be simply one of six large suppliers of FCG metal packaging coatings, growing at a somewhat faster rate than the total market – similar to Valspar.

## 4.3. Summary

In summary, the suggestion that Metlac is growing rapidly relative to other suppliers due to its aggressive pricing strategy is not supported by the data. In FCG, Metlac grew at a faster rate than the market, approximately in line with Valspar. In relation to B2E sales volumes, Metlac did gain significant volumes between 2008 and 2011 due to its contract with **[CONFIDENTIAL]**; however, it has not grown at a substantially greater rate than the market between 2009 and 2011.

# 5. Evidence indicates that other players do provide effective competitive constraints

The PFs' find that neither large suppliers (i.e. Valspar and PPG) nor smaller suppliers provide effective competitive constraints on ANPG. The PFs find that Valspar and PPG do not currently compete particularly aggressively on price and have not grown sales as significantly as ANPG and Metlac have grown sales in recent years.[37] The PFs find further that smaller firms do not constrain ANPG, Valspar and PPG in B&B. Moreover, although these smaller suppliers are acknowledged as playing a significant role in FCG, the PFs play down their competitive significance: "*However, customers have told us that these smaller suppliers do not generally have the ability to expand in the manner Metlac has done and they focus on particular market segments, which may hinder their ability and desire to expand*."[38]

We assess these arguments first in relation to Valspar and PPG, considering the competitive constraint they each provide in the B&B segment and then in the FCG segment, and then consider the competitive constraint provided by smaller suppliers.

## 5.1. Competitive constraint provided by Valspar and PPG

A central plank of the PFs' finding that the proposed transaction will give rise to unilateral effects is the finding that Valspar and PPG do not provide an effective competitive constraint on ANPG and therefore would not prevent the merged entity from profitably increasing prices to both B&B customers and to FCG customers.[39]

### 5.1.1. Competitive constraint provided by larger suppliers in the B&B segment

The PFs state that Metlac exerts a significant pricing constraint on all suppliers of B2E coatings.[40] Furthermore, although customers have indicated that in the event of a price increase by the merged entity they could switch to Valspar and PPG, the PFs argue that in the CC's view "*it is possible that Valspar and PPG would follow any price increase instituted by AkzoNobel, if their prices are not already higher*".[41]

Our response to this reasoning and conclusion is as follows.

- First, there is scant to no evidence to support the findings that Valspar and PPG do not compete effectively. But how could Valspar and PPG maintain their respective market positions if they did not provide effective competitive offerings to customers? Indeed, we note (as shown in Section 4) that Valspar has grown its share in B2E by more than Metlac. It is difficult to see how that observed market fact is consistent with the PFs'

[37] See paragraph 8.126.

[38] Paragraph 8.135.

[39] Paragraphs 9.35 to 9.38 and 9.45 to 9.48.

[40] Paragraph 9.35.

[41] Paragraph 9.36.

assertion that Valspar is not an effective competitive constraint, particularly when customers state that they could switch to Valspar and PPG in response to a price increase.[42]

- Second, the PFs provide no evidential or theoretical support for the view that Valspar and PPG would be likely to simply follow any attempt by the merged entity to increase prices to B2E customers. ***Indeed, the PFs ignore entirely the bidding features of competition in most of the B&B segment.***

  The award of a contract to supply is made to the most attractive offering (that includes both price and non-price components) received by the customer. If the merged entity were to increase prices above those bid by ANPG and/or Metlac absent the merger, this would increase the chances of Valspar or PPG winning the contract! Any post-merger change in the pricing behaviour of Valspar or PPG relative to the counterfactual situation (where Metlac would continue to operate as a separate business, 71.7% economically owned by AkzoNobel) would conversely lower those chances.

  In addition, since tender submissions are non-transparent, Valspar and PPG would have no knowledge that the merged entity had sought to bid with a higher price. Hence, increasing their own bids would again reduce their chances of winning the contract.

  Furthermore, the PFs state that *"[w]e have not seen any evidence of past behaviour that either Valspar or PPG have been willing to compete vigorously on price in the way that Metlac has".*[43] But, as demonstrated in Section 4, Valspar has grown in volumes terms significantly more than Metlac in terms of B2E volumes. That growth surely, in part, reflects competitive low price offerings on the part of Valspar; otherwise we would have expected those customers who increased purchases from Valspar to have chosen an alternative supplier.

  The CC's view that Valspar and PPG would choose to follow any post-transaction price increase is therefore ill-founded.

- Third, there is ample evidence that ANPG, PPG and Valspar compete effectively in the B2I segment, where Metlac is not present, and which features the same customers as the B2E segment. For example, Valspar won a large part of the **[CONFIDENTIAL]** contract from ANPG; a few years later, ANPG managed to win a contract to supply all of **[CONFIDENTIAL]** requirements in the EMEA. This shows that ANPG and Valspar competed fiercely to win business rather than just following price increases of competitors, even without the presence of Metlac in this segment. There is no reason to believe that their behaviour would be different in B2E following the merger.

- Fourth, the PFs' analysis is internally inconsistent. On the one hand, the costs of a customer switching to a non-qualified supplier are said to be significant. But on the other, the PFs claims that Metlac provides a significant pricing constraint on the supply of B2E coatings to those customers for which it has not yet qualified a product.

[42] Paragraph 9.36.

[43] Paragraph 9.38.

- Finally, serious doubts as to the validity of the PFs' finding become clear once its logical implications are understood: if neither Valspar nor PPG were not to represent an effective competitive constraint on ANPG, then that would imply that a merger between ANPG and either Valspar or PPG would raise no competition concerns.

#### 5.1.2. Competitive constraint provided by larger suppliers in the FCG segment

The basis on which the PFs' finding that Valspar and PPG are not effective competitors in the FCG segment is, if anything, even weaker than the arguments presented in relation to B&B.[44]

The PF's acknowledge that FCG "*customers often mentioned Valspar and PPG"* as suppliers to which they could switch in response to a hypothesised price increase by the merged entity. But the PFs attempt to play down such responses by asserting that such switching would be conditional on a number of factors. But the PFs are silent on what those factors are or how important they are. Or indeed, whether they apply equally to Metlac.

Again, the PFs retreat to asserting with no supporting explanation that Valspar and PPG would follow a price increase imposed by the merged entity. The "evidence" in support of this assertion appears to be the CC's selective interpretation of responses received from a very small number of customers.

## 5.2. Competitive constraint provided by smaller players

This section considers the competitiveness of other players in supplying FCG customers. The PFs conclude that *"[s]maller customers may not be able to replicate all of Metlac's product range from other smaller customers".*[45] The PFs go on to argue that expansion by smaller suppliers would not be sufficiently timely in food contact coatings in Food and C&C.[46] The PFs further assert that despite being likely and timely, entry and expansion would not occur "*at a sufficient level to constrain the merged entity, given past evidence on growth of smaller suppliers and qualification requirements"*.[47]

Those arguments are subject to the following severe criticisms.

First, we note that the PFs acknowledge severe gaps in their market assessment that render its conclusions little more than guess work. At paragraph 9.56, the PFs set out the following issues that affect the competitive conditions for each FCG product and therefore the assessment of the likely competitive effects of the merger.

- *"how many direct substitutes for each product type there are:*

[44] The CC's reasoning is set out in paragraphs 9.45 to 9.48.

[45] Paragraph 9.55.

[46] Paragraph 9.109.

[47] Paragraph 9.117.

- *the cost (and time) of qualifying each substitute to be used in the customer's plant. This can range from zero (already qualified) to a significant amount (e.g. for unqualified internal food coatings);*
- *the number of suppliers who are both perceived to be reliable and are prepared to supply/qualify the product; and*
- *In the event that there are no/few substitutes already in the market, or the customer requires a new product, the number of suppliers who: have the technical capability to develop a substitute/new product; are perceived to be a reliable supplier; and are prepared to develop and qualify the product and are able to supply the product at a competitive price".*[48]

With respect to the first bullet on the PFs' list of factors required to provide a proper competitive assessment of the likely effects of the proposed transaction, and as we have noted above, the Competition Commission simply has no idea. See, as noted above, paragraph 9.25 and 9.55, the latter which we repeat here:

> *" .... there are so many products in this market we have not been able to assess whether there are qualified substitutes for each product or smaller suppliers active in adjacent products which could develop and product competitive new products".*

Against the background of such admissions, the PFs are essentially reaching conclusions as regards to the competitive constraint provided by smaller suppliers in the FCG segment that are seriously flawed and not based on any sound evidence. Even if all the PFs arguments relating to the ability of smaller suppliers to expand their product portfolios in the FCG segment were correct (and for reasons set out below that is not the case) the Competition Commission has simply no idea as to the impact of the proposed transaction on the actual competition for the supply to each individual customer.

Second, the PFs seek to brush under the carpet these significant analytical and evidentiary lacunae in the Competition Commission's analysis by asserting that the *"most important determinant of competitive conditions for a significant proportion of the products in this market is therefore the number of suppliers who have the reputation, the technical expertise and the commercial appetite to develop and supply a substitute product at a competitive price".* A number of comments on this paragraph are in order.

- As noted in Section 2, where a customer is supplied by either ANPG or Metlac with products for a given end use and has at least one other qualified supplier for that end use, the proposed transaction can give rise to no competitive concerns regardless of the factors the reputation, technical expertise or commercial appetite of other suppliers.
- Reiterating the point made above, the PFs are simply unable to identify how many customer-product pairs are so affected by the proposed transaction. The Competition Commission simply doesn't know which and what proportion of FCG customers would require smaller suppliers to expand their product portfolio to prevent any post-transaction price increases.

[48] Paragraph 9.56.

- The PFs 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, Valspar, PPG and Metlac (see below).

  The PFs argue that only ANPG, Valspar, PPG and Metlac posses "technical expertise and reputation across a broad range of products.[49] But, it ought to be self-evident that a customer's ability to switch to an alternative smaller supplier does not depend on whether that alternative supplier has "technical expertise and reputation across a broad range of products" that matters. What matters is that a given supplier is able to supply products that that customer requires; and since the PFs find that Grace and Schekolin have grown strongly in the Food segment (the most difficult and time-consuming segment in which to qualify new products), it is clear that smaller suppliers are able to do so. 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. Only if there were sub-segments of products for which none of the smaller suppliers were active might it be appropriate to discount the competitive constraint provided by smaller firms. The PFs identify no such sub-segment of products and for the reasons set out above, the Competition Commission simply has no way of identifying such sub-segments. The PFs observation that smaller supplier do not (according to the PFs) supply a wide range of products in the FCG segment is therefore, even if true, irrelevant to the competitive assessment.

Third, as noted above the PFs 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, the PFs would appear to ignore/disregard evidence that other smaller suppliers including suppliers of comparable size to Metlac e.g. Grace and much smaller suppliers e.g. Schekolin have grown at a faster rate in the Food segment than the segment average.[50] The fact that these suppliers are, like Metlac, growing must imply that they provide an effective competitive alternative for a number of customers.

Fourth, the ability of smaller suppliers to compete effectively is demonstrated in Table 3 which compares the number of customers supplied by ANPG and a number of smaller suppliers, Metlac included, in each segment. We note that in the Closures segment, Metlac has a similar number of customers as Grace and Actega. In the Food segment, Grace supplies slightly more customers and Actega and Schekolin slightly fewer customers than Metlac. A similar picture is observed in the General Line segment.

**Table 3: Number of customers supplied (EEA, Metal Packaging, 2011, excl. Italy)**

| Segment | Akzo | Grace | Metlac | Schekolin | Actega | Rembrandtin |
|---|---|---|---|---|---|---|

**[CONFIDENTIAL]**

*Note: **[CONFIDENTIAL]***

[49] Paragraph 9.58.

[50] See Appendix H, paragraph 12.

For these reasons, there is no credible basis for the Competition Commission's preliminary conclusions presented at paragraph 9.59 of the PFs that "*smaller suppliers are unlikely to be able to significantly constrain the merger entity*".