

NON-CONFIDENTIAL VERSION

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

**Submission by the Metlac Group on the
Competition Commission's Provisional Findings Report**

October 10, 2012



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I. INTRODUCTION

1. This Submission sets out the response of Metlac Holding S.r.l. and Metlac S.p.A. (together “Metlac”) to the Provisional Findings Report published by the Competition Commission on September 21, 2012. Metlac submitted a separate response to the Competition Commission’s Notice of Possible Remedies on October 3, and will also respond separately to the submission of AkzoNobel on the Notice of Possible Remedies.
2. Metlac agrees with the provisional conclusions reached by the Competition Commission, and believes that these provisional conclusions should be confirmed in its Final Report. Although Metlac agrees with the overall conclusions reached by the Competition Commission, its views differ on a number of specific points. However, Metlac does not repeat in this Submission evidence that it has previously submitted to the Competition Commission, and which the Competition Commission has already considered in the process of reaching its provisional findings.
3. This Submission therefore contains evidence that Metlac has not previously submitted, either because the specific point has not previously arisen or because the evidence has become available more recently.

II. METLAC’S SUBMISSIONS

4. Metlac makes submissions on the following topics:
 - A. The Rationale for the Transaction
 - B. Metlac’s Growth Projections
 - C. Demand for BPA-NI Products
 - D. Metlac’s Potential Entry into Inside Spray and Beverage Ends
 - E. The Cost of Approving a New Supplier
 - F. Capacity in the Industry
 - G. Catastrophe Planning
5. Metlac also submits comments on the AkzoNobel MIS database, following the Competition Commission’s decision to allow access to that database by means of a dataroom exercise.

A. Rationale for the Transaction

6. AkzoNobel claims that its rationale for the Transaction is threefold.¹ Specifically it states:

¹ Provisional Findings Report, paragraph 4.9.

- It was always envisaged that the Metlac and AkzoNobel businesses would come under full common control.
 - The Transaction would give AkzoNobel significant presence in Italy, which it does not have at present [§].
 - The acquisition of Metlac would result in synergies and efficiencies.
7. As previously submitted to the Competition Commission,² it is not Metlac's understanding that the acquisition of Metlac was "*always envisaged*" since 1997. In any event, this point is irrelevant to an assessment of the competitive effects of the proposed acquisition today.
8. As to the position in Italy, Metlac does not dispute that it has a relatively strong position in Italy. This success has been hard won, against competition from all other suppliers in the market. In any event, as previously explained to the Competition Commission, [§].³
9. Metlac is unaware of the detail of the synergies AkzoNobel expects to achieve by acquiring Metlac. However, it makes the following observations on the general categories of synergies AkzoNobel has identified.
10. **Lower Procurement Costs.** It is possible that AkzoNobel, as a large global operation consuming high volumes, is able to negotiate competitive input prices, particularly in relation to inputs used in more than one of its business areas (*e.g.*, certain pigments). However:
- It is unlikely that the acquisition of Metlac would have a material impact on the prices AkzoNobel is already able to negotiate from suppliers.
 - Metlac is itself already able to benefit from low input costs in ways that AkzoNobel may not. Specifically, Metlac is able to procure supplies on a flexible basis, taking advantage of discounted offers, and switching between suppliers. For example, Metlac sources epoxy resins from [§] and titanium dioxide from [§], and is prepared to purchase and store sufficient quantities to last several weeks of production, in order to take advantage of lower prices. [§].
 - Metlac's production facilities are modern and highly efficient. This allows Metlac to purchase certain inputs in bulk quantities, whereas other manufacturers – including AkzoNobel – cannot. [§]. To the best of its knowledge, AkzoNobel buys the same product in bags.
 - Certain input materials are tailor-made by suppliers based on the specific requirements formulated by coating producers. These inputs may be more

² Response by the Metlac Group to the Initial Submission of AzkoNobel, July 13, 2012, paragraph 5.

³ Metlac Comments on Working Papers and Response to Questions from Main Party Hearing, August 22, 2012, paragraph 12. [§]

sophisticated than traditional ones and are used to ensure higher properties of certain types of specialty coatings, which are not produced in large quantities (e.g., white side-spray lacquer for internal three-piece cans, BPA-NI heat-sealing lacquer, and pigmented internal lacquer). It is highly unlikely that the acquisition of Metlac would have a material impact on the price AkzoNobel is able to negotiate for these inputs, given that they are used in the production of specialty coatings which may not be manufactured by AkzoNobel and, in any event, are not produced in the quantities necessary to trigger rebates or more favourable terms.

11. **Efficient Allocation of Product Lines.** Metlac is skeptical that its plant could be made more efficient as a result of a rationalization by the enlarged AkzoNobel business, given the plant's current construction and the investment Metlac has made in state-of-the-art equipment. In any event, reconfiguring Metlac's plant in the way suggested would itself require capital investment (which would need to be recouped). It would also require new customer approvals – since customers inspect, audit and approve the facilities manufacturing the products they purchase.
12. **Use of In-House Resin.** While Metlac recognises that the use of in-house resin can result in cost savings in relation to some products, this is not always the case. As far as it is aware, all manufacturers of metal packaging coatings buy-in resins where it is economic to do so. More specifically, [§]. In addition, AkzoNobel's resin reactors would not be adaptable to new BPA-NI technologies.
13. **Savings in R&D and Commercial Operations (e.g., back-office support).** Metlac's operations are run on an efficient and lean basis. Metlac has already provided evidence to the Competition Commission that its processes are highly automated, resulting in high rates of productivity per person.⁴ Similarly, its R&D function is efficient and although employing just [§] people – albeit representing a relatively high proportion of its overall workforce – it has enabled Metlac to match and even exceed the product development efforts of its competitors at lower cost. In Metlac's view there is very limited scope to improve the efficiency of its R&D and/or commercial operations. Rather, there is every prospect that AkzoNobel would increase the number of employees and managers on site, and that further "head office" costs would result from integrating Metlac's plant into the wider AkzoNobel network. In addition to a loss of efficiency, there is a risk that the unique innovative culture of Metlac's business will be hampered by a combination with AkzoNobel, whose own internal documents identify product innovation as one of its weaknesses.⁵
14. Taken overall Metlac does not recognise the potential for synergy or efficiency savings suggested by AkzoNobel's submission, nor does it believe that AkzoNobel's own operations would benefit from synergies or efficiencies in any meaningful way as a result of the proposed transaction. In addition, even if AkzoNobel were able to generate efficiencies through the Transaction, it is by no means clear that these would be timely or sufficient to prevent the expected SLC. In any case, given the limited

⁴ See, for example, Metlac's Initial Submission, paragraph 68.

⁵ Provisional Findings Report, Appendix J, paragraphs 7 to 12.

competition that would exist post-merger, it is unlikely that AkzoNobel will have sufficient incentives to pass on these alleged efficiency gains to customers.⁶

B. Metlac’s Growth Projections

15. Metlac has submitted copies of its growth projections to the Competition Commission. Although acknowledging Metlac’s significant growth over recent years and the likelihood of its continued growth, the Competition Commission has nevertheless concluded that Metlac’s specific projections are “*optimistic*”.⁷
16. Metlac submitted at its Main Party Hearing that these projections were not, in its view, unrealistic and that they might in fact be considered conservative. Metlac provides the following additional explanations of its submissions in this regard.
 - The growth projections for Metlac’s FCG sales are based on, and consistent with, its recent growth in these segment. They do not factor in the possibility of growth resulting from more fundamental shifts in customer demand. For example, [✂].⁸
 - [✂].
 - [✂].
 - [✂].
17. For all of these reasons, Metlac continues to believe that its projections are realistic and based on conservative assumptions.

C. Demand for BPA-NI Products

18. The Provisional Findings Report recognises the impetus in the market to move to BPA-NI coatings, given the perceived health risks associated with BPA. However, the Competition Commission has provisionally concluded that the rate of adoption of BPA-NI coatings may depend on: (i) legislation; and/or (ii) the price of BPA-NI products falling to the level of non-BPA-NI product.⁹ In addition to the evidence already submitted in this regard, Metlac makes the following observations.

⁶ See the Competition Commission’s Guidelines on Merger remedies, paragraph 1.16. See also, the European Commission’s Horizontal Merger Guidelines, (2004), O.J. C 31/5, at paragraph 84: “[t]he incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry” ((2004), O.J. C 31/5, paragraph 84).

⁷ Provisional Findings Report, paragraph 8.27.

⁸ Metlac Comments on Working Papers and Response to Questions from Main Party Hearing, August 22, 2012, paragraph 4.

⁹ Provisional Findings Report, paragraph 9.67.

Legislation

- The use of BPA is already restricted in Europe in relation to containers for baby food (including caps for jars of baby food) in many European countries.¹⁰
- On October 9, 2012, the French Senate approved a bill banning the use of BPA in all packaging coming into contact with food, to take effect from July 1, 2015.¹¹ The Senate's approval was subject to some amendments to the bill previously approved by the National Assembly on October 12, 2011. The bill has therefore been referred back to the National Assembly for final approval.
- Belgium has drafted legislation that would ban the use of BPA in containers for foodstuffs aimed at children up to the age of three years, to come into effect on January 1, 2013. This is based on a recommendation of the Belgian Superior Health Council that exposure of young children to BPA should be limited to the lowest level possible.¹²
- Once one or more European countries have adopted legislation banning the use of BPA in certain products, can manufacturers across Europe will in all likelihood need to comply with the highest national standards, since it would be impractical to have separate production lines depending on the final destination of the cans.
- In the US, several States have banned the use of BPA.¹³

Brand-Owner Switching

- In March 2012 the Campbell Soup Company decided to phase out BPA from all its food cans before 2015, as a result of public pressure.¹⁴

¹⁰ BPA is also prohibited in the manufacture of baby bottles across the EU (Commission Directive 2011/8/EU).

¹¹ See (in French) at http://www.lemonde.fr/sciences/article/2012/10/09/le-senat-adopte-le-texte-d-interdiction-du-bisphenol-a-dans-les-contenants-alimentaires_1772668_1650684.html Prior to the approval by the Senate, the news was reported on English language websites (e.g., <http://www.packagingnews.co.uk/news/france-to-ban-bpa-in-food-contact-packs-by-2015>).

¹² See, for example, <http://www.euwid-packaging.com/news/singlenews/Artikel/bpa-ban-belgium-follows-frances-lead.html>

¹³ For example, D.C. Bill 521 in the District of Columbia, enacted in March 2011, prohibits the manufacture, sale or distribution of bottles, cups or containers made from BPA if they are designed to be filled with food or liquids. The restrictions took effect on 1 July 2011.

¹⁴ See: <http://www.foodproductiondaily.com/Quality-Safety/Campbell-Soup-to-complete-bisphenol-A-phase-out-before-2015-source> ; and <http://www.forbes.com/sites/amywestervelt/2012/03/05/under-pressure-from-parents-advocacy-groups-campbells-goes-bpa-free/>

- Heinz, Nestle, General Mills, Danone, Unilever, and other food companies are also removing BPA from some or all of their product packaging.¹⁵

Can Manufacturers Switching

- A number of can manufacturers have expressed an intention to switch to BPA-NI coatings for part of their production in the course of 2013, independently from requests from their own customers. This will allow them to acquire significant experience in the manufacturing of these products prior to likely legislative bans and/or customer demands.
- Metlac is aware that this change will result in additional costs to can manufacturers. Metlac is therefore prepared to offer very competitive pricing terms to support these customers. In particular, [§].

Scientific Research

19. There is also an increasing body of research concluding that BPA is potentially harmful to humans. This includes:
 - The French Agency for Food, Environmental and Occupational Health and Safety (“ANSES”) released two reports in September 2011 concluding that, even in minimal doses, BPA has negative health effects on laboratory animals as well as on humans. Based on its findings, ANSES called for the substitution of BPA in applications such as food contact materials, toys and child-care products, to protect infants and pregnant women.¹⁶
 - The European Food Safety Authority is also closely monitoring the issue on an annual basis: in February 2012, it launched a new enquiry following the completion of additional scientific studies showing some BPA-related effects observed in rodents at low dose levels and their possible relevance to human health.¹⁷
 - In November 2011, the Harvard Gazette published a new study from the Harvard School of Public Health, which concluded: “*The magnitude of the rise in urinary BPA we observed after just one serving of soup was unexpected and may be of concern among individuals who regularly consume foods from cans or drink several canned beverages daily. It may*

¹⁵ See, for example, Heinz Corporate Responsibility Report 2009: http://www.heinz.com/CSR2009/social/business/food_safety.aspx See also: <http://www.packaging-int.com/news/heinz-drops-bisphenol-a-food-packaging.html>

¹⁶ See: <http://packwebasia.com/packaging-legislation-compliance/legislation-standards/1369-france-bans-bpa-in-all-food-contact-packaging>

¹⁷ See: <http://www.efsa.europa.eu/en/topics/topic/bisphenol.htm?wtrl=01>

*be advisable for manufacturers to consider eliminating BPA from can linings”.*¹⁸

- The US Food and Drug Administration (the “FDA”) and the National Institutes of Health expressed concern about the potential effects of BPA on the brain, behaviour, and prostate gland in foetuses, infants, and young children. The FDA is currently carrying out in-depth studies to clarify uncertainties about the risks of BPA but has taken various steps in the interim to try and reduce human exposure to BPA in food supplies, including:
 - supporting the industry’s actions to stop using BPA in baby bottles and infant feeding cups in the US;
 - facilitating the development of alternatives to BPA for the linings of infant formula cans; and
 - supporting efforts to replace BPA or minimise BPA levels in other food can linings.¹⁹

D. Potential Entry into Inside Spray and Beverage Ends

20. The Provisional Findings Report recognises that Metlac is planning to enter the inside-spray and beverage ends segments, [⌘].

E. Cost of Approving a New Supplier

21. Metlac has previously submitted that the cost to a customer of switching between coatings suppliers is significant, especially in relation to B&B products, and that the cost of switching could outweigh the cost of accepting a price increase. As a result, customers cannot, and do not, switch quickly between suppliers in the event of a price increase.²⁰
22. Metlac does not know the precise cost to a manufacturer of switching supplier, since packaging manufacturers closely guard this information. It nevertheless understands from conversations with B&B can manufacturers that the costs can be hundreds of thousands of euro. These costs include:
- Laboratory testing of the new product.
 - Pack-testing the new product.
 - The lost production resulting from testing a product on a line that would otherwise be active on a continuous basis.

¹⁸ See: <http://news.harvard.edu/gazette/story/2011/11/canned-soup-linked-to-higher-bpa-levels/>

¹⁹ <http://www.fda.gov/newsevents/publichealthfocus/ucm064437.htm>

²⁰ Provisional Findings Report, paragraphs 8.58 and 9.134.

- The cost of “scrapping” thousands of cans that are used in the testing process.
- The cost to the brand owner (e.g., Coca-Cola, Heineken or Red Bull) who will run independent tests of the product quality, including assessing impact on taste and smell of the content. This will also involve “scrapping” thousands of cans. Metlac does not know whether the brand owner ultimately bears these costs or whether they are passed on to the can manufacturer. Either way, the need to persuade the brand owner to accept a new supplier acts as a further disincentive to the can manufacturer to switch coating supplier.

F. Capacity in the Industry

23. The Competition Commission concludes that the industry is characterised by “*a significant level of spare capacity*”. While it recognises that bald capacity figures can be misleading in this industry, the Competition Commission notes that “*suppliers’ views vary on whether it is difficult to switch production between coating types.*”²¹
24. Metlac has already provided evidence: (i) that it would be uneconomic to switch production capacity between different product families; and (ii) that the ability to employ excess capacity is also constrained by the need to secure customer approvals. In any event, customers seeking to switch from AkzoNobel post-Transaction would have few *viable* alternatives. Other than Valspar and PPG (who have not in the past shown a willingness to lower prices in order to employ spare capacity), there are no viable alternatives for many customers.
- None of the smaller competitors is active in the B&B segment.
 - In the FCG market smaller competitors do not offer a full range of products but generally focus on specific segments and, within such segments, only supply certain types of products.
 - Smaller players are unable to satisfy demand for BPA-NI products, and are certainly unable to develop and offer BPA-NI alternatives to the full set of coatings currently on the market.
 - Large customers ([~~3~~]) purchase the vast majority of their requirements only from “certified” suppliers (at present, Metlac, AkzoNobel, Valspar, and PPG). In the event of a price increase by the merged entity, customers making recourse to “certified” suppliers could only switch to Valspar or PPG, until other suppliers have managed to pass their complex approval procedures (even assuming they attempt to do so, which they have not to date).
 - In addition, the largest customers adopt a multi-sourcing policy, often involving three suppliers. Accordingly, the Transaction would force these customers to satisfy most of their requirements from the same three remaining large suppliers.

²¹ Provisional Findings Report, paragraph 8.36.

25. For these reasons, even to the extent that spare capacity exists in the industry, it would not act as a competitive constraint on AkzoNobel post-Transaction.²² In other words, contrary to AkzoNobel's claim that market shares may fall as a result of customers moving volumes from the merged entity to protect their multi-sourcing strategy, AkzoNobel will become an indispensable supplier for a large proportion of customers.

G. Catastrophe Planning

26. AkzoNobel has identified the following as a barrier to Metlac's successful entry into the inside-spray segment:²³

"... customers might be reluctant to source B2I from a company with a single site and no catastrophe planning available. Second, AkzoNobel stated that if a production run failed due to inadequate coating, claims against the coatings supplier could be very large ..."

27. This statement is both inaccurate and misleading. First, Metlac has catastrophe planning in place at its current facility. For example, it has independent back-up power supply, and independent back-up servers to allow the plant to continue operating in the event of a power or IT failure, or other disaster. Metlac's production office has been constructed to be both fire-proof and explosion-proof.
28. The claim that Metlac would be unattractive to customers of B&B inside spray because it operates from a single site also misrepresents the situation in the industry. Currently, the entire EEA demand for inside spray is produced at a single AkzoNobel site in Birmingham, a single Valspar site in Deeside, and a single PPG site in the Netherlands (producing small volumes). AkzoNobel's single inside-spray facility supplies close to [X]% of European production. A catastrophic failure of this site would therefore have a significant impact on customers. Moreover, to the best of Metlac's knowledge, these plants are operating at close to maximum capacity. This means that in the event of a catastrophic failure at any one, customers would be unable to switch to a different supplier.
29. As a result, the entry of Metlac into this segment will be welcomed by customers not only because of the benefits of increased competition, but also because it will alleviate the potential impact on the industry as a whole in the event of a catastrophic failure of any one of the suppliers in the market.

²² This scenario is similar to that in case M.4381, *JCI/Fiamm*, decision of the European Commission of May 10, 2007. In that case the Commission found that "[c]ertification is not merely a technical procedure. OE-customers mentioned a number of criteria that would need to be fulfilled by a supplier to become certified. These include technical specifications, quality testing and auditing of the production processes, but also commercial aspects such as financial stability, demonstration of reliability, experience in producing large volumes and competitive pricing. Furthermore, design development, R&D and know-how were mentioned by OE-customers as relevant criteria for certification. Some of these criteria exclude or at least disadvantage small, aspiring new entrants. The requirement for financial stability, for example, makes it difficult for small entrants to enter into investments to expand their capacities in order to meet the large volume criteria" (paragraphs 378 to 379).

²³ Provisional Findings Report, paragraph 9.81.

IV. THE AKZONOBEL MIS DATABASE

30. The Competition Commission has considered submissions made by AkzoNobel based on an analysis of its MIS database by RBB Economics. The Competition Commission concluded that this database was inaccurate in a number of important respects, and that the analysis was therefore unreliable. The Competition Commission has since allowed AkzoNobel's and Metlac's economic advisers access to the underlying data as part of a dataroom exercise. Having reviewed the MIS database and compared with Metlac's actual sales data, Metlac's economic advisers reached the conclusions summarised below.
31. The Competition Commission holds a copy of the work carried out by Metlac's economic advisers, containing confidential information and data that has not been (and may not be) shared with Metlac or its legal advisers. Consistent with the Competition Commission's Dataroom Rules, this detailed work does not constitute a submission on behalf of Metlac and should not be treated as such. However, it may be used by the Competition Commission to verify the conclusions set out in this Submission.

A. The MIS Database is Unreliable

32. Data in the MIS database on sales by companies other than AkzoNobel itself is based purely on estimates by AkzoNobel's sales representatives. By comparing AkzoNobel's estimates of Metlac's sales with Metlac's actual sales (as recorded in Metlac's Customer Transaction database), Metlac's advisers have ascertained that the MIS database contains data that is inaccurate and that cannot be relied on to perform a valid economic analysis. Specifically:
- It contains numerous and substantial discrepancies between the estimates made by AkzoNobel's sales representatives and Metlac's actual sales. These discrepancies are found at all levels of aggregation of the available data and for the two relevant markets affected by the Transaction.
 - The MIS database generally underestimates Metlac's sales, although there are some limited instances in which it the MIS database errs in the opposite direction.
 - The MIS database not only provides inaccurate estimates of Metlac's sales, it also excludes countries, customers and plants that are actually supplied by Metlac.
 - AkzoNobel's estimates of sales by PPG, Valspar and any other suppliers are susceptible to the same limitations, and to the extent Metlac's advisers were able to test the MIS database in this regard, it also revealed significant inaccuracies.

B. The Analysis Conducted by RBB is Unreliable

33. For the reasons summarised above, Metlac's economic advisers agree with the conclusions set out in the Provisional Findings Report, *i.e.*, that the MIS database is

materially unreliable and therefore cannot be used to assess closeness of competition between the parties. In any event, the analysis previously carried out by RBB Economics was inadequate to prove that Metlac is a minor competitor, and a “less close” competitor to AkzoNobel than Valspar or PPG. This is because:

- The MIS database does not record instances of competition between AkzoNobel and Metlac where the two parties competed for a customer but one was unsuccessful, or where both parties are approved to supply a customer but have not begun supplying a particular customer’s plant.
- The RBB Economics approach erroneously assumed that two firms compete only if they actually overlap in supplying the same customers. This is wrong for two reasons: (i) overlap between two firms may be due to the sale of complementary products; and (ii) firms that do not overlap might still be actual competitors where customers are willing to switch from one firm to another to procure the same product.
- The results of the RBB Economics analysis are largely driven by the four firms’ market shares, as estimated using inaccurate information drawn from the MIS database.
- If the degree of overlap is measured according to the number of customers/plants supplied by the different coatings manufacturers, the competitive “distance” between Metlac, Valspar and PPG is reduced (especially if the information relating to Metlac in the MIS database is corrected using actual Metlac sales data).
- The MIS database does in fact show that AkzoNobel supplies (or has supplied) a number of customers/plants supplied by Metlac. This means that Metlac’s customers are able, and may be willing, to switch to AkzoNobel in the event of a price increase by Metlac, confirming the competitive concern that the Competition Commission and Metlac’s customers have articulated.

C. The MIS Database Confirms Switching from AkzoNobel to Metlac

34. Metlac has previously provided evidence to the Competition Commission of customer contracts it has won from AkzoNobel. Records of AkzoNobel’s actual sales in the MIS database can be shown to verify these submissions in most instances (*i.e.*, the database records falls in AkzoNobel’s sales to the relevant customer, even if it does not recognise that Metlac won those sales). Where it was impossible to verify in certain instances, this is likely to be because AkzoNobel and Metlac use different descriptions and codes to identify the same customer sites.

V. CONCLUDING REMARKS

35. In conclusion, the additional evidence set out in this Response provides further support for the Competition Commission's provisional conclusion that the removal of Metlac from the market would result in substantial lessening of competition in the UK.

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CLEARY GOTTlieb STEEN & HAMILTON LLP