

AKZONOBEL/METLAC: INITIAL RESPONSE TO NOTICE OF POSSIBLE REMEDIES

This Initial Response provides AkzoNobel's preliminary views on the CC's notice of possible remedies; AkzoNobel reserves the right to make further submissions on possible remedies in light of any third party submissions that may be made following publication of this Initial Response. AkzoNobel is in the process of responding more fully to the CC's provisional findings. The fact that AkzoNobel has provided this Initial Response on remedies should in no way be taken as implying that AkzoNobel accepts the CC's provisional findings. On the contrary, AkzoNobel strongly disagrees with the provisional findings and is prepared to devote substantial resources and effort to ensuring that the CC ultimately reaches a different conclusion (whether later this year or during the course of 2013).

1. Background

1.1 ***Metal packaging coatings in context:*** Metal packaging coatings are intermediate products produced by a number of coatings suppliers in Europe; the three largest suppliers in Europe and globally are AkzoNobel, Valspar and PPG. These intermediate products are supplied to packaging manufacturers (such as Rexam, Crown, Ball and Ardagh) who use them to protect the inside and outside of the metal packaging products they produce, e.g. beverage or food cans, aerosols, tins, drums, other containers, as well as metal lids, bottle tops and other caps and closures ("C&C"). These customers then supply their finished packaging products to downstream customers who use them to package their products, such as Beer and Beverages ("B&B"), Food, and other consumer and industrial products (deodorants, cosmetics, paints, chemicals, etc). Some metal packaging customers focus on B&B cans, whereas others produce Food containers, Caps and Closures ("C&C") and/or other ("General Line" or "GL") products - with Food, C&C and General Line sometimes grouped together as "FCG".

1.2 ***AkzoNobel's interests in metal packaging coatings - the status quo:*** AkzoNobel's current interests in metal packaging coatings date from 2008 when it acquired ICI (which was at the time a public company listed in the UK). Those interests essentially comprise:

- its wholly-owned metal packaging business (previously ICI Packaging Coatings, now AkzoNobel Packaging Group or "ANPG") which manufactures and supplies metal packaging coatings globally, including from four plants in Europe: Birmingham (UK), Hilden (Germany), Elbeuf (France) and Vilafranca (Spain); and
- a 71.7% economic interest in Metlac, a business which manufactures and supplies metal packaging coatings from a plant at Bosco Marengo (Italy). Most of Metlac's sales have been to customers in Italy, although it does make some export sales (including relatively small volumes to customers in the UK). AkzoNobel holds a 44.44% direct interest in the operating company (Metlac SpA). The remaining 55.56% of this operating company is held by a special

purpose vehicle company (Metlac Holding Srl) which is in turn owned 49% by AkzoNobel, 17.87% by Metlac's long-standing Managing Director (Pier Ugo Bocchio), and 16.56% by each of his two sons (Davide Bocchio and Diego Bocchio).¹ AkzoNobel has board representation in both these Metlac companies and has various other contractual and legal rights (under Italian law) as a substantial shareholder and investor;² however, the Bocchio family currently enjoys control of the management and operation of the Metlac business.

The ICI/Metlac joint venture arrangements were originally put in place in 1997 for an intended maximum duration of 15 years - with ICI holding 44.44% and the remainder held by the Bocchio family and two other Italian families.³ In 2007 the two other families took advantage of put options to exit the joint venture, and the arrangements between ICI and the Bocchio family were revised to put in place the current shareholding structure for the subsequent five years. It was fully expected that by the end of that five year period full ownership would have passed to ICI as originally envisaged (*inter alia* bearing in mind that Pier Ugo Bocchio will be celebrating his 70th birthday in December 2012). Under the revised shareholders arrangements, inherited from ICI, AkzoNobel has a call option to purchase the Bocchio family's combined 51% stake in Metlac Holding Srl (for a price calculated according to a pre-agreed formula) which it was entitled to exercise from 1 October 2011. AkzoNobel exercised that option on 23 December 2011 with a view to acquiring 100% ownership and control of Metlac.

- 1.3 ***Disagreements between AkzoNobel and the Bocchio family:*** Despite agreeing to the call option in 1997 and 2007, the Bocchio family have decided that they now do not want to sell their shares and are disputing the call option price and the validity of the call option (which dispute is now the subject of arbitration proceedings in Italy). They have also ensured that Metlac itself adopts a hostile stance vis-à-vis the competition authorities across Europe, arguing that AkzoNobel's acquisition of full control of Metlac should be prohibited under the merger control rules.⁴ The transaction has been notified to or otherwise brought to the attention of the competition authorities in a large number of countries, whether by Metlac seeking a prohibition decision (e.g. in the case of the Bundeskartellamt in Germany) or by AkzoNobel seeking a clearance decision. With the

¹ Accordingly, AkzoNobel's economic interest in the Metlac business amounts to 71.7%, i.e. $55.56 \times 49\% = 27.2244 + 44.44 = 71.7\%$.

² AkzoNobel has given certain interim undertakings to the CC regarding the exercise of its rights and the operation of the Metlac business which will cease to be in force once the current CC reference is finally determined.

³ The establishment of the Metlac joint venture did not meet the thresholds for review by the European Commission under the Merger Regulation. Instead, in 1997 the arrangements were pre-notified to the Italian competition authority which raised no concerns.

⁴ One of the ironies of this case is that Pier Ugo Bocchio, as Managing Director of Metlac, has used his position to ensure that Metlac instructs lawyers and other advisers, at considerable expense, to oppose the merger in various jurisdictions - and those expenses have to date been billed to Metlac Holding Srl in which AkzoNobel holds a 49% interest. AkzoNobel is strongly contesting this.

exception of the ongoing CC investigation, the necessary merger clearance decisions have been obtained in all those countries, including elsewhere in the European Economic Area (Germany, Austria and Cyprus) as well as further afield (Brazil, Pakistan, Russia and Turkey). If the CC does approve the transaction later this year (or early in 2013), it is likely that the Metlac business will be fully combined with the ANPG business in Spring 2013, once the arbitration proceedings in Italy have been concluded. If the CC does not approve the transaction, AkzoNobel will appeal to the Competition Appeal Tribunal (“CAT”) with a view to closing the deal at a later date (just as the Bocchio family and Metlac may appeal a CC clearance decision to the CAT). If and for so long as the deal is not approved, AkzoNobel will continue to hold its 71.7% economic interest in Metlac (which is not subject to investigation by the CC or any other competition authorities) and will exercise its legal and contractual rights over the Metlac companies.

1.4 ***The CC’s provisional findings:*** On 21 September 2012 the CC published its provisional findings in which it provisionally concluded 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”* (Summary, paragraph 54). Two factors were highlighted as particularly relevant to this assessment (Summary, paragraph 40), namely:

- the CC provisionally concluded 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”*,⁵ *“sent detailed questionnaires to 39 customers and ten competitors”*,⁶ and *“gathered oral evidence through nine hearings with selected third parties”*.⁷

⁵ The CC’s invitation for comments (published on 24 May 2012) invited comments from all interested parties, in writing, by no later than 13 June 2012. No responses were received to this invitation to comment.

⁶ It is not clear on what basis the CC selected the 49 third parties to whom it sent questionnaires, although it would appear that it focused on essentially the same third parties as were contacted by the Office of Fair Trading (“OFT”) during its Phase I investigation earlier in 2012 (which would have been based on contact details supplied by AkzoNobel and Metlac in response to requests by the OFT). The CC asked more detailed questions of 12 (of the 39) customers which it regarded as “major customers”. The CC’s Provisional Findings (at paragraph 8.114) report that only 18 of the 39 customers responded to the CC’s customer questionnaires - although we understand that the CC also sent one follow-up question (to the same 39 customers) to which 20 customers responded.

⁷ The third parties selected by the CC comprised five customers (Ardagh, Ball, Caldicot, Crown and Rexam) and four competitors (Diostyl, PPG, Salchi and Valspar).

1.5 ***Additional work underway to address key factors relevant to the CC's provisional findings:*** AkzoNobel considers that the CC's provisional findings are based on an inadequate and flawed assessment of the evidence available to the CC. With a view to ensuring respect for due process, and that AkzoNobel has a better and sufficient understanding of the case against it, AkzoNobel has recently requested and been granted access (through its economic advisers) to a dataroom at the CC's premises; this should assist AkzoNobel to identify, and draw to the CC's attention, the inaccuracies and failings in the evidence relied upon by the CC in its provisional findings. AkzoNobel has also sought more information on the questions the CC sent to 39 customers and 10 competitors, and on their responses; the CC has recently granted AkzoNobel limited and redacted access to some of those customer responses in the form of a summary prepared by the CC. AkzoNobel is currently considering that summary. AkzoNobel is confident that a proper assessment of the data and of customers' and competitors' views on the transaction will confirm that they do not provide a basis for a finding of an SLC. AkzoNobel intends to work with the CC in the coming weeks with a view to ensuring that the CC's final decision is based on a proper assessment of the evidence and of third party views.

2. **Prohibition of the proposed transaction would be unlawful and disproportionate**

2.1 The only "remedy" outlined by the CC is the possible prohibition of the proposed merger, i.e. meaning that AkzoNobel would be prohibited from acquiring any additional shares, via exercise of its call option or any other means, in either:

- Metlac Holding Srl (i.e. the holding company in which AkzoNobel already holds a 51% interest); or
- Metlac SpA (i.e. the operating company in which AkzoNobel already holds a 44.44% interest, the remaining 55.56% being held by Metlac Holding Srl).

2.2 The CC's statutory order-making powers may extend to a person's conduct outside the UK if (and only if) they are a UK national, a body incorporated under the law of the UK, or a person carrying on business in the UK.⁸ Accordingly, AkzoNobel submits that the CC does not have the power to prohibit it or its non-UK subsidiaries from exercising the call option and acquiring full control of Metlac. The call option in respect of the Bocchio family's 51% shareholding in Metlac Holding Srl (an Italian company) is held by Akzo Nobel Coatings International B.V. ("ANCI"), a company incorporated in the Netherlands which is 100% owned by Akzo Nobel N.V. (the parent company of the AkzoNobel group).

2.3 While it might be open to the CC to accept a voluntary undertaking from AkzoNobel to remedy concerns, AkzoNobel does not envisage offering such an undertaking not to acquire any additional shares in the Metlac companies (whether by enforcing ANCI's

⁸ Enterprise Act 2002, Section 86 (and Sections 82-84, and Schedule 8).

call option or otherwise). First and foremost, AkzoNobel considers that the proposed transaction does not give rise to an SLC in the UK that requires remedying; accordingly, AkzoNobel urges the CC to reconsider the evidence and to reach a final decision that there is no SLC. That said, even if there were an SLC in the UK (which does not appear to be supported by the economic evidence or third party responses on which the provisional findings purport to rely), it would be disproportionate to impose a remedy which would have extraterritorial effect outside the UK and would prevent AkzoNobel from putting the merger of ANPG and Metlac into effect outside the UK. Metlac is an Italian business operating from a single plant in Bosco Marengo in the North of Italy, making most of its sales in Italy and a number of export markets where there is demand for its products. The UK accounts for only a relatively small proportion of Metlac's sales. Indeed, Metlac's 2011 sales in the UK amounted to only €2.6 million, accounting for less than 3% of its global turnover. Closer examination reveals that most of those UK sales were made to just one customer (Rexam) and concerned only one product category (i.e. B2E, being sales of metal coatings for application to the external walls of 2-piece beverage cans). More specifically:

- Approximately half of Metlac's sales are in Italy, a country in which ANPG has very limited sales of metal packaging coatings. The Italian competition authorities raised no concerns when ICI notified the establishment of the Metlac joint venture in 1997, nor have they raised any concerns with regard to the proposed acquisition of full ownership by AkzoNobel;
- The largest market for metal packaging coatings in Europe is Germany. Despite strenuous efforts by the Bocchio family and Metlac to have the transaction prohibited in Germany, the Bundeskartellamt adopted a Phase II clearance decision in March 2012. Although Mr Bocchio and Metlac have appealed that clearance decision to the courts in Germany, it is expected that that appeal will be dismissed within the next few weeks;
- All other competition authorities worldwide which have considered the transaction have approved the transaction without seeking remedies.

2.4 Moreover, AkzoNobel has identified considerable synergies which will arise from combining the Metlac business with ANPG. Customers will share in those benefits. Any remedy under which the Metlac business would continue to be operated separately from ANPG would prevent AkzoNobel and its customers and ultimately consumers) from achieving those benefits.

3. Alternative remedies

3.1 The CC has not outlined any other remedies for discussion. AkzoNobel has nevertheless been giving initial thought to whether alternative solutions could be developed to bring these proceedings to an end. Any such remedy would need to be proportionate to the aim of addressing the perceived SLC in the UK. For these purposes, the CC should not have regard to outcomes that might be in the financial or other interests of the Bocchio family. Rather, AkzoNobel's primary objective is to identify precisely what concerns customers have about the proposed transaction – in particular Rexam as the UK customer which appears most concerned at the prospect of losing Metlac as an independent supplier. Such solutions might include:

- reassuring Rexam (and/or other UK customers if appropriate) that the products they are currently sourcing from Metlac will not be discontinued without the customer's prior approval. These reassurances could also extend to products that are currently in development (e.g. BPANI products); and/or
- to the extent that Rexam (and/or other UK customers) identify any specific technologies which are currently owned by Metlac, agreeing to license those technologies to an alternative supplier of metal packaging coatings (other than Valspar or PPG) for sale in the UK. There are a number of other suppliers in the EEA who might be interested in exploiting those rights to supply customers in the UK (e.g. Salchi, Grace, Actega) if Rexam and/or others were interested in sponsoring entry or expansion into the particular product areas of concern. Such a solution could also be supported by toll manufacturing arrangements for an interim period.

3.2 AkzoNobel's initial view is that any suitable alternative remedies raise similar issues regarding their extraterritorial effect and proportionality. Nevertheless, if there were genuine interest in exploring such solutions from customers in the UK, AkzoNobel would be prepared to consider them seriously, with a view to removing those customers' concerns regarding the proposed merger.

3 October 2012