

# Anticipated acquisition by Clariant of certain assets of Kilfrost

## Decision on relevant merger situation and substantial lessening of competition

ME/6569/15

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 9 February 2016. Full text of the decision published on 11 March 2016.

**Please note that [REDACTED] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.**

### SUMMARY

1. Clariant International AG, Clariant Produkte (Deutschland) GmbH and Clariant Production UK Limited (all subsidiaries within the Clariant group of companies and under the parent holding company, Clariant AG) (**Clariant**) have agreed to acquire the European aircraft de-/anti-icing fluid (**ADF**) business, the rail de-/anti-icing fluid (**RDF**) business and associated assets (the **Target Business**) from Kilfrost Group Public Limited Company and, its wholly owned subsidiary, Kilfrost Limited (**Kilfrost**) (the **Merger**). Clariant and the Target Business are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) considers that the enterprises of the Parties will cease to be distinct as a result of the Merger, that the share of supply test is met and that accordingly arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. The Parties overlap in the manufacture and supply of ADF. The CMA assessed the Merger against a product frame of reference for the manufacture and supply of ADF, which includes all types of ADF used in the UK. In relation to the geographic frame of reference, the CMA assessed the impact of the Merger in the UK (taking into account the constraint of supplies from continental Europe).

4. The CMA examined whether the Merger would result in an increase in prices and/or a reduction in service offering/quality as a result of the loss of a direct competitor.
5. The CMA found that the Merger involves the two largest suppliers of ADF in the UK, based on current shares of supply. The CMA estimated that in 2014/2015, Kilfrost had a share of supply of [70–80]% and Clariant had a share of supply of [15–25]% in the UK, giving the Parties a combined share of [90–100]% post-Merger. The CMA considers that the Parties' combined shares of supply in the UK raise *prima facie* competition concerns. The CMA notes that the Parties also have high shares of supply in the European Economic Area (**EEA**) with a combined share of [80–90]% post-Merger based on the Parties' estimates for 2014/2015.
6. The CMA believes, on the basis of the evidence available to it, that Clariant is Kilfrost's closest competitor in the supply of ADF in the UK and that the competitive constraint between the Parties that would be lost as a result of the Merger would be substantial. The CMA also found that the competitive constraint imposed by the Parties' competitors is weak and that neither entry nor expansion would be timely, likely or sufficient so as to constrain the merged entity, taking into account historical trends in the manufacture and supply of ADF in the UK.
7. The CMA therefore considers that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in the manufacture and supply of ADF in the UK which may lead to price rises and/or a reduction in product or service offering/quality offered to customers. The CMA considers that it is not appropriate for it to exercise its discretion to apply the *de minimis* exception in this case.
8. The CMA is therefore considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (**the Act**). The Parties have until 16 February to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

## ASSESSMENT

### Parties

9. **Clariant** is a specialty chemicals company providing products and solutions across many industry sectors including, automotive and transportation, aviation, chemical intermediates, coatings, etc. Within its aviation product range, Clariant supplies ADF and runway de-icing products to customers in

Europe. The turnover of Clariant AG in 2014 was around £4 billion worldwide and around £[§] in the UK.

10. **Kilfrost** is a UK-based supplier of ADF, RDF and specialty fluids (including general ground de-icing products) to the civil aviation and transportation industry in Europe and globally. It has its principal office in Newcastle. The turnover of Kilfrost in 2014 was around £39 million worldwide and around £[§] million in the UK. The turnover of the Target Business in 2014 was around £13 million worldwide and around £[§] million in the UK.

## **Transaction**

11. The Merger involves the acquisition by Clariant of assets relating to Kilfrost's European business for the supply of ADF and RDF products. This includes Kilfrost's contracts, customers, intellectual property (**IP**) and selected fixed asset items, for the provision of ADF and RDF products. The production plant of Kilfrost at Haltwistle (Northumberland) will not be transferred as part of the acquisition. Clariant is also not acquiring Kilfrost's storage capacity for ADF and Kilfrost's research and development (**R&D**) business.

## **Jurisdiction**

12. As a result of the Merger, Clariant and the Target Business will cease to be distinct.
13. The Parties overlap in the manufacture and supply of ADF to customers located in the UK, with a combined share of supply of [90-100]% (increment of [15–25]%) (as shown in Table 1). The CMA therefore considers that the share of supply test under section 23 of the Act is met.
14. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
15. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 15 December 2015 and the statutory 40 working day deadline for a decision is therefore 11 February 2016.

## **Counterfactual**

16. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers, the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However,

the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.<sup>1</sup>

17. [☒]
18. The Parties did not however submit an alternative counterfactual to the prevailing conditions of competition [☒] nor have third parties put forward arguments to support a different counterfactual.
19. For the above reasons, the CMA considers the prevailing conditions of competition to be the relevant counterfactual.

## Background

20. ADF is sprayed onto aeroplanes while on the ground in order to prepare them for take-off and flight in winter conditions.
21. There are four different types of ADF (as defined in ISO 11075 and 11078<sup>2</sup>) – Types I, II, III and IV – containing glycol, water and additives in various compositions. Type I is typically used for de-icing aircraft and contains very little or no thickening agents, while Types II and IV are primarily used for anti-icing (ie to protect the aircraft from (re-)icing until take-off) and, as such, contain thickening agents (to enable the fluids to adhere for longer to the aircraft). Type III is not used in Europe.
22. Clariant submitted that ADF suppliers either manufacture ADF at their own production facilities and/or use toll manufacturers for the mixing and blending of ADF in different locations.
23. Third parties who responded to the CMA's merger investigation said that there are various certifications/approvals required for the manufacture and supply of ADF, as follows:
  - (a) *Product certification*: Manufacturers must submit ADF product samples for tests to: (i) Anti-Icing Materials International Laboratory (**AMIL**) for snow testing; (ii) AMIL for a certification according to Aerospace Material Specifications (**AMS**) standards; and (iii) APS Aviation Inc (**APS**) for tests

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<sup>1</sup> *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

<sup>2</sup> ISO 11075:2007 defines the requirements for ISO type I fluids while ISO 11078:2007 defines the requirements for ISO types II, III and IV fluids.

of holdover times. Third parties stated that product certification requirements for ADF within Europe are the same and that ADF also needs to be approved by the US Federal Aviation Administration (**FAA**)<sup>3</sup> (and this forms part of the requirements in the UK).

- (b) *Site certification*: Certification and approval of ADF is undertaken for each production site on an annual basis. If an ADF production site is changed, manufacturers would need to seek re-certification.
- (c) *Local licensing*: Individual airports and airlines may also have their own rules as to the ADF products which are approved for use by them and a licence would thus be required from such airports and airlines. There may also be local environmental regulations which apply to specific airports, local regions or countries.

24. Customers include de-icing service providers, ground handlers, airports and airlines, depending on which end-user performs the de-/anti- icing of aeroplanes at any given airport. Clariant submitted and third parties confirmed that ADF can be supplied to these customers in two main forms: (i) as pre-mixed ADF product, which does not require further dilution with water and can be applied directly to the aeroplane; and/or (ii) as formulated ADF in concentrated form, which requires further dilution with water before use.

25. Clariant submitted and third parties confirmed that ADF can be stored in different locations for customers, including: (i) at the manufacturing plant; (ii) at depots, in trailers or tankers located at a given distance to the customer; and (iii) at the customers' location/facilities. Customers can also choose between: (i) consignment stock, in which a specified quantity of ADF is stored close to the customer but remains the property of the ADF supplier until use by the customer; and/or (ii) direct delivery, of which the customer takes ownership and lead times are typically specified for delivery of the ADF to the customer.

## Frame of reference

26. The CMA considers that market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgment. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merger parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more

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<sup>3</sup> Holdover time guidelines for approved ADF products are published by the FAA.

important than others. The CMA will take these factors into account in its competitive assessment.<sup>4</sup>

### **Product scope**

27. Clariant submitted that the Parties overlap in the manufacture and supply of ADF and that the relevant product market is the manufacture and supply of (all types of) ADF products. In support of this, Clariant stated that:
  - (a) From a demand-side perspective, customers will usually buy Type I together with either Type II or IV and customers enquire about ADF Types I, II and IV and expect suppliers to be capable of supplying all three types depending on the specific weather conditions;
  - (b) From a supply side perspective, suppliers of ADF are flexible and are able to adjust their production between Types I, II and IV to supply a customer with any ADF type required.
28. The CMA's approach to market definition is to start with the narrowest plausible candidate frame of reference and see if this can be widened on the basis of demand- and supply-side substitutability factors. As its starting point, the CMA has considered separate frames of reference for the supply of each of the three ADF types (I, II, and IV) and then considered whether the product scope should include all of them within the same relevant product market.
29. Third party responses during the CMA's merger investigation indicated a product frame of reference covering the manufacture and supply of all three types of ADF product would be appropriate taking into account the following:
  - (a) responses from customers indicated that there is no demand-side substitutability between different types of ADF (as they cannot dilute a Type I product into a Type II or IV product due to different chemical compositions). Some customers also indicated that they would not switch between different types in response to a change in price;
  - (b) customers typically require a range of ADF products in order to deal with varying weather conditions and which have the required anti-/de-icing properties. Sales data provided by the Parties and information from third parties show that customers generally purchase combinations of ADF types together as these are all needed during the same season (ie Type I for de-icing and Type II or IV for anti-icing, as described in Paragraph 21). The majority of the Parties' ADF sales were for combinations of ADF

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<sup>4</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2.

types and the vast majority of customers that bought these combinations, bought them together from the same ADF supplier;

- (c) a competitor submitted that ADF suppliers which do not offer the three ADF types are not considered as credible suppliers;
- (d) from a supply-side perspective<sup>5</sup>, as indicated by the Parties, ADF manufacturers have the ability and incentive to shift capacity between the relevant ADF types depending on demand for each (as long as they have the formulae/IP). The evidence gathered by the CMA indicates that the ADF suppliers with the necessary formulae/IP compete to supply each or various combinations of the three different ADF products and the conditions of competition between these suppliers do not appear to vary by ADF type in the UK.

30. While the evidence gathered by the CMA (as described in Paragraph 70) shows that a small number of ADF suppliers do not currently offer the full range of three ADF products, responses from these ADF suppliers to the CMA's merger investigation showed that they aim to offer the full range of three ADF products in the future. The CMA considers the competitive constraints that such manufacturers are able to exert in Paragraphs 65 - 82 below.

#### *Conclusion on product scope*

31. On the basis of the evidence above, the CMA has considered the impact of the Merger in relation to the manufacture and supply of ADF types I, II and IV together within one frame of reference.

#### **Geographic scope**

32. Clariant submitted that the relevant geographic market is not meaningful, but is at least EEA-wide, and, in any case, can be left open. It stated that ADF suppliers can bid for contracts in the UK irrespective of their location and, as such, the location of ADF suppliers would not be relevant in determining the strength of the constraint they exert. The Parties also stated that competition between ADF producers therefore takes place at least at a European (if not worldwide) level.

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<sup>5</sup> While the boundaries of the relevant product market are generally determined by reference to demand substitution alone, the CMA may widen the scope of the market where there is evidence of supply, see *Merger Assessment Guidelines*, paragraph 5.2.17.

33. Clariant further submitted that manufacturing facilities in the UK are not essential to the supply of ADF in the UK as evidenced by the entry of Clariant and Proviron Functional Chemicals (**Proviron**) (a third party competitor) into the supply of ADF to the UK (as described in Paragraph 69(a)) (neither manufactures ADF in the UK).
34. Responses from third parties to the CMA's merger investigation and [§§] implies that the competitive conditions in the UK may be different from those in other parts of the EEA (eg [§§]<sup>6</sup>, Eastern Europe and Central Europe<sup>7</sup>).
35. Responses from third parties to the CMA's merger investigation also indicate the importance of a UK presence in the supply of ADF (ie manufacturing, storage and transport infrastructure as well as customer service) when competing successfully for UK customers. Some customers indicated that the presence of Kilfrost's manufacturing and many local storage facilities in the UK gives them greater confidence of receiving ADF supplies in adverse weather conditions. A number of UK customers who responded to the CMA's merger investigation indicated that they did not consider ADF suppliers from outside the UK to be suitable alternatives for their needs. One customer indicated that it would only consider an overseas ADF supplier if the supplier had a UK presence, storage infrastructure in the UK, and local customer support.
36. An internal Kilfrost document highlights the importance of [§§]<sup>8</sup> and/or [§§] for success in the supply of ADF in a given country.<sup>9</sup> Kilfrost's internal documents show that within the UK, it has [§§].[§§]<sup>10</sup> and third party competitors who replied to the CMA's merger investigation confirmed, that when supplying overseas, ADF manufacturers sometimes partner with domestic businesses (eg blenders, ADF manufacturers/ suppliers) in order to gain access and win business in those areas. [§§].<sup>11</sup>
37. Responses from two customers to the CMA's merger investigation suggest that the geographic scope could be local/regional for certain airports in the UK (based on specified lead times, distance to ports/storage infrastructure, etc when direct delivery is required (as described in Paragraph 25).

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<sup>6</sup> [§§].

<sup>7</sup> A competitor told the CMA that there are significantly higher costs of storage in the UK compared to countries such as the Netherlands and Belgium (as well as other logistic considerations) which suggests that there may be differences in price levels for ADF in the UK compared to these countries.

<sup>8</sup> Blending refers to a subset of the manufacturing process during which raw materials or semi-finished goods are turned into finished products by a third-party service provider with the relevant equipment and infrastructure for a fee.

<sup>9</sup> [§§].

<sup>10</sup> [§§].

<sup>11</sup> [§§].

38. The evidence gathered by the CMA, including third party responses, indicates that security of supply and efficient supply chains are important factors in customers' sourcing strategy. Third parties told the CMA that efficient supply chains are important for streamlining logistics and reducing costs and can be achieved by proximity to the customer, in terms of manufacturing and/or storage. The evidence gathered by the CMA also shows that all the ADF suppliers operating in the UK have one or more of the following in the UK: (i) manufacturing and/or blending facilities/arrangements; (ii) storage and/or transport infrastructure; (iii) sales/ customer service representatives; and/or (iv) supply to the UK through UK-based distributors. This indicates that, whilst ADF may be manufactured outside of the UK, a UK presence in relation to one or more of these other aspects is important for ADF suppliers competing in the UK.

#### *Conclusion on geographic scope*

39. On the basis of the evidence above, and on a cautious basis, the CMA has assessed the merger using a UK geographic frame of reference, taking into account the constraint of supplies based in continental Europe.
40. Competitive constraints from ADF suppliers based outside the UK are considered within the assessment of competitive effects section below.

#### ***Conclusion on frame of reference***

41. For the reasons set out above, the CMA has considered the impact of the Merger on the manufacture and supply of ADF in the UK, taking into account the constraint of supplies from continental Europe.

## **Competitive assessment**

### ***Horizontal unilateral effects***

42. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.<sup>12</sup> Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in a SLC in relation to unilateral horizontal effects

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<sup>12</sup> *Merger Assessment Guidelines*, from paragraph 5.4.1.

in the manufacture and supply of ADF in the UK (taking into account the constraint of supplies from continental Europe).

43. In order to assess the likelihood of the Merger resulting in unilateral effects, the CMA considered:

- (a) shares of supply;
- (b) the closeness of competition between the Parties; and
- (c) competitive constraints from alternative suppliers.<sup>13</sup>

*Shares of supply*

44. Based on the estimates provided by Clariant and third parties for 2014/2015 ADF sales (shown in Table 1 below), the Parties would have a combined share of supply of ADF in the UK of around [90-100]%, with an increment of [15-25]%.

**Table 1: Share of supply estimates (UK) by value**

	%				
	2010/11	2011/12	2012/13	2013/14	2014/15
Kilfrost	[90-100]	[90-100]	[75-85]	[65-75]	[70-80]
Clariant	0	0	[10-20]	[10-20]	[15-25]
<b>Merged Entity</b>	<b>[90-100]</b>	<b>[90-100]</b>	<b>[90-100]</b>	<b>[80-90]</b>	<b>[90-100]</b>
Other Competitors	[0-10]	[0-10]	[0-10]	[10-20]	[0-10]

Source: Parties and Third Parties.

45. The CMA considers that the Parties' combined shares of supply are high enough to raise *prima facie* competition concerns, in particular given that all other ADF suppliers would have total shares of supply in the UK of around [0-10]% in total in 2014/15. The CMA also notes the stability of market shares of other competitors (typically a third ADF supplier) over the last five years with the merging Parties always having more than [75-85]% of the share of supply; apart from in the 2013/2014 season when there were four ADF suppliers in the UK (compared to three in 2012/13 and 2014/15). Overall, the CMA considers that changes in market shares over the last three years have been materially driven by Clariant's entry into the supply of ADF in the UK.

46. As the Parties consider that the appropriate geographic frame is at least EEA-wide, they also submitted share of supply estimates on that basis. These are shown in Table 2 below. The CMA considers that the Parties' combined

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<sup>13</sup> Barriers to entry and expansion by alternative suppliers is considered in Paragraphs 90 - 97.

shares of supply at the EEA level are also high enough to raise *prima facie* competition concerns.

**Table 2: Share of supply estimates (EEA) by value**

	%		
	2012/13	2013/14	2014/15
Kilfrost	[25–35]	[15–25]	[25–35]
Clariant	[45–55]	[45–55]	[50–60]
<b>Merged Entity</b>	<b>[75–85]</b>	<b>[65–75]</b>	<b>[80–90]</b>
Other Competitors	[15–25]	[20–30]	[5–15]

Source: Parties' estimates.

*Closeness of competition between the Parties*

47. The CMA has examined the closeness of competition between the Parties taking into account:

- (a) the similarity of the Parties' offering;
- (b) primary evidence submitted by the Parties; and
- (c) third party views on closeness of competition.

*Similarity of the Parties' offering*

48. Whilst there is a degree of homogeneity of the ADF product offered by different suppliers, some customers who responded to the CMA's merger investigation indicated that their evaluation of the offering of ADF suppliers considers a range of factors relating to the ADF product(s), transport and storage and risk assurance.

49. Third parties told the CMA that:

- (a) In relation to the ADF product(s), it is important to customers that an ADF manufacturer is able to supply all three types of ADF (Type I, II and IV). In addition, one customer noted that Kilfrost is currently the only supplier of pre-mixed ADF product in the UK which it specifically requires due to the water quality in certain airports which makes the use of ADF concentrate uneconomical (ie infrastructure for the treatment of water to dilute ADF concentrates would be required).
- (b) In relation to transport and/or storage infrastructure, some third party competitors explained that, in the UK, customers commonly require ADF suppliers to provide storage solutions to them. When choosing an ADF supplier, customers specify and/or take into account in particular: the depot location and size; the quantity of ADF stock to be held at depots;

transport/ haulage to distribute ADF from the manufacturing plant/depot to the customer; distances between the airport and the storage facilities. One competitor noted that it invested significantly in storage for raw materials and finished products across the UK as it considered this to be necessary in order to compete with Kilfrost in the UK. Third parties noted that logistics are the most important part of the ADF business in the UK and two customers noted that there is a trade-off between getting the lowest price for ADF and obtaining the necessary logistic arrangements.

(c) In relation to risk assurance, customers indicated that they are interested in the extent to which ADF manufacturers provide security of supply and reassurance of minimal disruptions in emergencies. The risk assurance required by customers varies by customer. When choosing an ADF supplier, customers said they would consider in particular: location and capacity of the ADF manufacturing plant<sup>14</sup> (or blending facilities); supply of raw materials (particularly glycol) to the ADF supplier; delivery times from manufacturing site or depot; mode of transport (road, rail, sea); minimum supply lead times, supply of products on consignment, favourable payment terms under which the ADF supplier bears the financial risk<sup>15</sup>, technical assistance in switching ADF.

50. This is consistent with the submission by the Parties that the pricing of ADF is determined by the cost of raw materials, production costs, packing costs and transportation and storage costs.

51. Responses to the CMA's merger investigation indicate that ADF suppliers have different business models for their ADF supply chain and differ in how they meet the requirements of individual customers depending on the location of manufacture, storage and logistic capabilities. One competitor highlighted that differentiation of ADF suppliers through related services (in particular, storage) may be more pronounced in the UK than in other countries and that it would welcome a transparent and open pricing policy in the UK under which negotiations and price setting for the supply of ADF and the provision of related services are separate from each other as this would allow it to compete effectively in the UK. Some customers also indicated that they consider manufacturers' logistic capabilities over the whole supply chain from upstream access to raw materials to downstream delivery.

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<sup>14</sup> One customer noted that the fact that Kilfrost's production facility was in Newcastle (and it also held some stocks) provided it with comfort that airports in the north of England would receive ADF in an emergency – unlike in the south of England, where the customer had to specify that ADF stock was held in storage.

<sup>15</sup> One competitor noted that, currently, ADF customers across Europe expect ADF suppliers to bear the risk associated with the stock overhang needed to cope with variable ADF demand.

52. The CMA therefore considers that the offering of ADF suppliers to customers in the UK is differentiated to a significant degree and that competition takes place over the various dimensions of the offering, as set out in Paragraphs 49 and 50.
53. In relation to the similarity of the Parties' offering, responses from third parties indicate that the Parties:
  - (a) offer the full range of ADF Types (I, II and IV) required by UK customers;
  - (b) offer the required logistics, transportation and storage network in the UK, albeit they operate different business models;<sup>16</sup> and
  - (c) submit bids that are competitive with each other when competing to supply UK customers.
54. In relation to product innovation, Kilfrost operates an R&D technology facility for its products and has a history of investing significantly in R&D and innovation.<sup>17</sup> Clariant also undertakes R&D activities with the aim of offering innovative and environmentally responsive products (ie 'greener' de-icing technologies).<sup>18</sup>
55. Third parties told the CMA that ADF suppliers optimise their products on a regular (in some cases, annual) basis in order to provide customers with the best ADF product for their needs. One customer told the CMA that Clariant and Kilfrost also compete in relation to innovative ADF products. For instance, Clariant offered this customer an innovative ADF product which had better holdover times (as well as other properties) compared to Kilfrost. In attempting to keep this customer, Kilfrost then developed a product which matched the holdover times for Clariant's ADF product.

*Primary evidence submitted by the Parties*

56. Clariant submitted that many customers in the UK use tender processes to buy ADF. Responses from customers to the CMA's merger investigation, however, showed that customers often do not run formalised tender processes or record past bids and the evaluation of those bids. The incomplete nature of the tender data has led the CMA not to place significant weight on it.

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<sup>16</sup> [✉]

<sup>17</sup> <http://www.airport-suppliers.com/supplier/kilfrost/#sthash.lInSiogM.dpuf>

<sup>18</sup> See Press Release: [Aviation de-icing acquisition to expand Clariant's North American capabilities](#).

- 57. Kilfrost's internal documents<sup>19</sup> include an analysis of its competitors in the UK and Europe. Kilfrost projects that between 2013 and 2018, [☒]. The same document specifically identifies Clariant as having won specific airports or airlines in certain European countries through 'aggressive activity'. This would indicate that Clariant and Proviron are seen as close competitors to Kilfrost in the UK and Europe, [☒]
- 58. Proviron's annual report<sup>20</sup> stated that its de-icer sales in Europe were not strong in 2014 due to the mild winter (which resulted in squeezed prices) as well as a price war between (their) competitors.
- 59. The CMA undertook an analysis of ADF prices and cost of production submitted by the Parties<sup>21</sup> as well as the price differences between Kilfrost and Clariant. This analysis implies that Clariant places a strong competitive constraint on Kilfrost. The CMA, however, notes that, this analysis does not control for other demand and cost factors, different prices for existing and new contracts and other potentially relevant determinants and, as such, is of limited probative value on its own.

*Third party views on closeness of competition*

- 60. Third party responses to the CMA's merger investigation consistently indicated that the Parties are close competitors in the supply of ADF. In particular, customers stated that Kilfrost's and Clariant's offerings are similar in terms of services offered and their logistic capabilities and, as such, considered Clariant and Kilfrost to be each other's closest competitors.
- 61. Responses from customers to the CMA's investigation indicate that the offerings of Clariant and Kilfrost are similar in relation to:
  - (a) *Customer specifications*: Some customers told the CMA that Clariant and Kilfrost are the only two suppliers of ADF whose offering meets their needs (in terms of logistics, storage network and/or quantity of ADF required) in the UK and that there is no alternative option available to them;
  - (b) *Reputation*: One of the above customers noted that both Clariant and Kilfrost have been in the ADF business for a long time (ie have an established reputation compared to other suppliers) and have excellent supply chains and logistic arrangements;

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<sup>19</sup> [☒]

<sup>20</sup> Proviron 2014 Annual Report; page 3 and page 8 (submitted by Clariant).

<sup>21</sup> [☒]

- (c) *Managing commercial risk*: One customer stated that Clariant and Kifrost are the only suppliers with the competence and flexibility to be able to deal with both mild winters and cold winters (in terms of balancing holding sufficient stock and retaining the necessary resilience in mild winters); and
- (d) *Security of supply*: The same customer told the CMA that Kifrost and Clariant are the only manufacturers which are of sufficient size to give the assurance that they will have access to raw materials (glycol) in high-demand periods. The customer stated that smaller ADF manufacturers may not be prioritised by raw material suppliers when there is high demand for these raw materials.

62. Some customers were concerned that, following the Merger, they would struggle to maintain a credible dual supplier strategy, under which customers contracted with two ADF suppliers and/or used the threat of switching to an alternative ADF supplier in negotiations to achieve a better price (albeit not necessarily with the intention to follow through with switching).

63. All customers who responded to the CMA and expressed a view on the merger raised concerns that the Merger would reduce competition in the UK. One customer told the CMA that the Merger would reduce competitive pressure in the market as there is already a limited number of suppliers.

64. On the basis of the evidence above, the CMA considers that the Parties are each other's closest competitors in the UK.

#### *Competitive constraints from alternative suppliers*

65. Unilateral effects are more likely where customers have little choice of alternative suppliers. The CMA has considered whether there are alternative suppliers which could provide a competitive constraint on the merged entity. The CMA has also sought evidence on the competitive constraint imposed on the Parties by other suppliers.

66. Clariant submitted that customers in the UK can source ADF from a number of current suppliers of ADF in the UK and in Europe, as well as potential suppliers of ADF outside Europe (potential competitors) who they submit exercise competitive constraints on the Parties in the UK. These current and potential competitors are listed in Table 3 below.

**Table 3: Suppliers of ADF**

Not supplying into Europe (Potential competitors) <sup>22</sup>	Currently supplying into Europe in 2015	Currently supplying into the UK in 2015
AllClear Systems	Kilfrost (Target)	Kilfrost (Target)
Deicing Solutions LLC	Clariant	Clariant
Newave Aerochemical <sup>23</sup>	Proviron	Proviron
Arcton	Abax	
Home Oil Company	ADDCON	
Inland Technologies	LNT	
Aviation Xi-an High-Tech		
Dow Chemical		

Source: Parties and Third Parties.

67. Clariant further submitted that the supply of ADF is characterised by pan-European supply and that customers purchase on a pan-European basis. It also submitted that [☒] operates an [☒]<sup>24</sup> (similar to Clariant) and [☒].

68. The CMA assessed the constraint from these alternative suppliers by taking into consideration:

- (a) the similarity of offering;
- (b) primary evidence submitted by the Parties; and
- (c) third party views on alternative suppliers.

*Similarity of offering*

69. Current suppliers of ADF provided information to the CMA about their ADF offering as set out below:

- (a) Proviron manufactures and supplies the full range of relevant ADF Types (I, II, and IV). It has a licensing agreement with Cryotech, a de-icing products manufacturer in the US. It manufactures ADF in Ostend (Belgium) and considers that, due to the short distance, it can deliver ADF to the English coast within a day. More distant parts of the UK, such as Northern Ireland, would also be relatively easily reached by sea. Proviron currently supplies ADF to the UK.
- (b) Abax Industries (**Abax**) manufactures and supplies the full range of ADF Types (I, II, and IV) in Europe. Abax told the CMA that it had been supplying ADF in the UK for 10 years up to 2013. Prior to 2012, Abax manufactured ADF in France and transferred this by tanker for storage

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<sup>22</sup> 'Potential competitors' refers to suppliers of ADF with approved products but who do not currently supply into Europe. These have been identified by the Parties on the basis that they could start supplying ADF in Europe very quickly/easily.

<sup>23</sup> [☒]

<sup>24</sup> [☒]

and sale in the UK. In 2012 (when Clariant entered the ADF market in the UK), Abax entered into a commercial arrangement/partnership with Esseco UK Limited (**Esseco**) (a UK-based company) under which Esseco manufactured and distributed ADF for Abax (resulting in reduced transport costs and faster customer response times (within 24 hours)). At the end of 2013, the agreement between Abax and Esseco ended due to the competitive conditions and mild winters in the UK (ie the partnership with Esseco was predicated on ADF demand similar to the heavy winter in 2010/11). Esseco told the CMA that the competitive market in the UK combined with the fragility of their supply chain and logistics led them to withdraw from further supply of ADF to the UK. Abax does not currently supply ADF in the UK.

- (c) LNT Solutions (**LNT**) manufactures and supplies a Type I ADF product in Europe, but does not have Type II and IV ADF products. LNT does not currently supply ADF in the UK. LNT told the CMA that there are commercial risks associated with the supply of ADF in the UK (ie low sales during mild winters). For this reason, LNT noted that its ability to sell in the UK will depend on a change from current conditions in the market for the supply of ADF; *inter alia*, whether customers are willing to bear some of the risk associated with variable demand for ADF in the UK (eg by making purchase commitments to buy ADF stock irrespective of the weather).
- (d) ADDCON GmbH (**ADDCON**) told the CMA that it only recently developed a Type I ADF product which it manufactures and supplies in Europe, but it does not have Type II or Type IV ADF products. ADDCON stated that in order to be a credible supplier of ADF, it would be necessary for them to offer the full range of ADF products to UK customers (Types I, II, and IV). ADDCON noted that entry into the UK would most likely entail using a local logistics partner that can provide certain facilities (for storage, blending, etc) and would focus on winning contracts with specific target airports rather than competing UK-wide.

70. Overall, information obtained from current suppliers of ADF indicates that, in relation to the ADF product range, only Proviron and Abax are able to manufacture and supply the full range of ADF Types (I, II, and IV). LNT and ADDCON only have a Type I ADF product. Abax, LNT and ADDCON do not currently supply ADF in the UK. Therefore, they do not currently offer all the elements of a competitive offering (ie product, storage, transportation and/or logistics) required by UK customers. The CMA therefore does not consider them to place a current effective constraint on suppliers of ADF to UK customers. The CMA considers that Proviron is the only ADF supplier,

besides the Parties, to supply all elements of the offering required by customers in the UK.

71. In addition to the current suppliers of ADF, the CMA considered the offering of various potential competitors (as listed in the first column of Table 3 above) that responded to the CMA's merger investigation. One potential competitor only manufactures Type I and III products (ie it has no Type II and IV products at present) and plans to supply ADF to the UK only under the right business conditions (ie depending on investment costs and market conditions post-Merger). A second potential competitor only manufactures Types I and II products (ie. it has no Type IV ADF product). Two other potential competitors informed the CMA that they have no plans to supply into the UK at present. Therefore the CMA believes that these potential suppliers are not credible options for UK customers at present nor would they be a constraint on the merged entity.

*Primary evidence submitted by the Parties*

72. As discussed in Paragraph 57, Kifrost's internal documents forecast [§] by Proviron for the seasons 2013/2014 to 2017/2018 in the UK and Europe.<sup>25</sup> The CMA considers that this shows that Kifrost did not expect Proviron to [§] become a stronger competitor in the UK.
73. The CMA also notes that all ADF suppliers (other than Clariant and Proviron) [§] and this implies that [§] those other ADF suppliers as a lesser competitive constraint in the UK and Europe.

*Third party views on alternative suppliers*

74. Third parties indicated that, in order to be a credible supplier of ADF, it would be necessary for any ADF supplier to offer the full range of ADF products (Types I, II, and IV in Europe). As discussed in Paragraph 70, ADDCON and LNT do not supply Type II and IV ADF products and Abax does not currently supply ADF to the UK.
75. Responses from third parties to the CMA's merger investigation indicated the importance of developing a reputation in the supply of ADF in order to be considered a credible alternative for customers. Proviron told the CMA that it started supplying ADF in 2013 and responses from customers showed that, while some customers were aware of Proviron as an ADF supplier, they were unsure of the extent to which they were a credible supplier for their needs.

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<sup>25</sup> [§]

76. Two customers expressed concerns about the offering of one other supplier of ADF in continental Europe. [☒].
77. Overall, feedback from the customers from whom the CMA received evidence indicates that they do not generally consider other competitors (apart from Clariant and Kilfrost) as being positioned to offer the required products and logistics and, so, being sufficiently capable to be attractive in upcoming competitions.

*CMA's analysis of the competitive constraints from alternative suppliers*

78. Based on the evidence gathered by the CMA, including third party responses, the CMA considers the competitive constraints Proviron exercises on Clariant and/or Kilfrost to be weak for the following reasons:
  - (a) Proviron neither benefits from the competitive advantages (ie delivery lead-time advantage and lower transport costs) associated with manufacturing or blending of ADF in the UK (as Kilfrost does and Abax did) nor from economies of scale in the purchase of raw materials, in particular, glycol (as Clariant and Kilfrost do) which may limit their ability to price aggressively (see Paragraph 58);
  - (b) most customers in the UK have not had any practical experience with (ie neither tested nor used) Proviron's ADF and, as such, some customers do not consider Proviron as having an offering as good as Kilfrost and Clariant;
  - (c) Proviron's ADF business is small in size compared to the Parties and as discussed in Paragraph 56, Kilfrost did not expect Proviron to leave its position as a fringe player to become a stronger competitor in the UK. In this respect, the CMA notes that Abax was unable to expand its market share in the UK despite many years of operations and sales in the UK; and
  - (d) Proviron does not have a long track history or reputation in the supply of ADF<sup>26</sup> in the UK or Europe (compared to Clariant, Kilfrost and Abax).
79. Proviron told the CMA that it intends to expand its sales in the UK significantly and believes that it has the capabilities to do so. Therefore, it is possible that Proviron could expand rapidly and may be more likely to do so in the event of the merger. However, its potential expansion is highly uncertain. As discussed

in Paragraph 57, [§] Abax's experience shows that expansion can be difficult even with significant investment in local facilities. Therefore, the CMA does not believe that expansion by Proviron is sufficiently likely to occur and, even were it to occur, that it would necessarily replace the loss of competition between the Parties.

80. The CMA also considered whether various potential competitors exert a competitive constraint on the Parties. For the reasons discussed in Paragraph 71, the CMA considers that potential competitors exert a limited constraint (if any) on the Parties.
81. Based on the evidence available to the CMA, the CMA considers that Proviron does not offer a sufficient competitive constraint on the merged entity to offset the loss of competition resulting from the Merger, while none of the other competitors identified by the Parties are currently credible suppliers of ADF in the UK. Whilst it is possible that ADF suppliers (in particular, Proviron) may provide some competitive constraint in future, the CMA considers that third-party competitors in the UK have historically not shown the ability to win and retain bids (and market share) over time in the UK.

*Conclusions on the competitive constraints from alternative suppliers*

82. Accordingly, on the basis of the evidence gathered to date, the CMA considers that there would be insufficient competition remaining post-Merger from alternative suppliers.

*Conclusion on horizontal unilateral effects*

83. As set out above, the CMA believes that Clariant is Klfrost's closest competitor in the supply of ADF in the UK and that the competitive constraint between the Parties that would be lost as a result of the Merger would be substantial. On the basis of the evidence available to the CMA, as set out above, the CMA also found that the competitive constraint imposed by the Parties' competitors is weak.
84. Clariant submitted that the Merger would help to improve its offering for its customers in Europe through the acquisition of [§]. However, the CMA has not received enough evidence from the Parties to be able to test this assertion and in any event it considers that the Merger could also have a negative impact on innovation in relation to ADF products, as a significant force in

innovation<sup>27</sup> in the UK and Europe will be removed as a result of the Merger (as described in Paragraphs 54 - 55).

85. Therefore, the CMA believes that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the manufacture and supply of ADF in the UK which may lead to price rises, a reduction in product or service quality provided to customers and/or the loss of innovation.

### ***Coordinated effects***

86. Coordinated effects may arise when firms operating in the same market recognise that they are mutually interdependent and that they can reach a more profitable outcome if they coordinate to limit their rivalry.<sup>28</sup> A merger may raise competition concerns as a result of coordinated effects if it affects the market structure such that the conditions for sustaining coordinated effects are created or enhanced.
87. When assessing whether or not coordinated effects may arise as a consequence of a merger, the CMA has regard to whether (a) there is evidence of pre-existing coordination in the relevant market(s), (b) firms are able to reach and monitor the terms of coordination, (c) coordination would be internally sustainable, and (d) coordination would be externally sustainable.<sup>29</sup> The CMA has considered these factors below.
88. As discussed in Paragraph 48, the CMA considers that despite a degree of homogeneity of the ADF product itself, the offerings of ADF suppliers are differentiated. Also, while some customers use tender processes to buy ADF, others use competing offers to negotiate bilaterally with suppliers. The CMA has not received evidence of pre-existing coordination and considers that given the very high combined share of supply of the Parties, coordination between the remaining suppliers would lead to little additional profits.
89. Accordingly, the CMA considers that the Merger does not give rise to a realistic prospect of an SLC as a result of coordinated effects in relation to the manufacture and supply of ADF in the UK (taking into account the constraint of supplies from continental Europe).

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<sup>27</sup> Kilfrost held an event around in July 2015, attended by de-icing experts from around Europe, designed to share Kilfrost's expertise and knowledge with industry leaders and to develop understanding of the design and key properties of aviation deicing fluids. See <http://www.copybook.com/airport/kilfrost/articles/kilfrost-welcomes-the-aviation-de-anti-icing-industry-to-their-inaugural-training-event>

<sup>28</sup> *Merger Assessment Guidelines*, paragraph 5.5.1.

<sup>29</sup> *Merger Assessment Guidelines*, paragraphs 5.5.4 and 5.5.9.

## **Barriers to entry and expansion**

90. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.<sup>30</sup>

91. Clariant submitted that barriers to entry and expansion are low and that the threat posed by existing and potential competitors would be largely facilitated by easy entry and expansion. Clariant stated that production of ADF is easy and does not require considerable investment. It argued that it would not be necessary to establish manufacturing facilities in the country where the customer is located and it would be straightforward and cost-effective to use rented storage facilities and third-party providers for haulage [☒].

92. This submission is, however, not consistent with internal [☒] documents which state that the barriers to entry in the supply of ADF are high as (i) a strong regulatory environment (ie product certification) requires all products to be independently assessed and approved; (ii) major airlines demand high technological standards; (iii) customer relationships last decades in some cases; (iv) customers often view technology and safety as more important than price; and (v) customers are very conservative and risk averse towards new players.<sup>31</sup>

93. Feedback from third parties also indicates that there is a range of barriers to entry or expansion relevant in the manufacture and supply of ADF. These include:

(a) *Legal barriers*: As discussed in Paragraph 23, the necessary certifications would need to be obtained for ADF products and production sites. One competitor noted that the Merger might raise barriers to entry and expansion as Clariant could post-Merger influence standard setting due to its know-how and size, thereby making entry and expansion more costly.

(b) *Strategic barriers* (eg reputation, risk averse customers): third parties who responded to the CMA's merger investigation said that the need to develop a reputation in the supply of ADF and the fact that customers in the market are generally risk averse lead individually and jointly to high barriers to entry or expansion. A competitor noted that, even if it has a

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<sup>30</sup> *Merger Assessment Guidelines*, from paragraph 5.8.1.

<sup>31</sup> [☒].

good quality and well-priced product, it still needs a large customer to act as a ‘catalyst’ to encourage other customers to switch to it.

- (c) *Technical barriers* (proprietary formulae, recipes, and processes): Third party competitors stated that developing a formula and processes to manufacture ADF is one of the barriers to entry into this market as this is proprietary information of each manufacturer. Also, competitors stated that developing Type II and IV ADF products involves significant time (around three years), specialised equipment, know-how and costs (in £ millions).
- (d) *Structural barriers* (set-up costs in infrastructure): Third party competitors told the CMA that ADF manufacturers need to have logistic capabilities and infrastructure in any geographic market before being able to compete therein.
- (e) *Economies of scale* (eg raw material purchase, resilience in high-demand periods): Concerns were raised by a small number of third party competitors who replied to the CMA’s merger investigation, that the Parties’ increased buyer power post-Merger could lead to adverse effects (eg in the procurement of glycol) and, as such, small scale entry or a single-product entry may not be profitable.

94. The CMA asked current suppliers of ADF about their entry and/or expansion plans and the following views were provided:

- (a) Proviron told the CMA that it currently competes for customers in the UK and intends to compete to significantly increase its supply of ADF to the UK.
- (b) Abax told the CMA that, post-Merger, it does not foresee that it would be able to recommence ADF supply into the UK due to Clariant’s size in the UK, its local facilities, and its cost advantage in raw material procurement. Esseco (Abax’s UK partner, as described in Paragraph 69(b)) also told the CMA that it has no current plans to re-enter the ADF market within the next two years.
- (c) LNT told the CMA that it expects to obtain approval for its Type II and IV ADF products in six months and 12 months respectively. LNT also stated that there are commercial risks associated with the supply of ADF in the UK and that its ability to sell in the UK will depend on a change from current conditions in the supply of ADF; in particular, whether customers are willing to bear some of the risk associated with variable demand for ADF by making purchase commitments to buy ADF stock irrespective of the weather.

(d) ADDCON told the CMA that it expects that it will take 2 – 2.5 years to develop Type II and IV ADF products. ADDCON also stated that it is currently not in a position to expand their portfolio/ capacity and, in any case, would need to explore further whether expansion into other types of ADF and entry into the UK makes commercial sense as the Merger may diminish the profitability of such entry.

95. On the basis of the evidence above, the CMA considers that neither entry nor expansion would be timely, likely or sufficient so as to constrain the merged entity, taking into account historical trends in the manufacture and supply of ADF in the UK. As described in Paragraph 69(b), the CMA notes that Abax which had been supplying ADF in the UK for around 10 years could not achieve and sustain a significant share of supply. While Clariant has been able to expand its share of supply, the CMA considers the ability of Proviron to replicate this as uncertain (as described in Paragraph 78).

96. The CMA also considers that the relatively small size and volatile nature of the demand for ADF in the UK may exacerbate the aforementioned problems (for reasons described in Paragraph 58). On the basis of third party replies to its merger investigation, the CMA considers that at present, there is limited (if any) risk sharing between ADF suppliers and customers and, as such, in the event of mild winters (as noted by Proviron in Paragraph 58), entry may be unprofitable and this makes entry and expansion less likely in the UK. In addition, none of the potential competitors has presented evidence to the CMA of a timely, likely, and sufficient entry or expansion into the supply of ADF in the UK.

97. On the basis of the evidence before it, the CMA therefore believes that entry or expansion would not be sufficient, timely and/or likely to prevent a realistic prospect of a SLC as a result of the Merger.

### ***Countervailing buyer power***

98. In some circumstances, an individual customer may be able to use its negotiating strength to limit the ability of a merged firm to raise prices. The CMA refers to this as countervailing buyer power.<sup>32</sup>

99. Clariant submitted that ADF customers are sophisticated buyers who negotiate heavily or alternatively run competitive tender processes in order to secure the most competitive prices. Further, some customers, for example [§], were identified [§] as having particularly strong buyer power such that

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<sup>32</sup> *Merger Assessment Guidelines*, paragraph 5.9.1.

they could work with and sponsor an existing ADF supplier to enter the UK or to expand its offering in the UK.

100. Third party customers who responded to the CMA's merger investigation stated that they have little choice of credible suppliers in the UK and that there are also sometimes impediments to switching between suppliers. One customer indicated that the possibility of sponsoring entry or of self-supplying did not exist.
101. The CMA considers that the relatively small size and volatile nature of the demand for ADF in the UK (as well as the feedback from third parties during the CMA's merger investigation) indicates that ADF manufacturers may not be dependent on customers in the UK whereas customers are heavily dependent on ADF manufacturers even when they do not need any ADF (because of mild winters) because they must prepare for the worst case scenario. Further, the CMA considers that due to the high combined share of supply of the Parties and the lack of alternative suppliers, any buyer power is likely to materially diminish following the merger, should it have existed previously.
102. The CMA therefore considers, that the extent of buyer power, if any, is too limited to prevent an SLC in the supply of ADF in the UK.

### **Third party views**

103. The CMA contacted the Parties' customers and competitors. The majority of the Parties' customers and competitors raised strong competition concerns regarding the Merger.
104. Third party comments have been taken into account where appropriate in the competitive assessment above.

### **Conclusion on SLC**

105. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the manufacture and supply of ADF in the UK.

### **Exceptions to the duty to refer**

106. Where the CMA's duty to refer is engaged, the CMA may, pursuant to section 33(2)(a) of the Act, decide not to refer the merger under investigation for a Phase 2 investigation on the basis that the market(s) concerned is/are not of sufficient importance to justify the making of a reference (the ***de minimis***

**exception).** The CMA has considered below whether it is appropriate to apply the *de minimis* exception to the present case.

### ***Markets of insufficient importance***

107. In considering whether to apply the *de minimis* exception, the CMA will consider, in broad terms, whether the costs involved in a reference would be disproportionate to the size of the market(s) concerned, taking into account also the likelihood that harm will arise, the magnitude of competition potentially lost and the duration of such effects.<sup>33</sup>

### *Relevant factors*

108. The CMA will consider the likely level of consumer harm by reference to a number of factors when deciding whether or not to apply the *de minimis* exception: the size of the market, the strength of the CMA's concerns that harm will occur as a result of the merger, the magnitude of competition that would be lost by the merger, and the likely durability of the merger's impact.<sup>34</sup> The CMA will also consider the wider implications of a *de minimis* decision.<sup>35</sup> Each is considered in turn below.

#### *Market size*

109. Clariant submitted that, in light of the estimated value of the supply of ADF in the UK being approximately £[6-8]million per annum, this Merger would be a candidate for the application of the CMA's *de minimis* exemption. Clariant further submitted that the value of the supply of ADF in the UK could be estimated at:

- (a) approximately £[4-6]million, taking a 2 year average for 2013/14 and 2014/15 seasons;
- (b) approximately £[8-10] million taking a 5 year average;
- (c) approximately £[8-10] million taking a 8 year average.

110. Clariant further submitted that certain customers are particularly unlikely to be affected by the transaction and, as such, should be 'carved out' from the size of the market to be considered for the purposes of *de minimis*.

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<sup>33</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122), December 2010, chapter 2. The *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* were adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure*, Annex D).

<sup>34</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.28.

<sup>35</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.40-43.

111. The CMA's guidance states that, market(s) with an annual value in the UK of more than £10 million in aggregate will generally be considered to be of sufficient importance to justify a reference such that the *de minimis* exception will not be applied.<sup>36</sup> Based on estimates provided by Clariant, the CMA notes that the size of the ADF market in the UK in two of the last five years exceeded £10 million (around £[§] million and £[§] million in 2010/11 and 2012/13 respectively). The CMA also found no evidence to support the view that certain customers or contracts are unlikely to be affected by the Merger and, as such, should not be considered. On this basis, the CMA believes that it is not appropriate for it to exercise its discretion to apply the *de minimis* exception.
112. The CMA's guidance also states that, for market(s) with an annual value in the UK of between £3 million and £10 million in aggregate, the CMA will consider the expected customer harm resulting from the merger.<sup>37</sup> Based on estimates provided by Clariant, the CMA notes that the size of the ADF market in the UK significantly exceeded £3 million in each of the last five years.

#### *Strength of the CMA's concerns*

113. As discussed above, the CMA found that the Merger involves the two largest suppliers of ADF in the UK, with a combined share of supply of ADF in the UK of [90–100]% post-Merger. The CMA also considers Clariant and Kilfrost to be each other's closest competitors and believes that the competitive constraint imposed by the Parties' competitors is weak.

#### *Magnitude of competition lost*

114. The CMA believes that, based on the evidence set out above, Clariant is Kilfrost's closest competitor in the supply of ADF in the UK and that the competitive constraint between the Parties that would be lost as a result of the Merger would be substantial.

#### *Durability*

115. For the reasons set out above, the CMA considers that:
  - (a) the competitive constraint imposed by the Parties' competitors is weak;

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<sup>36</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.2.

<sup>37</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.3.

- (b) there are significant barriers to entry in this market;
- (c) neither entry nor expansion would be timely, likely, and sufficient so as to prevent an SLC in the supply of ADF in the UK; and
- (d) the durability of the Merger's impact is therefore unlikely to be limited, particularly taking into account the Parties' shares of supply in the EEA (as shown in Table 2).

#### *Replicability*

116. The CMA notes that Clariant has acquired two major European ADF suppliers in the last two years - Aerochem AB (2014) and Kifrost (2015) – and, as such, the CMA considers that further acquisitions could be replicated across the ADF sector in line with Clariant's 'regional expansion strategic pillar'.

#### *'In principle' availability of undertakings in lieu*

117. The CMA's general policy, regardless of the size of the affected market, is not to apply the *de minimis* exception where clear-cut undertakings in lieu of a reference could, in principle, be offered by the parties to resolve the concerns identified.<sup>38</sup>

118. The CMA's judgment as to whether undertakings in lieu are available (at the time of considering the 'de minimis' exception) is an 'in principle' one that does not depend on the actual offer, if any, of undertakings in lieu (or indeed whether the CMA believes they are likely to be offered).<sup>39</sup>

119. In most cases, a clear-cut undertaking in lieu will involve a structural divestment. The CMA will take a conservative approach to assessing whether undertakings in lieu are in principle available. To the extent that there is any doubt as to whether undertakings in lieu would meet the 'clear-cut' standard, it will not be included in the 'in principle' assessment.<sup>40</sup>

120. The CMA considers that an 'in principle' clear-cut undertaking in lieu is available in this case which is UK specific having regard to the assets which are being acquired as part of the Merger (as described in Paragraph 11).

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<sup>38</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraphs 2.2 and 2.18-27.

<sup>39</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.22.

<sup>40</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.27.

*Conclusion on the application of the de minimis exception*

121. Taking all the above factors into consideration, the CMA believes that the market concerned in this case (as described in Paragraph 111) is of sufficient importance to justify the making of a reference. Also, as noted above, the CMA believes that clear-cut undertakings in lieu of a reference could, in principle, be offered by the parties to resolve the concerns identified. As such, the CMA believes that it is not appropriate for it to exercise its discretion to apply the *de minimis* exception.

## **Decision**

122. Consequently, the CMA believes that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the United Kingdom.
123. The CMA therefore considers that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised pursuant to section 33(3)(b) whilst the CMA is considering whether to accept undertakings under section 73 of the Act in lieu of a reference. Pursuant to section 73A(1) of the Act, the Parties have until 16 February to offer an undertaking to the CMA that might be accepted by the CMA under section 73(2) of the Act. If the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if pursuant to section 73A(2) of the Act the CMA decides by 23 February that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it, then the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

**Andrea Coscelli**  
**Executive Director, Markets and Mergers**  
**Competition and Markets Authority**  
**9 February 2016**