Decision of the Competition and Markets Authority

Cleanroom laundry services and products: anti-competitive agreement

Case 50283

14 December 2017

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [✂].

The names of individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION AND GLOSSARY

A. Introduction[1]

1.1. This Decision is addressed to Fenland, Berendsen Newbury, and Berendsen plc. By this Decision, the CMA has decided that the Parties (Fenland and Berendsen Newbury) participated in an agreement which infringed the Chapter I prohibition in the Relevant Period (i.e. from 30 May 2012 to 2 February 2016), because it had the object of sharing the Relevant Markets through the allocation of territories and customers between the Parties, and may have affected trade within the UK. This is referred to in this Decision as the 'Infringement'.

1.2. Certain types of manufacturing must be undertaken in a controlled environment known as a Cleanroom. The garments that are worn by people working in Cleanrooms (and similar environments) are laundered by specialist Cleanroom Laundries. The Parties were the two leading Cleanroom Laundry operators in GB during the Relevant Period, and were also notable suppliers in the related market for Consumables.

1.3. The Parties had been involved in a long-running Joint Venture arrangement in which they shared knowhow and each operated under the Micronclean Brand. This arrangement had existed between various businesses in addition to the Parties since the 1980s, when the Relevant Markets were nascent. The Addressees have submitted that the Joint Venture enabled the Parties to build the Cleanroom Laundries that they continued to operate during the Relevant Period, to introduce and develop new Cleanroom services and to create a UK-wide delivery network.

1.4. In two contracts signed on 30 May 2012, referred to in this Decision as the TMLAs, the Parties explicitly agreed to allocate territories and customers between themselves. This applied to all customers except food sector customers. Broadly speaking, the Parties agreed that Fenland would serve customers north of a line drawn from London to Anglesey, and Berendsen Newbury would serve customers south of that line. The Parties also agreed that certain existing customers of one Party would, in principle, continue to be served by that Party, even if located in the other Party's territory.

1.5. Around a year before the TMLAs were terminated, the Parties agreed that each Party could respond to 'passive' (i.e. unsolicited) sales enquiries from customers located in the other Party's territory. The Parties maintained the

[1] For brevity, capitalised terms in this Part 1.A. are defined first in the Glossary at Part 1.B.. Where in this Decision it is helpful for the reader to reference a defined term in the text, such term may also be defined in the text.

restrictions on either Party actively marketing in the territory or to customers allocated to the other Party, until they terminated the TMLAs on 3 February 2016.

1.6. In this Decision, the CMA finds that the Parties explicitly agreed to share the Relevant Markets through an allocation of both territories and customers and that this agreement infringed the Chapter I prohibition. Sharing markets is expressly prohibited under section 2(2) of the Act and is a well-established infringement by object. Absent this agreement, and notwithstanding the wider context of the Joint Venture, the Parties could have competed to a greater extent. The agreement had as its object (or at least one of its objects) the prevention, restriction or distortion of competition.

1.7. In reaching this Decision, the CMA has taken the wider context of the Joint Venture fully into account. In particular, the CMA finds that (i) the territorial and customer allocation was not objectively necessary for the operation of the Joint Venture or the licensing of the shared Trade Marks, and (ii) the agreement did not benefit from an individual exemption under section 9 of the Act (or indeed a block exemption under section 10 of the Act). By the start of the Relevant Period, any significant investments had been made many years before, and any efficiencies or benefits had already been materially attained. The Relevant Markets were mature and each Party was well-established. There is no link between the territorial and customer allocation under the TMLAs and any prior, contemporaneous or future investments, sharing of knowhow or benefits to customers.

1.8. The CMA hereby imposes financial penalties on the Addressees in relation to the Infringement, holding Berendsen plc jointly and severally liable with Berendsen Newbury in relation to the period from 13 September 2014 (when Berendsen plc acquired Berendsen Newbury) to 2 February 2016. The penalty imposed on Fenland is £510,118. The penalty imposed on Berendsen Newbury is £1,197,956 (of which, Berendsen plc is jointly and severally liable for £1,028,671).

B. Glossary

1.9. In this Decision, the following terms shall have the definitions set out below. Where in this Decision it is helpful for the reader to reference a defined term in the text, such term may also be defined in the text.

Term	Definition
1984 Agreement	The agreement entered into between JVCo and [Former JV Partner F] in 1984.
1991 TM Agreements	The trademark user agreements entered into between JVCo and Fenland, and between JVCo and Berendsen Newbury, in 1991.
Act	Competition Act 1998.
Addressees	Fenland, Berendsen Newbury and Berendsen plc.
Advisory Letters	The mirror-image letters dated 16 February 2015 sent by the CMA to Fenland and Berendsen Newbury, respectively setting out concerns about possible anti-competitive conduct by Fenland and Berendsen Newbury.
Article 101(3) Guidelines	Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) of the Treaty), OJ C101, 27 April 2004.
Barrier Laundry or Barrier Laundries	A laundry (or laundries) which uses (or use) similar processes to a Cleanroom Laundry, but does (or do not) conform to the ISO 14644 standards required to be classified as a Cleanroom Laundry, usually due to not having the necessary air filtration system in place.
Barrier Laundry Services	The laundering of garments by a non-classified Barrier Laundry.
Berendsen	Berendsen Newbury and Berendsen plc collectively.
Berendsen DPS	The Draft Penalty Statement issued to Berendsen on 27 June 2017.
Berendsen DPS WRs	Berendsen written representations dated 10 July 2017 on the Berendsen DPS.
Berendsen Newbury	Formerly named Micronclean (Newbury) Limited until 15 September 2015 (and, since 15 September 2015, named Berendsen Cleanroom Services Limited), a private limited company with Companies House registration number 01713052.
Berendsen plc	A public limited company with Companies House registration number 01480047.
Berendsen SO WRs	Berendsen written representations dated 24 March 2017 on the SO.
Berendsen UK Limited	A private limited company with Companies House registration number 00228604.
CAT	The Competition Appeal Tribunal.
Chapter I prohibition	The prohibition imposed by section 2 of the Act.
CJEU	The Court of Justice of the European Union.
Cleanroom	A clean, controlled environment used in connection with the manufacturing of items sensitive to contamination by airborne particles, employed particularly within the pharmaceutical and semi-conductor industries.
Cleanroom Cleaning	The cleaning, decontamination and disinfection of Cleanrooms and associated equipment.
Cleanroom Garment(s)	Clothes worn by Cleanroom operators which fully enclose the individual to ensure no particulates from them or their normal clothes can contaminate the environment.

Term	Definition
Cleanroom Laundry or Cleanroom Laundries	A laundry or laundries classified to ISO 14644 Class 4, 5, 6, 7 or 8 (or equivalent).
Cleanroom Laundry Services	The laundering of Cleanroom Garments (and other garments), i.e. Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services and associated Cleanroom Garment and other garment rental services.
CLS	Clean Linen Services Limited, a private limited company with Companies House registration number 00087908.
CMA	The Competition and Markets Authority.
Commission	European Commission.
Consumables	A range of consumable products used to support the relevant Cleanroom's activities – e.g. disposable Cleanroom Garments, gloves, mops, disinfecting solutions and Cleanroom hardware.
Consumer Benefit Criterion	The second criterion in section 9(1) of the Act that the 'agreement' must allow consumers a fair share of the benefit resulting from the 'agreement' meeting the Improvement/ Promotion Criterion.
Countdown	Countdown Clean Systems Limited, a private limited company with Companies House registration number 01406069.
Customer Enquiry Examples	As defined in paragraph 3.131 of this Decision.
Decision	This decision.
Draft Penalty Statements	The Fenland DPS and the Berendsen DPS.
Fenland	Formerly named Fenland Laundries Limited until 1 July 2016 (and, since 1 July 2016, named Micronclean Limited), a private limited company with Companies House registration number 00176558.
Fenland DPS	The Draft Penalty Statement issued to Fenland on 27 June 2017.
Fenland DPS WRs	Fenland written representations dated 10 July 2017 on the Fenland DPS.
Fenland SO WRs	Fenland written representations dated 24 March 2017 on the SO.
Fenland Territory	The territory defined as 'Territory A' at Schedule 2 in the Fenland TMLA, and as 'Territory B' at Schedule 3 in the Newbury TMLA.
Fenland TMLA	The Trade Mark Licence Agreement dated 30 May 2012 entered into between Fenland (as licensee), Berendsen Newbury (as co-licensee) and JVCo (as licensor).
Fenland/Fishers	The anticipated acquisition by Fenland of the Cleanroom Laundry business of Fishers Services Limited, as notified to (and investigated by) the CMA.
Fenland/Fishers Decision	The document setting out the CMA's decision dated 16 December 2015 in relation to *Fenland/Fishers*, as published on 4 January 2016.
Fifth Berendsen Notice	Formal notice dated 30 May 2017, sent by the CMA to Berendsen pursuant to section 26 of the Act.
Fifth Fenland Notice	Formal notice dated 30 May 2017, sent by the CMA to Fenland pursuant to section 26 of the Act.
First Berendsen Notice	Formal notice dated 30 March 2016, sent by the CMA to each of Berendsen plc and Berendsen Newbury pursuant to section 26 of the Act.

Term	Definition
First Fenland Notices	Formal notices dated 30 March 2016, sent by the CMA to each of Fenland and JVCo pursuant to section 26 of the Act.
Fishers	Fishers Services Limited, a private limited company with Companies House registration number SC067627.
Fourth Berendsen Notice	Formal notice dated 10 April 2017, sent by the CMA to Berendsen pursuant to section 26 of the Act.
Fourth Fenland Notice	Formal notice dated 10 April 2017, sent by the CMA to Fenland pursuant to section 26 of the Act.
Full Cleanroom Laundry Services	The laundering of Cleanroom Garments and other garments by a Cleanroom Laundry classified to ISO 14644 Class 4 or Class 5 (or equivalent), including Cleanroom Garment and other garment rental.
GB	Great Britain.
Guardline	Guardline Technology Limited, a private limited company with Companies House registration number 01556397.
Guardline Newbury Limited	Guardline Newbury Limited, a private limited company with Companies House registration number 08689974, and dissolved on 8 November 2016.
Guardline Skegness Limited	Guardline Skegness Limited, a private limited company with Companies House registration number 08670776, and dissolved on 28 April 2015.
HSSD	Hospital Sterilisation Services Department (which is synonymous with the following other terms: SSD, i.e. Sterile Services Department; HSSU, i.e. Hospital Sterile Services Unit; HSDU, i.e. Hospital Sterilisation Decontamination Unit (or Hospital Sterilisation Disinfection Unit); and TSSU, i.e. Theatre Sterile Services Unit). HSSDs have 'contaminated' sections and 'clean' (or 'non-contaminated') sections.
IAP	Inspection, assembly and packing room within a HSSD, where clean items are inspected, assembled onto trays and wrapped with tray wraps. The IAP room must be an ISO Class 8 Cleanroom.
Improvement/ Promotion Criterion	The first criterion in section 9(1) of the Act that the 'agreement' contributes to improving production or distribution, or promoting technical or economic progress.
Indispensability Criterion	The third criterion in section 9(1) of the Act that the 'agreement' does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives of the Improvement/Promotion Criterion.
Infringement	As defined in paragraph 1.1 of this Decision.
Initial	Rentokil Initial Services Limited, a private limited company with Companies House registration number 00293397.
Intermediate Cleanroom Laundry Services	The laundering of Cleanroom Garments and other garments by a Cleanroom Laundry classified to ISO 14644 Class 6, Class 7 or Class 8 (or equivalent), including Cleanroom Garment and other garment rental.
[Former JV Partner D]	[Former JV Partner D], a private limited company with Companies House registration number [✂].
Joint Venture	The UK business operated under the Micronclean Brand by the JV Partners, which used JVCo as its corporate vehicle since the incorporation of JVCo.
JVCo	Formerly named Micronclean Limited until 1 July 2016 (and since 1 July 2016, named Fenland Laundries Limited), a private limited company with Companies House registration number 01525661.

Term	Definition
JV Partners	The shareholders in JVCo, from time to time, since the incorporation of JVCo.
Letter of Facts	The Letter of Facts issued on 16 October 2017 to the Addressees.
Microclean/ Guardline	The completed acquisition by JVCo of Guardline on 2 September 2013, as notified to (and investigated by) the OFT/CMA.
Microclean/ Guardline Decision	The document setting out the CMA's decision dated 20 May 2014 in relation to *Microclean/Guardline* (specifically, in this Decision, the version sent to the Parties on 17 June 2014, containing certain information confidential to JVCo).
Microclean Brand	The 'Microclean' brand, as used by the JV Partners when trading in the Relevant Markets, including any rights licensed to the Parties under the TMLAs in respect of their use of the name 'Microclean' in relation to the TMLA Products and Services.
Microclean MOSS Limited	Microclean MOSS Limited, a private limited company with Companies House registration number 01879892.
MPL	Microclean Products Limited, a private limited company with Companies House registration number 02319648.
Newbury Acquisition	The acquisition by Berendsen plc of Berendsen Newbury on 13 September 2014.
Newbury Territory	The territory defined as 'Territory A' at Schedule 2 in the Newbury TMLA, and as 'Territory B' at Schedule 3 in the Fenland TMLA.
Newbury TMLA	The Trade Mark Licence Agreement dated 30 May 2012 entered into between Berendsen Newbury (as licensee), Fenland (as co-licensee) and JVCo (as licensor).
No Elimination of Competition Criterion	The fourth criterion in section 9(1) of the Act that the 'agreement' does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
OFT	The Office of Fair Trading, one of the predecessor bodies to the CMA.
Origin	Origin Cleanroom Services Limited, a private limited company with Companies House registration number SC358584.
Out of Territory	Located in the Fenland Territory, from Berendsen Newbury's perspective, or located in the Newbury Territory, from Fenland's perspective.
Parties	Fenland and Berendsen Newbury, each a 'Party'.
Passive Sales Letters	The letters dated 23 February 2015 and 2 March 2015 exchanged between the Parties, by means of which the Parties recorded their agreement to '*not enforce*' the '*restrictions on passive sales*' in the TMLAs, as defined in paragraph 3.98 of this Decision.
Relevant Markets	The supply of Full Cleanroom Laundry Services (including Cleanroom Garment and other garment rental) in GB; the supply of Intermediate Cleanroom Laundry Services (including Cleanroom Garment and other garment rental) in GB; and the supply of Consumables in GB.
Relevant Period	The period from 30 May 2012 to 2 February 2016.
Restrictions	As defined in paragraph 5.15.
RTPA	The Restrictive Trade Practices Act 1976.
Second Berendsen Notice	Formal notice dated 19 July 2016, sent by the CMA to Berendsen pursuant to section 26 of the Act.
Second Fenland Notice	Formal notice dated 19 July 2016, sent by the CMA to Fenland (including JVCo) pursuant to section 26 of the Act

Term	Definition
Shared Customer	A customer operating at multiple locations across GB, in both the Newbury Territory and the Fenland Territory, as served by each of the Parties under 'sub-contracted' and 'joint' arrangements, and as further described in Part 3.D.III.b. of this Decision.
SO	The Statement of Objections issued on 20 January 2017 to the Addressees.
TFEU	The Treaty on the Functioning of the European Union.
Third Berendsen Notice	Formal notice dated 8 February 2017, sent by the CMA to Berendsen pursuant to section 26 of the Act.
Third Fenland Notice	Formal notice dated 8 February 2017, sent by the CMA to Fenland pursuant to section 26 of the Act.
TMLAs	The Fenland TMLA and the Newbury TMLA collectively.
TMLA Products and Services	The products and services listed in Schedule 1 of each of the TMLAs.
Trade Marks	The trade marks listed in Schedule 4 of each of the TMLAs.
TTBER 2004	Commission Regulation (EU) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ L123/11.
TTBER 2014	Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements [2014] OJ L93/17.
TTBERs	TTBER 2004 and TTBER 2014, together.
UK	The United Kingdom.
VABER	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices [2010] OJ L102/1.

2. PRE-INVESTIGATION BACKGROUND AND THE INVESTIGATION

2.1. On 30 March 2016, the Competition and Markets Authority (the 'CMA') opened a formal investigation under the Competition Act 1998 (the 'Act'). Further details on the investigation are set out at paragraphs 2.4 to 2.21 below.

2.2. Microclean Limited, formerly named Fenland Laundries Limited[2] ('Fenland'), and Berendsen Cleanroom Services Limited, formerly named Microclean (Newbury) Limited[3] ('Berendsen Newbury') (together, the 'Parties'), had some engagement with the CMA pre-investigation. During this investigation, the Parties and Berendsen plc[4] (together with Berendsen Newbury, 'Berendsen') (together, the 'Addressees') referred to certain pre-investigation correspondence between the CMA and one (or both) of the Parties. That correspondence, summarised at **Annex A**, related mainly to:

a. a review by the Office of Fair Trading ('OFT') and CMA[5] of the Parties' completed joint acquisition – via Microclean Limited, now known as Fenland Laundries Limited[6] ('JVCo') – of the entire share capital of Guardline Technology Limited ('Guardline') on 2 September 2013 (*Microclean/Guardline*);[7]

b. the CMA advisory letters[8] sent to the Parties on 16 February 2015 (the 'Advisory Letters');

c. a review by the CMA of a potential acquisition of the cleanroom laundry business of Fishers Services Limited ('Fishers') by Fenland ('*Fenland/Fishers*'), as notified to the CMA in October 2015.[9]

2.3. During its review of *Microclean/Guardline*, the CMA received copies of the Fenland TMLA and the Newbury TMLA from the Parties on 9 May 2014.[10]

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[2] Companies House registration number 00176558: see URN 00186.98 (Fenland change of name certificate of 1 July 2016).
[3] Companies House registration number 01713052: see URN 00036.3 (Berendsen Newbury change of name certificate of 15 September 2015).
[4] Companies House registration number 01480047.
[5] On 1 April 2014, the CMA took over the OFT's functions with respect to competition law enforcement, including the OFT's merger control function provided for by the Enterprise Act 2002.
[6] Companies House registration number 01525661; now named Fenland Laundries Limited, as of 1 July 2016: URN 00186.99 (JVCo change of name certificate dated 1 July 2016).
[7] See URN 00984 (The document setting out the CMA's decision dated 20 May 2014 in relation to Microclean/Guardline (specifically, in this Decision, the version sent to the Parties on 17 June 2014, containing certain information confidential to JVCo) – '*Microclean/Guardline* Decision').
[8] See https://www.gov.uk/guidance/warning-and-advisory-letters-essential-information-for-businesses
[9] Following this review, the CMA issued the document setting out the CMA's decision dated 16 December 2015 in relation to *Fenland/Fishers*, as published on 4 January 2016 (the '*Fenland/Fishers* Decision').
[10] URN 00987 (Reply of Parties/JVCo dated 9 May 2014 (assembled by [Fenland Director A]) to CMA's *Microclean/Guardline* questions of 8 May 2014), p.6/Appendices 4 and 5; see footnote 94 below. Also

Some clauses contained in the Fenland TMLA and the Newbury TMLA (collectively, the 'TMLAs'), as confirmed by the Parties' conduct in the Relevant Markets (described further in Part 4 below), form the subject of the current investigation.[11]

2.4. On 30 March 2016, the CMA opened a formal investigation under the Act, having determined that it had reasonable grounds for suspecting that the Parties (and JVCo) had entered into an agreement which may affect or may have affected trade within the United Kingdom (the 'UK') and has or had as its object or effect the prevention, restriction or distortion of competition within the UK, in breach of the prohibition in section 2 of the Act (the 'Chapter I prohibition'). The investigation relates to the period from 30 May 2012 to 2 February 2016 (the 'Relevant Period').

2.5. The CMA required the Addressees (and JVCo) to produce documents, and to provide information, relevant to the investigation under section 26 of the Act on 30 March 2016. Fenland and Berendsen each responded in tranches.[12]

2.6. The CMA required the production of further documents and the provision of information from the Addressees (including JVCo, as part of Fenland) under section 26 of the Act on 19 July 2016. Fenland (including JVCo) and Berendsen each responded in August 2016.[13] The CMA also asked certain

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on case file as URN 00036.8 (The Trade Mark Licence Agreement dated 30 May 2012 entered into between Fenland (as licensee), Berendsen Newbury (as co-licensee) and JVCo (as licensor) - 'Fenland TMLA'), and URN 00036.9 (The Trade Mark Licence Agreement dated 30 May 2012 entered into between Berendsen Newbury (as licensee), Fenland (as co-licensee) and JVCo (as licensor) – 'Newbury TMLA').

[11] In December 2016, the CMA took an administrative decision not to investigate at that stage – and the CMA therefore makes no findings in this Decision on – whether the Infringement extends to e.g. the supply of syringes/sterile packs and the supply of Cleanroom Cleaning services. In this investigation, the relevant markets are set out at Part 4. below.

[12] The 'First Fenland Notices' were issued to Fenland (URN 00005.1) and JVCo (URN 00005A). Fenland provided responses to the First Fenland Notices, on its behalf and that of JVCo, on 11 April 2016 (URN 00024.3), 20 April 2016 (URN 00037.1), 27 April 2016 (URN 00050.1) and 4 May 2016 (URN 00083.1) – as well as accompanying attachments. The 'First Berendsen Notice' was issued to each of Berendsen plc (URN 00003.1) and to Berendsen Newbury (URN 00004.1, returned as it duplicated URN 00003.1). Berendsen provided responses on 20 April 2016 (URN 00036.1) and 27 April 2016 (URN 00068.1) – as well as accompanying attachments. In response to follow-up queries from the CMA on 29 April 2016, Berendsen provided further clarifications on 6 May 2016 (URN 00101.1). Following a re-review of its records, Berendsen provided a further 58 responsive documents on 14 July 2016 (URN 00151.1).

[13] The 'Second Fenland Notice' was issued to Fenland (including JVCo) (URN 00154.1). Fenland responded on 6 August 2016 (URN 00186.1), providing accompanying attachments. The 'Second Berendsen Notice' was issued to Berendsen (URN 00155.1). Berendsen responded on 9 August 2016 (URN 00193.1), providing accompanying attachments.

follow-up questions on 19 October 2016, to which Fenland (including JVCo) and Berendsen responded on 25 and 27 October 2016 respectively.[14]

2.7. The CMA also required the provision of information under section 26 of the Act from [Berendsen Newbury Director A], [✂], on 20 October 2016. [Berendsen Newbury Director A] responded on 28 October 2016 and 2 November 2016.[15]

2.8. For the purposes of this investigation and Decision, the CMA has also referred to certain documents provided in connection with its reviews of *Microclean/Guardline* and *Fenland/Fishers* and the Advisory Letters.[16] The CMA informed Fenland and Berendsen of this approach on 30 March 2016 and provided details of the specific documents that the CMA proposed to transfer to the investigation case file on 11 November 2016.[17] Fenland and Berendsen were given an opportunity to verify and supplement the relevant documents.[18]

2.9. The CMA held a first State of Play meeting with each of Berendsen and Fenland on 6 and 7 June 2016 respectively.[19] Before,[20] during and after[21] those meetings, Fenland and Berendsen each requested that the CMA reassess its continued prioritisation of the investigation, principally on the basis that the Joint Venture[22] terminated shortly before the investigation was launched.

2.10. To help assess prioritisation, the CMA requested that Fenland and Berendsen provide on a voluntary basis certain further documents and information in

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[14] CMA questions of 19 October 2016 to Fenland (URN 00964), and Berendsen (URN 00962). URN 00967 (Fenland response of 25 October 2016 to CMA questions of 19 October 2016); URN 00968.1 (Berendsen response of 27 October 2016 to CMA questions of 19 October 2016).

[15] URN 00966 (Section 26 Notice dated 20 October 2016 to [Berendsen Newbury Director A]); see [Berendsen Newbury Director A] responses of 28 October 2016 (URN 00969) and 2 November 2016 (URN 00970).

[16] The CMA may use any information that it obtains during a case for the purposes of facilitating the exercise of any of its statutory functions: *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6, January 2014), paragraph 4.17.

[17] CMA emails/letters of 11 November 2016 to Fenland (URN 00971) and Berendsen (URN 00972).

[18] Each Party responded to the effect that certain aspects of some of the relevant documents would require an update if being re-provided as at that point in time. See Fenland responses of 18 November 2016 (URN 01013 and URN 01014); to that email chain were attached revised copies of URNs 00982–00992. See also Berendsen response of 22 November 2016 (URN 01018). For the purposes of this investigation, however, the CMA did not re-request any such information from the Addressees, as the information was correct during the Relevant Period (to which this investigation related).

[19] URN 00140.1 (Note of Berendsen State of Play meeting on 6 June 2016); URN 00141.1 (Note of Fenland State of Play meeting on 7 June 2016).

[20] See e.g. URN 00008.1 (Letter from Fenland dated 31 March 2016 regarding prioritisation) and URNs 00067.1–00067.2 (Berendsen prioritisation submission of 27 April 2016).

[21] See e.g. footnote 25 below. See also, e.g. Section 8 of the written representations – and p.37, line 20, to p.40, line 5 of the transcript – referred to at footnote 31 below.

[22] The UK business operated under the Micronclean Brand (see footnote 90 below) by the JV Partners, which used JVCo as its corporate vehicle since the incorporation of JVCo (the 'Joint Venture').

relation to the termination of the Joint Venture. Fenland and Berendsen each responded on 20 and 27 April 2016.[23] The CMA also invited Fenland and Berendsen to provide any further submissions on possible competition law justifications for the Infringement on a voluntary basis.[24] On 8 September 2016,[25] Fenland and Berendsen each provided initial submissions on this issue and again requested the CMA to reconsider its continued prioritisation of the investigation. Having considered the submissions provided, the CMA decided that the investigation remained a priority and decided to continue the investigation.

2.11. The CMA held a second State of Play meeting with each of Fenland and Berendsen on 1 December 2016.[26]

2.12. On 20 January 2017, the CMA issued a Statement of Objections ('SO') to the Addressees. This set out a proposed finding that Fenland and Berendsen Newbury had participated in an agreement which infringed the Chapter I prohibition. After the SO was issued, a Case Decision Group was appointed within the CMA to decide whether or not, based on the facts and evidence before it, and taking account of the Addressees' representations, the legal test for establishing an infringement had been met, and whether the investigation remained an administrative priority.[27]

2.13. The CMA required the production of further information and/or documents from the Addressees under section 26 of the Act, in particular in relation to financial information, on 8 February 2017[28] and on 10 April 2017.[29]

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[23] URN 00018 (CMA questions dated 5 April 2016 to Fenland); URN 00023 (CMA questions dated 11 April 2016 to Berendsen). URN 00068.1 (Berendsen response dated 27 April 2016 to Questions 8–14 and 20 of the First Berendsen Notice); URN 00037.1 (Fenland response of 20 April 2016 to Questions 4, 7, 10–15 and 19 of the First Fenland Notices).

[24] See, e.g., URN 00140.1 (full reference at footnote 19 above), paragraph 34; URN 00141.1 (full reference at footnote 19 above), paragraph 32.

[25] On that date, Fenland provided URN 00205.2 (Fenland voluntary submission of 8 September 2016) and over 700 accompanying documents; Berendsen provided URN 00201.1 (Berendsen voluntary submission of 8 September 2016) and 4 accompanying documents.

[26] URN 01128 (Note of Fenland Second State of Play meeting on 1 December 2016); URN 01129 (Note of Berendsen Second State of Play meeting on 1 December 2016).

[27] The role of the Case Decision Group is described in the *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8, March 2014), paragraphs 9.11 and 11.30–11.34.

[28] URN 01103 ('Third Fenland Notice'); Fenland responded on 8 March 2017 (URN 01121). URN 01104 ('Third Berendsen Notice'); Berendsen responded on 10 March 2017 (URN 01125) and 14 March 2017 (URN 01127).

[29] URN 01154 ('Fourth Fenland Notice'); Fenland responded on 28 April 2017 (URN 01173). URN 01155 ('Fourth Berendsen Notice'); Berendsen responded on 28 April 2017 (URN 01175) and 8 May 2017 (URN 01179). See also URN 01180 (Berendsen submission of 8 May 2017 regarding Guardian).

2.14. Fenland submitted written and oral representations on the matters referred to in the SO on 24 March 2017 and 27 April 2017 respectively.[30] Berendsen submitted written and oral representations on the matters referred to in the SO on 24 March 2017 and 2 May 2017 respectively.[31]

2.15. In order to clarify and/or substantiate certain oral representations made on the SO, the CMA requested further information and/or documents from the Addressees in May 2017.[32] In response to certain written representations made on the SO, the CMA also required under section 26 of the Act on 30 May 2017 the Addressees to produce further information and/or documents.[33]

2.16. The CMA held a third State of Play update with each of Berendsen and Fenland on 23 June 2017 and 26 June 2017 respectively.[34] Berendsen subsequently made certain observations in relation to Hospital Sterilisation Services Departments ('HSSDs') on 26 June 2017 and 17 July 2017.[35]

2.17. On 27 June 2017, the CMA issued the 'Draft Penalty Statements' to Fenland and Berendsen.[36] The Draft Penalty Statements set out the CMA's provisional decisions regarding the directions and financial penalties that it proposed to impose on the Addressees if the CMA were to reach an infringement decision. The CMA provided non-confidential versions of the Fenland DPS and Berendsen DPS to Berendsen and Fenland respectively on 28 June 2017.[37]

2.18. Fenland submitted written representations on the matters referred to in the Fenland DPS on 10 July 2017.[38] Berendsen submitted written and oral representations on the matters referred to in the Berendsen DPS on 10 July

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[30] URN 01220 (Transcript of Fenland SO oral hearing on 27 April 2017); URN 01139 (Fenland written representations dated 24 March 2017 on the SO – 'Fenland SO WRs'); URN 01170 (Fenland SO oral hearing slide presentation).
[31] URN 01142 (Berendsen written representations dated 24 March 2017 on the SO – 'Berendsen SO WRs'); URN 01216A (Transcript of Berendsen SO oral hearing on 2 May 2017); URN 01188 (Slide presentation for Berendsen SO oral hearing on 2 May 2017).
[32] URN 01191 (CMA post-SO oral hearing questions of 3 May 2017 for Fenland); Fenland responded on 23 May 2017 (URN 01182), providing accompanying attachments. URN 01195 (CMA post-SO oral hearing questions of 10 May 2017 for Berendsen); Berendsen responded on 26 May 2017 (URN 01213).
[33] URN 01231 ('Fifth Fenland Notice'). Fenland responded on 15 June 2017 (URN 01237), 16 June 2017 (URN 01256) and 23 June 2017 (URN 01281), providing accompanying attachments to its responses of 16 June 2017 and 23 June 2017. URN 01233 ('Fifth Berendsen Notice'); Berendsen responded on 9 June 2017 (URN 01222), providing accompanying attachments, 14 June 2017 (URN 01239) and 16 June 2017 (URN 01253).
[34] URN 01332 (Note of Berendsen Third State of Play update on 23 June 2017). URN 01325 (Note of Fenland Third State of Play update on 26 June 2017).
[35] Berendsen letters regarding HSSDs of 26 June 2017 (URN 01320) and 17 July 2017 (URN 01328).
[36] URN 01238 (Draft Penalty Statement issued to Berendsen on 27 June 2017 – 'Berendsen DPS'); URN 01240 (Draft Penalty Statement issued to Fenland on 27 June 2017 – 'Fenland DPS').
[37] Non-confidential version of the Fenland DPS (URN 01242) and the Berendsen DPS (URN 01241).
[38] URN 01340 (Fenland written representations dated 10 July 2017 on the Fenland DPS, non-confidential version – 'Fenland DPS WRs').

2017 and 7 September 2017 respectively.[39] In order to clarify and substantiate certain written representations made on the Draft Penalty Statements, the CMA requested further information and/or documents from the Addressees on 4 August 2017.[40]

2.19. In July 2017, Fenland made several voluntary submissions, in order to help clarify certain earlier submissions on the types of customers served by its plant in Louth.[41] On 20 September 2017, Berendsen made a voluntary submission following issues raised by the CMA at the DPS oral hearing.[42]

2.20. On 16 October 2017, the CMA issued to the Addressees a Letter of Facts setting out additional evidence on which the CMA considered it may rely to establish the Infringement (and/or support positions in the Draft Penalty Statements). Berendsen responded on 27 October 2017, and Fenland responded on 6 and 8 November 2017.[43]

2.21. During this investigation, the CMA has had regard to the pre-investigation correspondence and context referred to at paragraph 2.2 above. In particular, the CMA has had regard to the submissions by one or both of the Parties, and/or to the CMA conclusions, in the merger reviews of *Microclean/Guardline* and *Fenland/Fishers* to the extent appropriate given differences in the specific submissions, context and applicable legal frameworks.

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[39] URN 01333 (Berendsen written representations dated 10 July 2017 on the Berendsen DPS, non-confidential version – 'Berendsen DPS WRs'); URN 01380 (Transcript of Berendsen DPS oral hearing on 7 September 2017); URN 01392 (Berendsen DPS oral hearing slide presentation).

[40] The subsequent correspondence included URN 01363 (Fenland response dated 18 August 2017) and accompanying attachments, URN 01369 (Berendsen response dated 1 September 2017 to CMA Questions of 4 August 2017) and accompanying attachments, and URN 01373 (Berendsen response dated 8 September 2017).

[41] URN 01343 (Fenland response dated 25 July 2017 to CMA questions dated 20 July 2017; later subsumed within URN 01354) and accompanying attachments; URN 01354 (Fenland submission of 26 July 2017) and accompanying attachments; URN 01359 (Fenland submission of 31 July 2017) and accompanying attachments.

[42] URN 01377 (Berendsen submission dated 20 September 2017).

[43] URN 01431 (Letter of Facts dated 16 October 2017 – 'Letter of Facts'). URN 01438 (Berendsen response dated 27 October 2017 to Letter of Facts); URN 01441 (Fenland response dated 6 November 2017 to Letter of Facts); URN 01452 (Fenland response dated 8 November 2017 to Letter of Facts).

3. FACTUAL BACKGROUND

A. Parties

I. Fenland

3.1 Fenland is registered as a private limited company[44] with a turnover of £26.6 million in its last financial year,[45] having grown in each financial year since at least 2011.[46] Fenland describes its services and products as *'…ranging from laundered garments and mopping services for both industrial clients and pharmaceutical companies throughout the UK to cleanroom consumables which are sold internationally*'.[47] Its directors during the Relevant Period were as listed in **Annex B**, Table B1.

3.2 Fenland's issued share capital is held in three equal parts by (a) [Fenland shareholder 1]; (b) [Fenland Director A]; and (c) [Fenland shareholder 2].[48]

3.3 Fenland has several wholly owned subsidiaries, including JVCo and Micronclean Products Limited ('MPL'), which are of particular relevance to the investigation. Fenland and Berendsen Newbury each owned 50% of JVCo (directly) and 50% of MPL (indirectly) during the Relevant Period – until Fenland acquired Berendsen Newbury's interests in MPL in 2015 and JVCo in 2016 (see Part 3.A.IV. below).

3.4 From 1 October 2013 until 28 April 2015, Fenland owned 100% of Guardline Skegness Limited.[49] That subsidiary was incorporated in order to facilitate the

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[44] Registered at Companies House under company number 00176558.

[45] See URN 01381 (Fenland strategic report (including consolidated financial statements) FYE 31 December 2016, available e.g. at https://beta.companieshouse.gov.uk/company/00176558), p.6 (as printed).

[46] From £16.2 million in FYE 30 December 2011, for example: see URN 01382 (Fenland financial statements FYE 30 December 2012), p.5 (as printed), under '*2011*'; URN 01463 (Fenland abbreviated accounts FYE 31 December 2013), p.6 (as printed) under '*2012*'; URN 01383 (Fenland strategic report (including consolidated financial statements) FYE 30 December 2014), p.6 (as printed), under '*2013*'; URN 00977 (Fenland strategic report (including consolidated financial statements) FYE 31 December 2015), p.6 (as printed), under '*2014*'; URN 01381 (Fenland strategic report (including consolidated financial statements) FYE 31 December 2016, p.6 (as printed), under *'2015'* and *'2016'*. All documents available e.g. at https://beta.companieshouse.gov.uk/company/00176558

[47] http://www.micronclean.co.uk/Micronclean-About.aspx (as visited on 13 December 2017).

[48] Each part comprises 400 ordinary shares: URN 00978 (Fenland annual return dated 23 December 2015), p.6; URN 01384 (Fenland confirmation statement dated 23 December 2016), pp.2–3. Both documents available e.g. at https://beta.companieshouse.gov.uk/company/00176558.

[49] Records at Companies House show that Guardline Skegness Limited was dissolved on 28 April 2015 – See, e.g., https://beta.companieshouse.gov.uk/company/08670776. See also URN 00024.1 (Fenland structure charts), pp.8–9.

transfer of part of Guardline's '*UK business*' to Fenland after *Microclean/Guardline*.[50]

II. Berendsen Newbury

3.5 Berendsen Newbury is a private limited company[51] with a turnover of £8.3 million in its last financial year,[52] having grown in each financial year since at least 2011.[53] Berendsen Newbury '*provides specialist cleaning clothing management services and related consumable products'*.[54] Its directors during the Relevant Period were as listed in Table B2 at **Annex B**.

3.6 Between 30 May 2012 and 13 September 2014, Berendsen Newbury was owned by various people, including [Berendsen Newbury Directors A, B, E and F].[55] Berendsen Newbury has been wholly owned by Berendsen UK Limited since 13 September 2014.[56] Berendsen UK Limited is, in turn, owned by Berendsen plc and Berendsen Nominees Limited.[57]

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[50] From its incorporation on 25 September 2013 until 1 October 2013, Guardline Skegness Limited – like Guardline Newbury Limited – was wholly owned by JVCo, and thus indirectly owned 50/50 by Fenland and Berendsen Newbury; on 1 October 2013, Berendsen Newbury acquired Guardline Newbury Limited, and Fenland acquired Guardline Skegness Limited, from JVCo: URN 00024.3 (Fenland response of 11 April 2016 to Question 1 of the First Fenland Notices), pp.3–4; URN 00024.1 (full reference at footnote 49 above), pp.5–6.

[51] Registered at Companies House under company number 01713052.

[52] See URN 01390 (Berendsen Newbury financial statements FYE 31 December 2016, available e.g. at https://beta.companieshouse.gov.uk/company/01713052), p.8 (as printed).

[53] From £5.4 million in FYE 30 June 2011, for example: see URN 01385 (Berendsen Newbury financial statements FYE 30 June 2012), p.5 (as printed), under '*2011*'; URN 01464 (Berendsen Newbury financial statements FYE 30 June 2013), p.6 (as printed), under *'2012'*; URN 00973A (Berendsen Newbury financial statements FYE 30 June 2014), p.5 (as printed), under '*2013*'; URN 00973 (Berendsen Newbury financial statements FYE 31 December 2015), p.5 (as printed), under '*Year ended 30/6/14*'. URN 01390 (Berendsen Newbury financial statements FYE 31 December 2016), p.8 (as printed), under *'18 month period ending 31 December 2015'* and *'Year ended 31 December 2016'*. The financial year of Berendsen Newbury ended 31 December 2015 lasted 18 months; for the purposes of comparing year-to-year growth, the CMA has considered turnover for this year after pro-rating it by two-thirds: see, similarly, paragraph 6.44 below. All documents available e.g. at https://beta.companieshouse.gov.uk/company/01713052

[54] See URN 00973 (full reference at footnote 53 above), p.2 (as printed).

[55] URN 00974 (Berendsen Newbury annual return of 23 October 2013, available e.g. at https://beta.companieshouse.gov.uk/company/01713052), pp.8–9.

[56] URN 00973A (Berendsen Newbury financial statements FYE 30 June 2014), p.2 (as printed): '*on 13 September 2014 the whole of the outstanding share capital of the company was acquired by Berendsen UK Limited*' and '*Berendsen UK Limited* […] *is a wholly owned subsidiary of Berendsen plc*'.

[57] Berendsen plc (company number 01480047) holds 36,206,049 ordinary shares, and Berendsen Nominees Limited (company number 00235790) holds 1 ordinary share, in Berendsen UK Limited: URN 00976 (Berendsen UK Limited annual return dated 22 June 2016), p.9; URN 01386 (Berendsen confirmation statement dated 16 June 2017) pp.2–3 (both documents available e.g. at https://beta.companieshouse.gov.uk/company/00228604/). Berendsen Nominees Limited is wholly-owned by Berendsen plc: URN 01388 (Berendsen Nominees Limited annual return dated 2 June 2016), p.5, and URN 01387 (Berendsen Nominees Limited confirmation statement dated 16 June 2017), pp.2–3 (both documents available at https://beta.companieshouse.gov.uk/company/00235790).

3.7 As noted at paragraph 3.3 above (and detailed further at Part 3.A.IV. below), Berendsen Newbury and Fenland each owned 50% of JVCo (directly) and 50% of MPL (indirectly) during the Relevant Period – until Fenland acquired Berendsen Newbury's interests in MPL in 2015 and in JVCo in 2016.

3.8 From 1 October 2013 until the end of the Relevant Period, Berendsen Newbury had one wholly owned subsidiary, Guardline Newbury Limited.[58] That subsidiary was incorporated in order to facilitate the transfer of part of Guardline's '*UK business*' to Berendsen Newbury after *Microclean/Guardline.*[59]

III. Berendsen plc

3.9 Berendsen plc is a public limited company, and had a turnover of £1.110 billion in its last financial year.[60] Berendsen plc's group comprises various textile, hygiene and safety solutions businesses and provides '*a complete textile rental and laundry service to all types of activities*'. In addition to supplying Cleanroom Laundry Services (as further described in Part 3.B. below), the group's four business lines also supply, for example, clothing, chefware, cloths, bed and bath linen.[61]

3.10 Between 13 September 2014 and 2 February 2016 (i.e. the part of the Relevant Period after Berendsen plc acquired Berendsen Newbury) the directors of Berendsen plc were as listed in Table B3 at **Annex B**.

3.11 Berendsen plc was listed on the London Stock Exchange until its acquisition by ELIS S.A. in September 2017.[62] Berendsen plc holds all of the shares in the capital of Berendsen Nominees Limited and all of the shares, bar one, in the capital of Berendsen UK Limited.[63]

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[58] Guardline Newbury Limited was dissolved on 8 November 2016 – See, e.g., URN 01390 (full reference at footnote 52 above), p.23 (as printed).
[59] See footnote 50 above.
[60] Registered at Companies House under company number 01480047. See URN 01462 (Berendsen plc annual report for the financial year ended 31 December 2016, available e.g. at https://beta.companieshouse.gov.uk/company/01480047), p.122 (as printed).
[61] https://www.berendsen.co.uk/about/about/ (as visited on 13 December 2017).
[62] Berendsen RNS notice 6127Q dated 13 September 2017, available at e.g. http://irpages2.equitystory.com/websites/rns_news/English/1100/news-tool---rns---eqs-group.html?article=26430007&company=berendsen
[63] See footnote 57 above.

IV. JVCo

3.12 JVCo is registered as a private limited company and had a turnover of £[✂] in its financial year ended 31 December 2015.[64] Since at least the start of 2012, JVCo '*has primarily been a cost centre business, incurring the central costs of JVCo, such as trademark protection costs, marketing costs etc.*'[65] Its directors during the Relevant Period were as listed in Table B4 at **Annex B**.

3.13 During the Relevant Period, Fenland and Berendsen Newbury each owned 50% of the shares in JVCo. Fenland purchased Berendsen Newbury's 50% shareholding in JVCo on 3 February 2016 and now wholly owns JVCo.[66]

3.14 During the Relevant Period until 26 May 2015, JVCo owned 100% of the shares in MPL – with Fenland and Berendsen Newbury thus each owning 50% of MPL indirectly. On 26 May 2015, Fenland directly acquired the 50% interest in MPL then held, indirectly, by Berendsen Newbury.[67] After *Micronclean/Guardline*, Guardline's export business was transferred to MPL, and MPL – previously dormant – '*started to trade*'.[68] MPL became a wholly (and directly) owned subsidiary of Fenland on 26 May 2015. In January 2016, MPL's turnover-generating business was transferred to Fenland, and MPL ceased trading – '*other than to collect debtors and pay creditors*'.[69]

3.15 During the Relevant Period, JVCo had two wholly owned subsidiaries: Micronclean MOSS Limited and Guardline.[70] JVCo purchased, under the terms of *Micronclean/Guardline,* 100% of the shares in Guardline on 2 September 2013. The Parties later transferred and allocated all of Guardline's business between themselves. Guardline has since ceased trading.[71]

B. Cleanroom Laundry sector services and products

3.16 Part 3.B. provides an overview of the services and products relevant to this investigation, and the Parties' activities in the Cleanroom Laundry sector.

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[64] Registered at Companies House under number 01525661. See entry under '2015' in URN 00055.4 (Fenland submission entitled '*Micronclean Ltd Annual Turnover*').
[65] URN 00050.1 (Fenland response of 27 April 2016 to Questions 5, 8, 9 and 18 of the First Fenland Notices), p.4.
[66] See, e.g., URN 00024.1 (full reference at footnote 49 above), pp.1–13; URN 00036.2 (Berendsen structure as at 5 April 2016), pp.5–6.
[67] URN 00024.1 (full reference at footnote 49 above), pp.1–10.
[68] URN 00024.3 (full reference at footnote 50 above), p.3.
[69] URN 00024.3 (full reference at footnote 50 above), p.4.
[70] URN 00024.1 (full reference at footnote 49 above), pp.1–13.
[71] URN 00024.3 (full reference at footnote 50 above), pp.2–3. Guardline is still a wholly owned subsidiary of JVCo, however, see URN 00024.1 (full reference at footnote 49 above), pp.4–7.

I. Cleanroom Laundry sector services and/or products: overview

Cleanrooms and associated laundry services

3.17 Certain types of manufacturing must be undertaken in a controlled environment known as a 'Cleanroom'. This is to prevent contamination of the item being manufactured with particulates such as skin or dirt. To minimise the risk of contamination, employees working in a Cleanroom must wear garments that enclose them, to prevent skin, hair particles and fibres from normal clothing being released into the Cleanroom ('Cleanroom Garments'). These Cleanroom Garments need to be exchanged for fresh ones regularly (e.g. every time the employee enters the Cleanroom, or daily). Used Cleanroom Garments must be decontaminated by means of a laundering process conducted in an environment at least as 'clean' as the relevant Cleanroom.[72]

3.18 Laundries that launder Cleanroom Garments are known as Cleanroom Laundries, and classified according to their standard of cleanliness (based on the ISO 14644 classifications) ranging from Class 1 (indicating the lowest number of particulates, and highest degree of cleanliness) to Class 9.[73]

3.19 Certain other manufacturing processes, or operations, may be undertaken in non-Cleanroom environments. The relevant employees may need to wear specific garments suitable for the activity being undertaken (e.g. low-linting garments). These garments are not Cleanroom Garments, but may still need to be exchanged regularly for fresh ones – and may nonetheless be laundered by Cleanroom Laundries.[74]

3.20 Cleanroom Laundry operators provide 'Cleanroom Laundry Services', whereby they collect customers' used Cleanroom Garments (and other garments, as appropriate) and return them duly laundered. They are laundered using a system whereby they are loaded into a machine through one door (located in an uncontrolled area), washed and decontaminated and then unloaded through a different door (located in a controlled environment). They are then dried in an environment which prevents the entry of contaminated air (e.g. using pressurised tumble driers or tunnel finishers). Next, they are unloaded

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[72] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 17. URN 00998 (Final *Fenland/Fishers* merger notice submitted on 19 October 2015 to the CMA by Fenland and Fishers), paragraphs 14.7–14.8.

[73] The ISO 14644 classifications state the maximum number of particles per cubic metre of space within the controlled environment. Other classification systems exist, e.g. US Fed Std 209E; in this Decision, the CMA only refers to the ISO 14644 system. See e.g. URN 00984 (*Micronclean/Guardline* Decision), footnote 9 and, further, URN 00186.1 (full reference at footnote 133 below), pp.50–51 (response to Question 19).

[74] For more on customers that do not require, but nevertheless purchase, Intermediate Cleanroom Laundry Services see e.g. paragraphs 4.15 and 4.16 below.

back into the controlled environment, may be hermetically sealed in a bag, and are collated and returned back to the customer.[75]

Classifications of Cleanroom Laundry Services

3.21 There are certain classifications of Cleanroom Laundry Services. Services provided to customers from Cleanroom Laundries classified to ISO Class 4 or Class 5 are referred to as 'Full Cleanroom Laundry Services'. Services provided to customers using Cleanroom Laundries classified to ISO Classes 6, 7 and/or 8 are referred to as 'Intermediate Cleanroom Laundry Services'.[76] Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services together are referred to as Cleanroom Laundry Services.

3.22 The classification of Cleanroom Laundry Services a customer will purchase depends on the customer's specific needs and/or preferences, which will be informed by any requirements of the relevant Cleanroom. There is a wide spectrum of customer needs and/or preferences; set out below is a non-exhaustive list of some examples.

a. Pharmaceutical manufacturers, NHS pharmacies, and semi-conductor and micro-electronics producers often purchase Full Cleanroom Laundry Services.[77]

b. Pharmaceutical manufacturers, NHS pharmacies, and medical device manufacturers – amongst other types of customer – may use Intermediate Cleanroom Laundry Services in respect of relatively less stringent laundry processing requirements.[78]

c. Sometimes a given customer will have a range of different requirements, whether across different sites, or different parts of the same site. For example, a customer may operate different parts of its production process to different specifications. Alternatively, a customer's employees may operate in a 'full' Cleanroom environment wearing undergarments which are laundered to a lower classification than their outer garments.

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[75] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraphs 18–19; URN 00998 (full reference at footnote 72 above), paragraphs 14.8–14.10. Fenland submitted that 'intermediate' Cleanroom Laundries (and Barrier Laundries) normally use tunnel finishers rather than tumble driers, and that garments processed by 'intermediate' Cleanroom Laundries (and Barrier Laundries) are not always packed in hermetically sealed bags: URN 01139 (Fenland SO WRs), footnote 25.

[76] These terms follow, e.g. *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 1.

[77] For example, pharmaceutical manufacturers account for approximately 45–50% of Full Cleanroom Laundry Services usage in GB. NHS hospital pharmacy contracts account for a further 35–40%. URN 00998 (full reference at footnote 72 above), paragraphs 14.11–14.12. See footnote 94 below.

[78] URN 00998 (full reference at footnote 72 above), paragraphs 14.26–14.26.8.

Such customers may purchase a mix of Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services.[79]

3.23 Given the range of factors affecting purchasing decisions (see paragraphs 3.24 and 3.25 below), it is not surprising that, as noted in paragraph 3.19 above, some purchases of Cleanroom Laundry Services are driven not by an industry- or customer-specific requirement for laundry services of that classification, but by customer preferences for/customer perceptions of the benefits that these services may provide. For example, the preceding paragraph set out illustrative examples of the possible needs of customers in specific sectors, but within a specific sector sometimes very similar laundry requirements may be processed by Cleanroom Laundries or Barrier Laundries.[80] A Barrier Laundry is a laundry which uses similar processes to a Cleanroom Laundry but does not conform to the relevant ISO standards required to be classified as a Cleanroom Laundry (usually due to not having the necessary air filtration system in place).

Factors affecting Cleanroom Laundry Services purchasing decisions

3.24 Different customers purchase Cleanroom Laundry Services depending on their specific needs, and factors such as quality, price and range.[81]

3.25 Quality is an important criterion. Most customers of Full Cleanroom Laundry Services run competitive tender processes for these services. These customers often subject Cleanroom Laundries to due diligence and quality audits.[82] However, when a Full Cleanroom Laundry Services contract ends, the customer may not initiate a full re-tender, but instead opt to use a rolling contract.[83] Customers of Intermediate Cleanroom Laundry Services also tend to run competitive tender processes, although they are usually focused more

[79] URN 00984 (*Micronclean/Guardline* Decision), paragraph 43.
[80] Fenland submitted, e.g., that two automotive manufacturers used Fenland's ISO Class 6-classified Cleanroom Laundry at Louth, while two other automotive manufacturers used non-classified Barrier Laundries for similar laundry requirements: URN 01340 (Fenland DPS WRs), paragraph 2.13.1(d)(ii).
[81] URN 00998 (full reference at footnote 72 above), paragraphs 14.14–14.17 and 14.27.
[82] Pharmaceutical manufacturers are typically sophisticated buyers who run tender processes and often need to validate the supply of Cleanroom Garments through extensive auditing. NHS hospital pharmacy contracts are typically subject to public procurement rules requiring a competitive tender process to be run. URN 00998 (full reference at footnote 72 above), paragraphs 14.11–14.13. For details of the proportions of Full Cleanroom Laundry Services usage in GB which such customers account for, see footnote 77 above. For an example of the use of audits, see URN 00982 (Reply of Parties/JVCo dated 26 March 2014 to Questions 1–17, 27, 28, 40, 42 (and Additional Response 43) of an OFT *Micronclean/Guardline* request for information dated 27 December 2013), p.58.
[83] As such, competition may not begin afresh immediately at the end of each contract. URN 00985 (Reply of Parties/JVCo dated 26 March 2014 to Question 26 of an OFT Micronclean/Guardline request for information dated 27 December 2013), p.2, paragraphs 26.2 and 26.3.

heavily on price. This is in part due to them having lower quality requirements as compared to customers of Full Cleanroom Laundry Services.[84]

Consumables

3.26 Operators of Cleanrooms may purchase and use various consumable products – including, for example, disposable garments, gloves, wipes, trigger sprays and mats ('Consumables').[85] In general, there is a wide range of Consumables available to service different requirements, although individual products may be targeted at specific Cleanroom classifications.[86] Consumables suppliers include certain operators of Cleanroom Laundries and Consumables specialists.

Other related services and products

3.27 Alongside Cleanroom Laundry Services, operators of Cleanroom Laundries may also provide a range of related services and products – such as Cleanroom Garment or other garment rental services or sales, or laundry services with no Cleanroom classification (including Barrier Laundries).[87]

3.28 Although historically there were more Cleanroom Laundry Services suppliers operating in Great Britain ('GB'), by the end of the Relevant Period there were only Fenland, Berendsen Newbury and Fishers.[88] Additional details of the Parties' supply of services and/or products are set out at Part 3.B.II. below. Additional details on suppliers of Cleanroom Laundry Services and Consumables in GB are set out at **Annex C**.

II. The Parties' supply of services/products

3.29 Each Party supplied Cleanroom Laundry Services and Consumables in GB during the Relevant Period.[89] The terms of the Joint Venture and, specifically, the TMLAs covered Cleanroom Laundry Services and Consumables (see Part 3.C., Part 3.D. and paragraph 3.80 below). Each Party used the Micronclean

[84] URN 00998 (full reference at footnote 72 above), paragraph 14.27.
[85] URN 00984 (*Micronclean/Guardline* Decision), paragraph 59.
[86] URN 00982 (full reference at footnote 82 above), p.57. Fenland submitted that its Consumables range is primarily focussed at users of Full Cleanroom Laundry Services; URN 00186.1 (full reference at footnote 133 below), p.54 (response to Question 19).
[87] URN 00998 (full reference at footnote 72 above), p.35 and paragraph 15.15.
[88] URN 00999 (Fenland submission of 18 November 2015 in *Fenland/Fishers*), figures/graphics at p.6.
[89] Unless otherwise stated, this Part 3.B.II. refers to supply during the Relevant Period.

Brand[90] in connection with its supply of Cleanroom Laundry Services and Consumables.

Fenland

3.30 Fenland provided Full Cleanroom Laundry Services from a Cleanroom Laundry in Skegness (Lincolnshire) and Intermediate Cleanroom Laundry Services from a Cleanroom Laundry in Louth (Lincolnshire).[91] In order to supply Cleanroom Laundry Services and Consumables, Fenland used its distribution hubs located in Letchworth (Hertfordshire), Manchester/Warrington, Newcastle-upon-Tyne/Sunderland and Perth (Central Scotland) and its laundry/hub in Grantham.[92] Fenland's Cleanroom Laundry Services and Consumables customers were primarily located in the north of GB: see **Annex E**, Figure E4, and the locations noted in blue on each of Figure E3 and Figure E6.

3.31 Fenland submitted[93] that there was more than a 90% overlap between customers it supplied with Consumables and those it supplied with Full Cleanroom Laundry Services.[94]

3.32 Fenland generated a '*small amount*' of business from supplying other services and products, namely 'flatwork' laundry to hotels and restaurants, and domestic laundry services. This supply took place outside of the context of the Joint Venture, and under the 'Fenland' brand (and not under the Micronclean Brand). Fenland supplied non-classified laundry services (i.e. non-Cleanroom Laundry Services) from its Grantham plant as well as from a small Personal Protective Equipment (PPE) laundry facility at its Skegness plant.[95]

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[90] The 'Micronclean' brand, as used by the JV Partners when trading in the Relevant Markets, including any rights licensed to the Parties under the TMLAs in respect of their use of the name 'Micronclean' in relation to the TMLA Products and Services (the 'Micronclean Brand').

[91] Fenland also operated a Barrier Laundry in Grantham (Lincolnshire); see *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 12.

[92] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 12. URN 00984 (*Micronclean/Guardline* Decision), paragraph 60; URN 01281 (Fenland response dated 23 June 2017 to Questions 4–6 of the Fifth Fenland Notice), p.1 (Table 4.1, column entitled 'Route Depot'). Of all the hubs mentioned in paragraph 3.30 above, Letchworth was established most recently, in 2010: URN 00050.1 (full reference at footnote 65 above), p.6.

[93] URN 00982 (full reference at footnote 82 above), p.38; see footnote 94 above.

[94] Fenland noted that this information would need to be updated if provided now: URN 01013 (Fenland submission of 18 November 2016 in relation to the updating of information). However, for the purposes of this investigation the CMA did not re-request from Fenland the information, as the information was correct during the Relevant Period.

[95] URN 00998 (full reference at footnote 72 above), p.11 (and Fenland-related parts of graphic at p.9); URN 00037.1 (full reference at footnote 23 above), p.3.

Berendsen Newbury

3.33 Berendsen Newbury provided Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services from a Cleanroom Laundry in Newbury (Berkshire). Berendsen Newbury's distribution network was based on making deliveries directly from its Newbury site, rather than using a network of hubs.[96] Berendsen Newbury serviced Cleanroom Laundry Services and Consumables customers located primarily in the south of GB: see **Annex E**, Figure E5 and the locations noted in green on Figure E3.

3.34 Berendsen Newbury supplied virtually all its Consumables customers with Cleanroom Laundry Services too. Only a small subset of customers solely purchased Consumables from Berendsen Newbury.[97]

3.35 Berendsen Newbury generates a small amount (less than [0-10]%)[98] of its total revenues from non-Cleanroom Laundry Services, in particular, from the cleaning of goggles and non-classified laundry services.

3.36 As noted in paragraph 3.6 above, Berendsen Newbury was an independent, privately-owned business at the start of the Relevant Period, and was acquired by Berendsen plc in September 2014. As at late 2015, Berendsen plc's wider group was the '*largest supplier of laundry sector services in the UK*', providing a UK-wide service, primarily through its 'Sunlight' branded Barrier Laundries.[99]

The Parties' market shares

3.37 As described further in Part 4 below, the 'Relevant Markets' are the supply of:

a. Full Cleanroom Laundry Services in GB, which includes Cleanroom Garment/other garment rental;

b. Intermediate Cleanroom Laundry Services in GB; and

c. Consumables in (at least) GB.

3.38 The Parties were leading players in the Relevant Markets throughout the Relevant Period. For example, as detailed further at **Annex C**:

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[96] See, e.g.: URN 00998 (full reference at footnote 72 above), p.34; URN 01253 (Berendsen response dated 16 June 2017 to Questions 3–9 of the Berendsen Fifth Notice), paragraph 6.1.
[97] URN 00036.1 (Berendsen response dated 20 April 2016 to Questions 1–7 and 15–19 of the First Berendsen Notice), paragraphs 16.3(b) and 16.3(d).
[98] For example, in relation to 2015 see URN 01333 (Berendsen DPS WRs), paragraph 4.10.
[99] URN 00998 (full reference at footnote 72 above), p.45 and paragraph 14.32; *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 72.

a. by 2015, Fenland held a [50-60]% share, Berendsen Newbury held a [20-30]% share, and the Parties together held a combined share of [80-90]% in the market for Full Cleanroom Laundry Services in GB;

b. by 2015, Fenland held a [65-75]% share, Berendsen Newbury held a [20-30]%, and the Parties together held a combined share of [90-100]% in the market for Intermediate Cleanroom Laundry Services in GB; and

c. by 2014, the Parties held a combined share of approximately [10-20]% in the market for Consumables in GB.[100]

C. The Joint Venture

3.39 Part 3.C. contains a summary chronology of key points in the history of the Joint Venture. Further details are set out at **Annex D**.

I. The Joint Venture prior to the Relevant Period

3.40 JVCo was set up in 1980 (over 30 years before the Relevant Period, which is 30 May 2012 to 2 February 2016). Its purpose was to enable the operation of a national business under the Micronclean Brand. Fenland and Berendsen submitted that this facilitated the supply of Cleanroom Laundry Services in the UK (and, initially at least, Ireland). Fenland submitted that the Joint Venture enabled it to build Cleanroom Laundries and create a UK-wide network that could provide national coverage.[101] Fenland submitted that '*the Newbury cleanroom laundry was built as a direct consequence of the Micronclean arrangements'.*[102] Berendsen submitted that the Joint Venture allowed the '*introduction and development of new cleanroom services and consumables products in Great Britain, servicing unmet demand.*'[103]

3.41 Fenland made a number of submissions regarding the development and licensing of know-how. In the early 1980s it developed intellectual property relating to Cleanroom Laundries (e.g. a washing machine, tumble dryer, and Cleanroom Garments[104] – and held a patent over the associated technology).[105] Fenland then transferred its intellectual property to JVCo, which

[100] The [10-20]% figure for Consumables includes Fenland, Berendsen Newbury and Guardline (which was owned by JVCo, which was in turn owned by Fenland and Berendsen Newbury jointly). The Consumables market was relatively fragmented. The market leader in 2014 had a share of [30-40]%, but no other competitor had a share above 10%. For more details, see **Annex C**, Table C3.
[101] URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.1(c).
[102] URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.1(b).
[103] URN 00201.1 (full reference at footnote 25 above), paragraph 3.3(a).
[104] URN 01220 (full reference at footnote 30 above), p.21, line 3, to p.25, line 4.
[105] URN 00099.42 (Patent Office Certification of Grant of UK Patent dated 6 November 1985).

licensed it on to the shareholders in JVCo (the 'JV Partners').[106] Fenland submitted, for example, that, in 1982, it licensed its substantial know-how relating to building Cleanroom Laundries to Berendsen Newbury so as to enable Berendsen Newbury to supply Cleanroom Laundry Services under the Microclean Brand.[107] Fenland stated that, given the passage of time, it could not confirm if Berendsen Newbury paid any consideration for any such licence.[108] The earliest written agreement that the Addressees could locate relating to a Newbury-based business joining the Joint Venture dated from 1984 (the '1984 Agreement').[109] That agreement referred to certain trade secrets, but not specifically to any know-how licence.[110]

3.42 In its early years, the Joint Venture involved JV Partners which included the Parties, as well as certain other companies. The JV Partners have changed over time.[111]

3.43 From 1981 to 1989, JVCo operated a sales function. Working in parallel with the JV Partners – who operated Cleanroom Laundries – JVCo sought to win customers for Cleanroom Laundry Services, which JVCo then passed to the JV Partners for processing, according to territory. JVCo also sold Consumables in its own name. The JV Partners disbanded these centralised operations, and assumed primary responsibility for their respective sales of Cleanroom Laundry Services, in 1989/1990. Also around that time, JVCo's Consumables business was sold to a third party, and JVCo ceased to have any material assets.[112]

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[106] See, e.g., URN 01220 (full reference at footnote 30 above), p.30 at lines 13–15, and p.37, line 25, to p.38, line 7.
[107] URN 01139 (Fenland SO WRs), paragraphs 3.2.6–3.2.7.
[108] URN 01220 (Transcript of Fenland SO oral hearing on 27 April 2017), p.42, line 20, to p.44, line 4; URN 01182 (Fenland response dated 23 May 2017 to CMA questions of 3 May 2017 following Fenland's SO hearing), p.2 (response to Question 2).
[109] URN 01182 (full reference at footnote 108 above), p.1; URN 01186 (1984 Agreement between JVCo and [Former JV Partner F]). In 1989, [✂], and Berendsen Newbury bought out [Former JV Partner F]'s business (and shareholding in JVCo): URN 01375 (Special resolution passed on [✂] 1989); URN 00099.2 (List of JVCo shareholders since 1980).
[110] Berendsen Newbury agreed to '*keep secret all information in relation to the Company's* [i.e. JVCo's] *trade secrets techniques business or method of carrying on business and all information relating to the manner in which the Services are provided whoever the said information shall belong to and whether or not such information is in the public domain*': URN 01186 (the 1984 Agreement), clause 7(i). Under clause 6(vii), Berendsen Newbury agreed that '*Any installation erected by the Supplier* [Former JV Partner F] *for the provision of the Services shall be designed and built in accordance with the specification provided by the Company* [JVCo] *for such buildings'*. Berendsen submitted that it '*is unaware of whether there was a transfer of any know-how*' due to its lack of documents and corporate memory relating to the early 1980s: URN 01213 (Berendsen response dated 26 May 2017 to CMA questions of 10 May 2017 following Berendsen SO oral hearing), paragraph 9.1.
[111] URN 00099.1 (JVCo shareholder history from 1980 to 30 May 2012).
[112] URN 00083.1 (Fenland response of 4 May 2016 to Questions 2, 3, 6, 16 and 17 of the First Fenland Notices), pp.3–4 (response to Question 2). This is consistent with references to '*Central Marketing &*

3.44 From January 1995 onwards, the Parties were the only two remaining JV Partners, each holding a 50% shareholding in JVCo. This was reflected in the Articles of Association adopted for JVCo in 1996. Those Articles of Association also provided that, if one JV Partner was acquired by another company, then this would trigger a pre-emptive right for the other JV Partner to purchase the acquired JV Partner's shares in JVCo. In addition, those Articles of Association ensured that JVCo was held equally by the Parties, with no special voting rights assigned to either Party, all board and shareholder resolutions of JVCo requiring approval by both Parties with no chairman's casting vote allowed.[113]

3.45 For further background on the Joint Venture, and the JV Partners, prior to the Relevant Period, see Part 3.D.I. and **Annex D**, paragraphs D.1 to D.21.

II. The Joint Venture during the Relevant Period

3.46 Throughout the Relevant Period, the Parties remained the only JV Partners. Under the Joint Venture, they were entitled to operate in the UK using the Micronclean Brand. They did so under licence from JVCo (which held the relevant UK rights). The terms under which the Parties were licensed to use, and under which they operated, the Micronclean Brand were set out in the two TMLAs of 30 May 2012.

3.47 In September 2013, the Parties acquired Guardline, using JVCo as the acquisition vehicle.[114] The key rationale for *Micronclean/Guardline* was to acquire Guardline's Consumables business in order to broaden the Parties' range of Consumables.[115] Two non-trading subsidiaries were set up as vehicles to transfer a part of Guardline's UK business to each Party.[116]

3.48 Berendsen plc acquired Berendsen Newbury on 13 September 2014 (the 'Newbury Acquisition'). At this time, '*[i]t was not Berendsen's strategy to terminate*' the Joint Venture, as '*it holds commercial value to have the rights to use the brand name "Micronclean" in the UK market and had it chosen to*

Sales' in relation to the Joint Venture, and '*Sell Centrally, Process Locally*' in relation to the Restrictions, in URN 01170 (Slide presentation for Fenland SO oral hearing on 27 April 2017), pp.15 and 19.

[113] URN 00066.87 (1996 JVCo Articles of Association), clause 9(iii) (which states e.g. that *'if any corporate member shall become the subsidiary of another corporate member or of a body corporate of which another corporate member is a subsidiary'*) and clauses 11–14.

[114] URN 00024.1 (full reference at footnote 49 above), p.4; URN 00024.3 (full reference at footnote 50 above), p.3.

[115] URN 00984 (*Micronclean/Guardline* Decision), paragraph 21.

[116] As regards the transfer of Guardline's '*UK business*' to the Parties, see paragraphs 3.4 and 3.8 above; see paragraph 3.14 above regarding the transfer of Guardline's export business. Guardline itself ceased trading on 1 January 2014: URN 00024.3 (full reference at footnote 50 above), p.3.

terminate the JV, Berendsen would have had to transfer the brand to Fenland for no consideration.'[117]

3.49 The Newbury Acquisition gave rise to a pre-emptive right for Fenland to acquire Berendsen Newbury's shareholding in JVCo (see paragraph 3.44 above). Berendsen Newbury expected that Fenland would exercise its option to acquire 100% of JVCo and therefore '*take the Microncleαn brand in the UK for its sole benefit.*'[118] Fenland did not do so at that time, but instead entered into a series of discussions with Berendsen regarding whether the Parties' cooperation via the Joint Venture should continue, and, if so, on what terms.

3.50 Around this time, a number of options for the future operation of each Party's relevant activities were discussed. The minutes of a Fenland board meeting on 8 October 2014 noted that discussion with Berendsen had already taken place, and another meeting was to take place '*in around two weeks*'. The minutes also noted that the main options were '*to have no partnership and compete against each other*' and '*an agreement where Berendsen can still use the Microncleαn name and include a passive compete clause*'.[119]

3.51 As at November 2014, discussions focused on one option – namely, entering into further '*trademark licence agreements*' with '*an initial term of 2 years*'. This option would have involved '*[t]erritories as laid out in the existing [TMLAs]*'. So when compared to the arrangements in place before the Newbury Acquisition, it appears to differ only in corporate structure involved (i.e. whether JVCo's assets would be owned by the Parties jointly, or by Fenland alone).[120]

3.52 The discussions described at paragraph 3.48 above – and the Joint Venture – continued for a period of almost 17 months, until the Joint Venture was terminated on 3 February 2016. Fenland and Berendsen submitted that the time taken was in part because the future of the Joint Venture was linked closely to *Fenland/Fishers*. Fenland sought informal advice from the CMA on

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[117] URN 00067.9 (Berendsen Newbury reply of 26 October 2015 to CMA *Fenland/Fishers* questions dated 14 October 2015), p.3 (response to Question 2).

[118] URN 00067.9 (full reference at footnote 117 above), p.3 (response to Question 2).

[119] URN 00186.33 (Minutes of Fenland board meeting of 8 October 2014), paragraph 2.2.

[120] URN 00151.22 (Fenland proposals following a meeting between '*Berendsen and Fenland*' on 23 October 2014, produced by [Fenland Director A] on 2 November 2014), as re-submitted on 21 October 2016 after having been submitted initially by Fenland as Document 0021907, p.1 and p.4; URN 00124.6 (Fenland proposals following a meeting between '*Berendsen and Fenland*' on 23 October 2014, produced by [Fenland Director A] on 14 November 2014), as re-submitted on 21 October 2016 after having been submitted initially by Fenland as Document 0173003, p.1. See also reference to '*[i]nitial period of 2 years*' in URN 00043.14 (Fenland proposals following a meeting between '*Berendsen and Fenland*' on 17 November 2014, produced by [Fenland Director A] on 17 November 2014), p.4. See also reference to [Fenland Director A] reportedly envisaging an arrangement '*probably ending after 2 years*' in URN 00151.30 (email dated 20 November 2014 from [Berendsen Newbury Director G] to [Berendsen plc Manager A]).

that merger in March 2015 and formally notified it to the CMA in October 2015 (see **Annex A**, paragraphs A.10 to A.12). Fenland considered that it would be necessary to terminate the Joint Venture to facilitate CMA merger clearance so that Fenland would '*fully compete across Great Britain with Berendsen* [Newbury]' post-merger.[121] Discussions regarding the future of the Joint Venture progressed in the expectation that the Joint Venture would terminate in the event the CMA cleared *Fenland/Fishers*.

3.53 The Parties continued to operate the Joint Venture after the Newbury Acquisition until February 2016 – albeit subject to:

a. the postponement of board meetings scheduled for JVCo and MPL, on the proviso that '*the daily business between the companies should continue as is. This includes also the commercial meetings between the companies, product boards etc.*';[122]

b. a relaxation in the enforcement of '*any clauses in the trademark licence agreements* [i.e. the TMLAs] *that would prevent …passive competition*', as recorded in the Passive Sales Letters in February/March 2015 (see paragraph 3.98 below);[123]

c. Fenland acquiring MPL from JVCo in May 2015[124] – as agreed beforehand by the Parties in the context of discussing strategies for supplying Consumables once the Joint Venture was terminated;[125] and

d. Berendsen Newbury undertaking what it termed 'dual' branding (i.e. supplying UK customers under both the Berendsen and Micronclean names) from 15 September 2015, before a '*[f]ull re-branding*' in 2016.[126]

3.54 Following the abandonment of *Fenland/Fishers*, the Parties decided to terminate the Joint Venture in any event.[127]

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[121] URN 00186.119 (Proposal for the restructuring of JVCo dated 4 September 2015), p.1.
[122] URN 00151.17 (email dated 26 September 2014 from [Berendsen Newbury Director G] to [Berendsen Newbury Director F], [Berendsen Newbury Director E], [Berendsen Newbury Director C] and others at Berendsen).
[123] See paragraph 3.98 below, and URN 00043.34 (Letter dated 2 March 2015 from [Fenland Director A]), p.2.
[124] URN 00043.9 (Agreement between Fenland and JVCo for the acquisition of MPL).
[125] URN 00043.8 (Minutes of MPL and JVCo board meetings, May 2015), p.1.
[126] URN 00036.73 (Berendsen Presentation 'CBM Cleanroom UK'), p.6. URN 00036.78 (Berendsen Letter to Customers on Rebranding).
[127] URN 00043.1 (Heads of Agreement for restructuring of JVCo, produced by [Fenland Director A] on 28 January 2016 and signed by the Parties on 2/3 February 2016).

3.55 Further background on the Joint Venture during the Relevant Period is set out at **Annex D**, paragraphs D.22 to D.38.

III. Termination of the Joint Venture

3.56 The Parties terminated the Joint Venture on 3 February 2016. Fenland acquired Berendsen Newbury's shareholding in JVCo and, indirectly, JVCo's wholly-owned subsidiaries as at that date (see paragraph 3.15 above).[128]

3.57 As part of the termination of the Joint Venture, the TMLAs were terminated. This brought to an end Berendsen Newbury's licence under the Newbury TMLA to supply Cleanroom Laundry Services (and related services and/or products) in the UK under the Micronclean Brand.[129] However, for commercial reasons, Berendsen Newbury wanted to continue to supply Consumables in the UK under the Micronclean Brand.[130] To enable this, the Parties entered into an exclusive distribution agreement in respect of Micronclean-branded Consumables. Berendsen Newbury agreed to source any Consumables required by its customers of Cleanroom Laundry Services from Fenland and Fenland agreed to supply to Berendsen Newbury such Consumables.[131]

3.58 Since terminating the Joint Venture, each Party has made certain changes to the organisation and operation of its UK Cleanroom Laundry Services business – as set out at paragraphs 3.59 and 3.60 below. Notwithstanding these changes, each Party's supply to the Relevant Markets since the Joint Venture was terminated appear to be based on essentially the same infrastructure as during the Relevant Period.

3.59 On 1 July 2016, Fenland and JVCo swapped names: Fenland changed its name to 'Micronclean Limited', and JVCo changed its name to 'Fenland Laundries Limited'.[132] Fenland submitted, by way of explanation, that most of its sales at that point related to areas in which the Micronclean Brand was associated with being a technically advanced innovator. The Micronclean

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[128] URN 00043.5 (Minutes of the JVCo board meeting on 3 February 2016).
[129] URN 00043.5 (Minutes of the JVCo board meeting on 3 February 2016); URN 00043.3 (Trade Mark Licence Agreement between JVCo and Fenland dated 3 February 2016).
[130] URN 00067.2 (Berendsen prioritisation submission of 27 April 2016), paragraphs 3.25–3.28.
[131] See URN 00043.4 (Distribution agreement dated 3 February 2016 between Fenland and Berendsen Newbury). In June 2016, the CMA took a prioritisation decision not to investigate at this stage the distribution agreement entered into by the Parties in 2016. The CMA therefore makes no findings in this Decision in relation to that distribution agreement. As noted in the Advisory Letters, businesses are responsible for self-assessing whether their conduct complies with competition law including the Chapter I prohibition.
[132] URN 00186.103 (Form NM01 for company name change from Fenland Laundries Ltd to Micronclean Ltd); URN 00186.104 (Form NM01 for company name change from Micronclean Ltd to Fenland Laundries Ltd).

Brand was also recognised internationally, so its use was more effective.[133] However, Fenland submitted that '*[i]n essence, there are no differences in the way in which Fenland supplied cleanroom laundry services to customers when the Microncleanjoint venture arrangements were in place, compared to how it supplies them now that the joint venture arrangements have terminated'*.[134]

3.60 Berendsen Newbury undertook a '*[f]ull re-branding*' after the Joint Venture was terminated. It now supplies the Relevant Markets under only the 'Berendsen' brand, with limited exceptions.[135] Consistent with plans in 2015 '*to react on the potential ending of the JV*', which included the deployment of '*an extra transport van*' and certain resources '*in the Northern part of the UK*' (i.e. the Fenland Territory further described in Part 3.D.II.b. below), Berendsen Newbury has expanded its fleet of trucks[136] and also '*made a number of alterations to service delivery*' in 2016, albeit '*towards the entire customer portfolio, and […] not targeted towards customers located in either*' the Fenland Territory or the Newbury Territory (as further described in Part 3.D.II.b. below).[137] It also made some investments relevant to serving customers in the Fenland Territory.[138] Notwithstanding these changes, Berendsen submitted that, when comparing the Relevant Period and the period since the Joint Venture was terminated, '*[t]here are no material differences in the way in which Berendsen* [Newbury] *has served (or has planned to serve) customers*' in the Fenland Territory.[139]

D. The allocation of territories/customers between the Parties

I. The TMLAs: background

3.61 The investigation focused on the period from 30 May 2012, which is when the Parties formally recast their relationship in the form of the TMLAs. However,

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[133] Fenland has, however, maintained its existing brand for its non-Cleanroom flatwork business; see URN 00186.1 (Fenland response of 6 August 2016 to the Second Fenland Notice), pp.43–44 (response to Question 15.d.).

[134] URN 00186.1 (full reference at footnote 133 above), p.36 (response to Question 11).

[135] See, e.g., paragraph 3.53.d. above. For details of limited exceptions, see URN 00193.1 (Berendsen response of 9 August 2016 to the Second Berendsen Notice), paragraphs 9.1 and 21.1.

[136] URN 00193.81 (Berendsen press release entitled 'Berendsen Cleanroom Services expands its fleet of vehicles' and dated July 2016); URN 00067.10 (Berendsen Newbury reply of 7 December 2015 to CMA *Fenland/Fishers* questions dated 3 December 2015). See also *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraphs 54 and 60.

[137] URN 00193.1 (full reference at footnote 135 above), paragraph 11.2; further details were set out in (but for the purposes of this Decision have been redacted from) paragraphs 11.3–11.5.

[138] Details were set out in (but for the purposes of this Decision have been redacted from) URN 00193.1 (full reference at footnote 135 above), paragraphs 10.3–10.5 and 13.3(a).

[139] URN 00193.1 (full reference at footnote 135 above), paragraph 11.1; additional details were set out in (but for the purposes of this Decision have been redacted from) paragraphs 11.2–11.5 and 13.1–13.3.

this Part 3.D.I. contains a summary of certain arrangements and conduct pre-dating the TMLAs which are relevant to the CMA's assessment of the TMLAs.

The organisation and operation of the Joint Venture prior to the TMLAs

3.62 The CMA has been provided with copies of documents setting out the organisation and operation of the Joint Venture, pre-dating the TMLAs, e.g.:

a. Articles of Association adopted in 1980, 1982, 1986 and 1996;[140]

b. the 1984 Agreement (see paragraph 3.41 above);

c. the mirror-image 1991 TM Agreements;[141] and

d. a draft 'operating agreement' and a related draft 'heads of agreement', each drawn up in the mid-1990s but not signed (for more details, see **Annex D**, paragraphs D.14 to D.17).[142]

3.63 Based on the documents referred to in paragraph 3.62 above, it is not clear that the terms on which the JV Partners were licensed to use, and under which they operated, the Microncleаn Brand remained precisely the same from the start of the Joint Venture until its termination.[143] In particular, as explained in paragraphs 3.64 to 3.65 below, although the early Articles of Association referred to territories to be operated by the JV Partners, it is not clear to the CMA that the territorial *restrictions* contained in the TMLAs '*had been in place between the Parties since the outset of the joint venture in the early 1980s*'.[144]

3.64 It appears that the territories operated by the JV Partners have evolved since the start of the Joint Venture – for example, they were demarcated by county

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[140] See JVCo Articles of Association adopted in 1980, 1982, 1986 and 1996 at URN 00036.6, URN 00099.50, URN 00036.7 and URN 00066.87 respectively.

[141] URN 00099.38 (Trade mark user agreement between JVCo and Fenland dated 1 January 1991, with Patent Office cover letter dated 28 February 1992) and URN 00099.39 (Trade mark licence between JVCo and Berendsen Newbury dated 1 January 1991, with Patent Office cover letter dated 27 November 1992) (together referred to as the '1991 TM Agreements'). In 1991 the JV Partners included a company owned by [✂] and trading as [Former JV Partner D] (URN 00099.1 (full reference at footnote 111 above), p.4), hence URN 00099.40 (Patent Office letter dated 27 November 1992 to [Former JV Partner D]).

[142] URN 00186.59 (Draft Operating Agreement of 1995 between JVCo and 'two operating plants', which appear to be the Parties' plants in Skegness and Newbury); URN 00066.88 (Draft Heads of Agreement between JVCo and the 'three operating plants'). The CMA assumes that the three plants were Fenland's Skegness plant, Berendsen Newbury's plant and a plant in Perth operated by [Former JV Partner D]; however, URN 00066.84 (email dated 10 June 2011 from [Fenland Director A] to [Berendsen Newbury Director A]) describes this document as dating from 1996, whereas [Former JV Partner D] had by then left the Joint Venture (in January 1995).

[143] Fenland submitted that the TMLAs simply formalised certain pre-existing arrangements in the context of the Joint Venture: see, e.g., URN 00186.1 (full reference at footnote 133 above), p.54 (response to Question 19).

[144] See, e.g., URN 01139 (Fenland SO WRs), paragraphs 3.2.90 and 3.2.107.

initially, and by postcode more recently (see, e.g., **Annex D**, paragraphs D.18 to D.21). Each of the Articles of Association adopted in 1982 and 1986, and the two draft documents drawn up in the mid-1990s (see paragraph 3.62 above) referred to territories '*to operate*', or '*to be operated*', from the relevant Cleanroom Laundries.[145] Fenland described these territories as '*substantively the same as those set out in the TMLAs (subject only to certain minor modifications over time)*'.[146] The 1984 Agreement did not refer to any territory.

3.65 Both of the mid-1990s draft documents set out certain restrictions on each Party selling outside of its allocated territory. Both documents also stated that these restrictions were '*[i]n order to protect the Registered Trademarks and to avoid problems caused by distance from the operating cleanroom in the provision of services to customers*'.[147] The CMA has seen no document that pre-dates these two mid-1990s draft agreements and sets out sales restrictions based on territories. Further, JVCo had a centralised sales function until 1990 (see paragraph 3.43 above), which suggests that any territory-related arrangements agreed between the JV Partners before 1990 may have differed in nature compared to their more decentralised, post-1990 arrangements. The CMA has also seen no document that pre-dates the TMLAs and sets out sales restrictions of the type found in clauses 2.7 and 2.8 of each TMLA,[148] i.e. applicable irrespective of territory to the customers of any Party (or indeed any other, earlier JV Partner).

Revision/formalisation of the organisation and operation of the Joint Venture

3.66 By 2011, the Parties had identified a need to revise the documents setting out the organisation and operation of the Joint Venture. On 10 June 2011, [Fenland Director A] emailed [Berendsen Newbury Director A], referring as follows to the draft 'operating agreement' described at paragraph 3.62.d. above:

> '*I think that it contains the essence of what is now needed. Essentially, it contains the territorial restrictions, and it terminates itself and the Trademark User Agreement* [i.e. the 1991 TM Agreements] *if there is a*

[145] When Articles of Association of JVCo were adopted in 1982 and 1986 (and when the draft 'heads of agreement' was drawn up in the mid-1990s) the JV Partners included the Parties but also certain other entities. For further details of the various JV Partners and the territories referred to, see **Annex D**.
[146] URN 01139 (Fenland SO WRs), footnote 33.
[147] URN 00066.88 (Draft Heads of Agreement between JVCo and the 'three operating plants'), second page (titled 'Version A') and third page (titled 'Version B'); URN 00186.59 (full reference at footnote 142 above), p.2, under heading '*Territories*'. More generally, see **Annex D**, paragraphs D.14–D.17.
[148] On which, see paragraphs 3.88, 3.90, 3.91 and 3.93 below.

sale of the business…we can discuss if it is now sensible to implement such an agreement'.[149]

3.67 The minutes of a JVCo board meeting on 27 June 2011 noted that:

'*Articles of Association, Trademark User agreements and a draft Operating Agreement had been circulated prior to the meeting. It was agreed in principal* [sic] *to formalise the structure* [of the Joint Venture] *along the lines suggested in these documents*.'[150]

3.68 The minutes of that board meeting on 27 June 2011 also noted that:

a. '*It was agreed in principal* [sic] *that any trading using the Micronclean name would be constrained by the territorial restrictions'*; and

b. '*[a] register of agreed cross border customers will be kept to avoid uncertainty in the future*'.[151]

3.69 The minutes of that board meeting on 27 June 2011 also noted that the Parties envisaged that '*the territorial restrictions*' would be '*subject to*' the following*:*

a. *'A customer requesting to be supplied by a plant in the other territory will be so supplied.*

b. *A plant wishing to supply products or services into the other territory which the other plant cannot easily supply will be allowed to do so, but this will be by the express permission of the other plant in each and every case.*

c. *Fenland wish to supply the food industry under the Micronclean brand, but will be subject to the constraints above. It is expected that this permission will be given as Newbury to* [sic] *not currently supply this market and are unlikely to in the future.*'[152]

3.70 The minutes of the same board meeting also noted that, subject to the points listed at paragraph 3.69 above, '[Berendsen Newbury Director A] *confirmed that Fenland could supply food accounts in Newbury's area under the Micronclean brand*.'[153]

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[149] URN 00066.84 (email dated 10 June 2011 from [Fenland Director A] to [Berendsen Newbury Director A]).
[150] URN 00055.13 (JVCo Board meeting on 27 June 2011), p.1, paragraph 3 – referring to URNs 00066.84–00066.90.
[151] URN 00055.13 (full reference at footnote 150 above), p.1, paragraph 4.
[152] URN 00055.13 (full reference at footnote 150 above), p.1, paragraph 4. Fenland confirmed this understanding internally: see also paragraph 3.71 below.
[153] URN 00055.13 (full reference at footnote 150 above), p.1, paragraph 5.

3.71 [Fenland Director A] confirmed the Parties' agreement at the JVCo board meeting on 27 June 2011 in an internal email within Fenland. He noted the constraint on '*cross border trading*' and a requirement for express permission from Berendsen Newbury in relation to conducting any business in the Newbury Territory under the Micronclean Brand, save in relation to food sector customers. He also noted a belief that Berendsen Newbury had no interest in food sector customers at that time and would '*probably give us a blanket permission for this market place'*.[154] Notwithstanding that belief, the same email notes a 'proviso' in relation to food sector customers, namely that '*we* [Fenland] *must tell them* [Berendsen Newbury] *each time that we progress a prospect, and specifically each time that we sign a contract in their area*'.[155]

3.72 On 18 July 2011, there was a JVCo Board meeting, at which '[Lawyer] of [Law firm representing Parties] *ran through the Heads of Terms for a Licence Agreement that she had previously circulated.*' Points noted as '*agreed*' included: (i) '*a licensee wishing to obtain a customer in the other licensee's territory under the Micronclean name will in every instance require the express permission of the other licensee*'; and (ii) '*A register will be kept listing every customer in the other licensee's territory, and this list will be updated and approved at each Micronclean Ltd Board meeting*'. [Lawyer] was then asked to '*now produce a full Licence Agreement.*'[156]

3.73 At the board meeting of 18 July 2011, [Fenland Director A] and [Berendsen Newbury Director A] agreed that Fenland would send to Berendsen Newbury *'the current territory listing for approval'*, and that the Parties would *'send each other a listing of all customers in the other's territory for approval. This will constitute the starting register for the Licence Agreement'*.[157] Fenland submitted that *'when the TMLAs were entered into in 2012, the attached Excel spreadsheet, document number 0643003 formed the starting point of the 'central list'. Newbury Berendsen* [sic] *subsequently provided a listing of its 'out of territory' customers by email to Fenland (document number 0493003…). Fenland believes that it may also have provided a listing of its 'out of territory' customers to Newbury Berendsen* [sic] *at around the same time, but Fenland*

[154] URN 00066.95 (email from [Fenland Director A] to [Fenland Director D], [Fenland Director J] and others dated 27 June 2011).
[155] Fenland submitted that it did not, in practice, notify Berendsen Newbury each time that Fenland supplied food sector customers located in the Newbury Territory: URN 00050.1 (full reference at footnote 65 above), p.5. However, Fenland found one example of it having informed Berendsen Newbury about food sector prospects: URN 00055.14 (emails from June 2012 between [Berendsen Newbury Director C] and [Fenland Employee A]).
[156] URN 00036.60 (Minutes of JVCo board meeting on 18 July 2011), pp.1–2, paragraphs 12–14.
[157] URN 00036.60 (full reference at footnote 156 above), p.2, paragraphs 15–16.

cannot find any record of this.'[158] The CMA has no contemporaneous evidence confirming that the Parties actually exchanged such listings in or around July 2011. However, an internal Berendsen Newbury email from January 2014 states that Fenland declared its customers in the Newbury Territory *'in the last 3 or so years'*. This is indicative of the Parties having exchanged lists in 2011.[159]

3.74 The detailed nature of the Parties' discussions about the content and implementation of the proposed restrictions suggests that the TMLAs did not simply repeat arrangements already existing at that time.

3.75 On 30 May 2012, each Party – and JVCo – signed the TMLAs. A summary of the parts of the TMLAs which are most relevant to the investigation is set out in Part 3.D.II. below.

II. The TMLAs: main provisions

a. Summary of the main provisions of the TMLAs

3.76 The TMLAs set out the terms on which each Party could operate using the trade marks listed in Schedule 4 of each of the TMLAs (the 'Trade Marks') (which JVCo held). The TMLAs granted to each Party the non-exclusive right to use the Trade Marks in their own territory and the right to use the Trade Marks in the other Party's territory in certain circumstances. The TMLAs comprised two tripartite licensing agreements, each signed on 30 May 2012 by [Berendsen Newbury Director A], [Fenland Director E] and [Fenland Director A] (on behalf of Berendsen Newbury, Fenland and JVCo respectively). In each TMLA, JVCo was the 'Licensor'. In the Fenland TMLA, Fenland was the 'Licensee', and Berendsen Newbury was the 'Co-Licensee'. In the Newbury TMLA, Berendsen Newbury was the 'Licensee' and Fenland was the 'Co-Licensee'.

3.77 Each TMLA was a mirror-image of the other TMLA, save for certain differences between the respective Schedules.[160] A summary of the key points in the TMLAs is set out in this Part 3.D.II.a.; more details are at Part 3.D.II.b. below.

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[158] URN 00050.1 (full reference at footnote 65 above), p.5.; URN 00055.15 (undated spreadsheet showing postcodes and customers); URN 00043.48 (email chain dated 31 May 2012–7 June 2012 between [Berendsen Newbury Director A], [Berendsen Newbury Director C] and [Fenland Director A]), p.1. The CMA notes that URN 00055.15 includes (i) customers to which no sales values were attributed (so may no longer have been customers when the list was compiled) and (ii) numerous duplicate entries.
[159] URN 00068.7 (email from [Berendsen Newbury Director C] to [Berendsen Newbury Director A] and others dated 16 January 2014), p.2.
[160] Fenland provided two comparisons of Schedule 1 to each TMLA: see URN 00043.42 and URN 00043.43, as well as the specific references to these comparisons in footnotes 162–166 below. Fenland submitted the Schedules were '*very similar with only minor differences in wording for the main part*', the

a. The Parties divided GB, in effect with a line running from London to Anglesey – allocating to Fenland the territory north of that line (referred to as the Fenland Territory) and to Berendsen Newbury the territory south of that line (referred to as the Newbury Territory).

b. Each Party had a non-exclusive right to use the Trade Marks in relation to the products and services referred to in the TMLAs in (i) its allocated territory and (ii) the territory allocated to the other Party (but subject to the restrictions set out in the TMLAs).

c. Fenland agreed not to actively solicit new business in the Newbury Territory. Fenland also agreed not to actively solicit new business from Berendsen Newbury's customers (as defined in the TMLAs) in general. Berendsen Newbury agreed the same in relation to new business in the Fenland Territory and Fenland's customers in general.

d. If Fenland was approached by a prospective customer (as defined in the TMLAs) located in the Newbury Territory which was not yet supplied by either Party, Fenland could only supply that customer if it first obtained the customer's '*written confirmation*' that it wished to become a customer of Fenland and not Berendsen Newbury. The same applied, vice versa, if Berendsen Newbury was approached by a prospective customer located in the Fenland Territory.

e. If Fenland was approached by an existing customer of Berendsen Newbury, whether located in the Fenland Territory or not, Fenland could only supply that customer if Fenland first ascertained whether Berendsen Newbury had served the customer in the preceding year. If Berendsen Newbury had done so, Fenland had to (i) notify Berendsen Newbury of the customer enquiry, (ii) make all reasonable efforts to ascertain why the customer wished to change provider and (iii) allow Berendsen Newbury some time to work on any issues with the customer. If the issues could not be rectified (or it was not appropriate to try and do so), Fenland could then supply the customer. If Berendsen Newbury had not served the customer in the preceding year, Fenland had to obtain '*written confirmation*' that the customer wished to be served by Fenland, not Berendsen Newbury. The same applied, vice versa, if Berendsen Newbury was approached by a customer of Fenland.

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primary differences stemming from Fenland supplying certain services which Berendsen Newbury did not, and resulting in URN 00036.8 (Fenland TMLA), Schedule 1, including sections entitled '*Products for use in non-cleanroom environment*' and '*Cleanroom Cleaning*' which were largely unmatched, or without any equivalent, in URN 00036.9 (Newbury TMLA), Schedule 1. See URN 00037.1 (full reference at footnote 23 above), p.6 (response to Question 15).

f. A '*Central List*' would be used to record the details of any such customers for whom '*written confirmation*' was given, pursuant to the points noted at paragraphs 3.77.d. and 3.77.e. above.

b. Subject matter of the TMLAs

3.78 As further described in this Part 3.D.II.b., under the TMLAs the Parties could use certain trade marks in relation to their supply of certain services/products in certain territories. The TMLAs were in force throughout the Relevant Period.

3.79 Clause 1.1 of each TMLA set out several definitions. Sub-clause 1.1.11 of each TMLA stated that '"*Trade Marks*" *means the trade marks listed in Schedule 4 of the Agreement and "the Trade Mark" means any one of the Trade Marks relevant in that context*'. Sub-clause 1.1.2 of each TMLA stated that *'"Central List" means the list of Customers and Prospective Customers maintained by the Licensor at the request of the Licensee and with the agreement of the Co-Licensee'*. '*Customers'* and *'Prospective Customers*' were, respectively, the actual or potential customers of either Party.[161]

3.80 The TMLAs applied to the '*Products*' and '*Services*' listed in Schedule 1 of each TMLA (the **'**TMLA Products and Services'). '*Services*' included '*Laundry and disinfection*' of textile items[162] and related services, including Cleanroom Garment/other garment rental (i.e. Cleanroom Laundry Services).[163] In the Fenland TMLA, '*Services*' also included '*The cleaning, decontamination and disinfection of cleanrooms and associated equipment*' (referred to as

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[161] Sub-clauses 1.1.4 and 1.1.6 of each TMLA stated, respectively, that '*"Customer" means any customer of either the Licensee or the Co-Licensee*' and '*"Prospective Customer" means any customer who is not a Customer of either the Licensee or Co-Licensee*'.

[162] URN 00036.8 (Fenland TMLA), Schedule 1: '*Laundry and disinfection of textile items through any of the following laundry facilities as specifically agreed with the customer; ISO 14644 Class 4 cleanroom laundry, ISO 14644 Class 6 cleanroom laundry, "barrier" laundry not classified under ISO 14644, open unclassified laundry.*' URN 00036.9 (Newbury TMLA), Schedule 1: '*Laundry and disinfection of textiles i.e. garments and mops - Aftercare services include distribution of rental items, laundering, inspection, repair and irradiation.*' Fenland described these descriptions as '*[e]ssentially the same*', and noted that the Newbury TMLA '*does not specify the laundry classification which it should*': URN 00043.42 (Comparison of Schedule 1 in the Fenland TMLA to Schedule 1 in the Newbury TMLA) at '*FEN34*' and URN 00043.43 (Comparisons of Schedule 1 in TMLAs) at '*MNL14*' and '*MNL26*'.

[163] URN 00036.8 (Fenland TMLA), Schedule 1: '*Rental of any of the items listed in The Products other than consumable or disposable items. The rental may be either inclusive or exclusive of an aftercare service. Aftercare services could include any of the following distribution of the rental items to and from the customer, laundering, inspection, repair and maintenance, sterilisation.*' URN 00036.9 (Newbury TMLA), Schedule 1: '*- Rental of any item listed in 'The Products' other than consumable or disposable items. - Rental either 'exclusive' or' inclusive' of an aftercare service as agreed with the customer. - Aftercare services include distribution of rental items, laundering, inspection, repair and irradiation.*' Fenland described these descriptions as '*[e]ssentially the same*': URN 00043.42 (full reference at footnote 162 above) at '*FEN33*' and URN 00043.43 (full reference at footnote 162 above) at '*MNL24*' and '*MNL25*'.

'Cleanroom Cleaning').[164] Each TMLA defined '*Products*' as referring to '*[c]onsumable items for use in cleanrooms including but not limited to gloves*' and, for example,[165] '*[p]acks of syringes and associated equipment*'.[166] The TMLAs do not set out any sector-specific or customer-specific exclusions. In principle, each TMLA applied to the full range of services and products supplied by the Parties under the Micronclean Brand.

3.81 Sub-clause 1.1.9 of each TMLA stated that '*"Territory A" means the territory listed in Schedule 2*'. Sub-clause 1.1.10 of each TMLA stated that '*"Territory B" means the territory listed in Schedule 3*'. The '*Territory A*' set out in any TMLA mirrored the '*Territory B*' set out in the other TMLA. Conversely, the '*Territory A*' set out in one TMLA mirrored the '*Territory B*' set out in the other TMLA.

3.82 The Parties referred to as the '*Fenland Territory*' a territory comprising the postcodes listed in Schedule 2 of – and, therefore, '*Territory A'* under – the Fenland TMLA. This mirrored the territory comprising the postcodes listed in Schedule 3 of – and, therefore, '*Territory B'* under – the Newbury TMLA.

3.83 The Parties referred to as the '*Newbury Territory*' a territory comprising the postcodes listed in Schedule 2 of – and, therefore, '*Territory A'* under – the Newbury TMLA. This mirrored a territory comprising the postcodes listed in Schedule 3 of – and, therefore, '*Territory B'* under – the Fenland TMLA.

3.84 The Fenland Territory and the Newbury Territory did not overlap, but together covered all of GB – as illustrated at **Annex E**, Figure E1 and Figure E2. Fenland described the boundary between the two respective territories as '*a line between, broadly, London and Anglesey*'.[167]

3.85 Clauses 2.1 to 2.4 of each TMLA stated that:

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[164] URN 00036.8 (Fenland TMLA), Schedule 1. Fenland submitted that the Newbury TMLA had no counterpart as '*Fenland undertakes cleanroom cleaning across both territories and MNL does not provide this service*': URN 00043.42 (full reference at footnote 162 above), at '*FEN27*'.
[165] URN 00036.8 (Fenland TMLA), Schedule 1: '*Consumable items including but not limited to gloves.*' URN 00036.9 (Newbury TMLA), Schedule 1: '*Consumable items for use in the cleanroom including, but not limited to disposable gloves, contamination control mats, mob caps, overshoes, facemasks, beard snoods and cleanroom stationary* [sic]'. Fenland submitted that whilst the Fenland TMLA does not specify all of the Consumables items listed in the Newbury TMLA, '*thes* [sic] *missing items are covered by the generality of*' the counterpart descriptions in the Fenland TMLA: URN 00043.42 (full reference at footnote 162 above) at '*FEN6*' and '*FEN15*' and URN 00043.43 (full reference at footnote 162 above) at '*MNL9*'.
[166] URN 00036.8 (Fenland TMLA), Schedule 1: '*Packs of syringes and associated equipment used in the manufacture and supply of pharmaceutical product.*' URN 00036.9 (Newbury TMLA), Schedule 1: '*Packs of syringes and associated equipment used in clinical facilities to manufacture and dispense pharmaceutical products.*' Fenland described these descriptions as '*[e]ssentially the same*': URN 00043.42 (full reference at footnote 162 above) at '*FEN8*' and URN 00043.43 (full reference at footnote 162 above) at '*MNL11*'. The CMA makes no findings in this Decision on whether the Infringement extends to the supply of syringes/sterile packs: see footnote 11 above.
[167] URN 00998 (full reference at footnote 72 above), e.g. at p.4 (at paragraph xiii.b.) and p.10.

'*2.1 In consideration of the sum of £1.00, receipt of which is hereby acknowledged, and the mutal* [sic] *promises contained within this Agreement, the Licensor grants to the Licensee the non-exclusive right to use the Trade Marks in Territory A in relation to the Products and Services, subject to the terms and conditions of this Agreement.*

2.2 The Licensor grants to the licensee the non-exclusive right to use the Trade Marks in Territory B in relation to the Products and Services, subject to the terms and conditions of this Agreement, and subject to consent from the Co-Licensee.

2.3 The Co-Licensee is deemed to have granted consent to the Licensee in respect of any use of the Trade Marks in Territory B by the Licensee at the Commencement Date.

2.4 The Licensee and Co-Licensee shall notify the Licensor of any consent given to the other Party in accordance with term 2.2 or 2.3 above so that the Central List can be updated.'

3.86 Under the Fenland TMLA, JVCo granted to Fenland the '*non-exclusive right*' to trade using the Trade Marks in relation to the TMLA Products and Services in (i) the Fenland Territory, and (ii) the Newbury Territory, albeit subject to deemed '*consent from*' Berendsen Newbury. Similarly, under the Newbury TMLA, JVCo granted to Berendsen Newbury the '*non-exclusive right*' to trade using the Trade Marks in relation to the TMLA Products and Services in (i) the Newbury Territory and (ii) the Fenland Territory, albeit subject to deemed '*consent from*' Fenland. In addition, given clause 5.4 of each TMLA neither Party could, without JVCo's prior written permission, use any trade marks in relation to the TMLA Products and Services other than the Trade Marks.

3.87 Neither TMLA had a fixed-term duration. Each TMLA, under its clause 4.2, was to continue '*for as long as the Licensee is a shareholder of the Licensor*'. Each Party was '*a shareholder of the Licensor*' (i.e. JVCo) throughout the Relevant Period. Each TMLA was, therefore, in force throughout the Relevant Period.

c. Clauses governing one Party actively soliciting new business in the other Party's territory/from the other Party's customers

3.88 Clauses 2.5 and 2.7 of each TMLA stated – without reference to any sector-specific or customer-specific exclusions or requirements – that:

'*2.5 The Licensee undertakes to the Licensor and the Co-Licensee not to actively solicit new business in Territory B, except for Prospective Customers that are agreed in writing by the Co-Licensee in which case*

the details of the Prospective Customer will be added to the Central List.

…

2.7 The Licensee undertakes to the Co-Licensee not to actively solicit new business from the Customers of the Co-Licensee.'

3.89 Accordingly, the Parties agreed that Fenland could not actively solicit new business in the Newbury Territory, and Berendsen Newbury could not actively solicit new business in the Fenland Territory. The sole exception permitted was that a Party could actively solicit new business in the territory allocated to the other Party only if (i) the potential customer was not already a customer of either Party and (ii) this was agreed '*in writing*' with the other Party. The customer's details were then to be added to the '*Central List*'.

3.90 Each Party also agreed, under clause 2.7 of each TMLA, not to actively approach any customer of the other Party – i.e. whether or not that customer was located Out of Territory. This clause did not set out any exceptions.

d. Clauses governing enquiries from a '*Prospective Customer*' in the other Party's territory/from the other Party's customers

3.91 Clauses 2.6 and 2.8 to 2.11 of each TMLA stated – without reference to any sector-specific or customer-specific exclusions or requirements – that:

'*2.6 In the event that a Prospective Customer located in Territory B requests that the Licensee, to the explicit exclusion of the Co-Licensee, provides the Products and/or Services, the Licensee shall obtain written confirmation from the Prospective Customer stating that it wishes to become a Customer of the Licensee and not of the Co-Licensee. On production of this written confirmation, the Licensee shall be free to provide the Products and/or Services to the Prospective Customer, and the details of the Prospective Customer shall be added to the Central List. …*

2.8 In the event that a Customer of the Co-Licensee, located in either Territory A or Territory B, requests that the Licensee provides the Products and/or Services, the Licensee shall ascertain when the Customer last purchased Products and/or Services from the Co-Licensee.

2.9 In the event that the Customer referred to in clause 2.8 has not purchased Products and/or Services from the Co-Licensee within the previous 12 months, the provisions in clause 2.6 above shall apply as if the Customer is a Prospective Customer.

2.10 In the event that the Customer referred to in clause 2.8 has purchased Products and/or Services from the Co-Licensee within the previous 12 months, the Licensee shall:

2.10.1 notify the Co-Licensee that they have been contacted by the Customer;

2.10.2 make all reasonable efforts to ascertain from the Customer the reasons for seeking to change provider from the Co-Licensee to the Licensee, such efforts shall include notifying the Customer that this information will be shared with the Co-Licensee; and

2.10.3 if appropriate, agree with the Customer a period of not less than 3 months for the Co-Licensee to rectify the issues identified during the discussions with the Customer referred to at clause 2.10.2 above.

2.11 In the event that the issues identified by the Customer cannot be rectified within the 3 month period referred to at clause 2.10.3 above by the Co-Licensee, or it is not appropriate to try to do so, nothing in this Agreement shall prevent the Licensee from providing the Products and Services to the Customer of the Co-licensee.'

3.92 These clauses applied, for example, to any situation where Fenland was approached by a 'Prospective Customer' (that is, a customer not yet supplied by either Party) located in the Newbury Territory asking to be supplied '*to the explicit exclusion of*' Berendsen Newbury. In that situation, Fenland could only supply that customer if Fenland first obtained '*written confirmation*' from the customer that it wished to become a customer of Fenland and not Berendsen Newbury. The customer's details would then be added to the '*Central List*'. The same applied, vice versa, if Berendsen Newbury was approached by a '*Prospective Customer*' in the Fenland Territory.

3.93 Moreover, under clause 2.8 if Fenland was approached by any existing customer of Berendsen Newbury (i.e. whether or not that customer was located in the Fenland Territory), Fenland could only supply that customer if Fenland first ascertained whether Berendsen Newbury had served the customer in the preceding year. If Berendsen Newbury had done so, Fenland had to (i) notify Berendsen Newbury of the customer enquiry, (ii) make all reasonable efforts to ascertain why the customer wished to change provider and (iii) allow Berendsen Newbury some time to work on any issues with the customer. If any issues could not be rectified (or it was not appropriate to try and do so), Fenland could then supply the customer. If Berendsen Newbury had <u>not</u> served the customer in the preceding year, they were required to be treated as a 'Prospective Customer', that is, Fenland had to obtain '*written confirmation*' that the customer wished to be served by Fenland, not

Berendsen Newbury. The customer's details were then to be added to the '*Central List*'. The same applied, vice versa, if a Fenland customer approached Berendsen Newbury.

e. Subsequent agreement relating to '*restrictions on passive sales*'

3.94 In the months immediately after the Newbury Acquisition, the Parties discussed a possible '*passive compete clause*'. The aim of such a clause appears to have been as follows.

> '*Each Party to be free to respond to passive enquiries received from prospects in the other's territory or to respond to publically announced invitations to tender. Indeed these must be responded to without reference to the other party, on a proper commercial basis which is documented in each case.*'[168]

3.95 None of the references to '*passive*' sales or enquiries in the above proposal, or the evidence cited below in this Part 3.D.II.e., explicitly refers to any specific TMLA clause(s). The CMA has interpreted any such references as relating to clauses 2.6 and 2.8–2.11 of each TMLA.

3.96 The Parties did not replace the TMLAs with an updated version at this time, but did consider how to allow '*[e]ach Party to be free to respond to passive enquiries*' from prospective customers '*in the other* [Party]*'s territory*', and how this could be '*documented*' (as described in paragraph 3.94 above). This in turn, led to the actions detailed at paragraphs 3.97 to 3.101 below. Customers '*in the other* [Party]*'s territory*' are referred to as 'Out of Territory' customers.

3.97 In November 2014 and December 2014, the Fenland board discussed how: '*The passive competitive clause would need to be well managed and our responses to all sales enquiries and tenders would need to be well documented*'.[169] On 9 December 2014, Fenland noted that, to record sales enquiry responses, '[Fenland Director F] *had produced a form*' and '[Fenland Employee B] *will act as gatekeeper to track all out of area enquiries on a spreadsheet*'.[170] On 10 December 2014, [Fenland Director F] circulated within

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[168] This followed the proposal to maintain a '*No active selling into the other party's territory*' rule: URN 00068.16 (Fenland proposals following a meeting between '*Berendsen and Fenland*' on 6 October 2014, produced by [Fenland Director A] on 20 October 2014), as re-submitted on 21 October 2016, pp.1, 5 and 6.

[169] URN 00186.35 (Minutes of Fenland board meeting on 12 November 2014), paragraph 4.2; URN 00043.11 (Minutes of Fenland board meeting on 9 December 2014), paragraph 5.8. This quote appears to refer to the introduction, into one or both of the TMLAs, of a '*clause*'. However, as indicated by paragraph 3.96 above, the CMA has seen no evidence that any term of the TMLAs was in fact formally introduced, amended or removed before (or following) the date of the source document.

[170] URN 00043.11 (Minutes of Fenland board meeting on 9 December 2014), paragraph 5.8.

Fenland a draft record form, noting that '*[o]nce negotiations are complete and the form is approved for use we will use for any prospects which are in the Newbury area*'.[171]

3.98 On 23 February 2015 and 2 March 2015, the Parties exchanged letters (the 'Passive Sales Letters').[172] Those letters recorded the Parties' agreement that: (i) '*the restrictions on passive sales in the TMLA* [sic] *should be removed*'; (ii) '*delay in the formalisation of new agreements should not prevent us passively competing with each other*'; and (iii) each Party would '*not enforce any clauses in the* …[TMLAs] *that would prevent this passive competition*.'[173] The Parties appear not to have specified the TMLA clauses to be '*removed*' or '*not enforce[d]*' in any document seen by the CMA. In addition, no revised version of the TMLAs appears to have been produced or signed following the Passive Sales Letters.[174] Berendsen submitted that the Parties nonetheless reached, and were able to implement, an agreement to '*not enforce*' the '*restrictions on passive sales*'.[175]

3.99 On 1 March 2015, [Fenland Director A] forwarded copies of this correspondence internally within Fenland, noting that '*This is as discussed with [Berendsen plc Manager A] at Berendsen* [plc]*, and sets out the new position where we will compete with each other in a passive way (i.e. we will respond to enquiries we receive, but will not proactively solicit customers in Newbury's area)*'. [Fenland Director A] also wrote: '[Fenland Director F] – *You have produced a form to record our response to all such enquiries, so could you now ensure that this is used.*'[176]

3.100 The CMA has seen evidence that each Party responded to unsolicited Out of Territory customer enquiries following the Passive Sales Letters and, specifically, from at least March 2015 (that being the earliest date on any form

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[171] URN 01012 (email dated 10 December 2014 from [Fenland Director F] to Fenland's Directors).

[172] Fenland provided copies of these letters both during the CMA's review of *Fenland/Fishers*, and during this investigation: See, e.g., URN 00043.34 (Letter dated 2 March 2015 from [Fenland Director A]; letter dated 23 February 2015 from [Berendsen Newbury Director F]).

[173] The letters contained no references to any restrictions in the TMLAs on one Party making active sales into the other Party's territory; the CMA has therefore concluded that following this exchange, clauses 2.5 and 2.7 of each TMLA remained in force.

[174] For instance, Berendsen submitted that it was not '*aware, and has not been able to locate, any… form of joint venture agreement between the JV Partners*' other than the TMLAs: URN 00036.1 (full reference at footnote 97 above), paragraph 3.4.

[175] URN 01142 (Berendsen SO WRs), paragraphs 6.15–6.16.

[176] URN 01005 (email dated 1 March 2015 from [Fenland Director A] to [Fenland Director E], [Fenland Director F] and [Fenland Director C] (all of Fenland), provided to the CMA during the CMA's review of *Fenland/Fishers* on 2 October 2015). Within this email, [Fenland Director A] also stated that '*I will add this to the next Board Meeting for us to consider the implications*'; the CMA understands that the next two Fenland board meetings took place on 18 March 2015 and 8 April 2015, but the minutes of those meetings did not record any related discussion (URN 00186.41 and URN 00186.42).

used by Fenland to log Out of Territory customer enquiries).[177] Even after the Passive Sales Letters, Fenland continued to refer unsolicited Out of Territory customer enquiries to Berendsen Newbury: see paragraph 3.141 below.

3.101 In July 2015 Berendsen Newbury told its staff that *'our policy'* on *'unsolicited requests from companies*' was '*to follow-up on each prospective request and judge it on its merits'*.[178] Berendsen Newbury also told its staff that if they concluded *'that it does not make sense […] to make a bid'* in response to a passive sales enquiry then they *'should keep an internal record of the reasons for your decision'*, and a record form was designed for this purpose.[179] Berendsen Newbury submitted that its staff have never needed to complete the forms, as it was not aware of any instance in which it had received an unsolicited sales enquiry from an Out of Territory customer after the Passive Sales Letters and not bid in response.[180] That submission and internal notes described above in this paragraph are consistent with Berendsen Newbury's submission, in this investigation, in relation to its approach to opportunities to win new business of which it becomes aware.[181]

3.102 The CMA has seen no evidence of either Party considering (let alone responding to) any specific unsolicited Out of Territory customer enquiry before the Passive Sales Letters. This may be partly explained by Fenland having suffered a significant data loss in April 2015 (and a lack of certain data on the period between May 2012 and the end of 2013), and/or by Berendsen Newbury's limited access to records pre-dating the Newbury Acquisition.[182]

3.103 Fenland submitted that a '*passive compete clause*' was not necessary – as '*throughout the Relevant Period* [i.e. including late 2014 and early 2015] *each Party was permitted to make passive sales to customers in the other Party's territory*', but neither Party (for commercial reasons, and in view of natural constraints in the market) had much incentive to do so.[183] Fenland submitted

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[177] See, e.g., URN 00186.94 (a reworked version of URN 00055.19), URN 00186.71, URN 00186.88, URN 00186.82, and URN 00067.2 (full reference at footnote 130 above), Figure 3.2. Fenland submitted that it used these forms between late 2014 and April 2016: URN 01237 (Fenland response dated 15 June 2017 to Questions 1–3 of the Fifth Fenland Notice), p.15 (response to Question 3).
[178] URN 00067.13 (Berendsen Newbury competition law guidelines on the Joint Venture), pp.5 and 6 (at paragraphs 2.2 and 2.4 respectively). These guidelines date from 2015: see URN 00067.2 (full reference at footnote 130 above), footnote 77. These internal statements are consistent with the Berendsen Newbury submissions, in this investigation, at URN 00193.1 (full reference at footnote 135 above), paragraphs 5.12–5.13 and 12.2.
[179] URN 00193.103 (Appendix 2 dated 15 July 2015 to Competition Law Guidelines in regard to joint-venture Fenland: No bid log on passive selling request).
[180] URN 00968.1 (Berendsen response of 27 October 2016 to CMA questions of 19 October 2016), p.2.
[181] URN 00193.1 (full reference at footnote 135 above), paragraphs 5.12–5.13 and 12.2.
[182] See, e.g., URN 00037.1 (full reference at footnote 23 above), pp.2–3 (response to Question 7), and URN 00068.1 (full reference at footnote 23 above), paragraph 9.1.
[183] URN 01139 (Fenland SO WRs), paragraph 5.74.

that under the TMLAs customers were ultimately free to choose their supplier, and each Party was free to respond to passive sales enquiries from Out of Territory customers.[184] The CMA acknowledges that each Party gained certain Out of Territory customers before and during the Relevant Period, and notes the provisions regarding prospective customers in clause 2.6 of each TMLA. However, this does not undermine the CMA's view that the Restrictions restricted competition between the Parties, for the following reasons.

a. Neither Party could '*actively solicit new business*' from Out of Territory customers, or the other Party's customers more generally, given clauses 2.5 and 2.7 of each TMLA: see Part 3.D.II.c. above. This restricted the extent to which each Party could promote itself to customers and, in turn, restricted the extent to which customers would be aware of, and could be offered, a choice of two suppliers both using the Micronclean Brand.

b. The Addressees have acknowledged that, in order to implement the allocation of territories and customers in accordance with the TMLAs, each Party would in principle refer enquiries from Out of Territory customers, and/or the other Party's customers, to the other Party – in particular, before the Passive Sales Letters (see Part 3.D.III.d. below). This significantly limited any competition between the Parties in respect of these customers.

c. Fenland has provided no contemporaneous evidence to support its submissions in this regard. Indeed, its submissions seem at odds with the Parties' contemporaneous discussions noted at paragraph 3.94 above and internal notes described at paragraphs 3.97, 3.99 and 3.101 above (in particular, Fenland's note that the Passive Sales Letters in February/March 2015 reflected '*the new position where we will compete with each other in a passive way*': see paragraph 3.99 above).

3.104 Similarly, Fenland submitted that, had the TMLAs been still in force, it would have responded to customers' passive sales enquiries, such as those in respect of the two Out of Territory sites referred to in paragraphs 3.156 and 3.157 below, in '*the same way*' as Fenland responded after termination of the

[184] See, e.g., URN 00186.1 (full reference at footnote 133 above), p.16 (response to Question 4.a.), e.g.: '*[T]he TMLAs permitted Fenland and Newbury to respond to approaches made by customers in the other party's territory. Specifically, clause 2.6 in effect provided that a prospective customer in one party's territory could purchase from the other party if it wanted to (although, formally, the TMLAs required written confirmation from the customer that they wished to buy from that party). In practical terms, Fenland has always taken the view that, if a customer in Newbury's territory wanted to be supplied by Fenland then this was possible (and vice versa).*' See also, e.g., URN 01220 (full reference at footnote 30 above), p.53, line 20 to p.54, line 2, in relation to customers requesting supply by Fenland.

Joint Venture.[185] To the extent that this submission relates to the TMLAs before the Passive Sales Letters,[186] the CMA rejects this submission. Before the Passive Sales Letters, Fenland's response to passive sales enquiries from Out of Territory customers would have been limited by clauses 2.6 and 2.8–2.11 of each TMLA, and the fact that each Party would in principle refer enquiries from Out of Territory customers, and/or the other Party's customers, to the other Party (see Part 3.D.III.d. below). The CMA recognises that Fenland's responses to passive sales enquiries from Out of Territory customers after the Passive Sales Letters but before the termination of the Joint Venture may have been the same as its responses to passive sales enquiries after the termination of the Joint Venture (including termination of the TMLAs). In any event, the CMA notes Fenland's submission, made in response to a question about how things have changed since the Joint Venture was terminated, that '*[c]learly we* [i.e. Fenland] *are now responding to looking at any queries that come in from wherever they are*'.[187]

III. Territorial and customer allocation in practice

3.105 During the Relevant Period, the Parties implemented the territorial and customer allocation envisaged under the TMLAs. As set out more fully in this Part 3.D.III., the Parties did so by:

a. exchanging maps and lists of one Party's customers in a territory allocated to the other Party (see paragraphs 3.107 to 3.119 below);

b. serving portions of 'sub-contracted' or 'joint framework' contracts with customers which had sites across GB in line with the allocation of territories between the Parties (see paragraphs 3.120 to 3.124 below);

c. each Party agreeing that certain customers in its territory were to be served by the other Party (see paragraphs 3.125 to 3.129 below); and

d. referring customer enquiries and leads to each other, in line with the allocation agreed (see paragraphs 3.130 to 3.141 below).

3.106 The CMA considers that the points noted above comprise examples of the Parties' implementation of the allocation of territories and customers that the

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[185] See e.g. URN 01279 (How Fenland gained customers attachment to Fenland response dated 23 June 2017 to the Fifth Fenland Notice), p.1 (third and sixth rows); URN 01441 (full reference at footnote 43 above), rows 16 and 18 (at pp.18 and 19–20). For similar submissions in relation to other Out of Territory enquiries, see e.g. URN 01279, p.1 (fourth and fifth row) and p.2 (first row).
[186] The CMA has interpreted this submission as relating to the TMLAs before the Passive Sales Letters. This is on the basis of evidence suggesting that Fenland may have bid for one of these two sites three months or so before the termination of the Joint Venture (i.e. when the TMLAs were still in force), and eight months or so after the Passive Sales Letters: see footnote 271 below.
[187] URN 01220 (full reference at footnote 30 above), p.54 at lines 7–8.

Parties envisaged under the TMLAs, rather than separate infringements in their own right. The Parties implemented that allocation, as summarised in the points above, notwithstanding each Party's ability to compete with the other Party to a greater extent, including for more Out of Territory customers in the Relevant Markets, during the Relevant Period (on which, see Part 3.E. below).

a. Territorial/customer allocation through lists and maps

3.107 Each TMLA referred to a '*Central List*', which was defined as a list of the Parties' customers and prospective customers. The TMLAs required that the '*Central List*' was updated with details of new customers gained with the consent of the Parties or the written confirmation from the customer.[188]

3.108 Fenland submitted that '*[n]o 'central list' was comprehensively put together by Fenland and Berendsen Newbury and the lists that were exchanged were not actively monitored.*'[189] However, as set out in this Part 3.D.III.a., during the Relevant Period customer lists were: (i) exchanged at least three times – namely, in May/June 2012, January 2014 and December 2014; (ii) mentioned regularly at the Parties' board and other internal meetings; and (iii) updated from time to time, to reflect customers won and lost.[190] The exchange of these lists allowed each Party to monitor over time, for example, the number and identities of customers in its own territory which were being served by the other Party. This, in turn, enabled the Parties to monitor compliance with clauses 2.5–2.11 of each TMLA (see paragraphs 3.88 to 3.93 above).

Lists/maps dating from around the time that the TMLAs were entered into

3.109 On 31 May 2012, one day after signing each of the TMLAs, [Berendsen Newbury Director A] sent an email entitled '*Trademark Licence agreement*' to [Berendsen Newbury Director C], stating that '*This is now signed. The final piece needs* [sic] *to be put in place is a list of Newbury and Skegness customers in each other's territory. Please can you oblige on behalf of Newbury?*' On 7 June 2012 [Berendsen Newbury Director C] sent a list of Berendsen Newbury customers in the Fenland Territory to [Fenland Director A].[191] Fenland submitted that around this time it may have sent a similar list to Berendsen Newbury, but '*cannot find any record of this*.'[192]

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[188] Clauses 1.1.2 and 2.4–2.6 of URN 00036.8 (Fenland TMLA) and of URN 00036.9 (Newbury TMLA).
[189] URN 00050.1 (full reference at footnote 65 above), p.5.
[190] See, e.g., URN 00036.85 (Berendsen Newbury presentation dated 5 October 2015 titled '*Fenland Laundries Status Update*'): p.4 refers to '*Areas for discussion*', including '*register of accounts that are served outside territory*'.
[191] URN 00043.48 (full reference at footnote 158 above), pp.1–2.
[192] See footnote 158 above.

3.110 On 8 June 2012, [Fenland Director A] responded, saying: '*I will add them to the "Central List"*'. This list took the form of the spreadsheet that '*formed the starting point of a* '*central list"*. It appears to show all customers of each Party, including the contract value per customer, and whether the customer was based '*in* [the] *Newbury* [Territory]' or '*in Skegness* [i.e. the Fenland Territory]'.[193] The CMA has therefore inferred that this list was the result of the Parties having compiled the details of each Party's respective customers, both in its own territory and Out of Territory, within one file before the start of the Relevant Period.

Other lists/maps dating from the Relevant Period

3.111 On 27 February 2013, it was noted at a JVCo board meeting that Fenland had '*obtained a spreadsheet with all customers listed by deliver* [sic] *location but had not yet sorted these into the two territories. This will be carried forward to the next meeting*'.[194]

3.112 In June 2013, [Berendsen Newbury Director C] forwarded a list of customers exchanged in 2009 (see **Annex D**, paragraphs D.19 to D.21) internally to [Berendsen Newbury Director E] – who asked, in reply, whether '*we* [i.e. Berendsen Newbury] *have more in their territory* [i.e. the Fenland Territory] *or theirs in ours*'. [Berendsen Newbury Director C] responded that the '*[s]hort answer is I am not too sure … however my guess is that it is about even. Please see my notes from several years ago when we last discussed this with them*'.[195] The handwritten notes attached, likely dating from November 2009,[196] mentioned Fenland customers in the Newbury Territory, and Berendsen Newbury customers in the Fenland Territory.

3.113 Following *Micronclean/Guardline*, the Parties allocated Guardline's business between themselves, including by reference to the Fenland Territory and the Newbury Territory. Fenland provided a copy of a map which appears to date from 20 September 2013 and to show the line dividing the territories then allocated to the Parties (see **Annex E**, Figure E1). Guardline customers were allocated between the Parties in line with '*the Postcode District trading area allocated to either Newbury or Fenland based on the cleanroom laundry*

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[193] URN 00068.2 (email chain dated 7–8 June 2012 between [Berendsen Newbury Director C] and [Fenland Director A]); see footnote 158 above.
[194] URN 00043.26 (Minutes of JVCo board meeting on 27 February 2013), point 3.
[195] URN 00068.3 (emails from November 2009 between [Fenland Director A], [Berendsen Newbury Director C], and others – followed by internal emails within Berendsen from June 2013), p.2.
[196] URN 00068.4 (Note from [Berendsen Newbury Director C] re Territories (undated)). The CMA has inferred that these may date from November 2009 from the reference in the cover email to '*my notes from several years ago*' and the fact that the weekly values for Fenland's customers in Berendsen Newbury's territory in those notes correspond with those mentioned in Fenland's '*listing of all customers in Newbury's territory*' of November 2009 (URN 00068.12).

territories', subject to any '*manual …adjustments… agreed by all parties at the time*'.[197]

3.114 On 12 January 2014, Fenland sent to Berendsen Newbury '*a list of all Fenland accounts in Newbury's area*' and a map generated by MapPoint software.[198] On 16 January 2014, [Berendsen Newbury Director C] sent an internal email to [Berendsen Newbury Director A], stating '*I reckon they have poached without telling us the following in the last 3 or so years since they previously declared*'. The email then listed seven Fenland customers in the Newbury Territory. [Berendsen Newbury Director A] forwarded this email to [Fenland Director F] on the same date, asking for '*[a]ny comments on the quiet please?*'. [Fenland Director F] responded on the same date, setting out '*what I have sent to* [Fenland Director A]' (which included brief comments on each of the customers mentioned in the list sent by [Berendsen Newbury Director C]).[199]

3.115 The first agenda item for a JVCo board meeting on 16 January 2014, was '*Agreement of Customers in Each Territory*'.[200] [Fenland Director A]'s handwritten notes of that meeting stated that '*Newbury agreed Fenland's list*', and that he was to '*e-mail* [Berendsen Newbury Director E] *with territory listing*'. Furthermore, those handwritten notes confirmed for '[Berendsen Newbury Director C] – *No change from previous*' – and included an action point to '*circulate combined spreadsheet*'.[201]

3.116 On 17 January 2014, [Berendsen Newbury Director C] sent to [Berendsen Newbury Director A] internally a list of Berendsen Newbury customers in the Fenland Territory, adding that '*[w]e have been serving all of these for over 4 years (apart from the workwear at [Berendsen Newbury Customer A] which transferred 3 years ago) so there should not be any surprises*.[202] That list

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[197] URN 00186.120 (email dated 7 May 2015 from [Fenland Director A] to [Berendsen Newbury Director J] and [Berendsen Newbury Director E]), p.1; URN 00193.6 (email dated 26 September 2013 from [Fenland Director A] to [Berendsen Newbury Director E] and others), p.1.

[198] URN 00068.5 (email dated 12 January 2014 from [Fenland Director A] to [Berendsen Newbury Director A] and others). The '*list of all Fenland accounts in Newbury's area*' has been provided to the CMA as URN 00043.47. The map file entitled '*Fenland Customers in Territories.ptm*' was provided to the CMA as URN 00193.4.

[199] URN 00068.7 (full reference at footnote 159 above).

[200] URN 01017 (document entitled '*MC Ltd Board Meeting Agenda 2014-01-16.doc*', provided by Fenland to the CMA during *Fenland/Fishers* on 2 October 2015), point 1.

[201] URN 00043.24 (Notes from JVCo board meeting on 16 January 2014), p.1. Fenland submitted that these notes were dated '*"16/01/13"… this date is an error, and …the meeting …actually took place on 16 January 2014*': see URN 00037.1 (full reference at footnote 23 above), p.2 (response to Question 4).

[202] URN 00068.9 (email dated 17 January 2014 from [Berendsen Newbury Director C] to [Berendsen Newbury Director A] re Newbury accounts in Fenland's area).

showed 12 Berendsen Newbury customers in the Fenland Territory,[203] On the same day, [Berendsen Newbury Director A] forwarded it to Fenland.[204]

3.117 The minutes of a JVCo board meeting on 17 June 2014 noted that [Fenland Director A] was '*to provide a list of territories and any anomalous customers for review by both parties*'.[205]

3.118 On 17 November 2014, the Parties discussed Fenland's proposals for the Micronclean Brand. A record of this meeting noted that [Fenland Director A] was to '*send to* [Berendsen Newbury Director G] *a list of postcodes in Excel format and a MapPoint file that shows the territories as he understands them*' and [Berendsen Newbury Director G] would '*supply a list of segments for agreement at the next meeting*'.[206]

3.119 On 2 December 2014, [Fenland Director A] sent to Berendsen Newbury '*a spreadsheet listing territories as I understand them, and a MapPoint File mapping these*'. [Fenland Director A] also stated, in the relevant cover email, that he had '*not cross referenced this data back to the territories on the 2012 Trademark User Agreements* [i.e. the TMLAs] *(also attached), but the data should match*'.[207]

b. Territorial allocation of parts of GB-wide contracts

3.120 Certain customers operated multiple sites across GB, with at least one site in each of the Newbury Territory and the Fenland Territory. Some of those customers were served by both Parties, under GB-wide contracts ('Shared Customers'). This Part 3.D.III.b. contains a summary of the Shared Customers – in Table 1 immediately below – and how the Parties supplied Cleanroom Laundry Services and/or Consumables to them during the Relevant Period.

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[203] URN 00068.10 (Micronclean Newbury accounts in Fenland's Territory Spreadsheet (undated)). Fenland also provided a copy of this list, as URN 00186.61 (Newbury Accounts in Fenland Area spreadsheet), which Fenland described as being dated '*17/01/2014*': see URN 00186.2 (Fenland document register dated 6 August 2016). Fenland described its duplicate, URN 00043.46, as being dated '*13/02/2014*': see URN 00073.1 (Fenland document register dated 27 April 2016).

[204] URN 01015 (email dated 17 January 2014 from [Berendsen Newbury Director A] to [Fenland Director A], attaching document entitled '*Newbury accounts in Fenland's area.xlsx*').

[205] URN 00043.23 (Minutes of JVCo board meeting on 17 June 2014), point 7.

[206] URN 00043.14 (full reference at footnote 120 above), p.1 (under '*"Option 3" – Licensing Option*').

[207] URN 00193.11 (email dated 2 December 2014 from [Fenland Director A] to [Berendsen Newbury Director G]). For the relevant spreadsheet and map, see URN 00186.65A ('Combined Customers 2010-06-22.xls') and URN 00186.65E ('2012 Territories.pdf') respectively (each an attachment to URN 00186.65, which was returned on the basis that it was a duplicate of URN 00193.11).

Table 1: Parties' sub-contracted and 'joint' Shared Customers during the Relevant Period[208]

Shared Customer	Contract type/ comments	Portion of contract serviced by Berendsen Newbury	Portion of contract serviced by Fenland
[Shared Customer A][209]	'Sub-contracted'	[Shared Customer A sites 1-5] and [Shared Customer A site 6 (in London)][210] [Shared Customer A site 7] *(from April 2015 onwards)*[211]	[Shared Customer A sites 8-11] and [Shared Customer A site 6 (in London)]
[Shared Customer B]	'Sub-contracted'	[Shared Customer B site 1]	[Shared Customer B site 2]
[Shared Customer C]	'Sub-contracted'	[Shared Customer C site 1]	[Shared Customer C sites 2-3]
[Shared Customer D]	Joint framework	[Shared Customer D sites 1-2]	[Shared Customer D sites 3-12]
[Shared Customer E][212]	Joint framework	[Shared Customer E sites 1-2]	[Shared Customer E sites 3-7]

3.121 Fenland and Berendsen described as a 'sub-contracted' contract one which was awarded to one Party only (the 'main contact'), albeit in the knowledge that certain locations to be supplied under the contract would be serviced by the other Party (in line with the territorial allocation agreed between the Parties). The main contact would then discuss, and enter into a sub-contract

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[208] URN 00186.1 (full reference at footnote 133 above), pp.19–24 (response to Questions 5 and 6); URN 00186.114 ('Customers purchasing under sub-contracting and joint framework arrangements'); in these submissions, Fenland did not refer to [Shared Customer A site 7]. URN 00193.1 (full reference at footnote 135 above), pp.13–18; in these submissions, Berendsen did not refer in this context to either [Shared Customer D] or [Shared Customer E].

[209] In the submissions referenced in footnote 208 above, Fenland and Berendsen respectively referred to a customer called '*[Shared Customer A]*' and '*[Shared Customer A]*'. These terms appear to refer to the same customer: for example, Berendsen stated that '*[Shared Customer A] was a predecessor of [Shared Customer A]*': URN 01253 (full reference at footnote 96 above), footnote 15.

[210] In the submissions referenced in footnote 208 above, Fenland and Berendsen each submitted that it served [Shared Customer A site 6 (in London)]; Fenland stated that it served [Shared Customer A site 5] not referred to by Berendsen.

[211] '[✂]' refers to the [Shared Customer A site 7]. Berendsen Newbury submitted that it supplied [Shared Customer A site 7] under a separate agreement '*between 2011 and April 2015*', at which point '*[Shared Customer A] decided to bring the [Shared Customer A site 7] contract under its national contract with Fenland (as the main contracting party)*', after which '*supply to [Shared Customer A site 7] was also sub-contracted to Berendsen Newbury by Fenland under this national contract*': see URN 01253 (full reference at footnote 96 above), paragraphs 8.1–8.5.

[212] Fenland submitted that it also served [Shared Customer E site 2], supplying general workwear; it is not clear to the CMA whether Fenland supplied any Cleanroom Laundry Services to [Shared Customer E site 2]. Table 1 aims to reflect only activities in the Relevant Markets; however, Fenland submitted that it also supplied workwear to [three other Shared Customer E sites]. In any event, Fenland submitted that any joint framework between [Shared Customer E] and both Parties was replaced by separate framework arrangements between [Shared Customer E] and each Party, in 2015: see the Fenland submissions referenced in footnote 208 above.

as necessary, with the other Party. The sub-contractor would invoice the main contact, and the customer would pay only the main contact.[213]

3.122 Fenland and Berendsen described as a 'joint' contract one which they were awarded together, albeit on the basis that each Party would service different sites covered by the contract (in line with the territorial allocation agreed between the Parties in accordance with the TMLAs). Fenland submitted that '*[u]sually one of the …*[Parties] *would take the lead in negotiating*'. The customer would negotiate national framework terms from which the '*customer's sites could call off*', and the relevant site(s) '*would then enter into a contract with the local Microclean operator at the framework prices*'.[214]

3.123 The Addressees submitted that Shared Customers served as described at paragraphs 3.121 and 3.122 above were aware of which Party would service which site(s)[215] – and derived benefits from these arrangements (e.g. single national contract, more 'local' supplier being able to offer lower pricing and/or security of supply).[216] The CMA has assessed any submissions on the alleged benefits to Shared Customers at Parts 5.F. and 5.J. of this Decision.

3.124 The Shared Customer arrangements provided examples of the Parties having implemented the territorial allocation under the TMLAs. Fenland served each Shared Customer site located in the Fenland Territory, while Berendsen Newbury served each Shared Customer site located in the Newbury Territory.[217] These arrangements were agreed notwithstanding each Party's ability to compete for at least some of the 'Out of Territory' sites of a Shared Customer allocated to the other Party: see e.g. paragraphs 3.164 and 3.193.a. below. The CMA makes no finding on whether either Party could have bid for all sites of all Shared Customers on its own, or whether the Shared Customer

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[213] Generally, customer queries during the contract tended to go to the main contact – [Shared Customer A] being an exception, as it sent queries emanating within the Newbury Territory direct to Berendsen Newbury, the 'sub-contractor' on the relevant contract. See URN 00186.1 (full reference at footnote 133 above), p.19 (response to Question 5); URN 00193.1 (full reference at footnote 135 above), paragraphs 5.6–5.8. For an example of a customer having been directed to negotiate with the main contact, who would then sub-contract with the other Party, see URN 00043.38 (emails dated 13 December 2012 regarding [Shared Customer C]).

[214] URN 00193.1 (full reference at footnote 135 above), paragraphs 5.15–5.18; URN 00186.1 (full reference at footnote 133 above), p.19 (response to Question 5).

[215] URN 01139 (Fenland SO WRs), paragraphs 5.40.2 and 5.43 (cross-referring to URN 00186.1 (full reference at footnote 133 above), p.19 (response to Question 5)); URN 01142 (Berendsen SO WRs), paragraphs 3.42(a) and 6.9.

[216] URN 01139 (Fenland SO WRs), paragraphs 5.40.3 and 5.44 (each cross-referring to URN 00186.1 (full reference at footnote 133 above), p.19 (response to Question 5)); URN 01142 (Berendsen SO WRs), paragraphs 3.27–3.28 and 6.10–6.12; URN 01216A (full reference at footnote 31 above), p.10 at lines 2–4.

[217] Although each Party stated that they served [Shared Customer A site 6 (in London)], which is in the Newbury Territory: see footnote 210 above.

arrangements in themselves infringe competition law.[218] Rather, the CMA has described these Shared Customer arrangements since their agreement and implementation during the Relevant Period[219] was in line with the territorial allocation agreed between the Parties, and therefore constitutes evidence of implementation of the Restrictions relating to territorial allocation. This remains the case irrespective of whether any Shared Customer was aware of, and/or derived any benefits from, the arrangements.

c. Allocation of specific customers not based on territory

3.125 In accordance with the terms of the TMLAs, customers were allocated between the Parties primarily on the basis of territory. However, the Parties envisaged some exceptions to such territorial allocation, namely the Parties agreed that each Party had a limited number of customers located in the territory allocated to the other Party. This is consistent with the Parties' discussions at JVCo board meetings in June and July 2011 (see paragraphs 3.67 to 3.73 above), and the fact that clauses 2.7 and 2.8 of each TMLA were not limited to customers in the relevant '*Territory B*' (see paragraphs 3.88 to 3.93 above). To this end, the Parties noted in a JVCo board meeting on 18 July 2011 that they intended to exchange lists '*of all customers in the other's territory for approval*' (see paragraph 3.73 above). Similarly, during the Relevant Period, the minutes of a JVCo board meeting on 17 June 2014 noted that [Fenland Director A] was '*to provide a list of territories and any anomalous customers for review by both parties*'.[220]

3.126 Through the Parties' exchange of details on respective '*anomalous customers*', each Party clarified its existing Out of Territory customers, and reviewed (and gave '*approval*' to) the other Party's Out of Territory customers. Out of Territory customers were then allocated to the relevant Party, and protected under clauses 2.7 and 2.8 of each TMLA. This is consistent with the Parties' agreement in 2011 that '*[a] register of agreed cross border customers will be kept to avoid uncertainty in the future*' (see paragraph 3.68.b. above). Set out in this Part 3.D.III.c. are some further details on such customers.

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[218] For example, Berendsen submitted that neither Party would have been able to service any such national contracts on its own, and that such arrangements raised no competition law concerns: URN 01142 (Berendsen SO WRs), e.g. at paragraphs 3.27, 6.8 and 6.10–6.11; URN 01216A (full reference at footnote 31 above), p.10 at lines 2–4.

[219] Arrangements relating to [Shared Customer B] began mid-way through, and continued until after the end of, the Relevant Period. The [Shared Customer E] joint framework ended before the end of the Relevant Period. See further URN 00186.114 ('Customers purchasing under sub-contracting and joint framework arrangements').

[220] URN 00043.23 (full reference at footnote 205 above), point 7.

Customers in the Newbury Territory but allocated to Fenland

3.127 The Parties agreed that Fenland would serve certain customers located in the Newbury Territory. For example, on 12 January 2014, Fenland sent to Berendsen Newbury '*a list of all Fenland accounts in Newbury's area*' (see paragraph 3.114 above). A Fenland internal note on the same date indicates that these Out of Territory customers operated in various sectors – e.g. '*NHS*', '*Pharmaceutical*', '*Healthcare*' and '*Medical Devices*'. Those notes do not indicate the reason why Fenland served each Out of Territory customer listed, but do indicate that some were served as part of a customer's group-wide contract, and/or had '*[h]istorically been with Fenland*' (or been '*Fenland customer for* > [i.e. longer than] *10 years*').[221] At a JVCo Board meeting on 16 January 2014 '*Newbury agreed Fenland's list*'.[222] As the Parties agreed that certain customers located in the Newbury Territory would be allocated to Fenland, Berendsen Newbury agreed not to compete for those customers.[223] Indeed, in 2014 Berendsen Newbury passed to Fenland an enquiry from one of those customers (see paragraph 3.139 below).

Customers in the Fenland Territory but allocated to Berendsen Newbury

3.128 The Parties agreed that Berendsen Newbury would continue to serve a number of customers in the Fenland Territory at around the time that the Parties entered into the TMLAs. On 7 June 2012, one week after the TMLAs were signed, [Berendsen Newbury Director C] emailed a list of Berendsen Newbury customers located in the Fenland Territory to [Fenland Director A].[224] This list appears to feature, for example, all of the '*Newbury in Skegness*' customers listed in the spreadsheet that '*formed the starting point of a 'central list"* (see paragraph 3.109 above).

3.129 Berendsen Newbury continued to serve certain customers located in the Fenland Territory during the Relevant Period. To this end, the CMA has also

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[221] URN 00186.62 ('Fenland Accounts in Micronclean Newbury Area' spreadsheet dated 12 January 2014), pp.1–2. The CMA notes that this list includes (i) some customers to which no sales values were attributed, and/or (ii) numerous duplicate entries. The list also includes some customers in sectors including '*Food*' and '*Industrial*', on which see paragraphs 5.21–5.31 below. Fenland also submitted that (i) all bar seven of the customers in that list were located close to the border between the Parties' territories, and (ii) the seven apparent outliers were invoice addresses (not delivery addresses), related to a trial that did not translate into an ongoing contract, or were a syringes/sterile packs account (on which, see footnote 11 above): URN 01441 (full reference at footnote 43 above), row 36 (at pp.39–40), and URN 01443 (Map (Document 0030611) submitted by Fenland on 6 November 2017 in response to the Letter of Facts). Some of these 'outliers' were also mentioned in the [Fenland Director F] notes referred to at paragraph 3.114 above.

[222] See paragraph 3.115, and footnote 201, above.

[223] URN 00036.9 (Newbury TMLA), clauses 2.7 and 2.8.

[224] URN 00043.48 (full reference at footnote 158 above), p.1.

seen lists[225] of Berendsen Newbury customers located in the Fenland Territory dating from January/February 2014 and late 2015.[226] The former list, for example, suggests that most of these Berendsen Newbury Out of Territory customers were active in the '*NHS*' and '*Pharmaceutical*' sectors, with some others in the '*Medical*' and '*Precision Eng*' sectors.[227] That list does not indicate the reason why Berendsen Newbury served each Out of Territory customer listed, but does indicate that one such customer relocated from the Newbury Territory to the Fenland Territory.[228] As the Parties agreed that certain customers located in the Fenland Territory would be allocated to Berendsen Newbury, Fenland agreed not to compete for those customers.[229]

d. Referring of customers from one Party to the other Party[230]

3.130 The Addressees submitted that, in order to implement the allocation of territories and customers (as described in Part 3.D.II. above), each Party would refer Out of Territory customer enquiries to the other Party.

a. Fenland submitted that *'[i]f the territorial restrictions were in place, they territorially assign the customers. It is only if the customer […] specifically wanted to work with the other partner that they would do*'. Hence, if a prospective Out of Territory customer approached Fenland, then in principle Fenland's first reaction would be to refer that customer to that customer's 'normal supplier', i.e. Berendsen Newbury. That was the case even if the customer in question was located within a '*viable transport distance*' for Fenland to service.[231]

b. Similarly, Berendsen submitted that: (i) '*where a prospective customer located in Fenland's area contacted a Microncl*ean email address

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[225] See footnote 203 above, and URN 00994 (Attachment entitled 'Q1_Customer list incl process' to Berendsen Newbury reply of 4 November 2015 to CMA *Fenland/Fishers* questions of 26 October 2015).
[226] Berendsen noted that this information would need to be updated if provided now: URN 01018 (Berendsen submission of 22 November 2016 in relation to the updating of information). However, for the purposes of this investigation the CMA did not re-request from Berendsen the information, as the information was correct during the Relevant Period (to which the case is scoped).
[227] 12 Berendsen Newbury customers are listed in URN 00186.61 (Newbury Accounts in Fenland Area spreadsheet), of which 7 are labelled as in the '*NHS*' sector, and 2 in the '*Pharmaceutical*' sector. The CMA infers that '*Medical*' refers to customers in the medical devices sector, and that '*Precision Eng*' refers to customers in the precision engineering sector.
[228] One customer had '*[t]ransferred from [Oxfordshire] main site*'. [Oxfordshire] has the postcode OX[✂], which is listed in Schedule 3 of the Fenland TMLA as being in '*Territory B*', i.e. the Newbury Territory: see URN 00036.8 (Fenland TMLA), p.19.
[229] URN 00036.8 (Fenland TMLA), clauses 2.7 and 2.8.
[230] For brevity, in this Part 3.D.III.d., due to the volume of references made, footnotes refer to examples of customer enquiries only by unique reference number (URN), not document names or descriptions.
[231] Fenland also submitted that it *'probably would not be able to serve them* [customers in the Newbury Territory] *unless they were close to the boundary'*. See URN 01220 (full reference at footnote 30 above), p.73, line 1, to p.74, line 7.

belonging to Berendsen Newbury in order to enquire about, or place, a new order, Berendsen Newbury would forward the enquiry onto the correct contact at Fenland to enable them to respond'; and (ii) '*where a prospective customer located in Berendsen Newbury's area contacted a Micronclean email address belonging to Fenland in order to enquire about, or place, a new order Fenland would forward the enquiry onto the correct contact at Berendsen Newbury to enable them to respond'*.[232]

Sample of 44 examples of customer enquiries

3.131 Berendsen provided the CMA with email correspondence showing 44 examples of customer enquiries relating to one or more of the Relevant Markets having been referred by one Party to the other Party ('Customer Enquiry Examples').[233] At least 7 Customer Enquiry Examples involved enquiries about Cleanroom Laundry Services,[234] and at least 25 others involved enquiries about Consumables.[235] The remaining 12 do not identify the relevant services and/or products clearly.[236] The Customer Enquiry Examples comprise a sample, rather than a comprehensive list, of customer enquiries relating to one or more of the Relevant Markets which were referred by one Party to the other Party.[237] These examples indicate that the Parties referred customer enquiries, in order to implement the territorial and customer allocation in the TMLAs – albeit without any reference to the related processes set out in clauses 2.6 and 2.8–2.10 of each TMLA.

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[232] URN 00068.1 (full reference at footnote 23 above), paragraphs 1.6(d) and 1.6(e).
[233] URNs 00193.17–00193.79. While 63 documents were provided, 16 were attachments to emails provided, so did not constitute separate enquiries. 2 other documents related to products which are not within the Relevant Markets, and 1 other document was duplicative of another within this set.
[234] URNs 00193.22–00193.23 (pair of documents comprising an email and attachment in relation to a single enquiry); URN 00193.65; URN 00193.69; URN 00193.73; URN 00193.74; URN 00193.76; URN 00193.79. In URN 00193.1 (full reference at footnote 135 above) paragraphs 3.5.(a)(i), 3.5.(b)(i) and 3.10, Berendsen submitted that the following 4 documents also related to Cleanroom Laundry Services: URN 00193.26; URN 00193.75; URN 00193.77; URN 00193.78.
[235] URNs 00193.17–00193.18*; URN 00193.19; URNs 00193.24–00193.25*; URNs 00193.27–00193.28*; URNs 00193.29–00193.30*; URN 00193.31; URN 00193.33; URN 00193.36; URNs 00193.37–00193.38*; URNs 00193.39–00193.40*; URNs 00193.41–00193.42*; URN 00193.44; URN 00193.46; URNs 00193.47–00193.48*; URNs 00193.49–00193.50*; URNs 00193.52–00193.53*; URN 00193.56; URN 00193.58; URN 00193.59; URNs 00193.60–00193.61*; URNs 00193.62–00193.63*; URN 00193.64; URN 00193.66; URNs 00193.67–00193.68*; URNs 00193.70–00193.71*. Pairs of documents marked with a * comprise an email and attachment regarding a single enquiry. In URN 00193.1 (full reference at footnote 135 above), paragraphs 3.5(b)(ii), 3.8–3.9, Berendsen submitted that the following 8 documents were also related to Consumables: URN 00193.32; URN 00193.34; URN 00193.43; URN 00193.45; URN 00193.51; URN 00193.54; URN 00193.57; URN 00193.72.
[236] URN 00193.26; URN 00193.32; URN 00193.34; URN 00193.43; URN 00193.45; URN 00193.51; URN 00193.54; URN 00193.57; URN 00193.72; URN 00193.75; URN 00193.77; URN 00193.78. Berendsen stated that 4 of these documents were related to Cleanroom Laundry Services, and 8 to Consumables: see footnotes 234 and 235 above.
[237] URN 00193.1 (full reference at footnote 135 above), paragraph 3.1.

The referring of enquiries from prospective new customers

3.132 The Customer Enquiry Examples appear to have been referred by one Party to the other Party for a number of reasons, including those set out below.

a. An enquiry directed to one Party from a prospective new customer was referred by that Party to the other Party, in line with the territorial allocation agreed between the Parties. This is consistent with the submissions summarised at paragraph 3.130 above.[238]

b. An enquiry directed to one Party from a prospective new customer (from that Party's perspective) was referred by that Party to the other Party, in line with the customer allocation (i.e. on the basis of being a pre-existing customer, irrespective of territory) agreed between the Parties.[239]

c. An enquiry through the central Micronclean Consumables website was referred to Berendsen Newbury, when the enquiry was from a prospective new customer located in the Newbury Territory.[240]

3.133 Each of the 10 Customer Enquiry Examples referred to at paragraph 3.132 above involved prospective new customers (from the perspective of the Party receiving it). That was consistent with how, in principle, the Addressees submitted each Party should have responded to Out of Territory enquiries from prospective new customers (see paragraph 3.130 above).

The referring of customer enquiries arising from customer error

3.134 At least 9 Customer Enquiry Examples may have involved a customer having intended to contact its existing supplier but having instead contacted the other Party, in error.[241]

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[238] See the following 7 examples: URN 00193.44; URN 00193.56; URN 00193.59, URN 00193.65, URN 00193.76, URN 00193.77, and URN 00193.79. The CMA considers that these enquiries came from prospective new customers. In addition to indications to that effect within the relevant emails themselves, the CMA notes that these enquiries came from customers which do not appear to be listed as existing customers of either Fenland or Berendsen Newbury within the following documents: URN 01258 ('Contract start dates' list (Document 0011606) provided in response to the Fifth Fenland Notice) for Fenland; and URN 00186.60 ('Listings document' dated 22 June 2010), URN 00982 (full reference at footnote 82 above), and URN 00994 (full reference at footnote 225 above) for Berendsen Newbury.
[239] In April 2014 Berendsen Newbury referred to Fenland a Consumables-related quotation request from [Fenland Customer A], on the basis that '*[Fenland Customer A] is a long standing Skeg*[ness, i.e. Fenland] *customer in Newbury's area at [London] Hospital and so the order should go to Skeg*': URN 00193.36, p.1. Fenland had, before this enquiry, included this customer on a list of its customers in the Newbury Territory which Fenland referred to Berendsen Newbury: see paragraph 3.127 above.
[240] See the following 2 examples: URN 00193.43, and URN 00193.57. To establish that these are new prospective customers, the CMA has conducted the same exercise described in footnote 238 above.
[241] For example, the CMA notes (i) 5 instances in which both Fenland and Berendsen submitted that a customer appears to have emailed one Party a purchase order addressed to the other Party (URNs

3.135 The CMA does not accept Fenland's submissions that a further 22[242] of the Customer Enquiry Examples fell into this category.[243] For example, the CMA rejects the submission that 16 enquiries sent to a generic email address (e.g. orders@micronclean.co.uk) may not demonstrate an intention on the part of the customers to contact any particular Party.[244]

3.136 Fenland submitted that it would be reasonable to conclude that the relevant customers had confused the Parties' respective email addresses.[245] However, as the Parties presented themselves as a single entity to customers,[246] it appears plausible that at least some such customers were unaware that there were two Parties to contact, and thus not trying to contact any specific Party.[247]

Implementation of the territorial/customer allocation envisaged in the TMLAs

3.137 The CMA considers that at least the 10 examples referred to at paragraph 3.132 above (which involved prospective new customers, from the perspective of the Party receiving each relevant enquiry), appear to reflect the implementation of the territorial and customer allocation in the TMLAs.

00193.22–00193.25, URNs 00193.37–00193.38, and URNs 00193.47–00193.50); and (ii) 4 instances in which both Fenland and Berendsen submitted that a customer asked one Party to amend an existing order from the other Party (URN 00193.33, URN 00193.51, URN 00193.69, and URN 00193.75). See relevant submissions of the Addressees at URN 01139 (Fenland SO WRs), paragraph 5.55.3(a), and URN 00193.1 (full reference at footnote 135 above), paragraph 3.5(b).

[242] 2 of these Customer Enquiry Examples related to products outside of the Relevant Markets; URNs 00193.20–00193.21*, and URN 00193.35. For the 20 other enquiries related to products/services within the Relevant Markets, the CMA notes: (i) 1 instance in which Fenland submitted that a customer appears to have emailed one Party a purchase order addressed to the other Party, but Berendsen disagreed (URNs 00193.39–00193.40*); (ii) 3 instances in which Fenland submitted that a customer asked one Party to amend an existing order from the other Party, but Berendsen disagreed (URN 00193.55, URN 00193.58, URNs 00193.67–00193.68*); and (iii) 16 further instances in which Fenland submitted that customers emailed a 'Customer Enquiries' (or similar) generic email address operated by one of the Parties (URN 00193.17, URN 00193.31, URN 00193.34, URN 00193.59, URN 00193.62, URNs 00193.64–00193.66, URN 00193.70, URNs 00193.72–00193.74, URNs 00193.76–00193.79). Pairs of documents marked with a * comprise an email and attachment regarding a single enquiry.

[243] Fenland submitted that the vast majority of the Customer Enquiry Examples involved a customer seeking to contact its existing supplier but contacting the other Party in error, and that in such circumstances it was entirely appropriate for the relevant enquiry to be have been sent on to the Party which the customer had intended to contact: see URN 01139 (Fenland SO WRs), paragraph 5.55.

[244] Fenland referred to, in this regard, 16 of the examples in URN 01139 (Fenland SO WRs), paragraph 5.55.3(b). Fenland also referred to an additional 6 examples in URN 01139 (Fenland SO WRs), footnote 56; this figure excludes examples relating to products/services outside of the Relevant Markets.

[245] URN 01139 (Fenland SO WRs), paragraph 5.55.3(b)ii.

[246] See, e.g., *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 14.

[247] On this basis, the CMA has included Customer Enquiry Examples involving generic email addresses within the examples of enquires referred to at paragraph 3.132 above. For example, 5 of the 7 Customer Enquiry Examples referred to in footnote 238 above involved generic email addresses (URN 00193.59, URN 00193.65, URNs 00193.76–00193.77, URN 00193.79).

3.138 In particular, 7 of those 10 examples clearly referenced an agreed territorial allocation as the reason for an enquiry being referred to the other Party.[248]

a. The CMA has seen a number of additional examples of Fenland having referred an enquiry to Berendsen Newbury whilst referring to a customer's location in the Newbury Territory (or simply '*your area*').[249]

b. This also accords with an internal Berendsen Newbury email dated 27 January 2014 which attached '*the Newbury postcodes* [under the TMLAs] *so you can correctly allocate new prospects. If it is not on this list then we should pass it to Skeg* [Fenland] *please*'.[250] Berendsen Newbury followed this approach: for example, in August 2014 Berendsen Newbury notified Fenland of a customer enquiry, stating that '*SE[✂] isn't a postcode we have listed as in our area so I believe this is a Skegness* [Fenland] *account*'.[251]

3.139 Another of those 10 examples clearly referred to an agreed allocation of a customer not based on territory: see paragraph 3.132.b. above.

3.140 Fenland submitted that, following an Out of Territory customer enquiry, it would serve that customer if feasible, but only if the '*customer does not want to work with* [Berendsen] *Newbury and wants to work with us*'. Likewise, Berendsen Newbury would serve an Out of Territory customer only if it *'did not want to work*' with Fenland, '*or specifically wanted to work with*' Berendsen Newbury.[252] The CMA notes that this would have been consistent with the TMLAs providing that certain checks should have been undertaken with an Out of Territory customer (or a customer of the other Party more generally) before any Party took on that customer: see paragraphs 3.91 to 3.93 above. However, none of the Customer Enquiry Examples refers to any Party having mentioned (or undertaken) any such checks with a customer before it referred an enquiry to the other Party. Moreover, the Addressees could provide only one example of a customer specifically requesting to work with one Party and not the other Party – and that arose after the 'other Party' in that instance had declined to

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[248] URN 00193.43, URN 00193.44, URN 00193.56, URN 00193.57, URN 00193.65, URN 00193.76, and URN 00193.77. 2 more Customer Enquiry Examples involved queries from customers at Newbury Territory postcodes (i.e. B[✂] and UB[✂]) being forwarded by Fenland to Berendsen Newbury: see URN 00193.59, and URN 00193.79.

[249] For example, in addition to the documents mentioned in footnote 248 above, see URN 00193.45, URN 00193.46, URN 00193.55, URN 00193.58, URN 00193.62, and URN 00193.74.

[250] URNs 00193.93–00193.94.

[251] URN 00193.44.

[252] URN 01220 (full reference at footnote 30 above), p.53, line 20 to p.54, line 2 (e.g. '*Where customers have asked us to, if we can, we will serve them. If we can is the question, "Can we get our transport to those areas?"*"'), and p.73 at lines 8–9 and p.73, line 21 to p.74, line 7 (e.g. '*If a customer does not want to work with Newbury and wants to work with us, then we would look at whether we could feasibly do that from an economic point of view*').

work with that customer.[253] Fenland's submission thus does not undermine the CMA's reference to the Customer Enquiry Examples in this regard.

3.141 13 of the Customer Enquiry Examples (including 4 of the 10 described in paragraph 3.132 above)[254] post-dated the last of the Passive Sales Letters, in which the Parties recorded their agreement to '*not enforce*' the '*restrictions on passive sales*' (see paragraph 3.98 above). Berendsen Newbury submitted that after the Passive Sales Letters in early 2015 it ceased to refer customer enquiries in respect of any Relevant Market(s) to Fenland.[255] Fenland, by contrast, appears to have continued to refer certain customer leads and enquiries to Berendsen Newbury after the Passive Sales Letters, until the day on which the Joint Venture was terminated (3 February 2016).[256] In May 2015, for example, Berendsen Newbury noted internally that it was '*receiving pricing information and leads from Fenland still. Do we want to send them a formal letter to say that we should not be receiving these from them given the situation?*', and noted '*the seriousness of the breach from their side*'.[257]

E. The Parties' ability to compete for territories and customers

3.142 This Part 3.E. shows that, absent the Restrictions, each Party would have been able to compete with the other Party to a greater extent, including for more Out of Territory customers in the Relevant Markets, during the Relevant Period.

3.143 The evidence shows that:

a. each Party did in fact serve some Out of Territory customers during the Relevant Period;

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[253] URN 00037.1 (full reference at footnote 23 above), pp.4–6 (responses to Questions 10, 12 and 13); URN 00043.33 (email dated 18 September 2015 from [Fenland Customer B] to [Fenland Director A]). URN 00068.1 (full reference at footnote 23 above), paragraphs 10.1–10.2, 12.1–12.2 and 13.1–13.2.
[254] URNs 00193.65–00193.79; 2 of these 15 documents were attachments to emails provided, so did not relate to separate enquiries. This included 4 enquiries apparently from a prospective new customer, as described in paragraph 3.132.a.: URN 00193.65, URN 00193.76, URN 00193.77, and URN 00193.79.
[255] URN 00193.1 (full reference at footnote 135 above), paragraphs 3.8(b) and 3.11; URN 01142 (Berendsen SO WRs), paragraphs 6.17–6.18 and 9.15(c); URN 01216A (full reference at footnote 31 above), p.26 at lines 14–19. This is consistent with internal Berendsen Newbury training to the effect that '*You should not automatically forward customer requests to Fenland*': URN 00067.8 ('Microncleanclean JV & Competition Law Compliance Training, Newbury, July 20 2015'), p.5, first bullet.
[256] See e.g. URN 01011 (email dated 15 July 2015 from [Fenland Director A] to [Berendsen Newbury Director J] and [Berendsen Newbury Director E]), in which [Fenland Director A] states: '*Most recently we* [i.e. Fenland] *exhibited at Pharmig and APDM… I am forwarding to you the leads from the exhibitions that fall into the distribution area for the Microncleanclean name.*' and URN 00193.79.
[257] URN 00193.65, pp.1–2. In this chain, [Berendsen Newbury Director F] reports on 15 May 2015 that: '*I have just got off the phone with* [Fenland Director A] *- he will bring this up in his management meeting and address the issue with his member of staff who (in his words) hadn't been briefed properly*'.

b. absent the Restrictions, each Party could have served more Out of Territory customers using (i) its own distribution network (using existing routes and/or new routes), and/or (ii) using couriers;

c. after the Passive Sales Letters, and then after the end of the Joint Venture, the Parties have competed for more Out of Territory customers;

d. other suppliers, not subject to the Restrictions, were able to (and did in fact) serve customers across the whole of GB;

e. each Party could have supplied customers which were located in its own territory but which were allocated to the other Party; and

f. the Parties perceived each other as a competitive threat.

3.144 In this Part 3.E., the CMA has taken into account some evidence and submissions notwithstanding that they post-date the Relevant Period. This is on the basis that each Party's distribution network and infrastructure was materially the same during the Relevant Period as it was in the year after the Joint Venture was terminated: see paragraphs 3.58 to 3.60 above. The CMA therefore considers that each Party's approach to Out of Territory customers in the year or so after the Joint Venture was terminated is indicative of what it could have done in relation to such customers during the Relevant Period.

I. Each Party's actual supply to Out of Territory customers

3.145 There were no legal or regulatory barriers preventing either Party from competing with the other Party throughout GB. The TMLAs gave each Party the '*non-exclusive right*' to use the Trade Marks throughout GB. However, by adhering to the Restrictions, each Party could only trade in the territory allocated to the other Party with that other Party's '*consent*' (see paragraphs 3.81 to 3.86 above).

3.146 Nonetheless the evidence provided by the Addressees shows that each Party supplied certain Out of Territory customers before, during and after the Relevant Period.

3.147 Each Party had some Out of Territory customers before the Relevant Period.

a. Fenland supplied Cleanroom Laundry Services and/or Consumables to certain customers located in what became the Newbury Territory – see, for example, a map dated November 2009.[258]

b. In November 2009, Berendsen Newbury sent to Fenland a list of '*accounts that we serve on your patch* [i.e. the Fenland Territory]', noting that Berendsen Newbury had '*served most of these for ages*'.[259]

3.148 Each Party had some Out of Territory customers during the Relevant Period.

a. In response to a CMA request regarding 10 'sample' Out of Territory customers, Fenland submitted that, between 2010 and 2015, it served certain sites in London and [London] using its Letchworth hub, and certain sites in [Shropshire] and Birmingham using its Grantham hub.[260] Further, an email from Fenland to Berendsen Newbury on 12 January 2014 attached details of at least 5 other Fenland Out of Territory customers not included in the aforementioned 'sample'.[261]

b. In response to a similar CMA request, Berendsen Newbury submitted that, between 2010 and 2015, it served 10 'sample' Out of Territory customers – located in London, [London], [Hertfordshire], [Leicestershire], [Hertfordshire], [Leicestershire], [Staffordshire] and [Leicestershire] – using its own distribution network directly from Newbury.[262] Further, an email from Berendsen Newbury to Fenland on 17 January 2014 attached details of 4 other Berendsen Newbury Out of Territory customers not included in the aforementioned 'sample'.[263]

c. After the Passive Sales Letters and before the termination of the Joint Venture, each Party continued to serve certain Out of Territory customers

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[258] URN 00068.13 (Map entitled 'Micronclean Territories November 2009 - Fenlands Customers in Newburys Area', which the CMA assumes is the file '*Micronclean Territories November 2009.ptm*' attached to an email dated 11 November 2009). See also URN 00193.104 ('Appendix 1 Pro 28 Competition Law Guidelines in regard to joint- venture Fenland – Micronclean Territories November 2009 – Fenlands Customers in Newburys Area').

[259] URN 00068.3 (full reference at footnote 195 above), p.2. See also an internal Berendsen Newbury email highlighting that, as at January 2014, it had '*been serving …for over 4 years*' various customers in the Fenland Territory (see paragraph 3.116 above).

[260] URN 01281 (full reference at footnote 92 above), p.1 (Table 4.1, column entitled 'Route Depot'). Fenland used its own network to serve 9 of these 10 customers between 2010 and 2015, and in June 2017 began to use its own network to also supply the other customer: see footnote 317 below.

[261] These customers were located in [Birmingham], Leicestershire ([✂] and [✂]), [London] and [Buckinghamshire]: URN 00043.47 (full reference at footnote 198 above).

[262] URN 01253 (full reference at footnote 96 above), paragraphs 4.1–4.6. As described in that submission, for one of these customers, Berendsen Newbury used couriers to supplement its deliveries when volumes became too high to deliver solely using Berendsen Newbury's own distribution network.

[263] These customers were located in Leicestershire, [Staffordshire], [London], and London. The relevant cover email noted that Berendsen Newbury had, with one exception, '*been serving all of these for over 4 years*'. See paragraph 3.116 above.

– and acquired new Out of Territory customers. For example, Fenland began serving new customers in e.g. [Wiltshire] and [West Midlands].[264] Berendsen Newbury began serving a new customer in Essex.[265]

3.149 Each Party gained some Out of Territory customers after the Relevant Period. See, for example, paragraphs 3.188.b. and 3.201 below.

3.150 The fact that each Party has consistently served at least some customers in the other Party's allocated territory shows that the boundary between the Parties' respective territories does not conclusively demarcate the geographic territories it was feasible for each Party to serve.

II. Each Party's potential to supply Out of Territory customers using its own distribution network

3.151 This Part 3.E.II. shows that each Party could have served more Out of Territory customers using its own distribution network[266] absent the Restrictions. Each Party could have done so by extending existing delivery routes, or adding new ones.[267] In addition, Fenland has previously further extended its network by establishing distribution hubs, and (as a longer term strategy) it may have been able to serve more Out of Territory customers by establishing further hubs.

Fenland's ability to serve more Out of Territory customers using its own distribution route network

3.152 Fenland served Out of Territory customers, and did so using its own network: see paragraph 3.148.a. above. This suggests that the range of Fenland's own network extended to at least part of the Newbury Territory.

3.153 Fenland used a *'system of hubs with overnight trunking from the laundry to the hubs and local vehicles distributing out of the hubs during the day'* to serve

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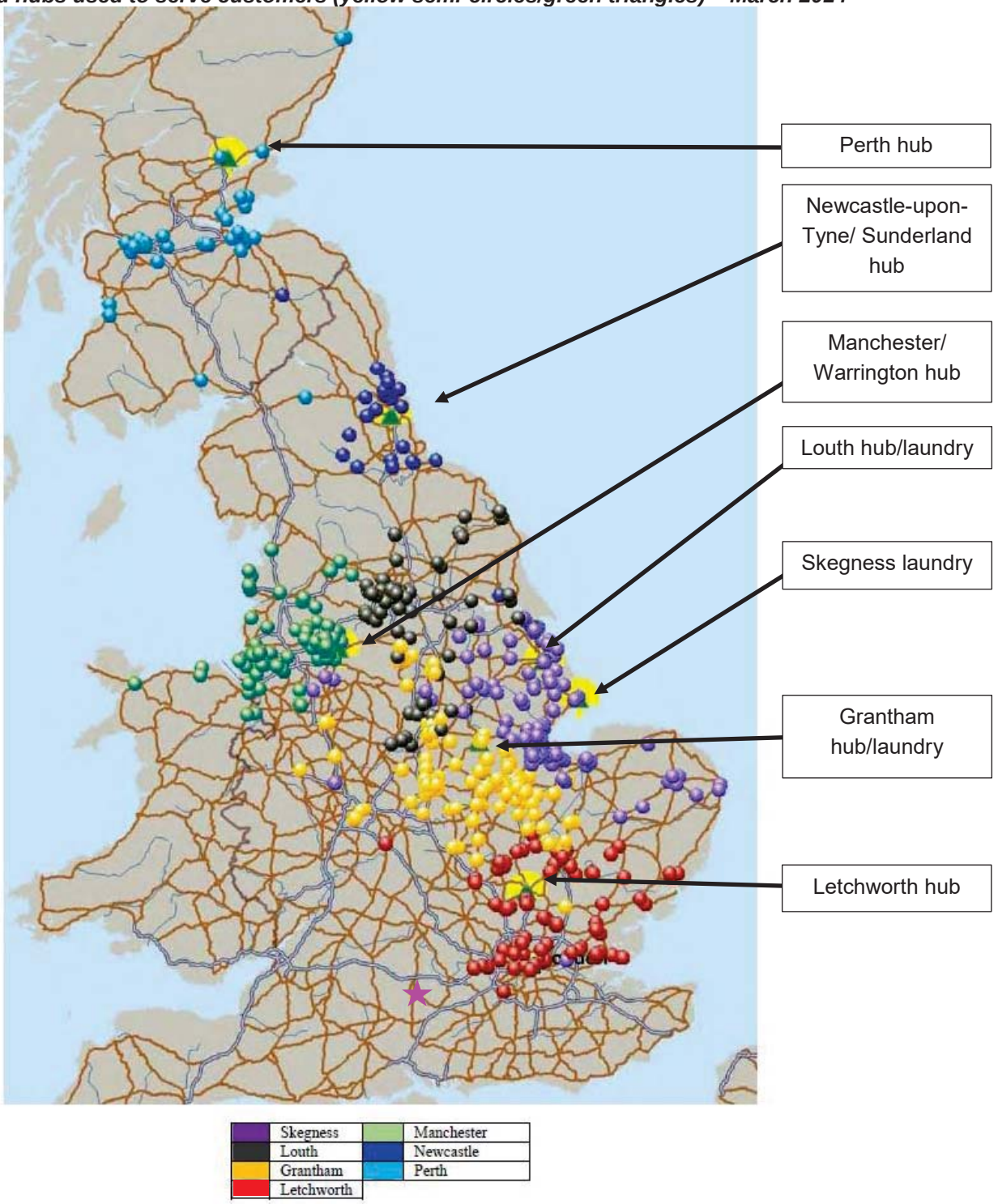
[264] URN 00186.92 (Fenland Spreadsheet showing Fenland Customers in Berendsen Territory from the end of 2013 to the end of 2015).
[265] URN 01369 (full reference at footnote 40 above), paragraphs 4.1 and 4.4; also referred to in URN 01253 (full reference at footnote 96 above), paragraph 5.2.
[266] Fenland served Out of Territory customers from its Cleanroom Laundries located in Skegness and Louth, in some cases using its distribution hubs. Berendsen Newbury supplied Out of Territory customers from its Cleanroom Laundry located in Newbury. See paragraphs 3.30 and 3.33 above.
[267] See e.g. the Parties' joint submissions on extending and adding delivery routes at URN 00982 (full reference at footnote 82 above), pp.42–44 – for example, at p.42: '*New customers will normally be within striking distance of an existing route, so the marginal cost of adding the customer is relatively small provided that there is enough capacity to take the customer's volume on the existing route. If not, a new route may need to be added or a number of existing routes changed to accommodate the customer'*; see footnote 94 above.

certain customers.[268] The locations of Fenland's hubs, and of customers served using those hubs, are illustrated below.

Figure 1: Locations of Fenland's Cleanroom Laundry Services customers in GB (dots) and hubs used to serve customers (yellow semi-circles/green triangles) – March 2014[269]



[268] URN 00988 (Reply of Parties/JVCo dated 26 March 2014 to Question 19 of an OFT *Microclean/Guardline* request for information dated 27 December 2013), p.3.
[269] URN 00982 (full reference at footnote 82 above), p.33 (Map 6.2); see footnote 95 above. NB the CMA has added, for the purposes of this Decision, the pink star (to indicate the approximate location of Newbury), and arrows/text boxes (to indicate locations of Fenland's laundries/hubs).

3.154 The CMA considers that absent the Restrictions Fenland could have supplied more Out of Territory customers by using its own distribution network – i.e. by:

a. adding additional drops to, without extending, an existing route;

b. extending an existing route; and/or

c. creating a new route (from an existing laundry or hub).

3.155 As set out at paragraphs 3.156 to 3.158 below, there are examples of Fenland having contemplated using and/or having used each approach noted at paragraph 3.154 above to serve more Out of Territory customers viably during, or shortly after, the Relevant Period.

3.156 Fenland supplied an Out of Territory site located by adding the customer to an existing route, without the need to extend or materially redesign the route. This drop was added with '*relatively small marginal costs and disruption*'.[270] Fenland indicated that it bid for the relevant site as it belonged to a customer with another site already served by Fenland (in the Fenland Territory), and Fenland wanted to serve all sites of that customer.[271]

3.157 Fenland has extended/redesigned routes in order to viably serve Out of Territory customers. For example, it redesigned a route from its Letchworth hub in order to serve an Out of Territory site, following the Passive Sales Letters. Fenland submitted that, while this required a significant re-routing, the related cost was in line with the rest of Fenland's distribution network.[272]

3.158 Fenland added a new route from its Letchworth hub to serve three Out of Territory sites (in the Portsmouth/Southampton area) following the Passive Sales Letters. Fenland described this route as '*arguably viable*', as it comprised three large value accounts, and entailing '*acceptable*' costs.[273]

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[270] URN 01281 (full reference at footnote 92 above), p.5 (in particular, the bullet beginning '"*Addition" means…*') and p.6 (bullet beginning '*The "Additional" …*'). Fenland also submitted that the cost of adding a new drop to an existing route is generally low: URN 01139 (Fenland SO WRs), paragraph 5.22.3.

[271] URN 01281 (full reference at footnote 92 above), p.6 (Table 5.1, third row) – which also clarifies that Fenland first invoiced this site within a month or so of the termination of the Joint Venture. URN 01279 (full reference at footnote 185 above), p.1 (third row) – which also refers to the passive compete forms at URN 00186.69 and URN 00186.72. Given the dates on those forms, Fenland may have bid for this site eight months or so after the Passive Sales Letters and three months or so before the termination of the Joint Venture.

[272] URN 01281 (full reference at footnote 92 above), p.6 (Table 5.1, sixth row) and pp.7 and 8 – which also clarifies that Fenland first invoiced this site within a month or so of the termination of the Joint Venture. URN 01279 (full reference at footnote 185 above), p.1 (sixth row).

[273] URN 01281 (full reference at footnote 92 above), pp.9, 10 and 11 (response to Question 5). The CMA addresses at paragraph 3.163 below Fenland's additional submission, at p.7 within the same document, that the CMA should not assume that Fenland can (or, indeed, will) supply viably, in the longer term, any of the new customer sites on this additional route.

Fenland indicated that it bid for the relevant sites as each site belonged to a customer with at least one site already served by Fenland (in the Fenland Territory), and Fenland wanted to serve all sites of the relevant customers.[274] Fenland submitted that this new route was created originally for only two of the three customers, and had since '*become viable by the lucky addition*' of the third customer, which '*was not foreseen at the route inception*'.[275] The CMA considers that creating a new route for some Out of Territory customers, and improving profitability by adding more customers over time, is exactly how each Party could absent the Restrictions have grown its customer base. The CMA considers that the targeting, and the subsequent addition, of appropriate customers to new or extended routes would have been a commercially rational way to gradually gain more Out of Territory customers.

3.159 Fenland submitted that, had the TMLAs been still in force, it would have responded to the customers in relation to the two Out of Territory sites referred to in paragraphs 3.156 and 3.157 above in '*the same way*' as it responded after termination of the Joint Venture. The CMA considers that this submission may relate to certain other arguments put forward by Fenland which the CMA has rejected elsewhere in this Decision.[276] However, the CMA accepts this submission to the extent it confirms that Fenland had the ability to serve these Out of Territory sites during the Relevant Period.

3.160 Therefore, the CMA considers that the examples at paragraphs 3.156 to 3.158 above show that Fenland could, absent the Restrictions, have expanded its network, and competed for more customers, within the Newbury Territory.

3.161 The Restrictions prevented and/or disincentivised Fenland from bidding for and serving Out of Territory customers. Once the Restrictions were terminated, Fenland was free to actively market to Out of Territory customers. For example, within four months of the Joint Venture having been terminated,

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[274] URN 01281 (full reference at footnote 92 above), p.9 (paragraph beginning '*This is the route …*') – which also clarifies that Fenland first invoiced one of these three sites within two months or so of the Joint Venture having been terminated, and the other two sites (including '*the lucky addition*' referred to elsewhere in this paragraph 3.158) within eleven months or so of the Joint Venture having been terminated. URN 01279 (full reference at footnote 185 above), p.1 (seventh, tenth and eleventh rows). The eleventh row at URN 01279, p.1, refers to the passive compete form at URN 00186.82, in relation to one of three sites; given the date on that form, Fenland may have bid for this site three months or so after the Passive Sales Letters and eight months or so before the termination of the Joint Venture.

[275] URN 01441 (full reference at footnote 43 above), row 15 (at p.17).

[276] See paragraph 3.104 above. In addition, to the extent that this submission relates to whether or not Fenland competed with Barrier Laundries for the relevant customer contracts, the CMA also rejects it – but on the basis that all supply from Fenland's Louth plant – except to the food sector – was within the scope of the Infringement, for the reasons given at paragraphs 5.21 to 5.31 below.

Fenland contacted 25 Out of Territory customer sites in postcode areas '*nearest to our territory, meaning that our current routes can be extended*'.[277]

3.162 The CMA acknowledges that adding customers to existing routes (either by adding a drop or extending/re-routing an existing route) or creating a new route would need to be commercially viable for Fenland. Fenland has submitted that the marginal cost of '*laying on a dedicated delivery route… is usually prohibitive, unless the customer has a particular reason for wanting to purchase from Fenland that outweighs any such concerns*'.[278] However, the marginal costs of adding drops, or extending or redesigning existing distribution routes, to serve Out of Territory customers are lower than those of creating a new route. Fenland has explained that, if an Out of Territory customer is close to an existing distribution route or close to the boundary with the Newbury Territory, it would be supplied by adding a drop or extending or re-routing a route. The customer would then be accommodated within Fenland's pre-existing distribution network with relatively small marginal costs.[279]

3.163 Fenland submitted that some new routes which it added were not viable and that since November 2015, it has sought to obtain Out of Territory customers with less regard to the commercial viability of supply, in order to show the CMA that it was competing against Berendsen Newbury. High associated distribution costs meant it did not make commercial sense for Fenland to serve many new Out of Territory customers on the relevant new routes.[280] Even if this is the case for some customers, paragraphs 3.156 to 3.158 above set out some examples of Fenland having added (and served viably) Out of Territory customers during, or shortly after, the Relevant Period.

3.164 Further in connection with Fenland's use of new routes to serve Out of Territory customers, the CMA notes that it established a new route to serve a particular customer in the Newbury Territory within a year or so of the termination of the Joint Venture. This was a former Shared Customer previously served under a sub-contracting arrangement, by Berendsen Newbury in the Newbury Territory and by Fenland in the Fenland Territory.[281]

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[277] URN 00186.115 (Fenland document entitled 'Telesales prospecting in Newbury's area'). This document is dated '*2016*' according to the relevant document index, i.e. URN 00186.2 (full reference at footnote 203 above), p.4; the CMA has inferred from entries in the '*Date 1st call*' column within URN 00186.115 the document likely does not pre-date 14 June 2016.
[278] URN 01139 (Fenland SO WRs), paragraphs 5.22.3–5.22.4.
[279] URN 01139 (Fenland SO WRs), paragraph 5.22.3; URN 01281 (full reference at footnote 92 above), p.5 (response to Question 5). URN 01220 (full reference at footnote 30 above), p.73, lines 18–19.
[280] URN 01281 (full reference at footnote 92 above), pp.7 and 10–11 (response to Question 5).
[281] See also Berendsen submission at URN 00193.1 (full reference at footnote 135 above), paragraph 5.12.

Fenland submitted that, to service this customer's sites in both the Newbury Territory and the Fenland Territory, it had to raise its price by [0–10]%.[282]

3.165 The CMA recognises that Fenland's supply to some Out of Territory customers, may involve relatively higher transport costs (and, on occasion, higher prices) compared to customers located in the Fenland Territory (e.g. if the delivery location is very far away from any existing route or Fenland considers that it needs to add an entirely new route to service a customer). However, the CMA does not consider that Fenland's prices would necessarily have prevented it from using its own network to serve more Out of Territory customers, absent the Restrictions. In reaching this view, the CMA has had regard to the examples at paragraphs 3.156 to 3.158 and 3.164 above and the submissions and evidence set out below in paragraphs 3.166 and 3.167.

3.166 For example, during the *Micronclean/Guardline* merger review, the Parties submitted jointly that, given that their respective networks were relatively fixed in nature, they costed customers at the same rate regardless of distance from the relevant Cleanroom Laundry (and/or the relevant hub, for Fenland), based on marginal cost related to the distance from existing routes. This was in the context of their operations as at 2014 – as was their submission that in general they did not charge higher prices to deliver to customers further away.[283] During the same merger review some third parties submitted that transport costs were higher when serving customers further away, but costs may be absorbed so have no significant impact on pricing.[284]

3.167 The points set out above are consistent with examples of Fenland absorbing higher transport costs for delivering to Out of Territory sites where the sites generated a lot of turnover and/or belonged to a customer which it already served in the Fenland Territory: see paragraphs 3.156 and 3.158 above.

3.168 The CMA acknowledges that it may be easier for a Party to serve Out of Territory customers located closer to the boundary between the Parties' respective territories. For example, certain customers in the Relevant Markets have previously indicated that suppliers delivering over greater distances can increase (actual or perceived) security of supply risks, and/or pose a weaker

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[282] URN 01139 (Fenland SO WRs), paragraph 5.44.5. While Fenland won the contract to supply all of the portion of the relevant contract previously serviced by Berendsen Newbury, at least part of that portion may still be sub-contracted out by Fenland, however: see URN 01281 (full reference at footnote 92 above), p.7 (second bulleted paragraph).

[283] URN 00982 (full reference at footnote 82 above), pp.42 and 44: for example '*[o]nly when a customer is a long way off an existing route will it significantly affect the pricing to the customer and this is a rare case*'. During this investigation, the Parties were asked if they wished to update now their relevant submissions. Neither Party noted that it would update now any of these submissions, so the CMA has proceeded on the basis that these submissions were generally valid throughout the Relevant Period.

[284] URN 00984 (*Micronclean/Guardline* Decision), paragraph 62; see footnote 94 above.

competitive constraint.[285] However, the CMA rejects Fenland's submissions that it could only use its own distribution network to serve Out of Territory customers which were close to the boundary, or that '*Fenland's network of hubs and associated transport infrastructure […] barely reaches into Newbury's territory'.*[286] Those submissions are inconsistent with other Fenland submissions, such as the suggestion that Fenland's distribution network extended '***significantly** into the Newbury territory'* after Fenland opened its hub in Letchworth in 2010 – which had '*allowed slow growth into some of the Newbury Territory over the past five to six years*'.[287] In addition, during the *Fenland/Fishers* merger review, Fenland submitted that '*[f]or Fenland serving into the southern territory, **much of this** can be directly transported from the existing Letchworth hub."*[288]

3.169 Fenland has also submitted that the boundary of the Fenland Territory reflected its natural operating geography.[289] However, the CMA considers that it would have been possible for Fenland to expand its reach towards more Out of Territory customers. It could have done this by identifying and targeting Out of Territory customers which it could serve viably by extending or redesigning its existing distribution routes. Then it could have added these customers gradually to its distribution network. Once the numbers of these Out of Territory customers grew to a sufficient level, it would be possible to add new routes on a viable basis to serve them. Indeed, this is one way in which Fenland has grown business within its own territory, and its distribution network/route coverage, over the many years since the Joint Venture was set up.[290]

3.170 Fenland submitted that it also grew its distribution network/route coverage by building up a customer base in a given area and/or on given routes to a point where that area/route provided sufficient turnover to support the overhead costs of opening and operating a hub. Fenland would then run vehicles to serve customers (with the possibility of later expanding further) from that

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[285] URN 00984 (*Microclean/Guardline* Decision), paragraphs 62–64; see footnote 94 above.
[286] URN 00186.1 (full reference at footnote 133 above), p.17 (response to Question 4.c.).
[287] URN 00050.1 (full reference at footnote 65 above), p.6: '*Fenland's distribution network did not extend significantly into the "Newbury Territory" until Fenland started using a hub in Letchworth in 2010'*.
[288] URN 01000 (Fenland and Fishers reply of 4 September 2015 to CMA *Fenland/Fishers* questions dated 3 August 2015), p.10 (under 'Response from Fenland'), within the following Section: '*For Fenland serving into the southern territory, much of this can be directly transported from the existing Letchworth hub. However the western part of the territory will be inaccessible from Letchworth and would initially be served on couriers until enough turnover is obtained. The company would then look at a hub, probably along the M4 corridor so that it is accessible from Letchworth or Grantham.'* The CMA has inferred that each of '*the territory*' and '*the southern territory*' refers to the Newbury Territory, given the lack of further explanation within that submission (or, e.g., URN 01007 (paper entitled '*Berendsen Acquisition of Microclean Newbury*', attached to email dated 21 September 2014 from [Fenland Director F] to [Fenland Director A]), in which '*the southern territory*' is also used).
[289] URN 01281 (full reference at footnote 92 above), p.4 (response to Question 4).
[290] URN 01281 (full reference at footnote 92 above), p.7 (response to Question 5).

hub.[291] Fenland submitted that this was how it established a hub in Manchester and, later, in Letchworth.[292] There were also two exceptional step-changes in the expansion of Fenland's distribution network – when Fenland acquired, closed and converted into hubs competitors' laundries. However, this was not typical of how, in general, Fenland has expanded its distribution network over time.[293]

3.171 During the *Fenland/Fishers* merger review, Fenland submitted that it could build a customer base in parts of the Newbury Territory furthest from Fenland's laundries, using couriers, before moving customers onto its own distribution network (potentially by setting up a hub).[294] During this investigation, Fenland clarified that those previous submissions reflected its view then that it '*should be possible to accelerate*' the process of extending its network by '*using couriers to* [cover] *greater distances more quickly than would be possible with its own transport*'. However, Fenland further submitted that its more recent experience of couriers has seen it revert to focusing on building its network more slowly, using its transport fleet (rather than couriers).[295]

3.172 Due to the expansion of its distribution network over time, Fenland has been able to use its own distribution network to serve customers, including Out of Territory customers, located at quite some distance from Fenland's Letchworth hub or Grantham hub/laundry. This is supported by the CMA's analysis of the distances between Fenland's Letchworth hub or Grantham hub/laundry and its customers, as at September 2015, as set out at Table 2 immediately below.

Table 2: CMA analysis of distances to Fenland customers, as at September 2015[296]

Distance to customers measured from	***Distances to Fenland Full Cleanroom Laundry Services customers***		***Distances to Fenland Intermediate Cleanroom Laundry Services customers***	
	80% of customers	**Maximum**	**80% of customers**	**Maximum**
Letchworth hub	up to [50-100] km	[100-200] km	up to [50-100] km	[200-300] km
Grantham hub	up to [50-100] km	[100-200] km	up to [50-100] km	[100-200] km

[291] URN 01220 (full reference at footnote 30 above), p.32, line 25, to p.33, line 8 and p.56 at lines 16–22; URN 00141.1 (full reference at footnote 19 above), p.4.
[292] URN 01281 (full reference at footnote 92 above), p.7 (response to Question 5).
[293] In the mid-1990s, Fenland acquired a laundry and customer base around Perth, Scotland, when [Former JV Partner D] exited the Joint Venture and the Relevant Markets. In 2008, Fenland acquired CES and its laundry and customer base around Newcastle-upon-Tyne. See URN 01220 (full reference at footnote 30 above), p.32, line 25, to p.33, line 8 (in relation to [Former JV Partner D]) and p.33 at lines 9–14 (in relation to CES); URN 00141.1 (full reference at footnote 19 above), paragraphs 13.e. and 13.h; and footnote 856 of this Decision.
[294] URN 01000 (full reference at footnote 288 above), pp.10–11 (under 'Response from Fenland').
[295] URN 01441 (full reference at footnote 43 above), row 13 (at p.16).
[296] Source: URN 01277 (Fenland response of 23 June 2017 to the Fifth Fenland Notice, response to Questions 4–6, spreadsheet).

3.173 The CMA also considers that some customers in the Newbury Territory were located as close (if not closer) to Fenland – in particular to Fenland's southernmost hub, at Letchworth, which was opened in 2010 – compared to Berendsen Newbury's plant in Newbury.[297] This is illustrated by **Annex E**, Figure E4 and Figure E5. The CMA's view is also supported by Berendsen Newbury, having noted internally in May 2015 that '*Fenland's transport and sales network allows them into our customers immediately*' and possible '*[l]oss of revenue and difficulties to get it back.*'[298]

3.174 In conclusion, the CMA finds that absent the Restrictions Fenland could have served more Out of Territory customers during the Relevant Period, using its own network. Fenland confirmed this when it submitted that, although it may have been relatively viable for Fenland to service certain Out of Territory customers located '*close to the boundary*', it typically referred such customers to Berendsen Newbury because of the Restrictions.[299] Specifically, Fenland could have served more Out of Territory customers close to the boundary between the Parties' territories, by extending its existing distribution routes. The CMA also considers that, in the longer term, Fenland could have served more Out of Territory customers – located further into the Newbury Territory – by replicating the methods used to grow Fenland's own network over time.

Berendsen Newbury's ability to serve, using its distribution route network, more Out of Territory customers

3.175 Berendsen Newbury served Out of Territory customers, and did so using its own network, directly from its Cleanroom Laundry in Newbury: see paragraph 3.148.b. above. This suggests that the range of Berendsen Newbury's own network extended to at least part of the Fenland Territory.

3.176 That view is supported by Berendsen Newbury's submissions on its network. For example, that *'Berendsen Newbury's delivery network was based on a [3-5] hour drive from the Newbury site'*,[300] i.e. its '*furthest delivery point cannot exceed a [3-5] hour drive from the Newbury plant so that drivers have time to return to Newbury at the end of the day'*. Berendsen Newbury's delivery sites are, however, typically closer than a '*[3-5] hour drive*' from Newbury. This is because drivers make multiple drops (at least [✂] drops, and up to a maximum of [✂] drops) and need time to load and unload. The longest round-

[297] See footnote 287 above.
[298] URN 00193.89 (Berendsen Newbury Risk Register of 20 May 2015), p.3 (under '*Intensifying competitive field with Fenland*').
[299] See footnote 231 above.
[300] URN 00201.1 (full reference at footnote 25 above), paragraph 4.28. In footnote 42 of the same document Berendsen also noted that '*[u]ntil very recently the use of couriers could not provide the level of reliability and quality expected by Berendsen Newbury customers*'.

trip route currently on its distribution network is [400-500] miles from Newbury.[301] If such a round-trip were replicated in the direction of the Fenland Territory, it would allow Berendsen Newbury to reach at least part of the Fenland Territory.

3.177 That view is also supported by the fact that Berendsen Newbury considered and rejected the option of a new plant '*in [✂]… to expand its customer base northwards*'. This was deemed unnecessary, as it could expand northwards from a '*potential …new plant [in [✂]]*' at a location which – like Newbury – is south of the M4.[302] Berendsen Newbury submitted that '*it is able to supply [✂] customers based anywhere in Great Britain from either its current Newbury plant or the potential* [new] *location*'.[303]

3.178 During this investigation, Berendsen Newbury submitted that following the Newbury Acquisition its strategy was to compete vigorously in the market for Cleanroom Laundry Services and Consumables in GB. To support this, Berendsen Newbury invested in additional staff (new management and sales staff) and also made other investments in Berendsen Newbury's business (such as developing a comprehensive sales plan) to strengthen its competitive position and to facilitate its ability to compete.[304] This suggests that Berendsen Newbury had the potential to compete for more Out of Territory customers without the need for major capital investment in its distribution network. For example, during the CMA's review of *Fenland/Fishers*, Berendsen Newbury submitted that it had budgeted for the deployment of an extra transport van for 2016.[305] The CMA considers that the deployment of an extra transport van would enable Berendsen Newbury to serve a greater number of customers using its own network, including Out of Territory customers which could be reached within a maximum of '*a [3-5] hour drive from the Newbury plant*' (taking account of the need for multiple drops, and loading and unloading at drops along the way as described in paragraph 3.176 above).

3.179 Berendsen Newbury confirmed that it serves Out of Territory customers using its own network, and that '*the means by which Berendsen Newbury has served customers in Territory B* [since termination of the Joint Venture] *is no different to its approach to serving existing customers*'.[306] It submitted that its pricing to its Out of Territory customers was not specifically affected by the way in which

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[301] URN 01253 (full reference at footnote 96 above), paragraphs 6.1–6.2.
[302] URN 00067.2 (full reference at footnote 130 above), paragraphs 3.19(d)(iii)–(iv).
[303] URN 00067.2 (full reference at footnote 130 above), paragraphs 3.19(d)(iii)–(iv).
[304] URN 01142 (Berendsen SO WRs), paragraphs 3.45–3.55 and URN 00067.2 (full reference at footnote 130 above), paragraphs 1.7, 3.6, 3.8, 3.11–3.24, 5.4.(a).
[305] URN 00067.10 (Berendsen Newbury reply of 7 December 2015 to CMA *Fenland/Fishers* questions dated 3 December 2015); *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 54.
[306] URN 00193.1 (full reference at footnote 135 above), paragraph 10.1.

it served them.[307] Berendsen Newbury also submitted, during the *Fenland/Fishers* merger review, that for [✂] it could potentially absorb any increase in transport costs arising from serving more customers.[308] The CMA considers that this supports the CMA's view that Berendsen Newbury would have been able to compete to a greater extent, for more customers, in the Fenland Territory during the Relevant Period, using its own network.

3.180 The CMA also considers that some customers in the Fenland Territory were located as close (if not closer) to Berendsen Newbury's plant in Newbury compared to Fenland's plant (such as its Grantham hub). This is illustrated in **Annex E**, Figure E4 and Figure E5.

3.181 For its part, Fenland submitted during the CMA's review of *Fenland/Fishers* that, to deliver *'garments to customers in the North*' Berendsen Newbury's various options included supplying '*customers in a substantial part of Great Britain direct from its laundry in Newbury*'. This was on the basis that Newbury is located '*such that the parties estimate that Berendsen may be able to access around 75% of the market using lorries that transport garments directly to and from Newbury, without needing to use hubs or third party couriers*' – and that Berendsen Newbury's Laundry was *'much better located for laundry services than Fenland's laundry in Skegness*'.[309]

3.182 In conclusion, the CMA finds that absent the Restrictions Berendsen Newbury could have served more Out of Territory customers during the Relevant Period, using its own network. In particular, it could have served more Out of Territory customers close to the boundary between the Parties' territories by extending and redesigning its existing routes. In addition, further Out of Territory customers could have been served, extending deeper into Fenland's Territory by adding routes, using further vehicles as required.

Conclusion

3.183 In conclusion, the CMA finds that absent the Restrictions each Party would have been able to compete with the other Party to a greater extent, for more Out of Territory customers, during the Relevant Period, using its own network.

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[307] URN 01253 (full reference at footnote 96 above), pp.3–6 (as printed), e.g. at paragraph 4.6.
[308] URN 00067.9 (full reference at footnote 117 above), p.10. See footnote 226 above.
[309] URN 00998 (full reference at footnote 72 above), pp.44 and 46. The CMA also acknowledges that Fenland noted, a year earlier, that Berendsen Newbury's '*[t]ransport infrastructure would need boosting to offer services in the North*' (URN 01007 (full reference at footnote 288 above), p.3. However, while that note was for internal purposes within Fenland, URN 00998 was a formal submission made during the CMA's review of *Fenland/Fishers*.

III. Each Party's ability to deliver to customers in the other Party's territory using couriers

3.184 This Part 3.E.III. shows that each Party:

a. supplied certain Out of Territory customers (and, in particular, supplied Consumables to certain Out of Territory customers) using couriers;

b. used couriers to service a limited proportion of its Cleanroom Laundry Services business, which is consistent with submissions that there were certain limits to supplying customers by using couriers; and

c. could, nonetheless, have supplied more Out of Territory customers using couriers absent the Restrictions.

3.185 Each Party used couriers to supply less than [0-10]% of its Cleanroom Laundry Services orders.[310] The Addressees submitted that using couriers was less attractive to a supplier than using their own distribution networks.

a. Fenland submitted that using couriers was possible, but not preferable, for several reasons. Using couriers resulted in more missed or incorrect deliveries than when using its own infrastructure. Customers needed security of supply, and this could not be guaranteed when using couriers. Couriers were '*typically a more expensive option*'. Fenland generally sought to serve customers '*from an existing Fenland transport route*' on its own network, but if this was not possible because of a customer's location then Fenland could use couriers.[311]

b. Berendsen submitted that couriers could only provide the level of reliability and quality expected by customers after certain technical improvements had taken place in the last 2-5 years (i.e. during the Relevant Period).[312] Some customers may prefer a supplier to deliver using its own distribution network. It submitted that Out of Territory

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[310] Fenland calculated that during the Relevant Period it used couriers to serve '*considerably less than [0-10]%*' of its Cleanroom Laundry Services customers: URN 01182 (full reference at footnote 108 above), pp.3–4 (response to Question 4). The counterpart calculation for Berendsen Newbury was below [0-10]%, whether measured by reference to sales values or number of customers: URN 01253 (full reference at footnote 96 above), paragraph 7.1. Courier deliveries made temporarily by Berendsen Newbury to one customer (see paragraph 3.187.b. above) were excluded from Berendsen Newbury's calculations.

[311] See e.g. URN 00186.1 (full reference at footnote 133 above), p.32 (response to Question 19); URN 01139 (Fenland SO WRs), at p.34 (as printed) – *'In this case, it is also…*' – and p.35 (as printed) – *'Fenland firmly believes that…*'; URN 01220 (full reference at footnote 30 above), p.52, line 15, to p.53, line 8; also at p.72 at lines 2–19.

[312] URN 01253 (full reference at footnote 96 above), paragraphs 7.3–7.5. Given the date of this submission, the CMA has understood the reference to '*the last 2-5 years*' as encompassing a period since mid-2012 (i.e. the start of the Relevant Period) to mid-2015 (i.e. during the Relevant Period).

customers were served using Berendsen Newbury's own network if commercially viable (and using couriers only if that was not viable).[313]

3.186 Each Party may have used couriers to supply a higher proportion of Consumables relative to Cleanroom Laundry Services. Indeed, Fenland sometimes supplied a majority of its Consumables orders using couriers.[314] This is consistent with submissions that Consumables orders may be less time critical and/or regular compared to Cleanroom Laundry Services.[315]

3.187 Notwithstanding the above, each Party did in fact use couriers to supply Cleanroom Laundry Services to a limited number of Out of Territory customers.

a. As at October 2015, Fenland used couriers to supply Full Cleanroom Laundry Services to two Out of Territory customer sites in the UK, and had done so '*for a number of years*'.[316] Fenland submitted that, for one of these sites, it only did so because the relevant customer also had sites supplied by Fenland in the Fenland Territory (the supply to these customers allowed Fenland to recoup its courier costs). Fenland noted that it has now switched to supplying that Out of Territory site using its own distribution network.[317]

b. A few months before the Joint Venture was terminated, Berendsen Newbury won and began to supply one Out of Territory customer using couriers.[318] In addition, Berendsen Newbury began using couriers to supplement deliveries to one customer which it usually served using its own distribution network when volumes became too high.[319]

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[313] See e.g. URN 01213 (full reference at footnote 110 above), at paragraphs 4.1, 5.1(a) and 5.1(b)(iii). A further version of URN 01213, paragraphs 4.1, 5.1(a) and 5.1(b)(iii), was disclosed via the confidentiality ring on 22 November 2017.

[314] Fenland calculated that in 2012–2016 inclusive the annual proportion of Consumables orders which it supplied using couriers varied between [20–30]% and [65–75]%: URN 01182 (full reference at footnote 108 above), response to Question 4 (at p.4, and explanation at p.5).

[315] See e.g. URN 01220 (full reference at footnote 30 above), p.61 at lines 18–21.

[316] URN 00998 (full reference at footnote 72 above), footnote 12: '…*Fenland has used* [courier name redacted] *for a number of years to deliver full cleanroom laundry to* … [customer name redacted]…*[Oxfordshire], OX[✂]*… [and] [customer name redacted]… *[County Antrim], BT[✂]*'. This is consistent with a *'Skegness in Newbury'* customer with an OX[✂] postcode appearing on a list dating from 22 June 2010 of the Parties' customers: see URN 00186.60 ('Listings document' dated 22 June 2010).

[317] In June 2017, Fenland switched a customer with an OX[✂] postcode from couriers onto Fenland's own distribution network: URN 01281 (full reference at footnote 92 above), footnotes 4, 10 and 14 (response to Questions 4 and 5). See also, regarding recoupment of costs, URN 01441 (full reference at footnote 43 above), row 25 (at p.26).

[318] See footnote 265 above.

[319] The CMA also notes Berendsen's submissions regarding the level of courier charges passed on to the relevant customer, and that since April 2017 Berendsen Newbury no longer uses couriers to supplement deliveries to that customer: URN 01253 (full reference at footnote 96 above), paragraphs 4.2, 4.5 and 5.2.

3.188 Since the Joint Venture terminated, each Party has bid to supply Cleanroom Laundry Services to Out of Territory customers using couriers.

a. Two and a half months after the Joint Venture was terminated, Fenland noted that it would '*supply quote*' to an Out of Territory customer which had '*asked if we* [i.e. Fenland] *could courier*'.[320] This is consistent with the submission that '*[f]ollowing the termination of the TMLAs, Fenland has increased efforts to actively solicit all business types across Great Britain, including* [ISO] *Class 4 customers. However, Fenland is only able to serve many of these customers (i.e. the more geographically distant ones)* ***through the use of contracted out carrier services***.'[321]

b. The month after the Joint Venture was terminated, Berendsen Newbury won and began to supply an Out of Territory customer using couriers.[322]

3.189 The CMA acknowledges that either Party's supply to Out of Territory customers using couriers would have incurred additional costs (courier charges) which would not be applicable in respect of customers served by that Party's own network. However, the CMA does not consider that, absent the Restrictions, this would have necessarily prevented either Party from using couriers to serve more Out of Territory customers during the Relevant Period. For example, Fenland and Berendsen Newbury each appeared willing to absorb – to at least some extent – courier charges for a customer.[323]

3.190 Certain customers in the Relevant Markets have previously indicated that couriers may provide a lower level of customer service.[324] The Addressees have raised similar concerns, as summarised in paragraph 3.185 above. However, these concerns contrast with certain other submissions made by the Parties during the *Fenland/Fishers* merger review – such as those set out below.

a. Fenland made various submissions (with Fishers) on this subject, such as *'full cleanroom laundry operators have used …couriers very successfully, without any material customer service issues arising*'. Fenland and Fishers were *'resistant to any suggestion that the use of couriers inherently*' raised *'security of supply concerns*'. Any potential issues with courier deliveries were '*readily manageable, in particular by*

[320] URN 00186.86.
[321] URN 00050.1 (full reference at footnote 65 above), p.7 (emphasis added by the CMA).
[322] URN 01253 (full reference at footnote 96 above), paragraph 5.2; see reference to one customer cited in that paragraph in URN 00068.1 (full reference at footnote 23 above), p.5 (Table 9.1) (as replicated in URN 00067.2 (full reference at footnote 130 above), p.16, Figure 3.2).
[323] See paragraph 3.187.a. above; URN 01253 (full reference at footnote 96 above), paragraph 4.5.
[324] URN 00984 (*Micronclean/Guardline* Decision), paragraphs 62–64; see footnote 94 above.

using experienced couriers who are subject to sufficiently rigorous standards and controls', and *'the availability of a functioning laundry is a more significant security of supply risk issue*' compared to couriers.[325] '*Couriers are easy to use. Most laundries will already be using a courier, and it is likely that Microncleaning Newbury* [i.e. Berendsen Newbury] *already uses couriers for a number of its more far flung customers… Assuming that a courier is already being used, adding a new drop to the subcontracted courier service is straightforward*'. Fenland used a courier which allowed it to book a new drop online or by means of a telephone call, and within *'a one week time scale*'.[326]

b. Fenland also submitted that it could build a customer base in parts of the Newbury Territory furthest from Fenland's laundries, using couriers, before moving customers onto its own distribution network (potentially by setting up a hub) – similar to how Scotland-based Fishers had built a customer base in England and Wales.[327] However, during this investigation, Fenland further submitted that its more recent experience of couriers has seen it revert to focusing on growing its business more slowly, using its own transport fleet (rather than couriers).[328]

c. Berendsen Newbury submitted that using couriers enabled it to deliver and collect from '*anywhere in Great Britain*'.[329] Fenland (with Fishers) submitted that Berendsen Newbury's various options to deliver *'garments to customers in the North*' included using '*third party couriers, either as an interim solution or longer term*' and that Berendsen Newbury could do so '*immediately, since there are numerous third party couriers who could readily (and efficiently) transport full cleanroom laundry*'.[330]

Conclusion

3.191 The CMA recognises that couriers will not be an ideal means to supply every Out of Territory customer, but they are an option for supplying some Out of Territory customers (e.g. on an '*interim*' basis before a supplier obtains sufficient customers to extend its own distribution network). In conclusion, therefore, the CMA finds that absent the Restrictions each Party could have served more Out of Territory customers using couriers.

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[325] URN 00998 (full reference at footnote 72 above), pp.46 and 47–48.
[326] URN 01000 (full reference at footnote 288 above), p.10 (under 'Response from Fenland').
[327] URN 01000 (full reference at footnote 288 above), pp.10–11 (under 'Response from Fenland').
[328] URN 01441 (full reference at footnote 43 above), row 13 (at p.16).
[329] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 54.
[330] URN 00998 (full reference at footnote 72 above), p.46.

IV. Competition for Out of Territory customers after the Passive Sales Letters and after the end of the Relevant Period

3.192 This Part 3.E.IV. shows that each Party could, absent the Restrictions, have competed more for Out of Territory customers during the Relevant Period.

The Parties' views on Out of Territory sites they could serve/would target

3.193 The CMA considers that after the Passive Sales Letters and then after the Relevant Period, each Party considered that it could serve at least some Out of Territory sites which the Parties had agreed the other Party would serve.

a. For example, an internal document from September 2015 (after the Passive Sales Letters) suggests – under the heading '*What is waiting to be harvested?*' – that Berendsen Newbury was planning to target certain work undertaken by Fenland for one Shared Customer listed in Table 1 at paragraph 3.120.[331] Berendsen also submitted during this case (i.e. since termination of the Joint Venture) that Berendsen Newbury is planning to target some of that work.[332] On this basis, the CMA's view is that absent the Restrictions Berendsen Newbury could have bid for and serviced at least some of the Out of Territory portion of that Shared Customer's national contract during the Relevant Period.

b. Similarly, as set out at paragraphs 3.156 and 3.158 above for example, Fenland explained that, after the Passive Sales Letters, it bid for (and won) several Out of Territory sites. Fenland did so as each relevant site belonged to a customer with another site already served by Fenland (in the Fenland Territory), and Fenland wanted to serve all sites for the relevant customers.[333] On this basis, the CMA's view is that absent the Restrictions Fenland could have bid for and serviced these (and other) Out of Territory sites during the Relevant Period.

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[331] See references in URN 00036.83 (Berendsen Newbury presentation titled 'Board visit Cleanroom UK', dated 25 September 2015), p.14 – and in the further version of URN 00036.83, p.14, disclosed via the confidentiality ring on 22 November 2017 – to certain work undertaken by Fenland in the Fenland Territory for a customer listed in Table 1 at paragraph 3.120.

[332] Berendsen Newbury is planning to do so following one change it has made, albeit not to its supply infrastructure, since the Joint Venture was terminated: see URN 00193.1 (full reference at footnote 135 above), paragraph 14.6, referring to URN 00193.82 (undated Berendsen spreadsheet entitled 'UK Cleanroom Customer Pipeline'). A further version of URN 00193.1, paragraph 14.6, was disclosed via the confidentiality ring on 22 November 2017.

[333] URN 01281 (full reference at footnote 92 above), p.6 (Table 5.1). URN 01279 (full reference at footnote 185 above), p.1 (third row).

3.194 Further, the Addressees submitted that after the Joint Venture was terminated each Party targeted and/or actively marketed to more Out of Territory customers than it did during the Relevant Period.

a. Fenland submitted that *'Following the termination of the TMLAs* [through the termination of the Joint Venture]*, Fenland has increased efforts to actively solicit all business types across Great Britain, including Class 4* [i.e. 'full' Cleanroom] *customers*'. In addition, a few months after the Joint Venture terminated Fenland used telesales personnel to actively approach a number of Out of Territory customers, *'chosen as they are the nearest to our territory, meaning that our current routes can be extended*".[334]

b. Berendsen Newbury submitted that the termination of the Joint Venture '*represented part of the execution of Berendsen's strategy to compete for new customers in the cleanroom sector across Great Britain, including against Fenland*'. It also highlighted certain business which it had won from Fenland.[335] These submissions are consistent with certain other Berendsen Newbury submissions, and certain internal notes, to the effect that Berendsen Newbury wished to pursue every new business opportunity of which it became aware: see paragraph 3.101 above.

Quantitative data on the Parties' bids for Out of Territory customers

3.195 The CMA considered whether any quantitative evidence in relation to either Party's bids/tenders to supply Out of Territory customers demonstrated any increase in competitive intensity between the Parties after:

- the Passive Sales Letters; and/or
- the termination of the Joint Venture.

3.196 Berendsen Newbury submitted to Out of Territory customers:[336]

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[334] URN 00186.115 (Fenland document entitled 'Telesales prospecting in Newbury's area'). Fenland described this document as dating from '*2016*': see document index at URN 00186.2 (full reference at footnote 203 above), p.4; the CMA has inferred from entries in the '*Date 1st call*' column within URN 00186.115 the document likely does not pre-date 14 June 2016.
[335] URN 00067.2 (full reference at footnote 130 above), paragraphs 3.6, 3.18 and 3.22.
[336] URN 00067.2 (full reference at footnote 130 above), p.16, Figure 3.2 (as replicated in URN 00068.1 (full reference at footnote 23 above), p.5 (Table 9.1)); URN 00193.1 (full reference at footnote 135 above), Table 12.1; and URN 01253 (full reference at footnote 96 above), pp.1–2 (as printed, response to Question 3); URN 01369 (full reference at footnote 40 above), paragraphs 4.1 and 4.4. The CMA's analysis excluded two bids as duplicates; the first and second bids in Figure 3.2 within URN 00067.2 appear to duplicate, respectively, the last and third bids in Table 12.1 within URN 00193.1.

a. no bids in the 5.5 months between the Newbury Acquisition and the Passive Sales Letters (i.e. 13 September 2014 to 28 February 2015);

b. 2 bids in the next 11 months, between the Passive Sales Letters and the termination of the Joint Venture (i.e. 1 March 2015 to 2 February 2016) – an average of 0.2 per month;[337]

c. 14 bids in the 11 months following termination of the Joint Venture (i.e. 3 February 2016 to 31 December 2016) - an average of 1.3 per month; and

d. 9 bids in the final 5 months of data available (i.e. 1 January 2017 to 30 May 2017) – an average of 1.8 per month.

3.197 Following the 25 Out of Territory bids submitted by Berendsen Newbury, referred to at paragraph 3.196 above, it began to serve 2 new Out of Territory customers. For 7 of the 25 Out of Territory bids,[338] Berendsen Newbury indicated whether or not Fenland had served the customer before (or at the time of) its bid. At least 4 of those 7 bids related to former (or existing) customers of Fenland.[339] The CMA considers that had the Restrictions simply continued in force as set out in the TMLAs – i.e. absent the Passive Sales Letters and/or the termination of the Joint Venture – Berendsen Newbury would, in principle, not have bid in response to any unsolicited enquiry from (and/or actively marketed to) any Out of Territory customer without the prior permission of Fenland.

3.198 There are limitations to the data noted in paragraphs 3.196 and 3.197 above. Berendsen Newbury has limited information relating to the period before the Newbury Acquisition,[340] and submitted that it may be difficult to distinguish between active and passive sales enquiries.[341] The CMA nonetheless considers that this data indicates that Berendsen Newbury bid for more Out of

[337] One of these bids relates to the customer described in URN 01369 (full reference at footnote 40 above), paragraphs 4.1 and 4.4, which Berendsen started to serve between 1 March 2015 to 2 February 2016. This customer was not included in the evidence referred in footnote 336 above for the reasons explained in URN 01369, paragraphs 4.2 and 4.4. The other customer was referred to in URN 00067.9 (full reference at footnote 117 above) – which may be the basis for the CMA statement, as at December 2015, that '*[s]ince March 2015, Berendsen has only participated in one full cleanroom laundry tender in the North*': see *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 64.
[338] Berendsen Newbury did not provide, and the CMA did not request, counterpart details in relation to the other 18 bids referred to in paragraph 3.196 above.
[339] URN 00068.1 (full reference at footnote 23 above), paragraph 9.8; URN 00067.2 (full reference at footnote 130 above), paragraph 3.22(b) and Figure 3.2. Figure 3.2 of URN 00067.2 includes one of the two customers referred to in URN 01253 (full reference at footnote 96 above), paragraph 5.2.
[340] URN 00068.1 (full reference at footnote 23 above), paragraph 9.1.
[341] URN 00068.1 (full reference at footnote 23 above), paragraph 9.2.

Territory customers after (i) the Passive Sales Letters, and/or after (ii) the termination of the Joint Venture.

3.199 This is supported by Berendsen Newbury's submission – based on figures similar to those above, which were set out in the SO – that the number of its Out of Territory sales had increased since the Newbury Acquisition. However, Berendsen submitted that this increase was not due to the Joint Venture having terminated as such, but driven by improvements to Berendsen Newbury's capability resulting from Berendsen's investments and related changes.[342] Even if the increase in sales was due to the investments made by Berendsen, the CMA considers that the increase would not have materialised if the Restrictions had remained in force. This is because the aim of the investments was to support expansion across GB, and the Restrictions would have directly prevented any such expansion. Indeed, Berendsen confirmed that such investments were made on the assumption that the Joint Venture would be terminated.[343] Therefore, the CMA considers that the Passive Sales Letters and termination of the Joint Venture were drivers of the observed increase in Out of Territory bids/sales by Berendsen Newbury.

3.200 Fenland introduced forms to record its responses to Out of Territory customer enquiries. These forms record responses from March 2015 (see paragraph 3.100 above) until April 2016.[344] Based on these forms,[345] Fenland submitted to Out of Territory customers:

a. 13 bids in the 11 months between the Passive Sales Letters and the termination of the Joint Venture (i.e. 1 March 2015 to 2 February 2016) – an average of 1.2 per month; and

b. 8 bids in the 2.5 months following termination of the Joint Venture (i.e. 3 February 2016 to 19 April 2016)[346] – an average of 3.2 per month.

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[342] Including (but not limited to) rebranding (and other changes that have been redacted from the source document but disclosed via the confidentiality ring): URN 01142 (Berendsen SO WRs), paragraph 6.19–6.20.
[343] URN 01213 (full reference at footnote 110 above), paragraphs 2.1–2.2.
[344] Fenland stated that *'prior to the use of this form, there was no reliable method to identify prospects that approached Fenland from the Newbury Territory'*: URN 01237 (full reference at footnote 177 above), p.15 (response to Question 3).
[345] Summaries in URN 00186.89 and URN 00186.94 of the contents of URNs 00186.67–00186.88 (URN 00186.94 being a reworking of URN 00055.19); excludes two completed forms where Fenland declined to submit a bid (URN 00186.83 and URN 00186.75).
[346] Fenland stated that, following the termination of the Joint Venture in February 2016, it decided to no longer use the passive compete forms. Nevertheless, it continued to complete the form for a time with the last one created on 19 April 2016. URN 01237 (full reference at footnote 177 above), p.15 (response to Question 3). This implies that the number of bids recorded on the passive compete forms may underestimate the true figure for the period.

3.201 Following the 21 Out of Territory bids submitted by Fenland after the Passive Sales Letters, it won 8 contracts. At least 7 of the bids (and 4 of the wins) related to existing customers of Berendsen Newbury.[347] The CMA considers that had the Restrictions simply continued in force as set out in the TMLAs – i.e. absent the Passive Sales Letters and/or the termination of the Joint Venture – Fenland would, in principle, not have bid in response to any unsolicited enquiry from (and/or actively marketed to) any Out of Territory customer without the prior permission of Berendsen Newbury. This is shown by examples relating to two customers, each with sites in both the Fenland Territory and the Newbury Territory. Before the Passive Sales Letters, each customer was served, under separate contracts, in the Newbury Territory by Berendsen Newbury and in the Fenland Territory by Fenland. One of these customers issued a tender with a deadline for response during the Relevant Period, but around three months after the Passive Sales Letters. Fenland bid for (and won) the contract to serve the customer in both territories.[348] Similarly, the other customer issued a tender around two months after the Joint Venture was terminated. Fenland bid for (and won) the contract to serve that customer in both territories.[349] Fenland submitted that '*[t]he Micronclean JV would previously have responded to*' each of these unsolicited enquiries.[350] These examples therefore show the nature of the competitive intensity between the Parties after the Passive Sales Letters, and also after the termination of the Joint Venture.

3.202 There are limitations to the data noted at paragraphs 3.200 and 3.201 above. The data is based on Fenland's 'passive compete forms' – which cover only part of the Relevant Period, so may not be comprehensive.[351] In addition, the number of customers which switched (or considered switching) is limited.[352] On

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[347] URN 00186.94 (a reworked version of URN 00055.19), columns titled '*Newbury Customers (Y or N)*' and *'Current Status'*.

[348] As summarised in URN 00186.94 (a reworked version of URN 00055.19), in relation to the customer noted in URN 00186.82. In relation to the same customer, see also Berendsen Newbury submission at URN 00067.9 (full reference at footnote 117 above).

[349] As summarised in URN 00186.94 (a reworked version of URN 00055.19), in relation to the customer noted in URN 00186.67.

[350] That is, each Party would have bid only for the relevant site(s) located in its own territory. See URN 01279 (full reference at footnote 185 above), p.1 (seventh and tenth rows): '*The Micronclean JV would previously have responded to this type of request, and would have been able to serve the account more economically. With the termination of the JV, Fenland had little option but to bid for the whole contract despite the high distribution cost involved*'. The CMA inferred that 'previously' in this context refers to before the Joint Venture was terminated – and, presumably, also before the Passive Sales Letters.

[351] The CMA notes that Fenland's customer data indicates some customers joining during this time within the Newbury Territory which are not captured on the passive compete forms, such as the customer listed in URN 01258 (full reference at footnote 238 above), p.2 (tenth row). Fenland's data loss in April 2015 (see footnote 182 above) results in the figures being harder to verify.

[352] Fenland also submitted that the frequency of its bids was affected by the launch of this Investigation. The CMA notes that 14 out of the 21 'passive compete forms' pre-date 30 March 2016 (the date on which this Investigation was launched).

this basis, the CMA considers that the aforementioned data may not be conclusive in itself, but it corroborates Fenland's statements regarding its own strategy (see paragraph 3.194.a. above) and is consistent with the CMA's findings.

3.203 Fenland provided alternative data, on the number of Out of Territory contracts that it gained over time, and submitted that this was '*at odds with the CMA's assertion that competition between the Parties in the Relevant Markets has increased further since the Joint Venture terminated relative to the period before the Joint Venture terminated*'.[353] However, Fenland noted a number of potential issues with the reliability of its alternative data.[354] It also submitted elsewhere that its 'passive compete forms' provided the most reliable method of identifying its Out of Territory prospects. For this reason, the CMA has not presented above any data on the period before the Passive Sales Letters and[355] has not placed substantial weight on the alternative data provided by Fenland.

3.204 Irrespective of the data limitations noted at paragraph 3.202 above, it is clear that Fenland bid for some more Out of Territory customers after the Passive Sales Letters. In addition, the CMA considers that absent the Passive Sales Letters Fenland would, in principle, have been unable to bid for any such customer without the prior permission of Berendsen Newbury.

3.205 The relatively low number of bids and the absence of reliable comparative data for the period prior to the Passive Sales Letters or Newbury Acquisition mean that the data itself is inconclusive in empirical terms. The data is nevertheless qualitatively consistent with the CMA's view that, absent the Restrictions relating to active or passive sales, each Party would have been able to compete for more Out of Territory customers in the Relevant Markets, during the Relevant Period.

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[353] URN 01139 (Fenland SO WRs), paragraph 5.81–5.83. The analysis is described in URN 01256 (Fenland response dated 16 June 2017 to Questions 7–8 of the Fifth Fenland Notice), pp.1–2 (response to Question 7) and URN 00186.1 (full reference at footnote 133 above), pp.26–29 (response to Question 8). The underlying data is included in URN 00186.92 (full reference at footnote 264 above), and URN 01258 (full reference at footnote 238 above).

[354] URN 00186.92 (full reference at footnote 264 above), pp.3 refers to *'misleading anomalies'*; URN 01256 (full reference at footnote 353 above), p.1, footnote 1 (response to Question 7.b.) states that *'one customer account on Protrack may be subdivided into a number of contracts to allow segregation of garments either to different laundries or for other reasons'.*

[355] Fenland stated that *'prior to the use of this form, there was no reliable method to identify prospects that approached Fenland from the Newbury Territory'*: URN 01237 (full reference at footnote 177 above), p.15 (response to Question 3). Although this statement is in reference to the data available prior to the introduction of the passive compete forms, the CMA considers that this would equally apply to the data Fenland provided related to the post-Joint Venture period since they rely on the same underlying source.

V. Other suppliers' ability to deliver to customers across GB

3.206 This Part 3.E.V. shows that suppliers other than the Parties were able to supply customers across GB, which supports the view that absent the Restrictions each Party could have supplied more Out of Territory customers.

3.207 Other suppliers on one or more of the Relevant Markets were not subject to the Restrictions, and served customers throughout GB. As detailed below, over time Fishers and Guardline each used couriers to build a base of customers across GB – some of which they later served by developing and/or expanding their own distribution networks.

3.208 Fishers supplied Cleanroom Laundry Services to customers across all of GB from one Cleanroom Laundry in Scotland, using couriers and, in the latter part of the Relevant Period, a distribution hub in Northampton. As at December 2013, Fishers was using its own network to serve Scotland and couriers 'to serve the rest of the UK'.[356] By August 2015, Fishers – having first '*obtained work in England served via couriers*' until this '*reached a sufficient turnover value*' – had opened a hub in Northampton.[357] Fishers's contracted-out service using this hub took about 12 weeks to negotiate and set up, at no upfront cost.[358] During the *Micronclean/Guardline* merger review, the Parties jointly submitted that Fishers was '*pushing hard to expand its cleanroom business, and is taking business from Micronclean* [i.e. the two Parties]'.[359]

3.209 Guardline's business – acquired in 2013 by the Parties – was built up by supplying Consumables using couriers. Guardline later developed its own distribution network, using it to supply its Cleanroom Laundry Services customers (and a '*small percentage*' of its Consumables orders). Immediately before its acquisition by the Parties, Guardline was using couriers to supply some '*more far flung*' Cleanroom Laundry Services customers, and most of its Consumables orders, across GB: see **Annex C**, paragraph C.13.

3.210 Two maps at **Annex E** show, respectively, the locations of customers of Fishers (as at 2015; see the locations noted in red on Figure E6) and Guardline (as at March 2014; see Figure E7). Neither of these maps shows the delivery method used for those customers. However, paragraphs 3.207 to 3.209 above suggest that each supplier moved over time from using couriers

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[356] URN 00983 (Reply of Parties/JVCo dated 20 December 2013 to OFT *Micronclean/Guardline* inquiry letter dated 19 December 2013), p.23; see footnote 94 above.
[357] URN 01000 (full reference at footnote 288 above), p.11 (under 'Response from Fenland').
[358] URN 01000 (full reference at footnote 288 above), p.10 (under 'Response from Fishers').
[359] URN 00982 (full reference at footnote 82 above), p.80. This submission may be the basis for the CMA statement that Fishers was competing '*aggressively'* with the Parties in '*Scotland and England and Wales*': URN 00984 (*Micronclean/Guardline* Decision), paragraph 94.

to supplying more of its customers using its own distribution network. In any event, clearly each of Fishers and Guardline served customers across GB during the Relevant Period. This supports the view that absent the Restrictions each Party could have supplied more Out of Territory customers in the same period.

3.211 Fenland submitted in November 2017 that it did not believe that Fishers was currently winning any customers from it.[360] The CMA considers that this Fenland submission on the level of competitive constraint from Fishers which Fenland has felt since termination of the Joint Venture does not significantly undermine the contemporaneous evidence from the Relevant Period cited in this Part 3.E.V. That contemporaneous evidence shows that Fishers supplied Cleanroom Laundry Services customers across all of GB, from one Cleanroom Laundry in Scotland, during the Relevant Period.

VI. Each Party's ability to compete for customers located in its own territory but which were allocated to the other Party

3.212 Parts 3.E.II. to 3.E.V. above refer to each Party's ability to serve Out of Territory customers. In addition, the CMA's view is that each Party could have competed to a greater extent for customers located in that Party's own territory but which were allocated to (and served by) the other Party. The Parties described such customers as '*anomalous*' (see paragraph 3.117 above).

3.213 The CMA's view noted in the preceding paragraph is reinforced by the fact that each Party served '*anomalous customers*' which were not only in the territory allocated to the other Party, but also in the same sectors as those generally supplied by the other Party. For example, Fenland served '*anomalous customers*' in the '*NHS*', '*Pharmaceutical*' and '*Medical Devices*' sectors (see paragraph 3.127 above) – sectors supplied by Berendsen Newbury.[361] Berendsen Newbury served '*anomalous customers*' in the '*NHS*', '*Pharmaceutical*' and '*Medical* [Devices]' sectors (see paragraph 3.129 above) – sectors supplied by Fenland.

3.214 Further, the CMA has received no representations or evidence that would undermine the CMA's view regarding the viability of each Party supplying '*anomalous customers*' located in that Party's own territory but allocated to (and served by) the other Party. Therefore, the CMA considers that each Party could have bid for, and served, the other Party's '*anomalous customers*'.

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[360] URN 01441 (full reference at footnote 43 above), row 32 (at pp.34–35).

[361] For example, '*Berendsen Newbury supplies Intermediate Cleanroom Laundry Services*' to '*a diverse range of customers, including… the pharmaceutical industry and NHS pharmacies*' and '*the medical device industry*': URN 01142 (Berendsen SO WRs), paragraphs 7.12(a), 7.12(f) and 7.13.

VII. The Parties' perceptions of each other as competitors

3.215 This Part 3.E.VII. shows that each Party perceived the other Party as a competitive threat in the Relevant Markets.

3.216 Before the Newbury Acquisition, in May 2014, Berendsen noted [Fenland Director A]'s concern that if the *Microclean/Guardline* merger review were to *'end up in a phase 2 this could take years and* ***might end up in them*** [i.e. the Parties] ***being forced into competition'***.[362]

3.217 Around the time of the Newbury Acquisition, various statements were made by the Parties recognising that they posed a competitive threat to each other.

a. Fenland noted internally that one option was to '*Take* [Berendsen] *Newbury head on in the southern territory* [i.e. the Newbury Territory]', focusing on the following '*quick wins*': '*Current Consumable / Sterile Pack customers; Joint customers; Customers we have current relationships* [sic]' and '*customers with close geographic location to our routes*'.[363] Fenland noted the competitive threat posed to it by Berendsen Newbury – in particular, now it was owned by Berendsen plc. To this end, Fenland noted that Berendsen Newbury might '*decide to switch to trading as Berendsen and compete against us at which point we will have less ability to take their customers*', and that '*[w]ar is a very real option*'.[364]

b. After the Newbury Acquisition, the Parties engaged in discussions concerning the future of the Joint Venture.[365] After one meeting, Fenland noted that Berendsen appeared '*keen to continue with the arrangements. …It also slows (but does not stop) our competition with each other*'.[366] Discussions following the meeting were based on a document stating that if the Parties '*enter licence agreements to use the Microclean name but*

[362] URN 00151.13 (Berendsen internal email dated 13 May 2014 from [Berendsen Newbury Director G] to [Berendsen plc Manager A], detailing telephone call with [Fenland Director A]), p.1; emphasis added by CMA.
[363] URN 01007 (full reference at footnote 288 above), pp.2 and 4.
[364] URN 01008 (email dated 21 September 2014 from [Fenland Director A] to [Fenland Director F]), p.1. See also the options of e.g. '*Business as usual*' and '*Go to war*' in URN 01009 ('*Berendsen Acquisition of Newbury - Options*'), p.1, and the option of '*Declare war*' in URN 01010 ('*Thoughts for Meeting to discuss the Berendsen Acquisition of Microclean Newbury …Heathrow, 26th September 2014*').
[365] A number of these discussions also involved certain Berendsen plc personnel who, as far as the CMA is aware, had no formal role at Berendsen Newbury (e.g. [Berendsen plc Manager A] and [Berendsen plc Manager B]).
[366] URN 00186.117 (Note of a meeting between the Parties on 6 October 2014 to discuss Microclean Trademark User Agreements), p.1; emphasis added by the CMA.

compete with each other on a passive basis… This… will lead to the two parties becoming competitors with each other'.[367]

c. A few months after the Newbury Acquisition, the Parties were still discussing options for cooperation, based on a document stating that '*[i]f Berendsen continue to trade as Micronclean in the UK under a licence agreement with MC Ltd* [JVCo] *(that contains a passive compete clause), it is likely that competition will grow and not be dissimilar to that between the two parties that would exist if there were no agreement*'.[368] Fenland noted internally that '*the threat of Berendsen will become increased once the effects of the Newbury takeover has been finalized*'.[369]

3.218 Fenland submitted that its statements about Berendsen Newbury around the time of the Newbury Acquisition, such as those cited at paragraph 3.217 above, should be seen in context. At that time, there was significant uncertainty as to the future of the Joint Venture, and Fenland was concerned that Berendsen Newbury – backed by a new (and listed, plc) parent with UK-wide laundry operations – could in time become a viable competitor to Fenland.[370] Even accepting that context, the CMA notes that Berendsen also made statements about Fenland posing a competitive threat – as noted at paragraphs 3.173 and 3.216 above, and paragraph 3.220.a. below.

3.219 Six months or so after the Passive Sales Letters, the Parties considered that they were still not competing as fully as they could. A record of a meeting on 24 September 2015 noted that: (i) *Fenland/Fishers* '*will require Fenland to break the existing joint venture arrangements …relating to cleanroom garments so that Fenland (trading as Micronclean) will fully compete across Great Britain with BCS* [i.e. Berendsen Newbury] *trading as Berendsen*'; and (ii) if '*Fenland (continuing to trade as Micronclean) competes with BCS (trading as Berendsen) across the UK… [t]his re-structuring of the market will lead to greater competition than exists currently*'.[371] Similarly, Fenland noted internally in November 2015 that '*If the CMA passes the Fishers acquisition …[t]he two companies* [i.e. the Parties] *will actively compete on garments*'.[372]

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[367] URN 00068.16 (full reference at footnote 168 above), p.3 (emphasis added by the CMA).
[368] URN 00124.6 (full reference at footnote 120 above), p.2.
[369] URN 00186.40 (Fenland document entitled 'Sales Structure Review … – Jan 15'), p.1.
[370] URN 01139 (Fenland SO WRs), at paragraphs 5.87–5.90. Fenland also submitted at paragraph 5.91 of the same document that, from Fenland's perspective, Berendsen Newbury continues to operate post-acquisition (and post-termination of the Joint Venture) much as it did pre-acquisition with no material expansion of its capabilities. On this generally, see paragraphs 3.58–3.60 above.
[371] URN 00043.7 (Heads of Agreement of 24 September 2015 for the restructuring of JVCo), p.1; emphasis added by the CMA.
[372] URN 00186.48 (Minutes of Fenland board meeting on 11 November 2015), p.4 (paragraph 8.1).

3.220 Around the time of the planned termination of the Joint Venture, each Party noted internally the possibility of competing for the other Party's customers.

a. In October 2015, Berendsen Newbury contemplated internally '*sales and marketing, what is our plan for 2016 and the upcoming years and in particulate* [sic] *what is our plan to handle the new relationship with Fenland if they aquire* [sic] *Fishers and the JV gets dissolved. What are iur* [sic] *planned actions to defend and attack*'.[373] Similarly, Berendsen Newbury highlighted '*Plans for targeting the North* [i.e. the Fenland Territory]' amongst '*Opportunities 2016*'.[374]

b. As at February 2016, Fenland had identified the top ten Berendsen Newbury customers in each of Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services, and noted a strategy to '*continue to build relationships with the contacts that we have and gain customers at high prices and on quality*'.[375] Fenland was also considering '*customer retention*', i.e. aiming '*to work closely with customers to try to prevent any losses to Berendsen*'; regular customer visits were discussed and, as at March 2016, '*being dealt with*'.[376]

3.221 In conclusion, the CMA finds that the Parties perceived themselves to be competitors in the Relevant Markets.

VIII. The Parties' ability to compete for territories and customers: conclusion

3.222 The CMA finds that, absent the Restrictions, each Party would have been able to compete with the other Party to a greater extent, including for more Out of Territory customers, in the Relevant Markets, during the Relevant Period.

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[373] URN 00151.53 (email dated 28 October 2015 from [Berendsen Newbury Director G] to [Berendsen Newbury Director J]), p.2.
[374] URN 00036.84 (Berendsen Presentation '*Sales Approach 2016. UK Cleanroom*' dated 1 October 2015), p.10.
[375] See '*"Top 10" Berendsen Class 4 Accounts'* and '*…Class 6 Accounts'* respectively at URNs 00186.95–00186.96, each dated 15 February 2016. See also references in URN 00186.53 (Fenland 'Cleanroom Solutions Report' dated February 2016), p.3, to actions following up Fenland's February 2016 board meeting. See also URN 00045.3 (Minutes of Fenland board meeting on 15 February 2016), paragraphs 2.1–2.2: '*[Fenland Director A]'s view was to not aggressively attack Berendsen's customers, to continue to build relationships with the contacts that we have and gain customers at high prices and on quality. [Fenland Director C] reiterated this needs to be the approach to avoid a price war*'. See also URN 00186.97 (*'"Top 10" Fenland Accounts to Defend'*).
[376] URN 00045.3 (Minutes of Fenland board meeting on 15 February 2016), paragraph 2.3: '*Sales & Service team to work closely with customers to try to prevent any losses to Berendsen. [Fenland Director F] and [Fenland Employee A] to ensure our top ten customers are visited every month and a risk analysis produced.*' See also URN 00045.4 (Minutes of Fenland board meeting 10 March 2016), paragraph 4.1: '*[Fenland Director F] reported that this was being dealt with and [Fenland Employee A] will add to his monthly report.*' See also references in URN 00186.53 (Fenland 'Cleanroom Solutions Report' dated February 2016), p.3, to actions following up Fenland's February 2016 board meeting.

4. MARKET DEFINITION

A. Purpose and framework

4.1 When applying the Chapter I prohibition, the CMA is not obliged to define the relevant market – unless it is impossible, without such a definition, to determine whether the agreement in question has as its object or effect the appreciable prevention, restriction or distortion of competition.[377] The Competition Appeal Tribunal ('CAT') has stated that, in Chapter I cases, the '*determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement*'.[378]

4.2 In the present case, it is unnecessary to reach a definitive view on market definition in order to make the determination in relation to the Infringement. Nonetheless, the CMA has formed a view of the Relevant Markets in order to calculate the 'relevant turnover' for the purposes of establishing the level of the financial penalty imposed on the Addressees. Since the relevant evidence is applicable to both market definition and to establishing the Parties' ability to compete with each other, the CMA has also referred to the Relevant Markets in Part 3.E. above and Part 5.D. below.

4.3 The CMA has considered the relevant product and geographic market delineations within which the Parties supplied Cleanroom Laundry Services and Consumables (which are key components of the TMLA Products and Services). The CMA has also previously considered market definition in this sector in the context of two phase 1 merger reviews under the Enterprise Act 2002, and the CMA refers as appropriate to its previous decisions in relation to *Microclean/Guardline* and *Fenland/Fishers*. However, the CMA notes that, while past cases can provide useful information for market definition, the appropriate market definition can differ based on the specific facts of each case[379] as well as the applicable legal framework.

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[377] Judgment in *Volkswagen AG v Commission,* T-62/98, EU:T:2000:180, paragraph 230; judgment in *SPO and Others v Commission,* T-29/92, EU:T:1995:34, paragraph 74.
[378] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 176. See also *Market definition* (OFT403, December 2004), adopted by the CMA Board, footnote 6: '*[a]n exception is where agreements have as their object the prevention, restriction or distortion of competition. In these cases, market definition is not necessarily a prerequisite for finding an infringement: see Case T-62/98 Volkswagen AG v Commission [2000] ECR II-2707 at paragraphs 230 to 232'*.
[379] OFT403, paragraph 5.7 and footnote 5.

B. Relevant product market(s)

4.4 Schedule 1 of each TMLA lists the 'Products' and 'Services' covered by that TMLA (the TMLA Products and Services). These lists provide a starting point for identifying the Relevant Markets, and include:[380]

a. laundry and disinfection of textile items (i.e. Cleanroom Laundry Services);

b. the rental of any item listed in 'The Products' other than consumable or disposable items (i.e. Cleanroom Garment/other garment rental); and

c. products for use in Cleanroom environments (i.e. Consumables).

Cleanroom Laundry Services

4.5 Cleanroom Laundry Services are provided by Cleanroom Laundries to customers which operate Cleanrooms and therefore must have their Cleanroom Garments laundered within a cleanroom environment. Cleanroom Laundry Services are also provided to other customers which have no absolute need for Cleanroom Laundry Services, but nonetheless choose to have their garments laundered by Cleanroom Laundries.[381]

4.6 For those customers which need Cleanroom Laundry Services, their Cleanroom Garments must be decontaminated through an appropriate laundering process. The laundering process must be conducted within an environment of at least the same Cleanroom standard as that within which the Cleanroom Garments are worn. Cleanrooms, and Cleanroom Laundries, can be classified according to the standard of cleanliness required (e.g. based on the ISO 14644 classifications, ranging from ISO 'Class 1' to ISO 'Class 9').[382]

Full Cleanroom Laundry Services

4.7 The highest specifications of Cleanroom Laundry Services are provided by Cleanroom Laundries classified to ISO Classes 4 to 5 (referred to as Full Cleanroom Laundry Services). During the Relevant Period, each Party supplied Full Cleanroom Laundry Services, under the Trade Marks and in accordance with the TMLAs. Fenland operated an ISO Class 4 Cleanroom

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[380] Not all TMLA Products and Services are within the scope of this investigation: see footnote 11 above.
[381] See e.g. Part 3.B. above and paragraph 3.23 above.
[382] See paragraphs 3.18 and 3.21 above. ISO 14644 classifications are not the only classifications that may apply to Cleanrooms and/or Cleanroom Laundries: see footnote 73 above. Nor are ISO 14644 classifications the only standards in accordance with which garments may need to be laundered and processed; customers may also (or alternatively) refer to, for example, the Good Manufacturing Practice (GMP) guidelines: URN 00984 (*Micronclean/Guardline* Decision), paragraph 33.

Laundry in Skegness. Berendsen Newbury operated an ISO Class 4 Cleanroom Laundry in Newbury.

4.8 Customers which need Full Cleanroom Laundry Services cannot substitute to lower-grade laundry facilities. On this basis, in *Microclean/Guardline* and *Fenland/Fishers* the CMA adopted Full Cleanroom Laundry Services as a frame of reference.[383] The CMA has received no evidence from the Parties in this case that undermines that view.

4.9 Therefore, on the basis of the evidence in this case, the CMA concludes that the supply of Full Cleanroom Laundry Services is a Relevant Market. This Relevant Market includes supply to all customers purchasing Full Cleanroom Laundry Services as described above (and in the Glossary).

Intermediate Cleanroom Laundry Services

4.10 As noted in Part 3.B. above, some customer requirements may be served by lower grade Cleanroom Laundries, classified to ISO Classes 6 to 8 (referred to as 'intermediate' Cleanroom Laundries). During the Relevant Period, each Party supplied Intermediate Cleanroom Laundry Services. Fenland operated an ISO Class 6 Cleanroom Laundry in Louth. Berendsen Newbury operated an ISO Class 7 Cleanroom Laundry in Newbury.[384]

4.11 Intermediate Cleanroom Laundry Services may be purchased on a standalone basis. However, some customers of Full Cleanroom Laundry Services also purchase Intermediate Cleanroom Laundry Services, and may purchase both types of services as a bundle from the same supplier. [385] Each Party supplied Intermediate Cleanroom Laundry Services on a standalone basis and as a bundle. Evidence submitted by the Parties shows that:

a. [35–45]% of Berendsen Newbury's customers purchased standalone Intermediate Cleanroom Laundry Services and [35–45]% purchased a bundle of Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services.[386]

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[383] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraphs 32–35 and 41. URN 00984 (*Microclean/Guardline* Decision), paragraphs 32–42 and 66.

[384] As discussed at paragraphs 4.21 to 4.23 below, during the Relevant Period Berendsen plc also operated two ISO Class 8 laundries, under the Guardian brand. These laundries served operating theatres and processed reusable surgical gowns: see URN 00996 (Berendsen reply of 29 October 2015 to CMA *Fenland/Fishers* questions dated 21 October 2015 for competitors), p.2.

[385] URN 00984 (*Microclean/Guardline* Decision), paragraph 43. See also paragraph 3.22 above.

[386] These proportions are based on a CMA analysis of aggregated totals of individual figures redacted from the column entitled 'Annual Revenue' in URN 00994 (full reference at footnote 225 above), see footnote 226 above.

b. [55–65]% of Fenland's customers purchased Intermediate Cleanroom Laundry Services on a standalone basis and [10–20]% of Fenland's customers purchased both Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services.[387]

4.12 Fenland submitted that Berendsen Newbury built its 'intermediate' Cleanroom Laundry (alongside Berendsen Newbury's 'full' Cleanroom Laundry in Newbury) to serve demand for Intermediate Cleanroom Laundry Services from its Full Cleanroom Laundry Services customers.[388] However, the evidence set out above shows that Berendsen Newbury supplied Intermediate Cleanroom Laundry Services to a number of customers on a standalone basis during the Relevant Period, not just to its Full Cleanroom Laundry Services customers.

4.13 Certain customers would not consider laundry services supplied by a Barrier Laundry ('Barrier Laundry Services') to be an appropriate substitute for Intermediate Cleanroom Laundry Services, due to the operational specifications of their activities (in particular, their Cleanroom activities).[389] On this basis, the CMA considers that it would be appropriate to define an Intermediate Cleanroom Laundry Services market which excludes Barrier Laundry Services. For at least some Intermediate Cleanroom Laundry Services customers, Barrier Laundries would not provide a competitive constraint on 'intermediate' Cleanroom Laundries.

4.14 However, the CMA has previously received evidence that, for at least some customers, Barrier Laundries[390] provided an effective competitive constraint on intermediate Cleanroom Laundries.[391] On this basis, in *Fenland/Fishers* and *Micronclean/Guardline*, the CMA adopted a frame of reference encompassing both Intermediate Cleanroom Laundry Services and Barrier Laundry Services, without concluding on this point.[392]

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[387] These proportions are based on a CMA analysis of aggregated totals of individual figures which were, for the purposes of cross-disclosure in this investigation, redacted from URN 01002 (Attachment entitled 'Q4 – Customer Turnover split by customer delivery site and Fenland processing Laundry' of Fenland reply of 4 September 2015 to CMA *Fenland/Fishers* questions dated 12 August 2015) see footnote 94 above.

[388] URN 00186.1 (full reference at footnote 133 above), p.53 (response to Question 19).

[389] Fenland submitted that certain 'Class 6 Required' customers require an ISO Class 6 laundry service and cannot have their laundry processed in a Barrier Laundry. See, e.g.: URN 01354 (full reference at footnote 41 above), footnote 2; URN 01340 (Fenland DPS WRs), paragraph 2.13.1(c); URN 01182 (full reference at footnote 108 above), pp.6–8 (response to Question 5).

[390] Barrier Laundries are laundries which use similar processes to Cleanroom Laundries, but do not conform to the standards required to be classified as a Cleanroom Laundry: see paragraph 3.23 above.

[391] URN 00984 (*Micronclean/Guardline* Decision), paragraph 41. This is because some customers did not require garments to be laundered in a cleanroom environment, so may be willing trade off quality with price.

[392] URN 00984 (*Micronclean/Guardline* Decision), paragraph 42 ('…*although it was not necessary for the CMA to conclude on this point as no concerns arise irrespective of whether these are considered*

4.15 Certain customers may not necessarily need laundry services classified to at least the standard of Intermediate Cleanroom Laundry Services, but nonetheless may still choose to purchase Intermediate Cleanroom Laundry Services. The CMA has considered whether supply to these customers forms part of a market for Intermediate Cleanroom Laundry Services or part of a broader market which includes Barrier Laundry Services.

4.16 Fenland submitted that, if it were appropriate to define this Relevant Market narrowly, the CMA should distinguish between supply to different customers,[393] and should exclude supply to customers which do not need Intermediate Cleanroom Laundry Services but nevertheless purchase them.[394] According to Fenland, this is germane for the following types of customers (which could have their garments processed by non-classified Barrier Laundries).

a. Customers which prefer to purchase ISO Class 6-classified Cleanroom Laundry Services as they perceive that those services will provide benefits[395] – even though other customers, with similar needs, do not perceive such benefits and so procure Barrier Laundry Services instead.

b. Customers which need at least a Barrier Laundry-standard service and do not perceive any relevant benefits from an Intermediate Cleanroom Laundry Service,[396] and customers which do not need even the standard offered by Barrier Laundries.[397] Fenland has submitted, that it could supply these customers at Grantham (a Barrier Laundry) or Louth, but decided to supply them from Louth for commercial reasons (such as to balance capacity).[398]

4.17 The CMA has considered whether the terms or the services provided to and/or prices paid by customers which Fenland submitted do not need Intermediate Cleanroom Laundry Services but nevertheless purchase them differ from those for customers which need Intermediate Cleanroom Laundry Services such that supply to these types of customers should be considered to form separate

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separately or in combination'). *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 35(b).

[393] See e.g. URN 01139 (Fenland SO WRs), at paragraph 6.9.4.

[394] URN 01182 (full reference at footnote 108 above), pp.6–8 (response to Question 5); URN 01139 (Fenland SO WRs), paragraph 6.9.4; URN 01340 (Fenland DPS WRs), paragraph 2.13.1.

[395] Fenland described these customers as 'Competitive with Barrier Laundries' customers, e.g. in the submissions referred to at footnote 394 above.

[396] Fenland described these customers as 'Barrier Required' customers, e.g. in the submissions referred to at footnote 394 above.

[397] Fenland described these customers as 'No Barrier Required' customers, e.g. in the submissions referred to at footnote 394 above.

[398] URN 01182 (full reference at footnote 108 above), pp.6–8 (response to Question 5).

markets (or one market including both Intermediate Cleanroom Laundry Services and Barrier Laundry Services).

4.18 Fenland provided samples of its contracts (for garment rental and processing at its 'intermediate' Cleanroom Laundry in Louth) with customers which Fenland submitted did not need Intermediate Cleanroom Laundry Services. Each contract included a minimum technical specification, under which Fenland agreed to provide to each customer laundry services classified to ISO Class 6, as a minimum. The technical specification in Schedule 3 of each sample contract was therefore the same, regardless of whether or not the customer needed its garments to be processed by an 'intermediate' Cleanroom Laundry.[399] Fenland submitted that this (i) merely reflected its initial decision as to which of its laundries would process a customer's items, rather than any customer's requirement for an ISO Class 6-classified Cleanroom Laundry, and (ii) had not prevented Fenland from switching customers served under two of the sample contracts to two of Fenland's non-classified Barrier Laundry facilities.[400] However, on their face, these contracts do not support a view that all of the relevant customers would use (or consider using) Barrier Laundry Services. Instead, they indicate that the customers had contracted to buy, as a minimum, laundry services classified to at least ISO Class 6.

4.19 Fenland submitted that it charged customers needing Class 6-classifed laundry services a premium compared to those customers requiring only lower-level laundry services.[401] However, the pricing information that Fenland provided in this regard does not appear to support this submission. The CMA has considered the fact that prices are individually negotiated as well as other caveats which, Fenland submitted, limit the usefulness of the data (e.g. the price charged to a customer depends on a range of factors, including the type and cost of the garments, the garment processing time and the number of changes required by the customer).[402] The CMA considers that the data does not support the submission that Fenland charged a premium to customers which need laundry services classified to at least ISO Class 6 over and above the prices Fenland charged to customers which require only lower-level, non-classified laundry services.[403]

4.20 Therefore, on the basis of the evidence in this case, the CMA concludes that this Relevant Market includes supply to all customers purchasing Intermediate Cleanroom Laundry Services as described above (and in the Glossary),

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[399] URN 01354 (full reference at footnote 41 above), pp.4–5 (response to Question 5); URNs 01349–01353 inclusive (Sample contracts submitted by Fenland on 26 July 2017), in particular at Schedule 3.
[400] URN 01354 (full reference at footnote 41 above), pp.4–5 (response to Question 5).
[401] URN 01220 (full reference at footnote 30 above), p.64 at lines 3 to 7.
[402] URN 01354 (full reference at footnote 41 above), p.3.
[403] URN 01354 (full reference at footnote 41 above), pp.2–3.

including supply to customers which may not need this level of service but nevertheless purchase it. The CMA further concludes that the evidence in this case does not support a narrower market definition (including only supply to customers which need Intermediate Cleanroom Laundry Services) or a wider market definition (which would also include supply to customers using Barrier Laundries).

Laundry services supplied to operating theatres

4.21 Berendsen submitted that the supply of laundry services to operating theatres (including supply by Berendsen plc through its Guardian business unit, which has not been a party to this investigation) should not be included in the Relevant Market for Intermediate Cleanroom Laundry Services. It submitted that the drapes and gowns which are used in operating theatres often become heavily contaminated with blood and other bodily fluids and require specialist laundering. Berendsen submitted that laundries serving operating theatres are not a substitute for its 'intermediate' Cleanroom Laundries (or vice versa), because: (i) Berendsen Newbury's Intermediate Cleanroom Laundry Services customers would not accept their garments being laundered alongside garments from operating theatres, due to the risk (real or perceived) of cross-contamination; and (ii) there are specific technical standards to which laundries serving operating theatres must conform.[404]

4.22 The CMA's view is that the supply of laundry services to operating theatres can be distinguished from the supply of Intermediate Cleanroom Laundry Services,[405] for the following reasons.

a. Garments worn in operating theatres are not laundered alongside the garments of other customers of Intermediate Cleanroom Laundry Services, due to the risk (real or perceived) of cross-contamination.[406]

b. The laundering process is different for textiles which have been used in operating theatres compared to the process described at paragraph 3.20 above, which typically applies to Intermediate Cleanroom Laundry Services. For example, Fenland submitted that for operating theatres the '*textile finishing is usually by calendaring* [sic] *rather than tunnel or*

[404] URN 01142 (Berendsen SO WRs), paragraphs 7.16–7.30. URN 01180 (full reference at footnote 29 above), paragraphs 3.24–3.46.
[405] For the avoidance of doubt, in this investigation the CMA has not defined a Relevant Market for the supply of Cleanroom Laundry Services (or any other laundry services) to operating theatres.
[406] URN 01142 (Berendsen SO WRs), paragraphs 7.12–7.24. Berendsen submitted that Intermediate Cleanroom Laundry Services suppliers are able to serve pharmaceutical and NHS pharmacies, semi-conductor and disk drive, automotive, food, tabletting and cosmetics, medical device laboratories, and packaging customers using the same equipment at the same laundry site.

tumble drying' and *'Laundered textiles are normally sterilised by steam (autoclaving) prior to return to the theatre*.'[407]

c. These 'Intermediate' Cleanroom Laundry suppliers do not conform to the specific technical requirements of the Medical Device Directive (93/42/EEC) which relate to the textiles used within operating theatres.[408] Berendsen submitted that operating theatres consider these standards to be more important than the ISO 14644 classifications.[409]

4.23 Due to the factors listed at paragraph 4.22 above, operating theatres are served by dedicated, specialist laundries. In the UK, the main specialist laundries are Guardian and Synergy.[410] Each Party submitted that it does not provide (and/or does not compete to provide) Cleanroom Laundry Services to operating theatres, and did not do so during the Relevant Period either.[411]

4.24 In light of the above, the CMA considers that there is limited, if any, demand-side substitution as customers of Intermediate Cleanroom Laundry Services are very unlikely to switch to a supplier of laundry services to operating theatres. Equally, there is limited, if any, supply-side substitution between 'intermediate' Cleanroom Laundries and laundries supplying services to operating theatres. As such, the supply of laundry services to operating theatres is not within the Relevant Market for Intermediate Cleanroom Laundry Services.

Laundry services supplied to Hospital Sterilisation Services Departments

4.25 HSSDs, i.e. Hospital Sterilisation Services Departments,[412] consist of several rooms where different functions are carried out, including: reception area, cleaning and disinfection, inspection, assembly and packing ('IAP'), and

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[407] See joint submission of Fenland and Fishers, at URN 00998 (full reference at footnote 72 above), paragraph 14.26.8. Calendering is the process of passing the textile through heated rollers at high pressure which melts and flattens the surface and closes the fabric pores slightly: see URN 00066.34 (Micronclean Big Blue Cleanroom Handbook dated 2011), p.37 (as printed).

[408] URN 01180 (full reference at footnote 29 above), paragraphs 3.29–3.30.

[409] URN 01180 (full reference at footnote 29 above), paragraph 3.30.

[410] *'This is a specialised laundry operation, and laundries serving this sector are dedicated to the sector and do not compete for business from the other customer groupings discussed in this section'*; URN 00998 (full reference at footnote 72 above), paragraph 14.26.8. In addition, neither Guardian nor Synergy was listed in URN 00984 (*Micronclean/Guardline* Decision) or *Fenland/Fishers* Decision (full reference at footnote 9 above) as suppliers of Intermediate Cleanroom Laundry Services.

[411] URN 01142 (Berendsen SO WRs), paragraphs 7.21–7.22; URN 01237 (full reference at footnote 177 above), pp.8, 9 and 11 (response to Question 1).

[412] The Addressees submitted that HSSD was synonymous with the following other terms: SSD, i.e. Sterile Services Department; HSSU, i.e. Hospital Sterile Services Unit; HSDU, i.e. Hospital Sterilisation Decontamination Unit (or Hospital Sterilisation Disinfection Unit); and TSSU, i.e. Theatre Sterile Services Unit: URN 01237 (full reference at footnote 177 above), p.9 (response to Question 1); URN 01222 (Berendsen response dated 9 June 2017 to Question 1 of the Berendsen Fifth Notice), paragraph 1.3.

sterilisation. These rooms can be classified into contaminated sections and clean (or non-contaminated) sections. The IAP room is a clean section which must be classified to ISO Class 8 standard. Berendsen submitted that '*staff must change into cleanroom gowns before entering'* an IAP room.[413]

4.26 Berendsen submitted that the supply of laundry services to HSSDs – including supply by Berendsen plc under the Guardian brand – should not be included in any Relevant Market, e.g. because suppliers cannot launder garments worn in 'contaminated' parts of HSSDs alongside other Cleanroom Laundry Services customers' garments due to a risk of cross-contamination.[414]

4.27 The CMA's view is that the supply of Cleanroom Laundry Services to the clean sections of HSSDs is within the Relevant Markets for Cleanroom Laundry Services, for the following reasons.

a. Each Party provides Cleanroom Laundry Services to HSSDs. Fenland submitted that it provides Cleanroom Laundry Services to a small number of HSSDs.[415] Berendsen submitted that '*[w]hilst Berendsen Newbury does not actively target sales to HSSDs, Berendsen Newbury has determined, […], that it has supplied, and continues to supply, certain Cleanroom Laundry Services to HSSDs.'*[416]

b. Each Party supplies its HSSD customers from the same facilities as it uses to supply its other Cleanroom Laundry Services customers. The majority of each Party's HSSD customers are supplied using that Party's Intermediate Cleanroom Laundry facilities. This is consistent with the Parties' joint submission, during the *Microngclean/Guardline* merger review, that Intermediate Cleanroom Laundry Services are supplied to the '*Hospital - HSSD*' sector.[417] However, each Party also supplies a minority of its HSSD customers with Full Cleanroom Laundry Services.[418] Fenland submitted that it does so probably because the relevant HSSDs

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[413] URN 01222 (full reference at footnote 412 above), paragraph 1.7(c). See also URN 01223 (HBN 13 - Sterile Services Department document), paragraphs 2.11, 2.44, 3.23, 4.71 and 6.50. Fenland submitted that it was not certain that the clean area of a HSSD was classified as a Cleanroom: URN 01237 (full reference at footnote 177 above), p.10, footnote 4 (response to Question 1).

[414] URN 01142 (Berendsen SO WRs), paragraph 7.14.

[415] Fenland used 'SSDs' to refer to '*all of HSSDs/SSDs/HSSUs/HSDUs/TSSUs'.* URN 01237 (full reference at footnote 177 above), pp.9–10 (response to Question 1).

[416] Berendsen '*uses the term "HSSDs" to refer to all HSSDs, SSDs, HSSUs, HSDUs and TSSUs on the basis that they all carry out similar activities.'* URN 01222 (full reference at footnote 412 above), paragraphs 1.3, 1.4 and 1.6.

[417] URN 00982 (full reference at footnote 82 above), p.7 (Table 1.4).

[418] References to '*Class 4*' in the column titled '*Process*' were set out in (but for the purposes of this Decision have been redacted from) the table at URN 01173 (Fenland response dated 28 April 2017 to the Fourth Fenland Notice), p.12 (response to Question 6). See references to '*ISO 4*' (or '*Both* [ISO 4 and ISO 7]' against certain HSSD customers in URN 00994 (full reference at footnote 225 above).

are within hospitals already using Fenland's Skegness plant to process certain other laundry requirements.[419]

4.28 However, the CMA is of the view that supply to the contaminated sections of HSSDs is not within the Relevant Markets for Cleanroom Laundry Services. This is consistent with the supply of Cleanroom Laundry Services to HSSDs by the Parties. For example, Berendsen submitted that *'garments supplied to HSSDs by Berendsen Newbury cannot be used in those sections of HSSDs in which they may be contaminated with blood and bodily fluids'*.[420] This is consistent with one of the reasons why Berendsen Newbury does not serve operating theatres, namely that the garments would be contaminated with blood and bodily fluids.

Cleanroom Garment/other garment rental

4.29 During the Relevant Period, the Parties' Cleanroom Garment rental activities were subject to the TMLAs (see paragraph 3.80 above). The vast majority of customers of Cleanroom Laundry Services also rented Cleanroom Garments and/or other garments.[421] This was one of the reasons why the CMA used frames of reference for Full Cleanroom Laundry Services including the rental of Cleanroom Garments/other garments in *Fenland/Fishers* and *Micronclean/Guardline*. In this investigation, it is also appropriate that the relevant markets for Cleanroom Laundry Services should include associated Cleanroom Garment and/or other garments services.

4.30 Fenland submitted that not all garments processed by its Louth 'intermediate' Cleanroom Laundry are Cleanroom Garments as defined by the CMA.[422] However, these other garments are laundered in the same laundry (and processed commercially) as if they were Cleanroom Garments even though they may not meet the definition of Cleanroom Garments used by the CMA. The CMA therefore considers that, for the purposes of market definition in this case, all garments processed by Fenland's Louth 'intermediate' Cleanroom Laundry should be included within the Relevant Market whether they are Cleanroom Garments or other garments which are laundered in the same laundry (and processed commercially) as Cleanroom Garments.

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[419] URN 01441 (full reference at footnote 43 above), row 43 (at p.44).
[420] URN 01222 (full reference at footnote 412 above), paragraph 1.5(a).
[421] URN 00989 (Reply of Parties/JVCo dated 26 March 2014 to Question 21 of an OFT *Micronclean/Guardline* request for information dated 27 December 2013) pp.2–3, see footnote 94 above.
[422] URN 01340 (Fenland DPS WRs), paragraph 2.13.3.

Consumables

4.31 As noted in Part 3.B. above, each Party supplied a range of 'consumable' products for use in Cleanrooms (and/or potentially other environments), and the Parties' supply of Consumables was subject to the TMLAs.[423]

4.32 In this context, 'Consumables' covers various distinct products, such as wipes, sprays and gloves. However, given the purpose of market definition in this case (as set out at Part 4.A. above), the CMA considers it appropriate to identify a relevant product market consisting of bundles of Consumables (rather than concluding on whether individual products should be in separate product markets).[424] On a similar basis, in *Micronclean/Guardline* the CMA adopted a frame of reference including a wide range of disposable items.[425]

4.33 The CMA's view is that Consumables form a separate market to the other Relevant Markets. There is not, for example, the same link with Cleanroom Laundry Services as there is for Cleanroom Garment/other garment rental. In addition, Consumables suppliers and Cleanroom Laundry Services providers do not always overlap (see **Annex C**, paragraph C.10). The Relevant Market includes supply to all customers purchasing Consumables as described above (and in the Glossary).

4.34 As set out at footnote 11 above, the CMA took an administrative decision in December 2016 not to investigate, at this stage, any arrangements in relation to syringes/sterile packs – and makes no finding in this Decision as to whether supply of those products forms part of the Relevant Market for Consumables.

C. Relevant geographic market(s)

Cleanroom Laundry Services

4.35 In its *Fenland/Fishers* and *Micronclean/Guardline* merger reviews, the CMA adopted GB – and not a more local area – as the geographic frame of reference for the supply of Cleanroom Laundry Services. [426] That was based, for example, in the *Fenland/Fishers* merger review on submissions by Fenland that Cleanroom Laundry Services suppliers could compete across GB.[427]

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[423] See definition of Products and Services in Schedule 1 of the TMLAs.
[424] *OFT403*, paragraph 5.11.
[425] URN 00984 (*Micronclean/Guardline* Decision), paragraph 65 (although the CMA did '*not consider it necessary to conclude on the precise market definition for these products*' as '*no competition concerns arise with respect to any plausible frame of reference for the supply of cleanroom consumables*').
[426] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 40. URN 00984 (*Micronclean/Guardline* Decision), paragraph 65 (although the CMA did '*not consider it necessary to conclude on the geographic scope given that no concerns arise on any basis*').
[427] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 37. See e.g. joint submission of Fenland and Fishers, at URN 00998 (full reference at footnote 72 above), paragraph 13.8.

4.36 In this investigation, Fenland submitted that the geographic scope of the Relevant Markets for Cleanroom Laundry Services is narrower than GB-wide, '*most likely local and constrained to a certain distance from the laundries concerned'*. Fenland submitted that '*[e]ach of the Parties operated in distinct geographic markets (Berendsen Newbury …in the South West of England, and Fenland …in the North East of England)*'.[428]

4.37 The CMA has considered the evidence gathered in this investigation and the *Fenland/Fishers* and *Micronclean/Guardline* merger reviews and does not consider that it supports Fenland's submission that the geographic scope of the market is narrower than GB. The CMA considers that the factors set out below support the scope of the geographic market being GB.

a. During the Relevant Period, each of Fishers and Guardline (before it was acquired by the Parties) served customers throughout GB. This is consistent with evidence provided during the *Micronclean/Guardline* merger review, for example. In that context, the Parties jointly submitted that Fishers was '*pushing hard to expand its cleanroom business, and is taking business from Micronclean* [i.e. the two Parties]'.[429] This suggests that a supplier of Cleanroom Laundry Services and/or Consumables that was not subject to the Restrictions could have supplied across GB.

b. Berendsen Newbury had the ability to, and did, serve Out of Territory customers using its own distribution network. The CMA considers that Berendsen Newbury's distribution route network allowed it to extend into the Fenland Territory (see paragraphs 3.175 to 3.182 above).

c. Similarly, Fenland served Out of Territory customers using its own distribution network during the Relevant Period. Fenland submitted during this case that its distribution network did not extend '*significantly into the Newbury territory*' until it opened its Letchworth hub in 2010 – the opening of this hub had '*allowed slow growth into some of the Newbury Territory over the past five to six years*'.[430] However, in the *Fenland/Fishers* merger review, Fenland made submissions that '*much of*' the Newbury Territory could be served directly from Fenland's Letchworth hub.[431] The CMA considers that Fenland's distribution route

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During the *Micronclean/Guardline* merger review, the Parties jointly submitted that a UK-based laundry cannot easily serve all of the UK from a single site, but there are ways that this can be addressed: URN 00983 (full reference at footnote 356 above), p.23; see footnote 94 above.

[428] URN 01139 (Fenland SO WRs), paragraphs 3.2.21 (fourth bullet), 5.71–5.74.5 and 6.10–6.11.

[429] See footnote 359 above.

[430] URN 00050.1 (full reference at footnote 65 above), p.6.

[431] See submissions summarised at paragraph 3.168, and in particular footnote 288, above.

network allowed it to extend into the Newbury Territory (see paragraphs 3.152 to 3.174 above).

d. The CMA considers that, absent the Restrictions, each Party had the ability to compete with the other Party to a greater extent (including for more Out of Territory customers) using its own network – and specifically by creating new routes, extending or redesigning existing routes or adding drops onto existing routes (see Part 3.E.II. above).

e. Berendsen Newbury submitted that its strategy is to compete vigorously across GB following the Newbury Acquisition.[432] As such, following the termination of the Joint Venture and absent the Restrictions, Berendsen Newbury itself considers that it could serve customers across GB.

f. Fenland, Berendsen Newbury, Fishers and Guardline all used couriers to serve customers across GB. As discussed in Part 3.E.III. above, couriers are not an ideal means to supply all Out of Territory customers, but they are an option for supplying some Out of Territory customers (e.g. on an '*interim*' basis before a supplier obtains sufficient customers to extend its own distribution network). Each Party used couriers – albeit to a more limited extent than Fishers and Guardline used them.

4.38 The CMA also notes the CMA's previous conclusions that:

a. having considered customer views on a supplier's location, customers did not generally consider location of the laundry facility to be an important factor when choosing a supplier;[433] and

b. transport costs may affect a supplier's competitiveness over long distances, but do not preclude suppliers from competing throughout GB.[434]

4.39 In conclusion, on the basis of the evidence above, for Cleanroom Laundry Services, the CMA's view is that the relevant geographic market is GB.

Consumables

4.40 In *Micronclean/Guardline*, the Parties jointly submitted that the supply of Consumables was less constrained geographically than Cleanroom Laundry

[432] URN 00067.2 (full reference at footnote 130 above), paragraphs 1.7, 3.6, 3.8, 3.11–3.24, 5.4.(a) and URN 01142 (Berendsen SO WRs), paragraphs 3.45–3.55.
[433] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 39(c).
[434] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 40; URN 00984 (*Micronclean/Guardline* Decision), paragraphs 62–64 (see footnote 94 above).

Services, as couriers could be used more easily.[435] This supported a view that Consumables could be effectively supplied across GB.

4.41 In its *Micronclean/Guardline* review, the CMA adopted GB as the geographic frame of reference for the supply of Consumables.[436] The CMA has received no evidence or submissions in this case that undermines that view. Indeed, during this investigation Fenland noted that couriers can be used to supply '*across the UK*' but that the sale and distribution of Consumables may well '*piggy-back*' on Cleanroom Laundry Services[437] – which follows the submissions in *Micronclean/Guardline* referred to at paragraph 4.40 above.

4.42 Therefore, for Consumables, the CMA's view is that the relevant geographic market is no narrower than GB.

Defining Relevant Markets as GB-wide

4.43 As discussed in Part 3.E. above, the ease with which each Party could serve particular customers in the other Party's territory varies depending on the customer's requirements and location (e.g. in relation to existing distribution routes). The CMA does not consider that each Party would be able to deliver to all customers wherever they are located within GB. However, the CMA notes that defining a market as GB-wide does not imply, let alone require, that each supplier is able to deliver to customers all over GB.

D. Relevant market(s): conclusion

4.44 The Relevant Markets in this case are the supply of:

a. Full Cleanroom Laundry Services in GB, which includes Cleanroom Garment/other garment rental;

b. Intermediate Cleanroom Laundry Services in GB, which includes: (i) Cleanroom Garment/other garment rental, (ii) the supply of these services to customers which do not technically need this level of laundry services but which nevertheless purchase them, and (iii) the supply of these services to clean sections of HSSDs - and excludes: (i) the supply of these services to contaminated sections of HSSDs, (ii) the supply of these services to operating theatres, or (iii) Barrier Laundry Services; and

c. Consumables in (at least) GB.

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[435] URN 00983 (full reference at footnote 356 above), p.27: *'There are few geographic constraints. … Distribution is normally through external carriers, though Micronclean utilise the existing laundry distribution network and have a competitive advantage through this'*; see footnote 94 above.
[436] URN 00984 (*Micronclean/Guardline* Decision), paragraph 66.
[437] URN 01441 (full reference at footnote 43 above), rows 26 and 53 (at pp.26 and 62).

5. LEGAL ASSESSMENT

A. Introduction

5.1 As described in Parts 3.D.II.a. to 3.D.II.d. above, the Parties explicitly agreed in writing to share the Relevant Markets through an allocation of both territories and customers. For the reasons set out in this Part 5, the CMA finds that this agreement infringed the Chapter I prohibition.

5.2 The Chapter I prohibition prohibits agreements between undertakings which may affect trade within the whole or part of the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK unless an exclusion applies or the agreements in question are exempt in accordance with the provisions of Part 1 of the Act.

5.3 Sharing markets is expressly prohibited under section 2(2) of the Act. Sharing markets through territorial or customer allocation has long been established as being harmful to competition because, by its very nature, it constrains suppliers from determining independently the commercial policy which they intend to adopt on the market, and it deprives customers of the full choice of competitive offerings that might otherwise be available to them. When one undertaking agrees with another undertaking that it will enjoy exclusive access to a territory or customer group, that undertaking acts in the knowledge that it will face little, if any, competition from the other undertaking.

5.4 Active sales (i.e. where an undertaking actively approaches customers) and passive sales (i.e. where an undertaking responds to unsolicited approaches from customers) are both important, including in markets such as those in which the Parties operate, where customers tend to procure services through tenders and there are few other competitors (see Part 3.B. above). Restricting active sales and/or passive sales in such markets limits the number of suppliers competing for business, and therefore restricts competition.

5.5 In this case, the agreement to allocate territories and customers was made in the context of a wider joint venture. This wider context is important and the Addressees have made a variety of submissions on the issue. The wider context is relevant to the assessment of whether the agreement infringes competition law and the CMA has taken this wider context fully into consideration when assessing:

a. whether the Parties can be said to be actual or potential competitors in circumstances where it might be said that they have never truly competed before the Relevant Period: this issue is discussed in Part 5.D. below, where the CMA finds that they were actual (or at the very least potential) competitors;

b. whether the agreement constitutes an infringement by object despite being part of a wider joint venture: this issue is discussed in Part 5.E.I. below, where the CMA discusses the relevant case law that shows it can be;

c. whether the legal and economic context of which the agreement forms part shows that it reveals in itself a sufficient degree of harm to infringe the Chapter I prohibition by object: this issue is discussed in Part 5.E.II.c. below, where the CMA finds that it does;

d. whether the agreement falls outside the scope of the Chapter I prohibition because it was objectively necessary for the operation of the wider joint venture or the licensing of the Trade Marks: this issue is discussed in Part 5.F. below, where the CMA finds that the agreement was not objectively necessary; and

e. whether the agreement benefits from any exemptions as a result of being part of the wider joint venture, which included transfers of technology: this issue is discussed in Part 5.J. below, where the CMA finds that the agreement did not benefit from an individual exemption, and Part 5.K. below, where the CMA finds that the agreement did not benefit from any block exemption.

5.6 Therefore, contrary to the Addressees' submissions and for the reasons fully explained below, whilst the CMA has given very careful consideration to the wider joint venture context, this does not mean that the agreement cannot constitute an unlawful restriction of competition contrary to the Chapter I prohibition in this case. The CMA finds that the Parties participated in an agreement which infringed the Chapter I prohibition, because it had the object of sharing the Relevant Markets, through the allocation of territories and customers between the Parties, and affected trade within the UK. The CMA finds that the agreement was neither objectively necessary nor exempted (under section 9 of the Act, or any other provision).

B. Undertakings

I. Key legal principles

5.7 For the purposes of the Chapter I prohibition, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.[438] An entity is engaged in 'economic activity' where

[438] Judgment in *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

it conducts any activity '*… of an industrial or commercial nature by offering goods and services on the market ...*'.[439]

5.8 The term 'undertaking' designates an economic unit, even if in law that unit consists of several natural or legal persons.[440]

II. Legal assessment

5.9 The CMA concludes that throughout the Relevant Period:

a. Fenland was a supplier of, among other things, Cleanroom Laundry Services and Consumables, and was therefore engaged in economic activity and formed an undertaking for the purposes of the Chapter I prohibition; and

b. Berendsen Newbury was a supplier of, among other things, Cleanroom Laundry Services and Consumables, and was therefore engaged in economic activity and formed an undertaking for the purposes of the Chapter I prohibition. From 13 September 2014 onwards, Berendsen Newbury was an indirect wholly owned subsidiary of Berendsen plc. Those two entities, therefore, together formed a single economic unit[441] and an undertaking for the purposes of the Chapter I prohibition.

5.10 Part 5.C. below provides a description of the agreement between the Parties which the CMA finds has infringed the Chapter I prohibition. The relevant parties to that agreement are only Fenland and Berendsen Newbury.[442] As a result, the CMA does not need to decide whether JVCo formed a separate undertaking during the Relevant Period.

C. Agreement between undertakings

5.11 For the reasons set out in this Part 5.C, the CMA concludes that Fenland and Berendsen Newbury entered into an agreement for the purposes of the Chapter I prohibition to share the Relevant Markets through the allocation of

[439] Judgment in *Commission v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.
[440] Judgment in *Akzo Nobel NV and Others v Commission,* C-97/08 P, EU:C:2009:536, paragraph 55.
[441] See Part 5.L. below for further detail on this analysis.
[442] See also paragraph 5.18 below. In their responses to the SO, the Addressees did not contest this finding.

territories and customers (with the exception of food customers for the reasons explained at paragraphs 5.21 to 5.25 below).

I. Key legal principles

5.12 The key question in establishing an agreement for the purposes of the Chapter I prohibition is whether there has been '*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention*'.[443] The restriction of competition '*must result from all or some of the clauses of the agreement itself*'.[444]

5.13 It has been held that: '…*it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way*…'.[445] However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.[446]

II. Legal assessment

5.14 On 30 May 2012 the Parties and JVCo entered into the TMLAs, which:[447]

a. comprised two tripartite licensing agreements, each signed by [Berendsen Newbury Director A], [Fenland Director E] and [Fenland Director A] (on behalf of Berendsen Newbury, Fenland and JVCo respectively);

b. had no fixed-term duration; each TMLA was to continue '*for as long as the Licensee was a shareholder of the Licensor*'.

5.15 The CMA finds that the territorial and customer allocation provisions in the TMLAs described in more detail in Parts 3.D.II.a to 3.D.II.d above (the 'Restrictions'), constitute an agreement for the purposes of the Chapter I

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[443] Judgment in *Bayer AG v Commission*, T-41/96, EU:T:2000:242, paragraph 69 (upheld on appeal in the judgment of the joined cases in *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96–97).
[444] Judgment in *Société Technique Minière v Maschinenbau Ulm GmbH*, C-56/65, EU:C:1966:38, p.249.
[445] Judgment in *SA Hercules Chemicals NV v Commission*, T-7/89, EU:T:1991:75, paragraph 256.
[446] Judgment in *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, EU:T:2006:265, paragraph 77 (upheld on appeal in the judgment of the joined cases etc in *GlaxoSmithKline Unlimited v Commission*, C-501/06P, EU:C:2009:610).
[447] See Part 3.D.II.a. above, which contains a summary of the key points in the TMLAs, and paragraph 3.87 above.

prohibition. As stated at paragraphs 5.21 to 5.25 below, the CMA does not find that customers in the food sector fall within the scope of the Restrictions.

5.16 The concurrence of wills between the Parties when agreeing the Restrictions is shown by the following.

a. The Restrictions were in written form as part of the TMLAs.

b. The TMLAs were entered into and signed on behalf of both Parties.

c. The existence of the Restrictions is beyond doubt and reflects the faithful expression of the Parties' joint intention to conduct themselves on the Relevant Markets in a specific way, namely through the allocation of territories and customers in relation to the TMLA Products and Services.[448]

d. The Parties' joint intention is confirmed by the contextual background to the signing of the TMLAs, evidenced by other written documents shared between Fenland and Berendsen Newbury. These documents confirm that in the period leading up to the signing of the TMLAs, it was the Parties' express intention to agree to the Restrictions contained in the TMLAs by entering into the TMLAs.[449]

e. The Addressees have not disputed the existence of the Restrictions contained within the TMLAs.[450]

5.17 Proof of implementation is not necessary for a finding that each of Fenland and Berendsen Newbury was a party to an agreement for the purposes of the Chapter I prohibition. Nevertheless, in the circumstances of this case, the Parties did in fact implement the Restrictions contained in the TMLAs.[451]

a. The Parties exchanged maps and lists relating to each Party's territory and to each Party's customers in the other Party's allocated territory (see paragraphs 3.107 to 3.119 above). This allowed each Party to monitor, over time, compliance with the Restrictions.

b. The Parties agreed that certain customers would be allocated to one Party even if located in the territory of the other Party. For example,

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[448] See Part 3.D. above.
[449] See paragraphs 3.66–3.74 above. See also e.g. URN 00055.13 (full reference at footnote 150 above), paragraphs 3–5, referring to URNs 00066.84–00066.90, URN 00066.95 (email from [Fenland Director A] to [Fenland Director D], [Fenland Director J] and others dated 27 June 2011), and URN 00036.60 (full reference at footnote 156 above), paragraphs 11–18.
[450] See e.g. URN 01139 (Fenland SO WRs), paragraph 3.2.81, and URN 01142 (Berendsen SO WRs), paragraphs 5.29 and 5.34.
[451] See Part 3.D.III. above.

Fenland noted various customers in the Newbury Territory (e.g. in the 'Pharmaceutical', 'NHS' and 'Healthcare' sectors) had been Fenland customers '*for* > [i.e. longer than] *10 years*' (or had '*[h]istorically been with Fenland*').[452]

c. The Parties referred customer enquiries and leads to each other, in line with the agreed allocation of territories and customers. In particular, the CMA has been provided with correspondence showing 44 examples of customer enquiries relating to one or more of the Relevant Markets having been referred by one Party to the other during the Relevant Period (see paragraph 3.131 above).[453] For example, in April 2014 Berendsen Newbury referred to Fenland an enquiry from '*a long standing Skeg customer in Newbury's area*' (see paragraph 3.132.b. above). These examples indicate that the Parties referred customer enquiries, in order to implement the territorial and customer allocation in the TMLAs, albeit without regard to the procedures set out in clauses 2.6 and 2.8–2.10 of the TMLAs. This shows new customers being allocated in accordance with each Party's allocated territory/customer types, and the Parties respecting the allocation between them of each other's existing customers.

5.18 For the purposes of the Chapter I prohibition, an agreement is the expression of the parties' joint intention to conduct themselves on a market in a specific way. As detailed in Part 3.D.I above, the TMLAs were designed by and negotiated between Fenland and Berendsen Newbury within the context of the Joint Venture. The TMLAs were intended to impose the Restrictions contained therein on the Parties' activities in the Relevant Markets. Therefore, Fenland and Berendsen Newbury are the relevant parties to the Restrictions.

5.19 The TMLAs were signed by Fenland, Berendsen Newbury and JVCo. However, JVCo primarily acted as the licensor of the Trade Marks. JVCo was allocated a role in maintaining a '*Central List*' of customers in each allocated territory; in practice, JVCo kept no such a list, but the Parties directly

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[452] URN 00186.62 (full reference, and accompanying notes, at footnote 221 above), pp.1–2. See also URN 00186.60 ('Listings document' dated 22 June 2010), which lists over 700 Berendsen Newbury customers/postcodes (although not all include a 'value'), none of which are categorised as 'food'. Fenland submitted that URN 00186.60 '*is dated 22 June 2010, but the listings remained current in 2011*': URN 00186.1 (full reference at footnote 133 above), p.12 (response to Question 1.a.).

[453] Fenland has submitted that for the majority (31 of the 44) of the Customer Enquiry Examples it is either self-evident on the face of each relevant document that the relevant customer was seeking to contact its existing supplier but contacted the other Party in error, or the content of the documents should reasonably have led the CMA to consider the possibility that the customer might have contacted the wrong Party in error: URN 01139 (Fenland SO WRs), paragraph 5.55. This is discussed in paragraphs 3.131–3.141 above.

exchanged customer lists between them, without involving JVCo. The CMA does not find that JVCo was a party to the Restrictions.

5.20 In light of the above, the CMA finds that the Restrictions constitute an agreement between the Parties for the purposes of the Chapter I prohibition.

Scope of the agreement

5.21 The TMLAs do not set out any sector- or customer-specific exclusions (or requirements) in respect of the Restrictions. However, the Addressees submitted that laundry services to customers in the food sector were not covered by the Restrictions.[454] The Addressees submitted that Berendsen Newbury did not supply food customers, and had no intention to supply food customers, which was a unilateral decision on its part.[455] Fenland submitted that it had wanted to serve food customers under the Micronclean Brand, and that it would simply have continued to use the Fenland brand for these customers if it had believed that Berendsen Newbury had not agreed '*a waiver to the territorial restrictions*' (thus allowing Fenland unfettered use of the Micronclean Brand) for these customers.[456]

5.22 The CMA has considered the Parties' representations and has concluded on balance that food customers appear to have been outside the scope of the Restrictions. Even though the TMLAs covered food customers (which they needed to do, because Fenland wanted to serve food customers under the Micronclean Brand), the CMA finds that there is insufficient evidence to conclude on the balance of probabilities that the Parties agreed that the Restrictions covered food customers. The Parties' supply of services within the Relevant Markets to food customers therefore is not included within the agreement for the purposes of the Chapter I prohibition in this case. This finding is supported by the following evidence.

a. The minutes of the JVCo Board meeting on 27 June 2011 stated:

   Point 4: '*It was agreed in principal* [sic] *that any trading using the Micronclean name would be constrained by the territorial restrictions subject* to:

[454] URN 01142 (Berendsen SO WRs), paragraphs 6.3–6.5. URN 01139 (Fenland SO WRs), paragraphs 5.48–5.50 and 5.58–5.62.
[455] URN 01142 (Berendsen SO WRs), paragraphs 6.3–6.5. URN 01139 (Fenland SO WRs), paragraphs 5.48–5.49.
[456] URN 01173 (full reference at footnote 418 above), pp.9–10 (response to Question 5(ii)); URN 01139 (Fenland SO WRs), paragraphs 5.48, 5.49.3 and 5.86.3.

- *A customer requesting to be supplied by a plant in the other territory will be so supplied.*

- *A plant wishing to supply products or services into the other territory which the other plant cannot easily supply will be allowed to do so, but this will be by the express permission of the other plant in each and every case.*

- *Fenland wish to supply the food industry under the Micronclean brand, but will be subject to the constraints above. It is expected that this permission will be given as Newbury to* [sic] *not currently supply this market and are unlikely to in the future.'*

- *A register of agreed cross border customers will be kept to avoid uncertainty in the future.*'

Point 5: '*Subject to point 4, [Berendsen Newbury Director A] confirmed that Fenland could supply food accounts in Newbury's area under the Micronclean brand.*'[457]

b. Fenland sent an internal email shortly thereafter, also on 27 June 2011, which included evidence of Fenland's understanding of what the Restrictions would cover:

'*I have agreed in principal* [sic] *with him* [Berendsen Newbury Director A] *that we will progress a more formalised structure. ...It will also constrain cross border trading. This means that if we wish to sign up any business in the Newbury area under the Micronclean name, then we will need their express permission each and every time. With this proviso, we have permission to trade food business into Newbury's area under the Micronclean name, but we must tell them each time that we progress a prospect, and specifically each time that we sign a contract in their area. In practice, Newbury have no interest in food, and will probably give us a blanket permission for this market place. This all has to be put in to a legal framework and we have agreed to meet with* [Law firm representing Parties] *on the 18th July* [2011].'[458]

5.23 The Board minutes and Fenland's internal email (both contemporaneous documents), taken together with the context of Berendsen Newbury confirming it had no interest in serving food customers, indicate that the Parties intended that there was no restriction on Fenland serving food customers in the

[457] See URN 00055.13 (full reference at footnote 150 above), paragraphs 4–5.
[458] See URN 00066.95 (full reference at footnote 154 above).

Newbury Territory, which would have otherwise been the case under the TMLAs.[459] The Parties had come to this understanding before the Relevant Period began.

5.24 The CMA has considered whether, alternatively, the fact that Fenland sought permission from Berendsen Newbury to serve food customers in the Newbury Territory, and agreed to inform Berendsen Newbury when it served food customers (but in fact did so only once, based on the evidence on the CMA's case file),[460] may reflect the fact that the Parties' intentions had changed in the 'interim' period between the board meeting on 27 June 2011 and signature of the finalised TMLAs on 30 May 2012, such that they agreed in the end to include food customers within the Restrictions. However, the CMA has found no evidence that the Parties' intentions as regards food customers had changed in this 'interim' period, and the terms of the TMLAs may simply reflect the administration of a shared trade mark arrangement within a joint venture rather than evidence of a restriction of competition in this regard.

5.25 Given the evidence described above, the CMA does not consider on the balance of probabilities that the concurrence of wills between the Parties to restrict competition included the allocation of food customers. The CMA therefore concludes that food customers, whilst within the Relevant Market for Intermediate Cleanroom Laundry Services, are outside the scope of the Restrictions and, therefore, the scope of the Infringement.

5.26 Fenland also submitted that the Parties agreed that the Restrictions also would not apply to certain other customer groups. Fenland variously described these as 'standalone' or 'industrial' customers, or by reference to the lowest three (of four) categories of customer requirements.[461] By contrast, Berendsen has not submitted that any customer groups other than food sector customers were excluded from the Restrictions.[462]

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[459] It would also therefore be logical that there was no restriction on Berendsen Newbury serving food customers in the Fenland Territory, although it had not indicated any intention to do so.
[460] URN 00055.14 (emails from June 2012 between [Berendsen Newbury Director C] and [Fenland Employee A]), p.2. See also Fenland's submission in URN 00050.1 (full reference at footnote 65 above), p.5 (response to Question 8), that (i) Fenland did not, in practice, notify Berendsen Newbury each time that Fenland supplied food (or e.g. industrial sector) customers located in the Newbury Territory, and (ii) such supply was not *'officially notified to JVCo'* in the manner set out in the TMLAs.
[461] See e.g. URN 01139 (Fenland SO WRs), paragraphs 5.58–5.62, and URN 01173 (full reference at footnote 418 above), pp.9–10 (response to Question 5(ii)). For details of the four customer categories submitted by Fenland, see e.g. URN 01182 (full reference at footnote 108 above), pp.6–8 (response to Question 5) – as referred to in e.g. URN 01441 (full reference at footnote 43 above), row 47 (at p.52), and URN 01340 (Fenland DPS WRs), paragraph 2.13.1(c).
[462] For example, Berendsen referred only to food sector customers at e.g. URN 01142 (Berendsen SO WRs), paragraphs 6.3–6.5.

5.27 The evidence discussed above shows the understanding between the Parties specifically related to food customers only and the CMA has found no equivalent contemporaneous evidence referring to other customer groups. To the contrary, Berendsen supplied at least some customers which fall within some of the four categories of 'industrial' customers defined by Fenland, which suggests the same understanding did not apply to 'industrial' customers.[463]

5.28 Fenland submitted that the Parties' agreement to exclude food customers from the Restrictions '*was actually broader covering a range of industries previously served from Grantham (of which food was the largest).*'[464] Fenland submitted that when it '*negotiated the terms of the relevant TMLA, in 2012, it requested that it be allowed to market laundry services that had up until that time been supplied under the Fenland name. This was primarily its services to the food industry*'.[465] Fenland submitted that its interpretation was that it '*had agreement from Berendsen Newbury to supply laundry services to the food and industrial sectors under the Micronclean brand, without any sort of territorial restriction*'.[466] The CMA has found no contemporaneous exchange between the Parties indicating that each Party understood references to 'food' in the documents to also refer to certain other customer groups. Fenland's submissions in this regard are inconsistent with its statement that, within the cleaning services sector, 'food' is not generally synonymous with 'industrial'.[467]

5.29 In addition, there is no evidence suggesting that the Parties agreed (or would have been able to agree) on how precisely to define 'industrial' customers. Fenland stated that 'industrial' was a *'catch all*' (i.e. non-specific) term.[468] Fenland also submitted that a document written after the Newbury Acquisition, and containing a proposal by Fenland, gives a definition of the customers subject to the Restrictions, and implies that 'standalone' or 'industrial' customers would be those non-food sector customers which fall outside this definition.[469] Fenland also submitted a definition of these customers linked to categories of customer requirements, i.e. those listed in a document as

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[463] For example, Fenland described customers in each of its third and fourth categories (i.e. '*Barrier Required*' and '*No Barrier Required*') as including '*packaging companies etc*', URN 01237 (full reference at footnote 177 above), pp.14–15 (response to Question 2). That is a customer group to which Berendsen Newbury supplies Intermediate Cleanroom Laundry Services: URN 01142 (Berendsen SO WRs), paragraphs 7.12(h) and 7.13.

[464] URN 01173 (full reference at footnote 418 above), p.10 (response to Question 5(ii)).

[465] URN 00037.1 (full reference at footnote 23 above), p.6.

[466] URN 00186.1 (full reference at footnote 133 above), p.49 (response to Question 19).

[467] URN 01237 (full reference at footnote 177 above), p.12 (response to Question 2), e.g. '*[T]he term "industrial" is then a catch all for workwear to manufacturing environments that are not described by a specific term such as "food" or "cleanroom". Indeed, this classification into "industrial", "food" and "cleanroom" would be the breakdown that most laundries in the industry would recognise today.*'

[468] See footnote 467 above.

[469] URN 00124.6 (full reference at footnote 120 above), p.3, as referred to in URN 01441 (full reference at footnote 43 above), row 47 (pp.48–52).

'*"Barrier Required"*, "*No Barrier Required"*, *and a component of customers in the classification "Competitive with Barrier Laundries"*'.[470] Fenland itself described these customer groups in various ways. This suggests there was no contemporaneous understanding between the Parties to the effect that 'industrial' customers were not covered by the Restrictions.

5.30 Berendsen submitted that the CMA cannot conclude that the Infringement includes the supply of cleanroom services to HSSD customers because the CMA had not, at the time of Berendsen's relevant submissions, provided Berendsen with an opportunity to provide both written and oral representations on the CMA's reasons and evidence for including HSSDs within the scope of the Infringement.[471] HSSDs represent a small proportion of either Party's turnover.[472] In the SO, they were provisionally included within the Relevant Markets and the scope of the Alleged Infringement. The nature of the CMA's reasoning means that the CMA did not include in the SO details of each customer group. Notwithstanding that, the SO referred to specific HSSD customers.[473] In addition, HSSD customers were included in the customer lists and other evidence on the case file disclosed to the Addressees,[474] and the CMA has seen no evidence suggesting that they were not covered by the Restrictions. The CMA set out evidence relating to HSSDs in the Letter of Facts, to which Berendsen responded without referring to HSSDs.[475]

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[470] URN 01182 (full reference at footnote 108 above), pp.6–8 (response to Question 5), as referred to in URN 01441 (full reference at footnote 43 above), row 47 (at p.52). Also referred to in e.g. URN 01340 (Fenland DPS WRs), paragraph 2.13.1(c).

[471] URN 01333 (Berendsen DPS WRs), paragraphs 4.3–4.9; URN 01380 (full reference at footnote 39 above), p.11, line 1 to p.13, line 18, and URN 01377 (Berendsen submission dated 20 September 2017), paragraphs 1.1–1.5. The Addressees confirmed that HSSD was synonymous with the following other terms: SSD, i.e. Sterile Services Department; HSSU, i.e. Hospital Sterile Services Unit; HSDU, i.e. Hospital Sterilisation Decontamination Unit (or Hospital Sterilisation Disinfection Unit); and TSSU, i.e. Theatre Sterile Services Unit: URN 01237 (full reference at footnote 177 above), p.8 (response to Question 1.a.); URN 01222 (full reference at footnote 412 above), paragraph 1.3.

[472] Sales to HSSD customers represent substantially less than [0–5]% of Fenland's turnover: URN 01237 (full reference at footnote 177 above), p.11, footnote 5 (response to Question 1.c.). CMA analysis of URN 00994 (full reference at footnote 225 above), based on customer names, suggests that HSSD customers represent a similar proportion of Berendsen Newbury's turnover; see footnote 226 above. In addition, HSSD customers represent a *'small proportion'* of Berendsen Newbury's total cleanroom sales, URN 01222 (full reference at footnote 412 above), paragraph 1.6.

[473] In the context of a form used by Fenland to log an unsolicited Out of Territory customer enquiry (SO, footnote 201), referring to URN 00193.74), and specifically in the context of Fenland having referred that enquiry to Berendsen Newbury, noting that the customer was located in '*your area*', i.e. the Newbury Territory (SO, paragraph 3.121(a))).

[474] URN 00055.15 (undated spreadsheet showing postcodes and customers; see e.g. references to customer names including '*SSD*' on p.65, and '*HSSU*' on p.71), URN 00068.4 (Note from [Berendsen Newbury Director C] re Territories (undated)), URN 00186.75 (Passive Compete Pro-Forma signed on 8 December 2015, in relation to customer enquiry regarding '*cleanroom gowns… – rental and process only options*'), and URN 01173 (full reference at footnote 418 above).

[475] URN 01438 (Berendsen response dated 27 October 2017 to Letter of Facts).

5.31 The CMA therefore concludes that no customer groups except food sector customers are outside the scope of the Restrictions and, therefore, the scope of the Infringement.

D. Actual or potential competitors

5.32 For the reasons set out below, the CMA finds that throughout the Relevant Period, the Parties were actual (or at the very least potential) competitors in each of the Relevant Markets.

I. Key legal principles

5.33 A breach of the Chapter I prohibition can only be found in this case if the Parties were actual competitors, or at least potential competitors.

5.34 Two undertakings are treated as actual competitors if they are active on the same relevant market.[476]

5.35 In order to determine whether an undertaking is a potential competitor in the market, it must be determined whether '…*if the agreement in question had not been concluded, there would have been real concrete possibilities for it to enter that market and to compete with established undertakings. Such a demonstration must not be based on a mere hypothesis, but must be supported by factual evidence or an analysis of the structures of the relevant market. Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy*'.[477]

5.36 An agreement between two undertakings to refrain from selling in the other's allocated territory represents a '*strong indication that a competitive relationship existed*' between the two undertakings.[478]

5.37 Where specific market characteristics exist that may impact on potential entry (e.g. the geographic distance between two parties or intellectual property

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[476] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, paragraph 10.
[477] Judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission,* T-472/13, EU:T:2016:449, paragraph 100. See also judgment in *Delimitis v Henninger Bräu AG,* C-234/89, EU:C:1991:91, paragraph 21; judgment in the joined cases of *European Night Services and others v Commission,* T-374/94, T-375/94, T-384/94 and T-388/94, EU:T:1998:198, paragraph 137; judgment in *Visa Europe and Visa International Service* v *Commission,* T-461/07, EU:T:2011:181, paragraph 68; judgment in *E.ON Ruhrgas and E.ON v Commission,* T-360/09, EU:T:2012:332, paragraph 86.
[478] Judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraph 33.

protecting an incumbent's product), it is necessary to test whether these characteristics are an '*insurmountable barrier*' to a potential entrant.[479]

II. Legal assessment

5.38 Each Party supplied, and was therefore each active in, Full Cleanroom Laundry Services, Intermediate Cleanroom Laundry Services and Consumables throughout the Relevant Period. As described at Part 4.C. above, for each of these Relevant Markets, the CMA's view is that the geographic scope was GB-wide during the Relevant Period. As suppliers active on the same Relevant Markets, the Parties were therefore actual competitors in those markets.

5.39 Fenland submitted that the geographic scope of Cleanroom Laundry Services markets was narrower than GB-wide (and '*most likely local*'), and that each Party '*operated in distinct geographic markets*'. The CMA does not accept those submissions, for the reasons set out at paragraphs 4.35 to 4.39 above. Even if the submissions were accepted, each Party did in fact supply certain Out of Territory customers (see e.g. Part 3.E.I. above). Each Party was therefore active to some degree in the other Party's '*distinct geographic market*' (i.e. its allocated territory), so was an actual competitor to the other Party.

5.40 Similarly, Fenland's submission that normal competition never existed between the Parties due to the wider context of the Joint Venture and technology transfer licence between the Parties does not mean that they were not actual competitors when they did in fact both supply customers in the three Relevant Markets and in each other's allocated territory within those markets.[480] In any event, the Parties cannot claim they were not legally actual competitors as a result of having agreed to limit the competition between themselves.[481] For the reasons given in Part 3.E. above, absent the Restrictions, each Party would, during the Relevant Period, have been able to compete for the business of Out of Territory customers supplied by the other Party. This suggests that the Parties were, or absent the Restrictions would have been, actual competitors (or were, at the very least, potential competitors throughout GB) during the Relevant Period.

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[479] Judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission,* T-472/13, EU:T:2016:449, paragraph 124, citing the judgment in *Toshiba Corporation v Commission,* T-519/09, EU:T:2014:263, paragraph 230. See also the judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraph 31.

[480] See e.g. URN 01139 (Fenland SO WRs), paragraphs 3.2.7–3.2.8, and 3.2.90–3.2.96.

[481] See judgment in *Competition Authority v Beef Industry Development Society Ltd*, C-209/07, EU:C:2008:643, paragraph 34.

5.41 In addition, the Parties perceived each other as actual or potential competitors in the Relevant Markets, and indicated that it was only the Restrictions that were preventing them from competing for customers supplied by the other. For example:

a. During discussions following the Newbury Acquisition, Fenland noted that Berendsen appeared '*keen to continue with the arrangements. …It also slows (but does not stop) our competition with each other*'.[482]

b. Around the time of the Newbury Acquisition, Berendsen and Fenland discussed the option of permitting each Party to respond to unsolicited Out of Territory customer enquiries. Discussions were based on, for example, a document which stated that '*…if Berendsen and Fenland enter licence agreements to use the Microncleanname but compete with each other on a passive basis…This…will lead to the two parties becoming competitors with each other*'.[483]

c. During the Relevant Period, the evidence shows that the Parties needed to reciprocally 'agree' or 'review' the lists of allocated territories and customers.[484]

5.42 Each Party had a non-exclusive licence to use the Trade Marks throughout GB and was therefore able, absent the Restrictions, to supply Microncleanstandard TMLA Products and Services throughout GB without any legal or regulatory barriers preventing it from doing so (see Part 3.E. above).

5.43 Fenland submitted that the Parties were not actual competitors in the early 1980s when the Joint Venture began, and Berendsen Newbury was unable to enter the Cleanroom Laundry market without Fenland's technology, so the Parties would also not have been potential competitors in Full Cleanroom Laundry Services (or Intermediate Cleanroom Laundry Services and Consumables) at that time.[485] The CMA does not need to conclude on the issue, because the Infringement relates to the Relevant Period, which started in May 2012 when the Parties formally recast their relationship in the TMLAs. In the Relevant Period, both Parties had well-established Cleanroom Laundries and had been operating for many years in the Relevant Markets.

5.44 The CMA concludes that throughout the Relevant Period the Parties were actual (or at the very least potential) competitors in each of the Relevant Markets. This conclusion holds even if, as Fenland submitted, the geographic

[482] URN 00186.117 (full reference at footnote 366 above), p.1.
[483] URN 00068.16 (full reference at footnote 168 above), p.3.
[484] See e.g. URN 00043.24 (Notes from JVCo board meeting on 16 January 2014), and URN 00043.23 (full reference at footnote 205 above).
[485] See URN 01139 (Fenland SO WRs), paragraphs 3.2.106–3.2.112.

market was narrower than GB, since in that case the Parties were at the very least potential competitors in each other's territories.

E. Object of preventing, restricting, or distorting competition

5.45 This Part explains why the Restrictions had the object of preventing, restricting or distorting competition during the Relevant Period.

I. Key legal principles

General

5.46 The Chapter I prohibition prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition.

5.47 The term 'object' refers to the 'aim', 'purpose', or 'objective', of the coordination between undertakings in question.[486]

5.48 Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary for the CMA to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.[487]

5.49 Object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[488] The '*essential legal criterion*' for a finding of an anti-competitive object is that the coordination between undertakings '*reveals in itself a sufficient degree of harm to competition*' such that there is no need to examine its effects.[489]

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[486] See e.g. respectively: the judgment in *Consten & Grundig v Commission*, C-56/64, EU:C:1966:41, p.343 ('…*Since the agreement thus aims at isolating the French market… it is therefore such as to distort competition*…'); the judgment in the joined cases in *IAZ and Others v Commission*, 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraph 25; the judgment in *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraphs 32-33.

[487] See e.g. the judgment in *T-Mobile Netherlands BV v NMa*, C-8/08, EU:C:2009:343, paragraphs 28–30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, paragraph 269.

[488] Judgment in *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; affirmed by the judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraph 26.

[489] Judgment in *Groupement des Cartes Bancaires v Commission,* C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57; judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraph 26; judgment in *Commission v Stichting Administratiekantoor Portielje*, C 440/11 P, EU:C:2013:514, paragraphs 95 and 111; judgment in *ING Pensii v Consiliul Concurenței*, C-172/14, EU:C:2015:484, paragraph 32. See also *Ski Taxi v Norwegian Government*, E-03/16, an EFTA case, paragraph 63.

5.50 In order to determine whether an agreement reveals a sufficient degree of harm such as to constitute a restriction of competition 'by object', regard must be had to:

- the content of its provisions,
- its objectives, and
- the economic and legal context of which it forms a part.[490]

5.51 Although the parties' subjective intention is not a necessary factor in determining whether an agreement is restrictive of competition, there is nothing prohibiting that factor from being taken into account.[491]

5.52 An agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.[492]

5.53 For an agreement to be found restrictive by object it does not need to have been successful, implemented, applied or enforced.[493] Moreover, although the object concept should be applied restrictively, the types of agreements covered by Article 101(1) of the Treaty on the Functioning of the European Union ('TFEU') do not constitute an exhaustive list of prohibited collusion.[494] The CMA is not required to draw on a precedent precisely analogous with the facts

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[490] Judgment in *Groupement des Cartes Bancaires v Commission,* C-67/13 P, EU:C:2014:2204, paragraph 53; judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26*,* paragraph 27. According to the Court of Justice of the European Union ('CJEU') in the judgment in *Groupement des Cartes Bancaires v Commission,* C-67/13 P, EU:C:2014:2204, paragraphs 53 and 78, in determining that context, it is also necessary to take into consideration all relevant aspects of the context, having regard in particular to the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.

[491] Judgment in *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54; affirmed by the judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 118.

[492] Judgment in *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraph 21.

[493] See e.g. the judgment in *Miller International v Commission*, C-19/77, EU:C:1978:19, paragraph 7; C-277/87 *Sandoz Prodotti Farmaceutici SpA v Commission* [1990] ECR 145, paragraph 3 of the Summary; C-551/03 P *General Motors v Commission* [2006] ECR I-3173 paragraphs 37, 61–62, 67–70 and C-246/86 *Belasco v Commission* [1989] ECR 2117, paragraph 15. In its decision of 25 May 2016, Case AT.39792-*Steel Abrasives*, the Commission found that, '*The fact than an agreement having an anticompetitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market*' (paragraph 148, citing the judgment in *Groupe Danone v Commission*, T-38/02, EU:T:2005:367, paragraph 148). See also the judgment in *ING Pensii v Consiliul Concurenței*, C-172/14, EU:C:2015:484, paragraphs 54–55.

[494] Judgment in *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraph 23.

of this case in order to make a finding that the Restrictions are restrictive of competition by object.[495]

5.54 If it were the case that an agreement did not have a restrictive object, then the CMA would need to assess whether it was restrictive by effect.[496]

Market-sharing agreements

5.55 Section 2(2)(c) of the Act expressly prohibits '*agreements… which… share markets*'. Market-sharing agreements (e.g. where undertakings agree to apportion particular markets, by means of allocating territories[497] and/or customers,[498] between themselves) have consistently been found to constitute, in themselves, an object restrictive of competition. Indeed, agreements whose object is to share customers for services constitute forms of collusion that are particularly injurious to the proper functioning of normal competition and belong to the most serious restrictions of competition. These agreements pursue, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU. Such an object cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned.[499]

5.56 Restrictions of active or passive sales (or both) are restrictions of competition law 'by object' when part of otherwise legitimate vertical agreements, and therefore by analogy also when part of horizontal agreements. For instance, the VABER identifies hardcore restrictions in both the '*the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade*'[500] and '*the restriction of the territory into*

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[495] See e.g. the judgment in *Allianz Hungária Biztosító Zrt*, C-32/11, EU:C:2013:160, the judgment in *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643 and the judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, EU:T:2016:449, which concerned agreements/restrictions that were not necessarily restrictive by object on their face or had not been previously found to restrict competition by object.

[496] Judgment in *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49–52.

[497] Judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraphs 23-36; judgment in *Solvay Solexis v Commission*, C-449/11, EU:C:2013:802, paragraph 82; and judgment in *YKK Corporation and Others v Commission*, C-408/12, EU:C:2014:2153, paragraph 26.

[498] See Commission decision of 27 November 2002 in Case 37978 *Methylglucamine*, paragraphs 98 and 227; the judgment in *Commission v Stichting Administratiekantoor Portielje*, C-440/11P, EU:C:2013:514, paragraphs 95 and 111.

[499] Judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraph 28. See also the judgment in *ING Pensii v Commission*, C-172/14, EU:C:2015:484, paragraphs 32–34 and the judgment in *Siemens AG and Others v Commission*, C-239/11, C-489/11 and C-498/11, EU:C:2013:866, paragraphs 218–219, where the CJEU has found to be 'immaterial', in so far as concerns the existence of an infringement, the fact that a market-sharing agreement was concluded in spite of the existence for one party of purported technical and economic barriers to entry into the market.

[500] Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, OJ L102/1 of 20.04.2010 ('VABER'), Article 4

which, or of the customers to whom, a buyer party to the agreement… may sell the contract goods or services' is a hardcore restriction, except '*where the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier…*'.[501]

5.57 Similarly, the R&D Block Exemption Regulation identifies a hardcore restriction in '*the requirement not to make any, or to limit, active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation*'.[502]

5.58 Furthermore, the TTBER 2014[503] states that agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the allocation of markets or customers are hardcore restrictions. In such context, the restriction of active sales into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee in non-reciprocal agreements are compatible with competition law only when the licensees were not competitors at the time of the conclusion of its own licence.[504]

Restrictions that form part of a wider agreement or arrangement can be restrictions by object

5.59 Contrary to the Addressees' submissions,[505] restrictions of competition by object have been found in a number of cases where the restrictive clauses or agreement were part of a wider arrangement or cooperation.[506] These judgments also show that restrictions by object do not need to be covert.

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c). See also Commission Guidelines on Vertical Restraints, OJ C130/1, 19.05.2010, paragraphs 56–57, according to which '*dealers in a selective distribution system (…) cannot be restricted in the choice of users to whom they may sell, or purchasing agents acting on behalf of those users except to protect an exclusive distribution system operated elsewhere*'.

[501] VABER, Article 4(b) and 4(b)(i). Hardcore restrictions listed in the Commission block exemption regulations are generally considered to constitute (and therefore form a subset of) restrictions by object – see e.g. point 23 of the Guidelines on the application of Article 81(3) of the Treaty, OJ C101, 24.04.2004, p.97, and point 13 of the Commission's notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU, OJ C291, 30.08.2014.

[502] Commission Regulation (EU) No 1217/2010 on the application of Article 101(3) of the TFEU to certain categories of research and development agreements, OJ L335/36, 14.12.2010, Article 5(e).

[503] The version currently in force is Commission Regulation (EU) No 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93/17 of 21.03.2014 ('TTBER 2014').

[504] TTBER 2014, Article 4 c) (ii). An analogous provision is contained in TTBER 2004, Article 4 c) (v).

[505] See e.g. URN 01139 (Fenland SO WRs), paragraph 3.1.4 and URN 01142 (Berendsen SO WRs), paragraphs 5.28–5.30.

[506] For example, the judgment in *GlaxoSmithKline v Commission,* C-501/06 P, EU:C:2009:610; the judgment in *E.ON Ruhrgas v Commission,* T-360/09, EU:T:2012:332; the judgment in *Portugal Telecom*

5.60 Contrary to the Addressees' submissions, restrictions, including market-sharing agreements, agreed within the context of a wider joint venture have been found restrictive by object by, for example, the European Courts, the EFTA Court, and the European Commission ('Commission').[507]

5.61 Agreements may go in and out of validity over time if circumstances change.[508] The fact that a restriction would have been objectively necessary but for exceeding the necessary scope (in duration, geography, and/or range of products/services/customers) does not preclude the CMA from finding an agreement restrictive by object.[509]

5.62 The Commission's various block exemption regulations and guidance are wholly consistent with the CMA's position that restrictions of competition by object can be found in respect of agreements that form part of wider, legitimate cooperation. For example, Commission guidance gives cases involving wider co-operation between the parties such as *E.ON Ruhrgas*, *Lundbeck* and *Portugal Telecom* as examples of restrictions of competition by object.[510] Other Commission guidance gives the example of a non full-function sales joint venture which generates significant efficiencies but which still represents a

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v Commission, T-208/13, EU:T:2016:368; the judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, EU:T:2016:449*;* and *Ski Taxi v Norwegian Government*, E-03/16, an EFTA case.

[507] See for example: the judgment in *E.ON Ruhrgas v European Commission,* T-360/09, EU:T:2012:332; Commission decision of 5 March 2014 in Case 39952 *Epex Spot / Nord Pool Spot AS*; Commission decision of 18 June 2012 in Case 39736 *Areva SA / Siemens AG*; and the EFTA Court judgment in *Ski Taxi v Norwegian Government*, E-03/16. The Parties made various submissions that finding a restriction by object is contrary to EU/UK legislation, case law and guidance, for example in URN 01139 (Fenland SO WRs), paragraphs 3.2.25–3.2.26, 3.2.42–3.2.45 and 3.2.55; and URN 01142 (Berendsen SO WRs), paragraphs 5.28.a and 5.28.d. See also e.g. an infringement decision in the laundry sector in the Netherlands, which the CMA considers involved a similar set of facts to the current case: Case 6855 *Wasserijen* dated 8 December 2011 of the *Nederlandse Mededingingsautoriteit*; available e.g. https://www.acm.nl/nl/download/bijlage/?id=7538, as upheld first by the Dutch competition authority on 2 July 2014, available at https://www.acm.nl/nl/publicaties/publicatie/13217/Besluit-op-bezwaar-boete-gebiedskartel-Wasserijen-Rentex-en-CleanLeaseFortex/ and upheld again by the District Court of Rotterdam on 12 May 2016, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2016:3477&showbutton=true&keyword=ECLI%3aNL%3aRBROT%3a2016%3a3477 (all in Dutch).

[508] Judgment in *E.ON Ruhrgas v European Commission,* T-360/09, EU:T:2012:332; *Passmore v Morland* [1999] 1 CMLR 1129, paragraph 26, which related to an infringement by effect rather than by object, but there is no reason to infer from the judgment that the principle was confined only to effects cases (contrary to Berendsen's response in URN 01213 (full reference at footnote 110 above), paragraphs 10.6–10.11). See also, *Asda and others v MasterCard* (2017) EWHC 93 (Comm), paragraph 48. In addition, the CJEU seems to recognise the transient nature of Article 101 infringements in relation to the nullity referred to in Article 101(2), which can be relied on by anyone '*once the conditions for the application of Article 81(1) EC are met and so long as the agreement concerned does not justify the grant of an exemption under Article 81(3)*': the judgment in *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, C-279/06, EU:C:2008:485, paragraph 74.

[509] See e.g. the Commission decision of 18 June 2012 in Case 39736 *Areva SA / Siemens AG* paragraphs 63–76 and the judgment in *Portugal Telecom v Commission*, T-208/13, EU:T:2016:368.

[510] Commission Staff Working Document: Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice (June 2014), paragraph 2.2.1.

restriction of competition by object because it involves customer allocation and price setting by the joint venture.[511] The application in this case of Commission block exemptions is discussed further in Part 5.K. below.

Trade marks and competition law

5.63 Rights under national trademark law, such as the licensing of the Trade Marks in the TMLAs, cannot be exercised so as '*to frustrate the...law on cartels*'[512] and so fall to be assessed under the Chapter I prohibition.

5.64 Trade marks do not, in themselves, prevent a competitor from entering any market with their own products or services: they merely prevent a competitor from annexing the protected mark in order to facilitate their market entry.

5.65 Where a licence agreement is designed to grant absolute territorial protection, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.[513] It is for the parties to put forward any such circumstances falling within the legal and economic context.[514]

II. Legal assessment

5.66 For the reasons set out below, the CMA finds that Fenland and Berendsen Newbury entered into an agreement to share the Relevant Markets through the allocation of territories and customers which had as its object the prevention, restriction or distortion of competition.

5.67 In reaching its finding, the CMA has assessed the content of the agreement, its objectives and the legal and economic context (in addition to discussing the wider context in other parts of this Decision as appropriate, in particular the assessment of objective necessity in Part 5.F. below, but also the assessment of whether the Parties were actual or potential competitors in Part 5.D. above,

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[511] See e.g. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, paragraph 255.
[512] Judgment in the joined cases of *Etablissements Consten S.à.R.L and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, 56 and 58/64, EU:C:1966:41, p.346.
[513] See e.g. the judgment in the joined cases of *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 139–140; the judgment in *Nungesser v Commission*, C-258/78, EU:C:1982:211, paragraphs 60–67; the judgment in the joined cases of *Etablissements Consten S.à.R.L and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, 56 and 58/64, EU:C:1966:41.
[514] Judgment in the joined cases of *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 143.

and the assessment of whether any exemptions apply in Parts 5.J. and 5.K. below).

a. Content of the agreement

5.68 The CMA has found that the Restrictions constituted an agreement between the Parties. This agreement was horizontal in nature because the Parties operated at the same level of the supply chain, namely the supply of Cleanroom Laundry Services and Consumables.[515]

5.69 The content of this agreement, as described further in paragraph 3.77 above, was as follows.[516]

a. The Parties divided GB into two territories either side of a line running from London to Anglesey, allocating to Fenland the territory north of that line (defined above as the Fenland Territory) and to Berendsen Newbury the territory south of that line (defined above as the Newbury Territory).

b. Fenland agreed not to actively solicit new business in the Newbury Territory. Fenland also agreed not to actively solicit new business from Berendsen Newbury's customers in general. Berendsen Newbury agreed the same in relation to new business in the Fenland Territory and Fenland's customers in general.

c. If Fenland was approached by a prospective customer located in the Newbury Territory which was not yet supplied by either Party, Fenland could only supply that customer if it first obtained the customer's '*written confirmation*' that it wished to become a customer of Fenland and not Berendsen Newbury. The same applied, vice versa, if Berendsen Newbury was approached by such a prospective customer located in the Fenland Territory.

d. If Fenland was approached by an existing customer of Berendsen Newbury, whether located in the Fenland Territory or not, Fenland could only supply that customer if Fenland first ascertained whether Berendsen Newbury had served the customer in the preceding year. If Berendsen Newbury had done so, Fenland had to (i) notify Berendsen Newbury of the customer enquiry, (ii) make all reasonable efforts to ascertain why the customer wished to change provider and (iii) allow Berendsen Newbury some time to work on any issues with the customer, and if the issues could not be rectified (or it was not appropriate to try and do so), Fenland

[515] See e.g. the definition of 'vertical agreement' in VABER, Article 1(1), and the Commission Guidelines on Vertical Restraints, OJ C130/1, 19.05.2010 (May 2010), paragraph 25(c).
[516] For a fuller explanation of the main provisions of the TMLAs, see paragraphs 3.76–3.103 above.

could then supply the customer. If Berendsen Newbury had not served the customer in the preceding year, Fenland had to obtain '*written confirmation*' that the customer wished Fenland, not Berendsen Newbury, to serve it. The same applied, vice versa, if Berendsen Newbury was approached by a customer of Fenland.

e. A '*Central List*' would be used to record the details of any such customers for whom '*written* confirmation' was given pursuant to points c. and d. above. The Central List would also record the customers of each of the Parties.

5.70 The content of the agreement is confirmed by various contemporaneous documents from the period leading up to the signing of the TMLAs, which express the Parties' intentions in respect of the content of the agreement. For instance, paragraphs 3.66 to 3.73 above set out the emails sent between the Parties as well as JVCo board minutes and internal emails, which detail the genesis of the TMLAs and describes the recasting of previous arrangements.

5.71 The content of the agreement is further demonstrated by the way the Parties in practice implemented the territorial and customer allocation in the TMLAs. For instance, around the time that they entered into the TMLAs the Parties allocated some existing customers between themselves, by means of a spreadsheet that '*formed the starting point of a* '*central list"* and listed one Party's existing customers in a territory allocated to the other Party (see paragraph 3.110 above). The Parties also agreed that certain existing and prospective customers would be allocated to one Party even if located in the territory of the other Party (for example, see Part 3.D.III.c above). In addition, the Parties referred customer enquiries to each other in accordance with the territorial and customer allocation, as set out in Part 3.D.III.d. above. In the case of prospective customers, notwithstanding the specific provisions summarised at paragraphs 5.69.c. to 5.69.e., in practice the Parties tended to refer prospective customer approaches from the other Party's territory, rather than seek written confirmation and add to the '*Central List*', such that if a prospective customer in the Newbury Territory approached Fenland, Fenland would refer that prospective customer on to Berendsen Newbury (see Part 3.D.III.d. above).

5.72 The above analysis of the content of the agreement shows that the Parties agreed to the Restrictions contained within the written TMLAs and thereby to share the Relevant Markets by means of allocating territories and customers. As such, the parties agreed to prevent or restrict competition between themselves in respect of those allocated territories and customers. The Restrictions clearly, on their face, restricted each Party's ability to actively and passively compete in the other Party's territory and for the other Party's

customers. As discussed above, territorial and customer allocation of this nature is typically a restriction of competition by object.

5.73 On 23 February 2015 and 2 March 2015, the Parties recorded via the Passive Sales Letters their agreement that '*restrictions on passive sales*' in the TMLAs should be '*removed*' or '*not enforce[d]*': see paragraph 3.98 above.[517] Berendsen submitted that Berendsen Newbury ceased to refer to Fenland any customer enquiries after March 2015.[518] By contrast, Fenland continued to refer customer enquiries to Berendsen Newbury until the Joint Venture was terminated on 3 February 2016. Indeed, 13 of the 44 instances of one Party referring an unsolicited Out of Territory customer enquiry to the other Party occurred after March 2015.[519] The evidence therefore does not show that the removal of the passive sales restriction had been fully implemented by both Parties. In any event, at no point during the Relevant Period did the Parties agree to make any changes to, or relax the enforcement of, the restriction on active sales.

5.74 Even if the agreement noted in the Passive Sales Letters had been fully implemented (which the CMA does not consider to be the case, see paragraph 3.141 above), that would not change the finding that the Restrictions remained by their nature restrictive of competition. This is because active sales restrictions in a horizontal agreement are by their nature restrictive of competition (see paragraphs 5.56 to 5.58 above). Undertakings actively seeking to win customers from each other is clearly an important aspect of competition, and if a customer is not aware of the existence of an alternative supplier, or its willingness to supply, that supplier will not be invited to submit a tender (or be otherwise approached) by that customer. This is particularly the case here, where both Parties used the same Micronclean Brand.

b. Objective of the agreement to restrict competition

5.75 The CMA finds that the objective of the agreement as pursued through the Restrictions was to share the Relevant Markets through the allocation of territories and customers, thereby reducing competition between the Parties. This objective is demonstrated by:

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[517] URN 00043.34 (full reference at footnote 172 above).

[518] URN 00193.1 (full reference at footnote 135 above), paragraphs 3.8(b) and 3.11; URN 01142 (Berendsen SO WRs) paragraphs 6.17–6.18 and 9.15(c); URN 01216A (full reference at footnote 31 above), p.26 at lines 14–19. This is consistent with internal Berendsen Newbury training to the effect that '*You should not automatically forward customer requests to Fenland*': URN 00067.8 (full reference at footnote 255 above), p.5, first bullet.

[519] See e.g. URN 00193.79 (Email dated 3 February 2016 relating to an enquiry from [Prospective Customer A]). See also URN 01011 (Email dated 15 July 2015 from [Fenland Director A] to [Berendsen Newbury Director J] and [Berendsen Newbury Director E]).

a. the express terms of the TMLAs, by which the Parties agreed to share the Relevant Markets (as to which, see the discussion of the content of the agreement at paragraphs 5.68 to 5.74 above); and

b. the conduct of the Parties when designing and implementing the Restrictions, which shows that the Restrictions restricted and/or distorted competition between them and that the Parties intended this.

The conduct of the Parties before and during the Relevant Period

5.76 The conduct of the Parties and the communications between them before and during the Relevant Period confirm that they were aware that the purpose of the Restrictions was to restrict competition between them by allocating territories and customers, and that this was their intention. A more detailed description of the Parties' conduct in this regard is set out in paragraphs 3.61 to 3.75 and 3.105 to 3.141 above.

5.77 The Parties' communications before entering into the TMLAs show that their aim was to allocate territories and restrict competition in relation to those territories. Examples are set out below.

a. In his email to [Berendsen Newbury Director A] dated 10 June 2011, [Fenland Director A] referenced how '*territorial restrictions*' are now needed.[520]

b. On 27 June 2011, [Fenland Director A] stated in an internal email that the intended cooperation with Berendsen Newbury '*will also constrain cross border trading*'.[521]

c. Again, on 27 June 2011, the JVCo board minutes dated 27 June 2011 stated that '*…any trading using the Micronclean name would be constrained by the territorial restrictions*' and that '*a register of agreed cross border customers will be kept to avoid uncertainty in the future'*.[522] The Parties carried out all of their activities in the Relevant Markets under the Micronclean Brand, so the statement that any trading would be constrained by the territorial restrictions effectively meant that all the Parties' activities in the Relevant Markets would be constrained in this way.[523]

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[520] URN 00066.84 (full reference at footnote 149 above).
[521] URN 00066.95 (full reference at footnote 154 above). The CMA understands the reference to '*cross border trading*' to refer to the Parties' ability to trade in each other's allocated territory.
[522] See URN 00055.13 (full reference at footnote 150 above), paragraph 4.
[523] See paragraphs 5.21 to 5.25 above confirming that food customers were outside the scope of the Restrictions.

5.78 Furthermore, the Parties' exchange of customer lists before and during the Relevant Period shows that the Parties' aim was to allocate territories and customers between the Parties.[524] The customer lists exchanged stated, for example, '*anomalous*' customers (i.e. Fenland's customers in the Newbury Territory, and Berendsen Newbury's customers in the Fenland Territory). The exchange of these lists had the aim of enabling each Party to determine which customers in the other Party's territory could be served without contravening the Restrictions, and to monitor the other Party's compliance with the Restrictions.

5.79 A number of statements made by [Fenland Director A] in the context of the Newbury Acquisition demonstrate that the Restrictions were aimed at restricting competition between the Parties, and thus reducing the risk involved in competing freely on the market.[525] For example:

a. Following a meeting on 6 October 2014, [Fenland Director A] noted that the agreement between the Parties '*…slows (but does not stop) our competition with each other*'.[526] Therefore, Fenland was aware that the Restrictions restricted competition between it and Berendsen Newbury, and this was Fenland's intention.

b. The minutes of Fenland board meeting on 8 October 2014 stated that: '*The main options are to have no partnership and compete against each other,* [Fenland Director A] *believes this will drive margin down quicker. The other main option is an agreement where Berendsen can still use the Microclean name and include a passive compete clause*'.[527]

c. On 20 October 2014, [Fenland Director A] asserted that *'…if Fenland…and Berendsen become competitors in the Class 4 market, Berendsen will be prevented from buying Fenland as the CMA would not allow two competitors to join and gain an 80%+ market share. Fenland believes that this will also be the situation if Berendsen and Fenland enter licence agreements to use the Microclean name but compete with each other on a passive basis. This latter arrangement will lead to the two parties becoming competitors with each other so that they are not*

[524] See Part 3.D.III.a. See e.g. URN 00068.3 (full reference at footnote 195 above), and URN 00043.48 (full reference at footnote 158 above).
[525] Judgment in *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 26.
[526] See URN 00186.117 (full reference at footnote 366 above), p.1.
[527] URN 00186.33 (full reference at footnote 119 above), paragraph 2.2. This quote appears to refer to the introduction, into one or both of the TMLAs, of a '*clause*', but the CMA has seen no evidence that any term of the TMLAs was in fact formally introduced, amended or removed before (or following) the date of that document: see paragraph 3.98 above.

perceived as a single market entity (the basis on which the CMA gave tacit approval for Fenland to acquire Newbury)'.[528]

d. [Fenland Director A] stated, in documents reflecting meetings with Berendsen on 14 November 2014 and 4 December 2014: '*If Berendsen continue to trade as Microclean in the UK under a licence agreement with MC Ltd* [JVCo] *(that contains a passive compete clause), it is likely that competition will grow and not be dissimilar to that between the two parties that would exist if there was no agreement*'.[529]

5.80 Almost all of the statements cited in the preceding paragraph were shared by Fenland with Berendsen Newbury during the Relevant Period.[530] The CMA has received no submissions or evidence indicating that Berendsen Newbury disagreed with these statements.

5.81 These statements show that, absent the Restrictions, the Parties would have competed against each other and that competition would have been more intense between these two leading players in the Relevant Markets. This supports the CMA's finding that the Restrictions had the objective of restricting competition.

5.82 The documents from the period leading up to the signing of the TMLAs show that the Parties' intention was for their activities in the Relevant Markets to be constrained by the Restrictions (and the CMA concludes in Part 5.F. below that the Restrictions were not objectively necessary for the existence of the TMLAs or the Joint Venture). The evidence of subjective intention supports the finding that the Restrictions had the objective aim to restrict competition by sharing the Relevant Markets.

5.83 The exchange of the Passive Sales Letters in early 2015 (see paragraph 3.98 above) does not affect the finding that the purpose of the Restrictions was (and remained throughout the Relevant Period) to share the Relevant Markets, by allocating territories and customers and thereby restrict competition between the Parties in respect of those territories and customers. This is because, even if the agreement recorded in the Passive Sales Letters had been fully

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[528] URN 00068.16 (full reference at footnote 168 above), p.3.

[529] URN 00124.6 (full reference at footnote 120 above), p.2. See also later iterations: URN 00186.119 (full reference at footnote 121 above), p.1 – whereby [Fenland Director A] stated that in respect of '*cleanroom garments*', following the proposed restructuring *'Fenland…will fully compete across Great Britain with Berendsen…This re-structuring of the market will lead to greater competition than exists currently'*; URN 00043.7 (full reference at footnote 371 above), p.1; URN 00068.16 (full reference at footnote 168 above), p.5. URN 00043.13 (Note of a meeting between Fenland and Berendsen on 4 December 2014, produced by [Fenland Director A] on 5 December 2014), p.2.

[530] With the exception of URN 00186.33 (full reference at footnote 119 above), which Fenland did not share with Berendsen Newbury during the Relevant Period.

implemented (which the CMA does not consider was the case: see paragraph 3.141 above), the restriction on each Party's ability to actively solicit new business in the other Party's territory, and the restriction on one Party's ability to actively solicit new business from the other Party's customers remained in force.[531] The aim of the Restrictions did not, therefore, cease to be anti-competitive when the Parties exchanged letters as described above. As set out in paragraph 5.4 above, active competition is important in the Relevant Markets and, as set out in Part 3.D.II.e. above, the Restrictions relating to active competition remained unaffected by the Passive Sales Letters described above.

5.84 The Addressees submitted that the CMA's analysis of the objective of the agreement was deficient, as it did not reflect the Parties' rationale for entering into the TMLAs. For example, Berendsen submitted that the CMA failed to have regard to the pro-competitive objective of the TMLAs which gave rise to significant customer, consumer and efficiency benefits by not giving proper consideration to the wider legal and economic context.[532] Fenland submitted, for example, that: (i) normal competition never existed between the Parties due to the wider context of the Joint Venture and technology transfer licence between the Parties, and the need to prevent free-riding; and (ii) the TMLAs recorded certain pre-existing arrangements, and added others (such as Fenland's ability to terminate the Joint Venture, should there be a change of control of Berendsen Newbury).[533]

5.85 The CMA accepts that the TMLAs were agreed in the context of the long-running Joint Venture and accepts that the objectives of the TMLAs may have been multi-faceted. However, the CMA does not consider that these arguments preclude a finding that the Restrictions constitute an infringement by object. Moreover, these arguments are appropriately and fully addressed in the assessment of actual/potential competition, objective necessity and individual/block exemption as well as in the following discussion of legal and economic context. Even if the Parties had a number of objectives in agreeing the Restrictions, they clearly had the objective of sharing markets and reducing competition between them.[534]

5.86 Market sharing is of its nature restrictive of competition, and a standalone market-sharing agreement is usually found to have an anticompetitive object,

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[531] See paragraphs 3.88–3.90.
[532] See e.g. URN 01142 (Berendsen SO WRs), paragraphs 5.21(d) and 5.31.
[533] See e.g. URN 01139 (Fenland SO WRs), paragraphs 3.2.7–3.2.8 and 3.2.90.
[534] See the judgment in *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraphs 21–23; judgment in *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 70. See also the judgment in C-551/03 P *General Motors v Commission* [2006] ECR I-3173, paragraphs 64 and 66.

in accordance with a long line of case law (as set out in paragraph 5.55 above).[535] However, the Addressees submitted that, according to the Commission's Guidance on the De Minimis Notice,[536] market sharing may not constitute 'by object' restrictions where they are '*part of a wider cooperation* agreement *between two competitors*'.[537] The CMA rejects this submission, as paragraph 2.2.1 of the same guidance provides that '*[i]f the conduct of the parties to an agreement (for example, a distribution agreement between actual or potential competitors) shows that their objective was to share the market, that objective may be taken into account in deciding whether the agreement is a restriction by object*' and it gives cases such as *E.ON Ruhrgas*, *Lundbeck* and *Portugal Telecom*, which included restrictions as part of a wider co-operation agreement, as examples.

c. Legal and economic context of the Restrictions

5.87 This Part 5.E.II.c. discusses the legal and economic context of which the Restrictions form part, in order to determine whether this agreement between undertakings reveals a sufficient degree of harm that it may be considered a restriction of competition by object.[538]

Legal framework

5.88 The CJEU has held that '*market-sharing agreements constitute particularly serious breaches of the competition rules*' and '*agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned*'.[539] As such, '*in respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object*'.[540] It is

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[535] The case law referenced at paragraph 5.55 above is not exhaustive.
[536] Commission Staff Working Document: Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice (June 2014).
[537] URN 01142 (Berendsen SO WRs), paragraph 5.28; URN 01139 (Fenland SO WRs), paragraph 3.2.43.
[538] Judgment in *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 26–28, citing the judgment in *ING Pensii v Consiliul Concurenței*, C-172/14, EU:C:2015:484, paragraph 33.
[539] Judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraph 28. The judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26 does not distinguish between covert and non-covert market-sharing agreements.
[540] Judgment in *Toshiba Corporation v Commission,* C-373/14 P, EU:C:2016:26, paragraph 29. The Commission also made this observation in its submissions to the EFTA Court in the *Ski Taxi v Norwegian Government*, E-03/16, see paragraph 43 of the judgment. It is clear that this quote is not therefore only relevant to classic, covert cartels, but to any form of market sharing whether covert or non-covert, not least because the judgment does not distinguish between covert and non-covert cartels.

necessary to take into consideration '*all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the legal and economic context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market*'.[541]

5.89 It is also clear that an examination of the conditions of competition must be based not only on existing competition between undertakings already present on the relevant market, but also on potential competition.[542]

5.90 To determine the likelihood that (having regard to the economic context) competition will be seriously weakened as a result of the agreement, the structure of the market, '*the existence of alternative distribution channels and their respective importance and the market power of the companies concerned*' should be considered.[543] The market power of the Parties therefore has some significance in this case, particularly in view of the fact that the Parties effectively divided GB in two.

5.91 The Addressees submitted that: (i) the CMA failed to consider fully the economic and legal context and thereby disregarded established cases such as *Société Technique Minière*;[544] and (ii) it was not appropriate for the CMA to limit its analysis of the context to what is 'strictly necessary'.[545] The CMA rejects these submissions. Not only does the case law state that the CMA is entitled to limit an analysis of the context to what is strictly necessary in cases concerning market sharing, the CMA has, in fact, carried out a more detailed contextual assessment. The CMA has paid particular regard to the legal test set out in *Société Technique Minière* and other similar judgments in its assessment of the object of the Restrictions within their legal and economic context. The CJEU held that when considering whether an agreement has as its object the restriction of competition it is necessary first to '*consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article* [101(1)] *must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be*

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[541] Judgment in *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 78.
[542] Judgment in *E.ON Ruhrgas v European Commission,* T-360/09, EU:T:2012:332, paragraph 85.
[543] Judgment in *Allianz Hungária Biztosító Zrt*, C-32/11, EU:C:2013:160, paragraph 48.
[544] URN 01139 (Fenland SO WRs), paragraphs 3.2.46–3.2.50, 3.2.72–3.2.84 and URN 01142 (Berendsen SO WRs), paragraphs 5.18–5.30. See the Judgment in *Société Technique Minière v Maschinenbau Ulm GmbH*, C-56/65, EU:C:1966:38.
[545] URN 01142 (Berendsen SO WRs), paragraph 5.26.

considered'.[546] The *Société Technique Minière* judgment therefore sets out the relevance of determining the precise purpose of the agreement in its economic context and clarifies that the anticompetitive nature of such purpose can result from all or some of the clauses of an agreement. In this case, the TMLA clauses setting out the Restrictions are clear and unambiguous – and, therefore, when reviewed in their context, establish the precise purpose of the relevant agreement.

5.92 The point at which the legal and economic context is assessed, is also of relevance. In *Lundbeck*, the General Court held that the Commission was correct to assess whether the parties were potential competitors '*at the time the agreements at issue were concluded'*.[547] This was because the time at which the agreement was concluded was the crucial point for determining whether the undertakings had real concrete possibilities of entering the market and that as a result of the agreement that competitive pressure was eliminated, which constitutes, by itself, a restriction of competition by object.[548]

Assessment

5.93 The Addressees made different submissions on the correct period in relation to which the analysis of the legal and economic context should be undertaken. Fenland submitted that the CMA's analysis was erroneously restricted to a period after May 2012, ignoring the wider context of the Restrictions (insofar as the Parties were not actual or potential competitors when certain restrictions were put in place in the 1980s).[549] Conversely, Berendsen submitted that the CMA should assess only facts within the Relevant Period.[550]

5.94 Berendsen also asked the CMA to take into account the pro-competitive impact of the Newbury Acquisition (in September 2014), given Berendsen Newbury's subsequent:

a. rebranding, from the Micronclean Brand to the 'Berendsen' brand;

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[546] Judgment in *Société Technique Minière v Maschinenbau Ulm GmbH*, C-56/65, EU:C:1966:38, p.249. See also the judgment in *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraph 15.
[547] Judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission,* T-472/13, EU:T:2016:449, paragraph 437.
[548] Judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission,* T-472/13, EU:T:2016:449, paragraph 474. See also, the *Guidelines on the application of Article 81 to technology transfer agreements* (paragraph 33), and also the more recent March 2014 version (paragraph 37), which states that the assessment of the context is sensitive to material changes in the facts.
[549] URN 01139 (Fenland SO WRs), paragraph 3.2.96. Note that there is no evidence of written territorial restrictions dating from the 1980s.
[550] URN 01142 (Berendsen SO WRs), paragraph 10.2.

b. development of sales force capability and sales plans;

c. investments in its business.[551]

5.95 In line with the case law discussed at paragraphs 5.88 to 5.92 above, the CMA has assessed the legal and economic context during the Relevant Period, whilst also recognising the broader history of the Joint Venture.

5.96 The CMA recognises the significance attached to the legal and economic context by the Parties, who were part of a long-standing Joint Venture. The Addressees have submitted that there are deficiencies in the CMA's analysis of the legal and economic context, in that the CMA failed to fully consider the wider context in which the TMLAs were agreed.[552] As such, the Addressees submitted that the CMA artificially divorced the territorial restrictions contained in the TMLAs from the wider context of the long-standing Joint Venture and technology transfer licence.[553] By not fully considering the context, the Addressees submitted, the CMA failed to establish a sufficient degree of harm,[554] consider the relevant economic and legal context,[555] or have regard to the objectives of the Joint Venture arrangements.[556]

5.97 Even if the TMLAs had been merely a continuation of previous agreements that had been in place since the 1980s, it remains relevant to assess the situation in the Relevant Period, and it was appropriate for the parties to assess the lawfulness of the arrangements at the point of entering into the TMLAs.

5.98 The legal and economic context in this case is considered in this Part 5.E.II.c. as part of the assessment of whether the Parties' conduct represents an infringement of competition law by object. The legal and economic context is also relevant for the assessment of the objective necessity in Part 5.F. below.

5.99 Any genuine uncertainty on the part of the Parties as to whether their conduct amounted to a breach of the Chapter I prohibition is considered in step 3 of the

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[551] URN 01142 (Berendsen SO WRs), paragraphs 3.44–3.55.
[552] URN 01139 (Fenland SO WRs), paragraphs 3.2.46–3.2.50, and 3.2.72–3.2.84; URN 01142 (Berendsen SO WRs), paragraphs 5.1–5.39.
[553] URN 01139 (Fenland SO WRs), e.g. at paragraphs 3.2.95–3.2.96 (and, in contexts other than legal and economic context, the similar submission at paragraphs 3.2.13 and 3.2.81). The CMA has seen no evidence of a one-way technology transfer licence: see paragraphs 5.223 to 5.227 below. See also URN 01142 (Berendsen SO WRs), paragraphs 5.18 and 5.25, stating that the CMA artificially divorced a limited number of provisions within the TMLAs, excluding the remaining provisions of the TMLAs and wider JV arrangements thereby defining away all the issues relevant to the context of the conduct.
[554] URN 01142 (Berendsen SO WRs), paragraphs 5.10–5.17.
[555] URN 01142 (Berendsen SO WRs), paragraphs 5.18–5.30.
[556] URN 01142 (Berendsen SO WRs), paragraphs 5.17 and 5.38.

penalty calculation in Part 6.D.III. below, as awareness of illegality is not necessary for a finding of an object infringement.

5.100 The legal and economic context prevailing when the Joint Venture was first set up in the 1980s compared to what it was by May 2012 is markedly different.[557] During the Relevant Period, the Parties were actual competitors, and they held significant combined market shares in Cleanroom Laundry Services: [80-90]% in Full Cleanroom Laundry Services and [90-100]% in Intermediate Cleanroom Laundry Services in 2015,[558] with evidence that market shares of around these levels existed throughout the Relevant Period.[559] The only other supplier in the Full Cleanroom Laundry Services market was Fishers and there were a couple of other smaller suppliers in the Intermediate Cleanroom Laundry Services Market.[560] The Parties were also actual competitors and notable players in the relatively fragmented Consumables market, with a market share of [10-20]% in 2014.[561]

5.101 After the Newbury Acquisition, Berendsen plc rebranded the Berendsen Newbury business, appointing new management and making additional investments. Bringing Berendsen Newbury within a larger corporate group represented a structural change in the industry, but did not directly affect Berendsen Newbury's position on any Relevant Markets.

5.102 The Parties' significant market share in Cleanroom Laundry Services was produced partly by the Parties' leading role in developing the markets, partly by the Parties' acquisition of competitors (e.g. [Former JV Partner D] and Guardline) and partly by competitors otherwise leaving the Relevant Markets (e.g. Countdown Clean Systems Limited, referred to as 'Countdown').

5.103 The Restrictions exacerbated this limitation of choice, by reducing the Parties' ability to market to and serve territories and/or customers allocated to the other Party. The Restrictions were set out explicitly in the TMLAs. It is clear from the evidence that the Restrictions were specifically designed to constrain competition between the Parties.[562]

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[557] The history of the Joint Venture is discussed in more detail in Part 3.C. above.
[558] See Part 3.B.II. and **Annex C**, Table C1 and Table C2.
[559] For example, the Parties' share of Full Cleanroom Laundry Services in 2013 was 80%–90%, URN 00984 (*Microclean/Guardline* Decision), paragraph 5. See also **Annex C** (in particular, paragraphs C.8 and C.14 on how market shares generally remained relatively constant during the Relevant Period).
[560] See **Annex C**, paragraphs C.3–C.5.
[561] The [10-20]% figure includes Fenland, Berendsen Newbury and Guardline (which was owned by JVCo, which was in turn owned by Fenland and Berendsen Newbury jointly). The market leader in the Consumables market in 2014 was Shield Medicare with a market share of [30-40]%, but no other competitor had a market share above 10%. See **Annex C**, Table C3, for further details.
[562] See, for example, the evidence cited at paragraphs 3.66 to 3.74 above.

5.104 As explained in Part 3.E. above, which sets out the Parties' ability to compete for territories and customers during the Relevant Period, the Parties were clearly capable of supplying territories and/or customers allocated to the other Party. For example, even with the Restrictions in place, each Party serviced Out of Territory customers.[563] Some customers in all and/or parts of the Fenland Territory were at least as close to Berendsen Newbury as they were to Fenland, and vice versa.[564]

5.105 As explained further in Part 3.E.VII. and 5.D.II. above, the Parties perceived each other as competitors in the Relevant Markets.

5.106 The CMA has considered the nature of the services affected, as well as the actual conditions of the functioning and the structure of the markets concerned. The majority of Cleanroom Laundry Services contracts are awarded following a competitive tender process.[565] Parts 3.E.II. to 3.E.V. above show that, whilst customers are sensitive to price and quality of service, they are not necessarily always sensitive to the location of the laundry facility.[566] The fact that Fishers supplies customers throughout GB from one laundry supports this.[567] Absent the Restrictions, there would, moreover, be no significant barriers to the Parties expanding their 'Out of Territory' sales, by developing their distribution networks, as they have done historically (e.g. Fenland's expansion to the North of England and Scotland) and as they have started to do after the termination of the Joint Venture.

5.107 Each Party had a non-exclusive right to trade under the Trade Marks in (i) its allocated territory, and (ii) the territory allocated to the other Party (see paragraphs 3.76 to 3.101 above). Moreover, insofar as the Parties' freedom to trade throughout GB under the Trade Marks was in any way constrained under the TMLAs, that was self-imposed and could be remedied by agreement. Each

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563 See URN 00068.3 (full reference at footnote 195 above), URN 00043.48 (full reference at footnote 158 above).

564 See **Annex E**. See also URN 00043.35 (Email chain dated 22 November 2013 between [Berendsen Newbury Director C] and [Fenland Director F], with the subject line '*RE: Phone Call re [Shared Customer E site 3]*'), in which [Berendsen Newbury Director C] passed on to Fenland an enquiry from [Shared Customer E site 3] (the postcode for which is SG[✂], in the Fenland Territory'), which is located approximately [100-200] km (approximately a [1-2] hour drive) from Newbury, and approximately [100-200] km (and more than a [2-3] hour drive) from the Skegness Laundry facility where the garments are laundered and [0-50] km from the Letchworth hub, via which Fenland serves the customer (URN 01277 (Fenland response of 23 June 2017 to the Fifth Fenland Notice, response to Questions 4–6, spreadsheet). See also e.g. URN 01002 (full reference at footnote 387 above), p.1, for an example of an '*Aseptic Manufacturing*' sector customer located in Middlesex served by Fenland's Skegness site, located over [200-300] km from Skegness (approximately [100-200] miles, and a [2-4] hour drive); Berendsen Newbury is located approximately [50-100] km from the customer (approximately [50-100] miles, and a [1-2] hour drive).

565 See e.g. paragraph 3.25 above.

566 See also paragraph 4.38 above.

567 See **Annex E**, Figure E6, which shows the map of customers serviced by Fishers.

Party was therefore able to trade under the Trade Marks throughout GB and, absent the Restrictions, service each other's customers using the Micronclean Brand and adhere to the same standards of quality.[568] The existence of the Trade Marks themselves, which were already well-established during the Relevant Period, did not therefore have a material impact on or provide a barrier to entry into each other's territory.

5.108 If the Restrictions had not constrained each Party from actively approaching customers allocated to the other Party, each Party could have proactively made itself known to those customers, potentially leading to customers inviting that Party to tender.[569]

5.109 The legal and economic context reveals that during the Relevant Period the Parties chose to explicitly constrain competition between them (both before and after the Newbury Acquisition) by entering into the TMLAs despite being two leading players (and actual competitors) in the Relevant Markets. The Parties' investments in the Joint Venture did not necessitate such protection against each other's active and passive sales during the Relevant Period.

Conclusion

5.110 The CMA finds that the legal and economic context in which Cleanroom Laundry Services and Consumables were supplied by the Parties during the Relevant Period, shows that the Restrictions reveal in themselves a sufficient degree of harm. This is supported by the Parties' strong position on the Relevant Markets and the importance of both active and passive competition in the Relevant Markets.

III. Conclusion on the object of preventing, restricting or distorting competition

5.111 For the reasons set out above, the CMA concludes that the Restrictions had as their object the prevention, restriction or distortion of competition within the UK by sharing the Relevant Markets through the allocation of territories and customers. In assessing their content, objectives and legal and economic context, the CMA concludes that the Restrictions revealed in themselves a sufficient degree of harm because, by their very nature, the Restrictions were harmful to the proper functioning of normal competition. Consequently, it is not necessary to examine their effect.

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[568] See 3.D.II Clause 1.1.8 of each TMLA defines the 'Standards of Quality'; Schedule 4 of each TMLA lists the Trade Marks.

[569] See Part 3.E.IV. for a discussion of competition for Out of Territory customers after the Passive Sales Letters and after the Joint Venture was terminated.

F. Objective necessity

5.112 In Part 5.E. above, the CMA concludes that the Restrictions had the object of restricting competition. This Part discusses whether the restriction of competition identified nonetheless falls outside the scope of the Chapter I prohibition because the Restrictions were objectively necessary to the implementation of a main operation or activity (here, the long-standing Joint Venture or the licensing of the Trade Marks in the TMLAs) which is pro-competitive or neutral.[570] For the reasons set out in this Part 5.F. below, the CMA finds that this exception does not apply in this case, notwithstanding the CMA's consideration of the wider context in which the Parties operated the long-standing Joint Venture.

5.113 The burden of proving that the Restrictions are objectively necessary rests on the Addressees – unless the Addressees first make out an objective necessity case on the facts, no such case arises for consideration by the CMA.[571] In response to the CMA's request, the Parties made a number of submissions pre-SO. The CMA asked the Addressees a number of times to provide further representations and evidence to support the submissions they made pre-SO, but none of the Addressees has made any submissions specifically claiming the objective necessity of the Restrictions since the SO was issued.[572] However, the CMA has considered their submissions under this principle as well as carrying out its own assessment.

I. Key legal principles

5.114 If a restriction of competition is objectively necessary to the implementation of a main operation or activity and proportionate to the objectives of that operation or activity, it is necessary to examine the compatibility of that restriction with the Chapter I prohibition in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be caught by the Chapter I prohibition.[573]

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[570] *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11, paragraphs 272–273. *Agents Mutual Limited v Gascoigne Halman Limited* [2017] CAT 15, paragraph 153. See also the judgment in *Mastercard Inc. and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.
[571] *The Racecourse Association v OFT* [2005] CAT 29, paragraphs 132–133.
[572] The Parties made various voluntary submissions pre-SO, as contained in their submissions dated 8 September 2016: URN 00205.2 (full reference at footnote 25 above), paragraphs 4.9, 5.5 and 5.9–5.16; and URN 00201.1 (full reference at footnote 25 above), paragraphs 3.1–3.31.
[573] Judgment in *Mastercard Inc. and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 90.

5.115 If the main operation or activity is not caught by the Chapter I prohibition, owing to its neutral or positive competitive effect, any restriction which is objectively necessary to it will not be caught by that prohibition.[574]

5.116 The assessment of objective necessity implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, secondly, whether it is proportionate to it.[575]

5.117 For a restriction to be objectively necessary to a main operation, that operation must be impossible to carry out in the absence of the restriction. The restriction is not objectively necessary if that operation is simply more difficult to implement or even less profitable without the restriction.[576] The test is '*an extremely high one*'.[577]

5.118 Proportionality is a general principle of EU law, which requires a consideration of first whether the measure in question is suitable or appropriate to achieve the objective, and second whether the measure is necessary to achieve that objective or whether it could have been attained by a less onerous method. The Supreme Court has also stated that there is some debate as to whether there is a third question, sometimes referred to as proportionality *stricto sensu*, i.e. whether the burden imposed by the measure is disproportionate to the benefits secured.[578]

5.119 The compatibility of restrictions with competition law can change over time, whereby a change in circumstances can mean an agreement may be considered void under certain circumstances and not void under others.[579] The objective necessity of a restriction can therefore vary over time if the circumstances change.

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[574] Judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, EU:T:2016:449, paragraph 451; and the judgment in P *Mastercard v Commission*, C-382/12, EU:C:2014:2201, paragraph 89.
[575] Judgment in *E.ON Ruhrgas and E.ON v Commission*, T-360/09, EU:T:2012:332, paragraph 64. See also *Agents Mutual Limited v Gascoigne Halman Limited* [2017] CAT 15, paragraphs 152–153.
[576] Judgment in *Mastercard Inc. and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91. See also *Agents Mutual Limited v Gascoigne Halman Limited* [2017] CAT 15, paragraph 153; the judgment in *H. Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, EU:T:2016:449, paragraphs 453 and 454; and the judgment of the EFTA Court in *Ski Taxi v Norwegian Government*, E-03/16.
[577] *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11, paragraph 273.
[578] *R (Lumsdon) v Legal Service Board* [2015] UKSC 41, paragraphs 32–33. A summary of the principle of proportionality under EU law is also set out in the judgment of the CJEU in *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa,* C-331/88, EU:C:1990:391.
[579] *Passmore v Morland* [1999] 1 C.M.L.R. 1129, paragraph 26; judgment in *E.ON Ruhrgas and E.ON v Commission*, T-360/09, EU:T:2012:332, paragraphs 88–93; *Asda and others v MasterCard* (2017) EWHC 93 (Comm), paragraph 48.

5.120 The underlying question of whether the primary operation or activity is impossible to carry on, that is, whether the restrictions can be detached from that primary operation or activity without rendering the operation impossible to carry on, is answered through the use of counterfactual hypothesis. The appropriate counterfactual hypotheses are not limited to only the situation that would arise if the ancillary restriction were removed altogether. Rather any such hypothesis needs to be realistic and so may extend to those realistic situations that might arise in the absence of the restriction.[580] It is therefore appropriate for the counterfactual to postulate the existence of some restriction different from that which in fact existed. If such lesser restraint is realistic and enables the main operation to be economically viable, then the restraint is not objectively necessary.[581]

5.121 Whether a restriction of competition is objectively necessary to the implementation of the main operation or activity is separate from the question whether the restriction can be individually exempted under section 9 of the Act (which is considered at Part 5.J. below).[582]

II. Legal assessment

5.122 In light of the legal principles highlighted above, the CMA has assessed:

- whether there is a 'main operation' that is not caught by the Chapter I prohibition owing to its neutral or positive effect on competition;
- whether the Restrictions were objectively necessary to the implementation of any such main operation; and
- whether the Restrictions were proportionate to the objectives of any such main operation.

a. Main operation

5.123 The Parties submit that their Joint Venture, that is their cooperation since the early 1980s, was aimed at offering high quality and technologically advanced Cleanroom Laundry Services across GB under the Micronclean Brand. This Joint Venture and/or, more narrowly, the licensing of the Trade Marks under

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[580] Judgment in *Mastercard Inc. and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 109–111; *Asda and others v MasterCard* [2017] EWHC 93 (Comm), paragraph 47.
[581] *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11, paragraphs 274–277.
[582] *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11, paragraph 278. See also, the judgment in *Mastercard Inc. and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 231.

the TMLAs could qualify as a neutral or pro-competitive main operation for the purposes of assessing objective necessity.

5.124 The Addressees have submitted that the Joint Venture and the licensing of the Trade Marks under the TMLAs had the following pro-competitive aims:

a. introducing and developing new Cleanroom Laundry Services and Consumables in GB, servicing unmet demand;[583]

b. enabling and incentivising the Parties – '*relatively small organisations*', which had '*remained family run, owner-controlled enterprises*' – to invest in the construction, maintenance and improvement of the Cleanroom Laundries, in particular Berendsen Newbury's premises;[584]

c. introducing, developing and exploiting the jointly owned Trade Marks[585] in GB and developing brand marketing standards;

d. providing consistent, higher standards of Cleanroom Laundry Services (and Consumables) to customers across GB, particularly as regards security of supply;[586] and

e. enabling Parties to compete with the major market player, Countdown (at the time the Joint Venture was set up).[587]

5.125 The Addressees have claimed that the Joint Venture and/or the licensing of the Trade Marks under the TMLAs gave rise to customer, consumer and efficiency benefits, such as:

a. innovation and competition in Consumables, where the Micronclean Brand's entry into the market delivered high quality and lower prices and reduced customer costs;[588]

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[583] URN 00201.1 (full reference at footnote 25 above), paragraph 2.2. Fenland also submitted that it transferred material knowhow to Berendsen Newbury when the Joint Venture was set up and that it needed to be protected against competition as a result. This also discussed in Part 5.K. below.
[584] Berendsen URN 00201.1 (full reference at footnote 25 above), paragraph 3.6. Similar considerations can be extrapolated from Fenland at the Oral Hearing: URN 01220 (full reference at footnote 30 above), e.g. at p.35 at lines 22–25, and p.44 at lines 10–22.
[585] See Berendsen URN 00201.1 (full reference at footnote 25 above), paragraph 3.5, and URN 01142 (Berendsen SO WRs), paragraph 5.32. Fenland URN 01139 (Fenland SO WRs) paragraph 3.2.96.
[586] URN 00205.2 (full reference at footnote 25 above), paragraphs 4.10 and 5.8; and URN 01142 (Berendsen SO WRs), paragraphs 3.4–3.24.
[587] URN 01220 (full reference at footnote 30 above), p.29 at lines 5–8.
[588] Fenland URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.7. Berendsen URN 01142 (Berendsen SO WRs), paragraphs 3.15–3.19 and 5.33.

b. improved security of supply and disaster recovery;[589]

c. joint initiatives to share know how and improve quality of service;[590] and

d. joint selling to large customers.[591]

5.126 In the context of its objective necessity assessment, the CMA considers it appropriate to take into account the wider context in which the Restrictions were introduced. The Addressees have identified the rationale for creating and operating the Joint Venture, in particular, in response to the growing demand for Cleanroom Laundry Services in the 1980s and 1990s, which was triggered by the growth of the pharmaceutical and semi-conductor industries (see **Annex C**, paragraphs C.1 to C.3). For example, Berendsen submitted that during the early 1980s there were two key features of customer demand for laundering Cleanroom Garments, namely that:

a. customers required Cleanroom Garments to be laundered close to their Cleanroom operation; and

b. customers required security of supply.[592]

5.127 The Addressees stated that consequently, given the limited capability in the UK at that time to provide sophisticated Cleanroom Laundry Services, JVCo was set up to develop jointly the capability to offer high quality and technologically advanced Cleanroom Laundry Services across GB under the Micronclean Brand.[593]

5.128 In addition, Berendsen submitted that the TMLAs were beneficial to competition, when considered in isolation, because the TMLAs resolved issues associated with shared trade marks (such as incentivising investment and maintaining high and consistent quality standards).[594]

5.129 Fenland has further submitted that the rationale for entering into the TMLAs in 2012 was also to provide each Party with the ability to terminate the Joint Venture, and to prevent the use of the Micronclean Brand by the other Party, in the event of a change of control of the other Party. The JVCo Articles of Association

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[589] Fenland URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.4. Berendsen URN 01142 (Berendsen SO WRs) paragraphs 3.20–3.24.
[590] Fenland URN 00205.2 (full reference at footnote 25 above), paragraph 5.8. Berendsen URN 01142 (Berendsen SO WRs), paragraph 3.25–3.26.
[591] Berendsen URN 01142 (Berendsen SO WRs), paragraphs 3.27–3.28.
[592] URN 00201.1 (full reference at footnote 25 above), paragraph 3.4.
[593] URN 01139 (Fenland SO WRs), paragraph 3.2.7 and URN 00205.2 (full reference at footnote 25 above), paragraph 5.8. Berendsen URN 01142 (Berendsen SO WRs), paragraphs 3.3–3.28 and URN 00201.1 (full reference at footnote 25 above), paragraphs 3.3–3.6.
[594] URN 01142 (Berendsen SO WRs) paragraphs 3.29–3.40.

already gave each Party certain pre-emption rights in the event of change of control of the other Party, but did not set out any mechanism to prevent the use of the Micronclean Brand by the other Party post-termination.[595]

5.130 The CMA invited each of Fenland and Berendsen on a number of occasions to provide details of the investments made and knowhow shared in relation to the Joint Venture, in the early part of the Joint Venture and/or during the Relevant Period.[596] The information provided by the Addressees was limited and did not include evidence of knowhow being shared (or of that knowhow being secret or valuable) other than statements that such knowhow was indeed shared. They did not distinguish between investments made on behalf of the Joint Venture (perhaps including investments made for each Party's own independent business that would not have occurred without the presence of the Joint Venture) and any other investments made by each Party for its own business. Indeed, given the length of time for which the Parties have operated the Joint Venture, it may be difficult to make such distinctions. In any case, it would not be appropriate to attribute all investments made by either Party to the main operation of running the Joint Venture or licensing the Trade Marks unless the investment would not have occurred in the absence of the Joint Venture.[597]

5.131 While the information available about the investments made in the early period of the Joint Venture is scarce, given the passage of time, the main investments prior to the Relevant Period highlighted by the Addressees were as follows:[598]

a. developing in the early 1980s certain intellectual property relating to Cleanroom Laundries (e.g. a washing machine, tumble dryer, and Cleanroom Garments for rental[599] – as well as a patent over the associated technology);[600]

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[595] URN 01220 (full reference at footnote 30 above), p.35 at lines 3–12.
[596] For example, the SO, paragraph 5.88 (and Part 5.D.II.d of the SO more generally); URN 01216A (full reference at footnote 31 above), p.48, line 2 to p.49, line 25; URN 01220 (full reference at footnote 30 above), p.66, line 5 to p.68, line 23; URN 01191 (full reference at footnote 32 above).
[597] See, for instance, URN 01216A (full reference at footnote 31 above), p.48, line 2 to p.53, line 11 and URN 01220 (full reference at footnote 30 above), p.66, line 5 to p.79, line 16.
[598] Some of these investments were undertaken in collaboration with the other parties who were JV Partners at the relevant time. See Fenland URN 01220 (full reference at footnote 30 above), p.66, line 22 to p.67, line 9. Fenland submitted that the CMA should have included in this list some additional benefits listed in URN 00205.2 (full reference at footnote 25 above), e.g. most of paragraphs 5.8.2–5.8.10 – see URN 01441 (full reference at footnote 43 above), row 51 (pp.57–60) – but these were alleged benefits and/or running costs of the Joint Venture rather than investments (and in any case it is not clear whether Fenland believed they required the protection of the Restrictions).
[599] URN 01220 (full reference at footnote 30 above), p.21, line 3 to p.25, line 4.
[600] URN 00099.42 (Patent Office Certification of Grant of UK Patent dated 6 November 1985).

b. building in 1980 (and rebuilding in the mid-1990s) Fenland's Skegness plant;[601]

c. developing Micronclean as a viable national brand;[602]

d. building Berendsen Newbury's plant in 1983;[603]

e. building the [Former JV Partner D] plant in Perth in around 1985 (which was, in 1995, acquired by Fenland and converted into a transport hub);[604]

f. building Fenland's plant in Louth in the early 2000s;[605]

g. building Fenland's transport hub in Manchester/Warrington in 2004;[606]

h. building Fenland's transport hub in Newcastle/Sunderland in 2008, following the acquisition of CES and closure of its Cleanroom Laundry;[607]

i. building Fenland's transport hub in Letchworth in 2010;[608]

j. supplying Consumables under the Micronclean Brand from 2010;[609]

k. developing (but ultimately not launching) the MicronBeam branded business in 2011;[610]

l. building a 'liquids' cleanroom to dose disinfectants in 2011;[611] and

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[601] URN 01220 (full reference at footnote 30 above), p.30, line 25 to p.31, line 1 and p.66 at lines 14–21.
[602] URN 00205.2 (full reference at footnote 25 above), paragraphs 5.8.1–5.8.3; URN 01220 (full reference at footnote 30 above), p.29 at lines 16–18.
[603] URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.1(b); URN 01220 (full reference at footnote 30 above), p.22, line 7 to p.23, line 1, p.30 at lines 20–23 and p.31 at line 18.
[604] URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.1(c); URN 01220 (full reference at footnote 30 above), p.28 at lines 8–11, p.30 at lines 20–23, p.32 at, lines 5–7, and p.32, line 25 to p.33, line 8.
[605] In 2000 or 2002: see URN 00186.1 (full reference at footnote 133 above), p.53 (response to Question 19), and URN 00120.1 (Fenland presentation on prioritisation dated 7 June 2016), slide 8.
[606] URN 01220 (full reference at footnote 30 above), p.33, line 21 to p.34, line 8.
[607] URN 01220 (full reference at footnote 30 above), p.34 at lines 9–14.
[608] URN 01220 (full reference at footnote 30 above), p.34 at lines 15–19. Fenland submitted that adding a hub costs in the region of £[50,000-150,000] per year, which the CMA assumes includes the costs of the original investment: see URN 01220 (full reference at footnote 30 above), p.50, line 22 to p.51, line 3.
[609] URN 00205.2 (full reference at footnote 25 above), paragraphs 5.8.5(c)(xi) and 5.8.7; URN 00201.1 (full reference at footnote 25 above), paragraphs 4.10–4.13.
[610] URN 00205.2 (full reference at footnote 25 above), paragraphs 5.8.5(c)(ix) and 5.8.8; URN 00201.1 (full reference at footnote 25 above), paragraphs 4.19–4.24.
[611] URN 01441 (full reference at footnote 43 above), row 54 (pp.63–64). No indication of the cost of this investment was provided other than saying it was '*significant and it is highly questionable whether it would have happened absent the Joint Venture*'.

m. producing versions of the Big Blue Cleanroom Handbook up to and including the 2011 version.[612]

5.132 The main investments during the Relevant Period, highlighted by the Addressees were:

a. ongoing protection of the Micronclean Brand including trademarks/patents and marketing (including maintaining, and undertaking training in line with, the Big Blue Cleanroom Handbook[613] and the Parties' various websites);[614]

b. ongoing research and development and knowhow sharing in relation to, for example, Cleanroom Garments and Consumables;[615] and

c. researching international investment opportunities.[616]

5.133 The Parties also jointly acquired Guardline, via JVCo, in 2013 for a purchase price of £[1-2] million (subject to certain adjustments, [✂]).[617]

5.134 Some investments made prior to the Relevant Period may theoretically still be in the course of being amortised during the Relevant Period, although the Addressees have not pointed specifically to any such investments.

5.135 Some or all of the earlier benefits to customers and competition (rather than benefits to the Parties) of the Parties' co-operation may have diminished or ceased by the start of the Relevant Period. This is because by then the Relevant Markets were more mature (for example, having developed since the 1980s and been served for many years, using broadly similar technology, by

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612 URN 00066.34 (Micronclean Big Blue Cleanroom Handbook dated 2011). The cost of printing this was around £[0-25,000]; URN 00066.16 (Minutes of 'Micronclean Newbury & Skegness Joint Meeting' on 8 June 2011), p.1; URN 00066.27 (Email dated 11 July 2011 from [Berendsen Newbury Director A] to [Fenland Director J] and [Fenland Director A]). There were previous versions of the handbook produced in 1981 and 1991, and it was '*completely re-written*' for the 2011 version (URN 00066.34, p.1 (as printed)).

613 The Big Blue Cleanroom Handbook was produced in 2011 (URN 00066.34) and reprinted in 2016 (URN 00681). In URN 01389 (email from Fenland's solicitor to the CMA of 10 October 2016), p.1, Fenland submitted that the 2016 version has '*essentially the same*' contents as the 2011 version and the CMA's own comparison of the two documents confirms this.

614 URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.3.

615 URN 00205.2 (full reference at footnote 25 above), paragraphs 5.8.5(c)(xiii) and 5.8.10.

616 URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.5(c)(viii). See for example, the CMA has seen an invoice for £[0-25,000] relating to a report on possible investment in [✂] (URN 00471 (Global Reachout/UKTI invoice), p.2), and a price of £[0-25,000] relating to a report on possible investment in [✂] (URN 00460 (Email regarding [✂] investigation) and URN 00463 ([✂] business proposal)).

617 URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.7(f); URN 01220 (full reference at footnote 30 above), p.35 at lines 13–19. The purchase price is taken from URN 00983 (full reference at footnote 356 above), p.15 (response to Question 9).

similar players),[618] the Parties had significant market positions and any joint investments during (or shortly before) the Relevant Period appear to be less significant compared to investments made in the 1980s such as developing and building the plants.[619] Nevertheless, it is plausible that the Joint Venture and/or the licensing of the Trade Marks under the TMLAs (absent the Restrictions) was a main operation, which had neutral or positive effects on competition during the Relevant Period.

5.136 In light of the CMA's finding, set out below, that the Restrictions were not objectively necessary to either the Joint Venture or the licensing of the Trade Marks under the TMLAs (or a combination thereof) during the Relevant Period, there is no need for the CMA to reach any finding on whether either potential main operation pursued a neutral or pro-competitive object.[620]

b. Objective necessity of the Restrictions

5.137 The appropriate time for determining whether or not the Restrictions were objectively necessary to the Joint Venture and/or the licensing of the Trade Marks under the TMLAs is the Relevant Period, which commenced at the time when the Parties formally recast their relationship in the TMLAs.

5.138 There is insufficient evidence to conclude that TMLA provisions including the Restrictions existed previously in the same form.[621] Neither the TMLAs nor any surrounding correspondence on the CMA's file made any link between the Restrictions and any prior, contemporaneous or future sharing of knowhow or investments. In any case, even if the TMLAs had been merely a continuation of previous agreements that had been in place since the 1980s, this Decision does not purport to assess the compatibility with competition law of the Parties' conduct prior to the Relevant Period, although the history of the Joint Venture provides useful background context in which the assessment is made.

5.139 The CMA also recognises, at least in theory, that investments and other improvements made prior to the Relevant Period could potentially continue to require protection from competition during the Relevant Period, although the further back in time these are the less likely this becomes. By analogy, even in

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[618] See e.g. URN 01441 (full reference at footnote 43 above), row 28 (at p.301); URN 01220 (full reference at footnote 30 above), pp.18–25; **Annex C** (in particular, paragraphs C.8 and C.14 on how market shares generally remained relatively constant during the Relevant Period); and **Annex D**

[619] See e.g. URN 01220 (full reference at footnote 30 above), p.66, line 5 to p.67, line 25.

[620] It is not necessary to determine the ongoing compatibility of the Joint Venture and/or the TMLAs with the Chapter I prohibition given that these arrangements were terminated on 3 February 2016.

[621] The CMA has seen the following documents, all of which were different in nature to the TMLAs and did not contain provisions similar to the Restrictions: Articles of Association adopted in 1980, 1982, 1986 and 1996; the 1991 TM Agreements; and the 1984 Agreement. There is also a draft 'operating agreement' and a related draft 'heads of agreement', each drawn up in the mid-1990s but not signed.

a vertical relationship (as opposed to a horizontal relationship such as the present case) in which territorial restrictions are necessary to support substantial entry investments, such restrictions would generally fall outside Article 101(1) TFEU (and therefore also outside the Chapter I prohibition) only for the first two years.[622] The present case concerns undertakings in a horizontal relationship, suggesting that any territorial protections would be less likely to fall outside the Chapter I prohibition, or at least only do so for a short time that would have expired before the Relevant Period.

5.140 Fenland submitted that the Restrictions were an integral part of the wider pro-competitive cooperation between the Parties, and thus cannot be divorced from the context of the wider cooperation for the purpose of analysing the nature or effect of the Restrictions.[623] Fenland submitted the Restrictions were needed to attract licensees to cover the UK through:

a. ensuring that the licensees' investment was protected at least for a given territory;[624]

b. avoiding brand confusion;[625] and

c. identifying the geographic territories where the licensee had to set up the '*expensive*' transport infrastructure and protecting that investment.[626]

5.141 Berendsen submitted that the Restrictions were necessary to resolve practical and commercial issues associated with the shared Trade Marks. This was because operation of the Joint Venture under JVCo resulted in separate businesses (e.g. the Parties) each supplying the Relevant Markets under the Micronclean Brand. Berendsen submitted that such practical and commercial issues include the need:[627]

a. for the Parties to continue to have an incentive to invest in the Micronclean Brand and in the quality of services provided;

b. to avoid one Party free-riding on the efforts and investments of the other Party;

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[622] Commission Guidelines on Vertical Restraints, OJ C130/1, 19.05.2010, paragraph 61. Berendsen made submissions referring to the competition law framework applicable to vertical restraints, and later clarified that these were by analogy: see e.g. URN 00201.1 (full reference at footnote 25 above), paragraphs 3.12, 3.18(a), 3.22 and 3.24–3.25, and URN 01129 (Note of Berendsen Second State of Play meeting on 1 December 2016), paragraph 16.
[623] URN 01139 (Fenland SO WRs), paragraphs 3.2.13, and 3.2.81.
[624] URN 01220 (full reference at footnote 30 above), p.36, line 15, to p.37, line 4.
[625] URN 01220 (full reference at footnote 30 above), p.38 at lines 8–14.
[626] URN 01220 (full reference at footnote 30 above), p.38 at lines 15–24.
[627] URN 00201.1 (full reference at footnote 25 above), paragraph 3.8.

c. to provide and maintain a high and consistent level of service under the Micronclean Brand (including security of supply and disaster recovery); and

d. to avoid customer confusion in relation to the identity of the undertaking with which a given customer was contracting.[628]

5.142 Berendsen also submitted that benefits arose from '*[j]oint selling to large customers*' with multiple sites across GB.[629]

5.143 Broadly speaking, therefore, the Addressees have submitted that the Restrictions were objectively necessary: (i) to give each Party the incentive to invest at the start of the Joint Venture and during its lifetime (including by avoiding free riding and giving them sufficient protection from competition); (ii) to avoid customer confusion arising from a shared Trade Mark; (iii) to ensure high and consistent service standards; and (iv) to serve large customers jointly. Given the overlapping nature of these submissions, the CMA has conducted its assessment of objective necessity both in the round and, where relevant, specifically in respect of each of these arguments individually.

Main operation not impossible absent the Restrictions

5.144 The CMA finds that the Restrictions were not objectively necessary for the operation of either the Joint Venture or the licensing of the Trade Marks under the TMLAs (or a combination thereof) during the Relevant Period for the reasons set out below.

5.145 As stated above, the Addressees provided the CMA with limited evidence of the cost or benefits of any specific investments made or knowhow shared (either before or during the Relevant Period), or of the links between the Restrictions and any benefits or aims of the Joint Venture and/or the licensing of the Trade Marks under the TMLAs. The CMA has therefore made its assessment of objective necessity in the context of limited evidence, and bearing in mind that the burden of proof rests with the Addressees in proving objective necessity.

5.146 The Restrictions do not fall within the category of restrictions that are acceptable under competition law for the lifetime of a joint venture. Such

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[628] URN 00201.1 (full reference at footnote 25 above), paragraphs 3.8–3.29. See also URN 01213 (full reference at footnote 110 above), paragraphs 7.1–7.7, in which Berendsen submitted that avoiding customer confusion was not the only, or even the primary, purpose of the Restrictions.
[629] For example, URN 00201.1 (full reference at footnote 25 above), paragraphs 4.26–4.29. See also URN 01142 (Berendsen SO WRs), paragraphs 3.27–3.28 and URN 01216A (full reference at footnote 31 above), p.10 at lines 2–4.

restrictions are typically in respect of full-function joint venture cases, which represent an integration of functions and a structural change in the market and fall within the scope of the merger control regime.[630] Ancillary restrictions between the full-function joint venture and its parent undertakings, rather than between the parent undertakings themselves, are generally deemed acceptable in competition law terms.[631] In this case, neither the Joint Venture nor the licensing of the Trade Marks under the TMLAs, represents a full-function joint venture because there is no entity that is autonomous of its parent undertakings.[632] There is therefore no functional integration or structural change in the market: both JVCo parents, Fenland and Berendsen Newbury, continued to operate independently on the Relevant Markets.

5.147 By the time the TMLAs were signed and during the Relevant Period, many of the benefits claimed by the Addressees had already been attained. Indeed, by May 2012, the most significant investments – the building of Cleanroom Laundries at Skegness, Louth and Newbury – had been made decades ago and it is likely that, by then, they had been mostly or wholly amortised. For example, the most significant capital investment to which an estimated cost has been attributed by Fenland was the rebuilding of the Skegness plant, which represented an investment in the region of £2-3 million made nearly 20 years before the TMLAs were signed.[633] Investments of this magnitude seem modest in the context of the Parties' combined annual turnover in the Relevant Markets (which was e.g. approximately £[✂] million around the beginning of the Relevant Period).[634]

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[630] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24 of 29.1.2004 ('the Merger Regulation'). Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, paragraph 6. In assessing whether there is a full-function joint venture, the Commission examines whether the joint venture is autonomous in an operational sense, in accordance with the Commission Consolidated Jurisdictional Notice, made under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004. In any event, Article 2(4) of the Merger Regulation provides that if the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, then that coordination will be appraised under Article 101 TFEU.

[631] Commission notice on restrictions directly related and necessary to concentrations (March 2005), paragraphs 36–41. In the UK, the Act, Schedule 1, section 1(2), the exclusion provided to an agreement which results in enterprises ceasing to be distinct extends to any provision directly related and necessary to the implementation of the merger provisions.

[632] URN 01220 (full reference at footnote 30 above), p.26, line 18 to p.29, line 4.

[633] URN 01220 (full reference at footnote 30 above), p.66, line 5 to p.67, line 25.

[634] The £[✂] million figure is a broad estimate calculated primarily from 2013 turnover using Fenland turnover of £[✂] million (£[✂] million in the Full Cleanroom Services market based on URN 00983 (full reference at footnote 356 above), p.17; £[✂] million in the Intermediate Cleanroom Services market based on Louth revenues (see footnote 1, p.46 of URN 00982 (full reference at footnote 82 above) and URN 01441 (full reference at footnote 43 above), row 55 (at p.65)); and £[✂] million in the Consumables market (excluding turnover from syringes) based on URN 00983 (full reference at footnote 356 above), p.17; and Berendsen Newbury turnover of £[✂] million (£[✂] million in the Full Cleanroom Services

5.148 By May 2012, the Parties had already made the investments and shared the knowhow necessary to:

a. successfully enter the Relevant Markets;

b. establish the Micronclean Brand as a leading brand in the industry;

c. establish the quality standards for Cleanroom Laundry Services under the Micronclean Brand;

d. set up their own distribution networks; and

e. reap the benefits of the investments in relation to each of the above points.

5.149 Therefore, the Restrictions could not have been objectively necessary by May 2012 to achieve these historic outcomes, either individually or in aggregate, because they had already been achieved. Even if some restriction on the freedom of action of the JV Partners had been objectively necessary in the early years of the Joint Venture, that does not mean that it remains objectively necessary and proportionate around 30 years later. This is particularly the case where circumstances had changed over time. For example, the Parties have large customer bases, the Micronclean Brand is well-established, and a new legal framework – the TMLAs – was being negotiated and signed.

5.150 No plant was built in the years leading up to the start of the Relevant Period. The smaller investments made in that period did not require the Restrictions in order for the Parties to be incentivised to make them. This is for the following reasons.

a. The only large investment (broadly defined) identified by the Addressees was the acquisition of Guardline. This was the acquisition of a business that was already generating revenue and profit, primarily in the Consumables market. The CMA sees no plausible reason why the Parties needed protection from competition from each other in order to recoup that investment. Nor indeed have the Parties provided any evidence or explanation to that effect.[635]

b. The other investments made during the Relevant Period required relatively little capital investment. In the absence of evidence to the contrary, the CMA considers that any Party could have made these

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market; £[✂] million in the Intermediate Cleanroom Services market; and £[✂] million in the Consumables market) based on URN 00983 (full reference at footnote 356 above), p.19; see footnote 94 above.

[635] See paragraphs 3.47, 3.113 and 3.209–3.210. Guardline's Consumables turnover represented over three-quarters of its turnover (£[✂] million out of £[✂] million).

investments as an individual competitor without the need for protection from competition by their joint venture partner. They already had sufficiently large and well-established customer bases able to generate the necessary return to justify such investments. Indeed, they would normally be categorised as the costs of operating an ongoing business, rather than significant capital investments.

5.151 In the Relevant Period, any concern regarding the risk of free-riding was no longer material as the Parties were independently well-established. In addition, the ongoing sharing of secret knowhow had only limited value given the key knowhow pertinent to selling Cleanroom Laundry Services and Consumables under the Micronclean Brand was long-established. For example, the contents of the Big Blue Cleanroom Handbook in the 2011 version were essentially the same as in the reprinted version in 2016.[636]

5.152 In the Relevant Period, the Relevant Markets were mature, having developed since the 1980s. Both Parties were well-established; they were larger in size meaning that they could take the commercial risks of making investments individually and bid for large customers' contracts; and they were the two leading suppliers in Cleanroom Laundry Services (partly as a result of having acquired competitors such as [Former JV Partner D], and the exit of other competitors) and had a well-established market position in Consumables.[637] This meant that each Party had an established revenue-generating customer base from which to obtain a return on investments.[638] The Addressees have not provided any evidence to demonstrate why they needed the high level of protection from competition afforded by the Restrictions in order to make any investments (individually or in aggregate) or share knowhow between them.

5.153 Both Parties agree that the Restrictions did not resolve, or at least did not fully resolve, the customer confusion issue. Once a customer had told one of the Parties it was confused, the Restrictions would have helped the Parties know to which of them a customer should be allocated. The Restrictions would also have reduced the likelihood of both Parties marketing themselves to a customer. The evidence does not show that the Restrictions in fact helped the Parties to avoid customer confusion in the Relevant Period. For example, Fenland identified over 90 instances in 2015 alone in which a customer of Fenland made payment to Berendsen Newbury by mistake (and, 33 instances where Berendsen Newbury customers made payment to Fenland by mistake during the same period). Berendsen likewise acknowledged that customer

[636] See paragraph 5.132(a) above.
[637] See footnote 618 above.
[638] See paragraph 3.37 above.

confusion still arose during the Relevant Period.[639] The Addressees have not explained why clear customer communications or differentiation in the Parties' branding would not have been more effective in addressing customer confusion directly. As discussed in more detail below, the CMA also considers that the Restrictions were not an appropriate measure to achieve that aim, which supports the CMA's finding that the Restrictions were not objectively necessary for this aim.

5.154 The CMA acknowledges the overall context and commercial reality of this case where two businesses agreed and operated a long-running joint venture in which they shared a common brand name and wanted to maintain a spirit of co-operation over time. However, the specific activities of the Joint Venture would not have been impossible during the Relevant Period absent the Restrictions.

5.155 Notwithstanding this conclusion that the activities of the Joint Venture (and licensing of the Trade Marks) would not have been impossible without the Restrictions in the Relevant Period, in line with the case law cited above and for completeness, the following paragraphs discuss whether there would have been less restrictive options that the Parties could have pursued to operate the Joint Venture or license the Trade Marks. First, the CMA looks at less restrictive options in the round; then the CMA looks at less restrictive options for each of the reasons given by the Addressees for why the Restrictions were necessary.

Less restrictive options in the round

5.156 In any event, the Parties could have used different, less restrictive ways to operate the shared Trade Marks or the Joint Venture more generally across the Relevant Markets. For example:

a. The Restrictions could have been removed entirely from the main operation without rendering it unable to continue. A lack of competition between the Parties may well have made the sharing of the Trade Marks or the operation of the Joint Venture easier or even more profitable, but it is unlikely that such competition would have rendered it impossible, particularly given their respective geographical strengths, established customer bases, and the limited investment that was necessary by the time of the Relevant Period.

[639] See, for example, URN 01213 (full reference at footnote 110 above), paragraphs 7.1–7.7; and URN 01139 (Fenland SO WRs) paragraph 5.55.3. See also URN 01220 (full reference at footnote 30 above), p.69 at lines 3–10.

b. The Parties could have co-branded,[640] using the Micronclean Brand and an additional identifier to make clear to customers that there are two separate competitors. The Parties could have made, for example, greater use in their marketing and/or communications with customers of the signifiers 'Micronclean Skegness' and 'Micronclean Newbury'. For example, the Parties' respective customer-facing Twitter accounts had the handles Micronclean Skegness and Micronclean Newbury.[641] Indeed, in late 2014, the Parties noted but did not immediately pursue the option of Berendsen Newbury being '*permitted to use the Micronclean brand in conjunction with the Berendsen brand to prevent confusion between Berendsen and Fenland*'.[642] To the extent that the Parties were making innovations in their own plants independently, greater differentiation between the Parties' businesses would have enabled them to reap any competitive advantage and reduce any free-riding concerns. Fenland commented that co-branding would have been possible, and indeed was done to a limited extent, but that the brand would have been less powerful as a result.[643] However, Fenland stated that this comment was made only in the context of the Restrictions remaining in place because each Party would otherwise be forced to differentiate itself more fully, so as not to promote its competitor.[644]

Less restrictive options to maintain the incentive to invest

5.157 In addition to those ways listed above, there would have been other less restrictive ways to maintain the incentive to invest and innovate, while avoiding any free-riding concerns during the Relevant Period. For example:

a. The Parties could have entered into short-term R&D agreements or other forms of cooperation as and when necessary to develop the Micronclean

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[640] Berendsen has argued that the Parties did differentiate their branding, for example by Berendsen Newbury adopting a purple logo and Fenland adopting a blue logo, and by Berendsen Newbury including '*Micronclean (Newbury) Limited*' in its default email signature, and that the continuing customer confusion shows that co-branding would not necessarily have resolved the issue: URN 01213 (full reference at footnote 110 above), paragraphs 7.1–7.7. The CMA notes that the two logos use the same name and the same picture logo together with fairly similar colours (purple and blue), so do not strongly differentiate between the Parties. The use of '*Micronclean (Newbury) Limited*' in an email signature does not make it clear that the Parties were independent businesses – for example, it may suggest to customers that the Parties were two subsidiaries in the same Micronclean corporate group. In the event, neither the Parties' slightly differentiated branding nor the Restrictions fully resolved any customer confusion issues.

[641] URN 01130 (Screenshot of https://twitter.com/microncleanskeg, as visited on 12 January 2017) and URN 01131 (Screenshot of https://twitter.com/microncleannew, as visited on 12 January 2017).

[642] See, e.g. proposals within URN 00124.6 (full reference at footnote 120 above), p.1, seventh bullet. Subsequent versions of these proposals contain the same option.

[643] URN 01220 (full reference at footnote 30 above), p.69, line 16 to p.70, line 2.

[644] URN 01441 (full reference at footnote 43 above), row 57 (p.67).

Brand, protecting only those narrow investments made, and otherwise trading freely across GB subject to the Micronclean quality standards.

b. The Parties could have agreed a contractual arrangement under which a form of royalty per unit would be charged, to ensure that the revenues associated with investment in the context of the Joint Venture would be distributed between the Parties in a manner that reflected the investments that each Party had made. Given the low capital cost of any investments made during or in the period before the Relevant Period, the precise terms of any such agreement would be unlikely to have made a material difference to either Party's profitability.

Less restrictive options to avoid customer confusion

5.158 In addition to those ways listed above such as co-branding, there would have been other less restrictive ways to avoid any customer confusion associated with the operation of shared Trade Marks or the Joint Venture more generally. For example, the Parties could have contacted their customers and/or run a marketing campaign to explain the situation. The Parties did have at least one marketing brochure which included contact details on the last page directing '*customers in the South*' to Berendsen Newbury and '*customers in the North*' to Fenland, suggesting that such an approach could have been pursued to a greater extent if the Parties had wanted to reduce customer confusion significantly.[645] This could have been done independently of any tender process and/or in response to specific approaches from customers.

Less restrictive options to maintain high service standards

5.159 In addition to those ways listed above, there would have been other effective, but less restrictive, ways to maintain a high and consistent level of service under the Micronclean Brand and share knowhow. For example, the Parties set out agreed quality and service standards for the Products and Services in the TMLAs. The Parties also could have come to a more narrowly scoped agreement to cover any legitimate security of supply or disaster recovery issues[646] on an arm's length basis.

Less restrictive options to supply customers with multiple sites

5.160 In addition to those ways listed above, there would have been other effective, but less restrictive, ways to sell to large customers with multiple sites, some of which one Party could not supply viably alone. Joint bidding or sub-contracting

[645] URN 00066.31 (MPL Catalogue 2014), p.20.

[646] On the claimed benefit of disaster recovery arrangements see e.g. URN 00201.1 (full reference at footnote 25 above), paragraphs 4.14–4.18, and URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.4.

with customer knowledge and consent occurs in many industries, particularly in responding to large tenders. However, the Restrictions went beyond what would be objectively necessary for the Parties to be able to supply such customers. The Restrictions were not confined to various parts of contracts for large customers. Less restrictive arrangements were available to the Parties, such as identifying those large customers (if any) the Parties were unable to supply individually, informing those customers, and proposing to make a joint bid or an individual bid, but sub-contracting to the other Party those sites that the other Party is better placed to supply. The scope of the Restrictions could have been confined only to those large customers. Alternatively, the Parties could have used large contracts to facilitate their independent geographical expansion into the other's territory.

Less restrictive options to be able to terminate the Joint Venture

5.161 In relation to Fenland's submission that the TMLAs served the purpose of giving each Party the ability to prevent the use of the Micronclean Brand by the other Party post-termination, the CMA considers that there was no need to impose the Restrictions in order to achieve that purpose. A less restrictive option would simply have been to remove the Restrictions from the TMLAs, and to include a clause under which the licensing rights granted to one Party could be terminated (in the event of a change of control of that Party) by the other Party.

Conclusion on less restrictive options

5.162 In light of the above, the CMA is satisfied that there would have been other realistic counterfactual options that would have avoided the need for a market-sharing agreement during the Relevant Period (the CMA makes no findings as to whether that was also the case in the early decades of the Joint Venture). It was therefore not objectively necessary to impose on the Parties the Restrictions for them to operate the Joint Venture under the Micronclean Brand or to license the Trade Marks, including continuing to have the incentive to invest and share knowhow while avoiding any free-riding problem, maintaining a high and consistent level of service, avoiding any customer confusion arising from the Parties' choice to share the Trade Marks, and joint selling to multi-site customers. This conclusion applies whether each issue is considered individually or in combination with other issues.

c. Proportionality

5.163 Given the CMA's finding that the Restrictions were not objectively necessary for a main operation, it follows that the Restrictions were not a proportionate means of achieving that operation, in particular as the Restrictions were potentially unlimited in time. Partitioning a national market by allocating

territories and customers was not a suitable or appropriate means to achieve the main operation cited by the Parties, nor was it a necessary means. The Restrictions imposed were not directly related to and went beyond what was necessary in the context of the main operation for the reasons set out above.

5.164 The Restrictions were also not proportionate in product scope. In the 1980s the Parties were not yet active in Intermediate Cleanroom Services or Consumables, and the initial investments cited by the Parties did not relate to Intermediate Cleanroom Services or Consumables, yet the Restrictions cover these segments. The Restrictions covered a wider range of products than the original Joint Venture covered and the Addressees have not put forward any credible arguments as to why the Restrictions needed to cover these products. Therefore, the CMA finds the Restrictions exceeded what was necessary in product scope.

d. Conclusion on objective necessity

5.165 The CMA finds that the Restrictions were not objectively necessary to a wider main operation during the Relevant Period.

G. Appreciable restriction on competition

Key legal principles

5.166 An agreement that is restrictive of competition by 'object' will fall within the Chapter I prohibition only if it has as its object an appreciable prevention, restriction or distortion of competition.[647]

5.167 An agreement that may affect trade between EU Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.[648] In accordance with section 60(2) of the Act, this principle also applies *mutatis mutandis* in respect of the Chapter I prohibition.[649] Accordingly, an agreement

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[647] It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see the judgment in *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 16 citing, among other cases, the judgment in *Völk v Vervaecke*, C-226/11, EU:C:1969:35, paragraph 7. See *OFT401*, paragraph 2.15.

[648] Judgment in *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 37; Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, OJ C 291, 30.8.2014, paragraphs 2 and 13.

[649] When determining a question in relation to the application of the Act, Part 1 (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Courts in respect of any corresponding question arising in EU law: the Act, section 60(2). See also *Carewatch Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraph 148.

that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

Assessment

5.168 The CMA finds that the Restrictions had the object of preventing, restricting or distorting competition (see Part 5.E. above) and that they may have affected trade within the UK (see Part 5.I. below). The CMA therefore also finds that the Restrictions constitute, by their very nature, an appreciable restriction of competition within the Relevant Markets for the purposes of the Chapter I prohibition.[650]

5.169 In any event, and in the alternative, the CMA finds that the Restrictions had an appreciable impact in the Relevant Markets (for the purposes of the Chapter I prohibition):

a. The Restrictions covered the whole of mainland GB (see Part 3.D.II.b. above).

b. Each Party had a significant market share in Full Cleanroom Services and Intermediate Cleanroom Services, and a more modest market share in Consumables, giving them each (and both together) a significant presence in the industry overall.[651]

c. Each Addressee is a substantial undertaking.[652] Fenland had a turnover of £26.6 million in its last financial year. Berendsen Newbury had a turnover of £8.3 million in its last financial year as part of the wider Berendsen corporate group, which had a turnover of £1.110 billion in its last financial year. For further details, see Part 3.A. above.

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[650] See URN 01142 (Berendsen SO WRs) where Berendsen submitted that the CMA's assessment did not take into account the wider arrangements (sections 3 and 5). The CMA does not accept this assertion in light of the *Expedia* judgment where appreciableness is assumed for restrictions by object and on the basis of the more detailed reasoning provided in paragraph 5.169 which assesses the appreciable impact of the Restrictions on the basis of the remit of TMLAs in which the Restrictions are contained and the market power of the Parties in the Cleanroom Laundry Services market in particular.
[651] See **Annex C**, Table C1–Table C3.
[652] In *North Midland Construction PLC v Office of Fair Trading* [2011] CAT 14, paragraph 60, the CAT took into account that the parties to the infringement were '*substantial undertakings*' (one of which had turnover of £10 million) in concluding that the alleged infringement was appreciable. See also the CMA's Retail Banking Market Investigation (August 2016), which found that SMEs (defined as businesses with a turnover of less than £25 million) represent over 99% of all UK businesses and that over 97% of SMEs in the UK have a turnover of less than £2 million.

H. Duration

5.170 The CMA finds that the agreement constituting the Restrictions started on 30 May 2012 (the date on which the Parties signed each TMLA) and continued until 2 February 2016. Fenland acquired 100% of the shares in JVCo, and the Parties terminated the TMLAs in which the Restrictions were contained, on 3 February 2016.

I. Effect on trade within the UK

Key legal principles

5.171 The Chapter I prohibition applies to agreements which may affect trade within the UK.[653] The effect on trade does not necessarily need to be 'appreciable'.[654]

Assessment

5.172 The CMA finds that the Restrictions may have affected trade within the UK.[655] The TMLA Products and Services were supplied throughout GB. The Parties' shares of supply together accounted for [80-90]% of Full Cleanroom Laundry Services, [90-100]% of Intermediate Cleanroom Laundry Services, and [10-20]% of Consumables (following *Microclean/Guardline*).[656] The Restrictions were implemented within GB.

5.173 The CMA also finds that, insofar as required, the effect on trade within the UK was 'appreciable' – given, in particular, the points set out below.

a. The very object of the Restrictions was to share the Relevant Markets through the allocation of territories and customers. By their very nature, the Restrictions were capable of affecting trade.

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[653] The UK includes any part of the UK in which an agreement operates or is intended to operate: the Act, section 2(7). As is the case in respect of Article 101 TFEU, it is not necessary to demonstrate that an agreement has had an actual impact on trade – it is sufficient to establish that the agreement is capable of having such an effect: judgment in the joined cases of *Tate & Lyle plc and Others v Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 78.

[654] *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, paragraphs 459–461. The concept of 'appreciable effect on inter-state trade' is an EU law jurisdictional requirement which demarcates the boundary line between the application of EU competition law and national competition law. According to the CAT, this requirement should not be read into the Act, section 2.

[655] Berendsen submitted in its response to the SO that the CMA had only assessed the effect on trade based on the narrow definition of the 'Agreement' in the SO, and not on the wider Joint Venture: URN 01142 (Berendsen SO WRs), paragraph 5.23. The CMA rejects this argument, as it clearly based its reasoning on (i) the TMLAs which were agreed in the context of the wider Joint Venture and, (ii) the Parties market shares within the Relevant Markets. The effect on trade criterion is also not a substantive issue, but a jurisdictional one.

[656] See **Annex C**.

b. The Restrictions covered the whole of GB[657] and covered the Parties' activities in the supply of Cleanroom Laundry Services and Consumables within GB (see Part 3.D.II.b. above), with the exception of the supply to food sector customers (see paragraphs 5.21 to 5.29 above). Given each Party's considerable shares of supply in at least some Relevant Markets (see paragraph 5.100 above), the Restrictions must have affected trade in the UK to an appreciable extent.

c. The Parties are both substantial undertakings, for the reasons set out at paragraph 5.169 above.

J. Individual exemption

I. Key legal principles

5.174 An exemption from the Chapter I prohibition exists for an agreement (in this case, the Restrictions) if it satisfies the following four cumulative conditions of section 9(1) of the Act:

a. the agreement must contribute to improving production or distribution, or to promoting technical or economic progress ('Improvement/Promotion Criterion');

b. consumers must receive a fair share of the resulting benefit ('Consumer Benefit Criterion');

c. the agreement must be indispensable to the attainment of these objectives ('Indispensability Criterion'); and

d. the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question ('No Elimination of Competition Criterion').

[657] See Part 3.D.II. above.

5.175 Any party claiming the benefit of the individual exemption bears the burden of proving that the conditions of section 9(1) of the Act are met.[658]

5.176 In considering whether an agreement satisfies the conditions for an individual exemption under section 9 of the Act, the CMA will have regard to the Commission's Article 101(3) Guidelines and relevant case law.[659]

5.177 The CMA has found that the Restrictions are not objectively necessary to the implementation of a main operation or activity. Accordingly, only the objective advantages resulting from the Restrictions may be taken into account in the context of section 9 of the Act, and not the advantages resulting from the main operation or activity.[660]

5.178 Therefore, the Restrictions, not the wider cooperation between the Parties, must contribute to improving production or distribution, or to promoting technical or economic progress, and pass on to consumers a fair share of such benefits. Moreover, the Restrictions, not the wider cooperation between the Parties, must also be indispensable to the attainment of those objectives and must not eliminate competition in respect of a substantial part of the products in question.

5.179 In this regard, the CMA notes the Commission's analysis of the application of Article 101(3) TFEU in *SAS/Maersk*, which included a market-sharing agreement as part of a legitimate code share agreement.[661] The Article 101(3) analysis focused on the market-sharing agreement and did not consider benefits arising from the wider code share agreement. The market-sharing agreement itself did not justify exemption under Article 101(3) TFEU.

5.180 With respect to the Improvement/Promotion Criterion, a party invoking section 9 of the Act must prove that the claimed benefits consist of 'appreciable objective advantages'. Such advantages must be of a kind as to compensate for the resulting disadvantages for competition.[662] These advantages may be

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[658] The Act, section 9(2). See also the judgment in *GlaxoSmithKline v Commission*, C-501/06 P, EU:C:2009:610, paragraphs 82–83.

[659] Guidelines on the application of Article [101(3) TFEU], OJ C101, 27.04.2004, pp.97–118 (Article 101(3) Guidelines). See also *OFT401*, paragraph 5.5.

[660] *MasterCard and Others v Commission*, C-382/12, EU:C:2014:2201, paragraphs 231–232.

[661] Commission decision of 18 July 2001 in Case 37444 *SAS/Maersk*.

[662] As stated by the CJEU in the judgment in the joined cases of *GlaxoSmithKline Services Unlimited v Commission,* C-501/06P, C-513/06P, C-515/06P, EU:C:2009:610, paragraph 92, the agreement should lead to *'appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition*.'. The CJEU clarified in the judgment in the joined cases of 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, p.348 that the advantages '*cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities. These advantages are generally indisputable and show the agreement as in all respects indispensable to an improvement as understood in this sense. This subjective method, which*

described as ‘efficiencies’.[663] All claimed advantages must be substantiated so that the following can be verified:

a. the nature of the claimed efficiencies;[664]

b. the link between the agreement and the claimed efficiency;[665]

c. the likelihood and magnitude of the claimed efficiency; and

d. how and when the claimed efficiency would be achieved.[666]

5.181 The Article 101(3) Guidelines identify two broad categories of potential efficiencies.[667] These are:

a. cost efficiencies (costs savings); and

b. qualitative efficiencies, whereby value is created through (e.g.) new or improved products or greater product variety.

5.182 In the case of claimed cost efficiencies, a party must, as accurately as reasonably possible, calculate or estimate the value of the claimed efficiency gain and describe in detail how the amount has been computed.[668]

5.183 The Article 101(3) Guidelines suggest dealing with the Indispensability Criterion before the Consumer Benefit Criterion. This is because the analysis of the Consumer Benefit Criterion requires a balancing of the negative and positive effects of an agreement on consumers, but should not include the

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makes the content of the concept of 'improvement' depend upon the special features of the contractual relationships in question, is not consistent with the aims of Article 85.’

[663] Article 101(3) Guidelines, paragraphs 48–72.

[664] Article 101(3) Guidelines, paragraphs 51–52 and case law cited.

[665] For example, in the judgment in *Van den Bergh Foods Ltd v Commission,* T-65/98, EU:T:2003:281, the General Court found that benefits to retailers from having freezer cabinets for the storage of ice cream were linked to those cabinets being made available free of charge and thus could be achieved without an exclusivity obligation. The General Court found it likely that, as a matter of commercial reality, freezer cabinets would continue to be provided to retailers even absent the exclusivity restriction. As those benefits did not flow from the exclusivity obligation, the restrictive element of the agreement, they did not qualify as benefits to be considered under the first condition Article 101(3) TFEU. See the judgment in *Van den Bergh Foods Ltd v Commission,* T-65/98, EU:T:2003:281, paragraphs 142–143. Upheld by the CJEU on appeal in the judgment of *Unilever Bestfoods (Ireland) Ltd v Commission*, C-552/03 P, EU:C:2006:607, paragraphs 102–106.

[666] Article 101(3) Guidelines, paragraph 51.

[667] Article 101(3) Guidelines, paragraph 59.

[668] Article 101(3) Guidelines, paragraph 56.

positive effects of any restrictions which do not meet the Indispensability Criterion.[669]

5.184 With respect to the Indispensability Criterion, a restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise.[670] The question of indispensability is especially important for those agreements involving price-fixing or market allocation, which can only be considered indispensable under exceptional circumstances.[671]

5.185 Under the Consumer Benefit Criterion, the Parties must demonstrate that consumers are allowed a fair share of the benefits (efficiencies) brought about by an agreement. The Article 101(3) Guidelines state that this criterion incorporates a 'sliding scale', meaning that the greater the restriction of competition, the greater the efficiencies and the consumer pass-on must be.[672]

5.186 Agreements that have as their object the prevention, restriction or distortion of competition are unlikely to benefit from individual exemption. This is because they generally fail (at least) the Improvement/Promotion Criterion and the Consumer Benefit Criterion: they neither create objective economic benefits, nor benefit consumers.[673] However, each agreement ultimately falls to be assessed on its merits.

5.187 With respect to the No Elimination of Competition Criterion, the more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated within the meaning of this criterion. Moreover, the greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated.[674]

II. Legal assessment

5.188 For the reasons set out below, the CMA finds that the Restrictions do not benefit from an individual exemption under section 9 of the Act. The CMA finds that the Improvement/Promotion Criterion is not satisfied, and in the event

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669 Article 101(3) Guidelines, paragraph 39.
670 Article 101(3) Guidelines, paragraph 79.
671 Commission Horizontal Guidelines, paragraph 249. Similarly, the Article 101(3) Guidelines state, at paragraph 79 that, *'The more restrictive the restraint the stricter the test under the third condition. Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable'.*
672 Article 101(3) Guidelines, paragraph 90.
673 Article 101(3) Guidelines, paragraph 46. Moreover, such agreements generally also fail the third criterion (i.e. indispensability), see Article 101(3) Guidelines, paragraph 79.
674 Article 101(3) Guidelines, paragraph 107.

there is any uncertainty about whether it is satisfied, also finds that the Indispensability Criterion is not satisfied. Given that all four of the cumulative criteria set out in section 9(1) of the Act must be met to qualify for an individual exemption, there is no need to assess the other two criteria.

5.189 At the CMA's invitation, each of Fenland and Berendsen made voluntary submissions on 8 September 2016 in relation to the individual exemption assessment under section 9 of the Act.[675]

5.190 The Addressees have not, however, set out clear step-by-step reasoning as to why each of these four criteria is satisfied. However, the CMA has considered the points made, directly or indirectly, in the Addressees' respective voluntary submissions of 8 September 2016, and also their representations on the SO in assessing whether the Parties met the criteria for an individual exemption under section 9 of the Act.

5.191 The Addressees' submissions also do not explicitly separate any alleged benefits between those which result specifically from the Restrictions, and those which relate to the wider cooperation between the Parties (in the Joint Venture and/or the licensing of the Trade Marks under the TMLAs). In its assessment, the CMA has considered both whether any benefits claimed by the Addressees could result in an individual exemption under section 9 of the Act, and whether, if this were the case, the benefits would result from the Restrictions, as opposed to other aspects of the wider cooperation between the Parties. In this assessment, the CMA draws on its analysis set out in Part 5.F. above in relation to objective necessity as to whether any benefits could be achieved with less restrictive commercial agreements.

a. Assessment of efficiencies submitted by Fenland and Berendsen Newbury

5.192 The Addressees' submissions in respect of the alleged benefits of the Restrictions, in the context of the Joint Venture and/or the licensing of the Trade Marks under the TMLAs, are described in Part 5.F. above in relation to objective necessity, and are not repeated here. The CMA considers the relevance of the Addressees' submissions to the individual exemption under

[675] URN 00205.2 (full reference at footnote 25 above); URN 00201.1 (full reference at footnote 25 above).

section 9 of the Act in the following three sections, which relate to different forms of economic benefits that might result from the Restrictions:

a. efficiencies which arise from the development of new production facilities, including the development of new services and intellectual property, which would not have been developed without the Restrictions;

b. efficiencies which arise from the ongoing investment and innovation in the improvement of the production facilities used by the Parties, and which would not have been developed without the Restrictions; and

c. efficiencies which arise from the combination of the Parties' production facilities, and which would not have been developed without the Restrictions.

Efficiencies which arise from the development of new production facilities

5.193 As discussed in Part 5.F. above, the more significant investments made by the Parties, particularly the development of new facilities and the development of new services and intellectual property, were made in the early decades of the Joint Venture. In particular, the Addressees cited:

a. introducing and developing new Cleanroom Laundry Services and Consumables in GB, servicing unmet demand;[676]

b. enabling and incentivising the Parties – '*relatively small organisations*', which had '*remained family run, owner-controlled enterprises*' – to invest in the construction, maintenance and improvement of the Cleanroom Laundries, in particular Berendsen Newbury's premises;[677] and

c. introducing a single Trade Mark and joint brand marketing standards to be used by all businesses applying that Trade Mark in GB.[678]

5.194 As these were completed primarily in the early stages of the Joint Venture, many years before the Relevant Period, any claimed efficiencies linked to these elements were materially achieved and exhausted before the Relevant Period, which is the relevant time to assess the application of section 9 of the Act. Even if certain territorial restrictions resulted in efficiencies when making

[676] URN 00201.1 (full reference at footnote 25 above), paragraph 2.2. Fenland also submitted that it transferred material knowhow to Berendsen Newbury when the Joint Venture was set up and that it needed to be protected against competition as a result. This is also discussed in Part 5.K. below.
[677] URN 00201.1 (full reference at footnote 25 above), paragraph 3.6. Similar considerations can be extrapolated from Fenland at the Oral Hearing, URN 01220 (full reference at footnote 30 above), p.35 at line 23.
[678] See Berendsen URN 00201.1 (full reference at footnote 25 above), paragraph 3.5 and URN 01142 (Berendsen SO WRs), paragraph 5.32. URN 01139 (Fenland SO WRs) paragraph 3.2.96.

substantial investments in setting up the Joint Venture, this justification would likely only apply for an initial period that would have expired long before the Relevant Period.

5.195 Therefore, even assuming there was a link between any efficiencies resulting from these developments and any territorial restrictions agreed between the JV Partners at the time that the Joint Venture was set up (and/or agreed between the Parties when Berendsen Newbury joined the Joint Venture), it is not appropriate to consider such efficiencies in respect of the Relevant Period if any such benefits had already been achieved. Had the Parties at the time of the TMLAs not agreed the Restrictions, and instead competed fully with each other, none of these assumed efficiencies would have been jeopardised.

5.196 The CMA therefore concludes that any efficiencies relating to the development of new facilities, services and intellectual property do not meet the Improvement/Promotion Criterion.

Efficiencies which arise from the ongoing investment and innovation in the improvement of the production facilities

5.197 The Addressees submitted that there were efficiencies generated in the ability to achieve benefits that would be shared with consumers in the form of improved products and lower costs. The Addressees submitted that such joint investments required an agreement which precluded the potential for 'free-riding', and cited the potential benefits set out below.

a. Promoting competition in the Consumables market, through both the Parties' entry in 2010, and the design and development of the Micronclean range of products.[679]

b. R&D, innovation, and bringing new products to market. For example, the Parties sought to develop and patent innovations relating to mop systems, cleanroom wipes and Cleanroom Garments.[680]

c. The Joint Venture enabled the Parties to share costs and resources, resulting in lower costs and higher quality to consumers. Areas of joint activity identified included advertising, the creation of technical literature, and website creation and management.[681]

[679] For example, URN 00201.1 (full reference at footnote 25 above), paragraphs 4.10–4.13. URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.
[680] For example, URN 00205.2 (full reference at footnote 25 above), paragraphs 5.8.5(c)(xiii) and 5.8.10; URN 00201.1 (full reference at footnote 25 above), paragraphs 4.19–4.24.
[681] For example, URN 00201.1 (full reference at footnote 25 above), paragraph 4.25; URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.3.

5.198 The activities and examples identified by the Addressees could in principle have generated some efficiencies with respect to product innovation, product quality and reductions in investment costs due to sharing of activity and costs between the Parties, and can be linked to the existence of a Joint Venture between the Parties.

5.199 However, such efficiencies are only relevant for exemption under section 9 of the Act where there is sufficient evidence that:

a. the efficiencies are objective advantages for customers that outweigh the disadvantages caused by the Restrictions to competition;

b. the efficiencies are linked to the Restrictions; and

c. Fenland and Berendsen have provided evidence of the benefits and the link to the Restrictions.[682]

5.200 In this case Fenland and Berendsen have not provided any compelling evidence that the efficiencies are objective nor were significant enough during the Relevant Period, and therefore sufficient to outweigh the costs of the Restrictions.

5.201 The CMA is also not persuaded by the Parties' evidence that there is a link to the Restrictions. In particular, all of the examples summarised in paragraph 5.197 above appear to be benefits of co-operative working. None of these represent examples of benefits which have any relationship with territorial restrictions. The CMA has seen no evidence to show that the Parties could not have entered into a co-operation agreement at arm's length, either without the Restrictions or with alternative, non-restrictive commercial arrangements. The CMA describes in detail at paragraph 5.157 above how such arrangements could have been entered into through less restrictive commercial arrangements.

5.202 In light of the above, the CMA considers that the Addressees have not made the case that the Restrictions themselves, rather than other actions by the Parties, have resulted in efficiencies.

5.203 The CMA also notes that, even assuming the Parties were able to demonstrate that the efficiencies were objective advantages linked to the Restrictions, the

[682] Judgment in *GlaxoSmithKline v Commission*, C-501/06 P, EU:C:2009:610, paragraphs 82–83.

evidence at paragraph 5.157 above would also demonstrate that the Restrictions were not indispensable to these efficiencies.

5.204 As a result, the CMA does not consider that any efficiencies relating to innovations and investments that improved products and lowered costs meet the criteria for the individual exemption under section 9 of the Act.

Efficiencies which arise from the combination of the Parties' production facilities

5.205 Fenland and Berendsen have claimed that there were efficiencies resulting directly from the ability:

a. to 'jointly sell' to customers with more than one site, with each site being serviced by its 'local' laundry, and so reducing transport costs;[683]

b. for one Party to use the other Party's laundry facility in the event of an incident or disaster that closes one Party's laundry, and so limit disruption to customers;[684] and

c. to avoid potential customer confusion caused by both Parties operating under the Micronclean Brand.[685]

5.206 The Addressees have not provided any quantified evidence of the type envisaged in paragraph 5.180 above that any of the points in paragraph 5.205 above deliver efficiencies able to meet the Improvement/Promotion criterion.

5.207 Furthermore, it is unclear that any of these points could not have been achieved without the Restrictions. As set out in paragraphs 5.156 to 5.162 above, there were alternative means available to the Parties to achieve such efficiencies absent the Restrictions. The CMA considers that, even assuming these points were able to satisfy the Improvement/Promotion Criterion, they would have not satisfied the Indispensability Criterion.

5.208 Fenland submitted that there were transport and distribution cost benefits for customers deriving from the Restrictions, and that the closer the laundry is located to a customer, the lower the transport costs borne by customers (and the lower the risk to security of supply).[686] The CMA has considered whether the effect of any reduction(s) in transport costs and/or security of supply risk

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[683] URN 00201.1 (full reference at footnote 25 above), paragraphs 4.26–4.29; URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.2(c).
[684] URN 00201.1 (full reference at footnote 25 above), paragraphs 4.14–4.18; URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.4.
[685] See e.g. URN 00205.2 (full reference at footnote 25 above), paragraph 5.15.3(c); URN 00201.1 (full reference at footnote 25 above), paragraphs 3.28–3.29.
[686] See e.g. URN 01139 (Fenland SO WRs), paragraph 3.2.102 (first, second and third bullets, at pp.33–36, as printed); URN 01441 (full reference at footnote 43 above), e.g. at row 9 (at pp.11–13).

could constitute an 'efficiency' for the purpose of assessing whether the Restrictions benefit from an individual exemption.

5.209 The CMA has concluded that the effects arising simply from a customer being automatically directed to only one Party – which may (or may not) be located closer to the customer, than the other Party – cannot be classified as 'efficiencies' in this context. The CMA considers that in the absence of the Restrictions, a customer could have chosen freely with which Party it wanted to work, including choosing the Party in whose territory the customer was located – if the advantages claimed by Fenland existed, and were valued by the customer. Based on the evidence presented in this investigation, the CMA does not consider the Restrictions to have been indispensable for a customer to enjoy any of the advantages claimed by Fenland in this regard.

5.210 The CMA concludes that efficiencies relating to qualitative improvements to the Micronclean Brand and supply network do not meet the Improvement/Promotion Criterion or Indispensability Criterion.

Conclusion

5.211 For the reasons outlined above, the evidence provided by the Addressees on the linkage between the Restrictions and any potential efficiencies and the evidence provided by the Addressees as to whether any potential efficiencies represent examples of benefits which could not have been achieved without the Restrictions is insufficient to satisfy both the Improvement/Promotion Criterion and the Indispensability Criterion of section 9(1) of the Act.

b. Individual exemption: other criteria

5.212 As explained in paragraph 5.175 above, the conditions provided in section 9(1) of the Act for a party to benefit from an individual exemption are cumulative. The CMA has concluded above that the Restrictions do not meet the Improvement/Promotion Criterion or the Indispensability Criterion. The CMA therefore concludes that there is no need to assess the other conditions set out in section 9(1) of the Act.

K. Exclusion or block exemption

Exclusion

5.213 The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act.[687]

[687] The Act, section 3(1). Schedule 1 covers mergers and concentrations. Schedule 2 covers competition scrutiny under other enactments. Schedule 3 covers general exclusions.

5.214 The CMA finds that none of the relevant exclusions applies to the Restrictions.

5.215 Fenland submitted that the OFT informed Fenland that the Joint Venture was not registrable under the Restrictive Trade Practices Act 1976 (the 'RTPA'), which meant that Fenland had good reason to believe that the Joint Venture did not infringe competition law.[688] To the extent that any agreement relating to the Joint Venture was in the past excluded from the application of the Chapter I prohibition due to the now repealed RTPA, that exclusion would not have applied after May 2007.[689] Upon the entry into force of the Act, an agreement given clearance under section 21(2) of the RTPA was excluded from application of the Chapter I prohibition, unless a 'material variation' was made to the agreement. This exclusion was repealed with effect from 1 May 2007, so no part of the Restrictions could have benefited from it during the Relevant Period (which began on 30 May 2012).

5.216 The Restrictions did not result in the Parties ceasing to be distinct for the purposes of the Enterprise Act 2002, so they would not have been excluded from the Chapter I prohibition by Schedule 1 of the Act.

Block exemption

5.217 Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States, but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation. Vertical agreements that restrict competition may be exempt from the Chapter I prohibition if they fall within the VABER or the version of TTBER that was in force at the relevant time.[690]

5.218 As with an individual exemption, the burden of proof for proving the applicability of a block exemption regulation to an agreement rests on the parties claiming the benefit of it.[691] Fenland made a number of submissions on the applicability of the TTBERs.[692] Fenland submitted that the Restrictions were exempted as result of a non-reciprocal technology transfer licence agreement entered into between Fenland and Berendsen Newbury when Berendsen Newbury joined the Joint Venture in the 1980s, which continued

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[688] URN 01128 (Note of Fenland Second State of Play meeting on 1 December 2016), paragraph 9.
[689] Schedule 3, sections 2(1) and 2(2) of the Act was repealed with effect from 1 May 2007.
[690] The version currently in force is the TTBER 2014. The version in force at the start of the Relevant Period was Commission Regulation (EU) No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123/11 of 27.04.2004 ('TTBER 2004'). This Decision refers to TTBER 2004 and TTBER 2014 together as the 'TTBERs'.
[691] See by analogy section 9(2) of the Act.
[692] For example, URN 01139 (Fenland SO WRs), paragraphs 3.2.5–3.2.7, 3.2.27–3.2.65.

throughout the Relevant Period.[693] Fenland submitted, for example, that, in 1982, it licensed its substantial know-how relating to building (and the technology required to build) Cleanroom Laundries to Berendsen Newbury so as to enable Berendsen Newbury to supply Cleanroom Laundry Services under the Micronclean Brand.[694] Fenland provided, however, limited substantive evidence in support of its claims.

5.219 Conversely, Berendsen Newbury made no direct submissions on the application of a block exemption regulation to the Restrictions, but submitted that TTBER 2014 excludes the types of territorial restrictions contained in the TMLAs from the definition of a 'hardcore restriction'. Therefore, the Restrictions cannot be presumed to reveal a sufficient degree of harm in order to be a restriction 'by object'.[695]

5.220 For the reasons set out below, the CMA has found no scenario under which the Restrictions could be block exempted under either version of the TTBER or any other block exemption.[696]

5.221 At the start of the Relevant Period, TTBER 2004 was in force. By the end of the Relevant Period, TTBER 2014 was in force. At the start of the Joint Venture, in the early 1980s, the TTBER 2004 (or indeed the previous 1996 version) was not yet in force, but the CMA has assessed the situation by analogy in order to consider the merit of the Addressees' submissions.

5.222 The TTBERs define 'knowhow' as:

> '… *practical information, resulting from experience and testing, which is: (i) secret, that is to say, not generally known or easily accessible,*

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[693] See paragraph 4(1)(c) of the applicable TTBER 2004, which states: '*The exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the allocation of markets or customers, except: …(iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party; (v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence.*' Paragraph 4(3) states: '*Where the undertakings party to the agreement are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, paragraph 2 and not paragraph 1 shall apply for the full life of the agreement unless the agreement is subsequently amended in any material respect*'.

[694] URN 01139 (Fenland SO WRs), paragraphs 3.2.5–3.2.7.

[695] URN 01142 (Berendsen SO WRs), paragraph 5.28(e).

[696] For instance, VABER; Commission Regulation No 1217/2010 on the application of Article 101(3) of the TFEU to categories of research and development agreements, OJ L335/36, 14.12.2010; and Commission Regulation No 1218/2010 on the application of Article 101(3) of the TFEU to categories of specialisation agreements, OJ L335/43, 14.12.2010.

(ii) substantial, that is to say, significant and useful for the production of the contract products, and
(iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.'[697]

5.223 The Addressees have been unable to provide a copy of any written non-reciprocal knowhow transfer agreement pertaining to the 1980s (or indeed since that time) and have not shown that any knowhow transfer was secret, substantial or identified for the purposes of the TTBERs. Nor have they been able to show any consideration paid for the knowhow transfer.[698] Rather, Fenland provided a copy of a written agreement between JVCo (as it was then) and Berendsen Newbury dating from 1984 (the '1984 Agreement').[699] That agreement was of a different nature to the TMLAs, and does not evidence or document any form of *transfer* or licence of knowhow (or indeed trademarks) from Fenland to Berendsen Newbury at any time.[700] Instead, the 1984 Agreement is a form of agency agreement, whereby JVCo (referred to in the 1984 Agreement as the 'Company') enters, as principal, into contracts for services with third parties which are then provided the services by a predecessor of Berendsen Newbury (referred to in the 1984 Agreement as the 'Supplier').[701] The 1984 Agreement also contains no active or passive sales restrictions or indeed territorial or customer allocation clauses. It is therefore materially different in nature from the TMLAs.

5.224 The TMLAs do not identify any knowhow transfers by Fenland or knowhow retained by Fenland or require that such knowhow remain secret.[702] Moreover, Berendsen Newbury submitted that any Micronclean knowhow was jointly held

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[697] TTBER 2014, Article 1(i). TTBER 2004, Article 1(i).
[698] URN 01220 (full reference at footnote 30 above), p.42, line 20, to p.44, line 4; URN 01182 (full reference at footnote 108 above), p.2 (response to Question 2).
[699] URN 01186 (the 1984 Agreement). Clause 6(vii) specified that *'any installation erected for the provision by the Supplier of the Services shall be designed and built in accordance with the specification provided by the Company for such buildings and to the satisfaction of the Company.'* For details on the link between [Former JV Partner F] and Berendsen Newbury, see footnote 109 above.
[700] URN 01186 (the 1984 Agreement), clause 7(i) requires the Supplier during and after termination of the agreement to *'keep secret all information in relation to the Company's trade secret techniques, business or method of carrying on business and all information relating to the manner in which the Services are provided whoever the said information shall belong to and whether or not such information is in the public domain.'* On termination of the agreement, the Supplier is required to return to the Company *'all goods belonging to the Company in its possession or under its control and any advertising and promotional matter relating to the goods in it control…'* (clause 12).
[701] Berendsen Newbury already appears to be a shareholder in JVCo: see URN 01186 (the 1984 Agreement), clause 11.
[702] The 1984 Agreement, on the other hand, stated that the Supplier (i.e. Berendsen Newbury) must during the continuance of the 1984 Agreement and at any time after the termination of the 1984 Agreement, keep secret all information in relation to the Company's (i.e. JVCo's) trade secrets techniques business or method of carrying on business (clause 7).

and developed.[703] Fenland acknowledged that, at various points during the Relevant Period, it was involved in reciprocal exchanges of knowhow with Berendsen Newbury in relation to the Relevant Markets.[704]

5.225 The CMA's finding that there was no documented one-way technology transfer licence that continued to apply during the Relevant Period, and that any knowhow during the Relevant Period was not 'secret', 'substantial' or 'identified' within the meaning of the TTBERs, is supported by the fact that there is no evidence of Berendsen Newbury being obliged to return any knowhow to Fenland either when Berendsen plc purchased Berendsen Newbury or when the Joint Venture was terminated.[705]

5.226 Berendsen has stated that the knowhow acquired by Berendsen plc via the Newbury Acquisition comprised knowledge of customer preferences, and of the Consumables market, in GB.[706] Neither of these two categories were the subject of a one-way knowhow transfer from Fenland; indeed, the CMA considers that such knowhow was developed by Berendsen Newbury itself (perhaps in co-operation with Fenland). It is therefore unlikely that the knowhow was sufficiently secret and identified to meet the conditions for exemption under the TTBERs.[707] The CMA has found no evidence of a transfer of substantial knowhow that would benefit from the protection afforded by the TTBERs.

5.227 The CMA also does not accept that the TMLAs are a mere continuation of any other non-reciprocal knowhow transfer agreement entered into in the 1980s. This is because the TMLAs: (i) do not reference that knowhow, but rather license the Trade Marks on a non-exclusive basis to the Parties; (ii) each TMLA is between JVCo as licensor and Fenland and Berendsen Newbury as respective licensee/co-licensee;[708] and (iii) the Parties were competitors by

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[703] URN 01142 (Berendsen SO WRs), paragraphs 2.4(d), 3.10, 3.13(c), 3.25–3.26, and 5.33(c).
[704] URN 01220 (full reference at footnote 30 above), p.42 at lines 4–19, in response to a question regarding '*a sharing of developments and technological developments between the* [JV Partners'] *laundries'* (that CMA question referring back to Fenland submissions at p.29, lines 9–11, of the same transcript – e.g. that via the Joint Venture and/or JVCo '…*all the shareholders could share ideas and we all learned off each other*').
[705] For example, there is no mention of this issue in the Sale and Purchase Agreement for the Newbury Acquisition: details were set out in (but for the purposes of this Decision have been redacted from) URN 01144 (Share purchase agreement for Berendsen Newbury). Fenland has confirmed that Berendsen Newbury was not obliged to return to it any knowhow on termination of the Joint Venture: URN 01220 (full reference at footnote 30 above), p.45 at lines 18–22.
[706] URN 01253 (full reference at footnote 96 above), paragraphs 9.1–9.4.
[707] See paragraph 1(i) TTBER 2004 (and Article 2).
[708] Nor does the 1984 Agreement purport to hold Fenland out as the licensor, rather JVCo enters into the agreement with Berendsen Newbury.

May 2012. In addition, there is no evidence of a non-reciprocal knowhow transfer in the 1980s.

5.228 Even if the CMA were to accept Fenland's submissions that the Parties were not actual or potential competitors at the time the Joint Venture was originally formed,[709] and if either of the TTBERs did apply to any early knowhow transfers, the Restrictions would only be exempted from the Chapter I prohibition if there had been no material changes to the agreement during its lifetime.[710] There have been a number of material changes in this case. For example, since the Joint Venture was set up in the 1980s both Parties have entered the Relevant Markets for Intermediate Cleanroom Laundry Services and Consumables. Therefore, the scope of the TMLA Products and Services must be wider than the scope of any knowhow licensed, or any other arrangements, in the 1980s when the Parties were only active in Full Cleanroom Laundry Services. Other material changes include the JV Partners changing over time since the 1980s, including when Fenland acquired the business of another JV Partner (i.e. [Former JV Partner D]), and the Restrictions having been formally agreed in writing in the TMLAs for the first time.

5.229 The TMLAs themselves were not technology transfer agreements for the purposes of the TTBER 2004 (which was the version in force when the TMLAs were signed). The guidelines for TTBER 2004 explicitly state that the Commission '*will not extend the principles developed in the TTBER and these guidelines to trademark licensing*'.[711]

5.230 Finally, the Restrictions could only be block-exempted under TTBER 2004 or TTBER 2014 if the Parties' market shares were below the relevant threshold, which is a 20% combined market share if the Parties were actual or potential competitors, or a 30% combined market share if the Parties were not competitors.[712]

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[709] As discussed in Part 5.D. above, the fact that Fenland chose Berendsen Newbury as its partner suggests that it was one of the best placed businesses to enter the market which was nascent at that time (a market which other firms such as Fishers did then enter successfully) and perhaps therefore a potential competitor. In any case, the CMA does not need to conclude on the issue, because the Infringement relates to the Relevant Period, which started in 2012. In the Relevant Period, the Parties both had well-established laundries in what was by then a mature, relatively consolidated market: see e.g. Part 3.B.II. above and **Annex C**.

[710] TTBER 2004, Article 4(3). In TTBER 2014, Article 4(3), the following sentence was added: '*Such an amendment includes the conclusion of a new technology transfer agreement between the parties concerning competing technology rights*'.

[711] TTBER Guidelines 2004, paragraph 53. A similar statement can be found in the guidelines for TTBER 2014 at paragraph 50.

[712] TTBER 2014, Article 3; TTBER 2004, Article 3.

5.231 The Parties' market shares, shortly before and during the Relevant Period, in the Relevant Markets for Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services exceeded the market share thresholds allowed under TTBER 2004, TTBER 2014 or any other block exemption.[713] The Parties' market shares were lower in Consumables, but they were not active in that market until 2010 and it is difficult to see how any transfer of Consumables knowhow could be described as a transfer from Fenland to Berendsen Newbury when they had acquired Guardline together through JVCo. It is therefore clear that the TTBERs would not have block-exempted the Restrictions in the Relevant Period, even if either of them had been in force throughout the life of the Joint Venture.

5.232 For completeness, the VABER did not apply in this case because *inter alia* the Parties did not operate for the purposes of the agreement at a different level of the production or distribution chain and instead were competitors.[714] Neither the research and development block exemption[715] nor the specialisation block exemption[716] applied because, amongst other reasons, the primary purpose of the TMLAs was to license the Trade Marks. The Parties' market shares in two of the three Relevant Markets covered by the TMLAs exceed the relevant thresholds for any block exemption to apply.

Conclusion

5.233 The CMA finds that no block exemption applies in this case. It follows that the Restrictions are not exempt from the application of the Chapter I prohibition by virtue of section 10 of the Act.

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[713] See **Annex C** for details of market shares.

[714] See VABER, Articles 2(1) and 2(4). Even under a franchise arrangement, competition between franchisor (in this case, JVCo) and franchisee (in this case, the Parties) can be restricted, and the franchisor can be prohibited from appointing another franchisee in the contract territory, but the franchisees must be able to compete freely. There is no allowance for competition being restricted on a horizontal level between the franchisees. See e.g. Commission Guidelines on Vertical Restraints OJ C130/1, 19.05. 2010, paragraphs 189–191.

[715] Commission Regulation (EU) No 1217/2010 of on the application of Article 101(3) of the TFEU to certain categories of research and development agreements, OJ L335/36, 14.12.2010. See Article 2(2).

[716] Commission Regulation (EU) No 1218/2010 on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements, OJ L335/43, 14.12.2010. See Article 2(2).

L. Attribution of liability

I. Key legal principles

5.234 Competition law refers to the activities of undertakings. If an undertaking infringes the competition rules, it falls, under the principle of personal responsibility, to that undertaking to answer for that infringement.[717]

5.235 An undertaking may consist of several persons, legal or natural. Given the requirement to impute an infringement to a legal entity or entities on which fines may be imposed and to which an infringement decision is to be addressed, it is necessary to identify the relevant legal persons that form part of the undertaking in question.[718]

5.236 The conduct of a subsidiary may be imputed to its parent company where that subsidiary, although having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. This is because, in such a situation, the parent company and its subsidiary form a single economic unit, and therefore a single undertaking for the purposes of the relevant prohibitions.[719]

5.237 Where a parent company owns 100% of a subsidiary which has infringed the competition rules, there is a rebuttable presumption that:

a. the parent company is able to exercise 'decisive influence' over the conduct of its subsidiary; and

b. the parent company does in fact exercise such decisive influence over the conduct of its subsidiary,

such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.[720]

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[717] Judgment in *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraphs 54–56.
[718] Judgment in *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 57.
[719] Judgment in *Evonik Degussa GmbH v Commission,* C-155/14 P, EU:C:2016:446, paragraph 27, citing the judgment in *Commission and Others v Versalis and Others,* C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 40; See also the judgment in *Alliance One & Others v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 44 citing the judgment in *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraphs 58–59.
[720] Judgment in *Evonik Degussa GmbH v Commission,* C-155/14 P, EU:C:2016:446, paragraph 28 and the case law cited; judgment in *Alliance One & Others v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraphs 46–48; judgment in *Akzo Nobel NV and Others v Commission*, C-97/08 P,

5.238 It is for the party in question to rebut the presumption by adducing sufficient evidence to show that its subsidiary acts independently on the market.[721] The presumption also applies to situations where the parent company indirectly holds 100% of a subsidiary, for example, via one or more intermediary companies.[722]

5.239 In determining which entities are liable for the Infringement, the CMA has identified, for each undertaking that it has found to have infringed the Act (i.e. the undertaking comprising Fenland and the undertaking comprising Berendsen), the relevant legal entities which form part of those undertakings.

II. Legal assessment – Fenland

5.240 The CMA finds Fenland liable for the Infringement, on the basis that Fenland was directly involved in the Infringement during the Relevant Period. It is one of the legal entities that entered into the Restrictions.

III. Legal assessment – Berendsen

5.241 The CMA finds Berendsen Newbury and Berendsen plc jointly and severally liable for the Infringement.

5.242 Berendsen Newbury was directly involved in the Infringement during the entire Relevant Period. It is one of the legal entities that entered into the Restrictions.

5.243 As noted at paragraph 3.6 above, from 13 September 2014 to the end of the Relevant Period Berendsen Newbury was an indirect wholly owned subsidiary of Berendsen plc. There is, therefore, a rebuttable presumption that, during that period, Berendsen plc exercised decisive influence over Berendsen Newbury. Berendsen plc has not sought to rebut this presumption in its submissions to the CMA. Therefore, from 13 September 2014 to the end of the Relevant Period, Berendsen Newbury and Berendsen plc formed a single economic unit, and therefore a single undertaking for the purpose of the Chapter I prohibition.

5.244 However, for the sake of completeness, the CMA notes that the following further evidence is consistent with the presumption that Berendsen plc

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EU:C:2009:536, paragraphs 60–61; see also the judgment in *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, C-107/82, EU:C:1983:293, paragraph 50.

[721] Judgment in *Alliance One & Others v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 47, citing the judgment in *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 61.

[722] Judgment in *General Química SA and Others* v *Commission*, C-90/09 P, EU:C:2011:21, paragraphs 86–87.

exercised decisive influence over Berendsen Newbury from 13 September 2014 to the end of the Relevant Period.

a. The overlap in the senior management of Berendsen Newbury and Berendsen plc reinforces the above presumption. [Berendsen Newbury Director G] was an employee of Berendsen plc and, from 13 September 2014 until 1 April 2015, a director of both Berendsen Newbury and JVCo. [Berendsen Newbury Director H] was the company secretary of Berendsen Newbury from 13 September 2014 to 22 December 2016, and of Berendsen UK Limited from 26 April 1999 to 22 December 2016.[723] See **Annex B** for further details.

b. In addition, from 13 September 2014 to the end of the Relevant Period Berendsen plc's employees were involved in the implementation of the Restrictions. In particular, on a number of occasions in late 2014 [Berendsen plc Manager A] and [Berendsen plc Manager B] (neither of whom had a formal role within Berendsen Newbury) – and [Berendsen Newbury Director G] (who, as noted in the paragraph 5.244.a. above, had roles at Berendsen plc, Berendsen Newbury and JVCo) – met and discussed matters with [Fenland Director A]. Those matters included whether cooperation between the Parties should continue, and, if so, on what terms (including retaining a '*No active selling into the other party's territory*' provision).[724] As noted at paragraphs 3.98–3.99 above, the Parties' agreement to '*not enforce*' the '*restrictions on passive sales*' was described by Fenland as a '*position …discussed with* [Berendsen plc Manager A] *at Berendsen* [plc]'.

[723] Records of corporate officers of Berendsen UK Limited, at e.g. https://beta.companieshouse.gov.uk/company/00228604/officers. As noted at footnote 56 above, '*Berendsen UK Limited* […] *is a wholly owned subsidiary of Berendsen plc*'.
[724] See e.g. URN 00124.6 (full reference at footnote 120 above), p.4. See also other iterations of similar proposals, as referenced at footnote 168 above.

6. THE CMA'S ACTION

A. The CMA's Decision

6.1 On the basis of the evidence set out in this Decision, the CMA has concluded that the Restrictions constitute an agreement which infringed the Chapter I prohibition from 30 May 2012 to 2 February 2016, because they had the object of sharing the Relevant Markets, through the allocation of territories and customers between the Parties, and may have affected trade within the UK (i.e. the Infringement).

6.2 This Part 6 sets out the enforcement action which the CMA is taking, and the reasons for taking that action.

B. Directions

6.3 If the CMA has made a decision that an agreement infringes the Chapter I prohibition, it may give to such person or persons such directions as it considers appropriate to bring the infringement to an end.[725]

6.4 The TMLAs were terminated on, and with effect from, 3 February 2016. In relation to Consumables, the Parties have replaced the framework of the TMLAs with a distribution arrangement. Under that arrangement, Fenland supplies Consumables to Berendsen Newbury, which Berendsen Newbury then supplies to its own customers. In June 2016, the CMA took a prioritisation decision not to investigate that arrangement at that stage.[726] The CMA therefore considers for the purposes of this Decision that the Infringement has ended, and that it would be unnecessary to give directions to any person to bring an end to the Infringement.

C. The CMA's power to impose financial penalties

I. Key legal principles

6.5 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition, the CMA may require an undertaking

[725] The Act, sections 32(1) and 33(1).
[726] See footnote 131 above.

that is party to the agreement concerned to pay a penalty in respect of the infringement.

6.6 As set out in paragraphs 5.236 to 5.238 above, a parent company may be held jointly and severally liable for an infringement committed by a subsidiary.

Intention/negligence

6.7 Once the CMA has found that an agreement has infringed the Chapter I prohibition, it may impose a penalty on an undertaking which is a party to the agreement if the CMA is satisfied that the infringement has been committed intentionally or at least negligently pursuant to section 36(3) of the Act.

6.8 For an infringement to have been committed intentionally, the undertaking '*must have been aware'* or '*could not have been unaware'* that its conduct was of such a nature as to encourage a restriction or distortion of competition.[727] In this regard, '*it is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I prohibition*'.[728] Intention may be confirmed by the undertaking's internal documents, or inferred from the fact that certain consequences are plainly foreseeable.[729]

6.9 For an infringement to have been committed negligently, the undertaking '*ought to have known that its conduct would result in a restriction or distortion of competition*'.[730]

6.10 The CMA's ability to impose a fine under section 36(3) of the Act does not therefore depend on the undertaking's awareness of the illegality of its conduct.[731] The fact that the undertaking concerned has characterised wrongly in law its conduct therefore cannot have the effect of exempting it from imposition of a fine in so far as it '*could not have been unaware*' or '*ought to*

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[727] See judgments in 100/80 *Musique Diffusion Française v Commission* [1983] ECR 1825, paragraph 112 and T-77/92 *Parker Pen v Commission* [1994] ECR II-549, paragraph 81. Confirmed by the CAT in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraph 456.
[728] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraph 456.
[729] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraph 456.
[730] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraph 457.
[731] See the judgment in the joined cases of 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ *International Belgium and Others v Commission* [1983] ECR 3369, paragraph 45; the judgment in 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 107; the judgment in C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I 9555, paragraph 124; the judgment in *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others,* C-681/11, EU:C:2013:404, paragraph 37. See also judgment in T-29/92 *SPO and others v Commission* [1995] II-00289, paragraph 356 and the judgment in T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraph 165.

have known' of the anti-competitive nature of that conduct.[732] Ignorance or a mistake of law, even if based on independent legal advice, does not prevent a finding that an infringement was committed intentionally or negligently.[733]

6.11 The CMA is not obliged to specify whether it considers the infringement to have been committed intentionally or negligently.[734]

6.12 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.[735] For the reasons set out at Part 5.E. above, the CMA considers that the Infringement had as its object the prevention, restriction or distortion of competition.

Small agreements

6.13 Section 39(3) of the Act provides that a party to a 'small agreement' is immune from financial penalties for infringements of the Chapter I prohibition. A 'small agreement' is an agreement between undertakings whose combined turnover does not exceed £20 million for the business year ending in the calendar year preceding one during which the infringement occurred and which is not a price-fixing agreement.[736]

The CMA's margin of appreciation

6.14 The CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act,[737] provided that any such penalty is:

a. within the range of penalties permitted by section 36(8) of the Act;

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[732] Judgment in *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others,* C-681/11, EU:C:2013:404, paragraph 38. See also judgments in the joined cases of 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ *International Belgium and Others v Commission* [1983] ECR 3369, paragraph 45; 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 107; and C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I 9555, paragraph 124.
[733] Judgment in *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others,* C-681/11, EU:C:2013:404, paragraph 43.
[734] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 453–457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.
[735] *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.
[736] Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term 'applicable turnover' means the turnover determined in accordance with the Schedule to these Regulations: the Act, section 39(1).
[737] This margin of appreciation is referred to in, for example, *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 134; *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 168; and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, paragraph 102.

b. calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/309;[738] and

c. calculated having regard to the CMA's published penalties guidance.[739]

6.15 The CMA is not bound by its decisions in previous cases under the Act in relation to whether to impose, or how to calculate, financial penalties.[740] Rather, the CMA makes assessments on a case-by-case basis, having regard to all relevant circumstances and the objectives of its policy on financial penalties. In accordance with statutory requirements and the twin objectives of the CMA's policy on financial penalties, as set out in its published guidance *(OFT423),* the CMA will also have regard to the seriousness of the infringement and the desirability of deterring the undertaking on which the penalty is imposed and others from engaging in agreements or conduct infringing any prohibition under the Act.[741]

II. Legal assessment

6.16 The CMA considers that it would be appropriate to impose a financial penalty for the Infringement.

6.17 The CMA is also satisfied that each of Fenland and Berendsen Newbury is liable for the Infringement, on the basis that each of them has intentionally or at least negligently committed the Infringement during the Relevant Period. Accordingly, the CMA hereby imposes a financial penalty on each of Fenland and Berendsen Newbury.

6.18 For the reasons set out in paragraphs 5.243 to 5.244 above, the CMA considers that it is appropriate to hold Berendsen plc jointly and severally liable for infringing conduct on the part of Berendsen Newbury from 13 September 2014 to 2 February 2016. In this Decision, the CMA has distinguished, as

[738] The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/309, as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259 (the 'Amended 2000 Turnover Order').
[739] The Act, section 38(8). The guidance currently in force is *Guidance as to the appropriate amount of a Penalty* (OFT423, September 2012), adopted by the CMA Board.
[740] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, paragraph 78.
[741] The Act, section 36(7A); *OFT423*, paragraph 1.4.

appropriate, between the respective liabilities of Berendsen Newbury and Berendsen plc.

6.19 Given the Parties' combined turnover (see paragraphs 3.1 and 3.5 above), neither Party benefits from the 'small agreement' immunity.

Intention/negligence

6.20 The CMA finds that the evidence set out in Part 3 above shows that each of Fenland and Berendsen Newbury must have been aware, or could not have been unaware, or at least ought to have been aware, that its conduct would result in a restriction or distortion of competition.

6.21 A restriction of competition is plainly foreseeable when, as in this case, two leading suppliers in a relevant market allocate territories and customers between themselves. The CMA is satisfied that the evidence set out in Parts 3.D.II and 3.D.III. above shows the Parties' intentional allocation of territories and customers through, *inter alia*:

a. the agreement on clauses preventing or regulating each Party's active and passive sales into the other Party's territory or to customers allocated to the other Party;

b. the exchange of detailed maps clearly marking the boundary between the respective territories;

c. the exchange of lists of customers expressly allocated to one or the other Party; and

d. the practice of referring customers from one Party to the other Party.

6.22 The Parties' awareness of the restrictive impact of their conduct on competition is further confirmed by the Parties' internal documents.

a. Following a meeting on 6 October 2014, [Fenland Director A] noted that the agreement between the Parties '*…slows (but does not stop) our competition with each other*'.[742]

b. At a meeting on 27 June 2011, the Parties agreed that '*any trading using the Micronclean name would be constrained by the territorial restrictions*'.[743]

[742] See URN 00186.117 (full reference at footnote 366 above), p.1.
[743] URN 00055.13 (full reference at footnote 150 above), p.1, paragraph 4.

c. The minutes of the Fenland board meeting on 8 October 2014 recorded [Fenland Director A] having stated that: '*The main options are to have no partnership and compete against each other,* [Fenland Director A] *believes this will drive margin down quicker. The other main option is an agreement where Berendsen can still use the Micronclean name and include a passive compete clause*'.[744]

d. In documents reflecting meetings with Berendsen on 14 November 2014 and 4 December 2014, [745] [Fenland Director A] stated: '*If Berendsen continue to trade as Micronclean in the UK under a licence agreement with MC Ltd (that contains a passive compete clause), it is likely that competition will grow and not be dissimilar to that between the two parties that would exist if there was no agreement*'. This suggests that the Parties were aware that the Restrictions restricted competition when compared to there being no agreement (i.e. no TMLAs) or a licence agreement between the Parties.

6.23 Each statement cited in paragraph 6.22 above purported to record discussions between the Parties and, with the exception of paragraph 6.22.c., was shared by Fenland with Berendsen Newbury during the Relevant Period. The CMA has seen no submissions or evidence indicating that Berendsen Newbury disagreed with any such statements.

6.24 The CMA holds Berendsen plc jointly and severally liable for the Infringement based on Berendsen Newbury's direct involvement in the Infringement. As such, it is not necessary to find that Berendsen plc acted intentionally or negligently with regard to the Infringement. In any event, Berendsen plc must have been aware, or could not have been unaware, or at least ought to have been aware, that the conduct would result in a restriction or distortion of competition. For example, a Berendsen plc internal review of the Newbury Acquisition noted that the relevant post-transaction integration plan has focused on areas such as: '*Clean up the joint venture structure with Micronclean Fenland in order to ensure a competitive setup going forward...*'. Related actions noted in that review include having '*taken steps to dissolve the JV structure, divest all of the JV companies to Fenland and to terminate the*

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[744] URN 00186.33 (full reference at footnote 119 above), paragraph 2.2. This quote appears to refer to the introduction, into one or both of the TMLAs, of a '*clause*', but the CMA has seen no evidence that any term of the TMLAs was in fact formally introduced, amended or removed before (or following) the date of that document: see paragraph 3.98 above.

[745] URN 00124.6 (full reference at footnote 120 above), p.2. See also later iterations: URN 00186.119 (full reference at footnote 121 above), p.1 – whereby [Fenland Director A] stated that in respect of Cleanroom Garments, following the proposed restructuring Fenland *'will fully compete across Great Britain with Berendsen…This re-structuring of the market will lead to greater competition than exists currently'*; URN 00043.7 (full reference at footnote 371 above); URN 00068.16 (full reference at footnote 168 above); URN 00043.13 (full reference at footnote 529 above), p.2.

market sharing agreement'.[746] In particular as parent company of a substantial multinational corporate group during the Relevant Period, Berendsen plc ought to have taken appropriate action to know of its subsidiary's conduct and ought to have known that it would result in a restriction of competition.

6.25 The Addressees submitted that the CMA has no jurisdiction to impose a financial penalty, since any infringement of competition law was not committed intentionally or negligently by either Party.[747] These submissions were based on reasons including those summarised below.

a. The Addressees submitted that some of the pre-investigation correspondence between the CMA and one (or both) of the Parties, summarised in **Annex A** to this Decision, had given one (or both) of the Parties the impression that the OFT/CMA had assessed the TMLAs as being compliant with competition law.[748] Berendsen submitted that this correspondence led the Parties to believe that the Restrictions were not a restriction of competition.[749] Fenland also referred to having been informed that the Joint Venture was not registrable under the RTPA: see paragraph 5.215 above.

b. Fenland submitted that it received legal advice in 2014 to the effect that the Restrictions were not a 'by object' restriction of competition law.[750]

c. Fenland submitted that any finding of an infringement 'by object' in this investigation would be contrary to applicable legislation, case law and guidance, and an illegitimate extension of the 'by object' concept.[751]

d. The Addressees submitted that as soon as each Party understood that the CMA had competition concerns, it took steps to address the CMA's concerns (and Berendsen submitted that it believed it had done so). For example, the Parties (taking a cautious approach, following legal advice) noted via the Passive Sales Letters an agreement to '*not enforce*' the

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[746] URN 00036.97 (Berendsen Board Paper of October 2015 entitled 'Review of Acquisition of Micronclean Newbury'), p.3.
[747] URN 01139 (Fenland SO WRs), paragraphs 2.3.4 and 4.2–4.4. URN 01142 (Berendsen SO WRs), paragraphs 9.3–9.17; URN 01216A (full reference at footnote 31 above), p.24, line 7, to p.26, line 24; URN 01333 (Berendsen DPS WRs), paragraphs 2.1–2.9.
[748] URN 01139 (Fenland SO WRs), paragraph 4.3 (first, second, third and fifth bullets); URN 01142 (Berendsen SO WRs), paragraphs 9.6–9.17; URN 01216A (full reference at footnote 31 above), p.24, line 7, to p.26, line 24; URN 01333 (Berendsen DPS WRs), paragraphs 2.4–2.7.
[749] URN 01380 (full reference at footnote 39 above), p.8 at lines 9–11.
[750] URN 01139 (Fenland SO WRs), paragraph 4.3 (fourth bullet). Fenland did not disclose a copy of this.
[751] URN 01139 (Fenland SO WRs), paragraphs 2.3.4 and 4.2.

'*restrictions on passive sales*' – and ultimately took steps to terminate the Joint Venture.[752]

6.26 The CMA concludes that the Addressees' submissions do not affect the finding that the Parties must have been aware, or could not have been unaware, or at least ought to have been aware, that their conduct would result in a restriction or distortion of competition. In addition, the CMA notes the following:

a. The correspondence with the OFT/CMA, legal advice received and steps taken by the Parties referred to in paragraph 6.25 above post-dated the Parties' signature of the TMLAs.[753]

b. The UK competition law regime has operated on a self-assessment basis since 2004,[754] and neither the OFT nor the CMA has ever stated that it had determined that the Restrictions did not restrict competition. For more details of the pre-investigation correspondence, see **Annex A**.

c. Any legal advice received by Fenland could not prevent a finding that the Infringement was committed intentionally or negligently.

d. Whether or not significant steps were taken to address competition law concerns raised by the CMA is not relevant to whether the Infringement was committed intentionally or negligently and the issue is considered at step 3 of the penalty calculations below.

6.27 The issues in the preceding paragraph are considered where appropriate in the calculation of the amount of the penalty below.

6.28 While the CMA considers it appropriate to treat 'genuine uncertainty' as a mitigating factor in the calculation of financial penalties at Part 6.D.III. below, such uncertainty is in respect of whether the Parties' conduct constituted an infringement of competition law. As discussed at paragraph 6.10 above, an awareness that the Restrictions infringed competition law is not a necessary

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[752] URN 01142 (Berendsen SO WRs), paragraphs 9.6(b) and 9.14–9.17; URN 01139 (Fenland SO WRs), paragraph 4.3 (fifth bullet).
[753] Except in relation to the RTPA-related correspondence which Fenland submitted took place in 1993. No related exclusion from the Chapter I prohibition applied after 2007: see paragraph 5.215 above.
[754] An exemption from the Chapter I prohibition could be granted by the OFT under section 4 of the Act, until repealed with effect from 1 May 2004 by The Competition Act 1998 and Other Enactments (Amendment) Regulations, SI 2004/1261. When the TMLAs were entered into, it was already well established that: (i) the sharing of markets with actual or potential competitors was likely to restrict competition by object; and (ii) an agreement may be found to be a restriction by object notwithstanding that it was reached in the context of a wider joint venture (see Part 5.E. above).

condition for a finding that the Infringement was committed intentionally or negligently.

6.29 The CMA therefore finds that each of the Parties committed the Infringement intentionally or at least negligently.

D. The CMA's calculation of financial penalties

6.30 When setting the amount of a penalty the CMA must have regard to the relevant guidance in force at that time: see paragraph 6.14.c. above. The six steps for calculating any penalty set out in *OFT423* are as set out below.

The CMA's discretion to impose a symbolic penalty

6.31 Berendsen submitted that it would be appropriate to impose only a symbolic penalty in this investigation. Berendsen made this submission largely for the reasons set out at paragraphs 6.25.a. and 6.25.c.–6.25.d. above[755] – but also because:

a. the Joint Venture arrangements were '*open and transparent and known to all market participants*';[756]

b. the Joint Venture arrangements were '*pro-competitive and delivered material customer benefits*', and/or the Restrictions may have been, for a period, justified in competition law terms;[757]

c. any finding that the Restrictions constitute a 'by object' infringement of the Chapter I prohibition would be novel and unorthodox;[758] and

d. a symbolic fine would be consistent with some past EU and UK decisions where, at the time the relevant conduct took place, the law was not clear as to whether it could constitute an infringement of competition law.[759]

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[755] See e.g. URN 01142 (Berendsen SO WRs), paragraphs 9.18–9.22; URN 01216A (full reference at footnote 31 above), p.26, line 25, to p.27, line 21; URN 01333 (Berendsen DPS WRs), paragraphs 3.1–3.6; URN 01380 (full reference at footnote 39 above), p.8, line 6, to p.9, line 24.
[756] See e.g. URN 01142 (Berendsen SO WRs), paragraphs 9.21(a) and 9.21(b); URN 01333 (Berendsen DPS WRs), paragraph 3.3(a).
[757] See e.g. URN 01142 (Berendsen SO WRs), paragraphs 9.18(b) and 9.22; URN 01333 (Berendsen DPS WRs), paragraphs 3.2(a) and 3.4; URN 01380 (full reference at footnote 39 above), p.9 at lines 3–19.
[758] See e.g. URN 01142 (Berendsen SO WRs), paragraphs 9.19–9.22; URN 01380 (full reference at footnote 39 above), p.8, line 11, to p.9, line 19. The CMA considers that Fenland's submission in paragraph 6.25.c. above – although explicitly addressing the finding of intention or negligence – is substantially analogous to the argument raised here by Berendsen.
[759] URN 01142 (Berendsen SO WRs), paragraphs 9.19–9.21; URN 01216A (full reference at footnote 31 above), p.26, line 25, to p.27, line 21; URN 01333 (Berendsen DPS WRs), paragraphs 3.4 and 3.6; URN 01380 (full reference at footnote 39 above), p.8 at lines 16–21.

6.32 The CMA does not accept that only symbolic penalties would be appropriate, for the reasons set out at Part 6.C. above – and set out below.

a. The Parties' aim was to allocate territories and customers, restricting competition between themselves, and the Parties were aware that the Restrictions were aimed at restricting competition between themselves (see, for example, Parts 5 and 6.C. above).

b. In addition, as noted in paragraphs 5.55 to 5.65 above, at the time the Parties agreed the Restrictions the law was not unclear as to whether they could constitute an infringement. In any event, the CMA's discretion to impose penalties is not bound by the approach taken in previous cases under the Act, or as a result of any case cited by the Addressees (see paragraphs 6.14 to 6.15 above).

c. Any submissions on the pro-competitive effects, customer benefits, any increase of competition resulting from the Newbury Acquisition, and/or the nature of Infringement are addressed as appropriate in Parts 5.F., 5.J., and 5.K. above, and this Part 6 below.

I. Step 1 – the starting point

6.33 The starting point for a financial penalty is calculated having regard to the seriousness of the infringement and the undertaking's relevant turnover.[760]

6.34 To adequately reflect the seriousness of an infringement, the CMA will apply a percentage rate of up to 30% to the undertaking's relevant turnover. The starting point will depend upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. When making its assessment of seriousness, the CMA will consider a number of factors.[761]

6.35 The relevant turnover is the CMA's analysis of the turnover of the undertaking in the relevant product market and geographic market affected by the infringement in the undertaking's last business year. Generally, relevant

[760] *OFT423*, paragraphs 2.3–2.11.
[761] *OFT423*, paragraphs 2.4–2.6. In accordance with *OFT423*, paragraph 2.6, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors. The assessment will be made on a case-by-case basis, taking account of all the circumstances of the case.

turnover will be based on figures from an undertaking's audited accounts, but in exceptional circumstances it may be appropriate to use a different figure.[762]

6.36 When assessing relevant markets for these purposes, it is not necessary for the CMA to carry out a formal analysis: it is sufficient for the CMA to be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement.[763]

Relevant turnover in this investigation

6.37 As the duration of the Infringement continued until 2 February 2016 (see step 2 below), the CMA has based its calculation of relevant turnover on sales in the Addressees' respective financial years, ending 31 December 2015.

6.38 As set out in Part 4 above, the CMA finds the Relevant Markets to be:

a. Full Cleanroom Laundry Services in GB, which includes Cleanroom Garment/other garment rental;

b. Intermediate Cleanroom Laundry Services in GB, which includes: (i) Cleanroom Garment/other garment rental, (ii) the supply of these services to customers which do not technically need this level of laundry services but which nevertheless purchase them, and (iii) the supply of these services to clean sections of HSSDs - and excludes: (i) the supply of these services to contaminated sections of HSSDs, (ii) the supply of these services to operating theatres, or (iii) Barrier Laundry Services; and

c. Consumables in (at least) GB.

Relevant turnover – Fenland

6.39 Fenland has challenged the CMA's view that there is a Relevant Market which includes supply to all customers purchasing Intermediate Cleanroom Laundry Services. Defining a separate market for the supply to customers which purchase but do not necessarily need Intermediate Cleanroom Laundry Services, or including the supply to these customers within a wider market

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[762] *OFT423*, paragraphs 2.8–2.10. Paragraph 2.7 of *OFT423* provides that the undertaking's last business year is the financial year preceding the date when the infringement ended.

[763] The Court of Appeal held in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 169: '*… neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty*.'. The Court of Appeal held that it sufficed for the OFT to '*be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*' (paragraphs 170–173. See also paragraph 189). See *Argos and Littlewoods v OFT* [2005] CAT 13, paragraphs 176–178, and *JJB Sports v OFT* [2005] CAT 22, paragraphs 112, 115 and 119.

including Barrier Laundries, would not alter the CMA's conclusion as to the scope of the of the Infringement. The CMA has concluded that the supply to all customers purchasing Intermediate Cleanroom Laundry Services (except food sector customers) is covered by the Infringement.

6.40 The CMA has calculated the relevant turnover of Fenland based on sales made by Fenland within the Relevant Markets under the Micronclean Brand (excluding sales to food customers) as £[✂].[764]

6.41 In order to calculate relevant turnover in the Relevant Market for Intermediate Cleanroom Laundry Services, the CMA has included sales made from each Party's 'intermediate' Cleanroom Laundry.

6.42 Fenland submitted that it is inappropriate to include much of the turnover which it generated from its 'Class 6'-classified Cleanroom Laundry at Louth, on the basis that some of these customers may not necessarily require laundry services classified to at least the standard of Intermediate Cleanroom Laundry Services.[765] These submissions are discussed in more detail in Part 4.B. and paragraphs 5.21 to 5.29 above. The CMA has concluded that all services supplied from Fenland's Louth plant were within the scope of the Relevant Market for Intermediate Cleanroom Laundry Services (see Part 4.B. above), and – with the exception of any sales to food sector customers – the scope of the Infringement (see paragraphs 5.21 to 5.29 above).[766] As a result, the calculation of Fenland's penalty has been based on all sales made from its Louth plant, except sales made to food sector customers.

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[764] This amount comprises the sum of: (i) £[✂] of '*Class 4*' Skegness laundry sales, £[✂] of '*Class 6@4*' Louth laundry sales, £[✂] of '*Class 6*' Louth laundry sales and £[✂] of '*Industrial*' Louth laundry sales (see URN 01173 (full reference at footnote 418 above), p.5 (response to Question 3); and (ii) £[✂] of Consumables (GB) in 2015 (see URN 00055.1 (Fenland turnover breakdown, in response to Question 5(a) of the First Fenland Notices – revised version as disclosed on 27 June 2017). Following URN 01340 (Fenland DPS WRs), paragraphs 2.15–2.16, the CMA then deducted from the sum noted at (ii) above sales made by Fenland to Berendsen Newbury totalling £[✂]: URN 01374 (Fenland email of 13 September 2017 relating to sales values); URN 01373 (full reference at footnote 40 above). The CMA has stated Fenland's relevant turnover figure, and all subsequent figures in the penalty calculations set out in this Decision, to the nearest pound.

[765] See e.g. URN 01121 (Fenland response dated 8 March 2017 to the Third Fenland Notice), pp.6–7 (response to Question 4); URN 01340 (Fenland DPS WRs), paragraph 2.12.1. See also the submissions discussed in more detail in Part 4.B. and paragraphs 5.21 to 5.29 above.

[766] No laundry services were supplied from Fenland's Louth plant to operating theatres or to contaminated sections of HSSDs.

Relevant turnover – Berendsen

6.43 The CMA has calculated the relevant turnover of Berendsen, based on sales made by Berendsen Newbury within the Relevant Markets under the Microclean Brand as £[✂].[767]

6.44 The financial year of Berendsen Newbury ended 31 December 2015 lasted 18 months.[768] To calculate relevant turnover on a 12-month basis, the CMA considers it appropriate, in the circumstances of this investigation, to pro-rate by two-thirds sales made in that year by Berendsen Newbury.

6.45 No additional relevant sales were generated by (or should be ascribed to) Berendsen plc, notwithstanding that it operates ISO Class 8 Cleanroom Laundries under the Guardian brand. Including such sales at step 1 would be disproportionate because, for example, the CMA has seen no evidence that sales by Berendsen plc's Guardian unit were affected by the Infringement.

6.46 In order to calculate relevant turnover in the Relevant Markets for Cleanroom Laundry Services, the CMA has included each Party's sales to the clean sections of HSSDs.

6.47 Berendsen submitted that the CMA had not established that sales to HSSDs were included in a relevant market affected by the Infringement.[769] These submissions are discussed in more detail in Part 4.B. and paragraph 5.30 above. The CMA has concluded that services supplied to clean sections of HSSDs are within the scope of the Relevant Markets for Cleanroom Laundry Services (see Part 4.B. above), and the scope of the Infringement (see paragraph 5.30 above).[770] As a result, the calculation of penalties has been based on all sales made to the clean sections of HSSDs by the Parties.

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[767] This amount comprises the sum of: (i) £[✂] of '*Cleanroom Laundry Sales*' (excluding direct sales of non-disposable garments); and (ii) £[✂] of '*Consumables Sales*': see URN 01127 (Berendsen response dated 14 March 2017 to the Third Berendsen Notice), at p.6 (Table 4.1)). Following URN 01333 (Berendsen DPS WRs), paragraphs 4.10–4.13, the CMA then deducted from the sum noted at (i) above – which did not include any sales to food sector customers – sales generated from the cleaning of goggles and from processing laundry using non-classified laundry facilities: URN 01369 (full reference at footnote 40 above), paragraphs 1.7–1.8 and Annex 1; URN 01373 (full reference at footnote 40 above).

[768] See URN 00973 (full reference at footnote 53 above), p.5 (as printed). The CMA notes that '*Berendsen Newbury's 2015 financial year was extended until 31 December 2015 in order to align the financial year with the rest of the Berendsen group. 2015 figures above therefore includes sales made across an 18 month period*': URN 00036.1 (full reference at footnote 97 above), p.13.

[769] See e.g. URN 01333 (Berendsen DPS WRs), paragraphs 4.3–4.9. See also the submissions discussed in more detail in Part 4.B. and paragraph 5.30 above.

[770] No laundry services were supplied from Fenland's plants at Skegness and Louth, or Berendsen Newbury's plant at Newbury, to operating theatres or to contaminated sections of HSSDs.

Starting point percentage in this case

6.48 The CMA considers that it is appropriate to apply, to each of the Addressees, a starting point of 16% of relevant turnover in relation to the Infringement. The CMA has, when determining this starting point and assessing the seriousness of the Infringement, taken into account the factors set out at paragraphs 6.49–6.51 below.

6.49 The CMA considers that the Infringement was an infringement 'by object' – that is, the Restrictions had as their 'object' the prevention, restriction or distortion of competition: see Part 5.E. above. Market-sharing agreements are inherently anti-competitive, as they artificially restrict the number of suppliers able to serve customers within the scope of the relevant agreements. They are among the most serious competition law infringements.[771]

6.50 However, not all 'by object' infringements have the same degree of seriousness.[772] Accordingly, the CMA has also taken into consideration the following factors, which relate to the overall context relevant to the Restrictions.

a. The market sharing in this case was not covert. Certain details were openly provided during the CMA's review of *Micronclean/Guardline*.[773]

b. The CMA has concluded that the Parties participated in an agreement which infringed the Chapter I prohibition during the Relevant Period. The CMA does, however, recognise that the Restrictions originated in the context of the wider Joint Venture, which started in the 1980s.[774] It is possible that any restrictions similar to, and pre-dating, the Restrictions may have been justified in competition law terms for a period of time following the start of the Joint Venture (i.e. before the period under investigation).[775] However, the CMA has not reached a view on this, given the focus of the CMA's investigation on the Relevant Period and the insufficient evidence available to the CMA (for example, due to the time that has elapsed since the 1980s).

c. In general, cooperation between undertakings aimed at developing technology in genuinely innovative ways that would not be possible without that cooperation (and which do not restrict competition

[771] *OFT423*, paragraphs 1.4 and 2.4. Generally, the CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law: *OFT423*, paragraph 2.5.
[772] This is consistent with Berendsen's submissions in URN 01333 (Berendsen DPS WRs), paragraphs 4.21 and 4.23; URN 01380 (full reference at footnote 39 above), p.16 at lines 1–21.
[773] See **Annex A**, paragraph A.3.
[774] See, for example, paragraph 3.40 above and **Annex D**, paragraphs D.1–D.5.
[775] See Part 5.F. (e.g. at paragraph 5.138 above) and Part 5.J. (e.g. at paragraphs 5.194–5.195 above).

disproportionately) can provide significant consumer benefits. Such cooperation should not be deterred by the application of competition law.

d. The Infringement continued, and continued to be a restriction 'by object', throughout the Relevant Period. However, in the latter part of the Relevant Period, i.e. in February/March 2015, the Passive Sales Letters recorded an agreement to '*not enforce*' the '*restrictions*' on a Party responding to '*passive sales*' enquiries from customers allocated to the other Party.[776]

6.51 In accordance with *OFT423*, the CMA has also taken into account the following factors, set out in *OFT423*.

a. **The Parties' market shares.** Based on **Annex C**, the Parties' combined shares in Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services exceeded 80%,[777] while their share of the third Relevant Market (i.e. Consumables) was [10-20]% following *Microncleanl/Guardline*.[778]

b. **Effect on competitors, structure of the market, and entry conditions.** The conduct affected almost all of each of the Party's respective activities in the Relevant Markets, which are GB-wide in scope.[779] Cleanroom Laundry Services markets have been slowly shrinking over the past decade, and offer limited opportunity for new entry. For example, during the Relevant Period, the number of Cleanroom Laundry Services providers in GB fell from seven to three: see **Annex C**. Although competitors have been exiting the sector, the CMA has seen no evidence that this resulted from the Infringement.

c. **Nature of the product.** Cleanroom Laundry Services and Consumables, and, in particular, timely and regular deliveries of laundered garments, appear to be a necessary purchase for certain customers. For example, Fenland submitted that *'a missed or delayed delivery can require a cleanroom to be shut down, causing significant losses and potentially placing the lives of NHS patients who rely on their pharmaceutical products at risk'*.[780] On the other hand, customers are often large and

[776] See paragraph 3.98 above.
[777] See Table C1 and Table C2 in **Annex C**.
[778] See Table C3 in **Annex C**.
[779] See Part 4.C. above.
[780] URN 00205.2 (full reference at footnote 25 above), paragraph 5.8.4(b). See also URN 00201.1 (full reference at footnote 25 above), paragraph 4.14.

sophisticated businesses, with cleanroom purchases representing only a small proportion of their overall costs.[781]

d. **Effect on third parties (including customers).** Any harm would be expected to include a reduction in choice, increased costs, and/or decreased innovation to the detriment of customers.

6.52 The CMA's assessment of the above factors in the round is that, whilst the nature of the 'by object' restriction is sufficiently serious to incur a penalty towards the high end of the range within *OFT423*, it is appropriate for the CMA to exercise its discretion to apply a lower penalty, given the mitigating effect of certain of these factors in this case.

6.53 Having applied the 16% starting point to the relevant turnover set out above, at the end of step 1:

a. Fenland's penalty is £[✂]; and

b. Berendsen's penalty is £[✂].[782]

II. Step 2 – adjustment for duration

6.54 The starting point under step 1 may be increased to take into account the duration of an infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year.[783]

6.55 The CMA considers the duration of the Infringement to have been from 30 May 2012 to 2 February 2016 (3 years, 8 months and 4 days). Therefore, the rounded step 2 duration multiplier is 3.75.

6.56 Having applied the relevant principles of *OFT423* (summarised above), and a factor of 3.75 to the penalties at the end of step 1, at the end of step 2:

a. Fenland's penalty is £[✂]; and

b. Berendsen's penalty is £[✂].

6.57 As discussed in paragraphs 5.241 to 5.244 above, the CMA considers that it is appropriate to hold Berendsen plc jointly and severally liable for infringing conduct on the part of Berendsen Newbury from 13 September 2014 (the date of the Newbury Acquisition) to 2 February 2016. Berendsen plc is not liable for the proportion of the penalty that relates to the period prior to 13 September

[781] For example, URN 00141.1 (full reference at footnote 19 above), paragraph 19; URN 00120.1 (Fenland presentation on prioritisation dated 7 June 2016), slide 22.
[782] The CMA distinguishes, as appropriate, between the respective liabilities of Berendsen Newbury and Berendsen plc from step 4 onwards.
[783] *OFT423*, paragraph 2.12.

2014. Since Berendsen plc is only liable for part of the Relevant Period, the CMA is required to identify a suitable approach to quantifying the liability of Berendsen plc. In this case, the CMA considers that the appropriate approach is to calculate the financial liability for Berendsen plc based on the proportion of the Relevant Period for which Berendsen plc owned Berendsen Newbury (i.e. following the Newbury Acquisition).[784] The CMA therefore distinguishes, from step 4 onwards below, between the respective liabilities of Berendsen Newbury and Berendsen plc, as appropriate.

III. Step 3 – adjustment for aggravating and mitigating factors

6.58 The amount of the financial penalty at the end of step 2 may be increased where there are aggravating factors, and/or decreased where there are mitigating factors.[785] In the circumstances of this case, the CMA has adjusted the penalty to take account of the factors set out below.

Aggravating factors – involvement of directors or senior management

6.59 The CMA considers that it should take into account as aggravating factors the involvement of Fenland directors and senior management, and the involvement of Berendsen Newbury directors and senior management, in the design and implementation of the Restrictions (and hence the Infringement).

a. The directors and senior management of Fenland and Berendsen Newbury played a leading role in the correspondence leading to the Parties entering into the TMLAs,[786] and signed the TMLAs.[787]

b. The directors and senior management of Fenland and Berendsen Newbury implemented the territorial and customer allocation agreed between the Parties throughout the Relevant Period (including after the Newbury Acquisition). To this end, for example, they exchanged maps and customer lists[788] and referred on to each other customer sales leads information.[789]

c. In addition, certain directors and senior management at Fenland and Berendsen Newbury had a number of discussions and meetings regarding the future of the Joint Venture – including one referring to

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[784] The pre-acquisition portion ran from 30 May 2012 to 12 September 2014 (2 years, 3 months and 14 days), equivalent to approximately 2.29 years. The post-acquisition portion ran from 13 September 2014 to 2 February 2016 (1 year, 4 months and 21 days), equivalent to approximately 1.39 years.
[785] See *OFT423*, paragraphs 2.13–2.15, for a non-exhaustive list of aggravating and mitigating factors.
[786] See paragraphs 3.66–3.75 above.
[787] Each TMLA was signed by [Fenland Director A] and [Fenland Director E] and [Berendsen Newbury Director A]. See further, paragraph 3.76 above and **Annex B**, Table B1 and Table B2.
[788] See paragraphs 3.107–3.119 above.
[789] See, for example, paragraph 3.141 above.

keeping a '*No active selling into the other party's territory*' rule – following the Newbury Acquisition.[790] Those discussions and meetings led to a re-confirmation in February/March 2015 of each Party's agreement to '*not proactively solicit customers*' in the other Party's territory.[791]

6.60 The CMA expects directors of each Party to be aware of competition law issues and considers that company directors have an additional responsibility, beyond that of other employees, not to infringe the law. Seeking legal advice is not sufficient, in itself, to absolve directors of their specific responsibilities in this regard.[792] The CMA considers that the points in this paragraph apply regardless of whether or not:

a. a company is small in size (see paragraph 5.169.c. above in this regard);

b. the relevant actions could have been undertaken without the necessary involvement of senior management; and

c. the relevant conduct had its roots in arrangements pre-dating the appointment of the relevant director.

6.61 For these reasons, the CMA rejects submissions that it would be unfair to apply a 'director or senior management' aggravating factor in this case.[793]

6.62 The CMA has set out at paragraphs 3.105 to 3.141 above its finding that Berendsen Newbury directors and senior management implemented, throughout the Relevant Period (including after the Newbury Acquisition), the territorial and customer allocation agreed between the Parties. Berendsen submitted that no uplift for the involvement of Berendsen directors and senior management should be applied in relation to the period after the Newbury Acquisition, since any such involvement changed in nature at that point. According to Berendsen, the actions of Berendsen plc senior management in

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[790] See, e.g. URN 00068.16 (full reference at footnote 168 above), p.6. See also, paragraphs 3.48–3.55 above and **Annex D**, paragraphs D.22–D.38. These meetings were attended by e.g. [Fenland Director A] and [Fenland Director E] (see **Annex B**, Table B1).

[791] URN 01005 (email dated 1 March 2015 from [Fenland Director A] to [Fenland Director E], [Fenland Director F] and [Fenland Director C] (all of Fenland), provided to the CMA during the CMA's review of *Fenland/Fishers* on 2 October 2015)), which refers to '*the new position*' as '*discussed with [Berendsen plc Manager A] at Berendsen* [plc]'.

[792] Judgment in *Bundeswettbewerbsbehörde v Schenker & Co. AG,* C-681/11, EU:C:2013:404, paragraph 38: *'the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct'*. See also paragraph 41: *'It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine'*.

[793] URN 01340 (Fenland DPS WRs), paragraphs 4.3.2–4.6; URN 01333 (Berendsen DPS WRs), paragraph 4.30(a).

relation to the Newbury Acquisition and in particular subsequently, were the 'driving force' which led to the termination of the Joint Venture.[794]

6.63 The CMA considers it appropriate to apply an aggravating factor to Berendsen Newbury's liability given the continued involvement of Berendsen Newbury directors in implementing the Infringement throughout the Relevant Period, including after the acquisition by Berendsen plc. The CMA has taken into account the actions of senior managers at both of the Parties in bringing the Joint Venture to an end – separately, as a mitigating factor (see paragraphs 6.72 to 6.76 below).

6.64 Given the above, in the circumstances of this case to reflect the involvement of Fenland and Berendsen directors or senior management the CMA considers it appropriate to apply at step 3 an increase of 5% to each of the penalties at the end of step 2.

Mitigating factors – genuine uncertainty

6.65 For the reasons set out at Part 6.C. above, the CMA has concluded that the Infringement was committed intentionally or negligently. As a subsequent and discrete matter, the CMA considers that genuine uncertainty as to whether the Restrictions constituted an infringement of competition law should be taken into account as a mitigating factor at step 3.

6.66 The CMA has had regard, in particular, to two factors which may have contributed to genuine uncertainty on the part of Fenland and Berendsen.

a. Although evidence from that time is scarce, the original context of the Joint Venture meant that it is possible that any previous restrictions of a similar nature may originally have been justified for a limited period of time, in competition law terms. The long-running nature of the Joint Venture, and the evolution over time of the context in which it operated, may have given rise to uncertainty on the part of the Parties as to whether, during the Relevant Period, the arrangements were (and/or continued to be) compliant with competition law.

b. There was various pre-investigation correspondence between the OFT/CMA and one (or both) of the Parties prior to the launch of this investigation, as further detailed in **Annex A**. The Parties submitted that they interpreted some of this pre-investigation correspondence as

[794] URN 01333 (Berendsen DPS WRs), paragraphs 4.24–4.31; and URN 01380 (full reference at footnote 39 above), p.17, line 14 to p.19, line 6.

supportive of a view that the CMA considered the Restrictions to be lawful.[795]

6.67 In relation to the pre-investigation correspondence referred to at paragraph 6.66.b. above, the CMA acknowledges the following points.

a. The Advisory Letters did not refer to market sharing or the TMLAs.[796] The Parties submitted that they inferred, upon receipt of those letters, that the CMA (i) had reviewed the TMLAs[797] and other relevant information, and (ii) had concerns only in relation to information exchange in the form of pricing discussions, which was the only specific competition law concern mentioned in the Advisory Letters.[798]

b. The TMLAs were disclosed by the Parties to the CMA on 9 May 2014, and the CMA first notified any concerns in relation to a possible market sharing infringement of the Chapter I prohibition only in February 2015 (in the case of Berendsen Newbury) and November 2015 (in the case of Fenland).[799]

c. In the interim period between the Parties having disclosed the TMLAs to the CMA and having received the Advisory Letters, there was correspondence between the CMA and the Parties (in the context of the final stages of the *Micronclean/Guardline* merger review) and between the CMA and Fenland (in the context of Fenland's request for informal mergers' advice on a potential merger between the Parties). None of this correspondence in this interim period referred to market sharing or the TMLAs.

6.68 The CMA has taken into consideration, both separately and in the round, the factors referred to in paragraphs 6.66 and 6.67 above. The CMA accepts that there may have been genuine uncertainty on the part of the Parties as to the lawfulness of the Restrictions because of the nature of the Joint Venture, and the evolving context in which it operated.

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[795] For example, the sale and purchase agreement for the Newbury Acquisition entered into on 13 September 2014 noted amongst other things that (i) the TMLAs were disclosed to the CMA before 13 September 2014, and (ii) the CMA did not contact either Fenland or Berendsen Newbury before 13 September 2014 in relation to any antitrust concerns arising from the TMLAs: Details were set out in (but for the purposes of this Decision have been redacted from) URN 01144 (full reference at footnote 705 above), clause 7.22.

[796] See **Annex A**, paragraphs A.6–A.9.

[797] The TMLAs were disclosed on 9 May 2014 to the CMA's Merger unit in the last weeks of its *Micronclean/Guardline* phase 1 merger review; the CMA's decision to clear that merger did not refer to the TMLAs: see **Annex A**, paragraph A.3. The CMA first informed the Parties in 2015 of any concerns in relation to a possible infringement of the Chapter I prohibition: see **Annex A**, paragraphs A.9. and A.13.

[798] URN 01143 (Advisory Letter sent on 16 February 2015 to Berendsen Newbury), pp.1–2; Fenland received a mirror-image letter.

[799] **Annex A**, paragraphs A.9. and A.13.

6.69 Further, while the CMA accepts that certain pre-investigation correspondence may have given rise to some genuine belief on the part of the Parties that the CMA had no concerns about the lawfulness of the Restrictions, the CMA also notes the following points of context in relation to that correspondence.

a. The Advisory Letters were issued almost three years after the Parties entered into the TMLAs and, in line with the general principle that businesses should self-assess the compliance of their commercial arrangements with competition law, encouraged the Parties to carry out such a self-assessment.

b. All the relevant pre-investigation correspondence took place more than two years after the Parties entered into the TMLAs. As such, that correspondence (whether in isolation, or in combination with the factor at paragraph 6.66.a. above) could only have given rise to any genuine uncertainty in the final 20 months or so of the Relevant Period, and therefore cannot have affected the negotiation, agreement and implementation of the Restrictions before that time.

c. None of the relevant pre-investigation correspondence, including the Advisory Letters, indicated that the Restrictions may be lawful.

6.70 Berendsen further submitted that since the actions on the part of the CMA had contributed to a reasonably held belief that the Restrictions did not infringe the Act, the CMA should (i) impose no fine, for reasons of legal certainty, or (ii) apply a reduction of at least 50% at step 3, in light of the *Lladró Comercial* and *National Grid* cases.[800] Whilst the CMA considers that genuine uncertainty should be taken into account as a mitigating factor for the reasons set out at paragraphs 6.66 and 6.67 above, it rejects Berendsen's submissions on the size of adjustment in relation to any genuine uncertainty. The CMA considers that the two cases cited above differ materially from this case and do not support Berendsen's submission. For example, in those cases a competition authority had been specifically requested to assess and decide whether an agreement was compliant with competition law or had at least been closely involved in putting in place the infringing conduct.

6.71 In the circumstances of this case the CMA considers that, to reflect genuine uncertainty on the part of the Addressees as to whether the Restrictions constituted an infringement it would be appropriate to apply at step 3 a reduction of 20% to each of the penalties at the end of step 2.[801]

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[800] URN 01333 (Berendsen DPS WRs), paragraphs 4.32–4.42, and URN 01380 (full reference at footnote 39 above), p.19, line 7 to p.22, line 12.
[801] This is consistent with case law. See, for instance, judgment in T-65/99 *Strintzis Lines Shipping SA v Commission*, 2003 II-05433, paragraph 171.

Mitigating factors – termination of the Infringement

6.72 The CMA considers that it should take into account termination of the Infringement as a mitigating factor at step 3.

6.73 The Joint Venture was terminated on 3 February 2016, prior to the launch of this investigation. The Addressees submitted that antitrust risk was one reason for terminating the Joint Venture,[802] and that the possibility of termination was considered much earlier than February 2016.[803] The Addressees' submissions in this regard are consistent with some evidence pre-dating termination of the Joint Venture:

a. a document prepared in March 2015 in the context of Fenland's planned acquisition of Fishers refers to discussions of a possible termination of the Joint Venture having been based on '*a particular focus on ensuring compliance with competition law*'.[804] and

b. one Party (i.e. Berendsen Newbury) noted in May 2015, in an internal risk register, the action '*Get out of Micronclean Ltd* [i.e. JVCo]' – apparently in the context of addressing antitrust risk.[805]

6.74 While termination took place around one year after the CMA issued the Advisory Letters,[806] the Advisory Letters did not mention market sharing allegations. Notwithstanding that, on 23 February/2 March 2015 the Parties recorded, in connection with the Passive Sales Letters, their agreement to '*not enforce*' the '*restrictions on passive sales*',[807] without reference to the 'active sales' element of the Restrictions. The CMA notes that the Passive Sales Letters were exchanged within a few weeks of the CMA having issued the Advisory Letters – and the Addressees' submissions that the Passive Sales Letters likely resulted from the Parties' responses to the Advisory Letters.[808]

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[802] See Fenland submissions at e.g. URN 01139 (Fenland SO WRs), footnote 32, and URN 00141.1 (full reference at footnote 19 above), paragraph 9. See Berendsen submissions at e.g. URN 00140.1 (full reference at footnote 19 above), paragraph 29.

[803] For example, around the time of the Newbury Acquisition in September 2014: URN 01142 (Berendsen SO WRs), paragraph 8.15. Berendsen also submitted, e.g. that it envisaged termination of the Joint Venture before the Newbury Acquisition completed – and, conversely, that '*[i]t was not Berendsen's strategy to terminate the JV when it acquired Newbury*': URN 00067.9 (full reference at footnote 117 above), p.3); URN 00140.1 (full reference at footnote 19 above), paragraph 13.

[804] URN 00186.118 (Proposal for the restructuring of JVCo dated 13 March 2015), p.1.

[805] URN 00193.89 (Berendsen Newbury Risk Register of 20 May 2015), p.3 (action marked against '*CMA Discussions*').

[806] The CMA issued the Advisory Letters on 16 February 2015: See **Annex A**, paragraph A.6.

[807] See paragraph 3.98 above.

[808] URN 00141.1 (full reference at footnote 19 above), paragraph 10. See also e.g. URN 01142 (Berendsen SO WRs), paragraph 8.4.

6.75 The CMA considers that the Passive Sales Letters, and ultimately the termination of the Joint Venture, required the agreement of both Parties. It is not clear to the CMA that either of these events was driven principally by one Party rather than the other Party. Accordingly, the CMA considers that both Fenland and Berendsen acted sufficiently quickly, after the CMA had clearly articulated possible market sharing concerns to each Party[809] – and, in any event, before any formal intervention by the CMA – to terminate the Joint Venture as to warrant a step 3 reduction to reflect the timing of that termination.[810]

6.76 In the particular circumstances of this case the CMA considers that, to reflect the timing of the termination of the Infringement, it would be appropriate to apply at step 3 to apply a reduction of 20% to each of the penalties at the end of step 2.

Other mitigating factors

6.77 The CMA does not consider that it would be appropriate to include any other mitigating factors in the calculation of the penalties in this case.

6.78 In particular, no party provided cooperation to the CMA beyond that which would be ordinarily expected, given the CMA's powers to compel the provision of information, and which enabled the enforcement process to be conducted and concluded more effectively and/or speedily.[811]

Cumulative effect of adjustments made at step 3

6.79 The adjustments at step 3 set out above result in a net reduction of 35% to each of the penalties at the end of step 2, so that at the end of step 3:

a. Fenland's penalty is £[✂]; and

b. Berendsen's penalty is £[✂].[812]

IV. Step 4 – adjustment for specific deterrence and proportionality

6.80 The CMA may adjust any penalty at step 4 for specific deterrence to ensure that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future; or for proportionality,

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[809] See **Annex A**, paragraphs A.9. and A.13.

[810] Including intervention of the sort referred to in *OFT423*, footnote 27: *'Intervention by the OFT would be by the exercise of its powers under sections 26 to 28A of the CA98'*. The CMA opened a formal investigation, and issued information requests under section 26 of the Act, on 30 March 2016.

[811] Fenland submitted that the CMA should apply a reduction to Fenland's penalty, to reflect the level of cooperation provided by Fenland. URN 01340 (Fenland DPS WRs), paragraphs 3.1–3.7.

[812] The CMA distinguishes, as appropriate, between the respective liabilities of Berendsen Newbury and Berendsen plc from step 4 onwards.

having regard to appropriate indicators of the size and financial position of the relevant undertaking, as well as any other relevant circumstances of the case. At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustments at step 4 may result in either an increase or a decrease to the penalty.[813]

6.81 Where necessary, the CMA may decrease the penalty at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.[814]

Fenland

6.82 The penalty at the end of step 3 for Fenland, i.e. £[✂], would represent:[815]

- [✂]% of Fenland's average annual worldwide turnover in the latest three years for which accounts are available, and [✂]% of Fenland's worldwide turnover in the last year for which accounts are available;
- [✂]% of Fenland's average annual profit after tax in the latest three years for which accounts are available, and [✂]% of Fenland's profit after tax in the last year for which accounts are available;
- [✂]% of the sum of (i) Fenland's net assets in the last year for which accounts are available, and (ii) Fenland's total annual dividends in the last three years for which accounts are available; and
- [✂]% of Fenland's relevant turnover.

6.83 Assessing this penalty in the round, having regard to Fenland's size and financial position and the nature of the infringement, the CMA considers that it is appropriate to [✂] Fenland's penalty at the end of step 3.

6.84 Accordingly, the penalty for Fenland at the end of step 4 is £510,118.

Berendsen

6.85 As described in Part 5.L. above, Berendsen plc is held jointly and severally liable for infringing conduct on the part of Berendsen Newbury from 13

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[813] *OFT423*, paragraphs 2.16–2.20. The CMA has taken into account a range of financial indicators in this regard, based on accounting information publicly available and/or provided by the Addressees.
[814] *OFT423*, paragraph 2.20.
[815] The latest accounts available for Fenland are for its financial years ended 31 December 2016, 31 December 2015, and 31 December 2014: see footnote 46 above.

September 2014 to 2 February 2016. After pro-rating as described at paragraph 6.57 above, liability for Berendsen's penalty at the end of step 3 is:

a. £[✂], for which Berendsen Newbury alone would be liable; and

b. £[✂], for which Berendsen Newbury and Berendsen plc are jointly and severally liable.

6.86 The CMA has discretion when considering proportionality and specific deterrence in cases involving a subsidiary and its wider corporate group, and an infringement period that comprises periods before and after an acquisition of the subsidiary. The CMA may have regard to the financial indicators of the relevant subsidiary and/or those of the corporate group of which it forms part. In this particular case, Berendsen plc is jointly and severally liable for some, but not all, of the penalty of its subsidiary. In that context, the CMA considers it appropriate at step 4 to place weight on the financial indicators of (i) Berendsen Newbury alone in relation to the penalty for which Berendsen Newbury alone is liable, and (ii) Berendsen plc in relation to the penalty for which Berendsen Newbury and Berendsen plc are jointly and severally liable.[816]

6.87 The penalty at the end of step 3 for which Berendsen Newbury alone would be liable, i.e. £[✂], would represent:[817]

- [✂]% of Berendsen Newbury's average annual worldwide turnover in the latest three years for which accounts are available, and [✂]% of Berendsen Newbury's worldwide turnover in the last year for which accounts are available;[818]
- [✂]% of Berendsen Newbury's profit after tax in the last year for which accounts are available (and [✂]%[819] of Berendsen Newbury's profit after tax for the previous year);[820]

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[816] Accounts for Berendsen plc consolidate the financial statements of Berendsen plc and all its subsidiaries, including Berendsen Newbury: see e.g. URN 01462 (full reference at footnote 60 above), notes on p.129 (as printed) and p.169 (as printed).
[817] The latest accounts available for Berendsen Newbury are for its financial years ended 31 December 2016, 31 December 2015, and 30 June 2014: see footnote 53 above.
[818] The [✂]% average annual worldwide turnover in the latest three years figure is based on pro-rating down the reported figure for financial year ending 31 December 2015, for the reasons discussed in paragraph 6.44 above.
[819] The [✂]% profit after tax figure for the financial year ending 31 December 2015 is based on pro-rating down the reported figure for the year, for the reasons discussed in paragraph 6.44 above.
[820] Berendsen Newbury, in its FYE 30 June 2014, reported an anomalously low profit after tax figure (due to the inclusion of a number of exceptional costs). The CMA has therefore not taken into account Berendsen Newbury's three-year (i.e. including FYE 30 June 2014) average profit after tax, as the CMA considers that financial indicators may not represent fully Berendsen Newbury's size and financial position.

- [✂]% of the sum of (i) Berendsen Newbury's net assets in the last year for which accounts are available, and (ii) Berendsen Newbury's total annual dividends in the last three years for which accounts are available; and

- [✂]% of Berendsen Newbury's relevant turnover.

6.88 The penalty at the end of step 3 for which Berendsen Newbury and Berendsen plc would be jointly and severally liable, i.e. £[✂], would represent:[821]

- [✂]% of Berendsen plc's average annual worldwide turnover in the latest three years for which accounts are available, and [✂]% of Berendsen plc's worldwide turnover in the last year for which accounts are available;

- [✂]% of Berendsen plc's average annual worldwide turnover in the latest three years for which accounts are available, and [✂]% of Berendsen plc's profit after tax in the last year for which accounts are available;

- [✂]% of the sum of (i) Berendsen plc's net assets in the last year for which accounts are available, and (ii) Berendsen plc's total annual dividends in the last three years for which accounts are available; and

- [✂]% of Berendsen plc's relevant turnover (see paragraphs 6.43 to 6.47 above).

6.89 The figures set out in paragraph 6.88 above in respect of Berendsen plc suggest that some considerable uplift to the penalty for which both Berendsen entities would be jointly and severally liable might be necessary, to ensure deterrence. The CMA also provisionally considers the following points to be relevant to whether any adjustment should be made at this step.

a. Berendsen's penalty relates to the period after the Newbury Acquisition and, unadjusted, represents a material proportion (roughly [✂]%) of the price paid by Berendsen plc to acquire Berendsen Newbury.[822]

b. Any uplift would be due to the financial position of Berendsen plc, a company which acquired Berendsen Newbury part way through the Relevant Period, and which had no role in designing the TMLAs.[823]

6.90 Assessing this penalty in the round, having regard to the size and financial position of the respective Berendsen entities, and other relevant circumstances

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[821] The latest accounts available for Berendsen plc are for its financial years ended 31 December 2016, 31 December 2015, and 31 December 2014: see footnote 60 above.
[822] The purchase price paid by Berendsen plc for Berendsen Newbury was £[✂]; Details were set out in (but for the purposes of this Decision have been redacted from) URN 01144 (full reference at footnote 705 above), clause 4.1.1.
[823] See, for example, URN 01333 (Berendsen DPS WRs), paragraph 4.50(b)(i).

of the case (including the long-running and evolving context of the Joint Venture), the CMA considers that it is appropriate to:

a. [✂] to the penalty for which Berendsen Newbury alone would be liable; and

b. [✂] to the penalty for which Berendsen Newbury and Berendsen plc would be jointly and severally liable.

6.91 Berendsen submitted that the CMA should reduce the penalty for which Berendsen Newbury and Berendsen plc would be jointly and severally liable by at least 90%. Berendsen submitted that this would be [✂], in particular as only one of the factors referred to in this part of *OFT423* (i.e., size and financial position) clearly supported [✂]. Berendsen submitted that given that its role in any infringement was no worse than that of Fenland, and Fenland's relevant turnover was greater, the penalty for Berendsen should be reduced.[824]

6.92 Step 4 aims to allow for an overall assessment of the size of the penalty in the round, and consideration and appropriate weighting of a number of factors. In particular, the CMA will have regard to appropriate indicators of the size and financial position of the relevant undertaking (see paragraphs 6.80 and 6.81 above). In this case, the figures set out in paragraph 6.88 above would, in isolation, tend to warrant an increase at step 4. If, as proposed by Berendsen, the penalty for which Berendsen Newbury and Berendsen plc would be jointly and severally liable was reduced by 90% at step 4, the resulting penalty would represent [✂]. Having regard to this and all of the factors discussed at paragraphs 6.89 and 6.90 above, the CMA considers it appropriate to maintain its approach of [✂] at step 4 the penalty for which [✂].

6.93 Accordingly, the penalty for Berendsen at the end of step 4 comprises:

a. £169,285, for which Berendsen Newbury alone would be liable; and

b. £1,028,671 for which Berendsen Newbury and Berendsen plc would be jointly and severally liable.

[824] URN 01333 (Berendsen DPS WRs), paragraphs 4.47–4.54, and URN 01380 (full reference at footnote 39 above), p.23, line 20 to p.28, line 6.

V. Step 5 – adjustment to prevent maximum penalty from being exceeded and to avoid double jeopardy

6.94 The final amount of the penalty calculated according to the method set out above may not in any event exceed 10% of the worldwide turnover of the undertaking in its last business year.[825]

6.95 If a penalty or fine has been imposed by the Commission, or by a court or other body in another Member State in respect of an agreement or conduct, the CMA must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.[826]

Fenland

6.96 In the latest financial year for which accounts available, Fenland had worldwide turnover of £26,606,153.[827] 10% of that figure is £2,660,615. The CMA has assessed the penalty figures reached in respect of Fenland at the end of step 4 (£510,118) against the statutory cap threshold. This assessment has not necessitated any reduction at step 5.

6.97 No other penalties or fines applicable to the Infringement have been imposed by other bodies, so no adjustments are needed to account for the risk of double jeopardy.

6.98 At the end of step 5, therefore, Fenland's penalty remains £510,118.

Berendsen

6.99 Berendsen Newbury was acquired by Berendsen plc in September 2014. In this Decision, the CMA has distinguished, as appropriate, between the respective liabilities of Berendsen Newbury and Berendsen plc. The CMA proposes to apply the current statutory cap to each liability separately.[828]

6.100 In the latest financial year for which accounts are available, Berendsen Newbury had worldwide turnover of £8,332,656.[829] 10% of that figure is £833,266. The CMA has assessed the statutory cap threshold against the penalty at the end of step 4 for which Berendsen Newbury alone would be liable (£169,285). This assessment has not necessitated any reduction at step 5.

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[825] The Act, section 36(8); the Amended 2000 Turnover Order; *OFT423*, paragraph 2.21 and footnote 13.
[826] *OFT423*, paragraph 2.24.
[827] URN 01381 (full reference at footnote 45 above), p.6 (as printed).
[828] This approach accords with the judgment in *YKK v Commission, C-408/12 P,* EU:C:2014:2153, paragraphs 55–68.
[829] URN 01390 (full reference at footnote 52 above), p.8 (as printed).

6.101 In the latest financial year for which accounts are available, Berendsen plc had worldwide turnover of £1,110 million.[830] 10% of that figure is £111 million. The CMA has assessed the statutory cap threshold against the penalty at the end of step 4 for which Berendsen Newbury and Berendsen plc would be jointly and severally liable (£1,028,671). This assessment has not necessitated any reduction at step 5.

6.102 No other penalties or fines applicable to the Infringement have been imposed by other bodies, so no adjustments are needed to account for the risk of double jeopardy.

6.103 Accordingly, at the end of step 5, the penalty for Berendsen still comprises:

a. £169,285, for which Berendsen Newbury alone would be liable; and

b. £1,028,671, for which Berendsen Newbury and Berendsen plc would be jointly and severally liable.

VI. Step 6 – Application of reductions for leniency and settlement

6.104 The CMA will reduce an undertaking's penalty at step 6 where the undertaking has a leniency agreement, and/or agrees to settle, with the CMA.[831]

6.105 None of the Addressees entered into a leniency or settlement agreement with the CMA.

6.106 Therefore, the CMA does not make any adjustments at step 6 for either Fenland or Berendsen. Accordingly, at the end of step 6:

a. Fenland’s penalty in respect of the Infringement is £510,118.

b. Berendsen Newbury’s total penalty in respect of the Infringement is £1,197,956; and

c. Berendsen plc is liable – jointly and severally with Berendsen Newbury – for £1,028,671 of the amount specified in sub-paragraph b. above.

[830] URN 01462 (full reference at footnote 60 above), p.122 (as printed).
[831] *OFT423*, paragraphs 2.25–2.26.

VII. Summary and payment of penalty

Summary of penalty calculations

Table 3: Summary of the CMA's penalty calculations in respect of Fenland

	Fenland		**Entities comprising Berendsen**	
	Adjustment	**Penalty at end of step**	**Adjustment**	**Penalty at end of step**
Relevant turnover	-	£[✂]	-	£[✂]
Step 1 – starting point	16%	£[✂]	16%	£[✂]
Step 2 – adjustment for duration	3.75	£[✂]	3.75	£[✂]
Step 3 – adjustment for aggravating and mitigating factors	-35% (aggregate)	£[✂]	-35% (aggregate)	£[✂]
Step 4 – adjustment for specific deterrence and proportionality	[✂]	£510,118	[✂] (penalty for which Berendsen Newbury alone would be liable) [✂] (penalty for which Berendsen plc is jointly and severally liable)	£1,197,956 (of which Berendsen plc is jointly and severally liable for £1,028,671)
Step 5 – adjustment to ensure statutory cap is not exceeded and to avoid double jeopardy	No adjustment	£510,118	No adjustment(s)	£1,197,956 (of which Berendsen plc is jointly and severally liable for £1,028,671)
Step 6 – adjustment for leniency and/or settlement	No adjustment	£510,118	No adjustment(s)	£1,197,956 (of which Berendsen plc is jointly and severally liable for £1,028,671)
Final penalty	**£510,118**		**£1,197,956 (of which Berendsen plc is jointly and severally liable for £1,028,671)**	

Payment of penalty

6.107 The CMA requires the Addressees to pay the penalties specified in paragraph 6.106 above.

6.108 Each such penalty will become due to the CMA in its entirety, and must be paid to the CMA (as set out in the letter accompanying this Decision) by close of banking business, on 15 February 2018.[832] If that date has passed and:

- the period has expired during which an appeal may be made against the imposition, or amount, of that penalty without an appeal having been made, or
- such an appeal has been made and determined,

the CMA may commence proceedings to recover from the undertaking in question any amount payable which remains outstanding, as a civil debt due to the CMA.

Signed by the following who are members of, and together constitute, the Case Decision Group:

[✂]
Alasdair Smith, Inquiry Chair (Chair of the Case Decision Group), for and on behalf of the Competition and Markets Authority;

[✂]
Gavin Robert, Panel Member, for and on behalf of the Competition and Markets Authority; and

[✂]
Chris Jenkins, Economic Director, for and on behalf of the Competition and Markets Authority.

[832] The next working day two calendar months from the expected date of receipt of the Decision.

ANNEX A
SUMMARY OF PRE-INVESTIGATION CORRESPONDENCE WITH THE CMA

A.1. Some submissions made by Fenland and/or Berendsen in the investigation referred to certain pre-investigation correspondence between the CMA and one (or both) of the Parties. That correspondence, a summary of which is set out in this Annex A, took place before this investigation in the context of:

a. the OFT/CMA review of *Microclean/Guardline*;

b. informal advice, requested from the CMA by Fenland in July 2014, in relation to a potential merger of the Parties;

c. the Advisory Letters issued on 16 February 2015 to the Parties;

d. informal advice, requested from the CMA by Fenland in March 2015, in relation to the potential *Fenland/Fishers* transaction; and

e. the CMA review of *Fenland/Fishers*.

Microclean/Guardline – OFT/CMA phase 1 merger review

A.2. On 19 December 2013, the OFT 'called in' – i.e. sent JVCo an inquiry letter regarding – *Microclean/Guardline* (see paragraph 2.2.a. above). The OFT/CMA then investigated the transaction, under its merger control powers.

A.3. During the *Microclean/Guardline* merger review, on 20 December 2013 the Parties submitted that post-completion '*a number of transactions have taken place to transfer the customers of Guardline*' to Berendsen Newbury, Fenland and MPL – and that the Parties had '*sites in Newbury serving the South of the country, and Skegness serving the North*'.[833] On 10 March 2014, in reply to a follow-up question, the Parties explained that '*[p]rior to the acquisition, MNL* [i.e. Berendsen Newbury] *and Fenland supplied cleanroom laundry services and cleanroom consumables to customers according to trading areas based on routes that allowed vehicles to get from the Microclean plant out to the customer and back in the day[1]. Guardline UK customers were split between MNL and Fenland based on these pre-existing geographic trading areas*.'[834] On 9 May 2014, in reply to a later question on agreements between the Parties, the Parties (i) submitted that '*[t]he use of the* [Microclean] *name is controlled by the trademark user agreements*', and (ii) provided copies of the TMLAs.[835] The CMA's decision to clear *Microclean/Guardline*, made on 20

[833] URN 00983 (full reference at footnote 356 above), p.3 and p.23; see footnote 94 above.
[834] URN 00982 (full reference at footnote 82 above), p.61.
[835] See footnote 10 above.

May 2014, did not refer to the TMLAs, the Parties' respective use of the Trade Marks or respectively allocated territories.[836]

2014 request for informal merger advice

A.4. In July 2014, Fenland requested the CMA's informal mergers advice[837] on a potential merger of Fenland and Berendsen Newbury, which was discussed in a telephone call between Fenland and the CMA.

A.5. On 1 September 2014, CMA Mergers unit staff responded to Fenland's request,[838] noting that at that time CMA Mergers unit staff did '*not intend to call this in for investigation under the merger control rules based on the information we currently have*'. This view was partly based on suggestions during the review of *Microclean/Guardline* that '*Fenland and Microclean Newbury are not seen as competing entities for cleanroom laundry services by (potential) customers*'. CMA Mergers unit staff also noted that '*should a third party (such as a customer) raise a concern about the merger, we will revise this position and are likely to open an investigation, because such a concern would indicate that Fenland and Microclean Newbury may in fact be seen as competitors by at least some market participants'.*

Advisory Letters from the CMA

A.6. Based on the information known to it at that time, the CMA made an assessment against its prioritisation principles as to whether to pursue a formal investigation under the Act in relation to possible anti-competitive conduct by the Parties. The CMA decided at that time not to open a formal investigation, but to issue the Advisory Letters to the Parties on 16 February 2015, setting out concerns about possible anti-competitive conduct by the Parties.

A.7. The CMA noted in the Advisory Letters that it had '*come to our attention that discussions involving the setting of pricing may have taken place*' between the Parties. The Advisory Letters did not refer to the TMLAs, but did encourage self-assessment in order to establish the extent to which the Parties' activities complied with competition law. The Advisory Letters also noted that, while the CMA did not intend to pursue a formal investigation at that stage, having made an assessment against its prioritisation principles, the CMA was not precluded from revisiting this matter in the future – in particular, if its prioritisation assessment changed.

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[836] URN 00984 (*Microclean/Guardline* Decision).

[837] If asked to do so, the CMA may (in appropriate cases, where certain conditions are met) provide informal advice to parties involved in contemplated mergers: *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2, January 2014), paragraphs 2.8 and 6.23–6.38.

[838] URN 01003 (email dated 1 September 2014 from CMA to [Fenland Director A]).

A.8. On 20 February 2015, each Party sent a letter to the CMA acknowledging receipt of the Advisory Letters. Fenland stated that it had '*never been involved in price setting discussions*' with Berendsen Newbury.[839] Berendsen Newbury stated that it would '*be looking into this allegation further*'.[840]

A.9. Berendsen Newbury's lawyers decided to proactively contact '*the CMA case officer*'.[841] The CMA and Berendsen Newbury's lawyers exchanged brief emails on 23 February 2015, and again on 2 March 2015.

a. An email from the CMA on 2 March 2015 confirmed the limited matters discussed with Berendsen's lawyers, on a short telephone call, on 23 February 2015. The CMA explained, for example, that the Advisory Letters were issued following information that '*discussions had been taking place between Microncleαn* [Fenland] *and* [Berendsen] *Newbury – essentially on pricing and geographic market sharing*'.[842] The email is the CMA's only record of the call on 23 February 2015 (after which, the CMA and Berendsen's lawyers did not correspond further in this regard).

b. The correspondence described in paragraph A.9.a. above took place on the same dates as Berendsen Newbury and Fenland exchanged letters aimed at recording their agreement that '*the restrictions on passive sales in the TMLA* [sic] *should be removed*' (see paragraph 3.98 above). Notwithstanding that, Fenland submitted that it was not aware, before the launch of this investigation, of that correspondence. Fenland also submitted that it was not aware, before the events noted at paragraph A.13. below, that the CMA had any concerns about possible market-sharing between the Parties.[843]

2015 request for informal merger advice

A.10. On 16 March 2015, Fenland requested from the CMA informal mergers advice in relation to *Fenland/Fishers* (a deal described as comprising two steps).[844]

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[839] URN 01004 (Cover email and letter dated 20 February 2015 from [Fenland Director A] to CMA). This was Fenland's only response to the CMA in this regard after the CMA issued the Advisory Letters.
[840] URN 00036.61 (Letter dated 20 February 2015 from [Berendsen Newbury Director F] of Berendsen Newbury).
[841] URN 00193.80 (emails dated 19–20 February 2015 between Berendsen Newbury and [Law firm representing Berendsen Newbury] Neither Fenland nor any advisers of Fenland proactively telephoned the CMA immediately after the CMA issued the Advisory Letters.
[842] URN 00997 (email chain dated 23 February-2 March 2015 between CMA and [Law firm representing Berendsen Newbury]).
[843] See, for example, URN 00205.2 (full reference at footnote 25 above), paragraph 3.3 and footnote 5.
[844] '*Step 1*' involved '*Fenland acquiring the cleanroom laundry business of Fishers*' and would '*be conditional on CMA approval*'. '*Step 2*' involved '*the exercise of certain pre-emption rights by Fenland which would, in effect, terminate the joint venture arrangement with Newbury…. For commercial reasons, Fenland will only proceed with Step 2 once it has sufficient certainty that Step 1 will proceed*

A.11. On 8 April 2015, Fenland noted that it was trying to meet with, and taking advice from, CMA Mergers unit staff in relation to *Fenland/Fishers*.[845] On a telephone call on 15 April 2015, CMA Mergers unit staff stated that guidance would be provided, based on Fenland's briefing paper dated 16 March 2015, but that this was not to be considered informal advice. Based on the information available, CMA Mergers unit staff noted that there appeared to be a realistic prospect of finding a substantial lessening of competition ('SLC') in relation to *Fenland/Fishers*. CMA Mergers unit staff stated that whether Fenland's offer to terminate any arrangements with Berendsen Newbury would be sufficiently 'clear cut' to resolve concerns regarding a possible SLC would depend, in particular, on Berendsen Newbury plans and/or incentives to expand in the north of GB, and to continue to trade in the south of GB, in each case under its own name (i.e. not as 'Micronclean').

Fenland/Fishers – CMA phase 1 merger review

A.12. Fenland notified *Fenland/Fishers* to the CMA, by means of a final Merger Notice on 19 October 2015.[846] During the resulting phase 1 merger review, in the context of discussing the appropriate counterfactual, CMA Mergers unit staff raised with Fenland concerns about possible market sharing – as described at paragraphs A.13 and A.14 below.

A.13. On 12 November 2015, during a 'state of play' telephone call with Fenland and Fishers, CMA Mergers unit staff noted concerns about accepting a counterfactual involving the TMLAs, as they appeared to comprise a market-sharing agreement, which is normally a restriction of competition by object. However, CMA Mergers unit staff clarified no view had been reached on whether the TMLAs infringed competition law. Fenland submitted that this was the first occasion on which any CMA staff had informed Fenland specifically of any potential market sharing concerns in relation to the TMLAs.[847] On 18 November 2015, Fenland responded in writing, noting for example possible competition law justifications for the Joint Venture and/or the TMLAs.[848]

A.14. In an issues paper sent on 20 November 2015 to Fenland and Fishers, CMA Mergers unit staff stated that the TMLAs potentially comprised a market-sharing agreement, insofar as they prevented the Parties from competing against each other in their respective territories (except in relation to passive

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(including that the CMA will approve the acquisition of the Fishers business)': see URN 01006 (email and briefing dated 16 March 2015, from Fenland to CMA, on *Fenland/Fishers*), paragraphs 2.4–2.5.

[845] URN 00186.42 (Minutes of Fenland board meeting 8 April 2015), paragraph 7.

[846] URN 00998 (full reference at footnote 72 above).

[847] See e.g. URN 00008.1 (Letter from Fenland dated 31 March 2016 regarding prioritisation), p.3 (third paragraph); URN 00205.2 (full reference at footnote 25 above), paragraph 3.20.7; URN 01139 (Fenland SO WRs), paragraph 4.3 (fifth bullet), footnote 32 and paragraph 7.6.2.

[848] URN 00999 (full reference at footnote 88 above), e.g. pp.5–7 inclusive.

sales).[849] CMA Mergers unit staff also noted the Advisory Letters were not a comprehensive, formal statement of objections – and had invited the Parties to self-assess and/or seek legal advice on possible infringements of competition law in general.

A.15. CMA Mergers unit staff considered the TMLAs in the specific context of the counterfactual assessment in its phase 1 merger review of *Fenland/Fishers*. The CMA decision (made on 16 December 2015), stated that: *'In this case, the CMA considered whether to assess the Merger against a counterfactual absent the JV agreement* [i.e. the TMLAs]*. On the face of it, the JV agreement appears to impose horizontal territorial restrictions on active sales, resulting in a territorial partitioning of the market (see paragraphs 13 and 14 above). The CMA will not apply a counterfactual that involves violations of competition law.[9] In this case, the CMA considers that in the light of the potential justifications for these territorial restrictions given the use by both JV parties of the Micronclean trademark, it is not clear that the JV agreement infringes competition law. As a result, the CMA has not disregarded the existence of the JV agreement in its analysis of the counterfactual*.'[850]

Conclusion

A.16. The summary set out in this Annex A shows that the CMA, since it became aware of the TMLAs in May 2014, at various points notified the Parties of possible competition law concerns. In particular, CMA staff explicitly mentioned possible market sharing concerns to Berendsen Newbury's lawyers on 2 March 2015 (after Berendsen Newbury's lawyers proactively contacted the CMA on 23 February 2015), and to Fenland in November 2015.

[849] Albeit the CMA was not, at that stage, conducting an investigation under the Chapter I prohibition into the TMLAs.
[850] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 29.

ANNEX B
DIRECTORS OF FENLAND, BERENDSEN NEWBURY, BERENDSEN PLC AND JVCO DURING THE RELEVANT PERIOD

The tables in this Annex B contain details of directors of Fenland, Berendsen Newbury, Berendsen plc and JVCo respectively during the Relevant Period. Directors are listed in chronological order of appointment in each table within this Annex B.

Table B1: Fenland directors during the Relevant Period[851]

Director	*Date of appointment*	*Date of resignation*
[Fenland Director K]	[Unknown]	7 February 2013‡
[Fenland Director A]	15 July 1993	*N/A – still in post*
[Fenland Director B]	1 July 1996	*N/A – still in post*
[Fenland Director J]	6 May 2003	8 November 2013‡
[Fenland Director C]	21 April 2005	*N/A – still in post*
[Fenland Director D]	11 April 2007	7 November 2014
[Fenland Director E]	30 July 2007	*N/A – still in post*
[Fenland Director F]	20 January 2011	*N/A – still in post*
[Fenland Director G]	25 September 2014	*N/A – still in post*
[Fenland Director H]	22 June 2015	*N/A – still in post*
[Fenland Director I]	11 November 2015	*N/A – still in post*

‡ *Denotes a Fenland director not included in Annex B of the confidential versions of this Decision issued on 14 December 2017 to Fenland and Berendsen respectively.*

Table B2: Berendsen Newbury directors during the Relevant Period[852]

Director	*Date of appointment*	*Date of resignation*
[Berendsen Newbury Director A]	Before 23 October 1991	13 September 2014
[Berendsen Newbury Director B]	Before 23 October 1991	13 September 2014
[Berendsen Newbury Director C]	5 July 1994	15 January 2016
[Berendsen Newbury Director D]	2 December 2003	17 October 2014
[Berendsen Newbury Director E]	5 July 2010	13 September 2014
[Berendsen Newbury Director F]	5 July 2010	30 June 2016
[Berendsen Newbury Director G]	13 September 2014	1 April 2015
[Berendsen Newbury Director H]	13 September 2014	22 December 2016
[Berendsen Newbury Director I]	13 September 2014	*N/A – still in post*
[Berendsen Newbury Director J]	1 April 2015	*N/A – still in post*
[Berendsen Newbury Director K]	1 April 2015	*N/A – still in post*

[851] https://beta.companieshouse.gov.uk/company/00176558/officers (as at 3 October 2017).
[852] https://beta.companieshouse.gov.uk/company/01713052/officers (as at 29 September 2017). Berendsen submitted the following individuals began their employment on the following dates, which differ from their appointment dates: [Berendsen Newbury Director A] - [✂]; [Berendsen Newbury Director B] - [✂]; [Berendsen Newbury Director F] - [✂]; [Berendsen Newbury Director J] - [✂]: URN 00193.1 (full reference at footnote 135 above), pp.33–34.

Table B3: Berendsen plc directors during the Relevant Period[853]

Director	*Date of appointment*	*Date of resignation*
[Berendsen plc Director A]	1 January 2005	25 April 2013
[Berendsen plc Director B]	29 April 2005	11 September 2017
[Berendsen plc Director C]	16 May 2005	12 September 2017
[Berendsen plc Director D]	1 January 2010	31 July 2015
[Berendsen plc Director E]	1 March 2010	12 September 2017
[Berendsen plc Director F]	1 March 2010	12 September 2017
[Berendsen plc Director G]	1 March 2010	12 September 2017
[Berendsen plc Director H]	1 June 2012	12 September 2017
[Berendsen plc Director I]	1 March 2014	12 September 2017
[Berendsen plc Director J]	1 August 2015	12 September 2017

Table B4: JVCo directors during the Relevant Period[854]

Director	*Date of appointment*	*Date of resignation*
[Fenland Director A]	24 December 1993	*N/A – still in post*
[Berendsen Newbury Director A]	9 August 1996	13 September 2014
[Fenland Director E]	13 September 2014	*N/A – still in post*
[Berendsen Newbury Director G]	13 September 2014	1 April 2015
[Berendsen Newbury Director J]	1 April 2015	3 February 2016

[853] https://beta.companieshouse.gov.uk/company/01480047/officers (as at 29 September 2017).
[854] https://beta.companieshouse.gov.uk/company/01525661/officers (as at 3 October 2017).

ANNEX C
SUPPLIERS OF CLEANROOM LAUNDRY SERVICES AND CONSUMABLES

Cleanroom Laundry Services

C.1. The CMA understands that since the early 1980s, demand for Cleanroom Laundry Services and therefore, for related services and products in GB developed from scratch, grew to a peak in the early 1990s, fell sharply in the early 2000s and stabilised in the late 2000s (and is now declining, slightly).[855]

C.2. The number of suppliers (and Cleanroom Laundries they operate) has reflected this trend.

a. In the mid-1980s, three Cleanroom Laundries operated under the Micronclean Brand in the UK. Three other Cleanroom Laundries were operated by Countdown. In addition, each of Fishers and Clean Linen Services Limited ('CLS') entered.

b. In the 1990s, Rentokil Initial Services Limited ('Initial') and Origin Cleanroom Services Limited ('Origin') entered, followed by Guardline in the early 2000s.

c. As demand shrank during the mid-2000s, Countdown cut the number of its Cleanroom Laundries gradually; it exited Cleanroom Laundry Services entirely in 2008.[856] Also, Initial closed its Bradford laundry and its UK laundry business.[857]

C.3. During the Relevant Period, the number of Cleanroom Laundry Service providers in GB fell further, from seven in early 2012 to three by the end of 2015. Guardline, Origin, CLS, and The Cleanroom Laundry Limited ceased to be independent suppliers of Cleanroom Laundry Services and their Cleanroom Laundries closed. At the end of the Relevant Period, only Fenland, Berendsen Newbury and Fishers remained.[858]

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[855] URN 00999 (full reference at footnote 88 above), figures at p.6.

[856] Countdown briefly entered administration in 2008; after finishing the administration process, it was renamed CES and it continued to supply Consumables: URN 00982 (full reference at footnote 82 above), p.79; see footnote 94 above. In 2008, Fenland acquired the Cleanroom Laundry of CES in Newcastle-upon-Tyne, shut the plant and serviced the customers by opening a hub in Sunderland: URN 00141.1 (full reference at footnote 19 above), paragraph 13.h. On 30 June 2016, Fenland acquired the remaining business of CES: URN 01381 (full reference at footnote 45 above), pp.2 and 23 (as printed).

[857] URN 00999 (full reference at footnote 88 above), pp.5–6.

[858] The Parties purchased Guardline in 2013 (as noted at paragraph 3.47). The Cleanroom Laundry Limited (which entered in 2010), Origin and CLS in effect became part of Fishers, with Fishers closing the respective laundries at Newcastle-upon-Tyne, Aberfeldy and Maidenhead between 2012 and 2014 (Fishers retained only one Cleanroom Laundry, based in Livingston, that was previously operated by Origin): see URN 00999 (full reference at footnote 88 above), figures at p.6.

C.4. Cleanroom Laundry Service providers tend to offer both Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services.[859] In 2015 revenues from the supply of Cleanroom Laundry Services in GB totalled approximately £[✂] million,[860] of which the Parties together accounted for £[✂] million.[861] As shown at Table C1 and Table C2 below, the Parties' combined share of supply exceeded 80% in each of Full Cleanroom Laundry Services and Intermediate Cleanroom Laundry Services.

Table C1: Full Cleanroom Laundry Services, shares of supply in GB (2015)[862]

Supplier	*Revenues*	*Share*
Fenland	£[✂]m	[50-60]%
Berendsen Newbury	£[✂]m	[20-30]%
The Parties combined	*£[✂]m*	*[80-90]%*
Fishers	£[✂]m	[10-20]%
Total	**£[✂]m**	**100%**

Table C2: Intermediate Cleanroom Laundry Services, shares of supply in GB (2015)[863]

Supplier	*Revenues*	*Share*
Fenland	£[✂]m	[65-75]%
Berendsen Newbury	£[✂]m	[20-30]%
The Parties combined	*£[✂]m*	*[90-100]%*
Fishers	£[✂]m	[5-10]%
Total	**£[✂]m**	**100%**

C.5. During the Relevant Period, within Cleanroom Laundry Services the Parties' major competitor was Fishers[864] (despite Cleanroom Laundry Services having been only a small component of Fishers' overall laundry services).[865] Fishers operated a Cleanroom Laundry located in Livingston, Scotland from which it provided Full Cleanroom Laundry Services and Intermediate Cleanroom

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[859] As at March 2014, the Parties were unaware of any other Cleanroom Laundry Services suppliers that have ISO Class 6 or ISO Class 7 accreditations, with the possible exception of Fishers: URN 00990 (Reply of Parties/JVCo dated 26 March 2014 to Question 32 of an OFT *Micronclean/Guardline* request for information dated 27 December 2013), see footnote 94 above.

[860] Consisting of £[✂] million for Full Cleanroom Laundry Services and £[✂] million for Intermediate Cleanroom Laundry Services (shown in **Annex C**, Table C1 and Table C2).

[861] Consisting of £[✂] million for Full Cleanroom Laundry Services and £[✂] million for Intermediate Cleanroom Laundry Services (shown in **Annex C**, Table C1 and Table C2).

[862] URN 00998 (full reference at footnote 72 above), paragraph 15.18, the source for Table 1 in the *Fenland/Fishers* Decision (full reference at footnote 9 above). See footnote 94 above.

[863] URN 00998 (full reference at footnote 72 above), p.13 (Fishers revenues) and p.53 (Berendsen Newbury revenues); see footnote 94 above. See also URN 01173 (full reference at footnote 418 above), p.5 (response to Question 3; all Fenland revenues on row titled '*Louth – Class 6*').

[864] See, e.g., *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 8.

[865] The revenue Fishers generated from Cleanroom Laundry Services shown above is only [✂]% of its total £35m revenue in 2015 (https://beta.companieshouse.gov.uk/company/SC067627). Fishers offers laundry and garment services for hotels, restaurants, healthcare, and workwear as well as for Cleanrooms (https://www.fisherslaundrygroup.co.uk/about.php).

Laundry Services to customers located across the whole of GB.[866] Many of its customers were in the northern part of GB (as illustrated by the locations noted in red at **Annex E**, Figure E6). As at December 2013, Fishers used its own network to distribute in Scotland but engaged couriers '*to serve the rest of the UK*'.[867] In mid-2014, Fishers decided to contract out delivery to the majority of customers outside of Scotland to a third party logistics company.[868] In August 2015, Fenland submitted that '*Fishers obtained work in England served via couriers*' until '*this reached a sufficient turnover value*', at which point Fishers opened a hub in Northampton.[869] Fishers then served some Cleanroom Laundry Services customers using that contracted-out service and hub, which was set up within about 12 weeks and at no upfront cost.[870]

C.6. Set out at Part 4.B. above is the definition of the relevant product markets. The Relevant Markets in respect of Cleanroom Laundry Services include, for the reasons set out at paragraphs 4.25 to 4.28 above, supply to non-contaminated parts of HSSDs. Each Party supplied Cleanroom Laundry Services to certain HSSDs, which the CMA understands is reflected in the Parties' sales figures at Table C1 and Table C2 above.[871] Other than the Parties, the CMA is aware of two suppliers of Cleanroom Laundry Services to HSSDs: Berendsen plc's Guardian unit, and Synergy Health.[872] The Addressees were not able to estimate the sales made to non-contaminated parts of HSSDs by Berendsen Guardian or Synergy.[873] Estimates of the Parties' market shares in relation to Cleanroom Laundry Services are therefore likely to be somewhat over-stated.

C.7. For the reasons set out at paragraphs 4.10 to 4.20 above, the Relevant Market relating to Intermediate Cleanroom Laundry Services has not been defined on a wider basis to also include supply by Barrier Laundries. For the same reasons, that Relevant Market has not been defined on a narrower basis to comprise only supply to customers described by Fenland as 'Class 6 Required' (which Fenland distinguished from customers which may not need a 'Class 6'

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[866] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraphs 3 and 39(a).
[867] URN 00983 (full reference at footnote 356 above), p.23; see footnote 94 above.
[868] URN 01000 (full reference at footnote 288 above), p.8 (under 'Response from Fishers').
[869] URN 01000 (full reference at footnote 288 above), p.11 (under 'Response from Fenland').
[870] URN 01000 (full reference at footnote 288 above), p.10 (under 'Response from Fishers').
[871] For example, the source of Berendsen Newbury's Intermediate Cleanroom Laundry Services revenue in Table 2 is URN 00998 (full reference at footnote 72 above), p.5); see footnote 94 above. Footnote 19 of URN 00998 notes that, ultimately, this is based on revenues stated in URN 00982 (full reference at footnote 82 above) – Table 1.4 of URN 00982 cites '*Hospital – HSSD*' as a type of Intermediate Cleanroom Laundry Services customer. Appendix 13 to URN 00982 lists '*Class 7 customers at MNL*' and their '*weekly invoice value*', and includes at least one customer with '*HSSU*' in its name to whom Berendsen Newbury made sales; see footnote 94 above.
[872] URN 01222 (full reference at footnote 412 above), paragraph 1.24.
[873] URN 01369 (full reference at footnote 40 above), paragraph 2.3. Fenland submitted that it had limited knowledge of, and did not have a list of, laundries that supply HSSDs: URN 01237 (full reference at footnote 177 above), p.11 (response to Question 1.c.).

level of service, but purchase it nevertheless). Fenland submitted that defining that Relevant Market so as to include Barrier Laundries would result in Fenland's share being [5-10]% (and the Parties' combined share being [5-10]%). Fenland submitted that defining that Relevant Market so as to only include supply to 'Class 6 Required' customers would result in Fenland's share being [25-45]% (and the Parties' combined share being [80-90]%).[874]

C.8. The source data for Table C1 and Table C2 above was largely submitted by Fenland (with Fishers) in October 2015 – i.e. during the Relevant Period. Table C2 above also features Fenland revenue data provided by Fenland during this investigation.[875] The CMA also notes the following.[876]

a. **Full Cleanroom Laundry Services:** Fenland submitted that *'market shares have probably remained relatively constant, except where changes occur as a result of acquisitions'*. Fenland submitted it was only aware of two specific events materially affecting shares during the Relevant Period: *Micronclean*/*Guardline* (which led to the Parties' combined share increasing by [0-5]%), and Fishers having acquired CLS (which led to Fishers' share increasing by [0-5]%).

b. **Intermediate Cleanroom Laundry Services**: Fenland submitted that *'market shares will probably have remained fairly constant.'* Fenland noted only one specific event materially affecting shares during the Relevant Period: *Micronclean*/*Guardline* (which led to the Parties' combined share increasing by '*a relatively small amount (similar to that reported for Full Cleanroom Laundry Services)*').

C.9. Given the preceding paragraph, and the purpose of market definition set out at Part 4.A. above (and thus of market shares), the CMA has not otherwise verified, or set out alternatives to, the shares in Table C1 and Table C2.

Consumables

C.10. Customers tend to purchase Consumables on a less predictable basis in relation to volume and timing and from a wider range of suppliers, as compared to their purchasing of Cleanroom Laundry Services.

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[874] URN 01256 (full reference at footnote 353 above), pp.4–6 (response to Question 8); URN 01139 (Fenland SO WRs), paragraphs 6.2–6.9.
[875] Fenland submitted that the CMA should not rely on '*"old" (and unverified) estimates provided*' during the *Micronclean*/*Guardline* merger review: URN 01256 (full reference at footnote 353 above), p.3 (response to Question 8).
[876] URN 01256 (full reference at footnote 353 above), pp.2–6 (response to Question 8).

C.11. Consumables can '*often be delivered on the same vehicle as the garments with no additional transport cost*'.[877] This explains why many of the Parties' customers for Consumables also procured Cleanroom Laundry Services from them (see paragraphs 3.31 and 3.34 above). However, Consumables are also supplied by suppliers which do not also provide Cleanroom Laundry Services.[878]

C.12. As at 2014, Consumables revenues in GB totalled approximately £[✂] million of which the Parties together accounted for £[✂] million, with a share of supply of approximately [10-20]% (following *Microclean/Guardline*), as set out in Table C3 below.

Table C3: Consumable products, shares of supply in GB (2014)[879]

Supplier	*Revenues*	*Share*
Guardline (Microclean)	£[✂]m	[5-10]%
Fenland (Microclean)	£[✂]m	[0-5]%
Berendsen Newbury (Microclean)	£[✂]m	[0-5]%
The Parties combined (before acquiring Guardline)	*£[✂]m*	*[5-10]%*
The Parties combined (after acquiring Guardline)	*£[✂]m*	*[10-20]%*
Shield Medicare	£[✂]m	[30-40]%
Basan	£[✂]m	[5-10]%
CES	£[✂]m	[5-10]%
Helapet	£[✂]m	[5-10]%
Nitritex	£[✂]m	[5-10]%
Agma	£[✂]m	[0-5]%
VWR	£[✂]m	[0-5]%
Hyprotect	£[✂]m	[0-5]%
Cravenmount	£[✂]m	[0-5]%
Cleanroom Supplies Limited	£[✂]m	[0-5]%
Other	£[✂]m	[10-20]%
Total	**£[✂]m**	

C.13. The Parties supplied Consumables in competition with Guardline until September 2013 (when the Parties acquired Guardline). Guardline started as a Consumables-only business and Consumables accounted for most of its revenues.[880] It expanded into Cleanroom Laundry Services later, '*as an add on*

[877] URN 00982 (full reference at footnote 82 above), pp.38 and 39.
[878] The Parties listed only competitors in Consumables which did not operate Cleanroom Laundries: URN 00992 (Reply of Parties/JVCo dated 28 March 2014 to Question 38 of an OFT *Microclean/Guardline* request for information dated 27 December 2013), p.2; see footnote 94 above. For example, the CMA's *Fenland/Fishers* Decision did not mention any overlaps in Consumables, as Fishers had no Consumables sales.
[879] URN 00982 (full reference at footnote 82 above), Table 10.8 on pp.52–53. The figures in Table C3 reflect the numbers in the aforementioned submission, albeit those numbers do not add up to 100% exactly. See footnotes 94 and 226 above.
[880] URN 00984 (*Microclean/Guardline* Decision), paragraph 17; URN 00982 (full reference at footnote 82 above), p.40.

service' for its Consumables customers. Initially, Guardline used couriers to supply Consumables. It continued to deliver Consumables mostly using couriers even after it developed its own distribution network, and after its expansion into Cleanroom Laundry Services (where order volumes were more stable). Guardline delivered only a '*small percentage*' of its Consumables orders using its own distribution network. Guardline supplied Cleanroom Laundry Services and Consumables to customers located across GB (as illustrated at **Annex E**, Figure E7).[881] After the Parties purchased Guardline, they allocated Guardline's business between themselves.[882]

C.14. The source data for Table C3 above was submitted by the Parties in March 2014, i.e. during the Relevant Period.[883] *Micronclean*/*Guardline* led to the Parties' combined share increasing by [5-10]%: see Table C3 above. All other mergers of Consumables suppliers in the past 10 years which Fenland cited in its submissions appear to have not taken place during the Relevant Period and/or not involved the Parties (so would not in any event have affected the Parties' market shares). Fenland submitted that '*the total market size has probably remained static'* during the Relevant Period, but its share of Consumables grew (e.g. from [0-5]% in 2012 to [5-10]% in 2014).[884] Most of this growth may have resulted from certain Guardline customers transferring to Fenland.[885] Table C3 above therefore includes the Parties' combined share of Consumables pre- and post- *Micronclean/Guardline*.

[881] URN 00982 (full reference at footnote 82 above), pp.36, 40, 41, 43.
[882] As regards the transfer of Guardline's '*UK business*' to the Parties, see paragraphs 3.4 and 3.8 above; see paragraph 3.14 above regarding the transfer of Guardline's export business. Guardline itself ceased trading on 1 January 2014: URN 00024.3 (full reference at footnote 50 above), p.3.
[883] See Fenland submission summarised at footnote 875 above.
[884] Based on growth in Fenland's Consumables revenues from £[✂] million (2012) to £[✂] million (2015) URN 01256 (full reference at footnote 353 above), pp.5–6 (response to Question 8).
[885] If the Guardline sales noted in Table C3 above was split equally between Berendsen Newbury and Fenland, it would account for [55–100]% of the growth in Fenland revenues noted at footnote 884 above.

ANNEX D
BACKGROUND DETAILS REGARDING THE JOINT VENTURE

Origins of the Microncleαn Brand and the Joint Venture

D.1. Before October 1980, certain employees of Fenland and [Former JV Partner B], for example, began discussing the establishment of a UK business supplying Cleanroom Laundry Services under the Microncleαn Brand. That brand was already being used in the United States of America. Around that time, a predecessor of Berendsen Newbury enquired about a washing machine being developed in this context.[886]

D.2. In late 1980, JVCo was incorporated, and re-named Microncleαn Limited.[887] Soon after its incorporation, JVCo acquired the UK rights to the Microncleαn Brand.[888] The aim of JVCo was to enable the JV Partners to market specialist Cleanroom Laundry Services nationally, under the Microncleαn Brand. The JV Partners have done so in the UK (and, initially at least, Ireland).[889]

D.3. Fenland submitted that it developed intellectual property relating to Cleanroom Laundries in the early 1980s and that in 1982 it then licensed certain related know-how to Berendsen Newbury (see paragraph 3.41 above).

D.4. In its early years, the Joint Venture involved JV Partners including the Parties and certain other partners. In February 1982, shares in JVCo were issued to Fenland, Berendsen Newbury, [Former JV Partner C], [Former JV Partner A] and [Former JV Partner B].[890] In December 1982, the then JV Partners agreed to revise the Articles of Association of JVCo from 1980. The 1982 Articles of Association listed territories '*to be operated from*' three laundries, of [Former JV Partner C], Berendsen Newbury and Fenland.[891]

D.5. Over the next few years, the JV Partners changed several times. For example, in 1984 [Former JV Partner D] joined the Joint Venture, and began to operate

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[886] URN 01167 (Minutes of a Microncleαn meeting dated 13–14 October 1980), pp.7–10 – referring, e.g., to '*Micron Clean U.S.A.*' at p.8, paragraph 11. '[Former JV Partner F]' – referred to at p.7, paragraph 3 – was '*the original Newbury company*': URN 01220 (full reference at footnote 30 above), p.22, line 25, to p.23, line 1.

[887] JVCo was incorporated as Lemwick Limited on 31 October 1980 (see URN 00036.6 (1980 JVCo Articles of Association)), and changed its name to Microncleαn Limited on 5 December 1980; URN 00099.1 (full reference at footnote 111 above).

[888] URN 01220 (full reference at footnote 30 above), p.20, line 21, to p.21, line 2; URN 00036.1 (full reference at footnote 97 above), paragraph 2.4.

[889] URN 00999 (full reference at footnote 88 above), p.5. The Irish business appears to have ceased to be part of the Joint Venture arrangement '*many years ago*': URN 00036.1 (full reference at footnote 97 above), paragraphs 2.3–2.4.

[890] URN 00099.1 (full reference at footnote 111 above); p.2; URN 00099.5 (JVCo Director and Secretary register, 1980–1996), p.1.

[891] URN 00099.50 (1982 JVCo Articles of Association), Schedules A–C at pp.17–18 (as printed).

a Cleanroom Laundry in Scotland.[892] The Articles of Association of JVCo were revised again in 1986, and listed territories to be operated by the laundries of Berendsen Newbury, Fenland and [Former JV Partner D].[893] [Former JV Partner E] joined the Joint Venture in October 1986, and left on 4 February 1991[894] (it was later acquired by the group of Berendsen plc).[895] By November 1993, the JV Partners were Berendsen Newbury, Fenland and [Former JV Partner D] – each of which held an equal shareholding in JVCo.[896]

D.6. When Fenland acquired the business of [Former JV Partner D] in 1995, Fenland and Berendsen Newbury became the only two JV Partners, each holding an equal shareholding in JVCo.[897] In May 1996, revised Articles of Association of JVCo were adopted to reflect this. At that time, [Fenland Director A] was a director of JVCo on behalf of Fenland; [Berendsen Newbury Director A] was a director of JVCo on behalf of Berendsen Newbury.[898] Those Articles also provided that if any JVCo shareholder was acquired by another company, a pre-emption right would apply, enabling any other JVCo shareholder to purchase the relevant shares of the acquired shareholder in JVCo.[899] The Parties remained JVCo's only direct shareholders until Berendsen Newbury sold its stake in JVCo, to Fenland, in February 2016.[900]

D.7. During the 1980s, JVCo had a centralised sales role, and supplied Consumables (see paragraph 3.43 above). Two subsidiaries of JVCo were set up in the 1980s: Micronclean Moss Limited and MPL.[901] During the Relevant Period, Micronclean Moss Limited remained predominantly dormant – as did

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[892] URN 01183 (Minutes of a JVCo board meeting held on 2 April 1984), p.1: '*The Board approved the issue of an operator's licence to* [✂] *to build and operate a Micronclean cleanroom and franchise in the area under 'D' category shareholdings. […] The revised operating areas are attached at Appendices 'A', 'B', 'C', 'D'.'* Area D comprised certain counties in England (e.g. Merseyside), as well as most of Scotland.

[893] URN 00036.7 (1986 JVCo Articles of Association), Schedules A–C at pp.25–28 (as printed).

[894] URN 00099.1 (full reference at footnote 111 above), pp.3–4.

[895] URN 00306 (letter dated 31 May 2006 from [Berendsen Newbury Director G] of '*Micronclean Berendsen*' to [✂] - price issues), at footer of each page: '*[Former JV Partner E] is onderdeel van de Berendsen groep*' (freely translated by the CMA case team as '[Former JV Partner E] is part of the Berendsen group').

[896] URN 00099.1 (full reference at footnote 111 above), pp.4–5.

[897] URN 00099.1 (full reference at footnote 111 above), p.5.

[898] URN 00066.87 (1996 JVCo Articles of Association); URN 00099.5 (JVCo Director and Secretary register, 1980–1996), p.2; URN 00099.1 (full reference at footnote 111 above). See also URN 00066.85 (Special Resolution of JVCo dated 26 January 1995), which revised the 1986 JVCo Articles of Association to reduce the minimum quorum for directors to two, from five.

[899] URN 00066.87 (1996 JVCo Articles of Association), clause 9(iii) referring e.g. to '*if any corporate member shall become the subsidiary of another corporate member or of a body corporate of which another corporate member is a subsidiary*'.

[900] URN 00099.2 (List of JVCo shareholders since 1980).

[901] Micronclean Moss Limited was initially incorporated in the name of Oakquick Limited in January 1985. MPL was initially incorporated in the name of Truesure Limited in August 1988.

MPL, until MPL became a holding company for the Parties' joint sourcing, and individual supply of, Consumables following *Micronclean/Guardline*.[902]

D.8. The JV Partners operated the Joint Venture based on rights licensed to them by JVCo. JVCo operated primarily – and particularly from the 1990s onwards – as a cost centre, holding the UK rights in the Micronclean Brand.[903] At this time, the JV Partners' use of rights to the Micronclean Brand was governed by the 1991 TM Agreements (see paragraph D.12 below).

D.9. JVCo also provided a forum for the JV Partners to consider acquisition and technical improvement opportunities. For example, preliminary work was carried out between 2011 and 2013 on the potential development of an electron beam sterilisation facility (a project ultimately dropped when customers failed to sign up to it).[904] In 2013, JVCo also undertook research into potential investment opportunities abroad.[905] JVCo also provided a forum for the Parties to meet to discuss the Micronclean Brand and the Joint Venture.[906]

D.10. JVCo generated only a small amount of revenue, including management charges (received from e.g. each Party in order to cover the licence of the Trade Marks and other project costs, including marketing). It also received some income from Cleanroom consultancy work.[907]

D.11. From around 2009, JVCo's subsidiary, MPL, '*began to develop its own-branded cleanroom consumables business'* with a view to supplying Consumables under the Micronclean Brand to UK laundry customers.[908]

Documents setting out the organisation and Operation of the Joint Venture

D.12. The organisation and operation of the Joint Venture in its early years was as set out in Articles of Association of JVCo adopted in 1980, 1982 and 1986. On 1 January 1991, JVCo entered into the 1991 TM Agreements with Fenland and

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[902] URN 00083.1 (full reference at footnote 112 above), p.2.
[903] URN 00083.1 (full reference at footnote 112 above), p.3; URN 00186.1 (full reference at footnote 133 above), p.51, footnote 34 (response to Question 19).
[904] URN 00024.3 (full reference at footnote 50 above), pp.1–2.
[905] For example, URN 00043.27 (Minutes of JVCo board meeting on 11 December 2012); URN 00066.52 ('Overseas Market Introduction Service' for [✂]); URN 00066.53 (Email on '[✂] report'); URN 00066.51 ('Competitor analysis cleanroom garments' in [✂]).
[906] See, e.g.: URN 00043.27 (Minutes of JVCo board meeting on 11 December 2012); URN 00043.26 (Minutes of JVCo board meeting on 27 February 2013); URN 00043.23 (full reference at footnote 205 above).
[907] URN 00036.1 (full reference at footnote 97 above), paragraph 2.6. JVCo generated annual revenues of approximately £[✂], £[✂], and £[✂] in 2012, 2013, and 2014 respectively: URN 00055.7 (JVCo unaudited financial statements, 2012); URN 00055.6 (JVCo unaudited financial statements, 2013); URN 00055.5 (JVCo unaudited financial statements, 2014).
[908] URN 00036.1 (full reference at footnote 97 above), paragraph 2.7.

Berendsen Newbury respectively. The 1991 TM Agreements permitted Fenland and Berendsen Newbury respectively '*to use the Trade Marks in the United Kingdom*', subject to certain quality requirements.[909]

D.13. The 1991 TM Agreements appear to have still been in place in June 2011.[910] At that point, [Fenland Director A] and [Berendsen Newbury Director A] (each a director of JVCo then) discussed how the 1991 TM Agreements might be updated.[911]

D.14. The Parties' discussions in 2011 took as a starting point a draft 'operating agreement' and a related draft 'heads of agreement', each drawn up in the mid-1990s.[912] Neither mid-1990s document was signed, but each referred to certain territorial restrictions – as described in paragraphs D.15 to D.17 below.

D.15. The draft 'heads of agreement' referred to each 'plant'[913] having a sales territory allocated to it, and two alternative sets of potential restrictions on sales outside of that territory. The first set of potential restrictions envisaged each 'operating plant' agreeing '*not to sell outside their defined territories except with the consent of the Operating Plant in whose territory a potential customer is based*'. The second set of potential restrictions envisaged a qualification to the first set of potential restrictions, by adding: '*Each Operating Plant agrees therefore that it will not actively solicit customers for this service outside the territory within which its operating cleanroom is situated. Each Operating Plant may however respond to any unsolicited orders or enquiries it receives for this service from customers or potential customers outside its territory.*'

D.16. Each set of potential restrictions in the draft 'heads of agreement' was stated as being *'[i]n order to protect the Registered Trademarks and to avoid problems caused by distance from the operating cleanroom in the provision of services to customers*'. The draft also stated that '*this Agreement and any restrictions herein are reasonably necessary for the protection of the*

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[909] Clause (1) of each 1991 TM Agreement: see URN 00099.38 and URN 00099.39 (full reference at footnote 141 above).

[910] Clause (3) of each 1991 TM Agreement: see URN 00099.38 and URN 00099.39 (full references at footnote 141 above) which stated that they would remain in force for five years, i.e. until 1 January 1996, but might then be renewed for five further years. The CMA has seen no evidence that any 1991 TM Agreement was renewed formally, but [Fenland Director A] stated the following in URN 00066.84 (email dated 10 June 2011 from [Fenland Director A] to [Berendsen Newbury Director A]): '*These contain no territorial restrictions and allow either of us to use the trademarks in the other territory. The agreements are for a period of 5 years and are thereafter cancellable by 3 months notice by either party. As no such notice has been given, I guess that they are still effective'.*

[911] See paragraphs 3.66 to 3.73 above. In addition, [Berendsen Newbury Director A], [✂], recalled that discussions leading to updated trade mark user agreements may have '*dated back to approximately 2009*': URN 00970 ([Berendsen Newbury Director A] response dated 2 November 2016 to Questions 1 and 2 of the section 26 Notice dated 20 October 2016), p.2 (as printed).

[912] See footnote 142 above.

[913] The CMA understands 'plant' to correspond to the Parties and/or their Cleanroom Laundries.

Registered Trademarks, …[JVCo] *and the other two Operating Plants and does not unreasonably interfere with its own freedom of action with regard to the management of its own business.*'[914]

D.17. The draft 'heads of agreement' was revised to become a draft 'operating agreement', between only two 'operating plant' parties (i.e. Fenland through its Skegness plant, and Berendsen Newbury through its Newbury plant). That version – like the first set of potential restrictions in the draft 'heads of agreement' mentioned in the preceding paragraph – restricted each 'plant' from making any sales outside of that 'plant's' allocated territory, except with the other 'operating plant's' consent.[915] The reason for these clauses was as stated in the 'heads of agreement' described above: '*[i]n order to protect the Registered Trademarks and to avoid problems caused by distance from the operating cleanroom in the provision of services to customers.*'[916]

D.18. As noted at paragraphs D.4 and D.5 above, the Articles of Association adopted in 1982 and 1986 for JVCo referred to territories to be operated by the JV Partners. Each of these, and also a draft 'heads of agreement' and a draft 'operating agreement' drawn up in the mid-1990s, appears to refer to territories allocated between the Parties[917] based on whole counties.[918]

D.19. It appears that the Parties agreed to revise the allocation of territories so that it was based on postcodes and not based on counties at some point prior to November 2009. This is evident from an email sent on 11 November 2009 by [Fenland Director A] to [Berendsen Newbury Director A], [Berendsen Newbury Director C] and others at Berendsen Newbury. The email noted that the Parties had agreed on 1 September 2009 to '*re-issue the postcode listing*'.

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[914] URN 00066.88 (Draft Heads of Agreement between JVCo and the 'three operating plants'), second, third, and fourth pages (although these are not labelled as such in the document).

[915] URN 00186.59 (full reference at footnote 142 above), p.2 under heading '*Territories*': Fenland and Berendsen Newbury '*recognise that it would be in their interest and in the interest of Microncleanto operate the workwear decontamination service under the Registered Trademarks within defined terrorities* [sic] *(as set out in Schedule 'B' hereof and specified in the map attached hereto) and agree not to actively sell to or actively solicit customers outside their defined territories except with the prior consent of the Operating Plant in whose territory a potential customer is based. If an Operating Plant receives an unsolicited enquiry from a customer or a potential customer who is outside their defined territory, and the Operating Plant in whose territory the customer or potential customer is based is satisfied that the enquiry is a request for the service to be specifically provided by the other Operating Plant, consent to respond to the unsolicited enquiry will not be unreasonably withheld'.*

[916] URN 00186.59 (full reference at footnote 142 above), p.2, under heading '*Territories*'.

[917] As described in this annex, at the time the 1982 Articles and the 1986 Articles (and the draft 'heads of agreement') were drawn up, the JV Partners included the Parties but also certain other entities.

[918] The only territories allocated between 'operating plants' in the documents referred to at footnotes 891, 894 and 916 above which were not based on counties were exceptions within Greater London and Northamptonshire. Each was split by a specific geographic feature – Greater London split by '*the Thames*', and Northamptonshire divided by '*the line linking… the following towns: Crick, West Haddon, Long Buckley, Dunston, Northampton, Hackleton*' – with the territory to the south of the specific geographic feature allocated to Berendsen Newbury, and the territory to the north allocated to Fenland.

Attachments to that email included a '*spreadsheet listing the postcodes*' and a map created using 'MapPoint' software to show the respective territories. [Fenland Director A] asked recipients of that email to '*...let me know if you disagree with any of the borders*'. [Berendsen Newbury Director C] responded on 19 November 2009, stating that '*[t]he border detail looks fine to me.*'[919]

D.20. In his email of 11 November 2009, [Fenland Director A] also noted that the Parties had on 1 September 2009 '*agreed that we would send each other a list of all customers that are in the others* [sic] *territory*'. [Berendsen Newbury Director C] attached to his response on 19 November 2009 a list of '*the accounts that we serve on your patch*', stating that '(*I doubt if there are any surprises as we have served most of these for ages)*'.[920]

D.21. [Fenland Director A] responded on 24 November 2009, providing a *'listing of all customers in Newbury's territory … and a geographical representation of them both in both a pdf and a MapPoint File*'.[921] That listing contained a column entitled '*Reason in Newbury Territory*', which linked the '*reason*' mostly to sector or distance from Fenland's Louth plant. The map attached by [Fenland Director A] showed a border splitting the Fenland Territory and the Newbury Territory, and the locations of '*Fenlands* [sic] *Customers in Newburys* [sic] *Area*'. [Fenland Director A] also stated that: '*it would be a really good idea for both companies to share their customer data bases … map these together and see if we can make any sensible decision on the territory boundary. We have spoken on and off for some time about re-aligning territories, and this would be a logical way to approach it*'.

Discussions post-September 2014 regarding the future of the Joint Venture

D.22. The Newbury Acquisition led to a series of discussions and proposals regarding the structure and form of JVCo and any future cooperation between the Parties. In late 2014, there were various related meetings and calls, and exchanges of documents. These mainly involved [Fenland Director A] and [Fenland Director E] (each a director of both Fenland and JVCo), [Berendsen Newbury Director G] (then a director of both Berendsen Newbury and JVCo, and an employee of Berendsen plc) and [Berendsen plc Manager A] (then [✂]).

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[919] URN 00068.3 (full reference at footnote 195 above), pp.2–3.

[920] URN 00068.3 (full reference at footnote 195 above), p.2 and p.4.

[921] URN 00068.3 (full reference at footnote 195 above); See also URN 00068.11 (email from [Berendsen Newbury Director C] to [Berendsen Newbury Director J] dated 14 July 2015). The attachments to this email appear to be URN 00068.12 (see footnote 196 above) and URN 00068.13 (full reference at footnote 258 above).

D.23. Fenland and Berendsen each submitted that, around the time that these discussions took place, *'[t]he change in ownership of Berendsen Newbury effectively put the operations of JVCo on hold while Fenland discussed with Berendsen what form (if any) the future structure of the JV should take.'* Hence there was *'a natural gap in the JVCo Board Minutes from the end of 2014 following the acquisition by Berendsen* [plc] *of Berendsen Newbury'*.[922] An email sent by [Berendsen Newbury Director G] on 26 September 2014 refers to *'what I agreed with* [Fenland Director A] *on the scheduled board meetings for ML* [JVCo] *and MPL going forward… we have …agreed untill* [sic] *later order to freeze the scheduled board meetings for both MPL, and ML. …We also agreed that the daily business between the companies should continue as is. This includes also the commercial meetings between the companies, product boards etc.'*[923]

D.24. On 26 September 2014, [Fenland Director A], [Berendsen Newbury Director G] and [Berendsen plc Manager A] met to discuss the Newbury Acquisition. A note of the meeting states that '*Berendsen knew about the share redemption clause, but did not think that we* [Fenland] *would want to invoke it. I.e.* [sic] *assumed that we* [Fenland] *would want them* [Berendsen] *to step into* [Berendsen] *Newbury shoes*.'[924]

D.25. The Parties subsequently discussed, at least initially, the following three main options for the future of JVCo:

a. the acquisition by Fenland of Berendsen Newbury and of other 'Micronclean' trade marks elsewhere in Europe owned by Berendsen plc. '*Berendsen and Fenland*' would also cooperate to sell Consumables to Berendsen Newbury's customers;

b. Berendsen Newbury ceasing to trade under the Micronclean Brand in the UK;

c. Berendsen Newbury continuing to trade under the Micronclean Brand in the UK, but the Trade Marks (and all other aspects of the Micronclean Brand) – and MPL – transferring to Fenland. JVCo would be re-named Micronclean Licensing Limited, and Fenland would be re-named Micronclean Limited. Fenland would then license to JVCo the Trade Marks, use of which would be sub-licensed to Fenland and Berendsen

[922] URN 00037.1 (full reference at footnote 23 above), p.1; URN 00036.1 (full reference at footnote 97 above), paragraph 19.3(a).
[923] URN 00151.17 (email dated 26 September 2014 from [Berendsen Newbury Director G] to [Berendsen Newbury Director F], [Berendsen Newbury Director E], [Berendsen Newbury Director C] and others at Berendsen).
[924] URN 00043.21 (Notes from a meeting between Berendsen and Fenland on 26 September 2014 to discuss the Micronclean Newbury Acquisition), p.1.

Newbury for use in the *'[t]erritories as laid out in the existing license agreements*'.[925]

D.26. In a note following a meeting on 6 October 2014 between the Parties, Fenland expanded on the three options listed in paragraph D.25. above. In particular, it expanded on the third of those options, and the terms under which the Parties would operate and how '*passive enquiries*' would be treated. Under that third option, the services covered by the proposed licence would be *'any re-usable textile service including textile sales, textile rental and laundering to customer sites that contain a Class 4 or Class 5 cleanroom as defined under ISO 14644'*. The aim was to *'allow any classification of laundry including Class 6 and 7, and indeed unclassified workwear and flatwork, but only to a site that has a Class 4 or 5 cleanroom*.'[926] The note also records that *'Berendsen appear keen to continue with the arrangements. This gives them a better option to acquire Fenland in the future, and keeps a relationship going. It also slows (but does not stop) our competition with each other. It buys them time."*[927]

D.27. A note following a meeting on 23 October 2014, initially produced and then updated in November 2014, indicates that the first option set out at paragraph D.25. above had been ruled out, and the second such option was not preferred. That meeting focussed on the third option, set out at paragraph D.25.c. above. Agreement was reached on points including: MPL would be transferred to Fenland and Fenland would control the Consumables business; Berendsen Newbury would be permitted to use the 'Berendsen' brand alongside the Micronclean Brand to prevent confusion between the Parties; technical developments were to be dealt with separately and any IP was to be protected by each Party (however, if it was beneficial to share developments then JVCo – to be re-named Micronclean Licensing Limited – would provide a forum for such sharing). The Parties noted that '*[t]he main reason that Fenland would wish to enter into an agreement where Berendsen continues to use the Micronclean name in the UK is to allow a strong cooperation on consumables both in the UK and in Europe. …This level of cooperation is unlikely if Fenland and Berendsen enter into full competition with each other in the UK[.]*' Each Party understood that this option would mean entering into further '*trademark licence agreements*' with '*an initial term of 2 years*'.[928]

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[925] URN 00068.16 (full reference at footnote 168 above), pp.2–9.

[926] URN 00068.16 (full reference at footnote 168 above), p.5. See also p.6, and the note that '*Each party to be free to respond to passive enquiries received from prospects in the other's territory or to respond to publically announced invitations to tender. Indeed these must be responded to without reference to the other party, on a proper commercial basis which is documented in each case'.*

[927] URN 00186.117 (full reference at footnote 366 above), p.1.

[928] URN 00151.22 (full reference at footnote 120 above), e.g. at pp.1, 2 and 5; URN 00124.6 (full reference at footnote 120 above), e.g. at pp.1, 2 and 5. See also reference to '*[i]nitial period of 2 years*' in URN 00043.14 (full reference at footnote 120 above), p.4, and reference to [Fenland Director A]

D.28. Another option was proposed on 15 November 2014, referred to as 'The other track - combining the two textile businesses'. 'The other track' proposal would have seen the Parties effectively combined, in a 50/50 ownership structure.[929] This proposal and the third option, set out at paragraph D.25.c. above, were discussed at meetings held on 17 November 2014 and 4 December 2014. At the former meeting, it was agreed that, with regard to the third option, it would be '*more appropriate and easier to administer in practice to define the trademark usage under the licensing arrangement by market segment rather than based on whether the customer had a class 4 cleanroom*'.[930]

D.29. At the 4 December 2014 meeting, it was '*accepted*' that under the third option an amount of £[0-100,000] would '*be paid to Berendsen for the IP*' in JVCo. It was also clarified that under that option Berendsen plc would not sell its European Micronclean trade marks to Fenland, but would allow Fenland to use them for an annual fee of €[✂].[931]

D.30. The frequency of the discussions reduced after a telephone call between [Fenland Director A] and [Berendsen plc Manager A] on 12 December 2014. During that call, [Fenland Director A] stated that the third option, and not 'the other track' proposal would be progressed further. [Fenland Director A] suggested a further meeting once there were draft agreements to discuss.[932]

D.31. In 2015, the future of JVCo was discussed further. Berendsen noted in April 2015 a plan to meet in May 2015 to discuss and implement a sale to Fenland

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reportedly envisaging an arrangement '*probably ending after 2 years*' in URN 00151.30 (email dated 20 November 2014 from [Berendsen Newbury Director G] to [Berendsen plc Manager A]).

[929] URN 00151.26 (email from [Berendsen plc Manager A] to [Fenland Director A] and [Fenland Director E] on 15 November 2014) attaching URN 00151.27 (a proposal called 'The other track- combining two textiles businesses'). Under this option, it was suggested that the 50/50 ownership structure would create *'a leading textile rental (and related service) supplier to the pharmaceutical (and related) industry in the UK (…) and with margins well above [✂]*'.

[930] URN 00043.14 (full reference at footnote 120 above). In relation to 'the other track' proposal, it was agreed at the 17 November 2014 meeting that [Berendsen plc Manager A] would suggest a company valuation to Fenland to enable [Fenland Director A] to consider if the price was sufficient to outweigh the value of remaining independent. At the meeting on 4 December 2014, [Berendsen plc Manager A] indicated a value of £[✂] million for Fenland, which [Fenland Director A] stated was sufficiently high for him to consider the offer. [Fenland Director A] also stated that he would be interested in entering a joint venture where Fenland held the majority share (e.g. 60%/40%). [Berendsen plc Manager A] stated that this was unlikely to be acceptable to Berendsen plc, but that he would put it to the board. It was agreed that a telephone call should be held on 12 December 2014 to discuss this matter further; see URN 00043.13 (full reference at footnote 529 above), pp.1–2.

[931] URN 00043.13 (full reference at footnote 529 above), p.2; see also URN 00068.16 (full reference at footnote 168 above).

[932] URN 00151.6 (Email from [Fenland Director A] to [Berendsen plc Manager A] dated 15 December 2014).

of Berendsen Newbury's 50% stake in MPL, and to '*postpone the Mcltd* [JVCo] *settlement, the option 3 discussion and execution until August* [2015]'.[933]

D.32. Fenland produced two notes, containing updates on the proposals for the restructuring of JVCo, on 13 March 2015 and 4 September 2015.[934] The note of March 2015 stated that '*[c]urrent discussions would suggest that Fenland may choose to assert its pre-emptive rights over the MNL* [Berendsen Newbury] *shares in MCL* [JVCo] *to acquire 100% of MCL.*' As a result, the Newbury TMLA would '*automatically terminate*'. However, this document stated that Fenland's decision on whether to assert its pre-emptive rights would '*be taken in light of discussions that Fenland will have with the CMA* [about *Fenland/Fishers*] *and is unlikely to be resolved until mid-year 2015*'.[935]

Steps towards termination of the Joint Venture

D.33. By 2 March 2015, the Parties had recorded, by means of the Passive Sales Letters, their agreement to *'not enforce …any clauses in the* …[TMLAs] *that would prevent …passive competition*' (see paragraph 3.98 above).

D.34. One aspect of the discussions regarding the future of the Joint Venture related to each Party's strategy for supplying Consumables after the termination of the Joint Venture. In this context, the Parties agreed that Fenland would acquire MPL from JVCo.[936] Fenland did so in May 2015.[937]

D.35. As at 16 March 2015, Fenland was seriously considering acquiring Fishers, and requested informal mergers advice from the CMA (see **Annex A**, paragraph A.10). Fenland considered that to facilitate CMA merger clearance it would be necessary, as part of the transaction, to terminate the Joint Venture (so that post-merger the Parties would '*fully compete across Great Britain*').[938]

D.36. Discussions between the Parties regarding the future of the Joint Venture progressed, at this time, in the expectation that the Joint Venture would terminate once the CMA cleared *Fenland/Fishers*. For example, a note dated 4 September 2015 discussed by the Parties stated that the CMA's approval of *Fenland/Fishers* '*will only be forthcoming if Fenland breaks the Microncleαn Ltd* [JVCo] *joint venture arrangement for the licensed use of the Microncleαn Trademarks in relation to cleanroom laundry so that Fenland (continuing to*

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[933] URN 00151.8 (email from [Berendsen Newbury Director G] to [Berendsen Newbury Director J], [Berendsen plc Manager A] and others (all of Berendsen) dated 16 April 2015).
[934] URN 00186.118 (full reference at footnote 804 above); URN 00186.119 (full reference at footnote 121 above).
[935] URN 00186.118 (full reference at footnote 804 above) e.g. points 28 and 32 at pp.5–6.
[936] URN 00043.8 (Minutes of MPL and JVCo board meetings, May 2015).
[937] URN 00043.9 (Agreement between Fenland and JVCo for the acquisition of MPL).
[938] URN 00186.119 (full reference at footnote 121 above), p.1.

trade as Microncleanl) competes with Berendsen (trading as Berendsen) across the UK'. The same note set out possible arrangements for the Parties' future use of the Microncleanl Brand in the UK, including a proposal that, in Consumables, Berendsen Newbury '*becomes a distributor with Fenland undertaking order fulfilment for them*'.[939]

D.37. Termination of the Joint Venture was a condition precedent to *Fenland/Fishers*, under the agreement by which Fenland was to acquire Fishers.[940]

D.38. From September 2015 onwards, Berendsen Newbury began to supply its Cleanroom Laundry Services customers using the Berendsen brand. Berendsen described this as 'dual-branding' (i.e. trading under both the Berendsen and Microncleanl names).[941]

D.39. In October 2015, the CMA began to investigate *Fenland/Fishers*. This merger review resulted in a decision by the CMA, announced on 16 December 2015, that *Fenland/Fishers* would be referred for an in-depth phase 2 merger review unless the merging parties offered acceptable undertakings to address the CMA's competition concerns.[942]

D.40. On 24 December 2015, Berendsen and Fenland communicated to each other their intentions to (i) conclude their previous discussions in relation to '*the future of the JV between Fenland and Newbury and the Microncleanl brand which we currently share*', and (ii) '*reach a firm decision on the JV structure*'.[943] Ultimately, the CMA decided to refer *Fenland/Fishers* to an in-depth phase 2 merger review, as a result of which that merger was abandoned.[944] The Parties proceeded, in any event, to terminate the Joint Venture.[945] Termination took place on 3 February 2016, with Fenland acquiring 100% of the shares in JVCo and thus also JVCo's wholly-owned subsidiaries as at that date (see paragraph 3.15).

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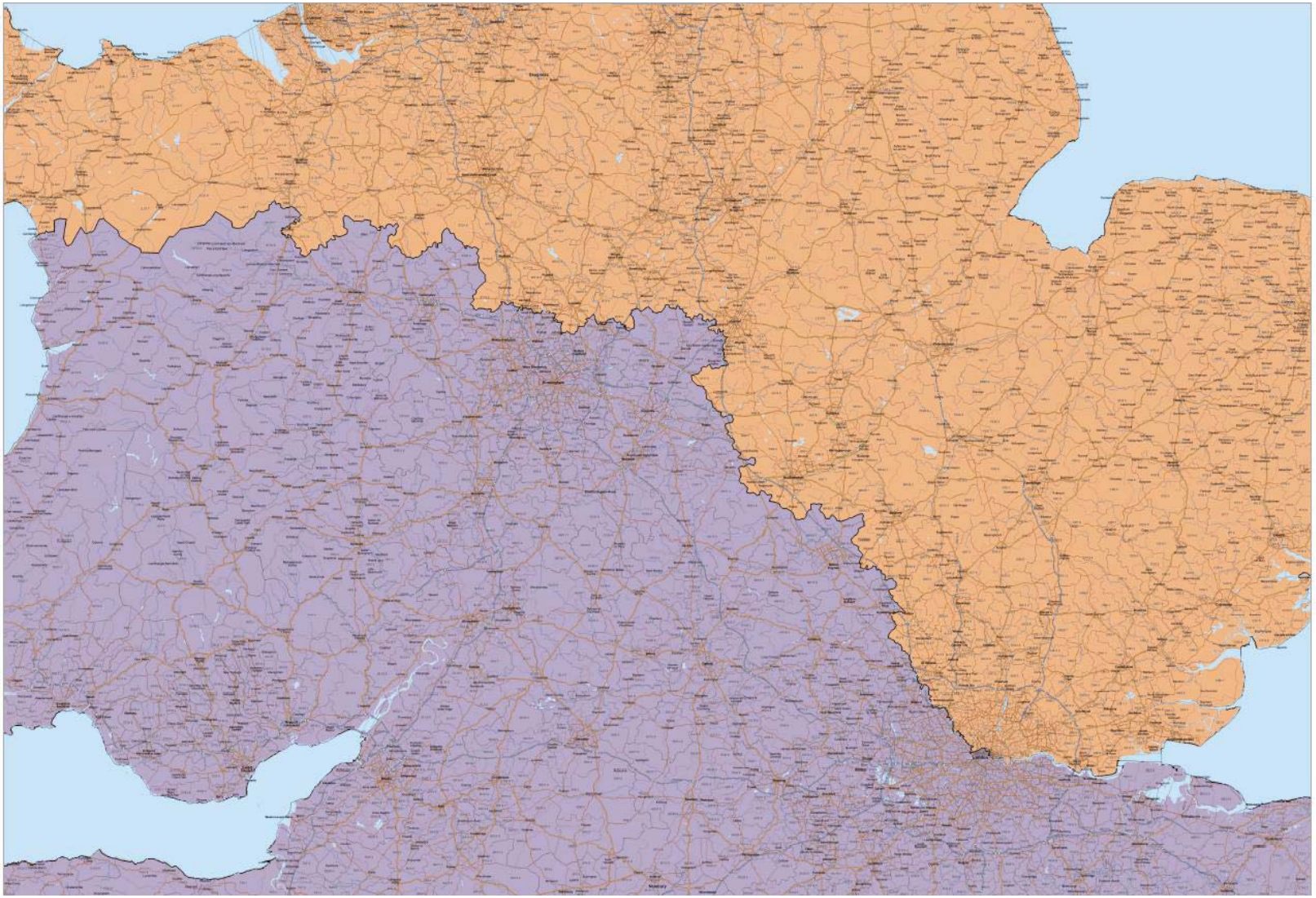
[939] URN 00186.119 (full reference at footnote 121 above), p.2.
[940] *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 4.
[941] URN 00036.73 (Berendsen Presentation 'CBM Cleanroom UK'), p.6. See also *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraph 56. Berendsen also submitted that this was a *'re-branding'* (i.e. a move to use only the Berendsen brand): URN 00068.1 (full reference at footnote 23 above), paragraph 14.2. Fenland, meanwhile, referred to this as *'co-branding'*: URN 00037.1 (full reference at footnote 23 above), p.6.
[942] This was principally on the grounds that, having regard to the combined share that would be held by Fenland and Fishers post-merger, *Fenland/Fishers* would give rise to a substantial lessening of competition (SLC) in the market for full cleanroom services, and that the SLC would not be offset by the constraint on the post-merger combined entity which would be exercised by Berendsen Newbury, then operating as an independent competitor in the market: *Fenland/Fishers* Decision (full reference at footnote 9 above), paragraphs 8–9. The CMA published a version of its SLC decision, i.e. the *Fenland/Fishers* Decision, on 4 January 2016.
[943] URN 00067.11 (emails dated 24 December 2015 between [Berendsen plc Manager A] and [Fenland Director A]).
[944] *Fenland/Fishers* cancellation of reference, paragraph 3.
[945] URN 00043.1 (Heads of Agreement for restructuring of JVCo, produced by [Fenland Director A] on 28 January 2016 and signed by the Parties on 2/3 February 2016).

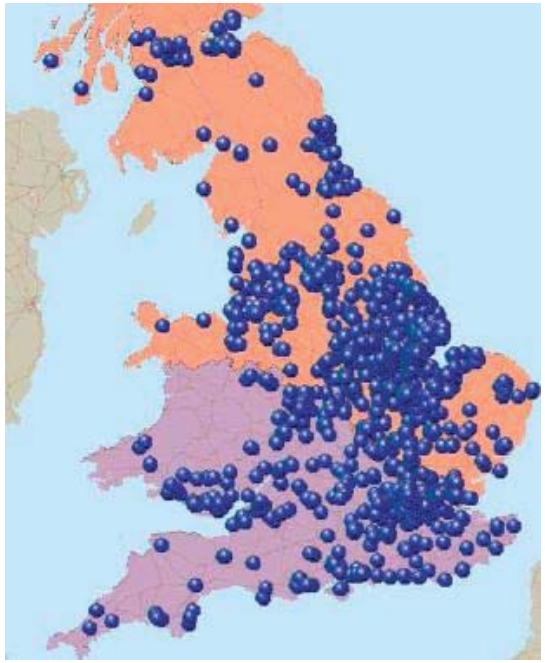
ANNEX E
MAPS INDICATING THE FENLAND TERRITORY, THE NEWBURY TERRITORY AND THE LOCATIONS OF CERTAIN CLEANROOM SECTOR CUSTOMERS

Figure E1: Detailed map showing boundary, as at 20 September 2013, dividing the Fenland Territory (shown in orange) from the Newbury Territory (shown in purple)



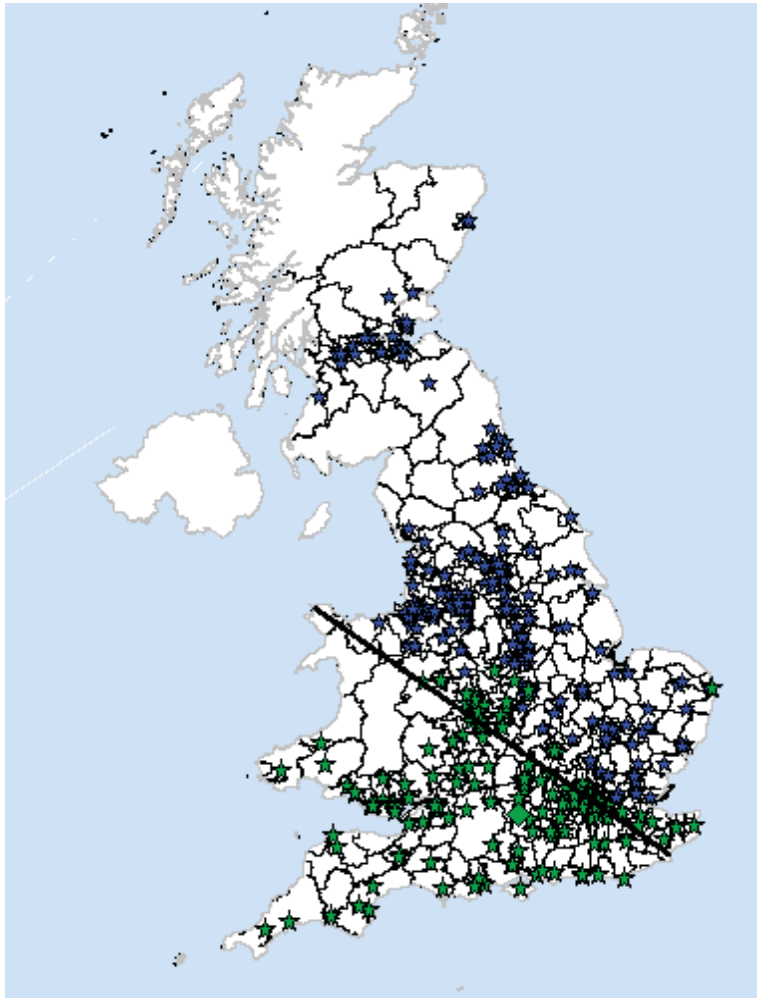
Source: URN 01016 (Document entitled 'Custom territories 2013-09-20.pdf', provided by Fenland to the CMA during the review of *Fenland/Fishers* on 2 October 2015).

Figure E2: Fenland Territory (shown in orange), the Newbury Territory (shown in purple) and the locations of the Parties' customers in these territories, April 2012



Source: URN 00066.7 (presentation entitled '2012-04-19 Customer Presentation [Fenland Director A]'), p.1. The CMA has inferred that this document was produced on the date referenced in its title.

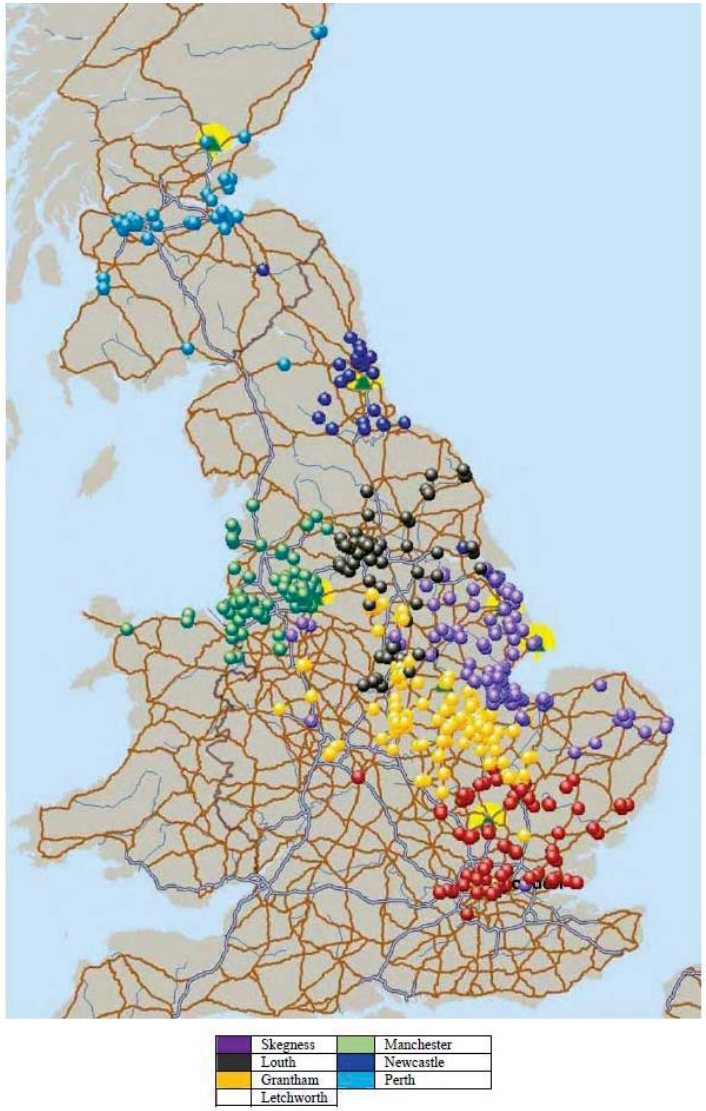
Figure E3: Full Cleanroom Laundry Services – locations of Fenland customers (in blue, mostly north of illustrative line) and Berendsen Newbury customers (in green, mostly south of illustrative line), October 2015



Source: *Fenland/Fishers* Decision (full reference at footnote 9 above), p.13 (Figure 2 – which included a line running '*between, broadly, London and Anglesey*' to give an indication of the Fenland Territory and the Newbury Territory: see paragraph 3.84 above).

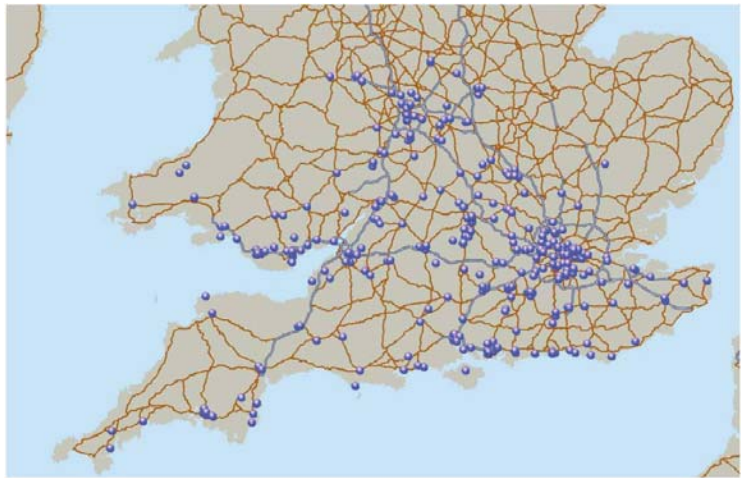
In relation to Berendsen Newbury customer location details, see footnote 226 above.

Figure E4: Fenland Cleanroom Laundry Services customer locations (and locations of Fenland hubs used to serve customers) in GB, March 2014



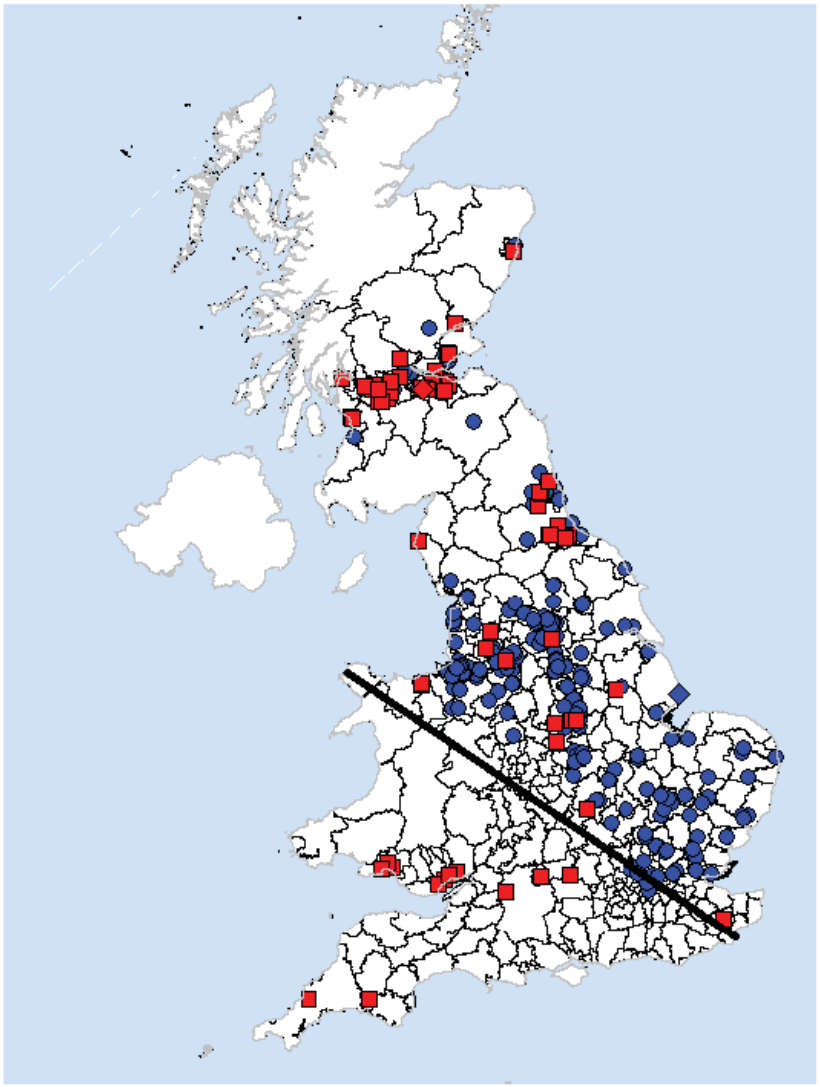
Source: URN 00982 (full reference at footnote 82 above), p.33 (Map 6.2); see footnote 94 above.

Figure E5: Berendsen Newbury Cleanroom Laundry Services customer locations in GB, March 2014



Source: URN 00982 (full reference at footnote 82 above), p.35 (Map 6.3): see footnotes 94 and 226 above.

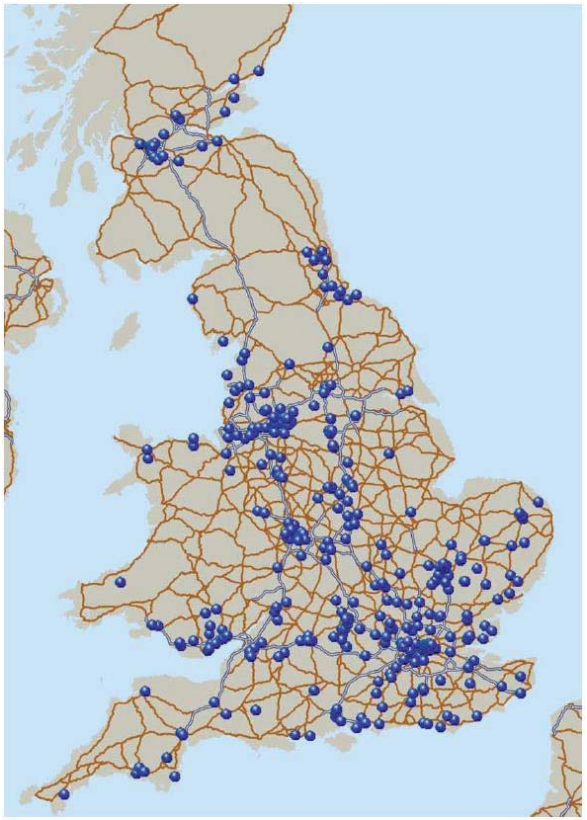
Figure E6: Full Cleanroom Laundry Services – locations, in GB, of customers of Fenland and Fishers, September 2015



Red squares – Fishers Cleanroom's full cleanroom laundry customers; Red diamond – Fishers Cleanroom's full cleanroom laundry facility
Blue circles – Fenland's full cleanroom laundry customers; Blue diamond – Fenland's full cleanroom laundry facility

Source: Map by the CMA, as taken from *Fenland/Fishers* Decision (full reference at footnote 9 above), p.11 (Figure 1 – which included an indicative line running *'between, broadly, London and Anglesey*': see paragraph 3.84 above).

Figure E7: Cleanroom Laundry Services and Consumables – locations, in GB, of customers of Guardline, March 2014



Source: URN 00982 (full reference at footnote 82 above), p.41 (Map 7.1)