

**PARTIES' INITIAL PHASE 2 SUBMISSION  
3 MAY 2019  
("INITIAL SUBMISSION")**

**ME/6793/18**

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*The terms used in this Initial Submission have the same meaning as that given in the Merger Notice submitted to the CMA on 12 February 2019 (the "**Merger Notice**"), the CMA's Phase 1 Decision of 10 April 2019 (the "**Decision**"). Where the same word has a different definition in these documents, the definition from the latest document has been used.*

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SCHEDULE: HOLCHEM WON AND LOST FOR SMALLER CUSTOMERS AND VERY SMALL CUSTOMERS1		

## 1. INTRODUCTION

- 1.1 Ecolab Inc ("**Ecolab**") and Holchem Group Limited ("**Holchem**") (together, the "**Parties**") have reviewed the CMA's Phase 1 decision of 10 April 2019 (the "**Decision**") concluding that Ecolab's acquisition of Holchem (the "**Transaction**") gives rise to a realistic prospect of a significant lessening of competition ("**SLC**") in the supply of cleaning chemicals (the "**Formulated Products**") to customers who produce and sell food and beverage ("**F&B**") products.
- 1.2 In particular, the Decision failed adequately to consider the competitive constraints operating on the Parties which would continue to operate on the "**Merged Entity**" following the Transaction, namely the constraints:
- (a) From Diversey and Christeyns as existing large competitors in the UK market and globally;
  - (b) From Kersia as a smaller (but expanding) competitor in the UK market, by virtue of its UK facilities, extensive pre-existing group reputation, resources and know-how, recruitments efforts and stated intentions;
  - (a) From smaller existing competitors already in the UK F&B market, whose ability to compete was dismissed, without citing any real evidence, and which include UK operations of large, well-regarded global and pan-EEA suppliers;
  - (b) From raw materials suppliers, who sell unformulated chemical products that can be substituted for Formulated Products, and in some cases were even named by customer as competitors of the Parties and apparently confused by the CMA for suppliers of Formulated Products in the Decision<sup>1</sup>; and
  - (c) From other new entrants (including those already active in other European markets) taking advantage of supply-side substitutability of the Formulated Products with those in adjacent markets to leverage existing manufacturing facilities with pre-existing know-how.

The Parties submit that any one of these constraints would be sufficient to prevent an SLC and the suggestion that all of them, taken together, cumulatively do not constitute a sufficient competitive constraint to prevent an SLC is implausible. The Parties submit that the market and the potential effect of the Transaction must be considered in the round during the Phase 2 process.

- 1.3 Notably, in considering the competitive constraint from smaller competitors (of which more than 20 are currently active in the UK), raw material suppliers and new entrants, the CMA appears to have accepted that manufacturing and product formulation do not represent barriers to entry or expansion. Instead, the CMA's argument appears to be based upon a more nebulous competitive advantage deriving from reputation and know-how in client support. As the Parties will demonstrate, these factors pose no material barrier to entry or expansion and can readily be obtained by rivals.
- 1.4 In this Initial Submission the terms "F&B", "F&B suppliers" and "F&B manufacturers" are used for the cleaning chemicals themselves and their manufacturers and suppliers (i.e. not manufacturers of foods and beverages) while the term "F&B customers" is used for the food

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<sup>1</sup> i.e. Caldic and Woburn

and beverage factory operators who purchase cleaning chemicals from, among others, the Parties. Terms such as "F&B market" refer to the market for the supply and purchase of cleaning chemicals rather than the manufacture of food and beverage itself.

- 1.5 The Decision does not acknowledge the main finding from the CMA's third party feedback exercise, which is that the apparent extremely low response rate suggests that the overwhelming majority of customers are unconcerned by the Transaction. Furthermore, while the CMA has allegedly relied on "reasoned and articulated"<sup>2</sup> customer feedback that it did receive from a small proportion of customers, this feedback does not appear to have been *evidenced*. As outlined in the Issues Paper Response and explored further below, certain customer feedback appears to be confused and other customer feedback (for example, the identification of raw materials suppliers as competitors) appears to have been misinterpreted by the CMA. Neither the Decision nor other feedback from the CMA suggest there has been any meaningful attempt to test the accuracy of or explain any discrepancies raised by the third party comments<sup>3</sup>, which the Parties trust will not be replicated during Phase 2.
- 1.6 The Parties received from a customer a copy of the CMA's customer questionnaire on the matter. The questionnaire is flawed in several respects which may have prejudiced the answers provided and then relied upon by the CMA. This is explored in further detail below.
- 1.7 The Parties' sales and other data are currently being refined for the Phase 2 inquiry process by economists RBB. Among other things:
- (a) Tender records and the won & lost analysis are being updated. In particular, while certain updated tender data will be provided in response to the CMA's currently outstanding requests for information to the Parties, the analysis set out herein is based on data already provided to the CMA during Phase 1;
  - (b) Further work is being done in order to group customers who are part of the same undertaking;
  - (c) Data on which customers have exclusivity agreements and/or loyalty rebates are being gathered; and
  - (d) The Parties' sales data is being evaluated in order to make sure that it is entirely comparable<sup>4</sup>.

This work is highly unlikely to change the overall conclusions of this Initial Submission, but some numbers are subject to change.

- 1.8 The UK F&B market is incredibly competitive and characterised by low (~~⌘~~) margins and prices, with competitors almost never being able to pass through cost increases to customers<sup>5</sup>. This is driven by the market reality that there are sufficient competitors willing to supply Formulated Products, as well as raw materials suppliers who constitute a very real alternative for customers for the majority of their purchasing needs.

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<sup>2</sup> Decision, paragraph 89

<sup>3</sup> A concern previously expressed in the Issues Paper Response, paragraph 3.1

<sup>4</sup> For example, Ecolab make sales of equipment in its own right, while Holchem sells equipment as an agent of equipment supplier Vikan. Additionally, Ecolab has a small number of customers based in Northern Ireland, which it services from the Republic of Ireland, meaning that Ecolab attributes turnover from these customers to its Irish business.

<sup>5</sup> ~~⌘~~

## 2. EXECUTIVE SUMMARY

2.1 This document is divided into the following themes and Sections:

- (a) Frame of reference: this Section notes that the Decision's conclusions in relation to an F&B product market with a UK geographic scope should be continued into Phase 2 and that there is little justification for distinguishing between Food, Dairy and Beverage customers in terms of frame of reference. The Section notes that barriers to entry between adjacent geographic markets are negligible for existing F&B suppliers in other EU jurisdictions;
- (b) Market size: this Section puts forward as an alternative a more robust bottom-up approach for estimating the size of the UK F&B market and demonstrates that the market size estimate used in the Decision is likely to underestimate greatly the size of the market and overestimates the Parties' shares;
- (c) Closeness of competition: this Section demonstrates that the Parties have not been each other's closest competitors. In particular, Ecolab's revenues are primarily derived from large International Customers, which Holchem is unable to compete for due to it not having the capacity to supply and support F&B customers based in multiple countries. Holchem's business and revenues meanwhile are focussed on Larger National Customers, i.e. UK-only customers with purchase values of over £50,000 per year.
- (d) Unformulated products: this Section shows that, while unformulated products may not be suitable alternatives for all cleaning applications, they are suitable for applications which constitute a significant proportion of F&B customers' demand, with much of the remainder being contestable by Institutional Products.
- (e) Bid analysis: this Section demonstrates that the Decision has undervalued the role played by smaller competitors.
- (f) Barriers to entry and expansion: this Section demonstrates that (i) barriers to expansion for the dozens of existing F&B suppliers in the UK market with small market shares are very low; and (ii) barriers to entry into the UK market for existing F&B suppliers based in other EEA Member States are extremely low, such to make entry timely, likely and sufficient in the event of a SSNIP.
- (g) Competitive Constraint: this Section evaluates the competitive constraint imposed by various competitors. In particular (i) the Decision's conclusion that Christeys is a weak, low quality competitor in F&B does not appear to be justified nor reflective of its recent UK activities; (ii) Kersia has the capacity, staff, know-how and reputation to exercise a competitive constraint; and (iii) smaller competitors do in particular exercise a competitive constraint over the Parties with respect to demand from Smaller Customers and Very Small Customers, who (based on the Parties' own customers) make up the vast majority of customers.
- (h) Internal Documents: this Section demonstrates that the Decision has wrongly drawn adverse conclusions by interpreting isolated statements out of context.
- (i) Competition in the Institutional Segment: this Section agrees with the CMA's conclusion that there is no reasonable prospect of an SLC in this Segment as a result of the Transaction.

### 3. FRAME OF REFERENCE

- 3.1 The Parties agree with the Decision's conclusion that the relevant frame of reference should be the supply of cleaning chemicals to F&B customers, particularly given the very clear supply side substitutability<sup>6</sup>. However we note that in certain instances the Decision does consider the narrower F&B Micro-Segments (Food, Dairy and Beverage) without explaining why these narrower frames of reference are relevant<sup>7</sup>. Although the Parties agree that the narrower Micro-Segments are not relevant, we would also submit that, even if one were to attribute any significance to the narrower Micro-Segments, the only overlap of potential relevance in this merger investigation is that in the F&B Food Micro-Segment, given that in both F&B Dairy and F&B Beverage the increment resulting from the Transaction is insignificant, and does not result in any significant change in the competitive dynamics<sup>8</sup>.

#### *F&B customers*

- 3.2 The Decision raises issues in relation to the supply of cleaning chemicals to F&B customers. These are all customers involved in the production and sale of food and beverage, who use a range of cleaning products in their factories. The customers' activities covered by level 2 NACE Codes C.10- Manufacture of Food Products and C.11- Manufacture of Beverages.
- 3.3 From a cleaning chemicals supply perspective, F&B Food includes all of F&B which cannot be placed within the F&B Dairy and F&B Beverage. This includes cleaning chemicals supplied for use in "protein", the term given to slaughterhouses and butcheries<sup>9</sup>. While historically the vast majority of the F&B Food Manufacturing Micro-Segment consisted of supply to protein customers, the growth of pre-packaged or "processed" foods (i.e. where ingredients are brought together on a production line) since the 1980s in the UK has meant that the protein component of the Micro-Segment has become comparatively less important as time has gone on<sup>10</sup>, and F&B Food now covers a full range of manufacture of jams, sauces, sandwiches, ready meals, soups, baked goods, packaged and canned fruits and vegetables, etc.
- 3.4 Despite many similarities, the supply of cleaning chemicals to F&B customers does not include level 1 NACE Code A activities such as the growing of plants or rearing of livestock (which is served by the Agricultural Sub-Segment) nor does it include level 1 NACE Code H activities such as the on-premises preparation of food, for example at restaurants (which is part of the Institutional Segment).

#### *Supply of cleaning chemicals to F&B customers*

- 3.5 The supply of cleaning chemicals to professional (i.e. non-consumer) end users is broadly divided into two "Segments" based on the customers served rather than the products supplied: the "**Industrial Segment**" and the "**Institutional Segment**". F&B customers are within the Industrial Segment, alongside other production facilities which require cleaning chemicals to maintain cleanliness and hygiene. The other Sub-Segments within the Industrial Segment

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<sup>6</sup> Decision, paragraph 42

<sup>7</sup> See for example, paragraphs 64-66 of the Decision

<sup>8</sup> Albeit according to the Decision's market size estimates, which the Parties believe to be inaccurate for the reasons set out in Section 4

<sup>9</sup> Protein is covered by level 3 NACE Codes C.10.1 and C10.2

<sup>10</sup> As described on the call between the CMA ~~X~~ of Holchem on 6 February 2019

relevant to the supply of cleaning chemicals are Agriculture, Life Sciences and Professional Laundry Services.

3.6 The cleaning products supplied to F&B customers are themselves divided into different applications. Broadly speaking, the Parties' sales can be divided into the following product categories:

- (a) Animal health (given that some F&B customers are dairies and slaughterhouses, a very small amount of demand for animal health cleaning products for the brief period during which live animals are present);
- (b) Bottle and tray wash (generally a foaming formulated product);
- (c) Clean In Place ("CIP"), i.e. the cleaning of interior surfaces of pipelines, tanks and other equipment with chemistry that flows through the interior surfaces and is safe for surfaces that contact food or beverages without the need to be disassembled for cleaning;
- (d) Cleaned Out of Place ("COP"), i.e. the cleaning of the exterior of equipment and other surfaces within the production area and equipment parts that must be disassembled (e.g. small pipes or valves) in order for them to be cleaned with chemistry that is safe for surfaces that contact food or beverages;
- (e) Conveyor Management: lubricant for the conveyor belts;
- (f) Environmental Hygiene, i.e. ensuring that the overall production facilities are kept clean, i.e. floors, doors, windows of production area that do not involve food contact, but also lobbies, staff lounges and bathrooms – notably these are not specific to F&B production and are the same as general Institutional cleaning products;
- (g) Equipment and Spare Parts, i.e. the dosing equipment supplied by cleaning chemicals manufacturers;
- (h) Food Surface Treatment, i.e. the treatment of surfaces used for food preparation;
- (i) Hand and Skin treatment, i.e. the hand-wash, hand sanitizers and lotions used by production line workers bathrooms – these are also not specific to F&B production and are the same as general Institutional hand-care products;
- (j) Membrane Treatment Chemicals, i.e. the cleaning of membranes used for filtration;
- (k) Speciality Applications, i.e. everything else.

3.7 Customer spending across each application is broadly similar for Food, Dairy and Beverage with some small exceptions (e.g. a Beverage customer has no need for animal health products). As shown in the tables below, F&B customers spending is heavily concentrated in the CIP and COP applications.

**Table 3.1: Ecolab F&B turnover in 2017 by application (Revenue)**

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**Table 3.2: Ecolab F&B turnover in 2017 by application (Percentage of Total)**



- 3.8 The different products for each application are not demand-side substitutable and are supplied at different price points. However, F&B customers will typically require a wide range of cleaning chemicals covering multiple applications and, although there is no technical reason that such products could not be supplied by different manufacturers for different applications, customers expect to be able to purchase the range of these products used in production applications from a single supplier both for convenience and also to be able to attribute responsibility if an issue arises in relation to chemical cleaning. Because of this, the European Commission has, in previous cases<sup>11</sup>, segmented the market by end users and not product type or application, an approach which has been adopted by the CMA<sup>12</sup>.
- 3.9 The Parties agree with this approach and note that segmentation by customer type mirrors how undertakings active in the supply of cleaning chemicals to professional customers organise themselves<sup>13</sup>. However, application *is* relevant in at least two respects:
- (a) In relation to the ability of customers to substitute raw materials for formulated products. CIP is particularly vulnerable to substitution with raw materials and makes up a significant proportion of the Parties' turnover in F&B; and
  - (b) In terms of understanding how difficult it is to estimate market size and share since it is not clear whether the available estimates and turnover figures include the entire range of cleaning and hygiene products that may be sold to F&B manufacturers or whether they are limited to products for specific F&B manufacturing applications and may not include more general Environmental Hygiene or hand-care products, or whether they may be chemicals only and not equipment. The Parties note that their estimates and turnover figures do include all such applications, but if other market size estimates (and figures provided for competitors' revenues) do not, the Parties' respective shares would go down if those applications were excluded from their turnover figures.

***Supply-side substitutability***

- 3.10 As argued by the Parties and noted in the CMA's decision, there is a large degree of supply-side substitutability across F&B, evidenced by:
- (a) The manufacturing process, packaging and delivery methods for products being identical across Food, Beverage and Dairy;
  - (b) There being considerable overlap in the cleaning products provided to customers in each of these segments;

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<sup>11</sup> Case M.704 – *Unilever/Diversey*, Case M.2665 – *Johnson Professional Holdings/Diverseylever*; Case M.6012 - *CD&R / CVC / Univar*

<sup>12</sup> Decision, paragraph 33

<sup>13</sup> See paragraph 75 of the Merger Notice



- (c) The relevant chemical formulations being almost identical as the functionality, levels of concentration and health and safety standards are almost identical;
  - (d) Typically, the individuals covering all F&B customers;
  - (e) Many applications, e.g. CIP cleaning, being used across all groups of F&B customers whose products are processed through a closed pipeline (e.g., milk, cheese, beer, juice, sauces, dressings, soups, etc.);
  - (f) The margins realised across the F&B customer groups being very similar;
  - (g) The four largest competitors (the Parties, Diversey and Christeyns) as well as smaller ones (e.g. Kersia, Evans Vanodine) being active across each of Food, Beverage and Dairy customers; and
  - (h) Ecolab's UK (and European and Global) business plans covering the full F&B segment;<sup>14</sup>.
- 3.11 As a result of this widespread supply-side substitutability, the CMA concluded that the differences between Food, Beverage and Dairy were more limited than the differences between the differences between F&B and the wider Industrial Segment (which would include Life Sciences and Agriculture)<sup>15</sup>.
- 3.12 While this is indeed the case, many of the arguments for supply-side substitutability across F&B drawn on by the CMA also apply more widely, in particular:
- (a) The four largest competitors (the Parties, Diversey and Christeyns) are also active in the Institutional Segment;
  - (b) There is significant overlap in the cleaning products provided to F&B customers and other cleaning chemicals customers, (i.e. including Life Sciences, Agriculture and Institutional);
  - (c) The manufacturing process, packaging and delivery methods for cleaning products are very similar across the entire Industrial Segment and similar to those used in the Institutional Segment;
  - (d) Many of the chemical formulations used in F&B are almost identical to cleaning products used by other Industrial and Institutional customers as the functionality, levels of concentration and health and safety standards are almost identical;
  - (e) Many applications (e.g. CIP) are used across the Industrial Segment. Hand and skin treatment products and environmental hygiene products used in F&B and the wider Industrial Segment are identical to hand and skin treatment products and environmental hygiene products used in the Institutional Segment (but for the addition of scent to the latter); and
  - (f) The Parties' list prices for identical products are the same in different Segments and Sub-Segments.

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<sup>14</sup> Decision, paragraphs 40 and 41

<sup>15</sup> Textile Care is typically included in Industrial, but more differentiated and less relevant to current case

- 3.13 The result of this is that barriers to expansion/entry for existing UK manufacturers in adjacent cleaning product markets are low and, where a manufacturer is already active in F&B in another geographic market, "negligible" (to use the words of the European Commission<sup>16</sup>). The Parties submit that where a manufacturer is active in an adjacent cleaning product market in the UK and active in F&B elsewhere in the EEA, these barriers to entry are extremely low and effectively non-existent and therefore a very significant competitive constraint on the Parties post merger. These issues are discussed in more detail in section 8 below.

#### *Demand-side substitutability*

- 3.14 Given the conclusions on supply-side substitutability, the Decision did not (and did not need to) consider demand-side substitutability in any great detail, merely noting that F&B customers told the CMA that they required F&B-specific knowledge, expertise and services from suppliers and that they would not consider companies not already supplying F&B in the event of a price increase by their current supplier<sup>17</sup>. The knowledge and servicing expertise required for F&B customers, and the means by which that can be established, are discussed further at section 8 below.
- 3.15 As an initial comment, it is notable that a significant portion of the Parties' customers do not receive site visits or any formalised support. Ecolab will only put in place a support and service programme for customers making purchases of around ₤ or more per annum. The vast majority of the Parties' customers (₤ % in the case of Ecolab, ₤ % in the case of Holchem) have turnover with the Parties under this threshold, suggesting that the majority of customers in the market will not have a formalised support and service programme.
- 3.16 With respect to F&B-specific knowledge and expertise, we note that this knowledge is Europe-wide and there does not appear to be any meaningful distinction between the knowledge, expertise and services required by an F&B customer in the UK and an F&B customer in any other EEA country. The legislation which regulates hygiene standards is Europe-wide and the fundamental issue being tackled (hygiene and cleanliness of production facilities) is the same the world over. While Marks & Spencer accreditation<sup>18</sup> is valued within F&B, we note that several of the accredited providers are based in other jurisdictions (including outside the EEA)<sup>19</sup>.
- 3.17 As regards expertise and servicing, we note that experts based in the wider EEA can be flown in the UK and that at least one competitor (Sopura) is known by the Parties to operate in the UK on this model (referred to in the industry as the "flying doctor" model). Notably, Holchem began supplying cleaning chemicals to Ireland using this model as well.
- 3.18 With respect to third party feedback suggesting that a customer would not consider suppliers not already supplying F&B, we note that this feedback does not appear to specify whether the suppliers would need to be supplying F&B in the UK in order to be considered. The Parties would strongly argue that the expertise and credibility and customer references are not limited to the UK.
- 3.19 Additionally, with regard to demand-side substitutability, the CMA does not appear to have applied its conclusions to its consideration of Kersia's on-going expansion into UK F&B. While

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<sup>16</sup> Case No IV/M.704 - *Unilever / Diversey*, paragraph 16

<sup>17</sup> Decision, paragraph 36

<sup>18</sup> See further paragraph 6.12 below

<sup>19</sup> Attached as Annex 7.1 to the Issues Paper Response

one competitor did note that purchasing managers operate under a "no one got fired for buying IBM" mentality<sup>20</sup>, it is not at all clear that this mentality would survive a SSNIP, particularly where an alternative supplier had a quality label such as Marks & Spencer accreditation<sup>21</sup> or a high profile F&B customer in another jurisdiction.

### *Conclusions on frame of reference*

3.20 Market definition is particularly relevant at Phase 1 but it is the beginning and not the end of the competitive assessment. Of particular relevance to this case are:

- (a) the high degree of supply side substitutability from production capacity currently deployed to satisfy other Industrial Segments and the much larger Institutional Sub-Segment; and
- (b) the ability of competitors active in other jurisdictions to leverage the know-how, skills and other expertise into the UK, particularly given that all competitors identified by the Parties are already active to some degree in the UK.

While both are technically competitive constraints from players outside the market, or only active to a limited extent, they are sufficient to prevent an SLC. This is discussed further in section 9 below.

## **4. MARKET SIZE**

### *CMA's conclusions on shares of supply*

4.1 The CMA's conclusions on the Parties' shares of supply indicated that it considered that the Transaction "*may be likely to result in a substantial increase in concentration in what may be an already concentrated market*"<sup>22</sup>. In drawing this conclusion, the CMA has apparently drawn on the estimated shares of supply of the Parties in each "**Micro-Segment**" (referred to in this Initial Submission as "**Food**", "**Dairy**" and "**Beverage**"<sup>23</sup>)<sup>24</sup> despite concluding that the relevant frame of reference is F&B *as a whole*. It is therefore uncertain (and indeed unexplained in the Decision) why the CMA believes that the Parties' shares of supply in each F&B Micro-Segment are relevant.

### *The Freedonia Report underestimates the market*

4.2 While the Freedonia Report<sup>25</sup> does not disclose its precise methodology, it appears that it adopted a "top down" methodology for estimating the market size<sup>26</sup>, using "*corporate accounts, SEC Form 10-K filings, product literature and other company information*" to estimate market size. In order to confirm this, the Parties' economists, RBB, contacted Freedonia in order to

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20 Decision, paragraph 120

21 See further paragraph 6.12 below

22 Decision, paragraph 67

23 Given that the CMA's Phase 2 Inquiry is focussed on what was previously referred to as the F&B Sub-Segment, the term "F&B" in these defined terms is now superfluous

24 Decision, paragraph 64-66

25 Attached to the Merger Notice as Annex 10.1

26 *Ibid*, page 16

discuss the methodology used to estimate the size of the UK F&B market. Based on these discussions, RBB suspects that Freedonia focuses on the top 4 competitors<sup>27</sup>.

- 4.3 Not only does is Freedonia Report therefore likely to underestimate the F&B turnover from the numerous smaller competitors currently on the UK market, it *also* fails to take into account F&B turnover from the following F&B businesses of significance which were consolidated into the top 4 since 2013 (the year for which the Freedonia Report provides an estimate), namely:
- (a) Clover Chemicals<sup>28</sup>, which was purchased by Christeys in 2018;
  - (b) T.J. & S. Jenkinson<sup>29</sup>, which was purchased by Christeys in 2014;
  - (c) CCL Pentasol, which was acquired by Zenith in 2016<sup>30</sup>;
  - (d) Either Klenzan<sup>31</sup> (purchased by Christeys in 2014) or Zenith (purchased by Diversey in 2018), depending on which one Freedonia considered to be in the top four in 2013.
- 4.4 Even with respect to the top 4 competitors' shares of supply, as previously submitted<sup>32</sup>, there are likely to be issues. Ecolab has found that the sales figures provided for itself in market reports are often highly inaccurate. For example, the Freedonia Report<sup>33</sup> suggests that Ecolab had worldwide Institutional and Industrial cleaning chemical sales of \$4.950bn in 2013 whereas the actual figure was  $\times$ , i.e.  $\times$  % larger than the reported figure.
- 4.5 The Freedonia Report figure is, therefore, likely a gross underestimate of UK F&B market size and its similarity to the figure used by the Decision is not evidence for the accuracy of the latter figure<sup>34</sup> but rather evidence for the estimate used in the Decision being a gross underestimate.

#### ***Methodology for generated market size estimates***

- 4.6 The CMA did not give the Parties access to the methodology it used in order to create its own market size estimate. However, the Parties are aware that an estimate was developed for the *Bain/Zenith* Decision and suspect that the estimate was a "top down" estimate, which assessed the market using large F&B competitors' statutory accounts, tender data or similar points of reference.
- 4.7 The Parties consider that such a top down approach has the potential to be highly misleading in this case, given that it is likely to:
- (a) Ignore demand which has not recently been tendered;

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27 Call between Jim Levin of Freedonia and Dan Gore of RBB, 26 April 2019

28 See <https://www.christeys.com/en/news/christeys-acquires-clover-chemicals-ltd>

29 See <https://www.christeysfoodhygiene.co.uk/klenzan-t-j-s-jenkinson-press-release/>

30 See <https://www.linkedin.com/pulse/zenith-hygiene-group-enters-formal-agreement-acquire-ccl-francis/>

31 See <https://www.christeys.com/en/news/christeys-acquires-final-shares-food-hygiene-specialist-klenzan>

32 Merger Notice, paragraph 70

33 Annex 10.1 to the Merger Notice, Chart VIII-1

34 Decision, paragraph 60

- (b) Ignore demand currently served by smaller competitors of which at least 20 are currently active in the UK, and which the tender data reviewed by the CMA shows exert a material aggregate competitive constraint on the Parties;
  - (c) Ignore demand currently served by foreign competitors making sales under a framework agreement (either of imported products or products manufactured under a toll manufacturing agreement);
  - (d) Ignore demand currently served by suppliers of raw materials; and/or
  - (e) Ignore demand from smaller customers.
- 4.8 Granular estimates by geography and customer type made within the Institutional and Industrial cleaning chemical sectors are likely to have significant margins for error. Smaller suppliers may not need to report their turnover in their published accounts and, even where they do, if they are privately owned very little information regarding how their turnover is segmented will be made public. The lack of visibility or information about groups of customers or competitors in a top-down process is likely to err on the side of under-reporting the market size versus over-reporting.
- 4.9 With regard to the Parties' sales themselves: over two thirds of Ecolab's UK F&B business (by revenue) largely consists of the fulfilment of International Customers' orders made under international framework agreements negotiated and entered into outside the UK, with minimal to no UK specific terms (e.g., price/delivery terms may vary by country although still fixed by headquarters outside UK) nor involvement by UK personnel on either side. Additionally, a significant proportion of Holchem's F&B business consists of orders from small local customers. Each Party therefore makes significant sales in sections of the market likely to be "undercounted" by a top down assessment, such that their resulting shares of a top down market estimate are likely to be materially overestimated when paired with their actual sales.
- 4.10 However, full disclosure of the Parties' F&B sales (as well as those of Diversey and Zenith for the CMA's previous inquiry), including sales to these customer groups has been made to the CMA. Additionally, Christeyns' F&B activity is largely constituted within the former Klezan entity, now named Christeyns Food Hygiene Ltd. The CMA therefore has a full picture of the largest suppliers' activities in F&B but very little visibility of other suppliers' activities. This has likely led to an overestimate of the larger suppliers' market shares.
- 4.11 As a more general comment, we note that the CMA's lack of disclosure as to the methodology used to calculate its market size estimate makes it extremely difficult for the Parties to respond to, or clarify any flaws in the reasoning behind, the CMA's assertion in the Decision that the Parties enjoy high market shares. At this stage, the Parties' understanding of the CMA's methodology is insufficient for the CMA to use its share of supply estimates as a basis for an SLC decision compatible with the Parties' rights of defence. Aside from its comparability with the heavily discredited Freedonia estimate (see above), there is currently little way of knowing how reliable the CMA's estimate can be said to be. However, we note that the CMA has commented on various occasions that it does not place much faith in the accuracy of the Bain/Zenith estimate used as the basis for the estimate in the Decision<sup>35</sup> and, this being the case,

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In an email from Faye Fullalove to Alexandra Kamerling, copying Colin Rafferty and Richard Jenkinson of 15 June 2018 the CMA noted that the estimates "*were quite heavily caveated given the lack of publicly available information and reports in this market, and did not include all possible market segments (for example neither party was active in providing cleaning chemicals to industrial customers active in professional laundry)*". The Decision also notes at paragraph 67 that the CMA's estimates "*should be treated with caution*".

the estimate does not currently appear sufficiently robust to form even part of the basis for an SLC decision.

- 4.12 Given the clear issues with the top down approach to this market, we hope that during this Phase 2 investigation the CMA will take a closer look to the much more detailed bottom up estimates that have been re-done, which uses as its starting point the irrefutable fact that every food and drink manufacturing plant in the UK must use a certain amount of cleaning products depending on what it makes and its production volumes, or it would simply not meet the requisite health & safety standards.

***Revised market size estimates***

- 4.13 As previous submitted to the CMA<sup>36</sup>, Ecolab's historic rough estimates were largely focussed on its traditional area of focus of large/international customers, which is also the part of the market Ecolab understands best. Ecolab's F&B business is Europe-wide and marketing/business planning and resources are prioritized on that basis. Ecolab's internal estimates were prepared for purposes of chasing and winning the largest accounts possible, i.e. achieving the biggest financial impact for Ecolab. Their purpose was not to gain a complete view of entire market and in particular not the parts of a domestic market that Ecolab is less likely to be able to secure.
- 4.14 Additionally, given (i) the relatively small size of the UK F&B market compared to the other markets in which Ecolab operates; and (ii) Ecolab's focus on International Customers within that market (i.e. F&B customers whose UK presence is but one component of their business), it has hitherto not made sense for Ecolab to devote significant resources to attempt to create a precise UK market estimate.
- 4.15 Plus, the UK F&B space is really small in any event compared to Ecolab's business outside UK, so it would not be prudent to spend a lot of time and energy trying to develop precision when most of Ecolab's sales to those customers do not even depend on UK factors, they depend on the sales outside UK.
- 4.16 The Target had estimated the total UK market size much larger than Ecolab or CMA: it is worth noting that a significant portion of the Target's business consists of UK SMEs, and it is very difficult to find any meaningful data on these. SME customers are, however, much more likely to be supplied by the long tail of small UK suppliers than the likes of a Diversey, Christeyns, Kersia or Ecolab, and are therefore very unlikely to be captured by any estimates they prepare for targeting prospective customers and developing strategic focus. The Decision's characterisation of the estimate as being calculated "*around the kitchen table*"<sup>37</sup> chooses to ignore the decades of industry experience of the individuals making the calculation, which itself consists of hundreds of site visits, dozens of approaches to customers and potential customers and tens of conferences. The Decision instead confines its evaluation of Holchem's estimate to a glib comment on the location of the meeting at which the calculation was finalised, which consists of four words selectively quoted from ~~X~~'s much more extensive verbal explanation given in response to a question asked by the Case Team at the Issues Meeting. The location of Holchem's senior staff meeting is irrelevant: as an owner-managed, family run business, senior staff of Holchem with decades of experience between them will often meet at each other's homes.

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<sup>36</sup> Issues Paper Response, paragraph 3.6

<sup>37</sup> Decision, paragraph 60(b)

- 4.17 As part of the preparation for the Merger Notice, Ecolab did a bottom up calculation. Unfortunately the individual that did most of the work left the organisation and Ecolab struggled during the Phase 1 process to provide the CMA with the full methodology and raw data used. This resulted in the CMA team entirely rejecting the results and reverting to the significantly smaller market size estimates built up from the Freedonia Report and *Bain/Zenith* estimates.
- 4.18 In order to assist the CMA's Phase 2 inquiry, Ecolab has re-created the market size estimates using the bottom up methodology. The data will be checked by RBB and cross-referenced with Holchem data. To summarise: once finalised, the estimates will come from three separate sets of hard data:
- (a) **Euromonitor and Eurostat data:** these are reliable third party data sources which have been used to determine food and beverage production in the UK, broken down by product type (e.g. beef, pork, chicken, milk, cheese beer), where due to regulatory health and safety requirements it is clear that all their products must meet the requisite cleaning standards;
  - (b) **Ecolab Customer data:** sales values of the different cleaning chemical products sold to its exclusive F&B customers (i.e. customers who only use Ecolab as their source for formulated cleaning products) are calculated and cross-referenced with the volume of products produced by the customers, in order to derive a calculation for how much of each product application (e.g. CIP, handcare, etc<sup>38</sup>) is required in order to produce a given volume of product. Given that such customers will usually receive a discount to list prices as a reward for exclusivity, this part of the calculation actually results in an underestimate of market size by value.
  - (c) **Holchem Customer data:** the Ecolab customer data exercise will be repeated with a selection of Holchem customers by RBB in order to increase the robustness of the calculation. As discussed in Section 4.22 below, the Parties have very different customer bases and so this cross-referencing exercise results in a representative cross-section of the F&B market being drawn upon.
- 4.19 The early indication following completion of the Ecolab phase of this process is that the UK F&B market was worth approximately £150m in 2017, excluding equipment sales. This calculation is subject to change following the incorporation of Holchem data and the RBB checking exercise, however it is unlikely that the figure will shift substantially. Once the analysis has been completed (which is estimated to be in time for the CMA's RFI deadline of 14 May 2019), it will be provided to the CMA, along with supporting data.
- 4.20 The market size estimate is of the addressable market, i.e. the demand which *can* be supplied by formulated products. This necessarily includes certain demand which is currently met by unformulated products.

### ***Conclusions on market size***

- 4.21 The Parties believe that the market size estimates provided with this Initial Submission represent a significant improvement on previous market size estimates and are likely to be much more fit for purpose than those used by the CMA in Phase 1.

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<sup>38</sup> The full list of applications is outlined at paragraph 3.6 above

4.22 The Parties' submit that the CMA should use these market size estimates going forward. However, should the CMA choose to refine the methodology used by the Parties, incorporate data from competitors to increase the robustness of the model and/or adopt a different method entirely, we request that data are shared on an external counsel only basis in order to ensure that the Parties' rights of defence are protected.

## 5. CLOSENESS OF COMPETITION

5.1 The CMA's Decision has concluded that the Parties are close competitors on the basis of:

- (a) The Parties' bidding data, which demonstrated competition between the Parties in F&B overall, as well as specifically in F&B Food;
- (b) Holchem's gain and loss data, which showed Holchem won or lost customers to Ecolab a "material" number of times in F&B as well as in F&B Food;
- (c) Evidence from third parties, including customers who indicated some concerns about the Merger; and
- (d) The Parties' internal documents, which show that each considers the other to be a key competitor in F&B and in particular within F&B Food<sup>39</sup>.

5.2 With regard to (a) and (b), bidding/won and lost analysis is discussed in more detail in section 7 below. (c) and (d) are discussed in this section.

### *Competition between the Parties*

5.3 The CMA's Decision suggests that the CMA did not engage substantively with the analysis provided in section 12 of the Issues Paper Response, preferring instead to dismiss the analysis out of hand in favour of the tender/bidding data and third party feedback.

5.4 An analysis of the Parties' customers suggests that F&B customers can be segmented through their purchasing behaviour into the following types:

- (a) **International Customers:** F&B producers who enter into a framework agreement with their F&B chemicals supplier to provide them with cleaning chemicals in multiple jurisdictions. Prices are generally negotiated on an international basis, with some local factors to address differences in the suppliers' local costs and the local volumes ordered. The considerable majority of Ecolab's UK F&B turnover is for customers in this category. Holchem has no customers in this category;
- (b) **Larger National Customers:** F&B producers who make sufficient purchase volumes in order to benefit from some kind of volume rebate and servicing from their supplier. Given the size of UK F&B factories, these customers often order products to be delivered to multiple sites. These customers will typically be visited by their suppliers for training, review, audit and/or servicing every 1-2 months;

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<sup>39</sup> Decision, paragraph 98



- (c) **Smaller Customers:** F&B producers who do not purchase sufficient volumes to benefit from rebates and get less servicing<sup>40</sup>. The majority of these customers are on standard terms and conditions; and
- (d) **Very Small Customers:** F&B producers so small that they will not warrant frequent visits from their cleaning chemicals supplier and will typically be visited 1-2 times per year, if that. These customers almost always purchase month by month on terms and conditions, as their sales volumes and the resulting margins do not justify a formal contract being drawn up. Other extras, such as free equipment, are not provided.

5.5 For the purposes of the analysis, the threshold between a Larger National Customer and a Smaller Customer has been set at £50,000 of purchases, with Very Small Customers having under £8,000 of purchases. The Parties' service levels for their own customers justify the setting of thresholds at or around these levels.

5.6 Ecolab sets a threshold internationally of  $\times$ <sup>41</sup> customers. For convenience, Ecolab interprets this in the UK as a  $\times$  threshold. Ecolab's internal guidance recommends that  $\times$ . Ecolab will also only visit a customer once per year for every  $\times$ <sup>42</sup> of sales.

5.7 Holchem groups its customers from  $\times$  which determines the guideline service levels to be provided to the customer at that site<sup>43</sup>. The groupings are as follows:

**Table 5.1: Holchem Service Levels**

$\times$

5.8 Additionally, each category of customer site gets a different expected amount of visits based on its spending:

5.9  $\times$ <sup>44</sup>

5.10 Notably,  $\times$ . Visiting targets for these customer sites does not, therefore, relate in any way to free servicing, which only comes in for customer sites with over  $\times$  of purchasing.

5.11  $\times$  Accordingly, Holchem can also be said to distinguish between customers based on the total amount of purchases made by that customer.

5.12 The possibility of a "UK and Ireland" category has been considered. Holchem regularly makes sales in Ireland as well as the UK, it has some customers who make purchases in both the UK and Ireland. Additionally, Ecolab organises its UK F&B sales within a "UK & Ireland" division, rather than a UK-only division. However:

- (a) Holchem's  $\times$  "UK and Ireland" F&B customers are very heavily concentrated in the UK, with  $\times$  % of Holchem's total sales to these customers being made in the

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<sup>40</sup> A key differentiator for Holchem is that it will visit these customers monthly. Holchem believes that it is unique on the market in this respect.

<sup>41</sup>  $\times$

<sup>42</sup> The UK interpretation of the international  $\times$  threshold

<sup>43</sup> The other relevant criterion is whether the account is a high risk/high care account. See further footnotes **Error! Bookmark not defined.** and **Error! Bookmark not defined.**

<sup>44</sup> <https://www.holchem.co.uk/content/images/page/files/safe%20working%20with%20chemicals%20-%20flyer%202015.pdf>

UK. Many UK customers with an agreement to purchase from Holchem in Ireland make very low or no purchases in Ireland (X made purchases of under £10,000 in 2018 while X made no purchases at all)<sup>45</sup>. This heavy bias towards the UK suggests that Irish procurement is merely an incidental add on for UK customers.

- (b) Ecolab's agreements with customers based in the UK and Ireland suggest that there is no meaningful "UK and Ireland" sub-category, or if there is, it is not relevant to the CMA's assessment. Ecolab has only X F&B customers with European turnover that is heavily concentrated (over 50%) in the UK and Ireland: X. Ecolab's agreements with X are global agreements under which significant F&B sales are made outside of Europe, meaning that Ecolab has only two "UK and Ireland" contracts, with X<sup>46</sup>.

As a result, the Parties do not believe that there is any merit in segmenting customers for the purpose of the analysis by whether they are based in the UK *and* Ireland only.

- 5.13 The Parties believe that customers are relatively fixed within these categories. International Customers organise their procurement centrally from one location, meaning that they often lack the staff to carry out as effective a procurement process in a single country. This central procurement function will cover a variety of products as well a cleaning chemicals (which are highly unlikely to be the procurement team's main area of focus). As such, an F&B customer would be unlikely to change its procurement model for UK cleaning chemicals from an international to a national model in response to a SSNIP in the price of those chemicals.
- 5.14 Holchem has previously attempted to persuade X, an International Customer, to purchase Holchem products in the UK, i.e. switch procurement models and become a Large National Customer in the UK. X. These efforts were unsuccessful and the customer remains an International Customer.
- 5.15 Large National Customers, Smaller Customers and Very Small Customers must purchase a certain volume of cleaning products in order to clean their production lines sufficiently. Accordingly, the amount of formulated and unformulated products purchased is determined by the volume of food or beverage being produced and so should not vary meaningfully. Given that there are benefits available to smaller customers from consolidating purchases of formulated products with a single supplier in the form of rebates, free equipment and other services, it appears unlikely that many Smaller Customers and Very Small Customers will have total formulated product purchases in excess of £50,000 and £8,000 respectively.
- 5.16 The tables below show the Parties' turnover with respect to these categories of customer:

**Table 5.2: Parties' Turnover for Each Customer Type 2018 (£)**

X

**Table 5.3: Parties' Turnover for Each Customer Type 2018 (% of total turnover)**

X

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<sup>45</sup> A full breakdown of sales made to UK customers with an agreement with Holchem in place to purchase in Ireland was provided to the CMA in a letter dated 1 March 2019, in the answer to the third question asked by the CMA in an email of 22 February 2019 in relation to the Parties' request for a "No Deal Brexit" derogation.

<sup>46</sup> Decision, paragraph 66

5.17 As shown in the above:

- (a) With respect to International Customers, Holchem does not compete for this category of customer at all, while International Customers are Ecolab's primary area of focus for its UK F&B business;
- (b) With respect to Larger National Customers, Holchem is a much stronger competitor than Ecolab, with nearly  $\times$  times Ecolab's sales by value. Holchem's revenues are also much more concentrated in this category, with nearly four times the proportion of its sales being made to customers in this category. Holchem's activities as an F&B supplier are clearly primarily focussed on this category of customer;
- (c) With respect to Smaller Customers, Holchem is a much stronger competitor than Ecolab, with nearly  $\times$  times Ecolab's sales by value. More than double the proportion of Holchem's sales are to customers in this category than Ecolab's, suggesting that this category is more of a focus for Holchem than Ecolab; and
- (d) With respect to Very Small Customers, both Parties have a very similar, very low proportion of their turnover with these customers, with neither having more than £1m of turnover from this customer category. On the assumption that smaller F&B competitors who are based in the UK are concentrated in this customer segment<sup>47</sup>, the Parties are unlikely to enjoy significant shares of this customer group. The very low proportion of the Parties' turnover in this category suggests that these sales are additions to the Parties' core focus on larger customers (albeit in different categories).

5.18 Even if these categories of customer are not accepted by the CMA, the Parties' revenues per customer demonstrate that Ecolab's revenues are much more concentrated on a small number of very large customers, typically multinationals. This is the case even when their revenues realised outside the UK are excluded.

5.19 The following charts show the distribution of the Parties' customers by revenue per customer.

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<sup>47</sup> As implied by the Decision. See paragraph 9.19 below.

**Chart 5.1: European Revenues Per UK F&B Customer as a Proportion of Parties' Total F&B Revenues**

✂

**Chart 5.2: UK Revenues Per F&B Customer as a Proportion of Parties' Total F&B Revenues**

✂

- 5.20 Even for Holchem, revenues are primarily concentrated with customers who make purchases of over £100,000. However, based on the Parties' data, the market itself primarily consists of very small customers, as the charts below shows:

**Chart 5.3: UK Revenues per F&B Customer as a Proportion of Parties' Total F&B Customers**

✂

- 5.21 In terms of what might seem an anomaly, where Ecolab has quite a number of very small customers (£1,000 - £2,000), this can be explained in that the Ecolab sales people will be focussed on their large accounts, but will make ad hoc sales to Very Small Customers as fortuitous add on sales. Or the sales may be just a portion of a customer's overall cleaning product spend, but they multi-source. Or an individual at a customer who is familiar with Ecolab's products moves to a smaller manufacturer and wants to switch them to Ecolab. In any event, these small customers are the subject of minimal marketing efforts, get minimal to zero service support and are by nature very vulnerable to switching suppliers at no notice. They just place orders and get billed through Ecolab's shared services function. Such customers may simply start ordering from others and orders to Ecolab taper off and Ecolab wouldn't know why or likely even notice.
- 5.22 Based on the above, the Parties cannot be regarded as close competitors. Additionally, the vast majority of the Parties' customers in the UK market are small customers who are more likely to be able to switch to smaller suppliers.

***Third party comments on closeness of competition***

- 5.23 The Parties have obtained a copy of the CMA's Phase 1 questionnaire to customers. Several of the questions are leading and encourage the respondent to name the Parties as potential suppliers in response to question 4:
- (a) The questionnaire names the Parties themselves in the filename and the heading but provides no other competitor names, prompting the respondent to remember the Parties but not necessarily their competitors; and
  - (b) The questionnaire was in all likelihood sent mostly (or even exclusively) to customers of the Parties, meaning that it underrepresents respondents who were not already customers of one Party or the other (and would therefore be more likely to identify other suppliers, including their own suppliers) .
- 5.24 The CMA did not, as part of the Phase 1 process, reveal the number of F&B customer respondents, the number of customers contacted by the CMA or what additional steps (if any) the CMA carried out in order to assess customer attitudes to the Transaction. However, both Parties being the most frequently named competitors, but still only being named by 16 F&B

respondents<sup>48</sup> despite the leading nature of the questionnaire, suggests that the CMA did not receive many (if any) more than 16 responses from F&B customers.

- 5.25 To put this in context, 3 unique email addresses from 3 domains were provided to the CMA as F&B customer contacts<sup>49</sup>. If a significant proportion of these respondents were contacted by the CMA as part of its Phase 1 review (and feedback received by Holchem from multiple customers who chose not to respond suggests this was the case), the response rate appears to have been extremely low. A likely reason for this low response rate is that the vast majority of customers are entirely unconcerned by the Transaction.
- 5.26 The low number and low response rate from customers suggests that the third party feedback gathered by the CMA during Phase 1 was statistically insignificant, making it difficult for the CMA to draw robust conclusions on customer sentiment in a market containing several thousand customers. The third party feedback gathered so far does not, therefore, appear usable by the CMA in Phase 2.
- 5.27 With regard to customer feedback received by the Parties themselves, the main concern received from Holchem's customers in the wake of the Transaction being made public was that Ecolab's customer focus was not the same as Holchem's and that, therefore, Holchem customers might suffer under the combined entity. The reality is that the Parties' customer bases are predominantly complementary, which has been a key driver for the Transaction.
- 5.28 The Parties look forward to reviewing the results of the CMA's further customer outreach during Phase 2 in the CMA's upcoming Third Party comments Working Paper and request that the CMA segment comments in this Working Paper by customer type as set out in paragraph 5.4 above in order that conclusions regarding closeness of competition by customer type can be drawn.

***Parties' internal documents on closeness of competition***

- 5.29 With regard to the internal documents quoted by the Decision in support of the CMA's conclusion that the Parties were "close" competitors in F&B, we note that certain statements quoted in the Decision from Ecolab documents<sup>50</sup> do not appear to be evidence of close competition at all, namely:
- (a) The statement in a board paper that Holchem is a "core F&B player in the UK" makes no comment as to whether Holchem is a close competitor of Ecolab or not, but rather refers to Holchem's core focus on F&B (which differentiates it from more generalist or Institutional cleaning chemicals manufacturers that are considered as Ecolab M&A targets);
  - (b) The transaction rationale in the same board paper explicitly states that Ecolab is buying Holchem to strengthen its position in F&B and Food in particular, where Ecolab is currently weaker, suggests that Ecolab does *not* view Holchem as a close competitor and instead views the Transaction as complementary.
- 5.30 With regard to Holchem's internal documents, the Decision notes that Holchem's internal sales reports monitor the activities of Ecolab, Diversey and Christeyns but does not "consistently"

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<sup>48</sup> Decision, paragraph 115(b)

<sup>49</sup> Annexes 26.2 and 26.3 to the Merger Notice

<sup>50</sup> Decision, paragraph 93

monitor the activities of any other competitors<sup>51</sup>. In fact, Holchem's internal sales reports mention a large range of different competitors in F&B, it is just that Ecolab, Diversey and Christeyns are currently Holchem's largest competitors (a fact that the Parties do not contest) and therefore more likely to appear in its reports. The CMA's decision mentions another 24 active suppliers of cleaning products for F&B customers<sup>52</sup> - all of which are mentioned in the Holchem internal documents.

## 6. UNFORMULATED PRODUCTS

### *What are unformulated products/raw materials/self-supply?*

- 6.1 Raw materials in F&B is the term given to food grade basic chemicals such as caustic soda, hydrogen peroxide, fluoride or nitric acid sold by reputable chemical resellers, which are used in place of formulated chemicals (in particular in the CIP and COP applications which make up the majority of the Parties' F&B turnover). An F&B manufacturer may choose to use a combination of raw materials and formulated products in different places in its factory and for different applications depending on the nature of the treatment requirement.
- 6.2 To take an example which works both with respect to Environmental Hygiene in F&B and domestic kitchen cleaning, a foaming “fresh scent” floor cleaner is a formulated product while an un-perfumed bleach (which is diluted sodium hypochlorite) is an unformulated product. The formulated product may even have the same active ingredient to clean and kill microorganisms (bleach) but it is combined with other chemical properties that may add efficacy (foam to extend surface contact and reduce labour) or aesthetic qualities (scent). A person seeking to clean a floor may use a floor cleaner or diluted bleach to achieve the same goal results, but may prefer one or the other depending whether it is their bathroom floor or the floor of their garage
- 6.3 While the Parties' previous submissions have referred to "self-supply" as the description for using unformulated products, it has become clear that this terminology is potentially misleading in that it suggests that F&B customers might manufacture their own formulated products, when instead they simply substitute and use off-the-shelf unformulated products for the same applications. "Raw materials" is also potentially misleading in that it suggests that some form of finishing process is required before the unformulated product can be used that is not required for formulated products. This is not the case: the only “pre-mixing” may be dilution with water, not other chemicals, but that not unique to raw materials; it is often required for formulated products delivered in concentrated form *and* for raw materials.
- 6.4 As shown below, third party comments often appear to be confused with respect to what the CMA has asked in relation to this topic. The Parties therefore propose to use the term "unformulated products" going forward.
- 6.5 Unformulated products also include electrolysed water and ozonated water, which are two alternative methods of cleaning using water which has been modified. Electrolysed water is created by passing a diluted saline solution through an electrolytic cell, causing the production of electrolysed oxidising water (a disinfectant) on the anode side and electrolysed reducing water (diluted caustic soda, a common alkali used in diluted form as an unformulated product

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51 Decision, paragraph 96

52 Decision, paragraph 114

and as the basis for several formulated products) on the cathode side<sup>53</sup>. Ozonated water is water which contains a high proportion of ozone molecules, which are an effective disinfectant<sup>54</sup>.

- 6.6 The technology behind these processes is not new, however environmental concerns and sewage treatment costs have triggered recent growth in the use of these solutions, given that the resulting effluent is less polluting<sup>55</sup>.
- 6.7 Electrolysed water and ozonated water are made by the customers on site and so suppliers will focus on the supply of the equipment necessary for creating the cleaning chemicals, rather than the chemicals themselves. As a result, this business model is not directly comparable to that of the Parties (or to more conventional unformulated product suppliers), however it does offer F&B customers an alternative solution for certain hygiene applications and therefore offers a competitive constraint on the Parties. For example Holchem is aware that ~~✗~~.

### *Factors in cleaning*

- 6.8 Every cleaning method involves a combination of four factors<sup>56</sup>:
- (a) Mechanical energy (i.e. physical brushing, scrubbing or scraping of the surface being cleaned): in general, the more mechanical energy is applied (e.g. the more vigorous the brushing), the cleaner the surface will be;
  - (b) Temperature (referred to as thermal energy): in general, the higher the temperature, the cleaner the surface will be;
  - (c) Time: in general, a longer cleaning cycle results in a cleaner surface; and
  - (d) Chemical energy: the role of the formulated or unformulated products in eliminating contaminants.
- 6.9 As a general rule, if one or more factors are reduced, the others can be increased in order to compensate<sup>57</sup>. The exact balance between the four factors will depend on a customer's preferences and the actual and perceived costs to the customer of each factor. For example, an F&B customer placing a higher premium on downtime for cleaning may not be as concerned about incurring energy costs as an F&B customer with a more relaxed production schedule, particularly if the extra labour does not result in incremental cost (e.g., just using excess capacity).
- 6.10 As a result of the interplay between the four factors, a formulated product may result in a cheaper cleaning process *overall* than an unformulated product. This is not recognised in the Decision which merely notes that "*using raw materials is significantly cheaper*"<sup>58</sup>.

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<sup>53</sup> Ozo innovations is a supplier of electrolysed water solutions. As its website shows, it targets F&B customers <https://ozoinnovations.com/>

<sup>54</sup> eozone group is a supplier of ozonated water <http://www.eozone.com/index.html>

<sup>55</sup> See also paragraph 235 of the Merger Notice

<sup>56</sup> These factors are sometimes referred to as the "Sinner circle"

<sup>57</sup> There are some exceptions. For example, food debris and biofilms are most efficiently removed using mechanical energy. Additionally diminishing, even negative, returns will eventually be experienced if one factor is increased too far: for example while diluted sodium hydroxide is effective for CIP cleaning applications, too high a concentration can cause crosslinking of proteins, which makes them harder to remove.

<sup>58</sup> Decision, paragraph 45

- 6.11 To continue with the "bleach versus floor cleaner" example used above: floor cleaner may take less time to use and/or require less scrubbing (i.e. mechanical energy) because it has certain additional properties (e.g. foaming). As a result, the increased price paid for the floor cleaner may be worthwhile. However, were this price to be increased beyond a certain level, the customer is able (and indeed likely) to switch back to using raw bleach.
- 6.12 However it is achieved, the end goal of all F&B customers is the same: to have a cleaning process for its F&B production which complies with the relevant EEA legislation. Certain customers who are "*chilled and high care/high risk manufacturers*", i.e. food manufacturers who provide food products which are to be eaten without additional cooking must also comply with Marks & Spencer's Guidance For Cleaning when manufacturing products to be supplied to Marks & Spencer. The Guidance has become a recognised quality standard for high risk F&B manufacturers not just for Marks & Spencer or in the UK but also for other F&B manufacturers both within and outside the UK<sup>59</sup>. Even with respect to this high standard, unformulated products Electrolysed Water and Ozonated Water (albeit from particular suppliers) are possible options.
- 6.13 Chemical energy is therefore only one of the four factors relevant in cleaning. Formulated products are based on raw materials but the formulation process used increases the effectiveness of the raw materials used. The chemical energy factor is increased and, as a result, one or more of the other four factors may be reduced in order to achieve the desired result.

***Third party comments***

- 6.14 The CMA's conclusions that unformulated products were not a viable alternative to formulated products appears to have been largely based on the limited third party feedback received.<sup>60</sup> The only relevant question in the questionnaire was:

*Please comment on alternative methods of meeting your cleaning chemical [sic] needs, such as outsourcing the whole operation or self-supply (ie buying the raw materials yourself).*

No further explanation of the meaning of the term "self-supply" was given, which appears to have prompted certain customers to believe that the CMA was seeking to determine whether customers were capable of buying and blending chemicals to produce formulated products themselves. One customer stated to the CMA that "*we would not want to mix our own products, we do not hold relevant equipment, have the space, legal permissions or expertise to undertake this*"<sup>61</sup> and "*due to the hazardous nature of the materials and formulation*"<sup>62</sup>. Likely adding further confusion, the questionnaire also asked about "outsourcing" in the same question, but did not define what this meant. The Parties had made no submission on outsourcing.

- 6.15 Notably, the first of these comments was included in the Issues Paper (and responded to in the Issues Paper Response, likely explaining its non-inclusion in the Decision) while the second comment was not included in the Issues Paper but *was* included in the Decision (meaning that the Parties did not have an opportunity to respond to it). Both comments appear to be based on a misinterpretation of the CMA's question and suggest that the customer was being asked whether it would manufacture its own formulated products. Given that raw materials are the

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<sup>59</sup> This Guidance was provided as Annex 7.1 to the Issues Paper Response

<sup>60</sup> As set out at paragraph 5.26, the Parties note that the representative nature of the responses received is in serious doubt given the apparent extremely low response rate.

<sup>61</sup> Issues Paper, paragraph 23 a)

<sup>62</sup> Issues Paper, paragraph 48



same as the active ingredients used to make formulated products, there is no additional legal permission or equipment required in order to store or use them than there is for the equivalent formulated product. The fact that both formulated and unformulated products are based on the same raw materials also means that one is not more hazardous than the other.

- 6.16 Taking the comment on "hazard" at face value (as the Decision has done) suggests that the F&B customer respondent quoted would consider the use and storage of products such as sodium hypochlorite (bleach) and caustic soda, which are available on open shelves in supermarkets and DIY stores across the UK as too great a hazard for the respondent's own factory. This conclusion is clearly absurd.
- 6.17 Additionally, the CMA does not appear to have realised that certain competitors of the Parties named by customers, namely Caldic and Woburn Chemicals<sup>63</sup> are primarily sellers of unformulated products<sup>64</sup>. Therefore, customer feedback *did* indicate that manufacturers of unformulated products *were* competitors of the Parties. The CMA's characterisation of third party feedback as being entirely negative toward the possibility of F&B customers purchasing unformulated products<sup>65</sup> is therefore in error.

### ***Examples of switching***

- 6.18 As explained at paragraph 6.10 above, a customer's overall cleaning solution based on formulated products and unformulated products will often cost it broadly the same, but that cost depends on the total costs incurred by the customer in providing the necessary extra energy and/or time required to complete a cleaning cycle to the necessary standard using an unformulated product versus an formulated product. Giving a very simplistic example, using a formulated product may require less water to be rinsed, and so while the price of the formulated product may be more than that of an equivalent raw material product, the total cost to the customer may be similar.
- 6.19 In recent years, the prices of unformulated products have been steadily increasing, meaning that over this period the trend has been for migration *from* unformulated products *to* formulated products<sup>66</sup>. This general trend does not preclude customer switching at the margin in response to changes in the relative cost of use for formulated and unformulated products, and indeed demonstrates customers' willingness to change procurement decision in response to changes in prices.
- 6.20 The charts below show Ecolab's tracking of two raw materials which are sold in diluted and undiluted versions as unformulated products, as well as forming the basis for formulated products: caustic soda (the most commonly used alkali) and acetic acid (the most commonly used acid). The underlying data for these charts is attached as Annex 6.1.

### **Chart 6.1: Caustic Soda pricing trends**

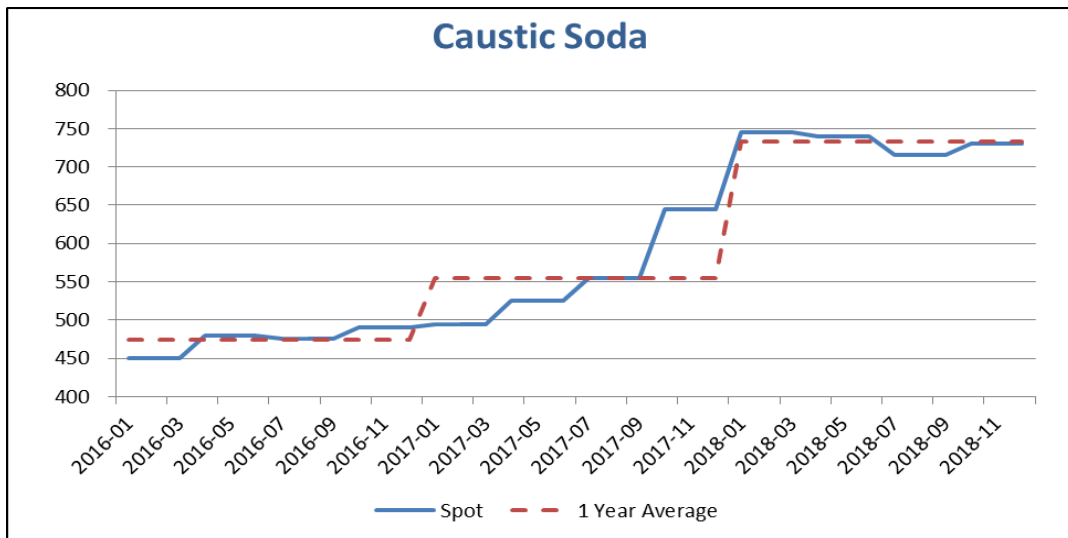
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63 Identified at paragraph 88 of the Decision

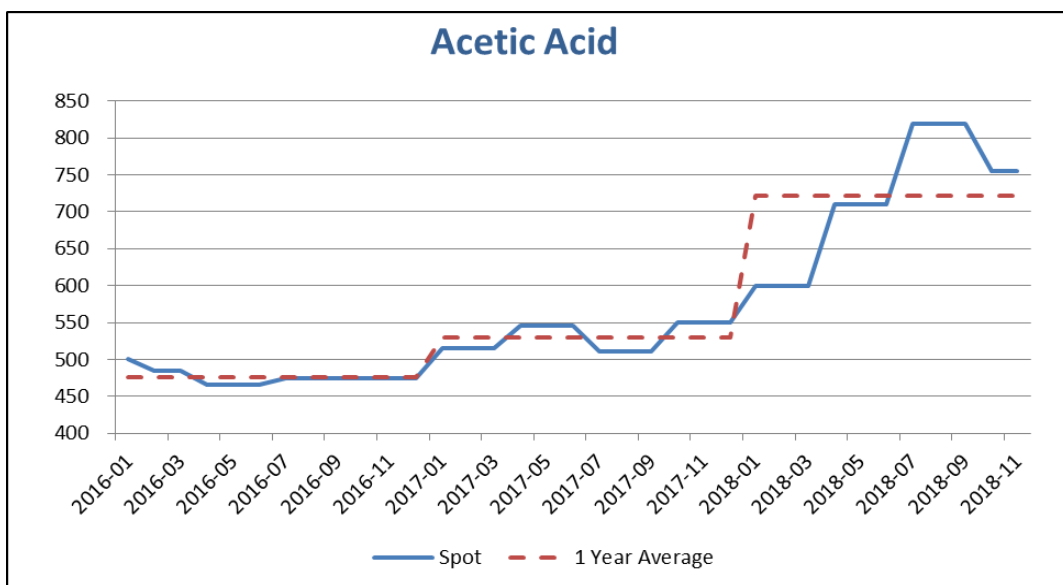
64 Caldic is not believed to sell *any* formulated products and Woburn supplies only a small range of formulated products.

65 Decision, paragraph 48

66 As noted in paragraph 1.8 above, prices of formulated products have remained fairly steady or, where they have increased to reflect the increase in raw materials prices (✕) no attempt has been made to maintain margin as a percentage of the total price. As a result, the price per kg of a formulated product has become proportionately closer to the price of a formulated product used for the same application.



**Chart 6.2: Acetic acid**



- 6.21 This corresponds with the examples already provided by the Parties to the CMA: all but one example is of switching from unformulated products to formulated products. This increase in raw material prices is not acknowledged in the Decision<sup>67</sup>.
- 6.22 Furthermore, as sellers of formulated versus unformulated product, it is clear that the Parties' focus business and therefore all their internal documents and marketing efforts will be focussed on persuading customers to switch from unformulated products to their formulated offering.
- 6.23 Additionally, the Decision discounts examples<sup>68</sup> because they related to F&B Dairy, even though the CMA's frame of reference in the Decision is F&B as a whole, without explaining why it may be appropriate to consider a narrower frame of reference with respect to

<sup>67</sup> Decision, paragraph 46

<sup>68</sup> Submitted in paragraphs 9.12 - 9.16 of the Issues Paper Response

unformulated products<sup>69</sup>. The Decision also discounts examples of switching between formulated and unformulated product because they do not relate to the UK<sup>70</sup>: given that production methods are similar and cleanliness requirements are set by EU legislation, this rejection appears to have been done out of hand and was not based on any evidence that the interests of UK F&B customers would be in any way unique.

- 6.24 In fact, very recently, Holchem's customer, X, has switched from formulated products to unformulated products for X, which were previously catered for by Holchem's formulated products. Holchem is attempting to recover its lost sales in this area.

#### ***Previous decisions and market studies***

- 6.25 The competitive constraint exercised by unformulated products on formulated products has been acknowledged in previous merger decisions. The Commission noted in *Unilever/Diversey* that "*Raw materials (commodity chemicals) are sufficiently available, and clients do sometimes purchase directly from chemical companies who, according to the Parties and some of their competitors, constitute a significant competitive force*"<sup>71</sup>.

- 6.26 The Freedonia Report<sup>72</sup> also states that:

*“Integration into raw materials procurement or production helps lower manufacturing costs, as well as secures reliable supplies of quality feedstocks. Examples of such vertical integration include Armand Products, a joint venture between Church & Dwight and Occidental Chemical and one of the world’s biggest producers of potassium carbonate and potassium bicarbonate. The company is a vertically integrated potassium carbonate producer through the manufacture of potassium hydroxide, the key raw material for potassium carbonate. Several major raw materials suppliers produce their own cleaners. Examples of merchant suppliers of raw materials (e.g., surfactants and solvents) who also offer finished cleaning chemicals include BASF, Dial (Henkel), and Procter & Gamble. Similarly, several companies, including Dow Chemical, Exxon Mobil, and Shell Chemicals, are vertically integrated in the production of raw materials for the manufacture of cleaning product chemicals. For example, Dow Chemical manufactures acrylic acids used to formulate detergents.”*

#### ***Competitors active in the sale of unformulated products***

- 6.27 As well as Caldic and Woburn (the raw materials suppliers identified to the CMA by F&B customers as competitors of the Parties) Brenntag<sup>73</sup>, Airedale Chemicals<sup>74</sup> and Univar are all known by the Parties to sell to F&B customers in the UK.

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<sup>69</sup> Decision, paragraph 47

<sup>70</sup> *Ibid*

<sup>71</sup> Unilever/Diversey, Case IV/M.704, paragraph 26

<sup>72</sup> Merger Notice Annex 10.1- Freedonia Report, page 266

<sup>73</sup> See Brenntag's brochure for cleaning in the UK and Ireland, which includes raw materials for use in F&B [https://www.brenntag.com/media/documents/uk\\_ireland/cleaning\\_product\\_list.pdf](https://www.brenntag.com/media/documents/uk_ireland/cleaning_product_list.pdf)

<sup>74</sup> See for example <https://www.airedalechemical.com/product/caustic-soda/>, which demonstrates that Airdale supplies raw materials which are safe to use in F&B. The Target is also aware that Airdale has been making pro-active approaches to F&B customers, in order to try to persuade these customers to switch to Airdale's food grade caustic soda for certain cleaning applications.

6.28 Suppliers of unformulated products will often have a pre-existing relationship with an Industrial customer, providing raw materials for different applications<sup>7576</sup>. For example, as well as being used a raw material or a basis for a formulated product, caustic soda is used in washing or chemical peeling of fruits and vegetables, chocolate and cocoa processing, caramel colouring production, poultry scalding, soft drink processing, and thickening ice cream<sup>77</sup>. Customers using formulated products are, therefore, often already in a trusted safety-critical relationship with a raw materials supplier for applications other than hygiene. Customers are therefore in a position to have confidence in extending their relationship to cover raw materials used in cleaning.

***The applications most vulnerable to competition from unformulated products make up a large majority of the Parties' F&B turnover. The majority of the remainder is in products already produced by Institutional Segment suppliers***

6.29 One F&B customer is quoted by the CMA as saying that "we wouldn't be able to buy the broad range of chemicals at a cheaper price" if it purchased unformulated products instead of formulated products<sup>78</sup>. This may be true of hand care and bottle/tray wash where a more complicated mix of chemicals may be required or preferred, however it is not the case with regard to CIP, COP and membrane treatment applications.

6.30 With respect to these applications, formulated products are particularly vulnerable to competition from unformulated products, as a very small number of unformulated products are required in order to complete a cleaning cycle.

6.31 A supplier of formulated products will typically enjoy exclusivity at a factory level (although where the customer is a multi-site customer it may well multi-source at different sites) due to the need to draft a coherent cleaning protocol for the site. For larger customers this exclusivity will often (but not always) be assured by an exclusivity agreement. Crucially, however, this exclusivity will often not extend to unformulated products, i.e. an F&B customer will use both formulated and unformulated products on the same site.

6.32 Given that unformulated products are entirely homogenous from one supplier to the next, it is much easier to draft cleaning protocols which include a mix of formulated products from one supplier and unformulated products from another than it is to draft protocols covering formulated products from more than one supplier. Additionally, exclusivity agreements with formulated product suppliers will typically allow for the purchase of unformulated products. As is currently happening to Holchem with respect to its customer, X<sup>79</sup>, it is very possible for customers to switch to unformulated products with respect to particular applications.

6.33 As shown in Tables 3.1 and 3.2 above and noted in paragraph 3.7, customer F&B spending is heavily concentrated in CIP and COP applications.

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<sup>75</sup> See <https://www.airedalechemical.com/sectors/food-beverage/> for an example of the cross-section of raw materials products supplied to the F&B Industry by Airdale.

<sup>76</sup> See <https://www.caldic.com/en-gb/markets/food> for an example of the cross-section of raw materials products supplied to the F&B Industry by Caldic. We note that Caldic was listed as a competitor to the Parties by a customer (Issues Paper, paragraph 68)

<sup>77</sup> See <https://www.airedalechemical.com/product/caustic-soda/>

<sup>78</sup> Decision, paragraph 48

<sup>79</sup> See paragraph 6.24 above

- 6.34 A CIP cleaning process typically has the following stages<sup>80</sup>:
- (a) Pre-rinse: the gross removal of debris with water;
  - (b) Caustic detergent clean: removal of soiling using an alkali-based product;
  - (c) Rinse: to remove the soiling residue and detergent;
  - (d) Acidic detergent clean: to remove any mineral scale;
  - (e) Rinse: to remove the acidic detergent;
  - (f) Disinfection: to reduce the number of microbes in the equipment to a safe level<sup>81</sup>;
  - (g) Final rinse: to remove any remaining chemical contaminants.
- 6.35 Despite the "detergent" name, the caustic detergent and acidic detergent stages can be accomplished using unformulated materials, with sodium hydroxide and nitric acid being common choices. The disinfection process is also often accomplished using hot water rather than a formulated disinfectant. Electrolysed reducing water can be used for the alkali detergent clean and electrolysed oxidising water can be used for disinfection, meaning that a customer with the necessary equipment to electrolyse water need only purchase an acidic detergent<sup>82</sup>.
- 6.36 A membrane cleaning process is very similar to a CIP cleaning process and can have the following steps:
- (a) Pre-rinse: the gross removal of debris with water;
  - (b) Caustic detergent clean: removal of soiling using an alkali-based product;
  - (c) Disinfection: to reduce the number of microbes in the equipment to a safe level;
  - (d) Rinse: to remove the soiling residue and detergent;
  - (e) Acidic detergent clean: to remove any mineral scale - only for microfiltration and ultrafiltration membranes (often referred to as "MF" and "UF" membranes); and
  - (f) Final rinse: to remove any remaining chemical contaminants.
- 6.37 As with CIP, detergents and disinfectants can be raw materials e.g. caustic soda, sodium hypochlorite<sup>83</sup> and phosphoric acid being candidates for the alkali detergent, disinfectant and acidic detergent respectively<sup>84</sup>.
- 6.38 CIP, and Membrane Treatment both relate to the cleaning of factory equipment. The Original Equipment Manufacturers ("OEMs") of this equipment will typically recommend the use of

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<sup>80</sup> See further <https://www.holchem.co.uk/divisions/food-processing/techniques/cleaning-in-place/>

<sup>81</sup> Disinfection, rather than sterilisation is usually sufficient.

<sup>82</sup> An unformulated product-based CIP process cleaning guide was provided as Annex 15.1 to the Response dated 14 February 2019 to CMA Request for Information dated 8 February 2019 ("**Supplemental Response to RFI 4**")

<sup>83</sup> Commonly known as bleach

<sup>84</sup> An unformulated product-based cleaning guide for a membrane was provided as Annex 15.2 to the Supplemental Response to RFI 4

unformulated products for the cleaning processes, rather than any particular formulated product. As shown in Annexes 15.1 and 15.2 to the Supplementary Response to RFI 4, OEMs provide support and instructions for the cleaning of equipment based on the use of unformulated products. OEMs will also often provide training as part of the sales service and this training will generally cleaning protocols. There are cases where the OEM factory guarantee is actually linked to recommended cleaning based on the use of unformulated, rather than formulated products.

- 6.39 With respect to Ecolab's other F&B turnover, ~~8~~% of total sales are in Environmental Hygiene, Food Surface Treatment and Hand/Skin Hygiene. These are all applications which use identical products to those used in the much large Institutional Segment, with the only difference for F&B being that the products are not perfumed, an adaptation which is already done for Institutional products supplied to the food service industry. Accordingly, if the Parties lose CIP and Membrane Treatment to unformulated products suppliers, they become even more vulnerable to competition from Institutional suppliers for the remainder of the Industrial applications.

#### *Conclusions on competitive constraint*

- 6.40 Given the fact that unformulated products are typically sold by different suppliers, are not suitable for all applications, and are sold at different price points to formulated products, the CMA may conclude that they are in a different product market to formulated products.
- 6.41 However, in light of the above, the Parties submit that there is a clear competitive constraint exercised by the manufacturers of unformulated products over suppliers of formulated F&B products in the UK. In particular:
- (a) With respect to the applications which can utilise unformulated products, customers are able to switch back and forth between formulated and unformulated products (seen through the recent transfer to formulated products as a result of steadily rising unformulated product prices from 2017);
  - (b) Suppliers of unformulated products compete with suppliers of formulated products for the provision of F&B cleaning solutions;
  - (c) Many F&B customers have pre-existing customer relationships with unformulated product suppliers as a result of their using similar (or often the same) unformulated products in other applications;
  - (d) Only a small number of unformulated products need to be purchased in order to provide a complete CIP or Membrane Treatment solution;
  - (e) Customers are able to get support from OEMs in relation to the cleaning processes used, with cleaning protocols for their equipment being freely available; and
  - (f) Because the ingredients are similar, the same vessels, piping, dosing pumps etc. can be used to store and distribute both formulated and unformulated products on customer site.

## **7. BID ANALYSIS**

- 7.1 The CMA appears to have adopted two partially contradictory stances with respect to bidding data, noting that:

- (a) Even where the Parties' records demonstrated that they were not actually competing with each other, the fact that they were considered as potential competitors was relevant to the competitive assessment, even though they could not actually win or lose the contract<sup>85</sup>; but
- (b) That "other competitors" (i.e. competitors other than the Parties, Diversey and Christeys) did not exercise a meaningful competitive constraint over the Parties because they only actually won or lost contracts to Holchem relatively rarely<sup>86</sup>.
- 7.2 Even on its own terms, the CMA's analysis of bids where Holchem perceived Ecolab as a competitor or Ecolab was the incumbent does not suggest particularly close competition between the Parties. Diversey appears more frequently as a rival than Ecolab.
- 7.3 The CMA has in fact identified only three cases of tenders that the two Parties contested, these representing around one fifth of the value of tenders in which each Party participated. This low level of competitive interaction does not constitute evidence of close competition.
- 7.4 The CMA has also reviewed Holchem customer gain and loss data. Within these data the CMA notes the extent to which Holchem gains and loses customers to Ecolab, Diversey and Christeys, albeit without commenting upon the fact that, again, Ecolab is not the most frequent or valuable source of gains/losses. The CMA does not, however, acknowledge the aggregate constraint provided by "other competitors". While each of the competitors within this category is individually relatively small, collectively these players account for more than half of gains/losses; and for a fifth of new business value and a quarter of lost business value. This demonstrates that smaller competitors, while individually relatively small, are an important feature of the F&B market, and exert a competitive constraint upon the Parties that cannot be overlooked.
- 7.5 While smaller competitors (including unformulated product suppliers) are particularly strong in competing for smaller customers, the Holchem gain and loss data nonetheless show instances of competition with smaller rivals for larger contracts. Holchem reports the following rivals for larger than average contracts:
- 7.6 ✂
- 7.7 The competitive constraint offered by smaller competitors is considered further from paragraph 9.19 below.
- 7.8 Finally, one should not lose sight of the fact that the available bid data is historic, whereas the parties have provided further independent evidence of the expansion and recruitment drive that both Christeys and Kersia have been making in the last year, which means that irrespective of their historic involvement in bids, they are a growing challenge post-merger which should not be under estimated.
- 7.9 The Parties are aware of the bidding activity they have participated in, but have limited knowledge of tenders where they were not invited to bid. At Phase 1, the lack of access to this information was a serious handicap to the Parties in explaining how competition works. This also limits the range of quantitative techniques that the Parties can employ to provide evidence.

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85 Decision, paragraph 76

86 Decision, paragraph 115(c)

- 7.10 We note that the CMA does not seem to have requested tender data from third parties. Given the very large number of customers, requesting the data from customers appears impractical, however the number of competitors in the marketplace appears to be manageable. We therefore urge the CMA, if it wishes to rely on tender data to draw any conclusions during Phase 2, to use its information gathering powers in order to gather bidding data as a minimum from the Parties' key competitors in F&B, namely Arrow, Brenntag, Christeys, Dasic, Diversey, Evans Vanodine, Kersia, Niche Solutions, Quat-Chem and Sopura<sup>87</sup>.
- 7.11 In any event, it is important to note that only a small portion of F&B demand is actually bid for in formal tender processes, and no evidence that that the customers who do go out to tender are representative of the rest of the customer base. As such, the CMA can only place limited weight on any tender analysis.

## **8. BARRIERS TO ENTRY AND EXPANSION**

- 8.1 As shown in Section 5.22 above, the Parties cannot be said to be competitors for the International Customers who make up  $\times\%$  of Ecolab's turnover nor can they be said to be close competitors for the National Customers who make up the remaining  $\times\%$  of Ecolab's turnover given that the distribution of customers for the two Parties is very different. Accordingly, they do not exercise a strong competitive constraint on each other in the UK F&B market. As shown in Section 6, unformulated products do represent a serious competitive constraint at the very least with regard to the applications which make up a large proportion of F&B turnover, with much of the remainder being constrained by Institutional Suppliers.
- 8.2 Accordingly, this Section focusses on the ability of existing F&B manufacturers (either in the UK or elsewhere in the EEA) to expand their presence rapidly in the UK market were they to be incentivised by the higher margins on offer from a SSNIP. This Section also demonstrates that the sunk costs required for entry are also sufficiently low so to enable a "hit and run" on the market in the event that a SSNIP was merely temporary.
- 8.3 When considering whether entry or expansion might prevent an SLC, the CMA will consider whether such entry or expansion would be timely, likely and sufficient<sup>88</sup>. The four broad categories of barriers to entry or expansion, and how they apply to the F&B Sub-Segment are<sup>89</sup>:
- (a) Absolute advantages for current market players (e.g. legal advantages or technical advantages);
  - (b) Intrinsic advantages for current market players (e.g. initial setup costs, research and development, advertising);
  - (c) Economies of scale; and
  - (d) Strategic advantages (e.g. first mover advantage due to loyalty and reputation)
- each of which are discussed in further detail with respect to the Transaction below.

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<sup>87</sup> Each named as a "top five" competitor in an F&B Micro-Segment or F&B more generally in paragraph 152 of the Merger Notice

<sup>88</sup> Merger Assessment Guidelines, paragraph 5.8.3

<sup>89</sup> Merger Assessment Guidelines, paragraph 5.8.5



### *Absolute advantages*<sup>90</sup>

- 8.4 With respect to cleaning chemical manufacturers not currently active in the UK F&B Sub-Segment, if a manufacturer has the know-how to manufacture the products concerned in another European country, then the existing competitors have no absolute advantages over it. Moreover, the chemistry involved is relatively simple and widely understood, such that product formulation represents no barrier to entry or expansion.
- 8.5 EEA manufacturers of cleaning chemicals must comply with various EU legislation including (among others) the rules laid down in Regulation (EC) 1272/2008 (the Classification, Labelling and Packaging Regulation or "**CLP**"), EU Regulation 1223/2009 (the "**Cosmetics Regulation**"), Regulation (EU) 528/2012 (the Biocidal Products Regulation or "**BPR**") and Regulation (EC) No 648/2004 (the "**Detergents Regulation**") (together, the "**EU Legislation**").
- 8.6 With the exception of the BPR, the EU Legislation requires manufacturers to label their products appropriately and provide an appropriate contact person based within the EEA for consumers to contact in case issues with the products are encountered. The BPR is intended to create a registration regime for biocidal products similar to REACH regime for chemical substances. First time registration on the BPR portal is currently ongoing. All of the EU Legislation with the exception of the CLP creates minimum standards for the products with regard to environmental harm and product safety.
- 8.7 Crucially, the EU Legislation is EEA wide in nature and creates a framework within which a product sold in one part of the EEA can be sold across the entirety of the EEA without any changes being required to be made to it in order to adhere to local standards. The EU Legislation also does not set a minimum volume level which allows smaller producers to escape the obligations which apply to larger producers.
- 8.8 Accordingly, once an F&B product has been placed on the market in the EEA, there are no legal or technical barriers to placing it on the market in the UK, or in increasing its production to supply the UK market. A large incumbent UK F&B manufacturer therefore has no absolute advantages against any smaller F&B manufacturer based anywhere in the EEA.

### *Intrinsic advantages*<sup>91</sup>

- 8.9 As demonstrated in the sub-section on absolute advantages, the products are the same Europe-wide, meaning that there is no need for an existing F&B manufacturer operating in another EEA Member State to undertake research and development into manufacturing products for the UK market specifically.
- 8.10 The main intrinsic advantages enjoyed by incumbents relate to the sales and marketing which must be undertaken and the staff who must be recruited in order to service customers. In both cases, a presence in an EEA F&B market outside the UK largely obviates the advantage held by a UK-based competitor.

### Sales and marketing

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<sup>90</sup> Given that all current market players can be said to have absolute advantages, this subsection focusses on entry into the UK market by manufacturers supplying F&B products elsewhere in the EU.

<sup>91</sup> Given that all current market players can be said to have intrinsic advantages, this subsection focusses on entry into the UK market by manufacturers supplying F&B products elsewhere in the EU.

- 8.11 Given that the F&B market is a professional market, there is no need for a widespread advertising campaign to "build the brand", as there is with a consumer market. Instead, suppliers concentrate on showing potential customers their expertise by:
- (a) Maintaining an internet presence through a website and social media accounts which showcase the competitor's activities in F&B;
  - (b) Developing and marketing new products to the market;
  - (c) Having representatives join trade associations and industry panels;
  - (d) Having representatives attend (and occasionally speak at) conferences attended by potential customers; and
  - (e) Providing customers with free resources, such as training.
- 8.12 Most of these activities can be carried out with respect to several geographic markets at once. The fact that standards (and therefore products) are identical EEA-wide means that marketing materials, new products and resources only need to be developed for one EEA Member State in order for them to be applied across all Member States. Given that English is by far the most common second language in the EEA and used by many multinationals as their language of business, materials produced by F&B manufacturers not based within the UK are often produced in English. Industry conferences are also often multi-national in attendance, with representatives attending conferences in countries where they have no presence or intention to establish one in order to interact with customers based in jurisdictions where they do<sup>92</sup>.
- 8.13 As noted in the Issues Paper Response<sup>93</sup> and expanded upon in the below, Christeyns also takes several steps in order to boost its reputation as an expert provider in F&B, in particular in the F&B Food Micro-Segment, including:
- (a) Actively marketing itself to UK F&B customers with (among other things) a regularly updated UK food hygiene Twitter account<sup>94</sup> and UK web address<sup>95</sup> and an entry in the UK's Food Manufacture Directory<sup>96</sup>;
  - (b) Developing and marketing new products to the F&B Food Micro-Segment, alongside case studies promoting their effectiveness. For example, in March 2019, it published a case study related to Ichiban UK, a leading UK producer of Sushi<sup>97</sup> (☒<sup>98</sup>);
  - (c) Supporting ☒;

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92 For example, Holchem representatives attend conferences all over the world in order to meet and network with potential UK and Ireland-based F&B customers.

93 Issues Paper Response, paragraph 7.17

94 [https://twitter.com/christeynsfh\\_uk?lang=en](https://twitter.com/christeynsfh_uk?lang=en)

95 <https://www.christeynsfoodhygiene.co.uk/>

96 <http://www.foodmanufacturedirectory.co.uk/companies/christeyns-food-hygiene-ltd>

97 <https://www.christeynsfoodhygiene.co.uk/freshcheck-a-very-powerful-addition-to-the-arsenal-of-a-hygiene-manager/>

98 Merger Notice, paragraph 231

- (d) Supporting ☒ in order to provide expert insight into relevant issues facing the food industry related to severe allergies, associated research and advice on related policies and activities;<sup>99</sup>
- (e) Sending representatives to speak at or attend conferences on topics related to F&B Food, both in the UK and further afield. For example:
  - (i) ☒ gave a lecture on 2 October 2018 at the Annual Food and Drink NPD and Innovation Summit on “The use of disinfectants for ensuring food safety”.
  - (ii) ☒ also gave a presentation at the 7th Annual International Allergen Conference in Frankfurt in November on the role of cleaning in allergen management.
  - (iii) ☒ will be speaking at SOFHT's conference "Cleaning for the Future" on 1 May 2019<sup>100</sup>.
  - (iv) Christeyn's UK food hygiene Twitter account is currently promoting Christeyn's sponsorship of the Food Sure Summit in Amsterdam on 13 and 14 May 2019<sup>101</sup>;
- (f) Promoting its own free UK F&B Food events<sup>102</sup>, at which training is offered to individuals in the F&B industry as a business development opportunity;
- (g) Rolling out in the UK its Movimiento customisable e-learning platform in April 2019, which it had previously launched in Belgium<sup>103</sup>.

#### Expanding staff

- 8.14 The main sunk cost in expanding in F&B in a new market is staff related<sup>104</sup>, with the number of needed dedicated staff being minimal.
- 8.15 Holchem's entry level customer support position is referred to as "Hygiene Technologist". This person may be a university graduate with a related degree, but this is not always the case. ☒. If there is a vacancy for one, Holchem will consider good Hygiene Technologists for a Technical Sales Consultant position from around two years of experience (or, if seeking external candidates, equivalent experience in hygiene management at a Food, Dairy or Beverage factory).
- 8.16 Holchem's Technical Sales Consultants are their main points of contact for customers. Each one manages an area of the UK and is responsible for approximately ☒ of sales depending on the region that they are responsible for and the Holchem customers present in that region.

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[https://twitter.com/CHRISTEYNSFH\\_UK/status/1116648093099941888](https://twitter.com/CHRISTEYNSFH_UK/status/1116648093099941888)

102

<https://www.eventbrite.co.uk/o/christeyns-food-hygiene-ltd-17853104007>

103

<https://www.christeynsfoodhygiene.co.uk/christeyns-food-hygiene-introduces-new-take-on-e-learning/>

104

See Section 7 of the Issues Paper Response

Technical Sales Consultants report in to Regional Sales Managers, who in turn report to the Head of Sales.

- 8.17 Attached as Annex 8.1 is a list of current Holchem employees involved in Holchem's F&B business, along with a list of recent leavers. The CMA will note that many of Holchem's Technical Sales Consultants as well as some of its Regional Sales Managers were not previously employed in similar roles at competitors, but instead in related roles in the F&B industry. Leavers from Holchem often go to competitors, but also to roles within the F&B industry. Annex 8.2 is a list of current Ecolab's employees involved in Ecolab's F&B business, the conclusions of which are similar.
- 8.18 Ecolab has a standardised on-boarding process for new Territory Managers in F&B/Agriculture who have no background in F&B or sales. This process contains a mixture of e-learning, one on one "in the field" learning and instructor led training (which takes place both in person and remotely).
- 8.19 The on-boarding process takes X from start to finish and covers X:
- 8.20 X
- 8.21 As the Parties' own personnel demonstrate, the expertise and skills necessary in order to perform well in a customer facing F&B role has considerable overlap with hygiene management within the F&B industry itself. As a result, a new entrant has a much wider pool to recruit from than just its competitors.
- 8.22 A person new to the customer's industry (in this case, food and beverage hygiene, either in-house or providing third party support such as consultancy) will typically not have their first unsupervised visit to a customer within the first three months. However, a person with a background in the industry is able to visit customers as soon as their second week in the job. Typically, F&B suppliers will recruit hygiene experts from their own customer base, as well as salespeople from competitors. As a result, many of the above steps are redundant for individual candidates and can be abbreviated.
- 8.23 Alternatively, customers can be serviced by a personnel based outside the jurisdiction. Even Ecolab's largest Corporate customers (and the ones who require the most intensive care) only receive a monthly visit from an Ecolab representative.

### *Economies of scale*

#### Production

- 8.24 As previously demonstrated by the Parties in the Issues Paper Response<sup>105</sup> and accompanying Annexes, the manufacturing processes for cleaning chemical products is entirely substitutable between the various products, irrespective of the industry into which they end up being sold, and irrespective of whether the products end up being sold to customers in different F&B sub-segments (Food, Brewing, Dairy), Agriculture or Institutional. The Parties also submitted evidence of regular switching between F&B and other cleaning chemicals on the same production lines, with switching times being measured in minutes or, at most, hours<sup>106</sup>.

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<sup>105</sup> Issues Paper Response, Section 5; Annexes 5.1 and 5.2 to the Issues Paper Response

<sup>106</sup> Annex 5.2 to the Issues Paper Response

- 8.25 The CMA appears to have accepted this, with the Decision concluding that starting or expanding the manufacturing of cleaning chemicals may be "relatively straightforward"<sup>107</sup>.
- 8.26 Notably, the Institutional Segment is much larger than F&B. The Parties estimated a UK Institutional Segment size of £528m in 2017, which the Decision does not take issue with, making the Institutional Segment over twice the size of even the largest F&B Sub-Segment estimates. Accordingly, there appears to be ample spare capacity in the UK market which could be turned over the F&B in the event that a manufacturer was able to pursue higher margins in that Sub-Segment than could be achieved in Institutional<sup>108</sup>.
- 8.27 Toll manufacturing is available in the event that additional capacity is required. ~~✗~~<sup>109</sup> Toll manufacturers currently used to serve the UK include Brenntag in the UK and Staub in Germany. One UK toll manufacturer, Rutpen, even lists as a case study on its website a toll manufacturing which took place in the UK in relation to cleaning chemicals supplier<sup>110</sup>.
- 8.28 There is therefore no difference in the economies of scale for the production of the product themselves enjoyed by two equally sized cleaning chemical suppliers, one of whom has a large presence in F&B and the other which has a small presence in F&B, but present in other customer segments.

#### Other economies of scale

- 8.29 Likewise, there are relatively low numbers of F&B specialist staff in each of the Parties' F&B operations. Ecolab's dedicated UK F&B business (including its Agricultural Sub-Segment business) in the UK and Ireland consists of under ~~✗~~ employees, many of whom are in non-specialised management roles and/or roles which also cover another region. With regard to the Target's UK F&B business, it has ~~✗~~ national account managers in F&B, ~~✗~~ divisional manager for brewing and beverage, ~~✗~~ regional sales managers, ~~✗~~ technical sales consultants, ~~✗~~ technical service managers, ~~✗~~ hygiene technologist manager, ~~✗~~ hygiene technologists and ~~✗~~ service engineers who are field based. Relatively small numbers of additional staff are required to service large increases in customer demand while smaller increases in customer demand can be serviced without the need for an increase in staff.
- 8.30 Where additional capacity *has* needed to be added by a competitor, customers have been willing to phase in entry in order to allow this happen. Given the relatively low cost of the necessary manufacturing plant (mainly mixing vessels and storage tanks), the cost to expand capacity is insignificant, For example, the Target ~~✗~~. Furthermore, the availability of toll manufacturing as either a temporary or long-term means to increase production provides a means by which smaller rivals can benefit from economies of scale and expand rapidly without capital investment.
- 8.31 Further evidence for economies of scale not being a barrier to entering UK F&B is shown by the presence of several very small competitors on the market which can (and do) take market share away from the larger players.

#### ***Strategic advantages***

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<sup>107</sup> Decision, paragraph 139

<sup>108</sup> Acknowledged by a competitor quoted at paragraph 137(a) of the Decision

<sup>109</sup> See further paragraphs 8.12 - 8.17 of the Issues Paper Response

<sup>110</sup> <http://www.rutpen.co.uk/contract-manufacture/liquid-blending/case-study-liquids-2>

## Reputation

- 8.32 The Decision also suggested that "establishing a strong reputation" might be a barrier to expansion for F&B competitors<sup>111</sup>, such that a supplier without such a strong reputation might find it difficult to enter/expand in UK F&B.
- 8.33 The Decision does not go into any real detail as to what might constitute the necessary attributes required for an F&B supplier.
- 8.34 Reputation can be leveraged from an affiliate in a foreign market and/or brought in through the hiring of a senior member of staff with a good reputation in the sector. Entry and expansion is further facilitated by the relatively simple and homogenous nature of cleaning chemical products.
- 8.35 Given that the F&B market is extremely opaque, market share cannot be relevant to a competitors' reputation. Thanks to the considerable uncertainty regarding the total market size<sup>112</sup>, competitors are unable to calculate their own market share or (given that most competitors compete in markets other than F&B and so mix their F&B figures with other turnover) definitively conclude how much larger or smaller a given competitors' market share is than their own. Instead, a competitor may refer to one or two prestige clients (which do not need to be based in the UK) while marketing itself to potential customers.
- 8.36 The Parties submitted with the Issues Paper Response a copy of the latest edition of Marks & Spencer's Guidance For Cleaning, which is provided to its F&B suppliers<sup>113</sup>. The quality mark for approved providers only applies to disinfectants for use by "*high care/high risk manufacturers*". These are food manufacturers who provide chilled food products which are to be eaten without additional cooking. As such, bacteria which are able to reproduce at refrigerator temperatures, such as *Listeria monocytogenes*, must be kept under control. The accreditation therefore applies only to disinfectants used on production lines manufacturing processed food to be eaten straight from the refrigerator (e.g. packaged salads) and only then when supplied to a supermarket with the highest quality standards.
- 8.37 Notably, the Marks and Spencer accreditation goes *beyond* the applicable regulatory standards. It therefore represents the high water mark in terms of what is required in terms of quality standards from a processed food manufacturer but is not necessary to compete for the vast majority of F&B Food applications. Any cleaning chemicals supplier manufacturing Marks & Spencer accredited products can therefore be said to have a good reputation in the food industry.
- 8.38 There are 12 different competitors listed in the Marks & Spencer Guidelines as approved to provide disinfectants for high care/high risk manufacturers. This includes three manufacturers not based in the UK: Sani Marc and Oxytabs. Kersia (via Hypred, its French subsidiary) is also included on the list, meaning that Kilco/Kersia is able to produce approved disinfectants for high care/high risk manufacturers.

## Customer loyalty

- 8.39 The majority of the Parties' customers (and it is believed that the majority of UK F&B customers as a whole) are not on exclusive or minimum purchase contracts, but rather on

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<sup>111</sup> Decision, paragraph 139

<sup>112</sup> Decision, paragraph 67

<sup>113</sup> Annex 7.1 to the Issues Statement Response

standard terms and conditions which include no notice period. They are therefore vulnerable to challenge on a month-by-month basis in event that the price provided is not competitive.

- 8.40 As was discussed with the CMA in its call with Holchem of 29 April 2019, it is rare that Holchem is asked to match a competitor's price or resubmit a bid during a competitive tender process. If the incumbent's bid does not win the first time around, the customer will typically switch. This suggests that customers do not have a strong attachment to their incumbent cleaning chemicals supplier.
- 8.41 The main barrier<sup>114</sup> to switching is the fact that a customer's cleaning protocols are often updated in response to the switch to a new suppliers' formulated products. This is not a strict legal requirement but provides a partial due diligence defence in the event that a hygiene failure is experienced. The number of person hours that this updating takes depends on the amount of equipment used by the customer and how complex it is to clean. Updating customer cleaning protocols is often provided as a free additional service to all Larger National Customers.
- 8.42 As noted at paragraph 8.15, this updating task is handled by Holchem's Hygiene Technologists: an entry-level client-facing role.
- 8.43 Very Small Customers of the Parties additionally do not get training or other support bundled in with the cleaning chemicals supplied and must purchase them separately on an as needed basis. As such, Very Small Customers do not have the opportunity cost from switching of losing these services. Several independent training providers offer hygiene training<sup>115</sup>. Given the large number of training providers and courses available, it is clear that many F&B customers source the services provided as ancillary services by the Parties from providers other than their F&B cleaning chemicals supplier.
- 8.44 The Parties have become aware that Diversey has recently announced to its customers that it will shortly be discontinuing all Zenith product lines. The Parties understand that Diversey expects all of its customers to be able to switch to a different set of products (which were originally formulated when Zenith was an independent business) in a very short space of time, given that it has announced that the Zenith products will be discontinued in weeks. ✕. Even though the suppliers are now the same, the vast majority of Zenith products formulations will have been developed when Zenith was independent from Diversey, meaning that this switchover will be, for the customer, effectively identical to a change in supplier.

#### Costs of switching

- 8.45 The Decision considered as a barrier to expansion the fact that customers reported that switching supplier requires product testing and staff training, and as such it is time consuming and costly<sup>116</sup>. The clear evidence that customers can and do switch suppliers on a regular basis undermines this contention.
- 8.46 A study of the Parties' customer lists suggests that the Parties have ✕ shared customers, who represent ✕% of Ecolab's sales and ✕% of Holchem's sales. This suggests that multi-sourcing is rare, but where it does occur, it takes place with respect to larger customers. This is consistent

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<sup>114</sup> Other barriers to switching are mainly related to the personal familiarity of the technical manager with their customers' premises.

<sup>115</sup> See for example: <https://www.virtual-college.co.uk/courses/food-hygiene-courses/level-2-food-hygiene-for-drinks-manufacturers>; <https://www.beveragedaily.com/Article/2017/01/06/food-safety-hygiene-course-for-drinks-manufacturers>; <http://www.britishsoftdrinks.com/Training>; <https://www.highspeedtraining.co.uk/food-safety/training/level3-food-safety-supervision-manufacturing.aspx>; <http://www.nsfinternationalfood.co.uk/services/by-type/training-development.php>

<sup>116</sup> Decision, paragraph 136

with the Parties' understanding of the market that multi-sourcing will typically be done by multi-site (i.e. larger) customers who will procure exclusively on a site by site basis<sup>117</sup>. Given that this exercise necessarily could not involve the Parties themselves, this is likely to be an underrepresentation as customers operating under different trading names with the two suppliers.

***Large UK F&B manufacturers are not advantaged against smaller UK competitors or competitors based elsewhere in the EU***

8.47 As shown in the above, there are limited competitive advantages held by large established UK F&B suppliers over smaller and/or less established F&B suppliers based elsewhere in the EEA:

- (a) Absolute barriers to entry, such as regulatory and know-how barriers, are a one-time barrier to entering F&B in the EEA as a whole. As such, there is a very large number of potential entrants into the UK F&B market;
- (b) Marketing budgets are relatively low, with new or expanding players able to concentrate their business development activity at trade events or through providing free know-how or training;
- (c) The economies of scale enjoyed by the larger F&B suppliers are largely replicated by other cleaning chemical manufacturers with operations in other hygiene segments or by toll manufacturers; and
- (d) Many competitors on the market enjoy the strategic advantage provided by a good reputation while the opaque nature of the F&B market makes it difficult for competitors to turn their pre-existing customer relationships into a strategic advantage.

8.48 Consequently barriers to expansion on the UK F&B market are low and barriers to entry from EEA F&B manufacturers not yet present in the UK are negligible. The large incumbents in the UK F&B market are only able to maintain their position thanks to offering competitive terms to their customers. They are therefore vulnerable to losing this position to competitors' expansion in the event that they do not continue to offer competitive terms.

## **9. COMPETITIVE CONSTRAINT**

9.1 As shown in Section 8 above, once an F&B manufacturer begins to make sales in one EEA Member State, there are very few barriers to expansion either in its home market or into new Member States. This Section will therefore concentrate on particular competitors and types of competitor and demonstrate that they are able to constitute a competitive constraint on the Parties, as a result of their ability to respond to a SSNIP by the Parties.

9.2 In order to reach its conclusion that an SLC was in reasonable prospect, the Decision concluded that only Diversey was a strong competitor of the Parties, with Christeys constituting a weaker competitor in F&B (and allegedly weak in Food). The competitive constraint offered by Kersia (whose group includes Hypred, a large, well-established F&B cleaning chemicals competitor in EEA and whose stated intention is to expand in the UK F&B market, which is evidenced by its acquisition of Kilco in the UK in June 2018) and a large number of smaller competitors

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<sup>117</sup> See paragraph 6.31 above.



mentioned in internal documents or by third parties was in effect ignored despite the clear fact they are obviously already active in the UK. .

### ***Constraint from Diversey***

- 9.3 The Decision acknowledges that Diversey is a "close competitor" of the Parties across UK F&B<sup>118</sup>. This is evidenced by third party feedback<sup>119</sup>, the CMA's bidding analysis<sup>120</sup> and the CMA's estimates of Diversey's turnover in F&B<sup>121</sup>.
- 9.4 The CMA's estimate of Diversey's market share is no doubt informed by figures submitted in the *Bain/Zenith* inquiry and we note that Diversey is likely the only competitor for whom the CMA has a detailed turnover breakdown across F&B Micro-Segments and in F&B as a whole.
- 9.5 The Parties agree with the conclusion of the CMA's Food bidding analysis that Diversey constitutes a stronger competitor to Holchem than Ecolab<sup>122</sup>. The Parties also submit that Diversey, as a competitor capable of bidding for International Customers constitutes a stronger competitor to Ecolab than Holchem (as the latter is incapable of bidding for International Customers).

### ***Constraint from Christeyns***

- 9.6 Despite Christeyns' extensive marketing efforts<sup>123</sup> and the Parties' encounters with Christeyns as a rival bidder for F&B customers, the Decision concluded that Christeyns is a "weaker" competitor in F&B<sup>124</sup>. The Decision also suggests that Christeyns is a poorer quality supply. It is said by two customers to have lower standards than Holchem and to produce products unfit for cleaning even a single piece of one customer's equipment<sup>125</sup>.
- 9.7 The Parties do not agree with the CMA's assessment that Christeyns is a weaker competitor, regarded by customers as a poor quality alternative to the other larger UK F&B manufacturers. As a Marks & Spencer accredited supplier of disinfectants to high risk manufacturers, Christeyns is in possession of a quality mark recognised industry-wide. Similarly it will have blue chip customer reference and case studies from its activities in other countries to draw on.
- 9.8 The Parties provided extensive evidence of Christeyn's business development activities<sup>126</sup> in F&B in the Issues Paper Response, as well as identifying 20 individuals by name believed to be working at Christeyns with direct experience in Food<sup>127</sup>. This evidence was not considered in the Decision.
- 9.9 In particular, the extensive business development activity being done by Christeyns in UK F&B (and Food in particular) suggest that Christeyns is expending serious effort into winning UK

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118 Decision, paragraph 106

119 Decision, paragraph 104

120 Decision, paragraph 103

121 Decision, paragraph 102

122 Table A of Annex 1 to the Decision

123 See paragraph 8.13 above

124 Decision, paragraph 113

125 Decision, paragraph 112

126 Issues Paper Response, paragraph 7.17, updated in paragraph 8.13 above

127 Issues Paper Response, Table 7.1 at paragraph 7.25

customers and is a stronger competitor than its estimated market share may suggest. We observe that Christeyns' business development and specialist sales staff would need to be *exceptionally unsuccessful* for the Decision's conclusions to hold true.

- 9.10 Additionally, despite a historic concentration in areas of F&B other than Food, Christeyns has demonstrated a willingness and ability to market to Food customers. As a competitor with a presence across the EEA, Christeyns is also capable of bidding to supply International Customers, making it a close competitor of Ecolab as well as Holchem.

### ***Kersia***

- 9.11 Rather than considering Kersia as an existing competitor on the UK F&B market, the Decision has considered it as a potential *entrant* onto the UK F&B market<sup>128</sup>. Given that its UK affiliate, Kilco advertises its F&B business on its website<sup>129</sup>, demonstrated that Kersia is *already* competing in UK F&B, this is an erroneous characterisation.
- 9.12 Even though Kersia is an existing competitor, its presence in UK F&B has hitherto been extremely limited, hence it being named only rarely in the Parties' historic internal documents<sup>130</sup>.
- 9.13 The Decision considers the fact that "*there are no examples of cleaning chemicals suppliers transitioning from agriculture to food processing*" as a reason why Kersia would not be likely to expand in the UK F&B market<sup>131</sup>. This ignores the fact that Kersia *is already an established F&B supplier*, through subsidiaries other than Kilco. One subsidiary, Hypred, is listed as an approved supplier for high risk F&B on the Marks & Spencer Guidelines.
- 9.14 The Decision also considered that expansion/entry by Kersia was unlikely because only one of the Parties' customers named Kersia as an alternative supplier<sup>132</sup>. The CMA does not, in fact, appear to have asked customers any questions in relation to Kersia's expansion in the UK. The questions in the CMA's questionnaire (which asked about (i) which potential suppliers *were* considered when the respondent did its last review<sup>133</sup>; and (ii) which potential suppliers *would be considered today*<sup>134</sup>) were not forward looking, and so would not cover customers' appreciation of Kersia's intention to expand. The question on new entry asked about new *entrants* into cleaning chemicals as a whole, rather than into an individual cleaning chemicals Sub-Segment<sup>135</sup>. Kilco is a well-established UK cleaning chemicals supplier and, as noted in paragraph 9.11 above, it already supplies F&B. It cannot, therefore be considered to be a new entrant and viewed with heightened scepticism whether it could actually gain entry.
- 9.15 Crucially, the Parties' version of the Decision is heavily redacted where the CMA sets out why it can only place "limited" weight on "*Kersia's entry and possible success in establishing a market presence following that entry*"<sup>136</sup>. Aside from the inaccurate characterisation of "entry"

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128 Decision, paragraph 142

129 <https://www.kilcoint.com/en/products/food/>

130 Decision, paragraph 138

131 Decision, paragraph 143

132 Decision, paragraph 144

133 CMA Questionnaire, question 4

134 CMA Questionnaire, question 5

135 CMA Questionnaire, question 6

136 Decision, paragraph 142

discussed above, this redaction appears to cover an important part of the Decisions reasoning on the competitive constraint exercised by Kersia on the Parties. As such, we request that the CMA consider providing the Parties (or at least their legal representatives) with an un-redacted version of the relevant paragraph.

- 9.16 Finally, given that barriers to entry between EEA Member States from adjacent geographic markets are "negligible"<sup>137</sup>. As such, it does not appear to be relevant that Kersia is considered to be a "foreign/international" supplier<sup>138</sup>.
- 9.17 The Parties have made extensive submissions in the Issues Paper Response on the timeliness, likelihood and sufficiency of Kersia's expansion into the UK F&B market<sup>139</sup>. In particular, the Parties draw the CMA's attention to the following:
- (a) Kersia's acquisition of Kilco was done with the stated intention of expanding in the UK F&B market<sup>140</sup>;
  - (b) Kilco's plant has the ability to manufacture F&B products<sup>141</sup> and is believed to already be supplying to UK F&B customers; and
  - (c) Kersia is making hires of UK-based F&B cleaning and hygiene specialists in order to increase its presence on the UK market.
- 9.18 Kersia's expansion into UK F&B is an on-going process and the Parties will continue to be on the lookout for evidence of increased competition from Kersia in UK F&B during the Phase 2 process.

#### ***Smaller UK competitors***

- 9.19 The Decision suggests that smaller competitors (as in UK competitors with less UK F&B turnover than the Parties, Christeyns and Diversey) may only be suitable for a limited number of customers<sup>142</sup>. While the Decision does not specify the customers who might make up this limited range the Issues Paper *did* suggest that smaller competitions would only be able to supply "*small customers with non-complex needs*"<sup>143</sup> but that this statement not make it into the Decision. As noted in the Issues Paper Response, there did not appear to be any evidence for the CMA's assertion<sup>144</sup>, which may explain why the assertion was dropped. However, in so doing, the Decision appears to have retained the conclusion from the Issues Paper while dropping its justification, leaving behind an unjustified statement.
- 9.20 Given the third party feedback related to the small size of competitors, the Parties have presumed that the CMA considers smaller competitors as being unsuitable to supply any customers who are Very Small Customers. This conclusion appears to be based on feedback

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137 Case No IV/M.704 - *Unilever / Diversey*, paragraph 16. See also paragraphs 8.1-8.4 of the Issues Paper Response

138 Decision, paragraph 143

139 See in particular paragraphs 7.8 - 7.14 and 7.24 of the Issues Paper Response

140 <https://www.kilcoint.com/en/blog/kersia-announces-the-acquisition-of-kilco/>

141 Not only is this known due to the supply side substitutability of the products, but also, as set out in paragraph 7.13 of the Issues Paper Response, Ecolab has an employee who was originally hired by the then-independent Kilco business to grow its F&B business and as such is aware of Kersia's UK capabilities

142 Decision, paragraph 116

143 Issues Paper paragraph 95 h)

144 Issues Paper Response, paragraph 3.1

from several F&B competitors contacted by the CMA who made representations as to the small sizes of their respective businesses.

- 9.21 However, smaller competitors *are* capable of servicing large contracts. Holchem believes that Chela ultimately was able to win a ⌘ contract (albeit in Institutional) to supply TfL. A contract of that size would put the customer into both Parties' ⌘ UK customers. Where a contract is too large for a suppliers' current capacity, customers are able to support expansion by allowing a gradual roll-out. This was done by Holchem when it won the ⌘'s F&B contract in 2008, having previously supplied only certain factories and is currently being done over a four month period with respect to Holchem's recent win of ⌘<sup>145</sup>.
- 9.22 The Holchem won and lost data supplied during Phase 1<sup>146</sup> reveals several contracts for customers other than Very Small Customers which were contested by smaller UK competitors and unformulated product suppliers.

**Table 9.1: Examples of Holchem new contracts contested by small competitors\* that are greater than average new contract value**

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**Table 9.2: Example of Holchem lost contracts contested by small competitors\* that are greater than average lost contract value**

⌘

- 9.23 Further tender analysis in relation to Holchem's wins and losses with respect to Smaller Customers and Very Small Customers is attached as a Schedule.
- 9.24 Even were this not the case, the F&B market consists largely of Smaller Customers and Very Small Customers. Smaller Customers and Very Small Customers still constitute a significant proportion of the UK F&B market for which the Parties compete: ⌘ % by number of Holchem UK only customers and ⌘% of Ecolab UK only customers are either Smaller Customers or Very Small Customers with ⌘% and ⌘% of UK only customers being very small. The median UK-only customer size by value of product purchased is ⌘ for Ecolab (i.e. ⌘) and ⌘ for Holchem (i.e. ⌘). Additionally, Smaller Customers and Very Small Customers will typically purchase the ancillary services provided by the Parties and other large cleaning chemicals suppliers and so do not require particular F&B expertise from their cleaning chemicals supplier.
- 9.25 The Decision partially justifies ignoring smaller competitors being present in Holchem's won and lost records for smaller customers on the basis that no one smaller competitor appeared more than 7 times<sup>147</sup>. This does not make sense as:
- (a) The won and lost records are not a comprehensive record of who Holchem was competing with for a particular customer, given the opaque nature of the market;
  - (b) The very fact that smaller competitors appear in the Holchem's won and lost records demonstrates that they have in the past exercised a competitive constraint over Holchem in the past; and

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<sup>145</sup> See also paragraphs 7.5 and 8.30 above

<sup>146</sup> Merger Notice Annexes 16.5 - 16.28

<sup>147</sup> Decision, paragraph 115(c)

- (c) There are several smaller competitors mentioned in Holchem's won and lost records. Taken together "smaller competitors" (i.e. those who are not Christeyns, Diversey or Ecolab) appear  $\times$  times<sup>148</sup> suggesting that smaller competitors exercise the greatest competitive constraint with respect to Smaller Customers.
- 9.26 Addressing specific third party comments on smaller competitors<sup>149</sup>, we note that several comments from competitors do not appear to support the conclusion reached in the Decision that the competitors making them should be discounted for the following reasons:
- (a) With regard to the comments that one competitor had "*only 10% of UK business in F&B*" and another that F&B "*represents a very small proportion*" of its activity, we note that Ecolab's own UK F&B turnover represents only around a quarter of its UK business and only around  $\times$ % of its EU F&B turnover; and
- (b) While only two smaller suppliers were reported to have over £1m of UK F&B sales, we note that this is larger than  $\times$  of Ecolab's F&B customers who are not International Customers and  $\times$  of Holchem's F&B customers;
- (c) With regards to competitors which supply only a narrow range of products or a narrow part of F&B, we note that the Decision concluded that F&B products are supply-side substitutable as regards their manufacturing processes<sup>150</sup>; and
- (d) With regards to competitors which supply only a certain geographical region, we note that the majority of F&B customers require delivery only to a single site.
- 9.27 Additionally, as demonstrated in Section 8 above, a small market share in F&B is not a reliable indicator of the capacity that a competitor has to service F&B, given that production capacity currently used to manufacture other cleaning chemicals can be switched over to manufacture F&B cleaning chemicals in a matter of hours.
- 9.28 Where customers are serviced purely on standard terms and conditions or on purchase order basis (i.e. in each case with no minimum supply obligation or exclusivity), a supplier is free to shift production to the market with the highest margins. Toll manufacturing can also be used to tide over the gap between receiving further orders and building additional capacity to serve them if needed.
- 9.29 Accordingly, Diversey, Christeyns, Kersia and others active in F&B plus other Segments are therefore all capable of quickly increasing their UK production of F&B cleaning chemicals in order to compete with the Parties and offset any SSNIP.

## 10. INTERNAL DOCUMENTS

- 10.1 In order to make up for what it perceives as a lack of internal strategy and market overview documents, the Decision has sought to interpret other internal documents as a guide to the Parties' unfiltered and authentic views of the marketplace. This strategy has led to the Decision

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<sup>148</sup> This includes 66 instances of named small competitors (e.g. Brenntag) and unnamed competitors such as "small local competitor"/"Independent". This excludes cases with no competitor information (e.g. "Unknown") where the winner could be Diversey/Christeyns or Ecolab.

<sup>149</sup> Decision, paragraph 115(f)

<sup>150</sup> Paragraph 3.10 above

drawing certain conclusions from internal documents which are not supported by the context in which those documents were generated:

- (a) The Decision has taken the listing of a three competitors in response to the question "*what other suppliers do you consider as your competitors?*" on a bid document by Holchem as evidence that Holchem considered itself only to have three competitors<sup>151</sup>. On the contrary, as the response was made on a bid document being provided to a potential customer, Holchem logically sought to provide the absolute minimum acceptable response and only listed its largest and most obvious customers;
- (b) The Decision has considered Holchem's sales representatives' monthly reports to be comprehensive reports of competitive conditions or competitors' activities, rather than a mechanism for tracking the performance of Holchem's sales representatives<sup>152</sup> and regarded the regular inclusion of updates on the largest three competitors of Holchem as evidence of systematic tracking of those competitors and those competitors alone. On the contrary, these documents are updates of the salespersons' own activities and encounters and are not an attempt to create a systematic overview of the market itself. Additionally, they feed into Holchem's gain and lost documents, previously provided to the CMA;
- (c) The CMA has also erroneously drawn the conclusion that reports prepared in a different style by Irish sales representatives are an indication of the Irish market being more competitive, rather than the reports' seeking to provide more detail to a reader not based in the author's home market or simply that individual's personal style.

10.2 Additionally, the CMA has used historic internal documents as a reason to ignore the increased competitive threat posed by Kersia as a result of its June 2018 acquisition of Kilco.

## 11. COMPETITION IN THE INSTITUTIONAL SEGMENT

11.1 The Parties welcome and agree with the Decision's conclusion that there is no reasonable prospect of an SLC in the Institutional Segment. In particular, the Parties note that the Decision found that:

- (a) The Parties' market shares were minimal<sup>153</sup>;
- (b) A considerable number of competitors (at least the 19 identified by the CMA) will continue to offer credible alternatives to the Parties<sup>154</sup>.

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151 Decision, paragraph 94

152 Decision, paragraph 96

153 Decision, paragraph 125

154 Decision, paragraph 129

## **SCHEDULE: HOLCHEM WON AND LOST FOR SMALLER CUSTOMERS AND VERY SMALL CUSTOMERS**

*Note: These tables reflect the rivals that Holchem believed that it was facing. However in most instances it is not revealed by customers who else was considered or even who won. Holchem's internal records of its competitors are often guesswork, with these records making no distinction between known competitors and assumed competitors.*

**Table 1: Rivals faced in Holchem's won tenders for contracts worth less than £50k**

✂

*The contract values and counts are included above for each rival faced. Contracts where multiple rivals are faced are double-counted, therefore the sum of all rows is greater than the total value of contracts worth less than £50k.*

**Table 2: Rivals faced in Holchem's won tenders for contracts worth less than £8k**

✂

*The contract values and counts are included above for each rival faced. Contracts where multiple rivals are faced are double-counted, therefore the sum of all rows is greater than the total value of contracts worth less than £8k.*

**Table 3: Rivals faced in Holchem's lost tenders for contracts worth less than £50k**

✂

*The contract values and counts are included above for each rival faced. Contracts where multiple rivals are faced are double-counted, therefore the sum of all rows is greater than the total value of contracts worth less than £50k.*

**Table 4: Rivals faced in Holchem's lost tenders for contracts worth less than £8k**

✂

*The contract values and counts are included above for each rival faced. Contracts where multiple rivals are faced are double-counted, therefore the sum of all rows is greater than the total value of contracts worth less than £8k.*