

**NON-CONFIDENTIAL SUMMARY OF ECOLAB'S RESPONSE TO
THE CMA'S REMEDIES NOTICE
("RESPONSE SUMMARY")**

ME/6793/18

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*The terms used in this Response 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**"), the Parties' Initial Phase 2 Submission of May 2019 ("**Initial Submission**"), the Parties' responses to the CMA's Requests for Information ("**RFIs**") and the Parties' consolidated response of July 2019 to the CMA's working papers and AIS ("**Consolidated Response**"). Where the same word has a different definition in these documents, the definition from the latest document has been used.*

1. Introduction

- 1.1 This document summarises Ecolab's response to the CMA's Remedies Notice of 6 August 2019 (the "**Remedies Response**"), which was submitted to the CMA on 16 August 2019. The Remedies Response is premised on the assumption that the CMA maintains its Provisional Findings ("**PFs**") concerning the supply of cleaning chemicals (and ancillary services) to F&B customers in the UK.
- 1.2 The Parties believe strongly that the PFs should not be maintained and that the available evidence does not support any finding of a substantial lessening of competition ("**SLC**"). On the contrary, there is compelling evidence that the market will remain highly competitive post-Transaction and, in these circumstances, the CMA should approve the Transaction unconditionally.
- 1.3 Without prejudice to the arguments and explanations that will be advanced in their Response to the PFs, we summarise below the principal reasons why the Transaction results in no SLC or, in the alternative, should require a remedy that is considerably narrower than the full divestment proposed by the CMA.
- 1.3.1 **The PFs are based on market shares that overstate the Parties' post-Transaction shares in important respects.** The PFs rely on estimates of the Parties' post-Transaction market shares that include sales to international customers who procure for sites within and outside the UK. There is, however, no competition between the Parties for such international customers as Holchem cannot meet their needs. Once sales to international customers are excluded and other errors in the market shares cited in the PFs are corrected, the Parties' post-Transaction combined share is well below the level that generally raises competition concerns, and the incremental increase in combined share resulting from the Transaction is low.
- 1.3.2 **All UK-only customers will continue to have sufficient choice to ensure competitive procurement and supply options.** Both Parties supply a large number of smaller customers that could easily switch to smaller suppliers other than the current largest four suppliers. The PF's estimate that 30-40% of total sales in the market today are already supplied by such smaller suppliers. For larger customers, who are more likely to have heightened service requirements and technical support, but also have powerful professional procurement organizations, the PFs find that "most competition for tendered contracts takes place between two or three large providers." The CMA and the European Commission have determined in many cases that, where, as here, competition occurs through tenders conducted by well-informed buyers, the existence of two or three suppliers will be a sufficient guarantee of effective competition. Accordingly, even if a large customer is less willing to use smaller suppliers, it would still have effective choice post-Transaction from the three remaining large suppliers.
- 1.3.3 **The PFs recognise that Holchem competes more closely with Christeys and Diversey than Ecolab.** It is not surprising or relevant that Holchem is found to be the largest constraint to Ecolab for UK-only business. The largest supplier in any market is typically the one who puts the most pressure on the others to stay competitive in the market. The relevant finding in this case is that Christeys and Diversey put more pressure on Holchem to stay competitive than Ecolab does. In this circumstance, the combination of Holchem and Ecolab is not likely to give rise to any SLC.

- 1.3.4 **Contrary to the CMA's finding, suppliers other than the Parties, Diversey and Christeyns can and would continue to exert a strong significant constraint.** Numerous suppliers other than the current largest four suppliers together account for over 30-40% of UK sales. They include Needlers, Arco, Kersia, Sopura, AFCO/Zep, Deb/SC Johnson, Niche Solutions, WaterTech, and Evans Vanodine. Any one of these many active suppliers could grow to become a more significant supplier of customers in the UK. The PFs fail to recognize that if the Parties were to raise prices or reduce quality after the Transaction, customers can switch with minimal disruption, creating great opportunity for these suppliers to expand.
- 1.4 These undeniable market facts render the PFs' conclusions implausible and unsustainable.
- 1.5 The reality is that competition between suppliers is intense today and will remain intense post-Transaction, as customers will continue to have a wide range of credible suppliers to choose from and play off against each other. The PFs are based on an inadequate body of evidence that is insufficient to maintain any SLC. Accordingly, no SLC should be identified and no remedy should be required.
- 1.6 Should, however, the CMA maintain its view that a remedy is needed (*quod non*), the remedy identified by the CMA in its Remedies Notice described below – effectively prohibiting the Transaction – would clearly be disproportionate.
- 1.7 Ecolab therefore puts forward an "**Alternative Remedy Proposal**" below, consisting of a portfolio of customers that would be sufficient and proportionate to address the SLC provisionally identified by the CMA and which would preserve some of the Transaction's rationale, including the extension of Holchem's successful services model to Ecolab's customers and the extension of Ecolab's innovations and international expertise to Holchem's customers.
- 2. The CMA's Suggested Remedy**
- 2.1 The Remedies Notice has identified one potential structural remedy, the divestiture of the whole of the Holchem Group Limited, which is in effect a prohibition of the merger.
- 2.2 The CMA is obliged to seek the least costly remedy, or package of remedies, from the remedies that it considers will be effective.¹ It is also obliged to avoid a remedy that risks imposing costs that would be disproportionate to the scale of the SLC.²
- 2.3 The CMA's proposed remedy would result in the divestment of business sectors of Holchem in respect of which the CMA has either explicit or implicitly recognized there is no plausible SLC concern (e.g., institutional sales, sales into Ireland and sales of unformulated products). This goes well beyond that necessary to address the concerns raised in the Provisional Findings. As such, the CMA's remedy proposal is clearly disproportionate.
- 2.4 The Alternative Remedy Proposal, explained below, would be sufficient to address the CMA's current concern and significantly less costly than the CMA's suggested remedy. Therefore, in the event that the CMA determines there is an SLC, it is proportionate to accept the Alternative Remedy Proposal rather than require the divestiture of all of Holchem.

¹ CMA Merger Remedies Guidance: CMA 87, 13 December 2018 ("**Remedies Guidance**"), paragraph 3.6

² Remedies Guidance, paragraph 3.11

3. Ecolab's Alternative Remedy Proposal

- 3.1 The only competitive overlap between Ecolab and Holchem's F&B business is with respect to the Parties' UK-only F&B Customers. Accordingly, the divestment of a portfolio of business with UK-only F&B Customers should be sufficient to remedy any SLC.
- 3.2 The Alternative Remedy Proposal comprises the divestment of a portfolio of business with UK-only F&B customers (the "**Divestment Business**") to an existing competitor who already has its own F&B product range and who would, during a reasonable transition period, convert these customers to its own cleaning products. This divestiture would be fully effective in remedying the concern articulated by the CMA.
- 3.3 There are numerous competitors already present in the industry who are capable of taking the Divestment Business and effectively using it to build up their own market presence in the UK to maintain and grow the competitive constraint represented by the Divestment Business.

Contents of the Alternative Remedy Proposal

- 3.4 The Alternative Remedy Proposal is proposed to contain the following elements:
 - 3.4.1 A portfolio of UK-only F&B Customers (the "**Divestment Customers**"), including contracts with such customers where applicable, associated database records, supplier-owned equipment at such customer sites (e.g., dispensers) and sufficient personnel who currently support Divestment Customers to provide services to the Divestment Business (subject to employment law restrictions).
 - 3.4.2 A Transitional Services Agreement to provide training, technical expertise, back-office and other support to the Purchaser and the Divestment Customers during the period until the Purchaser can convert them onto the Purchaser's own products and take over such services within its own organization and operating systems.
 - 3.4.3 A Supply Agreement for the full range of F&B cleaning chemical products (and any necessary ancillary equipment or parts) currently being purchased by the Divestment Customers to enable uninterrupted supply during the transitional period, until the Purchaser can convert them onto the Purchaser's own products, to be manufactured in the Purchaser's own facilities or through a third party manufacturer.
 - 3.4.4 The Parties are *not* proposing to licence any brands nor formulas, other than on a transitional basis as part of the supply arrangements to the extent and duration necessary to enable uninterrupted supply and resale to the Divestment Customers of the F&B products they are currently purchasing to allow the Purchaser to convert these customers to its own products and brands. Cleaning chemical products are subject to EU Regulations and any prospective purchaser is expected to be an existing competitor in the EEA and therefore expected to have a compliant range of products available. The Transitional Services Agreement and Supply Agreement will be of a sufficient duration to allow the Purchaser to transition all the Divestment Customers onto its own products in an orderly manner. Furthermore, the sales and service personnel included in the Alternative Remedy Proposal will be able to assist in selecting appropriate substitutes and

implementing the conversion to the equivalent products from the Purchaser's portfolio.³

- 3.4.5 Notably, this industry is not one where the brand name of the product is important. The Divestment Customers are sophisticated industrial professionals, and the brand of a product is irrelevant, what they want to know is the product's specified application and efficacy, i.e. whether it cleans and sanitises to the necessary specifications.
- 3.5 Accordingly, the Divestment Business would contain all the necessary components to constitute a viable standalone UK F&B chemicals business.

Additional commitments

- 3.6 Ecolab would undertake, and procure that its affiliates would comply with its undertaking:
- 3.6.1 Not to re-acquire the Divestment Business for a period of 10 years from closing of the divestiture without the prior written consent of the CMA;
- 3.6.2 Not to actively solicit, subject to customary limitations, for the supply of the F&B cleaning chemicals currently being purchased by the Divestment Customers, with certain customary exceptions, for an agreed period; and
- 3.6.3 Not to actively solicit, subject to the customary limitations and for an agreed period, any of the personnel transferring as part of the Divestment.

Suitable purchaser

- 3.7 Ecolab considers that any third party other than Diversey or Christeyns currently making F&B cleaning chemicals sales in the EEA could potentially be suitable as a purchaser of the Divestment Business. The Alternative Remedy Proposal would therefore create a new competitor in UK F&B, or alternatively significantly expand the scale of and strengthen one of the "long tail" of competitors already operating in the UK market. In either case, the Purchaser would quickly be established as a strong fourth player. As noted in paragraph 3.4.4 above, the Purchaser is expected to have its own pre-existing range of F&B cleaning chemical products, to which the Divestment Customers could be converted in an orderly manner over time following the divestment.
- 3.8 While the UK market is one of the larger EEA markets (due to UK consumers' higher consumption of processed foods), there are no material differences in the legislative standards, products or services that are provided. Any purchaser active in the EEA would therefore be expected to have its own products that meet the EEA regulatory requirements, be familiar with the servicing requirements of F&B customers, and have production capabilities necessary to ensure supply of the products, as well as having their own existing industry expertise. Given the long tail of approximately 40 smaller suppliers already active in the UK and/or in the EEA, there are plenty of competitors who also have their own assets and staff to combine with the Divestment Business to ensure that the Alternative Remedy Proposal creates a strong fourth competitor in the UK F&B market in the future, which the CMA is likely to see as an essential characteristic of any purchaser.

³ This can be done on the basis of creating a product mapping list by comparing both parties' safety data and technical specifications sheets required under EU Regulations. This is also how customers will typically facilitate the switch from an incumbent supplier's products to a new one.

4. Conclusion

- 4.1 If the CMA concludes that a remedy is necessary to address any SLC identified in its Final Decision, Ecolab believes that the most proportionate and effective remedy would be the Alternative Remedy Proposal, rather than a divestment comprising all of Holchem, given that the Alternative Remedy Proposal:
- 4.1.1 Would fully eliminate the SLC provisionally identified by the CMA. The Divestment Business would exert an equivalent competitive constraint for customer segments in respect of which concerns have been identified, as Ecolab today exerts on Holchem (and *vice versa*).
 - 4.1.2 Would exclude other customer segments where the CMA has not identified concerns, rendering it considerably more proportionate than the CMA's currently proposed remedy.
 - 4.1.3 Is a structural divestment that requires no on-going monitoring by the CMA; and
 - 4.1.4 Creates a fourth supplier for UK-only customers that is considerably larger than any of the "long tail" of other smaller suppliers dismissed by the PFs.
- 4.2 Additionally, the CMA can have a high degree of confidence in timely execution of the Alternative Remedy Proposal. There are various potential purchasers that would, having acquired the Divestment Business, fully replace or even exceed the constraint currently exerted by the Parties on each other.
- 4.3 There can be no reasonable doubt as to the effective implementation, monitoring, or enforcement of the Alternative Remedy Proposal. Carving out the Divestment Business and integrating it with the business of the Purchaser would involve no great complexity. There is precedent for similar transactions in recent CMA practice, such as *Rentokil/Cannon (Phase 2 remedies)* and *Rentokil /MPCL (UILs)*.