

**RESPONSE TO THE CMA'S PROVISIONAL FINDINGS  
("RESPONSE")**

**ME/6793/18**

**ECOLAB INC / THE HOLCHEM GROUP LIMITED**

**DLA PIPER UK LLP**  
160 ALDERSGATE STREET  
LONDON, EC1A 4HT  
UNITED KINGDOM

*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.*

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## 1. Introduction & Executive Summary

1.1 This submission contains the Parties' response to the CMA's Provisional Findings of 6 August 2019 (the "PFs"). It contests the CMA's provisional conclusion that the Transaction has resulted, or may be expected to result, in a substantial lessening of competition ("SLC") in the supply of formulated cleaning chemicals (and ancillary services) to F&B customers in the UK.

1.2 The Parties strongly believe that the PFs are based on errors of fact, law, and assessment, and that the overwhelming body of available evidence, including the substantial new evidence provided as part of this submission, is inconsistent with any SLC finding. On the contrary, there is compelling evidence that the market will remain highly competitive post-Transaction. This is due to: (a) the intense competition between the largest suppliers, Ecolab/Holchem, Diversey and Christeyns; (b) the existence of numerous small suppliers that can and do supply UK customers; and (c) the ease with which UK customers can and do switch between suppliers. The availability of a substantial number of credible alternatives will ensure effective competition and nullify the possibility of an SLC arising.

1.3 The new evidence provided as part of this submission includes:

1.3.1 An additional survey (the "**Survation Questionnaire**") of Large Customers undertaken according to the CMA's own guidance on surveys by a reputable external market research company (Survation). The full results of the survey and the methodology used are attached as Annexes 1.2- 1.8.<sup>1</sup> As set out in the Annex 1.1, the survey reflects responses from Large Customers accounting for [X%] of Ecolab's and [X%] of Holchem's Large Customers by value. Importantly, the number of respondents (30) exceeds (by around a third) the number of Large Customers who responded to the CMA (22). 70% of respondents to the Survation Questionnaire had no concerns about the impact of the Transaction on competition, in direct contrast with the CMA's provisional conclusion that the Transaction will result in an SLC including because they:

- (i) have many credible alternative suppliers (in addition to the Parties, Diversey and Christeyns);
- (ii) do not view the Parties as each other's closest competitors; and
- (iii) can switch suppliers easily, are not deterred from switching by the limited associated costs and effort, and can use the mere threat of switching to secure the best possible terms.

1.3.2 An economic analysis of the impact of customer longevity on the Parties' prices, which shows that long-term customers do not pay higher prices than new customers. [X]. This explains why the CMA found that historic customer switching rates are relatively low: customers do not need to switch because they realise that they are able to maintain competitive prices and they know that the threat of switching is sufficient to constrain their incumbent suppliers.

1.3.3 Further explanation of the issues with the Parties' internal data gathering on tenders, gains and losses. Among other things, we explain why the CMA should have taken

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<sup>1</sup> RBB have prepared a paper on the results of Survation Questionnaire (see Annex 1.1).

account of the “none-unknown” category as part of the long tail of “other” suppliers and recognised the constraint imposed by these suppliers on the Parties.

1.3.4 Further research into Kersia provided in this Response reinforces our contention that Kersia would be likely to expand in a timely and sufficient manner to constrain the Parties from taking any possible actions following the Transaction that would be reflective of the existence of an SLC. Furthermore Annex 1.9<sup>2</sup> pulls together all the evidence that has been provided which supports that Kersia is poised to become a real competitive threat to the merging parties.

1.4 The Parties strongly believe that a thorough and objective review of this evidence, together with the other information and explanations in this submission, will provide the CMA with compelling reasons to reconsider the preliminary conclusions in the PFs and conclude that the Transaction will not lead to an SLC. This is a function of the following conclusions:

- The CMA’s market shares overstate the position of the Parties on the market post-Transaction as Holchem’s unformulated sales and Ecolab’s sales to International Customers<sup>3</sup> should be excluded from the market share calculations.
- There is no SLC in relation to Small Customers<sup>4</sup> as there are a large number of “other” suppliers able to service their needs.
- Competition will remain intense post-Transaction for Large Customers<sup>5</sup> as: (a) Holchem and Ecolab are not close competitors; (b) Large Customers tend to seek bids from 2 or 3 suppliers as part of a tender process so there will be no change post-Transaction; (c) switching supplier is easy and inexpensive; and (d) “other” suppliers do exert a strong competitive constraint.
- Kersia’s expansion in the UK F&B market will be timely, likely and sufficient.
- The CMA overstates the concerns raised by customers regarding the Transaction. The majority of customers are unconcerned.

1.5 **The PFs are based on market shares which are flawed in two important respects and therefore overstate the impact of the Transaction on the Parties’ relative post-Transaction competitive positions.** Once adjusted, the Parties combined share is [30-40%] at most, with an limited increment of [5-10%], well below the level generally considered to raise competition concerns.

1.5.1.1 First, although the CMA has excluded sales of unformulated products from its estimate of the total market size, it has included Holchem’s sale of such products in its estimate of Holchem’s share, thereby

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<sup>2</sup> The Parties have prepared a summary of all the previous evidence provided to the CMA related to Kersia compared to what is reflected in the PFs (see Annex 1.9).

<sup>3</sup> F&B producers who enter into a framework agreement with their F&B chemicals supplier to provide them with cleaning chemicals in multiple jurisdictions.

<sup>4</sup> “**Small Customers**” means customers with purchases of less than £50,000 a year, who tend to purchase on standard terms and conditions and receive minimal, if any, ancillary services.

<sup>5</sup> “**Large Customers**” mean customers who purchase for UK only sites and make purchases more than £50,000 a year. Also references to as Large UK Customers.

overstating Holchem's position. If these sales are excluded, which they should be, the Parties' combined share would be [30-40%].

1.5.1.2 Second, the market shares cited in the PFs include Ecolab's sales made to International Customers,<sup>6</sup> even though the CMA expressly acknowledges that Holchem does not and cannot compete with Ecolab for such customers.<sup>7</sup> If sales to International Customers are also excluded, the Parties' combined share falls even further, to [30-40%], and the increment from Ecolab is only [5-10%], a significantly lower share than Christeyns [✂] or Diversey [✂].

1.5.1.3 In reality, the Parties' combined share is even lower because sales of unformulated products – which actively compete with formulated products for certain application – should be included given formulated suppliers are all competing with unformulated suppliers (and other formulated suppliers) to convert unformulated sales into formulated sales. Both the CMA's survey and responses to the Survation Questionnaire clearly have some customers listing unformulated suppliers as alternatives. The Parties consider that the most accurate method of calculating shares in this market is to include all sales of unformulated products and to exclude all sales to International Customers. On that basis, the Parties' combined share is only [20-30%], with an increment of [5-10%].

1.6 **The CMA effectively recognises that no SLC arises in respect of Small Customers.** Once International Customers are out-of-scope, an SLC can only possibly arise with respect to customers who procure solely in the UK. Among those, the PFs recognise that Large and Small Customers have distinct profiles. Small Customers readily buy products from both larger suppliers and all of the long tail of smaller suppliers that together account for around one-third (37%) of total sales to UK-only customers. That Small Customers have many alternatives to which they can switch with minimal expense or disruption is supported by the responses the CMA has received to its own questionnaire. Of all the Parties' Small Customers surveyed (152), only 14 had previously used the other merging party in the last five years, whereas over 40 listed another previous supplier (with 14 listing Diversey and nine listing Christeyns).<sup>8</sup> The existence of numerous rival suppliers that can and do supply Small Customers means there is no basis to identify an SLC in respect of such customers.

[✂]

1.7 **Competition for Large UK Customers will remain intense as these customers will continue to have plenty of choice.** The PFs' conclusions in respect of Large Customers are incorrect and cannot be sustained. Competition for such customers is vigorous and will remain so post-Transaction.

1.7.1.1 **The PFs recognise that Ecolab is not Holchem's closest competitor, nor even the second closest competitor.** The CMA explicitly

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<sup>6</sup> Defined as those companies that manage their purchases centrally for their plants located in multiple countries.

<sup>7</sup> In paragraph 7.68 of the PFs, the CMA notes that "*Holchem does not compete with Ecolab for international customers.*" The CMA goes on to explain that the International Customers they contacted with centralised procurement systems "*would be unlikely... to consider using a UK-only supplier*" (paragraph 7.71).

<sup>8</sup> CMA's Customer Questionnaire Analysis, slide 13.

recognises that for Large Customers, Christeyns and Diversey are “*even closer competitors*” to Holchem than Ecolab.<sup>9</sup> This is consistent with Holchem’s win/loss data. It is neither relevant nor surprising that the PFs also conclude that Holchem is the most important constraint on Ecolab. As the clear leader in the market for UK customers, Holchem is also likely to be the strongest constraint on Christeyns, Diversey, and others. The critical question is the competitive significance of Ecolab relative to Christeyns, Diversey, and other suppliers, and the evidence shows Christeyns and Diversey are closer competitors to Holchem.

1.7.1.2 **Large UK Customers typically seek bids from only two to three suppliers.** The CMA and the European Commission have recognised in many cases that, where, as here, competition occurs through tenders conducted by well-informed buyers, the existence of just two or three suppliers is a sufficient guarantee of effective competition.<sup>10</sup> This is reflected both in the PFs, which find that “*most competition for tendered contracts takes place between two or three large providers*”<sup>11</sup>, and in the results of the Survation Questionnaire. This means that, consistent with the market structure in other major EEA countries where two or three major suppliers compete in tenders, UK customers believe they need only two or three bidders to ensure effective competition (72% of Large Customers surveyed ask no more than three suppliers for an initial quote<sup>12</sup>). Accordingly, even if the CMA discounts the competitive significance of “other” suppliers, which the Parties strongly believe it should not do, Large Customers would continue to have effective choice post-Transaction from Ecolab/Holchem, Christeyns, Diversey and others.

1.7.1.3 **Contrary to the CMA’s finding, switching to other suppliers is not lengthy or expensive.** Contrary to the conclusions in the PFs, customers can and do switch between suppliers with minimal disruption or expense, creating a very credible competitive constraint. Although historical customer switching rates are relatively low, this reflects the competitiveness of the market, rather than the existence of high barriers to switching. This is supported by the results of the Survation Questionnaire, which indicate that it takes most customers between only one and three months to switch (although for some it can take only a matter of days or weeks) and that customers can and do use the threat of switching to secure the best possible terms.<sup>13</sup> Significantly, the Survation Questionnaire finds that the large majority of customers do not regard switching costs as being significant enough

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<sup>9</sup> PFs, paragraph 24

<sup>10</sup> See, e.g., *Tradebe Environmental Services Limited/Sita UK Limited*, Report of 28 March 2014, para. 7.1 (the Competition Commission found, in respect of a 3-to-2 transaction, that “*while the merger parties regularly bid in the same tenders, they do not constrain each other’s pricing to a significant extent*”); *Alpha Flight Group Limited/LSG Lufthansa Service Holding AG*, Report of March 14, 2012, paras 7.3 & 8.62-8.65 (the Competition Commission found that the existence of three “*credible options*” able to “*exert a competitive constraint on each other during bidding processes*” was sufficient).

<sup>11</sup> PFs, summary paragraph 25

<sup>12</sup> Survation Questionnaire, Question 28.

<sup>13</sup> Survation Questionnaire, Question 33.

to deter switching in the event of a small but significant price increase.<sup>14</sup>

1.7.1.4 **The long tail of “other” suppliers can and would exert a strong significant constraint on Ecolab/Holchem.** The products supplied by the Parties are fundamentally undifferentiated.<sup>15</sup> The CMA’s case rests in large part upon a nebulous and unsubstantiated theory of differentiation through service, quality and reliability. Customers can and do consider the long tail of “other” suppliers for their needs.

1.7.1.5 In the Survation Questionnaire customers clearly indicated that they would be willing to trial a new supplier<sup>16</sup>, and both the Survation Questionnaire<sup>17</sup> and the CMA’s own data show that it is common for customers to multi-source. Many Large Customers have a primary supplier and a smaller supplier (such as a local or niche supplier) as a secondary supplier. Also, it is not uncommon for a customer to have an alternative supplier at a number of sites. “Other” suppliers therefore already have existing relationships with Large Customers and are well-known to such customers, which makes it easy for those customers to increase the proportion of purchases it makes between the two suppliers. This disciplines both suppliers.

1.7.1.6 As a result of these market facts, the CMA cannot ignore the competitive constraint the merged entity will face from the long tail of “other” suppliers, who together account for a very significant 37%<sup>18</sup> of the market for UK customers and who could readily expand to counter any increase in prices or reduction in quality by the merged entity (competitor feedback – and EC precedent – have found that barriers to entry/expansion in this market are low).<sup>19</sup> These “other” suppliers include:

- (a) The UK F&B operations of large global/EEA-wide F&B suppliers, such as Kersia, Sopura, Zep / AFCO, and Deb / SC Johnson, all of which clearly have the industrial expertise and financial resources to expand rapidly and successfully;
- (b) Smaller UK-focused F&B suppliers (including those with a larger presence in other segments or geographies (*e.g.*, Needlers, Arco, Niche Solutions, WaterTech, and Evans Vanodine));
- (c) Suppliers of unformulated chemicals, who the CMA acknowledges already serve a portion of the cleaning and

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<sup>14</sup> Survation Questionnaire, Question 34.

<sup>15</sup> Provisional Findings, paragraph 7.30.

<sup>16</sup> Survation Questionnaire, Question 36.

<sup>17</sup> Survation Questionnaire, Question 12, 40% of the Parties’ Large Customers currently have a secondary supplier.

<sup>18</sup> See Figure 3.

<sup>19</sup> PFs, paragraph 7.230 and *Unilever/Diversey*, COMP/M.704, para. 26

hygiene chemical requirements of Large and Small Customers (e.g. Brenntag and Univar);<sup>20</sup>

- (d) Large suppliers already active in closely adjacent markets, who could easily expand into F&B in the UK, such as Novadan (a Danish-based F&B cleaning chemicals business owned by US-based industrial conglomerate, Illinois Tool Works (“ITW”)) and CID Lines (a Belgian-based, initially agriculture-focused business that has been expanding into Food).

1.8 **In particular, the CMA has taken insufficient account of Kersia’s existing capabilities, global expansion plans, and recent recruitment, which are sufficient today to prevent an SLC.** The PFs significantly underestimate Kersia's ability and intention to expand in the UK and challenge the existing suppliers. The evidence strongly suggests that Kersia, already a major global player, is poised to become a much larger player in the UK F&B market. Kersia’s business model is to enter a market (often via an acquisition which it has done) and then expand aggressively. Accordingly, if, over the Parties’ objections the CMA maintains (*quod non*) that Large Customers require four major suppliers, Kersia is already well placed to become that supplier, in particular if the merged entity tried to raise prices or reduce quality. As confirmed by the Survation Questionnaire, 77% of customers would be willing to allow Kersia to trial and provide a quote.<sup>21</sup> The Transaction may in fact accelerate Kersia’s plans by incentivising it to develop its UK business more quickly than it already is.

1.9 **The PFs systematically overstate customer disquiet about the Transaction and ignore the large number of customers that are supportive of, or unconcerned about, the Transaction.** The PFs have misrepresented the customer feedback provided. That the majority of customers are clearly not concerned about the Transaction is reflected in the results of the Survation Questionnaire<sup>22</sup> and the low level of customer engagement with the CMA process. Indeed, even though the response rate to the CMA’s questionnaire was low – at only 15% - the results were generally positive for a self-selecting response group faced with an un-contextualized question on whether they have concerns.

More generally, the Parties have serious concerns about the CMA’s level of engagement with third parties<sup>23</sup> and its apparent willingness to cherry-pick customer and competitor feedback in order to build a case against the Transaction – when the reality is that the majority of this feedback has been favourable or at least neutral.

1.10 **In sum, the PFs are based on an inadequate body of evidence that is insufficient to maintain any SLC finding, let alone one where the number one and number four merge (with combined shares of only [30-40%] and [5-10%] increment).** The CMA must prove that the Transaction is expected to result in an SLC<sup>24</sup> on the balance of probabilities (a degree

<sup>20</sup> Both customers and competitors identified various unformulated suppliers in their responses reported in Appendix B, see for example, Table 20 that list: Brenntag, Bunzl, Univar as alternative suppliers (and who only supply unformulated). This is similar in the responses to the Survation Questionnaire.

<sup>21</sup> Survation Questionnaire, question 38.

<sup>22</sup> See the responses to question 17 of the Survation Questionnaire where 70% of Large Customers had no concerns about the Transaction and of the 30% that did have concerns, a number had concerns that were not related to a reduction in competition rather they reflected customers’ perceptions of Ecolab’s service offering compared to Holchem’s. See question 18 of the Survation Questionnaire.

<sup>23</sup> A letter setting out the Parties concern with the CMA's inquiries into Kersia has already been sent to the CMA. The Parties reiterate these concerns.

<sup>24</sup> Section 35(1)(b) Enterprise Act 2002 (“EA02”).



of likelihood of more than 50%).<sup>25</sup> In the absence of such proof, the CMA must clear the Transaction unconditionally. The PFs fail to meet this standard and do not discharge the CMA's burden to the requisite degree of proof. The reality is that competition between suppliers is intense today and will remain intense post-Transaction, as Large and Small Customers will continue to have a wide range of credible suppliers. The new evidence provided by the Parties further supports this.

## 2. The PFs' Theory of Harm

2.1 The CMA's provisional conclusion that the Transaction is expected to result in an SLC is based on a number of findings, each of which is critical to the CMA's theory of harm. The remainder of this response explains why these findings are not supported by the evidence. In particular:

2.1.1 The PFs rely on market scope and size estimates that result in an overstatement of the Parties' shares and positions – the Parties' combined share is below 40% ([30-40] at most with an [5-10%] increment);

2.1.2 The PFs incorrectly assume there would be only three suppliers capable of supplying Large Customers in the UK post-Transaction;

2.1.3 The PFs, by placing undue reliance on the tender analysis, overstate the closeness of competition between the Parties and understate the competitive constraints imposed by other suppliers;

2.1.4 The PFs rely on a mistaken understanding that switching is difficult and time-consuming; and

2.1.5 The PFs dismiss compelling evidence that existing suppliers are constrained by the threat of expansion and new entry.

2.2 When compared to the scope of the Parties' UK overall activities, the SLC identified by the CMA in the PFs makes up a small fraction of the Ecolab business, as shown in the chart below.

### Figure 1: Breakdown of the Parties' activities against alleged SLC overlap

[✂]

2.3 Contrary to the conclusions drawn in the PFs, the evidence shows that: (i) the market is considerably more fragmented than suggested; (ii) the Parties' positions in the market are far less significant than suggested; (iii) the Parties are not close competitors for the majority of UK F&B customers; and (iv) there is a strong likelihood of expansion and entry.

2.4 The Parties do not seek to repeat all of the evidence they have submitted to the CMA throughout its investigation in this response. The Parties have provided a separate annex (Annex 1.10) which discusses the factual inaccuracies and misleading statements in the PFs. The Response focuses on the most significant evidence that undermines the CMA's theory of harm, and provide additional new evidence that credibly refutes specific points raised in the PFs.

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<sup>25</sup> IBA Health Ltd v OFT [2004] EWCA Civ 142, paragraph 46.

3. **The PFs’ Market Shares Are Based On Flawed Assumptions And Are Incorrect**

*The CMA’s View*

3.1 To support the preliminary conclusion that the Transaction would give rise to an SLC in the supply of formulated cleaning chemicals (and ancillary services) to F&B customers in the UK, the PFs cite market shares said to show that the Transaction “combines two of the four largest suppliers” in an “already concentrated market”, resulting in a merged entity that “will be significantly larger...than any of its competitors.”<sup>26</sup> The market shares cited in the PFs are set out in **Figure 2** below.

**Figure 2: CMA’S Estimated F&B Market Shares (2018) in PFs**

[✂]

3.2 Upon examination, however, these market shares overstate the Parties’ post-Transaction shares as a result of two important flaws:

3.2.1 **Holchem unformulated product sales.** First, contrary to the CMA’s preliminary conclusion that unformulated products do not form part of the same product market<sup>27</sup> as formulated products, the CMA has not excluded Holchem’s sales of unformulated products when calculating Holchem’s market share.<sup>28</sup> Holchem made sales of [✂] of unformulated products in 2018, which accounted for approximately [10-20%] of its F&B cleaning chemical sales by value. If unformulated products do not form part of the same product market as formulated products, and are therefore excluded from the total market size, the value attributable to the sale of such products by Holchem should clearly also be excluded. If market shares are recalculated in this way – as it is clear they should be – the Parties’ combined share is just [30-40%] (see **Figure 3** below).

**Figure 3: Estimated F&B Market Shares (2018) Excluding Holchem’s Sales of Unformulated Products**

[✂]

**Table 1 Estimated F&B market shares (2016 to 2018) Excluding Holchem’s Sales of Unformulated Products (Revised PFs Table 1)<sup>29</sup>**

Supplier	2016 Sales	%	2017 Sales	%	2018 Sales	%
Ecolab	[✂]	[10-20%]	[✂]	[10-20%]	[✂]	[10-20%]
Holchem	[✂]	[10-20%]	[✂]	[20-30%]	[✂]	[20-30%]

<sup>26</sup> PFs, paragraph 7.18

<sup>27</sup> The CMA has, somewhat arbitrarily, removed from the Parties' market size estimate 20% from the Food Segment and 25% from each of the Beverage and Dairy Segments on the ground that this market share is currently fulfilled (according to Ecolab's "rule of thumb" estimates) by unformulated products.

<sup>28</sup> As explained in previous submissions (in particular section 6 of the Consolidated Response to the Working Papers), and discussed below, the Parties contest this and these submissions are made without prejudice to the Parties’ arguments that unformulated products impose a significant competitive constraint on formulated products and should therefore be included in the estimate of total market size.

<sup>29</sup> Source: analysis of Parties’ data and visual inspection of provisional findings Figure 9 along with Table 1.

Supplier	2016 Sales	%	2017 Sales	%	2018 Sales	%
<b>Parties Combined</b>	[REDACTED]	[30-40%]	[REDACTED]	[30-40%]	[REDACTED]	[30-40%]
<b>Diversey</b>	Not available	[20-30%]	Not available	[10-20%]	[REDACTED]	[20-30%]
<b>Christeyns</b>	Not available	[5-10%]	Not available	[5-10%]	[REDACTED]	[10-20%]
<b>Others</b>	Not available	[0-5%]	Not available	[0-5%]	Not available	[0-5%]
<b>SC Johnson</b>	Not available	[0-5%]	Not available	[0-5%]	Not available	[0-5%]
<b>Others (known)</b>	Not available	[0-5%]	Not available	[0-5%]	Not available	[0-5%]
<b>Remainder</b>	Not available	[20-30%]	Not available	[20-30%]	Not available	[20-30%]
<b>Total</b>	120,308,516	100%	120,308,516	100%	120,308,516	100%

3.2.2 **International Customers.** Second, the market shares cited in the PFs include sales made to International Customers. The CMA expressly acknowledges that Holchem does not and could not compete with Ecolab for such customers.<sup>30</sup> The data provided at PFs Figure 9 allow a breakdown of sales between national and International Customers. If sales to International Customers<sup>31</sup> (as well as sales of Holchem’s unformulated products) are excluded, the Parties’ combined share falls even further, to [30-40%]. Significantly, stripping out sales to International Customers reduces the increment from the Transaction to only [5-10%], a significantly lower share than Christeyns [10-20%] or Diversey [10-20%]. In addition, a significant proportion of sales (37%) is held by other suppliers, which the CMA wrongly dismisses as a competitive constraint (see further Section 3 below): see **Figure 4** below. This demonstrates the limited role of Ecolab in competing for UK-Only Customers. This is a function of Ecolab’s focus on International Customers, which account for at least [50-60%] of its F&B sales in the UK.

**Figure 4: Estimated F&B Market Shares (2018) Excluding Holchem’s Sales of Unformulated Products and Sales to International Customers<sup>32</sup>**

[REDACTED]

<sup>30</sup> In paragraph 7.68 of the PFs, the CMA notes that “*Holchem does not compete with Ecolab for international customers.*” The CMA goes on to explain that the International Customers they contacted with centralised procurement systems “*would be unlikely... to consider using a UK-only supplier*” (paragraph 7.71).

<sup>31</sup> [REDACTED]

<sup>32</sup> Based on CMA’s market size, excluding sales to International Customers provided by the CMA for Diversey at Figure 9 of the PFs.

**Table 2 Estimated F&B market shares (2016 to 2018) Excluding Holchem's Sales of Unformulated Products and sales to International Customers (Revised PFs Table 1)<sup>33</sup>**

Supplier	2016 Sales	%	2017 Sales	%	2018 Sales	%
<b>Ecolab</b>	[X]	[5-10%]	[X]	[5-10%]	[X]	[5-10%]
<b>Holchem</b>	[X]	[20-30%]	[X]	[20-30%]	[X]	[20-30%]
<b>Parties Combined</b>	[X]	[30-40%]	[X]	[30-40%]	[X]	[30-40%]
<b>Diversey</b>	Not available	Not available	Not available	Not available	[X]	[10-20%]
<b>Christeyns</b>	Not available	Not available	Not available	Not available	[X]	[10-20%]
<b>Others</b>	Not available	Not available	Not available	Not available	[X]	[30-40%]
<b>Total</b>	99,808,516	100%	99,808,516	100%	99,808,516	100%

***The Parties' view***

- 3.3 In reality, the Parties' combined share is even lower. The Parties maintain that unformulated products should be included in the total market size (as previously submitted in Section 5 of the Consolidated Response to the Working Papers). Against the Parties' arguments, the CMA has removed unformulated cleaning chemicals from its market size estimate on the basis that they do not competitively constrain formulated cleaning chemicals.
- 3.4 The CMA removes from the market size the portion of customer cleaning demand that it estimates is served by unformulated products. That is, it is dismissing from the market the portion of supply where unformulated products have demonstrably competed successfully against formulated products.
- 3.5 The methodology applied by the CMA in order to reach this conclusion is circular and inconsistent with its approach to market share estimates in this case. On the one hand, the CMA rejected the Parties' original Phase 1 market size estimates on the grounds that they were not supported by "real" evidence and in so doing dismisses the credibility of the Parties' knowledge and experience in the market as a reliable basis for estimating market size. On the other, the CMA, ironically, chose to reduce the size of the market based on Ecolab's "rule of thumb", that was explicitly explained to be unscientific, that 20-25% of any European F&B market (i.e. not the UK in particular) will be made up of unformulated sales. This is meant to serve as guidance to push its salespeople to try to identify and convert to Ecolab's formulated products. The rule is based on anecdotal evidence. The CMA has even seized on Ecolab's similarly general,

<sup>33</sup> Source: analysis of Parties' data and visual inspection of provisional findings figure 9.

anecdotal observation that the share of unformulated in Food tends to be slightly lower while the share of unformulated in Beverage and Dairy tends to be slightly higher as decisive evidence for reducing the size of the Food Segment by 20% and the Beverage and Dairy Segments by 25%. The Parties have provided evidence that the market size is actually *larger*, the CMA has taken it upon itself to reduce the market size without providing any supporting evidence.<sup>34</sup> Applying two completely different standards to evidence depending on whether the evidence increases or decreases the estimated market size is inconsistent with the CMA's duties as an impartial regulator seeking to reach an accurate finding.

- 3.6 We note that no evidence has been shared with the Parties setting out an alternative methodology by the CMA for calculating market size to that put forward by the Parties and the CMA has concluded that the Parties' methodology is reasonable (but for the CMA's arbitrary reduction of the final figure). If the CMA *does* have additional evidence in relation to market size which has not yet been shared with the Parties, it cannot rely on this evidence without infringing the Parties' rights of defence. For the avoidance of doubt, while the CMA *has* shared estimates of market size provided by Diversey and Christeyns<sup>35</sup>, it has not shared any methodology used to verify these estimates, meaning that they appear to be just as "arbitrary" as previous market size estimates provided by the Parties and rejected by the CMA.
- 3.7 As discussed in more detail in Section 6, both the CMA and the Survation Questionnaire show that there are a significant number of customers that are already using unformulated products (37% of respondents to the Survation Questionnaire said they were already using unformulated cleaning chemicals).<sup>36</sup> The Survation Questionnaire also demonstrated that it is common for customers to source products from alternative suppliers<sup>37</sup> (either as alternate suppliers for different sites or as a so-called primary and secondary supplier). While unformulated products may not be used by all customers / for all a customer's cleaning chemical needs, it is wrong to simply dismiss the competitive constraint being exerted by unformulated products.
- 3.8 The Parties therefore consider that the most accurate method of calculating shares in this market is to include all sales of unformulated products (i.e., both Holchem's sales and in the market size) and to exclude all sales to International Customers (i.e., both Ecolab's sales and in the market size). On that basis, the Parties' combined share is only [20-30%], with an increment of [5-10%]: see **Figure 5** below.<sup>38</sup>

**Figure 5: Estimated F&B Market Shares (2018) Including All Unformulated Product Sales and Excluding Sales to International Customers**

[✂]

<sup>34</sup> In any event, including unformulated products in the total market size still understates the total size of the market. Ecolab calculated the total market size on the conservative assumption that customers were procuring all their cleaning chemical demand from them because they are on exclusive supply contracts. But the reality is that even those customers source some unformulated and certain niche cleaning products, such as hand care and wipes, from other suppliers. These products have the same active formulated chemicals as the Parties' products. It is only through this process that the Parties have realised how prevalent wipes and other niche cleaning products are in the F&B market. It seems likely that at least some customers source some other products (such as unformulated products and wipes) from third parties meaning that even Ecolab's estimate of a £155m UK F&B market is understated. See further paragraph 6.3 of the Consolidated Response.

<sup>35</sup> PFs, paragraph 7.11.

<sup>36</sup> Survation Questionnaire, question 40.

<sup>37</sup> Survation Questionnaire, question 14.

<sup>38</sup> [✂]

**Table 3 Estimated F&B market shares (2016 to 2018) Including All Unformulated Product Sales and Excluding Sales to International Customers (Revised PFs Table 1)<sup>39</sup>**

Supplier	2016 Sales	%	2017 Sales	%	2018 Sales	%
<b>Ecolab</b>	[X]	[5-10%]	[X]	[5-10%]	[X]	[5-10%]
<b>Holchem</b>	[X]	[20-30%]	[X]	[20-30%]	[X]	[20-30%]
<b>Parties Combined</b>	[X]	[20-30%]	[X]	[20-30%]	[X]	[20-30%]
<b>Diversey</b>	Not available	Not available	Not available	Not available	[X]	[5-10%]
<b>Christeyns</b>	Not available	Not available	Not available	Not available	[X]	[10-20%]
<b>Others</b>	Not available	Not available	Not available	Not available	Not available	[50-60%]
<b>Total</b>	134,248,425	100%	134,248,425	100%	134,248,425	100%

3.9 The resulting market shares for 2018 for each of these adjusted scenarios are shown in the table below.

<sup>39</sup> Source: analysis of Parties' data and visual inspection of provisional findings figure 9.

Table 4: Consolidated market share figures for Ecolab and Holchem 2018<sup>40</sup>

	<b>Ecolab (%)</b>	<b>Holchem (%)</b>	<b>Parties Combined (%)</b>	<b>Total Market Size</b>
<b>CMA View (i.e. Parties' Bottom-Up View with 20-25% Reduction for Unformulated Products)</b>	[10-20%]	[20-30%]	[40-50%]	£120m
<b>CMA View adjusted to Exclude Holchem's Sales of Unformulated Products From Shares</b>	[10-20%]	[20-30%]	[30-40%]	£120m
<b>CMA View adjusted to Exclude Holchem's Sales of Unformulated Products From Shares and Sales to International Customers From Shares and Market Size</b>	[5-10%]	[20-30%]	[30-40%]	£100m
<b>Parties' Phase 2 Bottom-Up View adjusted to Exclude Sales to International Customers From Shares and Market Size</b>	[5-10%]	[20-30%]	[20-30%]	£134m

3.10 As a result, it is clear that whether market shares are re-calculated either to be consistent with the CMA's preliminary conclusions, or to include unformulated products, the Parties' combined share post-Transaction would be well below 40%.<sup>41</sup> That market shares of this level are not expected to give rise to concerns has been recognised explicitly by the CMA in its Merger Assessment Guidelines, which explain that "*previous OFT decisions in mergers in markets where products are undifferentiated suggest that combined market shares of less than 40 per cent will not often give the OFT cause for concern over unilateral effects.*"<sup>42</sup> As explained in previous submissions, the Parties' products are undifferentiated.<sup>43</sup> The only examples listed by the Merger Assessment Guidelines of where a sub-40% market share may be problematic, is where there is a vertical foreclosure effect (which has never been considered even as a possibility by the CMA in relation to this Transaction). Taking a consistent view of the market structure demonstrates that market shares are not of a level where credible competition concerns can be said to arise in this market.

<sup>40</sup> Source: analysis of Parties' data and provisional findings figure 9.

<sup>41</sup> The European Commission does not typically find competition concerns with mergers where the parties combined market shares are below 40%, in fact in *Johnson & Johnson/Guidant* (2005) market shares above 70% were not found to be problematic.

<sup>42</sup> Merger Assessment Guidelines, paragraph 5.3.5

<sup>43</sup> See for example paragraph 3.7 of the Issues Paper Response. See also PFs, paragraph 7.30.

#### 4. The Transaction Is Not A “4 to 3” Merger

##### *Competition for Small Customers*

- 4.1 The PFs state that "*smaller suppliers compete for smaller customers*".<sup>44</sup> The PFs even suggest that Niche Solutions makes more sales to Small Customers than Ecolab<sup>45</sup> (effectively admitting that the Transaction at worst constitutes a 5-4 with respect to Small Customers) and it is very possible that Sopura, Deb / SC Johnson, and Selden Research do too (insufficient information is provided in the Parties' version of the PFs to conclude either way). In the responses to the CMA's Small Customer Questionnaire, 16 other suppliers were listed.<sup>46</sup> Also Table 11 of Appendix B, Small Customers listed using one of the other suppliers 40 times, while the Parties were listed as the previous supplier only 14 times in the last 5 years. Holchem's Gain and Loss data also mentions 15 competitors in addition to Diversey, Christeys and Ecolab that were listed more than once, and 48 additional competitors listed once. These are all actual competitors for Small Customers.
- 4.2 There are no barriers to switching for Small Customers. Small Customers do not typically engage in tenders and rarely have a fixed term contract. The CMA states that "*a large proportion of sales to customers over £250,000 are tendered whereas only a very small proportion of tenders are recorded for the smaller customers.*"<sup>47</sup> Small Customers are therefore less likely to have entered into a contract and will instead rely on standard terms and conditions.<sup>48</sup> Accordingly, Small Customers are free to switch supplier at any time and suppliers can only retain a customer if they offer competitive prices in order to renew and preserve the business.
- 4.3 Even though very few Small Customers run tender exercises,<sup>49</sup> the CMA has sought to draw sweeping conclusions with respect to competition for Small Customers from the tender analysis. The fact that only a small proportion of Small Customers do so undermines the reliability of any analysis for Small Customers based on the tender analysis. Therefore no reliance should be placed on these conclusions.
- 4.4 Rather, the fact that Small Customers have so many competitive options disproves the CMA's assertions that there is a lack of alternative suppliers to the four largest suppliers for those customers. By way of illustration, Christeys said "*smaller suppliers are better able to compete for smaller customers than large suppliers like Christeys because they have leaner overhead structure and can therefore offer better prices as well as being able to offer more frequent deliveries if they are focused on serving local customers*".<sup>50</sup>
- 4.5 As a result – as the CMA has effectively recognised – there is no basis on which to identify an SLC in respect of Small Customers.

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<sup>44</sup> PFs, paragraph 7.172.

<sup>45</sup> PFs, paragraph 7.167(b) suggests that 2/3 of Niche Solutions' £3m of F&B sales (*i.e.*, £2m) are to Small Customers whereas Ecolab only made sales of [REDACTED] to Small Customers in 2018.

<sup>46</sup> PFs, paragraph 7.131.

<sup>47</sup> PFs, paragraph 7.44.

<sup>48</sup> PFs, paragraph 7.41.

<sup>49</sup> See, for example, Annex 16.1 to Ecolab's response to the Market Questionnaire.

<sup>50</sup> PFs, paragraph 7.171.



### **Competition for Large UK Customers**

- 4.6 Large customers are powerful, sophisticated, and well informed companies that are able to run competitive tenders and obtain competitive prices. The evidence indicates that following the Transaction these customers will continue to benefit from intense competition and choice amongst suppliers.
- 4.7 The PFs present the Transaction as a “4 to 3” merger. Although not stated explicitly in these terms, the CMA takes the view that, other than Ecolab and Holchem, there are only two “*other suppliers of scale*.”<sup>51</sup> It states that the Parties “*do not compete with any other suppliers to a significant extent*”<sup>52</sup> and “*competition for tenders is focused predominately amongst the big market players with very few smaller competitors having the ability to compete successfully*”.<sup>53</sup> Thus the CMA concludes “*all the evidence points to the Parties being close competitors within a limited set of large suppliers*”.<sup>54</sup> Much of the evidence in the PFs is presented simply as a comparison of Holchem, Diversey, Christeys, Ecolab, and in some cases “others” or just a sub-segment of “others”<sup>55</sup>.
- 4.8 This approach misrepresents the competitive dynamics in the market and is unsupported by the evidence. The “other” suppliers that the CMA largely dismisses represent around 37% of the market for UK-Only Customers (both large and small) based on the CMA’s own assessment.<sup>56</sup> They compete for customers of all types and sizes, with the exception of International Customers (for which Holchem itself does not compete). The key evidence summarised below (and provided in the Parties’ previous submissions) demonstrates the competitive constraint that the Parties face from all suppliers in the market.
- 4.9 More specifically, this evidence shows that:
- 4.9.1 Other suppliers (which the CMA sometimes refers to as the “long tail” of competitors) are not only capable of winning accounts against the Parties and other larger suppliers, they *do in fact* win accounts against them (for example, Kersia has recently won a contract to supply a brewery customer against Holchem);
- 4.9.2 Many of the “long tail” are already secondary or alternative suppliers to Large Customers and customers can use this to leverage their buyer power with the larger suppliers<sup>57</sup>; and
- 4.9.3 Some of the suppliers that the CMA downplays specialise in particular segments of the market, such as Beverage<sup>58</sup>, and so provide a particularly strong constraint in those sectors.
- 4.10 It is wrong to assume that all “other” competitors in the F&B market are small or lack sufficient resources and scale to compete for larger customers. Many of these suppliers are UK subsidiaries of large international organisations (such as Sopura, Zep /AFCO, Water

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<sup>51</sup> PFs, paragraph 21.

<sup>52</sup> PFs, paragraph 7.102.

<sup>53</sup> PFs, paragraph 7.123.

<sup>54</sup> PFs, paragraph 7.123.

<sup>55</sup> Including named “long tail” but not “unknown”

<sup>56</sup> PFs, paragraph 7.164.

<sup>57</sup> See response to question 31 of the Survation Questionnaire.

<sup>58</sup> For example Niche Solutions and Sopura in beverage

Technology<sup>59</sup>, SC Johnson and Kersia). These are large, credible suppliers based in other countries and which are already active on the UK market. These suppliers are more than capable of competing for UK customer accounts and are already successfully doing so. There are also a number of UK independent manufacturers active in the UK F&B market, such as Niche Solutions, Needlers, Arco and others.

- 4.11 The CMA's own investigation found that "*suppliers require UK based staff with experience, relationships and expertise.*"<sup>60</sup> They also require "*a UK manufacturing plant to ensure prompt delivery of chemicals and relevant service requirement but do not need more localised production or other local constraints on supply.*"<sup>61</sup> Many suppliers have these capabilities, including Kersia, Zep / AFCO, Needlers, Arco, Niche Solutions, and Selden Research. National customers can approach any one of these smaller competitors to participate in a tender exercise.<sup>62</sup>
- 4.12 In largely dismissing competition from smaller suppliers, the CMA places significant weight on the Parties' tender and win/loss data. As explained below, this evidence in fact supports the Parties' submission that competition from "other" suppliers is significant. Moreover, in interpreting this data, it should be recognised that in responding to competitive tenders, the Parties (like other suppliers) have to anticipate and respond to expected bids from all suppliers in the market. All suppliers that are capable of tendering for a contract therefore provide a constraint on pricing and other terms – whether or not they are ultimately selected or even invited to tender – at the time when competition takes place.
- 4.13 Moreover, the CMA has sought to exclude data for which rival suppliers are not named or are unknown. While this approach is frequently used in the calculation of diversion ratios, on the assumption that unknown observations will follow the same distribution as observations concerning known rivals, in the current case, the fundamental assumption is false. Switching vis-à-vis smaller rivals is systematically biased to be recorded as "unknown". This is due to inherent limitations in the win/loss data records of both Parties.
- 4.14 As previously explained, [REDACTED].
- 4.15 Thus, because the Parties focus their win/loss efforts and tracking records on larger rivals, the "unknown" category will be disproportionately biased towards interactions with firms from the long tail of smaller rivals. While not central to the Parties' tracking, the extent to which sales are lost to these smaller rivals that tend to be categorised as "unknown" remains an important competitive constraint upon the Parties. By discounting these rivals within the win/loss data due to failing to recognise the limitations of the Parties' data for the CMA's purposes, the CMA has drawn misleading conclusions regarding the nature and extent of competition.
- 4.16 Evidence from Holchem's win/loss data in any event supports the Parties' understanding of the market: that competition comes from all suppliers. The CMA states that "*in over 80% of cases [where Holchem lost an account] where there was a known competitor, the primary competitor recorded was either Ecolab, Diversey or Christeyns.*"<sup>63</sup> This is misleading. It is irrelevant whether the winner is known. An account which has been lost is still lost whether or not you happen to know or record the name of the competitor who successfully won it. The

<sup>59</sup> Supplies customers in the UK with products manufactured at their plant in Ireland.

<sup>60</sup> PFs, paragraph 6.27(b).

<sup>61</sup> PFs, paragraph 6.27(a).

<sup>62</sup> This happened with respect to Holchem, [REDACTED] (paragraph 9.12 of the Response to the Working Papers), and Kilco who was invited to tender by Moy Park in 2017 – a major national account.

<sup>63</sup> PFs, paragraph 7.97.

'none/unknown accounts'<sup>64</sup> represent [40-50%] of lost accounts by value. Much more informative is that together with named competitors from the “long tail”, more than 50% by value (and more than 60% by number of customers) of Holchem's lost accounts were identified as being lost to someone other than Ecolab, Diversey or Christeyns. This is demonstrated by the table in Slide 10 from Holchem’s Gain and Loss Analysis:

**Table 5: Table from Slide 10 of Holchem's Gain and Loss Analysis Working Paper**

	Lost accounts	Ecolab	Diversey	Christeyns	“Long Tail” <sup>65</sup>	None / Unknown
Count	[X]	[X]	[X]	[X]	[X]	[X]
Share Count	100%	2%	[10-20%]	[20-30%]	22%	[40-50%]
Value	[X]	[X]	[X]	[X]	[X]	[X]
Share Value	100%	9%	[10-20%]	[20-30%]	11%	[40-50%]
Average Value	[X]	[X]	[X]	[X]	[X]	[X]

4.17 Adding the none/unknown competitors into the table used in slide 14 of the Working Paper creates the following result:

**Figure 6: Summary of Holchem Gain and Loss Results, Including "None/Unknown"**

[X]

4.18 In its Holchem Gain and Loss Analysis, the CMA also identified that, out of [X] accounts which Holchem lost over a period of more than three years, only "*two accounts were lost to Ecolab*". The CMA dismisses this as merely an “*indication that there may be asymmetric competition between the two Parties.*”<sup>66</sup> While mentioned in its Working Paper, this important asymmetry and its revealing implications are not properly recognised in the CMA’s analysis, with only a single cursory reference in the Provisional Findings.<sup>67</sup>

4.19 A more obvious conclusion can be drawn from this evidence. The fact that only [X] accounts – with a total value of [X] – switched from Holchem to Ecolab over three years demonstrates that Ecolab is not a significant competitive constraint on Holchem, and is certainly not its closest competitor. To put this in perspective, the UK market (however defined) is worth more than £100,000,000 per year. The switching from Holchem to Ecolab therefore represents less than 0.1%.

<sup>64</sup> As previously explained by the Parties in Ecolab's Response to the Market Questionnaire (paragraph 27) and at the Main Parties Hearing, where it is not possible to identify which competitor won, it was recorded as 'unknown'. This represents actual competing suppliers (as opposed to cases where the customer simply chooses to start or stop purchasing products in the absence of a competing supplier). The only thing which is clear is that it will most likely not be one of the other named competitors (Diversey, Christeyns or Ecolab / Holchem) as these have the highest likelihood of being known to the sales representative and therefore recorded. The CMA repeatedly makes this observation in footnotes 8-14 of the Appendices to the PFs, but then removes "unknown" suppliers from the Figures used in the PFs themselves with little justification.

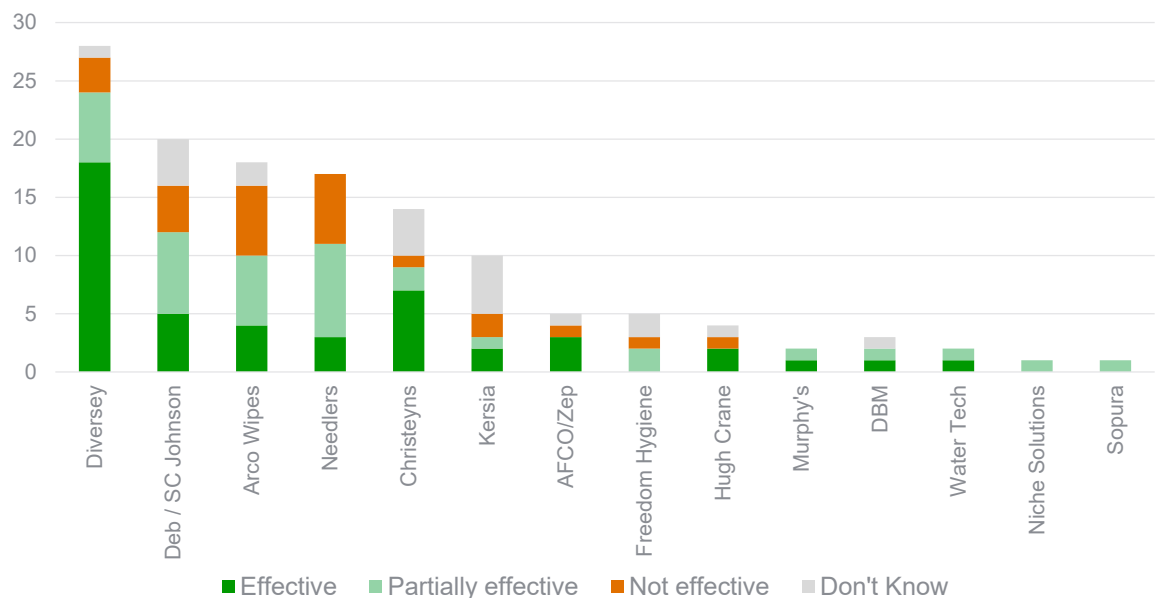
<sup>65</sup> Named as 'local' suppliers.

<sup>66</sup> Holchem Working Paper 4a, page 10.

<sup>67</sup> Provisional Findings, paragraph 7.88.

- 4.20 This is further supported by the Survation Questionnaire, where respondents considered a number of the other suppliers to be effective or partially effective such as AFCO /Zep, Kersia, Arco, Deb / SC Johnson and Needlers.<sup>68</sup> Only one respondent suggested that it would have issues finding a replacement for its current supplier<sup>69</sup>. While no alternative supplier other than Diversey scored recognition of over 50%, customers on average each recognised over four different formulated products suppliers to the Parties. Further, none of the 30 customers surveyed indicated that they saw no alternatives to the Parties and only two customers recognised only one alternative.
- 4.21 The Survation Questionnaire then asked customers about their current awareness on the effectiveness of the suppliers (i.e., before the supplier had prospected them or the customer had asked them to conduct a survey, trial or provide a quote)<sup>70</sup>. Only two customers were not currently aware of any competitors to the Parties who would be at least partially effective, and neither of these customers was concerned about the impact of the Transaction on competition (indicating their confidence that they would be able to find viable suppliers in the marketplace if the Merged Entity raised prices or reduced service quality). On average, customers named 2.8 competitors not including the Parties that they considered at the time of the survey would be either effective or partially effective alternatives. In the majority of cases, at least one of the suppliers named by the customer was a supplier other than Diversey or Christeyns (as demonstrated in the chart below).

**Figure 7: Recognition of Alternative Suppliers**



- 4.22 Smaller suppliers (as a whole) can therefore be said to be a significantly competitive force in the market. They are actively bidding and competing not only for Small Customers but also for partial supply of Large Customers.

<sup>68</sup> Survation Questionnaire, question 16.

<sup>69</sup> Survation Questionnaire, question 14. This respondent however stated that it believed that the Transaction would have advantages for its business (question 21), would result in improvements to services (question 22) and increase the availability on the market of Ecolab's international expertise (question 23). The respondent also said that the mere suggestion that it might switch suppliers was generally enough to ensure a good price (question 33). See further Annex 1.5

<sup>70</sup> Survation Questionnaire, question 16.

- 4.23 In light of this evidence, the CMA has failed to explain why customers would not switch (or threaten to switch) in whole or in part to exert competitive pressure if the merged entity were to raise prices or allow services to deteriorate. Based on the responses to the Survation Questionnaire, it is clear the Parties' own existing customers feel confident they could prevent this no evidence has come to light that would suggest companies who are not currently customers of either Party would not feel equally confident.<sup>71</sup>

***Competition in Particular Segments***

- 4.24 There are a number of suppliers that provide a particular constraint in certain segments of the market.<sup>72</sup> The PFs mention competitors that are active in certain niche segments, specifically identifying:

4.24.1 Sopura, which is an international supplier focused on supplying large global brewing companies. In fact, until Ecolab won them as an International Customer in late 2018, [redacted] ([redacted] very large customers with substantial cleaning chemicals demand and numerous sites in the UK) were [redacted] supplied by Sopura in the UK and elsewhere;

4.24.2 Niche Solutions, which is a supplier mainly to breweries, with a third of its total sales of £3m to Large Customers; and

4.24.3 Deb / SC Johnson, a specialist provider of skin care products.

- 4.25 These suppliers cannot be dismissed as “small” or simply part of a “long tail.” Niche Solutions' sales (to breweries) are only slightly lower than the sales made by Holchem or Christeyns to all Beverage customers. It has a share of between 5-10% in Beverage (as estimated by the CMA), almost as large a share as Holchem's [redacted]<sup>73</sup>. Similarly, just the [redacted] former accounts of Sopura mentioned above give it the credibility and scale for it to be a significant player on the market.

- 4.26 The fact that a supplier competes only (or principally) in a particular segment in no way diminishes its competitive constraint, including in competitive tender exercises. The Parties face constraints from a range of suppliers (including specialist suppliers) across all segments of the market. The evidence shows that the *combined effect* of competition from smaller suppliers acts as a real competitive constraint. Holchem's gain and loss data (for example) shows that, if the suppliers that the CMA describes as the “long tail” were treated as a single supplier, it would be a bigger competitor to Holchem than Ecolab (or vice versa) on almost every metric. As the CMA itself states: “*other suppliers might provide a significant competitive constraint in aggregate (with roughly 20% of value across all four account types.*”<sup>74</sup>

**5. The CMA Overstates the Closeness of Competition between the Parties**

***Ecolab is Only a Limited Constraint on Holchem***

- 5.1 The PFs state that “*Holchem is a strong constraint on Ecolab.*”<sup>75</sup> It relies on the fact that, for more than 70% of tenders (by value), Ecolab and Holchem were competitors (although not

<sup>71</sup> Survation Questionnaire, question 33.

<sup>72</sup> PFs, paragraph 7.167.

<sup>73</sup> PFs, Table 2

<sup>74</sup> PFs, 7.98.

<sup>75</sup> PFs, para 7.146.

necessarily the only competitors).<sup>76</sup> It also relies on Ecolab’s gain and loss data which, the CMA states, show that Holchem is Ecolab’s closest competitor for lost and threatened accounts as well as account opportunities.<sup>77</sup>

- 5.2 Holchem is the largest supplier in the UK F&B market. Ecolab is only the fourth largest supplier with only a [X] share (when International Customers are excluded). It is therefore unsurprising that Holchem would appear prominently in Ecolab’s tender and gain and loss data. Holchem, as the largest UK F&B supplier, would likely also feature significantly in the tender data for Diversey, Christeyns and the other competitors on the market. This is not sufficient to establish an SLC on the balance of probabilities.
- 5.3 The relevant question is whether Ecolab is such a significant competitive constraint on Holchem, in a way that others are not, that the merged entity ceases to be constrained by Diversey, Christeyns and other suppliers after the Transaction.
- 5.4 Even though Holchem’s tender data provides a relatively small sample size, it nevertheless provides an insight into competition dynamics. It is also more comprehensive than the other available data in that it records gains, losses, trials and threats (including tenders), along with the more typical interactions of unsolicited approaches and market testing.
- 5.5 Based on Holchem’s gain and loss data, the CMA suggests that Ecolab is a “*primary competitor for a material proportion of value across all four account types*”<sup>78</sup>. This is misleading. As the CMA itself acknowledges, “*Diversey and Christeyns have a higher share of value for Holchem losses and threats.*”<sup>79</sup> Moreover, on each measure, Ecolab is behind Diversey and Christeyns, by both value and number of customers with the only exception being Holchem's gained accounts by value, where it is the second closest competitor (at [10-20%] by value) behind Diversey (at [40-50%]), and only a single percentage point ahead of Christeyns (at [10-20%])<sup>80</sup>. As stated above, other competitors also feature significantly in the data set.
- 5.6 Responses to the CMA’s Questionnaire also suggest that Diversey (following its various UK acquisitions) is a much closer competitor to Holchem than Ecolab, and shows that Diversey was more likely to be selected as a better alternative than Ecolab by Holchem’s Small and Large Customers that responded to the CMA's Questionnaire.
- 5.7 Outside of the tender data (which is addressed below and which, as noted Section 4 above, cannot plausibly constitute evidence with respect to Small Customers’ preferences), it is unclear what evidence the CMA is referring to when it suggests that the Parties are closer competitors to each other than Diversey or Christeyns. Holchem is heavily concentrated in Food ([80-90%] of its 2018 UK F&B turnover is in Food) and its “closest” competitor would be expected to be more highly concentrated in Food than other competitors. However Ecolab ([30-40%]), Christeyns ([30-40%]) and Diversey ([30-50%]) all have very similar concentrations in Food to each other. Christeyns has a comparatively low concentration in Beverage ([10-20%]), but then again so too does Holchem ([10-20%]). The Parties also have very different business models: with Ecolab concentrating on International Customers and innovations that get extended to local customers and Holchem concentrating on servicing. This is reflected in their

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<sup>76</sup> PFs, para 7.113.

<sup>77</sup> PFs, para 7.94.

<sup>78</sup> PFs, 7.96.

<sup>79</sup> PFs, 7.96.

<sup>80</sup> See slide 8 of the CMA's Working Paper on Holchem's Gain and Loss

very different spending patterns on servicing: Ecolab spends [X] of its UK F&B turnover on servicing while Holchem spends [X].<sup>81</sup>

- 5.8 This evidence is consistent with the conclusion that there is a structural asymmetry in the closeness of competition. Even if Holchem may be a more frequent competitor to Ecolab in the UK, Ecolab does not exert a material competitive constraint upon Holchem. Stronger and closer competitors exist – and will continue to exist. Furthermore, it is clear from some of the concerns that Holchem is seen as offering a better level of service.<sup>82</sup> It therefore follows that the merger of Ecolab’s UK business into Holchem cannot be expected to bring about a substantial lessening of competition.

***Competitive Tenders will Remain Competitive***

- 5.9 The CMA does not properly consider whether the loss of one potential competitor would have a material impact on competition in individual tenders. It summarily concludes that the Parties are close competitors with a limited set of large suppliers, but goes no further.<sup>83</sup>

- 5.10 Specifically, the PFs do not consider whether, even if the Parties were close competitors, the loss of one of them as a potential bidder in tender exercises would result in an SLC. The CMA simply assumes that it would. Such a conclusion does not necessarily follow, and it is inaccurate in the present case.

- 5.11 The CMA and the European Commission have established in many previous cases that where, as here, competition occurs through tenders conducted by well-informed buyers, the existence of two or three suppliers can be a sufficient guarantee of effective competition. Here, by the CMA’s own assessment, there will be (at least) three effective suppliers capable of competing. For example:

5.11.1 In *Tradebe Environmental Services Limited/Sita UK Limited*, the Competition Commission found that the competitive pressure exerted by just one other prominent player in a bidding market was sufficient<sup>84</sup>. In that case, the Competition Commission examined the competitiveness of each bidder and found that a single alternative was a strong enough bidder when it was asked to tender such that it was sufficient to constrain the merged entity.

5.11.2 In *Alpha Flight Group Limited/LSG Lufthansa Service Holding AG*<sup>85</sup>, the Competition Commission found that the existence of three “credible options” able to “exert a competitive constraint on each other during bidding processes” was sufficient to prevent an SLC. Among those the three relevant credible alternative bidders was a new entrant to the market, which had not yet won a single bid for a contract in the market. The Competition Commission found that this new entrant would have to be taken into account by the incumbents when bidding in future, and so already exercised a competitive constraint.<sup>86</sup> In the present case, the entry of Kersia<sup>87</sup> can be expected to have a similar effect (particularly in light of Ecolab’s

<sup>81</sup> See paragraph 29 of Ecolab’s response to its Market Questionnaire and paragraph 33 of Holchem’s response to its Market Questionnaire respectively.

<sup>82</sup> See for example the comments provided in response to the Survation Questionnaire, question 18.

<sup>83</sup> PFs, paragraph 7.123

<sup>84</sup> Final Report of 28 March 2014, paragraph 6.133

<sup>85</sup> Final Report of March 14, 2012, paragraphs 7.3 and 8.62-8.65

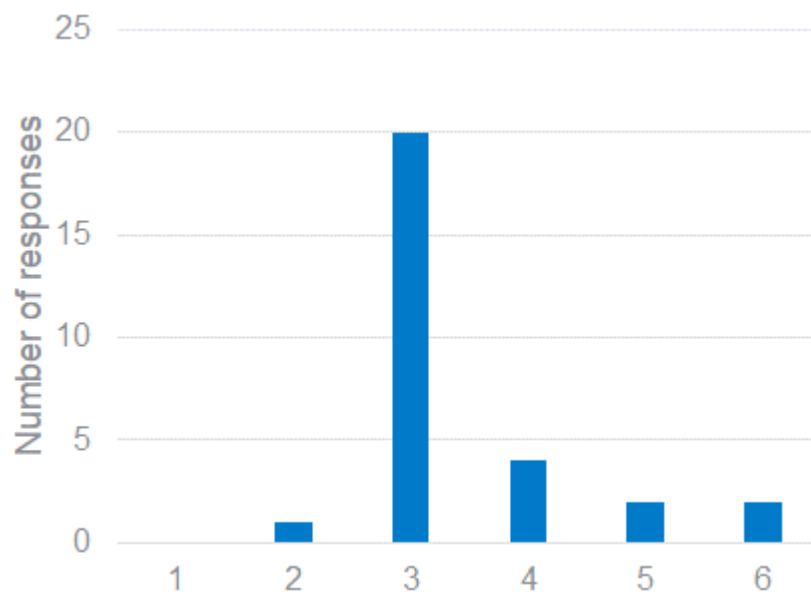
<sup>86</sup> Final Report of 28 March 2014, paragraphs 8.63 - 8.64

<sup>87</sup> See Section 6 below.

and Diversey's frequent competitive encounters with Kersia across Europe<sup>88</sup>) and further supported by the fact that Holchem recently learnt that Kersia won a competitive tender against it for a Brewery customer. This win was outside of its previous competency within the UK market in the agricultural domain.

- 5.12 The CMA acknowledges that Ecolab and Holchem usually compete against only 1 or 2 of the other larger suppliers in competitive tenders.<sup>89</sup> The Survation Questionnaire demonstrates that the majority of customers will ask up to 3 suppliers to provide an initial quote<sup>90</sup>. Of the remaining customers, several customers indicated that they would seek quotes from 5-6 suppliers, demonstrating that certain Large Customers are already seeking quotes outside the four largest suppliers that the CMA considers to be viable competitors today. And three-quarters of the customers who indicated they seek 4 quotes also indicated they had no concerns with the Transaction.<sup>91</sup>

**Figure 8: Number of Suppliers asked by Large UK Customers to provide an initial quote (Responses to Question 28 of the Survation Questionnaire)**



- 5.13 This data strongly suggests that customers choose not to invite more than two or three suppliers to bid for any tender, and that it is much less common to invite four or more suppliers.
- 5.14 It is also common for customers to engage in trials with potential suppliers before selecting them. The responses to the Survation Questionnaire demonstrate that Large Customers overwhelmingly believe (97% in favour<sup>92</sup>) that trialling is a good way of assessing the capabilities of a new supplier. The majority of customers stated that they would trial 1-2 suppliers, with a similar number of customers in favour of each option.<sup>93</sup> Trialling takes minimal time (setting up a trial takes 1-2 days and the trial itself takes place on an active

<sup>88</sup> See, for example, Annex 2 to the Consolidated Response.

<sup>89</sup> PFs, paragraph 7.114 and 7.118.

<sup>90</sup> Survation Questionnaire, Question 28.

<sup>91</sup> See Annex 1.5.

<sup>92</sup> Survation Questionnaire, Question 36.

<sup>93</sup> Survation Questionnaire, Question 29.



production line, with the results becoming apparent quickly by virtue of regular, standard testing throughout the day), and the costs are borne by the supplier (including set up and supplying the cleaning chemical products). Trials also allow the supplier an opportunity to provide the customer with any product training needed. This means that customers are not limited to suppliers that they currently use or have used in the past when inviting quotations or running tender exercises.

5.15 There is therefore no evidence that the merger between Holchem and Ecolab would prevent customers from running effective tender and trial process with as many viable competitors as they want to or do today. The CMA has not taken this evidence into account in its analysis. Nor has it explained why the three remaining larger competitors would be insufficient to allow for competitive tenders post-Transaction even if other smaller suppliers are discounted. When properly analysed, the evidence shows that sufficient competition would remain.

## 6. **The PFs Rely On A Mistaken Understanding That Switching Is Difficult And Time-Consuming**

6.1 The CMA has reached the preliminary conclusion that customers are risk-averse and are therefore deterred from switching chemicals supplier unless there is a very significant need for doing so. This conclusion is incorrect and unsupported by the evidence. The CMA has mistakenly misinterpreted the lack of significant switching away from Holchem, combined with an unsupported conclusion that costs are "material" as evidence that customers are being prevented or deterred from switching.<sup>94</sup> In support of this conclusion, the CMA seems to rely on generic and selective customer feedback. The conclusions are not supported by either: (i) customers' comments to the CMA Questionnaire taken as a whole; (ii) contractual barriers to switching (which the CMA admits do not exist to any significant degree); nor (iii) the time taken to switch (in which the CMA has suggested that the switching time reported on average is 3 to 6 months without any justification for whether that in of itself is "material").

6.2 The evidence available to the CMA, including new evidence provided by the Parties together with this submission, shows instead that: (i) customers do not consider themselves to be locked in; (ii) the time and cost required for switching suppliers is low; and (iii) customer feedback, as would be expected in light of these factors, does not support the finding of an SLC.

6.3 Indeed, the Survation Questionnaire asked customers directly whether respondents had stayed with the same supplier because of switching difficulties. 83% said that this was not the case, with only 10% saying that it was<sup>95</sup>.

### ***Customers do not consider themselves to be locked in***

6.4 The Parties accept that current customer-switching rates may be relatively low compared to some industries. This does not, however, mean that customers are prevented or deterred from switching; it simply reflects the competitiveness of the market. Customers do not need to switch because they realise that they enjoy competitive prices and services and know the threat of switching is sufficient to constrain their incumbent suppliers. Customers are knowledgeable and active in keeping their pricing competitive and do not hesitate to keep suppliers on their toes. In short, contrary to the CMA's contention, the length of a customer relationship is *not*

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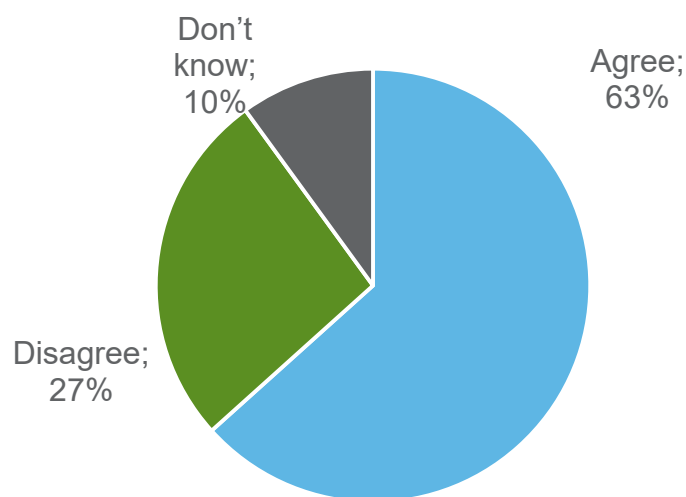
<sup>94</sup> The CMA emphasises the longevity of the majority of the customers relationships at para 7.45 of PFs.

<sup>95</sup> Survation Questionnaire, Question 34.

indicative of barriers to switching.<sup>96</sup> Rather, it is a feature of the strength of effective customer bargaining and healthy competition in the market, as explained in more detail below.

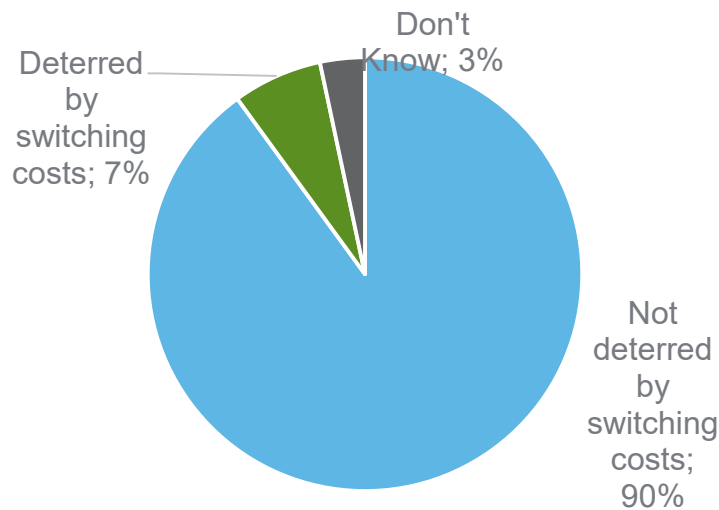
- 6.5 While the CMA's questionnaires asked about barriers to switching and the time taken to switch, they did not ask customers whether they considered themselves to be locked in to their incumbent supplier. This issue was therefore addressed through various different questions in the Survation Questionnaire.
- 6.6 A clear majority of customers to the Survation Questionnaire agreed that merely suggesting to an incumbent supplier that one might switch to a competitor was enough to obtain a more competitive price from the incumbent.

**Figure 9: Customers who agree/disagree that the mere threat of switching is sufficient to obtain a good price from the incumbent<sup>97</sup>**



<sup>96</sup> The CMA notes at paragraph 7.45 that [38%] of Holchem's revenues are from customers who have been with them for 10 years or more and suggests that this tallies with some vague customers comments about the risk of switching and the high cost of switching supplier.

<sup>97</sup> Survation Questionnaire, Question 33.

**Figure 10: Customers not deterred by switching costs<sup>98</sup>**

- 6.7 Further, the CMA's conclusion that low switching is shown by the fact that "*most respondents to our customer questionnaire did not list any previous supplier*" is unconvincing.<sup>99</sup> This lack of responses can be explained in part by the fact that hygiene managers frequently move between jobs and may not have switched recently.<sup>100</sup> There is no reason for a hygiene manager to know who supplied cleaning chemicals before they started working at the factory or, in some cases, before they were moved into that position.

***Time and cost taken to switch is not significant and does not prevent or deter switching***

*The PFs overstate the time it takes customers to switch*

- 6.8 The PFs state that the evidence supports a conclusion that "*switching providers can take a long time, although this varies significantly between customers*"<sup>101</sup>. In doing so the PFs have disregarded all of the evidence suggesting customers can and do switch, and the manner in which such switching takes place:

- 6.8.1 In the CMA's Summary of Third Party Hearing Calls, one customer told the CMA that "*there were no costs associated with switching supplier and it switched supplier on a regular basis*"<sup>102</sup>. In response to the CMA's Questionnaire, five Small Customers and three Large Customers confirmed that switching would take less than a week, and 29 Small Customers said it would take one to two months. Moreover, the responses to the Survation and CMA Questionnaires are different by an order of magnitude because of the CMA's failure to distinguish between (i) the length of time a customer would like to take to switch in an orderly and comfortable manner in the routine course of business (*i.e.*, gradual transaction) in contrast to (ii) the time actually needed to switch the products being used to a new

<sup>98</sup> Survation Questionnaire, Question 34.

<sup>99</sup> Provision Findings, paragraph 7.47.

<sup>100</sup> The industry is very reliant on interim Hygiene and Technical Managers who are typically on 6-12 month contracts, and cleaning chemicals manufacturers will often hire Hygiene and Technical Managers in a Technical Sales role due to their expertise.

<sup>101</sup> Provision Findings, paragraph 7.48.

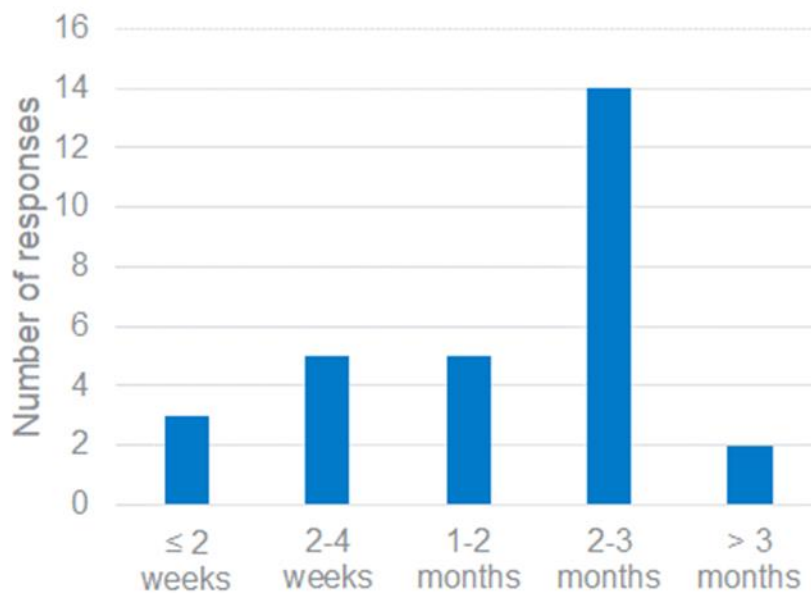
<sup>102</sup> See paragraph 11.

supplier once appointed in a more urgent situation (either due to an issue or because of a deterioration in the offering of their supplier), as well as failure to distinguish between (iii) time to consider switching and decide on the new supplier and e.g. possible tender and/or trial (which may vary significantly), including compared to (iv) the actual time to switch out products, return to normal operations and retrain staff. This is further supported by the Survation Questionnaire as discussed in more detail below.

6.8.2 At the Main Parties Hearing and in its Consolidated Response, Holchem provided the example of a customer ([redacted]) which was able to switch supplier within days following an error made in supply.

6.9 In order to address the ambiguity in the CMA's question, the Survation Questionnaire asked about how long it *actually* took a customer to switch after the new supplier had been chosen<sup>103</sup>. Here the consensus view was that switching times could be measured in weeks, with most customers indicating a timeframe of less than 3 months, and some respondents indicating a timeframe of mere days to switch. For example, one respondent said “one day if it is switching like for like”. Another customer suggested that the time taken for it to switch depended largely on their stock levels, suggesting that concerns other than the logistics of switching themselves are at play.

**Figure 11: Time taken to switch<sup>104</sup>**



6.10 The CMA makes the assumption that it would take a significant period of time to switch supplier as the new supplier would need to find appropriate product substitutes. Given these are commodity products based on basic chemistry it is relatively simply to conduct a mapping exercise to match like for like products so the new supplier can provide the right products for each of the various applications a customer needs. This is a routine exercise which is carried out whenever a customer switches supplier therefore this does not act as a barrier to switching.

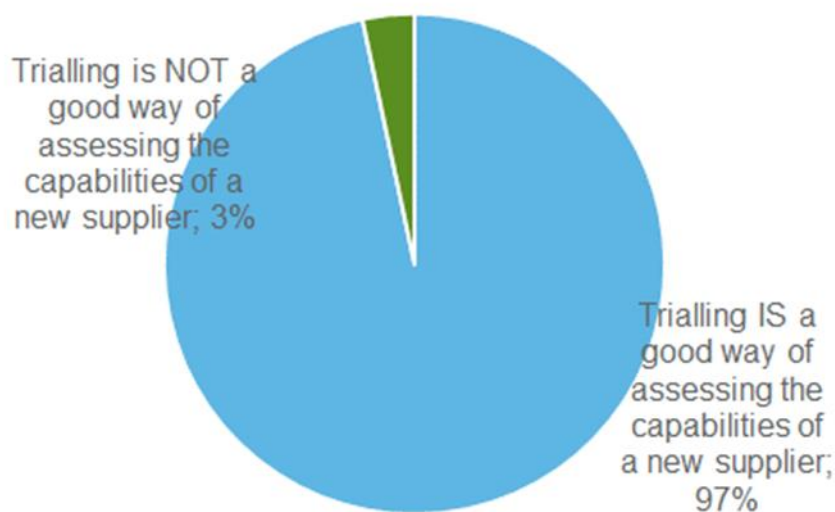
<sup>103</sup> Survation Questionnaire, Question 37.

<sup>104</sup> Survation Questionnaire, Question 37.

*The PFs also overstate the importance of other supposed “barriers”*

- 6.11 In this industry barriers to switching are, in fact, very low. The CMA has overstated the alleged risks involved in switching suppliers. The products are all made to the same EU specifications. Furthermore, in the Survation Questionnaire, customers clearly indicated that they would be willing to trial a supplier that was new to the marketplace, and both the Survation Questionnaire, the CMA’s own data and Ecolab’s own data<sup>105</sup> show that it is common for customers to multi-source. And where multi-sourcing occurs, there may be immediately another supplier who can take on additional sales without trialling.

**Figure 12: Customers view of whether trialling is a good way to assess the capabilities of a new supplier**



- 6.12 This provides a platform for rival suppliers (like Kersia, Sopura, AFCO, and Deb / SC Johnson) to develop existing relationships with customers as a secondary supplier and then compete also for primary supply. When asked about alternative suppliers or secondary suppliers, in the majority of cases, respondents to the Survation Questionnaire did not list a large supplier of F&B cleaning chemicals, but rather an unformulated materials supplier or a specialist supplier which supplies mainly hand care, disinfectants or wipes.<sup>106</sup> It is common for customers to source their products from multiple suppliers; either as alternate suppliers for different sites or as a so-called primary and secondary supplier. This is a proven way for customers to price check and keep the competitive pricing pressure on. It also gives customers a low-risk and easy way to trial alternatives. Customers are able to switch partially away from their chosen cleaning chemicals supplier with respect to certain products which can make up a large proportion of their cleaning chemical demand.

<sup>105</sup> Ecolab’s data suggests approximately half of customers multi-source (in some cases contrary to exclusivity agreements), given that they do not purchase hand care products from Ecolab and all customers require hand care. See paragraph 36 of the Response to RFI 2 of Phase 2 to Ecolab.

<sup>106</sup> Survation Questionnaire, Question 12.

- 6.13 Trials can be done with relatively low efforts and minimal cost to the customer. It also allows customers to switch some of their demand quickly and easily, and obtain price checks without having to switch all their requirements to a new supplier altogether.
- 6.14 While the Parties have always acknowledged the importance of trials with customers, the PFs do not acknowledge that these trials:
- 6.14.1 are on live production lines, *i.e.*, they do not prevent a customer from using the production line at the same time (meaning that there is no disruption to production);
  - 6.14.2 typically utilise products being provided by the manufacturer to the customer for free; and
  - 6.14.3 are typically set up by suppliers and often take only a matter of hours to run a few batches and carry out the hygiene tests (rather than taking days or weeks).
- 6.15 As one customer commented to the CMA, the "*only barrier [to switching] is time of resetting all documentation and retraining staff on new chemicals*"<sup>107</sup>, with no suggestion whatsoever that safety is a relevant consideration to switching.
- 6.16 In general, a trial is a relatively short duration demonstration of a product and performance. Training is only exceptionally required before the trial has been successfully completed. Crucially, during the trial, the application of the new supplier's products is done by the customer's hygiene technicians, without in-depth training having been provided by the supplier. There are a few situations where a large multi-site customer would decide to trial for e.g. three months in one site to test the full capabilities of a supplier before rolling out to the entire group. In such a situation, providing training could be part of proving the capabilities of the supplier.
- 6.17 With regard specifically to documentation and training costs, as the Parties have submitted on multiple occasions, these costs are typically borne by suppliers, not customers. Suppliers typically provide approximately a two-hour group training session for the relevant customer's employees.<sup>108</sup> The training provided is largely generic with only around 20% of the time spent on the new products. Because the products are homogenous, more time is spent on best practice reminders similar to the training provided to new employees.
- 6.18 Reputation is also less important than the CMA claims and has limited effect on customers' ability and willingness to switch. Customers' own staff are the most important component in maintaining compliant and reliable safety and hygiene standards and practices, not their specific chemical suppliers' products or reputation.

**Figure 13: Customers' UK based staff trained in hygiene<sup>109</sup>**

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<sup>107</sup> Customer Questionnaire Analysis Working Paper, page 27

<sup>108</sup> Approach typically adopted by Holchem and Ecolab and Parties would expect other suppliers to be similar.

<sup>109</sup> Survation Questionnaire, question 6.

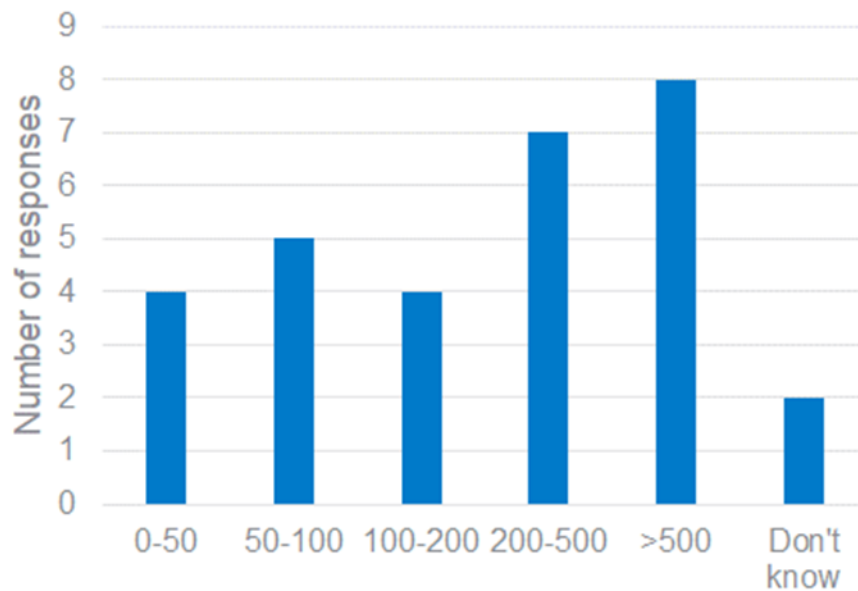
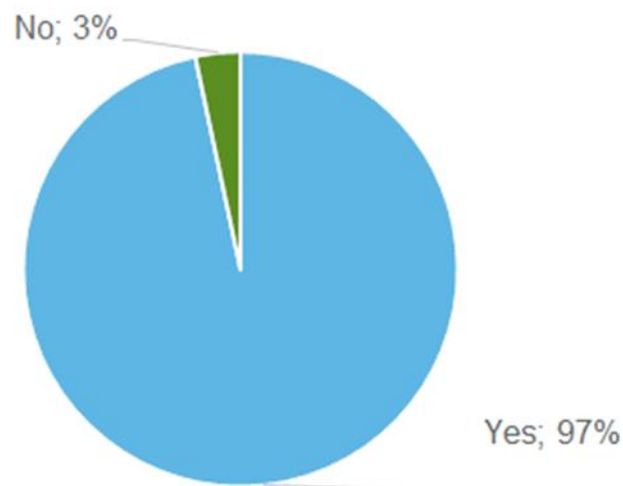


Figure 14: Customers with internal hygiene training<sup>110</sup>



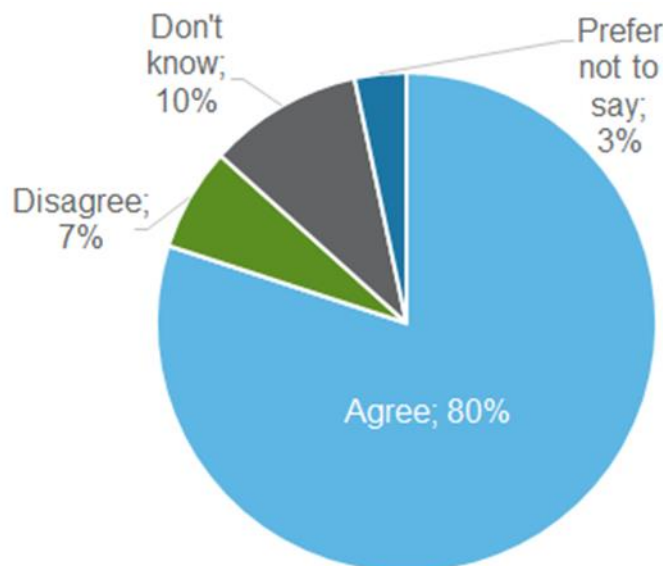
6.19 The CMA provisionally concludes that a strong reputation for reliability is crucial to be successful in the UK F&B market. Though the Parties agree this is correct, the CMA wrongly infers that no suppliers other than the current four largest suppliers would meet this criterion. In support of the importance of reputation the CMA repeatedly refers to the fact that "*some third parties have told us that these considerations are utmost in customers' minds when thinking about switching cleaning chemical suppliers, especially for larger customers*".<sup>111</sup> It is unclear from the PFs whether this statement was made by a customer or competitor or by how many respondents. This comment is not included in the CMA's Customer Questionnaire (or its

<sup>110</sup> Survation Questionnaire, question 8.

<sup>111</sup> PFs, paragraph 7.33.

survey results), however, and appears to have been made by a competitor, based on the feedback summaries. The Parties note that a competitor's interest is in overstating the sophistication and importance of their products, and that if this suggestion has not, in fact, been reflected in the CMA's interactions with actual customers, then it should be discounted. Therefore its weight should be considered accordingly if there was some context shared with the CMA but not the Parties which makes this statement relevant to the conclusion that the CMA draws from it. Most suppliers are capable of establishing the necessary credentials for reliability. The CMA links an apparent lack of customer switching to the fact that customers are "*risk-averse to changing chemical supplier*"<sup>112</sup>, again without any evidence. Notably none of the customers who responded to the CMA's Questionnaire cited 'reliability' or 'risk' as a reason for not switching. The Parties note that the responses to the CMA's Customer Questionnaire show that reputation is just one of many factors customers consider when selecting a supplier. In fact, reputation / brand was not the most important factor listed by either Small or Large Customers<sup>113</sup>. This risk can also be addressed by a customer trialling a supplier and/or selecting a supplier with experience in the customer's industry and/or with M&S accreditation. Responses to the Survation Questionnaire indicate that 80% of customers consider M&S accreditation to be of sufficient quality to be worthy of consideration<sup>114</sup>, while 97% believe that trialling is a good way of assessing the capabilities of a new supplier<sup>115</sup>. The examples of other suppliers active on the UK F&B market are not de novo entrants but existing competitors already servicing customers. It is simply not credible to dismiss UK suppliers like Sopura who supply brewing customers worldwide (including, until recently, [X] in the UK) just because they happen to have less revenues in the UK.

**Figure 15: Customers' view on M&S accreditation<sup>116</sup>**



<sup>112</sup> PFs, paragraph 7.46.

<sup>113</sup> PFs, Figure 1.

<sup>114</sup> Survation Questionnaire, Question 27.

<sup>115</sup> Survation Questionnaire, Question 36.

<sup>116</sup> Survation Questionnaire, question 27.



The CMA has failed to quantify what customers or suppliers consider to be a strong reputation for reliability. Moreover, the evidence presented in the Provisional Findings does not even suggest that customers found any suppliers to be 'unreliable'. The concept of reliability is therefore nebulous and the CMA has failed to properly analyse what this entails.

- 6.20 Crucially, the CMA states that "*although the cleaning chemicals and services are a small proportion of a customer's overall operating costs, the cleaning process or an incorrect formulation of the products has the potential to delay production / operations (and harm the customer's reputation with its own customers)*".<sup>117</sup> While those risks are real, the real risk of such an incident is not actually in the suppliers' control. Regardless of the supplier selected or their reputation, it is the customer's responsibility to ensure they carry out regular testing to ensure that their manufacturing processes meet the required standards in the hygiene protocols.<sup>118</sup> The CMA has mistakenly confused the risks that have to be managed by a customer and the risks managed by the F&B chemicals supplier. All UK customers have their own in-house technical expertise with Large Customers likely to have more in-house capacity (as confirmed by the responses to Survation Questionnaire question 8 where 97% of respondents confirmed they conduct their own internal training). To the extent that issues arise, it is almost inevitably due to the incorrect application of cleaning products or processes, not a problem with the product itself. As the CMA acknowledges, cleaning chemicals are functionally identical and effectively homogenous. A supplier's reputation does not mitigate a customer's hygiene risks in how the plant uses them. As observed by the CMA on the site visit, customers conduct regular testing of the cleanliness of their production lines and the products used on them as part of their hygiene protocols. A well-run cleaning line would be quick to discover any defective products as part of its usual routine.
- 6.21 The Parties are unaware (and the CMA has not provided any evidence) of there being any health incident as a result of a hygiene issue at a UK F&B factory resulting from defective cleaning products provided by an F&B supplier for at least the last five years, or any defective cleaning protocol being provided by an F&B supplier. The health and safety risks mentioned by customers to the CMA relate to how the products are used (which is down to the customer's own employees), rather than the products supplied by the Parties and their competitors themselves. While hygiene incidents sadly do occur on occasion, the fact that they are invariably traced and confined to a single factory demonstrates that they do not result from product failures related to the cleaning chemicals products (otherwise such outbreaks would be more widespread).
- 6.22 If there really were widespread concerns in the market in relation to product safety from smaller suppliers, it is implausible that none of the over 100 customers with whom the CMA has had contact regarding the Transaction would mention this to the CMA. Further, this assertion in relation to safety appears to have gone unchallenged and untested by the CMA. It cannot, therefore be relied upon to support an SLC.
- 6.23 In order to address this apparent lack of testing in the CMA's customer outreach, the Survation Questionnaire asked customers whether they would be prepared to allow a new supplier with a track record in adjacent markets (not in UK or not in F&B) to survey their plant and provide an indicative offer (*i.e.*, the first step in being brought in as a new supplier). The vast majority (83%) of respondents said that they would indeed do this<sup>119</sup>, suggesting that the purported

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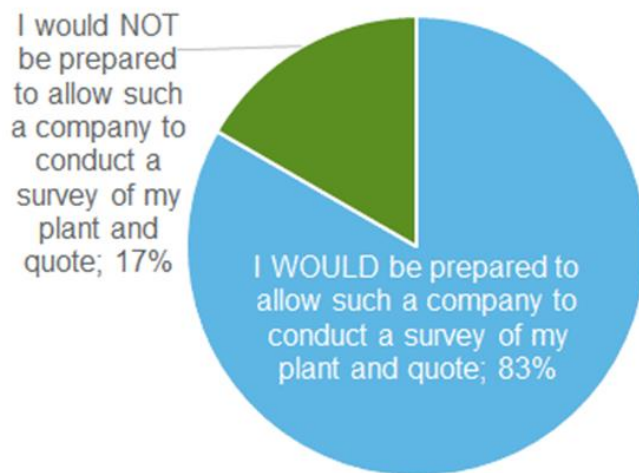
<sup>117</sup> PFs, paragraph 7.237.

<sup>118</sup> As demonstrated at the site visit to Greencore on 5 June 2019.

<sup>119</sup> Survation Questionnaire, Question 25.

reluctance to try a new supplier other than the four largest as indicated in the PFs simply does not exist.

**Figure 16: Customers' view of new suppliers with a track record in adjacent markets<sup>120</sup>**



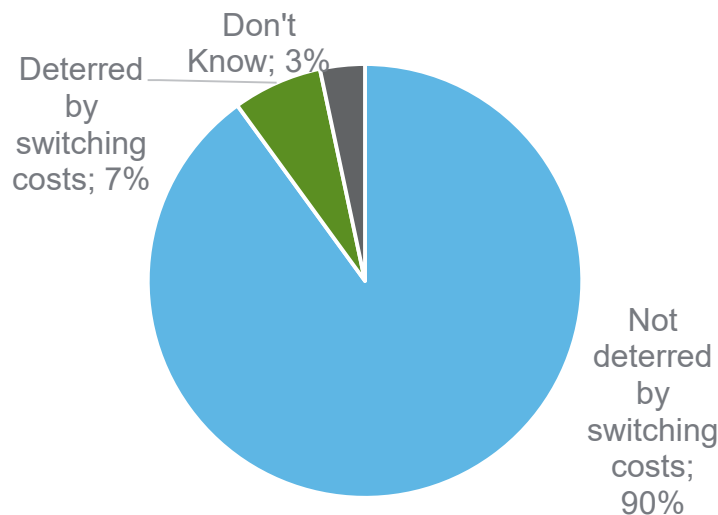
*Customers are not deterred from switching by the limited associated costs*

- 6.24 Of the 17% customers that were not prepared to allow a hypothetical company with expertise to trial, 7% expressly indicated that this decision did not have anything to do with them being wary of trialling a supplier untested in the UK market, referring to the decision being in the hands of a supermarket customer with significant buyer power or that they were happy as they were and so did not see any reason to trial.
- 6.25 Similarly, the CMA also reaches the preliminary conclusion that switching involves a "*material amount of resource and cost for a customer.*"<sup>121</sup> The CMA lists a number of possible costs that arise as a result of switching from retaining staff, replacing cleaning manuals and validation. The CMA provides no evidence to quantify the amount of such costs or demonstrate that costs would be material. The CMA has also failed to verify which costs are borne by the customer and which costs are covered by the new chemicals supplier. To the extent that costs do not fall on the customer they cannot be considered to be a barrier to switching.
- 6.26 Moreover, to the extent that there are costs that fall on the customer, the crucial question is whether those costs would deter customers from switching. The Survation Questionnaire finds that almost all customers see switching as a viable option to take in the event of a supplier increasing prices by a small but significant amount: 90% of customers would not be deterred by the cost and effort implied by switching were the merged entity to seek to raise prices.

<sup>120</sup> Survation Questionnaire, question 25.

<sup>121</sup> PFs, paragraph 7.48.

**Figure 17: Customers agreeing that Switching Costs will not deter switching in the event of a 10% price increase<sup>122</sup>**



#### ***Threat of switching to unformulated products***

- 6.27 The Parties have discussed the treatment of unformulated products in relation to the calculation of the market size and market shares at Section 3 above. The CMA considered whether unformulated products offered a competitive constraint and concluded that they are "*offering some level of constraint*".<sup>123</sup> However, "*few customers would be able to switch to unformulated and that they would only be able to use unformulated products for a small portion of their cleaning needs*"<sup>124</sup> to conclude that any constraint will be "*very limited*"<sup>125</sup>. The CMA has failed properly to consider or analyse the evidence on unformulated products.
- 6.28 In particular, the CMA has failed adequately to explain why, in order to be an effective competitive constraint, unformulated products need to be a substitute for the entirety of a customer's formulated cleaning products. This is particularly the case where customers multi-source (as demonstrated in the Survation Questionnaire).<sup>126</sup> The responses to the CMA's Questionnaires suggest that there are already a number of customers which are using unformulated products or could switch to unformulated products in response to price increases or a deterioration of the Parties' offering.<sup>127</sup> Indeed both the CMA surveys and the Survation Questionnaire have customers listing unformulated suppliers as alternative suppliers to the Parties (such as Brenntag and Univar). In response to the Survation Questionnaire, 37% of

<sup>122</sup> Survation Questionnaire, Question 34.

<sup>123</sup> PFs, paragraph 7.205.

<sup>124</sup> PFs, paragraph 7.205.

<sup>125</sup> PFs, paragraph 7.205.

<sup>126</sup> Survation Questionnaire, question 12.

<sup>127</sup> CMA Questionnaire: 26 Small Customers stated that they are using unformulated products along with formulated products and 3 Small Customers said they could use unformulated products for all their cleaning needs. 8 Large Customers said they use unformulated products for some of their cleaning needs, 8 Large Customers said they could use unformulated for all / some of their needs and 10 Large Customers said they could considering switching in response to a price rise.

Large Customers stated that they were already using unformulated products. In addition, Brenntag (an unformulated supplier) was listed as a secondary supplier by a number of respondents. Clearly unformulated products are being used for some of a customer's cleaning chemical needs. While, arguably, unformulated products and alternative solutions would not be equally suitable for all applications, they are suitable for a significant proportion of applications, both in terms of volume of product supplied and associated revenues to act as a competitive constraint. In this respect, the Parties have previously provided examples of F&B producers which do use unformulated products for all their cleaning chemical needs.<sup>128</sup>

- 6.29 The evidence is consistent with the conclusion that unformulated products provide an important competitive constraint. As previously explained, a critical loss analysis based on the CMA's survey results suggests that the relevant market for formulated cleaning chemicals should also include unformulated products.<sup>129</sup> While the questions asked by the CMA are insufficiently precise to permit a definitive conclusion on this question, the survey results and critical loss analysis do not rule out a constraint from unformulated, and certainly do not support the CMA's approach of excluding unformulated products from its market share calculations and, in practice, from its competitive assessment.
- 6.30 The CMA has discounted the critical loss analysis on the grounds that margins vary across products and that the analysis assumes customers would switch all of their demand to unformulated.<sup>130</sup> Neither of these observations nor invalidates the critical loss analysis as evidence that the role of unformulated products cannot be ignored.
- 6.31 As regards the first objection, while margins may vary across products and customers, the average margin level provides a guide to the typical cost of lost sales, which is the central element of the critical loss analysis. In order to dismiss the parties' evidence that the cost of customer switching found by the CMA's survey would be high enough to offset the benefit of a price increase, the CMA would need to establish that there is systematic price discrimination such that the parties set lower margins on products susceptible to unformulated substitution. The CMA has provided no such evidence of systemically or generally lower margins for formulated products where unformulated is seen as more of a threat.
- 6.32 As regards the CMA's second point, this misrepresents the calculation submitted. The Parties have not assumed that 50% of customers telling the CMA that they would switch "some or all" of their demand would switch the entirety of their demand. The Parties' calculation assumes that customers reporting that they would switch "some" of their demand would, on average, switch 50% of their demand. That is, the Parties assume that the four customers reporting that they would switch "all" of their demand would switch their entire demand; but that the nine customers reporting that they would switch "some" of their demand would switch only 50% of their purchases.<sup>131</sup> This gives a combined equivalent of  $4 + 4.5 = 8.5$  customers switching.<sup>132</sup>
- 6.33 The CMA relies on the fact that it says that it has "*seen very little evidence of actual switching*"<sup>133</sup> from formulated to unformulated. However, the CMA ignores the recent trend of increasing raw materials prices.<sup>134</sup> This has meant that the price of unformulated products has

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<sup>128</sup> [REDACTED]

<sup>129</sup> Consolidated Response, paragraphs 5.6 to 5.14.

<sup>130</sup> PFs, paragraph 6.12.

<sup>131</sup> Patricia Einfeldt email of 5 July 2019 17.33.

<sup>132</sup> Consolidated Response, paragraphs 5.13.

<sup>133</sup> PFs, paragraph 33.

<sup>134</sup> See, for example, paragraphs 6.20-6.21 of the Parties' Initial Submission.

risen relative to formulated (due to the % of raw materials) which has resulted in some switching from unformulated products to formulated products. The CMA has failed to provide evidence which suggests that if prices of raw materials were to decrease or the price of formulated products went up for reasons unrelated to the cost of raw materials, customers could not switch to back to unformulated products for a significant portion of their chemical purchases. The Parties submit that as soon as the price of unformulated products decreases, or if the price of formulated products were to rise, switching could reverse. Furthermore, any demand currently being satisfied by unformulated chemicals can be satisfied by formulated chemicals (formulated suppliers pitch to make these sales every day), and as such it should be included in the market size. Moreover the Parties have provided several examples of where they have tried to get customers to switch away from unformulated products, and failed.

## 7. The F&B market is characterised by sophisticated purchasers able to exert buyer power

- 7.1 The ease with which customers could switch to rival suppliers enables customers to exert buyer power and to extract discounts and other benefits from F&B chemicals suppliers. Namely: (a) there is a significant constraint from the threat of switching to unformulated products; (b) customers are sophisticated purchasers that can and do use the credible threat of switching to exert competitive pressure on suppliers; and (c) customers therefore benefit from an intensely competitive market without needing to actually follow through with a switch.
- 7.2 [X] receive a discount from the supplier's list prices. The Parties accept that Large Customers often receive a greater discount, but Small Customers do still secure price discounts off the list prices comparable to others purchasing at similar volumes. In short, [X] are able to secure discounts. This is because of the competitive uncertainty in the marketplace. As demonstrated above at section 6, customers are easily able to switch and often engage in market testing to ensure that they are receiving competitive prices. Customers are also often able to negotiate other extras such as rebates, free equipment and other ancillary services. [X]. [X] are able to negotiate a discount to list prices, often along with other additional benefits, shows that customers do have the ability to keep prices down. F&B customers have sophisticated purchasing operations and are well-position to take advantage of their buyer power (e.g. by threatening to switch or market testing) to exert pressure on suppliers.
- 7.3 The CMA simply dismisses the threat from market testing and the competitive constraint that this can impose on the parties: "*we think that it is reasonable to assume that as a result of the loss of competition between the Parties, the outcome of informal benchmarking exercises after the Merger will yield less favourable outcomes*"<sup>135</sup>. The CMA must establish that the Transaction is expected to result in an SLC on the balance of probabilities, not an un-evidenced assumption. The CMA must therefore prove that there will be less favourable outcomes due to the reduction in competition. It is totally unreasonable for the CMA to "assume" marketing testing will not represent an effective competitive constraint post-Transaction, especially in light of all of the evidence provided by the Parties to the contrary.
- 7.4 Customers are also able to use their buyer power in threatening to switch a significant volume of sales to alternative cleaning product suppliers that are not considered by the CMA to be part of the relevant market, such as suppliers of wipes which are impregnated with formulated cleaning chemicals. The Survation Questionnaire responses show that threats to use that buyer power are common among customers. The Greencore site visit demonstrated that a considerable percentage of customer spend could be on cleaning wipes, which although composed of formulated chemical products, were being purchased from a third party despite Holchem's sole

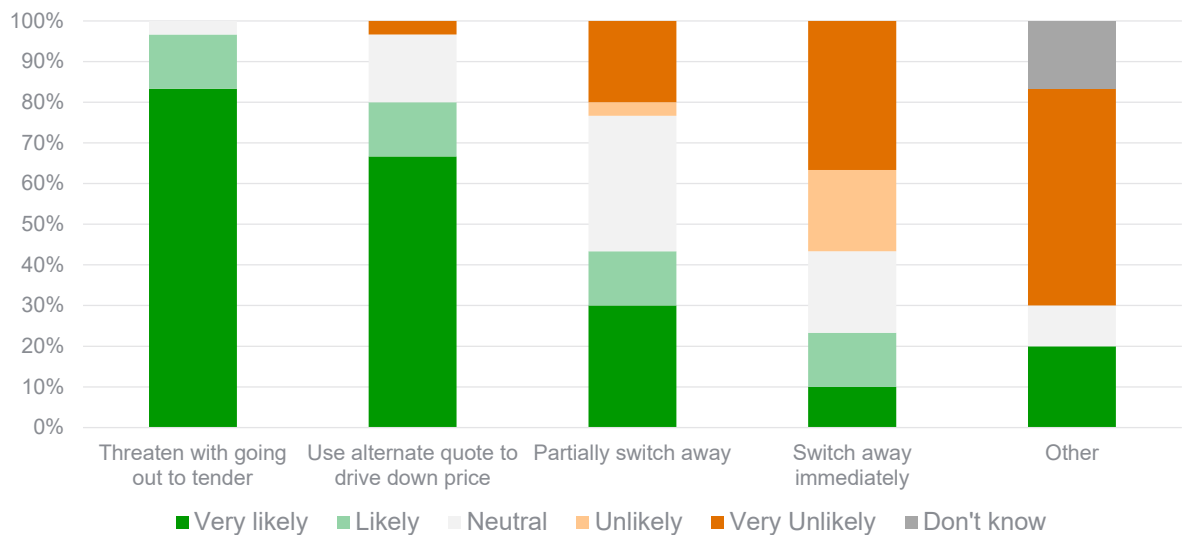
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<sup>135</sup> PFs, Paragraph 7.58.

supply agreement with Greencore. Holchem estimates that Greencore Northampton spends approximately [✂] per year on wipes (over [✂] of its total spend). Switching therefore does not need to represent all of a customer’s spend to be a constraint. Even a portion of a customer’s total spend can be significant (in terms of value) and put pressure on the primary supplier to improve their products, services and/or prices so as not to lose more business.

7.5 The Survation Questionnaire demonstrates that customers are willing to use their ability to exercise their buyer power in order to resist a price increase, with a clear majority of customers seeking to threaten their supplier with switching (either through seeking an alternative quote, or through threatening to go out to tender).<sup>136</sup> This is shown below:

**Figure 18: Likelihood of using various forms of buyer power to resist price rises<sup>137</sup>**



7.6 The PFs also state that the “merger reduces choice for some customers which would restrict their ability to exercise countervailing buyer power, even if it did exist before the Merger”.<sup>138</sup> The CMA has again provided no additional evidence or explanation to support this statement. The PFs only discuss a reduction in choice for Large Customers given that Small Customers are able to purchase F&B chemicals from a number of suppliers in the "long tail". The CMA therefore appears to be suggesting that even if Large Customers did have buyer power before the merger, it will not exist post-Transaction.

7.7 Even if the CMA were to conclude that only Large Customers are able to exert buyer power, it has failed to answer the critical question of why this would not still be the case post-Transaction. There is no reason why Large Customers will not still be able to exert competitive pressure on suppliers after the Merger. As already discussed at paragraph 5.12, Large Customers typically engage in a tender process where the existence of two to three suppliers they consider to be sufficient to guarantee effective competition. The market is opaque, as evidenced by the fact that suppliers often do not know who they are competing against in a tender process or even who won. Therefore post-Transaction, if the merged entity were to increase prices or deteriorate

<sup>136</sup> [✂]  
<sup>137</sup> Survation Questionnaire, Question 31.  
<sup>138</sup> PFs, para 7.267.

its offering when engaging in a tender process for a Large Customer, it would quickly start to lose a substantial portion of its business.

- 7.8 The CMA has failed to explain its conclusion that countervailing buyer power will not offset any SLC in any detail in the PFs. The CMA’s view on buyer power in this market is covered in a single paragraph in the PFs. Consequently the Parties have not been provided with an opportunity to respond to the concerns raised by the CMA.

***Customers benefit from an intensely competitive market without needing to switch***

7.9 [REDACTED].

7.10 [REDACTED].

7.11 [REDACTED].

7.11.1 [REDACTED].

7.11.2 [REDACTED]<sup>139</sup> [REDACTED].

7.11.3 [REDACTED]

7.11.4 [REDACTED]<sup>140</sup> [REDACTED]<sup>141</sup>[REDACTED]

7.11.5 [REDACTED]

7.11.6 [REDACTED]

**Figure 19: Customers not locked in by switching costs**

[REDACTED]

- 7.12 In a market where customers benefit from loyalty rather than suffering from a lock-in effect, low switching rates do not indicate a lack of competition. Rather, the low switching rates demonstrate that the other mechanisms for maintaining a competitive market that fall short of actual switching (such as benchmarking exercises and the threat of switching), as described above, are effective in constraining suppliers. This conclusion is consistent with findings from the Survation Questionnaire, which showed that a significant majority of customers (83%) suggested that the reason why they have stayed with the same supplier “for a long period of time” was “not mainly to do with difficulties in switching.”<sup>142</sup>

***Customer feedback does not support an SLC***

- 7.13 The PFs state that the response rate of slightly less than 15% should not be seen as a sign that the majority of customers were too unconcerned with the Transaction to respond<sup>143</sup>. The CMA Large Customer survey covered 22 customers. In contrast, the Survation Questionnaire covered 30 customers, a sample size around one third greater than the CMA’s. The Survation

<sup>139</sup> [REDACTED]

<sup>140</sup> [REDACTED]

<sup>141</sup> [REDACTED]

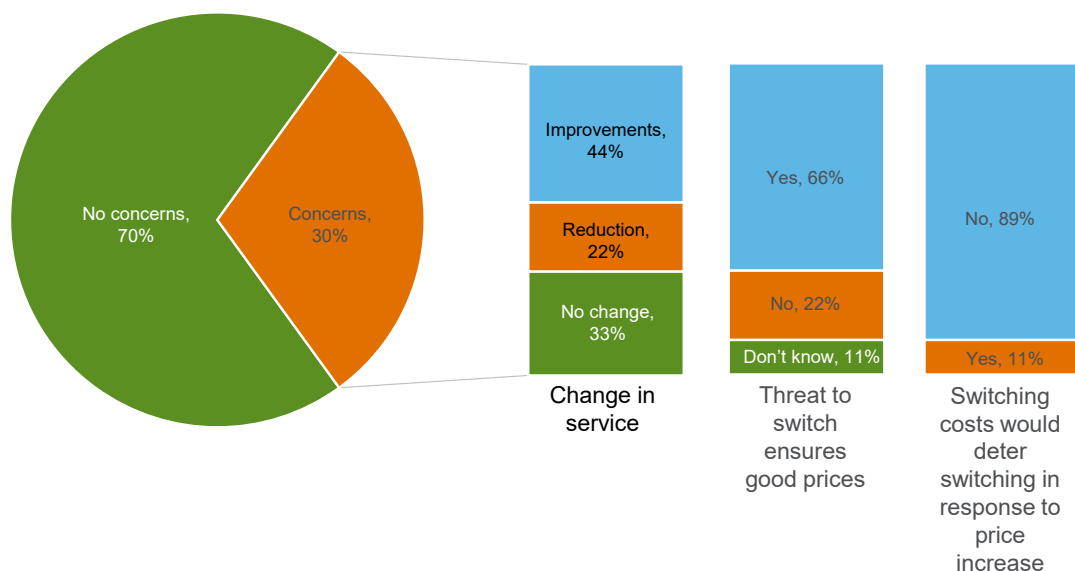
<sup>142</sup> Survation Questionnaire, Question 31.

<sup>143</sup> PFs, paragraph 7.126

Questionnaire encompassed customers accounting for [X%] of Ecolab's Large Customers by value and [X%] Holchem's Large Customers by value.

7.14 There are serious issues with the way in which the PFs have interpreted the CMA Survey results. Most notably, the PFs first mischaracterise customer views about the merger as being "mixed"<sup>144</sup> (which itself over-emphasises the negative responses) and then in the discussion focus only on the views of customers which were negative. This is not the case, in particular for respondents to the Large Customer Questionnaire: over twice as many large customers told the CMA that they were unconcerned by the merger as told the CMA that they were concerned. While the distribution between Small Customers expressing concerns and having no concerns was less pronounced, 60% of Small Customers expressing a view stated that they were unconcerned by the merger. The Survation Questionnaire paints a similar picture: with 70% of respondents stating that they do not have concerns with the impact of the Transaction on competition<sup>145</sup>. Of these customers (9 in total), only one customer indicated that there were no alternative suppliers to the Parties which would be fully effective at meeting the customer's needs (and even then, that customer named 4 other suppliers as partially effective)<sup>146</sup> and only six customers (20%) believed that their own business would be adversely affected.

**Figure 20: Customers concerned about the merger<sup>147</sup>**



7.15 On the contrary to there being concerns, a high proportion of customers expressed confidence that the Transaction would result in improvements or, at worst, no change to service quality

<sup>144</sup> PFs, paragraph 7.140

<sup>145</sup> Survation Questionnaire, Questions 17 and 20

<sup>146</sup> Survation Questionnaire, Question 16.

<sup>147</sup> Survation Questionnaire, Question 17.



(80%)<sup>148</sup>, or the availability on the market of Ecolab's international expertise (97%)<sup>149</sup> and innovations (90%)<sup>150</sup>.

7.16 As noted above in paragraph 1.10, the CMA must conclude that an SLC exists on a balance of probabilities. In order to sustain a finding of an SLC which is at odds with the opinion of the majority of Small Customers and the vast majority of Large Customers, the CMA would need to be bold enough to consider that it knows the market better than customers know it themselves.

## 8. The PFs Take Insufficient Account of Imminent Entry & Expansion

8.1 The CMA has failed to make due inquiry and have regard to evidence on the file that shows a range of strong competitors well positioned to rapidly expand and compete in the UK F&B market. This includes the UK operations of large Global/EEA-wide F&B suppliers who have significant industrial expertise and resources. In particular, it is clear that Kersia – one of the strongest pan-European suppliers in the F&B segment – has imminent plans to grow and expand its presence in the UK.

8.2 Despite the evidence collected by the CMA and provided by the Parties illustrating Kersia's imminent expansion plans, the CMA has provisionally concluded that the expansion of Kersia in F&B in the UK will not be timely, likely or sufficient.

8.3 The Parties have already written to the panel about their concerns as to the CMA's reliance in the PFs on the cursory information provided by Kersia and the inconsistency of that information with Kersia's publically stated intentions. This evidence previously provided by the Parties, along with additional up to date evidence is summarised in Annex 1.9 and 1.10. On this basis it is evident that the CMA's conclusion misinterprets the available evidence and is weakened by the CMA's failure to make due inquiry into evidence provided by the Parties. A closer analysis demonstrates that Kersia's expansion will be timely, likely and sufficient<sup>151</sup> to prevent any SLC arising from the Transaction.

### *Timely*

8.4 There are clear indications that Kersia is already actively implementing its plan to expand into the UK market. For example:

8.4.1 **Kersia has begun hiring relevant personnel to build up its UK business.** Kersia has already incurred significant sunk costs by hiring at least 4 experienced and well-known F&B sales representatives (with a combined experience of over 100 years in the industry)<sup>152</sup>. In the Parties' experience, a similar sized team of sales representatives would be anticipated to generate around £[X] of customer revenues in F&B. That alone is evidence that its expansion should be sufficient to exert a competitive constraint on the merging Parties and timely (given these recruits have started).

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<sup>148</sup> Survation Questionnaire, Question 22.

<sup>149</sup> Survation Questionnaire, Question 23.

<sup>150</sup> Survation Questionnaire, Question 24.

<sup>151</sup> As defined under paragraph 5.8.3 of the Merger Assessment Guidelines.

<sup>152</sup> See Annex 3 to the Response to the AIS and Working Papers for an overview of the experience of each of the Kersia sales team.

- 8.4.2 Kersia’s claim to have only hired two sales people covering the UK<sup>153</sup> is not consistent with other evidence available on file. The CMA has a duty to make enquiries to test the evidence provided by the Parties and Kersia, in particular where such discrepancies are evident (and brought to its attention). The CMA cannot dismiss the Parties evidence and take Kersia’s word as given without any explanation as to the reason for its decision and the discrepancies. In any event, the very fact that Kersia has made a number (whether that number be two or four) of experienced UK specific sales hires is inconsistent with its claims that it does not expect to be able to achieve significant traction and growth in the UK market within a short span of time. By Kersia’s own admission, they expect to – and in fact already successfully have – “*compete[d] for smaller customers*” as early as the “*end of 2019*”.<sup>154155</sup>
- 8.4.3 **Kersia’s sales targets do not accurately reflect its intentions.** Kersia has submitted sales targets which the CMA describes as “*modest*”.<sup>156</sup> The Parties believe these figures are out of date and inconsistent with Kersia’s own internal slide discussing the rationale for the Kilco acquisition provided in June 2018. The sales targets are dated November 2018 and therefore could not have reflected any impact of the Transaction on the UK F&B market nor likely its recent recruitment drive (of spring 2019). Moreover, the only internal document provided by Kersia to the CMA which has been shared with the Parties suggests that the submitted sales targets are understating the true ambition (or what is realistic) of Kersia in the UK market. [REDACTED]. Its projections appear overly modest given the investments being made. If Kersia were to win just one of the Large Customers mentioned on the slide, its turnover would far exceed the target that it set for 2022. For example, Ecolab’s turnover from [REDACTED] is [REDACTED] million, this is [REDACTED]. This also contradicts the statement in the PFs that Kersia expects to “*compete for smaller customers towards the end of 2019*”<sup>157</sup>.

**Likely**

- 8.5 The CMA had previously concluded in the Barriers to Entry & Expansion Working Paper that Kersia’s entry was at least likely, just not timely or sufficient. This was understandable given that Kersia is already present on the UK market. Without any new evidence or comments the CMA appears to have changed its mind as to the likelihood of entry into the PFs. The Parties have provided extensive evidence that its expansion is very likely (Annex 1.9).
- 8.6 Kersia has the ability and incentive to expand in the UK F&B cleaning chemicals market. The PFs state that “*Kersia submitted to us that it does not have the product range, commercial, technical or industrial capacity to supply international customers or large domestic customers*”<sup>158</sup>. The Parties have submitted evidence showing that this is misleading:

*Product range*

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<sup>153</sup> PFs , para.7.260  
<sup>154</sup> PFs, para 7.257.  
<sup>155</sup> PFs, para 7.262.  
<sup>156</sup> PFs, para 7.257.  
<sup>157</sup> PFs, para 7.257.  
<sup>158</sup> PFs, para 253.

- 8.6.1 **Kersia will not have to invest in developing its product range.** The PFs do not refute the Parties previous submissions that F&B cleaning chemicals are homogenous products based on simple chemistry. In addition, as the Parties have previously explained, EU regulatory requirements mandate specific common standards that cleaning chemicals must adhere to. The essential elements of F&B cleaning chemicals supplied by competitors across Europe are therefore broadly the same.
- 8.6.2 Through its subsidiaries Hypred and Anti-Germ Kersia has readily available the full range of F&B products with which it is already servicing customers across Europe. It's position as one of the top three F&B cleaning chemical suppliers in Europe<sup>159</sup> gives it a platform to deploy its full F&B product range in the UK within a relatively short period of time.<sup>160</sup>
- 8.6.3 **The Moy Park tender is irrelevant to an assessment of Kersia's ability to compete.** The Parties note that the PFs state that "*Moy Park, which ran a tender that both Parties bid for, told us that it also invited Kilco to the tender, but found that Kilco was not able to supply the full range of products (emphasis added)*".<sup>161</sup> The CMA has failed to provide any details of Kersia's participation in the Moy Park tender and it is unclear whether Kilco had any affiliation with Kersia at the time of the tender process. Although Kilco was acquired by Kersia in June 2018, the use of the name 'Kilco' rather than 'Kersia' suggests that Kilco not Kersia participated in the tender. The ability of Kilco as an independent entity to compete for Moy Park is irrelevant to an assessment of Kersia's ability to compete. It also says nothing to Kersia's ability to compete successfully on a forward looking basis.
- 8.6.4 **Kersia's M&S accreditation status appears to have been misrepresented.** Kersia has told the CMA that it does not yet have M&S accreditation and that its electronic hygiene management system is still being finalised.<sup>162</sup> This is misleading. The Parties have already submitted evidence which establishes that Kersia (through Hypred) does in fact have M&S accreditation<sup>163</sup>. As noted above, 80% of respondents to the Suration Questionnaire believed that M&S accreditation is an indication of a reputable supplier. There does not appear to be anything preventing Kersia from using its accreditation, obtained via Hypred, to sell approved disinfectants for high care/high risk manufacturers in the UK. In any event, Kersia informed the CMA that further M&S accreditation and its electronic hygiene management system will be in place later this year. The assertion that Kersia does not have the capacity or ability to produce a full product range suitable for UK F&B customers is therefore unfounded.

<sup>159</sup> Ecolab's Europe-wide win / loss data demonstrate that Kersia is the third largest F&B supplier in Europe. See Annex 2 to Response to the AIS and Working Papers.

<sup>160</sup> Similarly, in *Alpha Flight Group/Lufthansa Service Holding AG* the Competition Commission considered DHL to be a sufficient competitive constraint as a potential entrant into the market for catering management and logistics services to airlines, *inter alia*, because of its strength in the parallel global logistics market which was considered "*a key part of providing catering management and logistics services to airlines*" and evidence that its "*competitiveness [was] improving*" (Final Report of March 14, 2012 paragraph 28).

<sup>161</sup> PFs, para 7.167.

<sup>162</sup> PFs, para 7.259.

<sup>163</sup> Response to the Issues Paper, Annex 7.1

*Technical expertise*

- 8.6.5 **Kersia and its group of companies have the requisite technical expertise.** Kersia already have the requisite technical expertise through its subsidiaries Kilco, Hypred and Anti-Germ which operate successful F&B cleaning chemical business. Kersia itself is a sophisticated competitor with a strong reputation in Europe for food, dairy and beverage. In the UK it already has built a strong reputation in the market for 'pig and poultry'. Kersia can leverage this existing experience and technical expertise to win Large Customers.
- 8.6.6 **Kersia is developing and acquiring significant technical resources.** Ardian, the owners of Kersia, have a strong track record of rapidly-scaling entry / expansion in new markets. Kersia, therefore, has significant financial backing, incentive and resources to expand further in the UK. For example, Kersia acquired Medentech in 2017 (which is now known as 'Kersia Ireland'). Kersia Ireland experienced growth of 64% in the previous 3 years and has forecast a further 50% in the next 2 to 3 years.<sup>164</sup> Kersia's own public statements reflect this ambition. Its CEO Sébastien Bossard has openly stated that the company is in the process of looking to acquire more interesting targets in the food sector and "*aims to reach a EUR 300m turnover by the end of 2020, and EUR 500m in sales within the next five years, both via organic and external growth*".
- 8.6.7 There is also evidence that Kersia has recently focused on acquiring food R&D and technological skills (such as digital solutions for food safety). For example, the acquisition of Laboratories Choisy<sup>165</sup> in July 2019 and Anti-Germ in April 2017. Kersia's aggressive strategy to acquire technological skills and R&D capabilities is consistent with Ardian's historical approach to rapidly expanding its portfolio companies, and will facilitate Kersia's growth in the F&B market in the UK.<sup>166</sup> Just as Ecolab, Diversey and Christeyns leverage their global reach and use the results across all jurisdictions, it would therefore be rational for Kersia to do the same in order to meet its stated ambition of becoming a global leader in F&B.

*Industrial capacity*

- 8.6.8 **Kersia's manufacturing capacity is already sufficient.** Kersia already has significant manufacturing capacity in the UK through Kilco's plant at Lockerbie. Kilco obtained planning permission to double the size of its manufacturing plant in December 2016. As the new owners of Kilco, Kersia will be aware of this excess capacity. On 4 August 2018 Kersia also purchased the warehouse section of a plant in Wexford Ireland in order to make the manufacturing plant "*much bigger*"<sup>167</sup>. Consistent with its intentions to expand in the UK market, Kersia, therefore, has minimal barriers to significantly increasing its production capacity in the UK when it wins a contract to supply Large Customers or International Customers.
- 8.6.9 **Capacity is not a barrier to expansion.** In any event, capacity is not a constraint to expansion in the cleaning chemicals industry. Suppliers have many options to choose from even if their capacity does not meet demand from the outset. For

<sup>164</sup> <https://www.wexfordpeople.ie/news/kersia-ireland-to-create-new-jobs-37169398.html>

<sup>165</sup> According to its website, Choisy makes sales in the UK: <https://www.choisy.com/international/>

<sup>166</sup> For example: <https://www.biospace.com/article/releases/ardian-backed-kersia-acquires-choisy-laboratories/>. See also, See <https://www.businesswire.com/news/home/20190718005343/en/Ardian-Backed-Kersia-Acquires-Choisy-Laboratories>

<sup>167</sup> <https://www.wexfordpeople.ie/news/kersia-ireland-to-create-new-jobs-37169398.html>

example, it is common for customers to be willing to switch supplier slowly (on a site by site basis) which allows for production to gradually ramp up over time. Holchem adopted this approach when it won the contract to supply [X]. The ability to entering into tolling agreements with other manufacturers (as Holchem did when it first started out in the industry, and Ecolab does in Europe) also means that suppliers can fill production capacity without having the short-term production resources already in place. Suppliers are also able to stockpile certain products in order to help manage and anticipate issues with capacity and demand.<sup>168</sup>

- 8.7 Kersia therefore clearly has the ability to expand in the UK market. The Parties urge the CMA to reconsider the evidence available and clarify its position with Kersia.

### **Sufficient**

- 8.8 **Kersia has a strong track record of successful expansion into new markets.** Kersia (with the backing of Ardian), have ambitions to expand rapidly to become a significant player in the UK market. Its aggressive expansion strategy is evident; Kersia is engaged in a "*buy and build strategy after being acquired by Ardian in 2016*".<sup>169</sup> Kersia has subsequently bought five other companies active in the Food, Farm & Beverage sector. In July this year Kersia also stated that it had further acquisition plans and that the "*targets in sight generate about EUR 100m in sales*"<sup>170</sup>. Kersia (and Ardian's) track record of competing successfully in new markets through acquisitions is to be admired (for example, its successful purchase and development of Hypred in France and Anti-Germ in Germany).<sup>171</sup>
- 8.9 **Kersia already has a strong and growing reputation in the UK.** Kersia is on a similar trajectory in the UK. It has already acquired, through Kilco, a strong position in the UK market for 'pig and poultry' customers (where there is a clear cross-over with food/protein plants). Kersia is already building on this success to accelerate its expansion into the UK F&B market. Furthermore it has clearly indicated to the CMA that its own targets "*might include international customers*",<sup>172</sup> who will inevitably include large UK manufacturing sites who will require the necessary expertise, products and service support and so by their own admission they must be planning a sufficient F&B presence in the UK to service such companies, in direct contradiction with the statement that they are only capable of supplying small customers.<sup>173</sup>
- 8.10 The CMA places weight on the fact that only four out of 21 Large Customers (including some International Customers) who responded to the CMA Questionnaire said they had heard of Kersia.<sup>174</sup> However, Kersia only expanded into the UK F&B market in March 2019<sup>175</sup> and the CMA Questionnaire would have been conducted only two or three months after that. It is therefore unsurprising that Kersia is not yet as well known to the small number of Holchem and Ecolab customers that the CMA contacted. There is evidence though, that Kersia is quickly building a reputation and becoming well known in the UK F&B market. In just the space of

<sup>168</sup> As noted at paragraph 8.15 to the Issues Paper Response, toll manufacturers are available in the UK and have a track record of manufacturing cleaning chemicals.

<sup>169</sup> See Annex 1.9.

<sup>170</sup> See Annex 1.9.

<sup>171</sup> Kersia is also particularly strong in Dairy in Spain and Portugal and in Poland for Food.

<sup>172</sup> PFs 7.250

<sup>173</sup> PFs 7.253

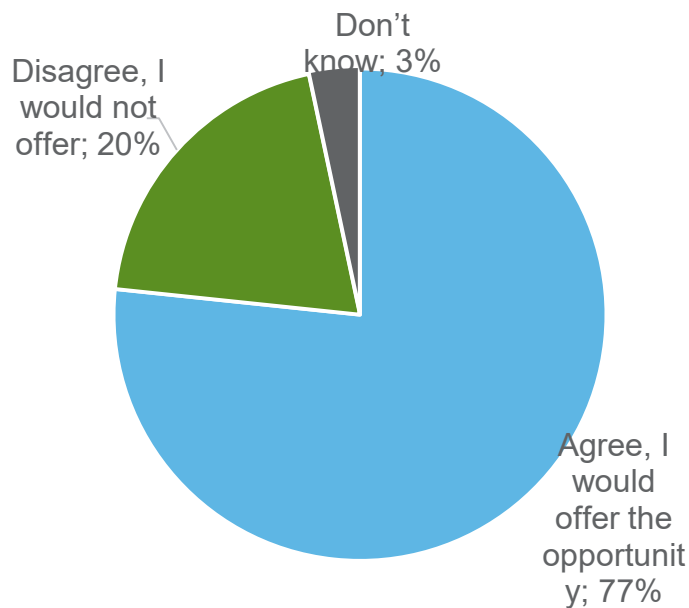
<sup>174</sup> PFs, para 7.259

<sup>175</sup> The Parties note that in February 2019 Sébastien Bossard re-posted a LinkedIn post showcasing Kersia's UK experience and listing six 'territory experts'. Sébastien Bossard's post says "*large combination of proficiencies for our customers and partners! Do not hesitate if you need improvement in Food Safety*".

time since the CMA survey, this reputation has grown with 33% of respondents to the Survation Questionnaire being familiar with Kersia compared to 19% of respondents to the CMA's Large Customer Questionnaire. And even in the short space of time since its entry, Kersia has already "prepared offers for a small number of customers on request, has approached a small number of small customer prospects, and gained one customer with annual sales of £30,000"<sup>176</sup> won from Holchem. This customer is a brewery, which is far removed from Kilco's traditional competency in the agricultural domain.

8.11 It is also clear that customers are receptive to an up and coming player in the market. The more recent survey data received from the Survation Questionnaire shows that customers would be willing to consider Kersia – as an established player expanding quickly in the UK market – as a potential supplier. The survey described Kersia to customers and asked them whether they would be willing to offer Kersia the opportunity to survey their plant and provide a quote (*i.e.*, the first step in the procurement process and one of the primary methods through which customers test the market and exercise buyer power<sup>177</sup>). As illustrated below, the vast majority of customers said that they would.

**Figure 21: Customers willing to offer Kersia the opportunity to quote<sup>178</sup>**



***Kersia's entry is timely, likely and sufficient***

8.12 The Parties must assume that Kersia will be in the market providing a credible competitive constraint on any quote being offered in future, as the Competition Commission found was the case with DHL in *Alpha Flight Group Limited/LSG Lufthansa Service Holding AG*<sup>179</sup>. The willingness of customers to allow Kersia to provide a quote having been made aware of its credentials shows that reputation is not a barrier to a supplier with the relevant accreditation or

<sup>176</sup> PFs, para 7.167.  
<sup>177</sup> See paragraph 7.5 above  
<sup>178</sup> Survation Questionnaire, Question 38.  
<sup>179</sup> See paragraph 5.11.12 of this Response.

a higher profile in F&B overseas being able to participate in the competitive process, nor is low current market share.

8.13 Indeed, there are several key parallels between the position of Kersia in the present case and the position of DHL in *Alpha Flight Group* which relate to why the Competition Commission regarded DHL as a credible competitor, namely:

**Table 6: Parallels between DHL in *Alpha Flight Group* and Kersia**

Factor relevant in Alpha Flight Group <sup>180</sup>	Similarities with Kersia
One of the biggest and most successful competitors globally.	Ecolab's Europe-wide win and loss data shows that Kersia is a strong competitive threat across Europe <sup>181</sup>
Present in the market and will remain so for the foreseeable future.	Will be present and competitive in the UK F&B market for the foreseeable future. Manufacturing facility purchased at Lockerbie with permission having been granted to double in size <sup>182</sup> .
Aim to create a significant business in the relevant market.	Numerous public statements of intent in relation to its expansion in F&B, <sup>183</sup> hiring of UK-specific sales persons and pursuing strategic UK aspirations.
Several customers viewing it as a credible competitors.	Respondents to the Survation Questionnaire overwhelmingly saw Kersia as sufficiently credible to survey and offer a quote, <sup>184</sup> as well as recently winning a beverage tender against Holchem.
Recent improvements in its competitiveness.	Kersia has engaged in a "buy and build" strategy in cleaning chemicals <sup>185</sup> , establishing a presence in the UK and engaging in the recruitment of four F&B technical sales staff with over 100 years of experience between them <sup>186</sup> .
Business model in line with current market trends.	"Farm to fork" strategy of Kersia <sup>187</sup> reflects the wider trend in the F&B industry of enhanced traceability and accountability across the length of the production process.

<sup>180</sup> Alpha Flight Group, paragraph 28

<sup>181</sup> See Annex 2 to the Consolidated Response

<sup>182</sup> See paragraph 7.5.8 of this Response.

<sup>183</sup> See FN 120.

<sup>184</sup> See Figure 21.

<sup>185</sup> See paragraph 7.7 of this Response.

<sup>186</sup> See Annex 3 to the Consolidated Response.

<sup>187</sup> [https://uk.finance.yahoo.com/news/ardian-backed-kersia-acquires-choisy-103400299.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce\\_referrer\\_sig=AQAAAE3R4E8D](https://uk.finance.yahoo.com/news/ardian-backed-kersia-acquires-choisy-103400299.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAE3R4E8D)

Factor relevant in Alpha Flight Group <sup>180</sup>	Similarities with Kersia
One of the biggest and most successful competitors globally.	Ecolab's Europe-wide win and loss data shows that Kersia is a strong competitive threat across Europe <sup>188</sup>

- 8.14 While the CMA is not strictly bound by previous precedents it should not dismiss those precedents out of hand either, especially where they contain such compelling parallels as the ones set out above.
- 8.15 The Parties have provided a considerable body of evidence (see Annex 1.9) that demonstrates Kersia's entry is timely, likely and sufficient. The CMA does not appear to have sufficiently investigated Kersia's unrealistic claims or considered the evidence provided by the Parties. The Parties are concerned that their representations as to Kersia's imminent entry have been overlooked or have been assigned inadequate weight in the PFs.
- 8.16 The limited information provided by Kersia to the CMA appears to be contradictory to publically available information and out of date in relation to recent hires, production capacity or the true extent of its sales activity or targets. [✂].
- 8.17 Failure to take account of Kersia's imminent expansion and capabilities means there are a number of findings of fact and analysis in the PFs which cannot be sustained. In particular, the CMA's preliminary conclusions that Kersia would encounter barriers to entry and not be a timely, likely or sufficient entrant should be reconsidered.

9. **Conclusion**

- 9.1 The evidence set out in this response demonstrates that the Transaction cannot be expected to result in an SLC, and that the CMA's provisional conclusion reached in the PFs should therefore be reversed. The Parties look forward to discussing these points with the CMA Inquiry Group and stand ready to provide any additional information that the CMA may require.

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<sup>188</sup> See Annex 2 to the Consolidated Response.