

## Anticipated acquisition by Carpenter Co. of the engineered foams business of Recticel NV/SA

### Submission of Greiner AG in response to the CMA's Notice of Possible Remedies of 28 September 2022

#### 1 Introduction and Executive Summary

- (1) This submission is made by Greiner AG ("**Greiner**") in response to the CMA's Notice of Possible Remedies of 28 September 2022 (the "**NPR**") in relation to the anticipated acquisition by Carpenter Co. ("**Carpenter**") of the engineered foams business ("**REF**") of Recticel NV/SA ("**Recticel**", together with Carpenter, the "**Parties**") (the "**Merger**").
- (2) Greiner is a global supplier of plastic and foam solutions. It was founded in 1868 in Nürtingen, Germany, and is headquartered in Kremsmünster, Austria. Greiner is a non-listed stock corporation. It operates from a classic holding structure with three operating divisions: Greiner Packaging, NEVEON, and Greiner Bio-One. Through NEVEON, Greiner has significant experience in the foam industry and, as a key European player, is well-placed to comment on the possible remedies as set out in the NPR.
- (3) As set out in further detail below, in summary Greiner considers that:
  - the only option outlined in the NPR that would represent a comprehensive and effective remedy to all aspects of the SLCs and resulting adverse effects that the CMA has provisionally found is prohibition of the Merger;
  - the remedy option proposed by the Parties, which comprises the partial divestiture of the UK assets and operations of REF (the "**Parties' Remedy Proposal**") gives rise to clear and high composition and purchaser risks, and therefore would not be an effective remedy;
  - there are significant interdependencies between the business comprising the Parties' Remedy Proposal and the wider REF business, which would impair the ability of the divested business to serve UK customers, innovate and compete effectively;
  - the Parties' Remedy Proposal would need to be amended in order to make it a viable and effective divestment remedy capable of solving the SLCs and any resulting adverse effects;
  - should the CMA accept the Parties' Remedy Proposal, which Greiner does not consider is viable in its current form, the only purchaser capable of resolving the interdependencies would be another foam manufacturer with a significant network of plants and capabilities, who itself does not give rise to competition concerns in the UK; and
  - given the very small (if existent) pool of suitable potential purchasers, an upfront buyer would be necessary in order to ensure that the significant composition and purchaser risks could be mitigated.

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## 2 The potential remedies as outlined in the NPR

- (4) In the NPR, the CMA identified the following potential structural remedies to the SLCs in the markets for (i) supply of comfort foam in the UK; (ii) supply of technical foam in the UK; and (iii) supply of converted comfort foam in the UK provisionally identified in the CMA's Provisional Findings dated 28 September 2022:
- (a) prohibition of the Merger; or
  - (b) the Parties' Remedy Proposal, comprising:
    - (i) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies unconverted flexible polyether polyurethane ("PU") comfort and technical foam ("**Alfreton 1**");
    - (ii) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies converted flexible polyether PU comfort foam ("**Alfreton 2**");
    - (iii) Data and information ("**Relevant IPR**") arising out of completed REF Research and Development ("**R&D**") projects which is used by the divestiture package;
    - (iv) All Relevant IPR held by REF as at closing of the sale for relevant current REF R&D projects as follows:
      - Where the project is planned to benefit REF's UK operations only, a full transfer of rights with Carpenter retaining no rights;
      - Where the project is planned to benefit both REF's UK operations and REF's non-UK operations, a perpetual, irrevocable royalty-free licence to the purchaser for UK applications only; and
    - (v) certain transitional Service and Supply Agreements ("**TSA**") for a fixed period with a potential purchaser covering R&D services, supply arrangements, consulting arrangements and IT, finance and HR support services.
- (5) The CMA's view is that prohibition of the Merger would "*represent a comprehensive solution to all aspects of the SLCs we have provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low*",<sup>1</sup> while noting that "*with any partial divestiture of REF, we would need to be confident that it remedied the SLCs in their entirety and had an acceptable risk profile*".<sup>2</sup> The CMA has also noted that "*a behavioural remedy is unlikely to be an effective remedy to the SLCs and/or any resulting adverse effects that we have provisionally identified*".<sup>3</sup>
- (6) Greiner agrees with the CMA's preliminary view that prohibition of the Merger would represent a comprehensive and effective remedy to all aspects of the SLCs and resulting adverse effects that the CMA has provisionally found. In fact, the only remedy proposed in the NPR that would fully resolve the SLCs is prohibition of the Merger – the divestiture package as proposed in the Parties' Remedy Proposal is not sufficient to resolve the SLCs and would not be a viable remedy package.

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<sup>1</sup> NPR, para. 13.

<sup>2</sup> NPR, para. 16.

<sup>3</sup> NPR, para. 11.

## 3 The scope of the divestiture package

- (7) The Parties' Remedy Proposal is too constrained and would not attract a suitable purchaser that could operate as an effective competitor. Nor would it contain the assets required to act as an effective competitor in the UK. Recticel's UK business is dependent on assets that are outside the scope of the remedy proposal. The Parties' Remedy Proposal therefore gives rise to clear composition and purchaser risks, and therefore would not be an effective remedy.

### 3.1 Composition Risks

- (8) In the UK, Recticel has a technical foam converting plant in Corby, Northamptonshire and also a flexible PU foam plant and a converted comfort foam plant in Alfreton, Derbyshire. These businesses cannot be separated from the remainder of REF due to important interdependencies.

#### 3.1.1 Conversion capability

- (9) Almost all major foam producers in Europe (more than 90%) have conversion capabilities. Having integrated foaming and converting capabilities allows foam producers to (i) offer competitive prices (by avoiding double marginalisation and reducing transport cost); and (ii) control quality (especially when homologation is required) as well as the lead-times of delivering final converted products. It also ensures that foaming companies can engage with final customers (rather than only with converters who will often also be their competitors) to provide higher value solutions.
- (10) Independent converters are mostly small companies that offer comfort foam conversion locally to the bedding and furniture sector. They typically do not have any technical foam offering. There are rare (and small) exceptions and these converters need to rely on supplies of foam blocks from foam producers. They cannot effectively engage in customer conversations on foam formulations and specifications because they need to in-source (often standardised) technical foams for converting. Considering the importance of transport costs, independent converters cannot source foam across larger distances. This heavily impacts their competitiveness. Similarly, foam producers without converting capabilities would need to rely on independent converters (unless they invest in converting equipment). The UK market for technical foams is currently predominantly served by large manufacturers that are vertically integrated. The proposed divestiture would change this and lead to an operator with a different (and unproven) business model in the area of technical foams.
- (11) The Parties' Remedy Proposal has integrated conversion capabilities in respect of comfort foam only (with a view to the [CONFIDENTIAL] at Alfreton 2). REF currently also has integrated conversion capabilities in relation to technical foam in the UK. The Corby plant, as a pure converting operation, needs inputs, i.e. technical foam from other REF's plants, such as Wetteren or Alfreton.
- (12) As a result, separating Alfreton 1 and 2 from the remainder of REF, including Corby, considerably undermines the viability and competitiveness of the Parties' Remedy Proposal. This applies not only to converted technical foam because not all converting equipment is exclusive to either comfort or technical foam. REF's technical foam converting plant in Corby can be (at least partially) used or repurposed to convert comfort foam. Therefore, the viability of the Parties' Remedy Proposal would depend entirely on a potential purchaser's converting capabilities (including spare conversion capacity) in proximity to the UK.

- (13) Only fully integrated comfort and technical foam plants could create a potentially viable business capable of remedying the SLCs that the CMA has provisionally found (and the Parties' have conceded). In addition, as the CMA has found SLCs in all markets where the Parties overlap in the UK, it is not clear to Greiner why other Recticel plants serving customers with (converted) technical foam in the UK (e.g. Corby and Wetteren) do not form part of the Parties' Remedy Proposal.

### 3.1.2 Interdependencies with plants in Europe

- (14) We understand that there are also significant interdependencies with other Recticel plants in continental Europe for critical input and knowhow. This concerns, in particular, but not only, Recticel's plant in Wetteren (Belgium), which is geographically close to the UK, easy to reach and on which Recticel's UK business relies for knowhow, input, back-up and credibility as a part of a large and well established network when selling to (sophisticated) customers that often purchase from several locations.
- (15) REF's Wetteren plant in Belgium is a modern and cost-efficient plant with established R&D capabilities. It serves as the R&D hub for REF (comfort and technical foam). This plant has the necessary equipment and produces the entire range of technical foams (e.g. including technical foam rolls; noise, vibration and harshness, "NVH" foams; filter and sealing foams). Given its location, the plant can cost-efficiently supply Recticel's UK plants and also serve customers across the UK, especially in England. In addition, it is well positioned to supply REF's technical foam conversion plant in Corby. In fact, the Corby plant needs inputs, in particular, from the Wetteren plant in Belgium (and potentially other Recticel foaming plants) for reticulated foam (WaterJet cutting, CNC cutting, kiss-cutting, laminating, stamping, gluing) for technical foam converting.
- (16) Furthermore, [CONFIDENTIAL]. Automotive customers typically require technical foam rolls to be homologised. [CONFIDENTIAL]. This process can take anywhere from several months to years. Its success will depend on finding credible substitutes for the different dependencies on Recticel's capabilities and on the ability to convince the relevant automotive customers that these substitutes are reliable.
- (17) Moreover, all plants engaged in manufacturing of products for automotive customers require an automotive quality management system for the VDA (*Verband der Automobilindustrie*, i.e. *German association of the automotive industry*) 6.3 certification. The VDA 6.3 certification requires a foam producer to implement quality assurance measures and introduce robust quality management practices. The VDA 6.3 certification process can take several months. [CONFIDENTIAL].
- (18) In addition, methylisocyanates and toluene diisocyanates that are used as raw materials in the production of PU foam qualify as dangerous substances under EU Directive 2012/18/EU (SEVESO III). This requires foam producers, among others, to implement measures that prevent major accidents and limit their consequences for human health and the environment. Implementing these safety measures takes considerable time and (financial) resources on a yearly basis. [CONFIDENTIAL].
- (19) Thus, even the sale of all Recticel plants in the UK, i.e. in Corby and Alfreton would not resolve the dependencies on Recticel. For the converting of technical foam, the plant in Corby would still be dependent on additional foam from Recticel's plant in Wetteren (and potentially other Recticel plants). [CONFIDENTIAL]. For some foams (e.g. reticulated products), there are only two suppliers in the UK (Vita and Recticel) and both are fully

vertically integrated. A competitor cannot sustainably rely on them for supply to replace its own intra-group sourcing.

### 3.1.3 Capacity constraints

- (20) Moreover, as the Parties' Remedy Proposal suggests, Alfreton **[CONFIDENTIAL]**.
- (21) **[CONFIDENTIAL]**. Without Wetteren (or other REF plants), the Parties' Remedy Proposal is not capable of viably and competitively serving REF's current technical foam customers in the UK. Therefore, the Parties' Remedy Proposal does not fully resolve the SLCs provisionally identified by the CMA. Any suitable purchaser would need sufficient spare capacity, network, infrastructure and industry knowledge to effectively serve UK customers.

### 3.1.4 R&D interdependencies

- (22) **[CONFIDENTIAL]** R&D is key to adapt to evolving customer specifications and requirements, for larger tenders and for enhancing efficiency in markets that are under constant cost pressure.
- (23) Foam producers typically have a central R&D organisation for their entire group, as well as local R&D departments. Recticel operates its central R&D organisation out of Wetteren. The local R&D departments typically comprise a local research laboratory and personnel dedicated to the local R&D organisation. R&D is not only important to offer innovative solutions, to meet customer specifications and to engage with customers to develop solutions for their needs. It is also essential to meet certain regulatory requirements, such as fire safety regulations in the UK, requiring comfort foam products to have fire retardant features that are not required in other European countries. In addition, in particular, at a time of significant raw material cost increases, R&D is crucial to ensure process efficiency and cost effectiveness.
- (24) Therefore, all R&D relevant to the UK business would need to be transferred with the remedy package – it is not sufficient to 'share' this with Carpenter under TSAs, as proposed in the NPR. As R&D is key in this industry, ensuring continuity of R&D is key to the viability and competitiveness of the divestment business. Any suitable purchaser would need sufficient knowhow and R&D capabilities in order to effectively compete given the lacking R&D setup of the Parties' Remedy Proposal. A TSA solution would create a player that depends on a competitor in a crucial field and that has no solution whatsoever when the TSA expires. Duplicating Wetteren's capabilities in Alfreton would be complex, uncertain and not cost effective for the divestiture business.

### 3.1.5 Sourcing and supply chain risks

- (25) Similarly, the proposed TSAs between Carpenter and a potential purchaser for supply arrangements relating to chemicals and additives used in manufacturing flexible polyether PU foam at the Alfreton 1 facility would not be sufficient because the chemical markets are very volatile and materials are typically purchased on a monthly basis. The purchaser would need to be experienced in these markets, qualify for raw materials and have their own supply chains in place. In addition, the existence of such links has the potential to distort competition between the Parties and the divestment business.
- (26) Scale and predictability of demand are key raw material sourcing advantages for technical and comfort foam. Foam producers with larger demand of raw materials can source these under more advantageous long-term conditions and reduce their dependence on volatile and more expensive spot markets. Raw material suppliers are established players with

significant market power, such as Dow, Shell, PCC Rokita, Wanhua, Repsol, BASF, and Covestro. Smaller and less experienced foam producers often suffer from less favourable conditions, and shortages in the supply chain can result in these smaller producers not being supplied at all.

- (27) In addition, raw materials are typically evaluated by customers within homologation processes and therefore need to be approved. This requires the PU foam producer to have sufficient procurement knowhow and ability/scale to secure raw materials to meet the customer's requirements. The producer cannot freely switch the approved raw material with another raw material. **[CONFIDENTIAL]**.
- (28) **[CONFIDENTIAL]**. Relying on a TSA for purchasing will not be satisfactory. It would (in the best case) align raw material cost with a key competitor, give a key competitor full visibility of the businesses' raw material purchasing conditions and create a constant incentive to de-prioritise serving the divestiture business at times when raw materials are scarce and/or prices increase.

### 3.2 Purchaser Risks

- (29) The Parties' Remedy Proposal as currently envisaged gives rise to the risk that a suitable purchaser is not available (or that the purchaser is weak and unable to sustain the business). **[CONFIDENTIAL]**. We also understand that the business would be poorly performing financially compared to the industry on a standalone basis, which will no doubt limit the universe of potential buyers, create viability issues and means that the business will find it hard to muster the financial firepower to invest and compete aggressively on a standalone basis.

## 4 The identification of a suitable purchaser

- (30) Should the CMA accept the Parties' Remedy Proposal, which Greiner does not consider is viable in its current form (as discussed above), the only purchaser capable of resolving the interdependencies and sustaining a viable business would be another foam manufacturer, who themselves does not give rise to competition concerns in the UK. The purchaser would need experience and capability in R&D specific to the foam industry and also in purchasing chemicals and supply chain logistics for foam manufacturing.
- (31) Greiner has a number of observations on the application of the criteria applied by the CMA when assessing the availability and suitability of potential purchasers:<sup>4</sup>
- (a) **Independence:** Greiner notes that the purchaser should have no significant connection to the Parties that may compromise the purchaser's incentive to compete with Carpenter (such as an equity interest, common significant shareholders, reciprocal trading relationships, or continuing financial assistance).
  - (b) **Capability:** The purchaser must have access to appropriate financial resources, expertise and assets to support the Parties' Remedy Proposal as necessary and ensure it can be an effective competitor in the UK market. In Greiner's view, this could only be achieved by another foam manufacturer because only they would have access to the R&D facilities and experience with homologation, quality management, safety measures, as well as in the supply chain logistics for purchasing chemicals,

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<sup>4</sup> Remedies Guidance, para. 5.21; NPR para. 29.



in order to be able to operate as an effective competing supplier of comfort, technical and converted comfort foam in the UK.

It is particularly important that the suitable purchaser has these capabilities equally in relation to comfort and technical foam. Technical foam and comfort foam are different products mainly in terms of end-use, function, price and characteristics. Pure comfort foam producers are not able to instantly switch to producing technical foams, and vice versa. For instance, entering the market for technical foam by an existing producer of comfort foam requires acquisition of additional capital intensive equipment, such as loop splitters for technical foam rolls or reticulation chambers for filter foams. In addition, the production of technical foam requires the installation of additional tanks for speciality additives and raw materials as well as development of own formulations and production knowhow. Moreover, certain customers, such as automotive customers, require the producers of technical foam to go through a homologation process, which can take several years.

- (c) **Commitment:** The purchaser should be able to provide an appropriate business plan and objectives for competing in the UK market, and a clear demonstrable intention and incentive to maintain and operate the business comprising Parties' Remedy Proposal as a viable and competitive business – including in competition with Carpenter.
  - (d) **Absence of competitive or regulatory concerns:** Given the structure and concentration of the UK market, other foam producers already active in the UK would themselves give rise to competition concerns in the UK should they be proposed as potential purchasers. The pool of suitable potential purchasers who would not give rise to competition concerns is therefore relatively small and includes at least Greiner, through its NEVEON division, which has only limited presence in the UK.
- (32) Other potential purchasers, such as financial investors or strategic buyers who are not foam manufacturers, would not be suitable purchasers because they would not be in a position to recreate the interdependencies currently present in the REF business, including the required capacity, sales force, network, infrastructure, production and industry knowhow, specific R&D, homologation experience, quality management, safety measures and supply chain capabilities (including sufficient scale) necessary to operate the business effectively as a strong and viable competitor.

## 5 The effectiveness of the divestiture process

- (33) Given the small pool of potential purchasers, an upfront buyer would be necessary in order to ensure that the composition and purchaser risks outlined above can be mitigated. In the absence of an upfront buyer, the Parties' Remedy Proposal would be too risky to constitute an effective remedy.
- (34) In addition, the appropriate timescale for achieving a divestiture must allow the potential purchaser sufficient time to undertake due diligence in order to understand and resolve the interdependencies.

## 6 Conclusion

- (35) The only potential remedy of the options outlined in the NPR that would represent a comprehensive and effective remedy to all aspects of the SLCs and resulting adverse effects that the CMA has provisionally found is prohibition of the Merger. The Parties' Remedy

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Proposal gives rise to clear composition and purchaser risks, and therefore would not be an effective remedy. Rather, it would need to be amended in order to make it a viable and effective divestment remedy capable of solving the SLCs and any resulting adverse effects. In order to address the composition and purchaser risks, the potential purchaser would also need to be a foam manufacturer and an upfront buyer requirement is necessary.