

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

Final report

Notified: 16 November 2022

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**Members of the Competition and Markets Authority
who conducted this inquiry**

Kip Meek (*Chair of the Group*)

Paul Hughes

Ulrike Hotopp

Karthik Subramanya

Chief Executive (interim) of the Competition and Markets Authority

Sarah Cardell

The Competition and Markets Authority has excluded from this published version of the final report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets. Non-sensitive wording is also indicated in square brackets.

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A: Terms of reference

Summary

Overview of our findings

1. The Competition and Markets Authority (**CMA**) has decided that the anticipated acquisition (the **Merger**) by Carpenter Co. (**Carpenter**) of the engineered foams business (**REF**) of Recticel NV/SA (**Recticel**) may be expected to result in a substantial lessening of competition (**SLC**) in:
 - (a) The supply of comfort foam in the UK.
 - (b) The supply of technical foam in the UK.
 - (c) The supply of converted comfort foam in the UK.
2. For the purposes of the phase 2 investigation, Carpenter and Recticel (together referred to as the **Parties**) requested to concede that the Merger may be expected to result in an SLC in each of the three markets in which competition concerns had been identified in the CMA's phase 1 decision (the **Phase 1 Decision**). We accepted the Parties' request.
3. In our inquiry we used evidence and information gathered in phase 1 and undertook targeted additional information gathering, including publishing an Issues Statement and making a limited number of requests for information. We published our provisional findings, notice of possible remedies and the Parties' remedy proposal (the '**Parties' Remedy Proposal**') on 28 September 2022. We have applied a 'balance of probabilities' standard when assessing the evidence before us.

Background to these findings

The Parties and the Merger

4. Carpenter is a USA-headquartered manufacturer of a range of flexible polyurethane (**PU**) foam and foam-related products. In the UK, Carpenter supplies comfort foam, technical foam and converted comfort foam for a range of applications.
5. Recticel is a Belgium-headquartered manufacturer of flexible PU foam (through REF), bedding and insulation products. In the UK, REF supplies and converts both comfort and technical foam.

6. On 6 December 2021, Carpenter agreed to acquire 100% of the shares in the relevant Recticel companies that currently own all assets and liabilities of and operate REF, for €656 million (approximately £559 million).

Relevant merger situation

7. We have decided that the Merger constitutes a relevant merger situation as it would result in Carpenter and REF ceasing to be distinct enterprises and because the share of supply test has been met.

Findings

Market outcome if the Merger did not take place

8. To determine the impact that the Merger may have on competition, we have considered what would have happened absent the Merger. This is known as the counterfactual. We have concluded that the counterfactual is the prevailing conditions of competition.

The relevant markets

9. We have considered the competitive effects of the Merger within the following markets:
 - (a) The supply of comfort foam in the UK.
 - (b) The supply of technical foam in the UK.
 - (c) The supply of converted comfort foam in the UK.

Our competitive assessment

10. We examined whether the Merger may lead to a significant reduction in competition between the Parties by removing an important competitor and, in doing so, whether the merged entity would be likely to worsen its offering compared to the situation if the Merger did not take place. This is a horizontal, unilateral effects theory of harm.
11. In respect of each of the three markets identified above we have found that the Parties compete closely and that the remaining competitive constraints are not sufficient to offset the loss of competition between them which may be expected to result from the Merger.

Barriers to entry and expansion

12. We have concluded that entry or expansion will not be timely, likely and sufficient to prevent any SLC arising from the Merger in relation to the supply of comfort foam, technical foam or converted comfort foam in the UK.

Conclusion

13. As a result of our assessment, we have decided that the Merger may be expected to result in an SLC in:
 - (a) The supply of comfort foam in the UK.
 - (b) The supply of technical foam in the UK.
 - (c) The supply of converted comfort foam in the UK.

Remedies

14. Having decided that the Merger may be expected to result in SLCs, we considered what action should be taken to remedy, mitigate or prevent the SLCs and their resulting adverse effects.
15. The Parties' Remedy Proposal included a partial divestiture of REF's UK assets and operations, principally comprising the divestiture of REF's UK subsidiary Recticel Limited. It included assets and operations that the Parties have submitted are sufficient to address effectively each of the SLCs, namely:
 - (a) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies unconverted flexible polyether PU comfort and technical foam (Alfreton 1);
 - (b) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies converted flexible polyether PU comfort foam (Alfreton 2);
 - (c) Data and information arising out of completed REF Research and Development (**R&D**) projects which are used by the divestiture package. For relevant current REF R&D projects, the following is included:
 - (i) Where the project is planned to benefit REF's UK operations only, a full transfer of rights with the Parties retaining no rights.

(ii) 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 use in UK applications only.

16. The Parties' Remedy Proposal also provided that Carpenter will enter into Transitional Service and Supply Agreements (**TSA**) for a fixed period with the purchaser for:
- (a) R&D services in relation to current R&D projects and new projects relating to unconverted and converted comfort foam and unconverted polyether sponge foam subject to a cap set at a specified number of hours annually across all projects;
 - (b) supply arrangements relating to chemicals and additives used in manufacturing flexible polyether PU foam at Alfreton 1 facility;
 - (c) consulting arrangements to provide expertise to the potential purchaser to conduct its own negotiations with suppliers of chemicals; and
 - (d) information technology, finance and HR support services.
17. We concluded that the Parties' Remedy Proposal contains most of the elements necessary to enable the divestiture business to compete effectively. However, we found that the proposed TSAs relating to R&D and to chemicals purchasing risked diminishing the level of competition between the Parties and the divested business and should be excluded from the scope of any potentially effective partial divestiture.
18. We found that the absence of R&D operations and experience in chemicals purchasing within the assets and operations to be divested gives rise to material effectiveness risks. Given the nature of these risks, we found that they are capable of being adequately mitigated by a suitable purchaser, and have reflected this in the criteria that a suitable purchaser will be required to possess. Any such purchaser would be likely to be active either in foam manufacturing or vertically related industries, another plastics manufacturing industry, and would be readily able to utilise and apply its experience to the divestiture business.
19. We therefore concluded that the divestiture under the Parties' Remedy Proposal (excluding the TSA elements relating to R&D and chemical procurement) to a suitable upfront purchaser, who has sufficient R&D capabilities and chemical procurement experience, would be effective in addressing the SLCs and the resulting adverse effects.

20. We also concluded that this would be an effective and proportionate remedy, and thereby as comprehensive a solution as is reasonable and practicable, to the SLCs and the resulting adverse effects we have found.

Findings

1. The reference

- 1.1 On 18 July 2022, the Competition and Markets Authority (**CMA**), in exercise of its duty under [section 33\(1\)](#) of the Enterprise Act 2002 (the **Act**), referred the anticipated acquisition (the **Merger**) by Carpenter Co. (**Carpenter**) of the engineered foams business (**REF**) of Recticel NV/SA (**Recticel**) for further investigation and report by a group of CMA panel members.
- 1.2 Carpenter and Recticel are together referred to as the **Parties** and, for statements referring to the future, the **Merged Entity**.
- 1.3 In exercise of its duty under [section 36\(1\)](#) of the Act, the CMA must decide:
 - (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition (**SLC**) within any market or markets in the United Kingdom (**UK**) for goods or services.
- 1.4 Our terms of reference are set out at **Appendix A**. We are required to publish our final report by 22 January 2023.
- 1.5 This document, together with its appendices, constitutes the CMA's final report published and notified to Carpenter and Recticel in line with the CMA's rules of procedure.¹ Further information relevant to this inquiry can be found on the CMA case page.²

2. The Parties and the Merger

The Parties

- 2.1 Carpenter is a USA-headquartered manufacturer of a range of flexible polyurethane (**PU**) foam and foam-related products. In the UK, Carpenter supplies comfort foam, technical foam and converted comfort foam for a range of applications. Carpenter has three manufacturing plants in the UK – a flexible PU foam plant in Glossop (Derbyshire), a converted foam plant in

¹ [CMA rules of procedure for merger, market and special reference groups \(CMA 17\), Rule 11.](#)

² [Carpenter / Recticel merger case page.](#)

Somercotes (Derbyshire) and a converted comfort foam plant in Penallta (South Wales). Carpenter group's worldwide turnover in the financial year ended 31 December 2021 was £[<], of which £[<] was generated in the UK.³

- 2.2 Recticel is a Belgium-headquartered manufacturer of flexible PU foam (through REF), bedding and insulation products. In the UK, REF supplies and converts both comfort and technical foam. REF has three manufacturing plants in the UK – a flexible PU foam plant and a converted comfort foam plant in Alfreton (Derbyshire) and technical foam converting plant in Corby (Northamptonshire). REF's worldwide turnover in the financial year ended 31 December 2021 was £509.1 million, of which £[<] was generated in the UK.⁴

The Merger

- 2.3 On 6 December 2021, Carpenter agreed to acquire 100% of the shares in the relevant Recticel companies that currently own all assets and liabilities of and operate REF, for €656 million (approximately £559 million).

Merger rationale

- 2.4 Carpenter submitted that its rationale for the Merger was to benefit from REF's complementary product focus (as REF's core expertise is in higher value technical foam, while in the UK and EEA, Carpenter's core expertise is in comfort foam). Carpenter further submitted that the acquisition of REF will improve Carpenter's position in technical foam in North America and Europe and establish a presence in Asia Pacific.⁵

3. Concession of SLCs identified at phase 1

- 3.1 For the purposes of the phase 2 investigation, the Parties requested on 10 August 2022 to concede that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in each of the three markets in which competition concerns had been identified in the CMA's phase 1 decision (the **Phase 1 Decision**),⁶ namely:
- (a) The supply of comfort foam in the UK.
 - (b) The supply of technical foam in the UK.

³ Final Merger Notice submitted to the CMA by the Parties on 4 April 2022 (**FMN**).

⁴ FMN, paragraphs 2.24 and 3.19.

⁵ FMN, paragraphs 2.24 and 3.19.

⁶ [Phase 1 Decision](#), 05 August 2022.

(c) The supply of converted comfort foam in the UK.

- 3.2 The Parties agreed to waive their right to challenge this position during the phase 2 inquiry and confirmed that they intended to submit remedies to address the SLCs.
- 3.3 The process that applies where merging parties request to concede an SLC is set out in paragraphs 7.18 to 7.21 of [CMA2 revised](#).⁷
- 3.4 We accepted the Parties' request to concede the SLCs on 24 August 2022.
- 3.5 In the phase 2 inquiry we have used evidence and information gathered in phase 1. Given the comprehensive information gathered in phase 1 we have undertaken targeted additional information gathering during the phase 2 inquiry, including by publishing an Issues Statement (to which only the Parties responded) and making a limited number of requests for information.⁸ As the Parties conceded the SLCs identified in the Phase 1 Decision waived their right to challenge the position in the phase 2 inquiry, we did not hold main party hearings.
- 3.6 We published our provisional findings, notice of possible remedies and Parties' remedy proposal (the **Parties' Remedy Proposal**) on 28 September 2022. We sent a remedies working paper to the Parties for comment on 21 October 2022. The Parties waived their right to a response hearing. We held a number of hearings with third parties and received one third-party response to the notice of possible remedies which was published on the inquiry [webpage](#) on 3 November 2022.
- 3.7 A non-confidential version of the final report has been published on the inquiry [webpage](#). We would like to thank all those who have assisted in our inquiry.

4. Relevant merger situation

- 4.1 This chapter addresses the first of the two statutory questions which we are required to answer under section 36 of the Act and pursuant to our Terms of Reference (see Appendix A), namely: whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
- 4.2 The concept of a relevant merger situation has two principal elements: two or more enterprises cease to be distinct enterprises within the statutory period

⁷ [CMA2 revised](#), paragraphs 7.18-7.21.

⁸ [Issues statement](#), 26 August 2022 and [Parties' response to the Issues Statement](#), 21 September 2022.

for reference;⁹ and the turnover test and/or the share of supply test is satisfied.¹⁰

Enterprises

- 4.3 The Act defines an ‘enterprise’ as ‘the activities or part of the activities of a business’.¹¹ A ‘business’ is defined as including ‘a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge’.¹²
- 4.4 Each of Carpenter and REF is active in the supply of (among other products) various types of flexible PU foam in the UK and generates turnover worldwide and in the UK (see Chapter 2 above). We are therefore satisfied that each of Carpenter and REF is a ‘business’ within the meaning of the Act and that, accordingly, the activities of each of Carpenter and REF are an ‘enterprise’ for the purposes of the Act.

Ceasing to be distinct

- 4.5 The Act provides that two enterprises cease to be distinct if they are brought under common ownership or common control.¹³
- 4.6 The Merger concerns the acquisition by Carpenter of the entire issued share capital of the relevant Recticel companies that currently own all assets and liabilities of, and operate, REF. On completion of the Merger, these enterprises, will be under the common ownership and control of Carpenter.¹⁴ Accordingly, we are satisfied that arrangements are in progress or in contemplation which, if carried into effect, will result in the enterprises of Carpenter and REF ceasing to be distinct.
- 4.7 The Merger has not yet completed, so Carpenter and REF remain independent enterprises. Therefore, we are satisfied that the four-month time limit (the statutory period for reference) for a relevant merger situation under the Act is not engaged in the present circumstances.¹⁵

⁹ Sections 23 and 24 of the Act.

¹⁰ Section 23 of the Act.

¹¹ Section 129(1) of the Act.

¹² Section 129(1) and (3) of the Act.

¹³ Section 26 of the Act.

¹⁴ On completion of the Merger, Carpenter will have a ‘controlling interest’ in the relevant Recticel companies within the meaning of that term in section 26 of the Act.

¹⁵ Section 24 of the Act. In summary, the four-month time limit applies only where the enterprises *have ceased* to be distinct.

Turnover test

4.8 The turnover test is satisfied where the value of the turnover in the UK of the enterprise being taken over exceeds £70 million.¹⁶ In this case, the turnover test is not satisfied as the turnover in the UK of REF does not exceed £70 million (see Chapter 2 above).

Share of supply test

4.9 The share of supply test is satisfied where the merger would result in the creation or enhancement of at least a 25% share of supply or acquisition of goods or services of any description either in the UK or in a substantial part of the UK.¹⁷

4.10 The Parties have overlapping activities in the UK in respect of various types of flexible PU foam, namely (i) comfort foam, (ii) technical foam and (iii) converted comfort foam. On the basis of any of our approaches to estimating shares of supply, as a result of the Merger the Parties would have a combined share of supply of more than 25% and the Merger would result in an increment in the share of supply.¹⁸ Accordingly, we have found that the share of supply test in section 23 of the Act is satisfied.

Conclusion on the relevant merger situation

4.11 In view of the above, we have found that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

5. The counterfactual

5.1 Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'.¹⁹

¹⁶ Section 23(1)(b) of the Act.

¹⁷ Section 23 of the Act and paragraph 4.60 of [CMA2 revised](#). The concept of goods or services of 'any description' is very broad. The CMA is required by the Act to measure shares of supply by reference to such criterion or such combination of criteria as the CMA considers appropriate (section 23(5) of the Act).

¹⁸ We have estimated shares of supply in the UK using four approaches: first, share of supply of comfort foam by volume (see Table 1 at page 19 below); second, share of supply of comfort foam by revenue (see Table 2 at page 19 below); third, share of supply of technical foam by volume (see Table 3 at page 28 below); and fourth, share of supply of technical foam by revenue (see Table 4 at page 28 below). These tables also demonstrate that for each of these metrics the Merger will result in an increment to the share of supply of over 10%. We consider these to be reasonable descriptions of sets of goods for the purposes of determining the share of supply test.

¹⁹ [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 3.1.

- 5.2 The Phase 1 Decision found that the counterfactual was the prevailing conditions of competition.²⁰
- 5.3 We did not find any evidence that the pre-Merger competitive conditions would not prevail absent the Merger. We therefore analyse the competitive effects of the Merger against the prevailing conditions of competition.

6. Market definition

- 6.1 The assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.²¹ Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger.²²
- 6.2 The Parties overlap in the supply of: (i) comfort foam; (ii) technical foam; and (iii) converted comfort foam in the UK (and more broadly, worldwide).²³

Product market

- 6.3 We have considered the relevant product market, in particular whether product markets should be defined separately in terms of: (i) the supply of comfort foam; (ii) the supply of technical foam; and (iii) the supply of converted comfort foam.

Substitutability between comfort and technical foam

- 6.4 We find that comfort foam and technical foam belong to separate product markets, based on limited demand-side substitutability. We have not seen any evidence from third parties that customers are able to substitute between comfort and technical foam, or examples of customers purchasing both of these products.²⁴ This evidence is also supported by the Parties' internal documents, which typically discuss comfort foam and technical foam separately.²⁵

²⁰ [Phase 1 Decision](#), paragraph 20.

²¹ [Merger Assessment Guidelines](#), paragraph 9.1.

²² [Merger Assessment Guidelines](#), paragraph 9.2.

²³ The Parties also overlap in the supply of a number of other foam-related products such as polyester fibre products, mattresses and mattress toppers. We have not identified concerns related to these overlaps and no third parties identified any concerns in these areas in response to our Issues Statement. They are therefore not covered further in our findings.

²⁴ [§<] phase 1 call note, 3 March 2022.

²⁵ For example: REF Annex 195, Annex 413, Annex 490 (slides 25 and 26); Carpenter Annex 172.

6.5 As regards supply-side substitutability, all foam suppliers that responded to the CMA's phase 1 investigation stated that they are unable to shift between supplying comfort and technical foam.²⁶ Whilst some suppliers (such as the Parties and Vita) supply both comfort and technical foam, some suppliers stated that a focus on one type more than another is common.²⁷

Segmentation within comfort foam

6.6 We find that it is not appropriate to find separate markets within the category of comfort foam. In phase 1, a few third parties indicated that there exist different types or 'grades' of comfort foam which have varying degrees of hardness and density (see further paragraph 7.12 below).²⁸ Notwithstanding this position, in phase 1 a larger number of third parties consistently described comfort foam as a homogenous or 'commodity' product,²⁹ with customers largely able to substitute between purchasing different types of comfort foam.³⁰ Moreover, in phase 1 most foam suppliers submitted that they are generally able to substitute between producing different types of comfort foam.³¹ As noted further below at paragraph 7.12, third party feedback received by the CMA in phase 1 also shows that the Parties produce similar ranges of foam grades. The Parties' internal documents also largely demonstrate that business strategies are discussed at the broader comfort foam level rather than for different types or grades of comfort foam.³²

Segmentation within technical foam

6.7 The evidence received by the CMA in phase 1 shows that there is a greater degree of differentiation in technical foam than in comfort foam. Technical foam may be either polyester- or polyether-based, unlike comfort foam which is polyether-based only. In addition, technical foam is used for a wider range of applications (such as in automobiles and industrial equipment, sponges, scouring pads, and packaging).³³

²⁶ [REDACTED] phase 1 third party CMA questionnaire responses.

²⁷ An internal document submitted by REF similarly indicates that certain suppliers may focus on supplying either comfort or technical foam. REF Annex 490, slide 67; [REDACTED] phase 1 call note, 21 March 2022; [REDACTED] phase 1 third party email dated 25 March 2022; and [REDACTED] phase 1 third party response to CMA questionnaire.

²⁸ [REDACTED] phase 1 call note, 17 March 2022; [REDACTED] phase 1 call note, 5 April 2022.

²⁹ [REDACTED] phase 1 third party email dated 25 March 2022; [REDACTED] phase 1 call note, 17 March 2022; [REDACTED] phase 1 call note, 7 March 2022; and [REDACTED] phase 1 call note, 21 March 2022.

³⁰ [REDACTED] phase 1 call note, 17 March 2022; [REDACTED] phase 1 third party CMA questionnaire response; [REDACTED] phase 1 third party CMA questionnaire response.

³¹ [REDACTED] phase 1 call note, 7 March 2022, paragraph 13; [REDACTED] phase 1 call note, 9 March 2022, paragraph 18.

³² For example: REF Annex 188, Annex 413; Carpenter Annex 158, Annex 171.

³³ FMN, paragraph 3.7.

- 6.8 Demand-side substitutability within technical foam is more limited as certain technical foam applications may require specific types of technical foam.³⁴ In particular, third-party submissions in phase 1 indicate that polyether- and polyester-based technical foam types have different properties and are therefore suitable for different applications.³⁵ The Parties' internal documents also largely support the view that technical foam is a differentiated and specialised product that may be tailored for certain technical foam applications.³⁶
- 6.9 Further, supply-side substitutability appears more limited than within comfort foam. For example, third-party submissions indicated there is more limited supply-side substitutability between polyether-based and polyester-based technical foam, and the evidence shows that some suppliers focus on supplying one but not the other.³⁷ Third parties also noted in phase 1 that more specialised grades of technical foam require different production assets, eg reticulated foam requires a reticulation chamber.³⁸
- 6.10 However, outside of certain applications, submissions received by the CMA from third parties in phase 1 generally show that technical foam suppliers are typically able to produce a range of different types of technical foam required by customers.³⁹ In particular, a large number of third parties submitted that suppliers often produce a range of types of technical foam.⁴⁰
- 6.11 Therefore, we do not consider it appropriate to segment within the category of technical foam and we have instead considered any differences between different types of technical foam, where relevant, in the competitive assessment below. In any event, the outcome of any market definition exercise does not determine the outcome of the assessment of the competitive effects of a merger, as it is possible to take into account constraints from outside the relevant market or segmentation within the market such that the CMA will generally not need to come to finely balanced judgements on what is 'inside' or 'outside' the market.⁴¹ In particular, when assessing closeness of competition between the Parties (and the competitive constraints they face), we have considered whether the Parties overlap in the supply of any particular types of foam. As is set out in further detail below, we

³⁴ [redacted] phase 1 call note, 9 March 2022; [redacted] phase 1 call note, 21 March 2022, paragraph 31.

³⁵ [redacted] phase 1 call note, 21 March 2022; and [redacted] phase 1 third party questionnaire response.

³⁶ For example: Carpenter Annex 178 and Annex 179; REF Annex 486, Annex 450.

³⁷ Neither Party produces polyester-based technical foam in the UK. While REF imports and sells polyester- (and polyether-) based foam in the UK, Carpenter only produces and sells polyether-based technical foam (in the UK and worldwide) and does not produce polyester-based technical foam anywhere in the world. See the FMN, paragraphs 13.57, 15.179 and 15.188. [redacted].

³⁸ [redacted] phase 1 call note, 21 March 2022; [redacted] phase 1 call note, 31 March 2022.

³⁹ [redacted] phase 1 third party CMA questionnaire responses.

⁴⁰ [redacted] phase 1 third party CMA questionnaire responses.

⁴¹ [Merger Assessment Guidelines](#), paragraph 9.4.

have noted that the Parties compete particularly closely as regards the supply of technical foam used to produce sponges in the UK, and we have assessed the remaining constraints in relation to the supply of this foam type in the competitive assessment.

Substitutability between comfort foam and converted comfort foam

- 6.12 We find that comfort foam and converted comfort foam belong to separate product markets. The evidence received by the CMA in phase 1 on demand-side substitutability shows that while a portion of comfort foam customers can convert comfort foam in-house so as to manufacture and supply finished consumer goods (so-called '**integrated converters**'),⁴² customers without in-house capabilities are unable to substitute between converted and unconverted comfort foam.⁴³
- 6.13 On the supply-side, the assets required to produce unconverted comfort foam and converted comfort foam are entirely different (as demonstrated by the presence of firms in the UK which convert but are unable to produce (unconverted) comfort foam).⁴⁴ These include firms that purchase unconverted or semi-converted comfort foam which they then convert to sell to third party suppliers of finished products (**independent converters**) and the integrated converters as defined above. The Parties' internal documents also support the use of separate product markets for (unconverted) comfort foam and converted comfort foam.⁴⁵ There is also a degree of differentiation between the conversion activities of vertically integrated producers of comfort foam and integrated/independent converters as explained in more detail from paragraph 7.79 below.

Geographic market

- 6.14 We have considered the scope of the relevant geographic market, in particular whether it should extend to the EEA, UK and Switzerland or whether it should be narrower (ie UK only).

⁴² [redacted] phase 1 third party CMA questionnaire responses.

⁴³ The significance of integrated converters is assessed further in the competitive assessment at paragraph 7.94. [redacted] phase 1 call note, 15 March 2022; [redacted] phase 1 call note, 5 April 2022.

⁴⁴ For example, Clinchplain ([Clinchplain – Belfield Group \(thebelfieldgroup.com\)](https://www.thebelfieldgroup.com)) and Comfortex ([Company – Comfortex](#)) are two examples of firms active in the UK that convert, but do not produce, comfort foam.

⁴⁵ Discussions in the Parties' internal documents are typically separate for unconverted comfort foam (ie blocks) and converted comfort foam. See for example: Carpenter: Annex 168; REF Annex 188.

Supply of comfort foam

6.15 The evidence points to the market for comfort foam being UK-wide for the following reasons:

- (a) As set out in more detail in the competitive assessment of Theory of Harm 1 (horizontal unilateral effects in the supply of comfort foam in the UK), the phase 1 evidence shows that non-UK based suppliers do not make material sales in the UK.
- (b) A large number of third parties, including all of the suppliers that responded to the CMA's phase 1 investigation, submitted that there are high transport costs associated with importing comfort foam from continental Europe to the UK that restrict non-UK based suppliers from competing in the UK.⁴⁶ Some customers also identified the longer lead times associated with deliveries of imported foam as being a barrier to sourcing comfort foam from non-UK-based suppliers.⁴⁷
 - (i) In particular, as set out in the shares of supply analysis below at paragraph 7.9, non-UK based suppliers specifically identified by the Parties, such as Polypreen, make only negligible sales in the UK.
 - (ii) Further, while we note that several firms do market themselves as being compliant with UK Fire Safety Regulations (which suggests that such regulations are a less limiting barrier relative to transport costs associated with imports) in phase 1 several third parties stated that compliance with such regulations is, in reality, difficult and operates as a barrier to importing comfort foam into the UK.⁴⁸
- (c) The Parties' internal documents largely discuss business plans and strategy related to comfort foam on a UK basis or make comments separately for the UK amongst other European countries.⁴⁹

6.16 Based on the evidence set out above, we find that the relevant geographic market for the supply of comfort foam is the UK. We have considered the competitive constraint imposed by suppliers producing comfort foam outside of the UK in the competitive assessment.

⁴⁶ [redacted] phase 1 call note, 9 March 2022; [redacted] phase 1 third party email dated March 25 2022; [redacted] phase 1 call note, 21 March 2022; [redacted] phase 1 third party CMA questionnaire responses.

⁴⁷ [redacted] phase 1 third party CMA questionnaire responses.

⁴⁸ [redacted] phase 1 call note, 7 March 2022; [redacted] phase 1 call note, 17 March 2022; and [redacted] phase 1 call note, 9 March 2022.

⁴⁹ For example: Carpenter, Annex 168, Annex 171, Annex 182, Annex 243; REF Annex 188, Annex 195 (slide 20), Annex 413.

Supply of technical foam

6.17 The evidence points to the market for technical foam being UK-wide for the following reasons:

- (a) As set out in more detail in the competitive assessment of Theory of Harm 2 (horizontal unilateral effects in the supply of technical foam in the UK), with the exception of REF itself, we have not seen evidence of any other technical foam producer (including, those competitors based outside the UK identified by the Parties) making material imports of technical foam into the UK (see further paragraph 7.44 below).⁵⁰ We have also considered Datamyne data relating to volumes of imports, but we consider that there are issues with this dataset which limits its evidentiary value (see paragraph 7.31 below).
- (b) A few third parties that responded to the CMA's phase 1 investigation submitted that certain types of technical foam, particularly more specialised technical foam, must be sourced from outside the UK as these foam types are not produced in the UK.⁵¹ However, a larger number of third parties stated that transport costs are a barrier to importing technical foam, with some third parties noting this in relation to technical sponge foam in particular, such that it would not be cost-effective to source such foam from outside the UK.⁵²
- (c) As discussed at paragraph 6.7 above and below, we consider that technical foam is a highly differentiated product. 'High value' foam for automotive applications is not an area of overlap between the Parties in the UK, and therefore has limited relevance to the competitive assessment of the constraint posed by the Parties on each other in technical foam.
- (d) The internal documents submitted by the Parties contain limited discussion of technical foam. However, one REF internal document on 'flexible foams UK' specifically discusses the market and performance for technical foam for the UK.⁵³ One Carpenter internal document refers to a [redacted] referencing reticulated foams from [redacted].⁵⁴ We consider that this

⁵⁰ REF makes material imports of technical foam into the UK. The CMA's analysis of Annex 545 to the FMN indicates that the volumes of technical foam sold in the UK by REF in 2021 that had been produced outside of the UK were [redacted] the volume of technical foam produced within the UK in 2021; [redacted] phase 1 third party CMA questionnaire responses.

⁵¹ [redacted] phase 1 third party CMA questionnaire responses.

⁵² Technical sponge foam is produced by both of the Parties in the UK (see paragraph 7.49 below); [redacted] phase 1 third party CMA questionnaire responses.

⁵³ REF Annex 413.

⁵⁴ Carpenter set out a quote from the sales report in the Phase 1 Issues Letter Response, paragraph 3.6.

document is of limited evidentiary value to the competitive assessment because Carpenter does not produce this type of technical foam in the UK or elsewhere.

- 6.18 Based on the evidence set out above, we find that the relevant geographic market for the supply of technical foam is the UK. We have considered any competitive constraint imposed by non-UK based suppliers of technical foam as an out of market constraint in the competitive assessment below.

Converted comfort foam

- 6.19 The evidence received by the CMA in phase 1 points to the relevant geographic market for the supply of converted comfort foam being UK-wide. This is because, as with comfort foam (see paragraph 6.15 above), third parties submitted that there are high costs associated with transporting converted comfort foam from outside the UK into the UK. Customers consistently stated that they would be unable to source converted comfort foam from outside the UK,⁵⁵ and that greater geographic proximity of a supplier reduces costs and facilitates quicker deliveries.⁵⁶
- 6.20 Further, similar to the Parties' internal documents that discuss (unconverted) comfort foam, internal documents including the Parties' business plans and strategies in relation to converted comfort foam are also discussed largely on a UK basis or separately for the UK amongst other European countries.⁵⁷
- 6.21 Based on the evidence set out above, we find that the relevant geographic market for the supply of converted comfort foam is the UK.

Conclusion on market definition

- 6.22 For the reasons set out above, for the purposes of our assessment of the Merger, we have found the following relevant markets:
- (a) The supply of comfort foam in the UK.
 - (b) The supply of technical foam in the UK.
 - (c) The supply of converted comfort foam in the UK.

⁵⁵ [redacted] phase 1 call note, 17 March 2022; [redacted] phase 1 call note, 15 March 2022; [redacted], phase 1 third party CMA questionnaire responses.

⁵⁶ [redacted] phase 1 third party CMA questionnaire responses.

⁵⁷ For example: Carpenter, Annex 168, Annex 171, Annex 243; REF Annex 188, Annex 396, Annex 397, Annex 394.

7. Competitive assessment – horizontal unilateral effects

- 7.1 Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade non-price aspects of its competitive offering (such as quality, range, service and innovation) on its own and without needing to coordinate with its rivals.⁵⁸ Horizontal unilateral effects are more likely when the merging parties are close competitors. The CMA assesses the potential competitive effects of mergers by reference to ‘theories of harm’. A theory of harm is a hypothesis about how the process of rivalry could be harmed as a result of a merger.⁵⁹
- 7.2 We have focused our inquiry on three theories of harm identified in the Phase 1 Decision. We have assessed whether the Merger may be expected to result in an SLC in:
- (a) the supply of comfort foam in the UK (Theory of Harm 1);
 - (b) the supply of technical foam in the UK (Theory of Harm 2); and
 - (c) the supply of converted comfort foam in the UK (Theory of Harm 3).
- 7.3 These are each horizontal unilateral effects theories of harm. Each of these theories of harm is assessed separately in the sections below.
- 7.4 As set out in Chapter 3, we accepted the Parties’ request to concede the SLC in all three cases and have used evidence and information gathered in phase 1.

Horizontal unilateral effects in the supply of comfort foam in the UK (Theory of Harm 1)

- 7.5 To assess the likelihood of the Merger resulting in horizontal unilateral effects in the supply of comfort foam, we have considered:
- (a) the Parties’ shares of supply;
 - (b) closeness of competition between the Parties; and
 - (c) competitive constraints imposed on the Parties by alternative suppliers.

⁵⁸ [Merger Assessment Guidelines](#), paragraph 4.1.

⁵⁹ [Merger Assessment Guidelines](#), paragraph 2.11.

Shares of supply

7.6 The CMA calculated its own estimates of shares of supply in phase 1, which are set out in Table 1 and Table 2 below. To estimate these shares, the CMA requested data on the volume and value of UK comfort foam sales made by the Parties and other foam suppliers producing foam in the UK and Europe. The CMA contacted a wide range of suppliers of comfort foam, including all of the suppliers identified by the Parties as being ‘primary competitors’ in the supply of comfort foam in the UK, and for whom the Parties had provided estimated shares.⁶⁰ As this analysis is based on actual supply data from a wide range of suppliers, we consider that its estimates are more accurate than those provided by the Parties (and we have therefore given them more weight in our assessment). We note that while this analysis produced shares and a market size that differ from those submitted by the Parties in phase 1, the data from our analysis relating to UK volume sales of block foam (including both comfort and technical) is very similar to Carpenter’s estimate in its pre-existing internal documents of the size of the UK market for block foam and volume sales of its competitors.⁶¹

⁶⁰ [redacted]. See paragraphs 14.2 and 14.12 of the FMN.

⁶¹ For example: Carpenter Annex 239, Annex 168. We have inferred that references to block foam made in these annexes relate to both comfort and technical foam on the basis that these documents discuss foams used for comfort applications (eg bedding) as well as technical applications (eg packaging).

Table 1: Comfort foam shares of supply by volume, UK

Year	Supplier								Total
	Carpenter	REF	Parties' Combined Share	Flex-2000	Kayfoam	Neveon	Polypreen	Vita	
2019	[30-40]%	[10-20]%	[50-60]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[40-50]%	100%
2020	[30-40]%	[10-20]%	[40-50]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[40-50]%	100%
2021	[30-40]%	[10-20]%	[40-50]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[50-60]%	100%

Source: CMA analysis of data submitted by the Parties and other foam suppliers.

Table 2: Comfort foam shares of supply by value, UK

Year	Supplier								Total
	Carpenter	REF	Parties' Combined Share	Flex-2000	Kayfoam	Neveon	Polypreen	Vita	
2019	[30-40]%	[10-20]%	[50-60]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[40-50]%	100%
2020	[30-40]%	[10-20]%	[40-50]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[40-50]%	100%
2021	[30-40]%	[10-20]%	[40-50]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[40-50]%	100%

Source: CMA analysis of data submitted by the Parties and other foam suppliers.

7.7 The estimates in Table 1 and Table 2 show that Carpenter's share of supply of comfort foam in particular has been consistently high over the last three years by both volume and value, and that the Merged Entity will have high shares of supply of approximately [X]% (volume) and [X]% (value) [40-50]% and a significant increment of [X]% by volume and [X]% by value [10-20]% by both volume and value. Following the Merger, the only supplier with a comparable scale to the Merged Entity would be Vita (which is also the only other supplier with a UK plant). This is consistent with the market view reflected in the Parties' internal documents and third-party views, as discussed further below at paragraphs 7.21 and 7.22.

7.8 Given the limited degree of differentiation in comfort foam (as discussed at paragraph 6.6 above), we consider that these shares of supply provide persuasive evidence that the Merger is likely to raise competition concerns (on the basis that firms with high shares of supply in undifferentiated markets are more likely to be close competitors to their rivals, and thus a merger removing these competitive constraints is more likely to raise competition concerns). These shares show that the Merger will lead to a reduction of suppliers with a material share from three to two post-Merger and we consider that they are particularly informative as regards the competitive assessment of

the closeness of competition between the Parties in the supply of comfort foam.⁶²

- 7.9 We also consider that the shares of supply as set out in Table 1 and Table 2 above show that imports are a limited constraint on the Parties in relation to the supply of comfort foam, given the very small share attributable to those suppliers without a UK manufacturing presence (Flex2000, Neveon, Polygreen and Kayfoam). Further discussion of this is set out in paragraph 7.26 onwards below.

Closeness of competition

- 7.10 In assessing the closeness of competition between the Parties, we have considered:

- (a) third-party views on closeness of competition;
- (b) evidence from internal documents; and
- (c) data submitted by the Parties relating to customer overlaps.

- 7.11 As a starting point, we note that closeness of competition is a relative concept, with overall closeness of competition between the merger firms assessed in the context of the other constraints that would remain post-merger.⁶³ Where there is evidence that competition mainly takes place among few firms, any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary. As anticipated above in the preceding section regarding the Parties' shares of supply, we consider that the small number of significant players supports a *prima facie* expectation that the Parties are close competitors. In line with the CMA's guidelines, we will require, in such a scenario, persuasive evidence that the Parties are not close competitors in order to allay any competition concerns.⁶⁴

- 7.12 In this context, we note that the vast majority of submissions received in phase 1 by the CMA from the Parties' comfort foam customers showed that the Parties are close alternatives as regards the supply of comfort foam in the UK.⁶⁵ All of the submissions received by the CMA from the Parties' competitors in the UK and Europe identified the Parties as competing to supply comfort foam in the UK. To the extent that different types of

⁶² [Merger Assessment Guidelines](#), paragraph 4.14.

⁶³ [Merger Assessment Guidelines](#), paragraph 4.10.

⁶⁴ [Merger Assessment Guidelines](#), paragraph 4.10.

⁶⁵ [§<] phase 1 third party CMA questionnaire responses.

unconverted comfort foam differ in terms of density and hardness, responses indicated that both of the Parties produce very similar ranges of foam types.⁶⁶

- 7.13 In phase 1, third parties submitted that customers' choice of a comfort foam supplier is primarily driven by price, with factors such as customer service, lead times and delivery options also being considered, and that the Parties perform similarly in terms of these parameters. For example, one customer noted that [REDACTED] and that [REDACTED].⁶⁷
- 7.14 A significant and material portion of third parties - including the majority of comfort foam customers and suppliers that responded to the CMA's phase 1 investigation - were concerned about the Merger's impact on competition.⁶⁸ A material portion [REDACTED] of these customers stated that the Merger will reduce the number of UK unconverted comfort foam suppliers from three to two, and similarly a material portion [REDACTED] of these customers stated that reduced choices will lead to a reduction in competition and higher prices.⁶⁹
- 7.15 The Parties' internal documents also generally illustrate that the Parties view each other as close competitors in the supply of comfort foam in the UK. Carpenter's internal documents show that REF is considered to be one of three main comfort foam suppliers in the UK, alongside Vita and Carpenter itself.⁷⁰ Similarly, an REF internal document demonstrates that it monitors and competes with Carpenter for comfort foam customers in the UK.⁷¹
- 7.16 We have additionally considered three separate datasets submitted by the Parties in phase 1:
- (a) **Data on the largest customers.** The Parties submitted data on each of their top ten largest UK comfort foam customers by value for 2021, with [REDACTED] customers being included in both REF and Carpenter's top ten comfort foam customers in this period. We note as a first limitation that this data is a relatively small subset which only details sales to the top ten of each Party's customers in the UK. Second, to the extent that customers source comfort foam from a single supplier, this customer overlap analysis will also underestimate the competitive interaction between the Parties. Notwithstanding these limitations, the data shows that there is a

⁶⁶ [REDACTED] phase 1 third party CMA questionnaire response.

⁶⁷ [REDACTED] phase 1 call note, 17 March 2022, paragraphs 14 and 17.

⁶⁸ [REDACTED] phase 1 third party CMA questionnaire responses.

⁶⁹ [REDACTED] phase 1 third party CMA questionnaire responses and phase 1 response to the invitation to comment published on the CMA case page.

⁷⁰ For example: Carpenter Annex 168, Annex 158, Annex 243 (slide 4).

⁷¹ For example: REF Annex 395.

degree of customer overlap between the Parties' top ten comfort foam customers.⁷²

- (b) **Data concerning UK customers in a recent six month period.** The Parties submitted data that sets out that [redacted] customers purchased comfort foam from both Carpenter and REF in the UK, in the six-month period prior to 17 February 2022. We note, however, that this data covers a relatively short time period, and does not detail the total number of customers purchasing comfort foam from the Parties in this period. As such, while demonstrating a degree of competitive interaction, the probative value of this data is very limited.
- (c) **Data concerning a sample of ten recent Carpenter orders.** Carpenter submitted data that it had compiled in March 2022 setting out the competitors it considered itself to have competed with for a sample of their ten most recent (as of 11 March 2022) comfort foam orders in the UK. We note that ten orders is a very limited sample size,⁷³ and that these competitors were not identified in contemporaneous records produced in the ordinary course of business, but as a retrospective exercise during the CMA's phase 1 investigation of the Merger. Notwithstanding these limitations, we note that Carpenter identified [redacted] and Recticel/REF as its only competitors for nine out of these ten orders.⁷⁴

7.17 We find that the evidence set out above demonstrates that the Parties compete very closely as regards the supply of comfort foam in the UK. The Merger will therefore remove an important constraint on each of the Parties in an already highly concentrated market.

Competitive constraints

7.18 Unilateral effects are more likely where customers have little choice of alternative supplier. We have assessed whether there are alternative suppliers which would provide a competitive constraint on the Merged Entity.

⁷² In 2021, [redacted] of these customers [redacted] were top customers of both Carpenter and REF. Sales made to these [redacted] customers however were limited, and accounted for only [redacted]% of Carpenter's UK comfort foam sales in 2021, and [redacted]% of REF's UK comfort foam sales in 2021 (FMN, Annex 565; CMA analysis of FMN, Annex 565 and FMN, Annex 541). While REF in particular made only very limited sales to [redacted] and [redacted], we consider REF's more limited sales of comfort foam as reflective of REF's more fragmented comfort foam customer base, rather than as evidence of a lack of closeness between the Parties.

⁷³ We also note that the total value of these orders was just £[redacted] (see FMN, Annex 568). For comparison, Carpenter's total revenues from the supply of comfort foam in the UK in 2021 were £[redacted].

⁷⁴ [redacted] was identified for [redacted] out of the nine orders for which competitors were identified. REF was identified for [redacted] out of the nine orders for which competitors were identified. REF submitted that the firms it was competing against for the relevant sample of orders are [redacted] (FMN, Annex 568).

- 7.19 We have assessed the constraint from these alternatives by taking into consideration:
- (a) the constraint imposed on the Parties by suppliers producing foam in the UK (namely, Vita);
 - (b) the constraint imposed on the Parties by suppliers producing foam outside of the UK; and
 - (c) additional competitive constraints imposed by imports of downstream products and alternative materials.

Constraint imposed on the Parties by suppliers producing foam in the UK (Vita)

- 7.20 Outside of the Parties, Vita is at present the only comfort foam supplier that produces comfort foam in the UK. As the shares of supply calculations at Table 1 and Table 2 illustrate, Vita is a significant supplier of comfort foam in the UK with an approximate share of [REDACTED] [50-60]% by volume and [REDACTED] [40-50]% by value. Post-Merger, it will be the only remaining competitor with a comparable share to that of the Merged Entity.
- 7.21 The vast majority of comfort foam customer responses and all responses from suppliers active in the UK and Europe received by the CMA in phase 1 identified Vita as being a competitive constraint on the Parties.
- 7.22 The Parties' internal documents show that they consider Vita to be one of the three main suppliers of comfort foam in the UK (in addition to each other).⁷⁵ For example one of Carpenter's internal documents on its UK strategy clearly identifies [REDACTED].⁷⁶ REF's internal documents also show that it competes closely with Vita for customers and [REDACTED].⁷⁷
- 7.23 Furthermore, in the data submitted in phase 1 on its ten most recent orders in the UK, Carpenter identified Vita as being (in addition to REF) a competitor in [REDACTED] out of these, which – notwithstanding the limitations of this dataset, as discussed at paragraph 7.16(c) above – shows that it perceives Vita as an important competitive constraint for these orders.
- 7.24 We therefore find that Vita is a strong constraint on the Parties in the supply of comfort foam in the UK.

⁷⁵ For example: Carpenter Annex 168, Annex 239; REF Annex 394.

⁷⁶ For example, Carpenter Annex 168,

⁷⁷ REF Annex 394, Annex 258, Annex 395.

7.25 We note that Strandfoam is expected imminently to open a new comfort foam plant in the UK. This new entry is expected to occur irrespective of the Merger. We discuss the competitive constraint that is likely to be exerted by Strandfoam's expected entry in greater detail below in Chapter 8 (Barriers to entry and expansion). For the reasons set out at paragraphs 8.10 to 8.12 below, we conclude that Strandfoam's planned entry would likely exert only a limited constraint on the Parties (and that, post-Merger, it would likely exert only a limited constraint on the Merged Entity).

Constraint imposed by suppliers producing foam outside of the UK

7.26 As regards Kayfoam, a Republic of Ireland-based supplier that does not have a UK plant, the CMA's share of supply analysis shows that Kayfoam's share does not exceed [redacted] [0-5]% on either a volume or value basis and is significantly smaller than that of the Merged Entity.

7.27 Evidence received by the CMA in phase 1 from third parties shows that Kayfoam competes only to a very limited extent with the Parties in the UK.⁷⁸ None of the Parties' customers that submitted a response to the CMA's phase 1 investigation identified Kayfoam as an alternative supplier for purchases they had made from the Parties, and only a minority submitted that they had purchased comfort foam from Kayfoam in the last three years.⁷⁹ Only one competitor identified Kayfoam as competing to supply comfort foam in the UK.⁸⁰ In addition, Kayfoam is not commonly referred to as a significant threat in Carpenter's internal documents, with Carpenter referring to Kayfoam as [redacted] in the UK.⁸¹ REF mentions Kayfoam in its internal documents to a much lesser extent than it mentions Carpenter or Vita.⁸²

7.28 As regards non-UK based suppliers more generally, the vast majority of both customers and competitors that responded to the CMA's phase 1 investigation consistently submitted that such suppliers are not able to compete to supply comfort foam in the UK. Customers and competitors identified the transport costs associated with importing comfort foam as being

⁷⁸ [redacted] phase 1 call note, 9 March 2022; [redacted] phase 1 third party CMA questionnaire response.

⁷⁹ [redacted] phase 1 third party CMA questionnaire responses.

⁸⁰ [redacted] phase 1 call note, 7 March 2022.

⁸¹ For example, as cited at paragraph 7.22 above, one of Carpenter's internal documents titled 'UK Strategic Plan' identifies [redacted], by contrast noting Kayfoam as simply another [redacted]. Carpenter Annex 168. Carpenter's Annex 182 mentions Kayfoam with a share of supply of '[redacted]%' which is the smallest out of the suppliers mentioned ie Carpenter, Recticel and Vita. We additionally note the Carpenter sales report of 6 June 2022, which Carpenter has submitted demonstrates that Kayfoam is competing with Carpenter to supply [redacted]. The Phase 1 Issues Letter Response, paragraph 4.8. While this document was not provided to the CMA, and we have been unable to assess its contents, we do not consider Kayfoam competing for [redacted] customers demonstrative of it exerting a strong constraint on Carpenter.

⁸² For example REF documents Annex 258 and Annex 395.

the primary reason for this and some also referenced the UK's Fire Safety Regulations.⁸³

- 7.29 Consistent with this evidence, only a small minority of the comfort foam customers that responded to the CMA's phase 1 investigation submitted that they source comfort foam from outside the UK.⁸⁴ Analysis of these customers' purchases of comfort foam shows that these imported purchases appear to supplement larger scale purchases made by these customers from suppliers producing foam in the UK (namely, the Parties and Vita). Indeed, the majority of these customers submitted that: (i) they imported only specialty foam types that are not produced in the UK;⁸⁵ or (ii) they had been forced to source foam from overseas during 2020 due to lockdown measures imposed in the UK.⁸⁶ In these instances, we do not consider that these imported foams are substitutable with the comfort foams produced by the Parties in the UK.
- 7.30 Finally, the Parties' internal documents make only very limited reference to constraints from competitors other than the other Party or Vita.⁸⁷
- 7.31 We also considered Datamyne data relating to volumes of imports which was submitted by the Parties during phase 1. However, we consider that this data likely overstates the true volume of imports of flexible PU foam (including, comfort foam) made to the UK because it includes data relating to imports of products not relevant to the Merger. The Datamyne data is also not consistent with the wide range of evidence set out above that suggests that non-UK based suppliers do not impose a sufficient constraint in the supply of comfort foam in the UK. We have therefore placed limited evidential weight on this data.
- 7.32 We therefore find that suppliers producing foam outside of the UK do not exert a sufficient competitive constraint on the Parties (whether individually, or in aggregate).

⁸³ The UK's Fire Safety Regulations were also noted as a barrier by several third parties who, as noted at regulation 6.15(b)(ii), indicated that compliance with such regulations could be difficult; [redacted] phase 1 call note, 9 March 2022; [redacted] phase 1 third party email dated March 25 2022; [redacted] phase 1 call note, 21 March 2022; [redacted] phase 1 call note, 7 March 2022; [redacted] phase 1 third party CMA questionnaire response; [redacted] phase 1 third party CMA questionnaire responses.

⁸⁴ [redacted] phase 1 third party CMA questionnaire responses.

⁸⁵ [redacted] phase 1 third party CMA questionnaire responses.

⁸⁶ [redacted] phase 1 third party CMA questionnaire response.

⁸⁷ Non-UK based suppliers listed by the Parties as competing in the UK, for example Neveon, Polypreen, Megaflex, are generally only discussed in their internal documents as competitors in relation to the Parties' activities in other European countries and not specifically in the UK. See for example: Carpenter Annex 172, Annex 159, Annex 163. Carpenter's internal document, Annex 183, only briefly mentions 'Plama-Pur, Slovenia' as part of 'other foamers'; REF Annex 390, Annex 493.

Constraint imposed by imports of downstream products

7.33 We find that comfort foam incorporated into finished goods that are imported into the UK will not pose a sufficient constraint on the Parties, as any foam that has already been incorporated into a finished product will not constitute a substitute for the Parties' customers, ie firms purchasing comfort foam to use as an input into their own finished goods. Consistent with this, we have not found any internal documents of the Parties identifying imports of downstream products as a competitive threat.

Conclusion on Theory of Harm 1

7.34 For the reasons set out above, we find that:

- (a) the Parties have a very high combined market share (which has been stable over time) in a highly concentrated market comprised of three main players: the Parties and Vita;
- (b) pursuant to the concentrated nature of the market, and the homogeneity of the product, the Parties necessarily compete closely, imposing an important competitive constraint on each other (supported also by evidence from in particular, third parties and the Parties' internal documents); and
- (c) the Parties do not face sufficient constraints in the supply of comfort foam. Other than Vita (the only other supplier that produces comfort foam in the UK), which imposes a strong constraint on the Parties, other suppliers (including non-UK based suppliers such as Kayfoam) do not impose a material competitive constraint on the Parties.

7.35 Accordingly, we consider that the Parties compete closely and that the remaining competitive constraints are not sufficient to offset the loss of competition between them potentially resulting from the Merger.⁸⁸

7.36 We also consider that the adverse effects which may be expected to result from any SLCs that we may find would be that the Merged Entity would be under less pressure to compete and this would result in reduced choice, and higher prices or lower quality and reduced innovation compared to what would otherwise have been the case absent the Merger.

7.37 Before reaching a decision on whether the Merger may be expected to result in an SLC in respect of the supply of comfort foam in the UK, we consider in

⁸⁸ [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 4.8.

Chapter 8 whether there are any countervailing factors (specifically entry and/or expansion) that could prevent such an SLC arising from the Merger.

Horizontal unilateral effects in the supply of technical foam in the UK (Theory of Harm 2)

7.38 To assess the likelihood of the Merger resulting in horizontal unilateral effects in the supply of technical foam, we have considered:

- (a) the Parties' shares of supply;
- (b) closeness of competition between the Parties; and
- (c) competitive constraints imposed on the Parties by alternative suppliers.

7.39 As noted in paragraph 6.11, the Parties overlap in the supply of standard polyether technical foam (the type used to produce sponges) in the UK.

Shares of supply

7.40 As a starting point for its share of supply analysis, we note that technical foam is a differentiated product (paragraph 6.7 above and 7.46 below) and, as such, shares of supply may be less informative as a source of evidence on closeness of competition.⁸⁹ We have, therefore, considered the shares of supply together with other sources of evidence on closeness of competition between the Parties in this market.⁹⁰

7.41 Table 3 and Table 4 below set out shares of supply (and the total market size) calculated using sales volume and value data submitted by the Parties and other foam producers based in the UK and Europe. The tables are based on data gathered at phase 1 relating to a wide range of suppliers of technical foam (including all of the suppliers identified by the Parties as being 'primary competitors' in the supply of technical foam in the UK).⁹¹

7.42 As noted at paragraph 7.6 in relation to comfort foam, while the analysis the CMA carried out produced shares, and a market size, that differ from those submitted by the Parties in phase 1, the data gathered by the CMA relating to UK volume sales of block foam (including both comfort and technical) is very

⁸⁹ [Merger Assessment Guidelines](#), paragraph 4.14 and 4.15.

⁹⁰ This is in line with the principles noted in the [Merger Assessment Guidelines](#), paragraph 2.25, which states that in attaching weight to different pieces of evidence, there is no set hierarchy between quantitative evidence and qualitative evidence, and the CMA may attach greater weight to one or the other as appropriate in the circumstances, depending on the relative quality of such evidence.

⁹¹ These were Vita; Neveon/Greiner/Eurofoam; Olmo/Toscana Gomma; Plama-pur; and Flexipol. See FMN, paragraph 15.141.

similar to Carpenter’s estimate of the size of the UK market for block foam and volume sales of its competitors in its pre-existing internal documents.⁹²

Table 3: Technical foam shares of supply by volume, UK

Year	Supplier		Parties' Combined Share	Kayfoam	Neveon	Plama-pur	Vita	Total
	Carpenter	REF						
2019	[30-40]%	[20-30]%	[60-70]%	[0-5]%	[0-5]%	[0-5]%	[30-40]%	100%
2020	[30-40]%	[20-30]%	[60-70]%	[0-5]%	[0-5]%	[0-5]%	[30-40]%	100%
2021	[30-40]%	[30-40]%	[60-70]%	[0-5]%	[0-5]%	[0-5]%	[30-40]%	100%

Source: CMA analysis of data submitted by the Parties and other foam suppliers

Table 4: Technical foam shares of supply by value, UK

Year	Supplier		Parties' Combined Share	Kayfoam	Neveon	Plama-pur	Vita	Total
	Carpenter	REF						
2019	[30-40]%	[20-30]%	[50-60]%	[0-5]%	[0-5]%	[0-5]%	[30-40]%	100%
2020	[20-30]%	[30-40]%	[50-60]%	[0-5]%	[0-5]%	[0-5]%	[40-50]%	100%
2021	[30-40]%	[20-30]%	[60-70]%	[0-5]%	[0-5]%	[0-5]%	[30-40]%	100%

Source: CMA analysis of data submitted by the Parties and other foam suppliers

7.43 The estimates in Table 3 and Table 4 show that that the Parties are, along with Vita, two of just three sizeable suppliers of technical foam in the UK.⁹³ REF’s consistently strong share is also supported by feedback from third parties on its strength and reputation in technical foam (discussed below), and the Parties’ own merger rationale.⁹⁴ Each Party’s high share has been consistent over the time period for which data is available.

7.44 These shares also show that the market presence of non-UK based suppliers of technical foam in the UK market (namely, Kayfoam, Neveon and Plama-pur) is limited.

⁹² For example: Carpenter Annex 239, Annex 168. We have inferred that references to block foam made in these annexes relate to both comfort and technical foam on the basis that these documents discuss foams used for comfort applications (eg bedding) as well as technical applications (eg packaging).

⁹³ FMN, paragraph 15.183. In phase 1, the Parties submitted that the CMA’s estimates understated Vita’s scale in particular. However, we note that [30-40]%. We are therefore satisfied that the CMA’s data does not understate Vita’s presence in the supply of technical foam.

⁹⁴ See [press release](#) announcing the transaction dated 7 December 2021, in which Brad Beauchamp (CEO of Carpenter) references REF’s ‘strong know how in technical foams’ and ‘its excellent R&D track record.’

Closeness of competition

- 7.45 We have examined the closeness of competition between the Parties and considered within our assessment:
- (a) the Parties' product offerings;
 - (b) third-party views on closeness of competition; and
 - (c) data submitted by the Parties relating to customer overlaps.
- 7.46 As described at paragraph 6.7 above, we consider that technical foam is a differentiated product. Different types of technical foam may be required for different applications, and different production methods may be used to produce different types of technical foam, eg polyester versus polyether technical foam.
- 7.47 We note that, as a general principle, the question of closeness of competition relates to whether suppliers compete closely to supply certain categories of products, or certain categories of customers. The proportion of one merging party's business that is dedicated to that particular category of product or customer is typically less relevant to the question of whether that firm competes closely against other market participants to supply that particular category of product or customer.
- 7.48 We consider that REF sells a greater range of technical foam, for a wider range of applications in the UK, than Carpenter does. This difference in the Parties' product portfolios is supported by sales data submitted by the Parties in phase 1, which shows that a material portion of REF's UK sales of technical foam are for applications for which Carpenter does not produce substantial volumes of foam. Almost [REDACTED] of REF's total sales of technical foam in the UK were sales of falling within its 'Mobility Performance' portfolio, which are used in conventional and electric vehicles, aircraft, aerospace and a wide range of public transport applications.⁹⁵ The [REDACTED] of the foams REF sells for these applications are polyester-based.⁹⁶ By contrast, [REDACTED] of Carpenter's (entirely polyether-based) technical foam sales in the UK in 2021 were accounted for by applications relating to: Consumer & Medical Care; and Industrial Solutions.⁹⁷

⁹⁵ CMA analysis of FMN, Annex 570. REF's portfolios of technical foam are described on its website at [Products | Recticel Engineered Foams](#).

⁹⁶ Phase 1 Issues Letter Response, paragraph 3.32.

⁹⁷ FMN, Annex 570.

- 7.49 In the UK, Carpenter and REF both sell conventional polyether-based technical foam (and in particular, technical sponge foam). The evidence, discussed further below, shows that the Parties compete closely to supply this particular category of products. Some third parties that responded to the CMA's phase 1 investigation considered the Parties to be the only options for their purchases of technical sponge foam. The majority of third parties (both technical foam customers and competitors) stated that the Merger would have a negative effect on competition in the supply of technical foam generally in the UK.⁹⁸
- 7.50 Moreover, while not necessary to support our assessment of closeness of competition between the Parties in polyether-based technical foam (and specifically, in technical sponge foam), we note that sales of these foam types represent a material portion of REF's business (as well as that of Carpenter's).⁹⁹
- 7.51 In addition to the submissions the CMA received in phase 1 from third parties, we have considered three datasets submitted by the Parties in phase 1 that were equivalent to those submitted in relation to comfort foam, the limitations in evidentiary value of which are discussed at paragraph 7.16 above. We consider that the same limitations that affect the insight that the comfort foam analysis can be considered to provide are equally applicable here in relation to technical foam. In addition, we note the following:
- (a) **Data on the largest customers.** The Parties submitted data on their top ten UK technical foam customers in 2021. Carpenter submitted that this dataset showed limited competitive interaction between the Parties, with only [redacted] customer being a top ten customer of both Carpenter and REF.¹⁰⁰ However, this sample dataset is not limited to sales of polyether-based technical foam (in particular technical sponge foam) and includes sales of other types of foam in which the Parties do not overlap. This dataset, therefore, is not informative of closeness of competition between the Parties in the specific category of products and customers in which they overlap. Furthermore, where this overlap analysis does include customers for technical sponge foam, to the extent customers source this foam from a single supplier, the analysis will also underestimate the competitive interaction between the Parties.

⁹⁸ [redacted] phase 1 third party CMA questionnaire responses; [redacted] phase 1 third party CMA questionnaire responses.

⁹⁹ Sales of technical sponge foam accounted for [redacted]% (by volume) of both Carpenter's and REF's 2021 UK sales.

¹⁰⁰ Phase 1 Issues Letter Response, paragraph 3.33.

- (b) **Data concerning UK customers in a recent six month period.** The second of these datasets sets out that [redacted] customers purchased technical foam from both Carpenter and REF, in the six-month period prior to 17 February 2022.¹⁰¹ The Parties submitted that in the vast majority of these instances, Carpenter does not supply a comparable type of technical foam to the foam the relevant customer purchased from REF.¹⁰² However, this sample dataset is not limited to sales of polyether-based technical foam (in particular technical sponge foam) and includes sales of other types of foam (such as polyester-based technical foam) in which the Parties do not overlap. As the focus of our closeness of competition assessment in technical foam pertains to the former polyether-based technical foam category of products, this dataset is therefore not informative of closeness of competition between the Parties in the specific category of products and customers in which they overlap.¹⁰³
- (c) **Data on the sample of ten recent orders.** Both Parties also submitted data that they had compiled in March 2022, setting out who the Parties considered themselves to have competed with for a sample of their ten most recent (as of 11 March 2022) technical foam orders in the UK.¹⁰⁴ We note that the same limitations flagged at paragraph 7.16(c) apply to this dataset.¹⁰⁵ We also note that this dataset is not limited to sales of technical sponge foam (the area of primary overlap between the Parties) and as such, the ten most recent sales may not be informative of closeness in that segment. Notwithstanding this, we note that the Parties did identify each other as competing in a number of these most recent orders.¹⁰⁶

7.52 Overall, we find that while REF sells a broader range of technical foam than Carpenter, the Parties overlap and are close competitors in the supply of polyether-based technical foam (and technical sponge foam in particular).

¹⁰¹ FMN, Annex 574.

¹⁰² Parties' response to question 1 of CMA's request for information dated 22 June 2022.

¹⁰³ We also note that this data covers a relatively short time period and also does not detail the total number of customers purchasing technical foam from the Parties in this period. As such, while demonstrating a degree of competitive interaction, the probative value of this data is very limited.

¹⁰⁴ FMN, Annex 568.

¹⁰⁵ We also note that the total value of these orders was just [redacted] (see FMN, Annex 568). For comparison, the Parties' combined total revenues from the supply of technical foam in the UK in 2021 were [redacted].

¹⁰⁶ Carpenter identified REF as a competitor for [redacted] orders; REF identified Carpenter as a competitor for [redacted] orders. (FMN, Annex 568)

Competitive constraints

- 7.53 We have assessed the constraint from alternative suppliers by taking into consideration:
- (a) the constraint imposed on the Parties by suppliers producing foam in the UK (namely, Vita);
 - (b) the constraint imposed on the Parties by suppliers producing foam outside of the UK; and
 - (c) additional competitive constraints imposed by imports of downstream products and alternative materials.

Constraint imposed on the Parties by suppliers producing foam in the UK (Vita)

- 7.54 Vita is the only foam supplier other than the Parties that produces foam in the UK. As demonstrated by the CMA's analysis of shares of supply, Vita will be the only sizable competitor remaining post-Merger.
- 7.55 Third party submissions received by the CMA in phase 1 show that Vita is generally a strong competitor in the supply of technical foam in the UK, and that it competes with the Parties to supply foam suitable for a range of applications.¹⁰⁷ Vita told the CMA that Vita produces foam that may be used to produce cleaning sponges,¹⁰⁸ but does not supply all grades. Some customers, however, told the CMA that Vita does not produce polyether-based foam types that would be a suitable alternative to all of the technical sponge foam types produced by the Parties.¹⁰⁹ As such, the Parties represent the only UK-based option for customers purchasing specific types of technical sponge foam.
- 7.56 We therefore find that while Vita is a strong competitor to the Parties in the supply of technical foam more generally, the evidence is mixed as to the strength of the competitive constraint it poses in technical sponge foam in particular.

Constraint imposed by suppliers producing foam outside of the UK

- 7.57 We have considered the evidence with respect to both imports in general and specific non-UK based suppliers identified by the Parties in phase 1.

¹⁰⁷ [redacted] phase 1 third party CMA questionnaire responses.

¹⁰⁸ For example, the following webpage was identified by Carpenter: <https://www.thevitagroup.com/wp-content/uploads/2020/06/DPL098-Caligen-Insert-Consumer.pdf>.

¹⁰⁹ [redacted], phase 1 third party CMA questionnaire responses and phase 1 call note, 9 March 2022.

- 7.58 With respect to imports in general, the evidence received by the CMA in phase 1 shows that high transport costs pose barriers to importing lower value technical sponge foam. One third party explained that this foam is of a low density, and lower price, and that it is not possible to source this product from outside of the UK.¹¹⁰ Third party submissions indicated that transport costs may be less prohibitive for importing higher value or more specialist types of technical foam.¹¹¹ The economic viability of importing higher value foam products is not, however, informative with respect to the viability of importing lower value foam products such as technical sponge foam. Furthermore, higher value foam types such as those for automotive applications are unlikely to be substitutable for lower value technical sponge foam for the reasons outlined above at paragraph 6.8.¹¹²
- 7.59 As noted in relation to Table 3 and Table 4 above, we have not seen evidence that any non-UK based suppliers make material sales of technical foam in the UK.¹¹³ We have also not seen any evidence that any non-UK based suppliers make material sales specifically of polyether-based technical sponge foam in the UK.
- 7.60 We have considered the position of Kayfoam in particular. We note that Kayfoam was identified as a competitor for [redacted] of Carpenter's ten recent upstream technical foam orders.¹¹⁴ As explained above at paragraph 7.51(c), ten orders is a very limited sample size and the competitors included in that dataset were not identified in contemporaneous records produced in the ordinary course of business, but were instead identified as part of a retrospective exercise to prepare that dataset for submission to the CMA in phase 1. As such, we find that the identification of Kayfoam as a competitor for [redacted] orders in that dataset is of limited evidential weight.
- 7.61 However, we note that sales data submitted by Kayfoam (see Tables 3 and 4 above) shows it has a limited presence in the UK. Consistent with this, third parties made minimal references to Kayfoam as an alternative to the Parties in their submissions to the CMA in phase 1.¹¹⁵

¹¹⁰ [redacted] phase 1 third party CMA questionnaire response; [redacted] phase 1 email dated 25 March 2022; and [redacted] phase 1 third party CMA questionnaire response.

¹¹¹ [redacted] phase 1 call note, 9 March 2022.

¹¹² [redacted] phase 1 third party CMA questionnaire response.

¹¹³ For the reasons outlined above at paragraph 7.31, the CMA has not placed evidential value on the Datamyne data.

¹¹⁴ Phase 1 Issues Letter Response, paragraph 3.36.

¹¹⁵ [redacted] phase 1 third party CMA questionnaire response.

7.62 We therefore find that imports from non-UK based suppliers exert only a limited constraint in the supply of technical foam to sponge manufacturers in the UK.

Additional competitive constraints

7.63 We have considered whether the Parties face competition from:

- (a) other materials, such as cellulose and natural sponge, that compete with technical foam at the upstream level;¹¹⁶ and
- (b) imports of downstream finished product cleaning sponges, including those made out of these alternative materials.¹¹⁷

7.64 As regards these submissions we find that:

- (a) No evidence submitted by third parties in phase 1 indicated that such alternative materials may be a substitute for technical foam. The Parties also confirmed that a customer purchasing foam to manufacture sponges could not substitute these inputs for polyether foam and produce the same end product.¹¹⁸
- (b) While imports of downstream finished good cleaning sponges may be an alternative for consumers, they are unlikely to be an alternative for suppliers purchasing technical foam from the Parties in the UK for use in manufacturing sponges. Consistent with this, we note that we have not found any internal documents of the Parties identifying imports of finished cleaning sponges as a competitive threat.

Conclusion on Theory of Harm 2

7.65 For the reasons set out above, we find that:

- (a) the Parties are two of just three sizeable suppliers of technical foam in the UK;
- (b) there is material degree of competitive interaction between the Parties in the supply of technical foam in the UK, as the Parties overlap and are close competitors for the supply of polyether-based technical foam (in particular, technical sponge foam);

¹¹⁶ Phase 1 Issues Letter Response, paragraph 3.46.

¹¹⁷ Phase 1 Issues Letter Response, paragraph 3.47.

¹¹⁸ Carpenter's response at the Issues Meeting on 13 June 2022.

(c) the Parties do not face sufficient constraints in the supply of technical sponge foam. There is mixed evidence with respect to the strength of the constraint Vita poses in technical sponge foam, but even taking Vita into account as a competitor, there are very limited alternatives in this segment. Imports from non-UK based suppliers exert only a limited constraint in the supply of technical foam to sponge manufacturers in the UK.

7.66 Accordingly, we consider that the Parties compete closely and that the remaining competitive constraints are not sufficient to offset the loss of competition between them potentially resulting from the Merger.¹¹⁹

7.67 We also consider that the adverse effects which may be expected to result from any SLCs that we may find would be that the Merged Entity would be under less pressure to compete and this would result in reduced choice, and higher prices or lower quality and reduced innovation compared to what would otherwise have been the case absent the Merger.

7.68 Before reaching a decision on whether the Merger may be expected to result in an SLC in respect of the supply of technical foam in the UK, we consider in Chapter 8 whether there are any countervailing factors (specifically entry and/or expansion) that could prevent such an SLC arising from the Merger.

Horizontal unilateral effects in the supply of converted comfort foam in the UK (Theory of Harm 3)

7.69 To assess the likelihood of the Merger resulting in horizontal unilateral effects in the supply of converted comfort foam, we have considered:

- (a) the Parties' shares of supply;
- (b) closeness of competition between the Parties; and
- (c) competitive constraints imposed on the Parties by alternative suppliers.

Shares of supply

7.70 We have calculated estimates of the Parties' shares of supply in converted comfort foam by assuming that the size of the UK market for converted comfort foam is equal to 80% of our estimate of the size of the UK market for

¹¹⁹ [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 4.8.

unconverted comfort foam.¹²⁰ Shares for individual competitors in converted comfort foam, including the Parties', were estimated using sales volume data submitted by these firms. The remaining share was aggregated in the 'other' category below.

7.71 We note that the methodology described above results in an estimated share of supply for 'other' suppliers' that is very large. However:

- (a) The estimated volume attributed to 'other' in Table 5 is not based on data collected from individual suppliers or on good data regarding the overall volume of converted comfort foam sales in the UK. Rather, as described above it is based on the size of the UK market for converted comfort foam and an assumption that only 20% of unconverted foam is lost during the conversion process. To illustrate the effect of this assumption Table 6 shows shares of supply based solely on data collected from individual suppliers (ie excluding 'other'). As Table 6 shows, each of the Parties is significantly larger than any supplier from whom the CMA received data, and the Merged Entity is more than [x] bigger than any other supplier;
- (b) For the reasons given in paragraph (a) we do not have a good basis on which to assess the true size of the 'other' suppliers. However, if 'other' suppliers accounted for as large a share of supply of converted comfort foam as implied by Table 5, then we would expect to see significant evidence that these suppliers are a significant competitive constraint on the Parties. However, while we have received some evidence indicating that other suppliers compete with the Parties, narrative submissions received from customers and competitors have not identified any competitors likely to exert a significant constraint on the Merged Entity and, for the reasons set out below at paragraph 7.79, we consider that the Parties may have some advantages when compared to integrated and independent converters, which may account for their comparatively larger share; and
- (c) The 'other' suppliers' share include integrated converters, that is companies that convert comfort foam in-house for manufacturing their finished products. Some of these companies may not supply converted comfort foam to third parties (or may do so only to a limited extent), and therefore may not actually compete with the Parties. We do not consider

¹²⁰ This value corresponds to the total sales of unconverted comfort foam (by volume) made by the suppliers identified in Table 5 in each year. The CMA assumed that 20% of unconverted foam is lost as scrap during the foam conversion process, and that it is reasonable to make this assumption based on the observation that roughly [x]% of the volume of Carpenter's [x] is sold as converted foam (please see Annex 541 to the FMN). However, we note that if the proportion of unconverted comfort foam lost as scrap during the conversion process were actually larger than 20% for other suppliers, the converted comfort foam market size would be smaller.

that integrated converters exert a strong constraint on the Parties as set out at paragraph 7.97(b) below. We do not have a basis to assess what proportion of the ‘other’ suppliers in the market are integrated converters.

7.72 For these reasons, we consider that, while these shares provide a useful indication as to suppliers’ relative presence, they do not give an accurate indication of suppliers’ absolute scale. Moreover, given differentiation in the supply of converted comfort foam, we consider that the market share estimates will not fully reflect the strength of the competitive constraint posed by market participants on one another.

Table 5: Converted comfort foam shares of supply by volume for 2019-2021, UK

											%
Supplier											
Year	Carpenter	REF	Parties' Combined Share	Breasley (UK) Ltd	Clinchplain Ltd	Drury Adams Ltd	Kayfoam	Peak Converters Ltd	Vita	Other	Total
2019	[10-20]	[5-10]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[5-10]	[0-5]	[60-70]	100
2020	[10-20]	[5-10]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[60-70]	100
2021	[10-20]	[5-10]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[5-10]	[60-70]	100

Source: CMA analysis of the Parties’ and competitors’ sales data

Table 6: Converted comfort foam shares of supply by volume for 2019-2021 excluding ‘other’, UK

											%
Supplier											
Year	Carpenter	REF	Parties' Combined Share	Breasley (UK) Ltd	Clinchplain Ltd	Drury Adams Ltd	Kayfoam	Peak Converters Ltd	Vita	Total	
2019	[20-30]	[20-30]	[40-50]	[0-5]	[5-10]	[10-20]	[0-5]	[10-20]	[10-20]	100	
2020	[30-40]	[20-30]	[50-60]	[0-5]	[5-10]	[10-20]	[0-5]	[5-10]	[10-20]	100	
2021	[20-30]	[20-30]	[50-60]	[0-5]	[5-10]	[10-20]	[0-5]	[5-10]	[10-20]	100	

Source: CMA analysis of the Parties’ and competitors’ sales data

7.73 We have considered the robustness of the data in Table 5. The data in the table is on specific input from third parties on the volume of their sales, is more robust than estimates of their competitors’ sales prepared by the Parties during phase 1. We note, in particular, that the CMA requested data on [redacted], and we are therefore satisfied that the data received does not understate Vita’s presence.

7.74 We note that while the evidence shows that comfort foam may be a homogenous product, the final converted foam components appear more differentiated. In particular, differentiation appears to arise from the complexity

of the converted foam component being produced, generally with more complex conversion at lower volumes required for furniture components (further discussion on differentiation within converted comfort foam can be found at paragraph 7.79 below), and less complex conversion at higher volumes being required for mattress components and semi-converted products (**simple converted components**).

7.75 Notwithstanding the limitations discussed above, we find that these estimates show that the Parties are the two largest suppliers of converted comfort foam in the UK, and that the Merged Entity would be substantially (more than [X]) larger than the next largest supplier with the remainder of the market being highly fragmented. We consider that its estimated combined share of [X]% [10-20]% in Table 5 may understate, for the reasons outlined above, the Parties' position in the supply of converted foam, and in particular simple converted components. As shown in Table 6, each of the Parties is significantly larger than any other supplier.

Closeness of competition

7.76 In assessing the closeness of competition between the Parties, we have considered:

- (a) the Parties' product offerings;
- (b) third party views on closeness of competition; and
- (c) evidence from internal documents.

7.77 Both Carpenter and REF supply converted foam in the UK for simple converted components and for more complex components (eg components used in furniture).

7.78 Evidence from customers and competitors to the Parties shows that the Parties compete closely in the supply of converted comfort foam, in part as a result of both Parties being vertically integrated suppliers of converted comfort foam. The Parties and Vita are the only vertically integrated suppliers of comfort foam based in the UK.

7.79 Customers and competitors told the CMA during its phase 1 investigation that the Parties' vertical integration leads to cost advantages (and other quality advantages) that result in the Parties competing particularly closely. Roughly half of customers explained that, as a result of the Parties' upstream activities in the supply of unconverted comfort foam, the Parties are able to provide

converted comfort foam at a lower cost than suppliers that are not vertically integrated, ie independent converters.¹²¹

- 7.80 For example, one customer explained that even though there is a large number of independent foam converters, it is far more cost-effective for it to work with firms that are vertically integrated, rather than with firms that are just converters, and that it would not be economically viable for it to purchase from independent converters.¹²² Another customer submitted: ‘We believe that having block manufacture and conversion in house brings with it significant advantages to both supplier and ourselves. It brings better internal controls, better flexibility on block sizes, reduced transport costs with conversion onsite [redacted].’¹²³
- 7.81 Some customers identified additional benefits to this vertical integration, such as reduced dependency on external suppliers,¹²⁴ increased flexibility as regards delivery lead times,¹²⁵ and the ability to better support quality requirements relating to the foam.¹²⁶
- 7.82 Customers and competitors to the Parties submitted that vertical integration is particularly advantageous in supplying simple converted components, which are typically supplied at higher volumes, because:
- (a) the complexity, and therefore ‘value-add’, of these components is lower than for converted foam components produced for furniture, making vertically-integrated suppliers’ cost advantage (as discussed above) particularly relevant.¹²⁷ In relation to the advantages of using a vertically integrated supplier more generally, one simple converted foam component customer and one mattress supplier explained that using a vertically integrated supplier reduces the incremental transport costs (of the block foam getting sent to the converter, and then finally to the customer) that a non-integrated supplier would incur;¹²⁸ and
 - (b) suppliers that are not vertically integrated are not able to support the quality and testing requirements of a bedding manufacturer,¹²⁹ with one mattress supplier explaining that it prefers to purchase converted foam

¹²¹ [redacted] phase 1 third party CMA questionnaire responses.

¹²² [redacted] phase 1 call note, 15 March 2022.

¹²³ [redacted] phase 1 third party CMA questionnaire response.

¹²⁴ [redacted], phase 1 third party email dated 27 March 2022.

¹²⁵ [redacted] phase 1 third party CMA questionnaire response.

¹²⁶ [redacted] phase 1 third party CMA questionnaire response.

¹²⁷ [redacted] phase 1 third party email dated 17 June 2022.

¹²⁸ [redacted] phase 1 third party CMA questionnaire responses.

¹²⁹ [redacted] phase 1 third party CMA questionnaire response.

from vertically integrated suppliers as this allows it to work with the supplier to achieve the correct foam density.¹³⁰

- 7.83 Consistent with the above, a significant and material proportion of third parties, including the majority of converted comfort foam customers,¹³¹ and all of the converters (including independent, integrated and suppliers that manufacture and convert comfort foam) that have submitted responses to the CMA in phase 1,¹³² submitted that the Merger will have a negative effect on competition in the UK.
- 7.84 In addition to these third party submissions, an REF internal document illustrates that it competes closely with Carpenter in the supply of converted comfort foam in the UK. In particular, this internal document discusses potential and/or current customers, and identifies Carpenter as a current supplier for a number of these customers.¹³³
- 7.85 In view of the above, we find that there is material degree of competitive interaction between the Parties in the supply of converted comfort foam in the UK. The Parties' vertical integration appears to give them a competitive advantage in particular in the supply of converted comfort foam for simple converted components.

Competitive constraints

- 7.86 Unilateral effects are more likely where customers have little choice of alternative supplier. We have assessed whether there are alternative suppliers which would provide a competitive constraint on the Merged Entity.
- 7.87 We have assessed the constraint from these alternative suppliers by taking into consideration:
- (a) the constraint imposed on the Parties by other vertically integrated firms that manufacture foam and supply converted foam in the UK (namely Vita);¹³⁴ and
 - (b) the constraint imposed on the Parties by integrated and independent converters.

¹³⁰ [redacted] phase 1 call note, 5 April 2022.

¹³¹ [redacted] phase 1 third party CMA questionnaire responses.

¹³² [redacted] phase 1 third party CMA questionnaire responses.

¹³³ REF Annex 395. Other REF internal documents also mention Carpenter as a competitor. For example: REF Annex 396, Annex 397, Annex 394.

¹³⁴ We note that Kayfoam does not manufacture or convert comfort foam in the UK, but we have nonetheless considered its constraint below.

Constraint imposed by suppliers that manufacture and convert comfort foam

- 7.88 As set out at paragraph 7.20, Vita is the only firm other than the Parties that manufactures unconverted comfort foam in the UK. Vita also supplies converted comfort foam and is therefore the only other UK-based vertically integrated supplier. As set out in Table 5 above in the discussion of the share of supply analysis, post-Merger, Vita will be the second largest firm in this market, although its market share will nevertheless be substantially smaller (around [redacted]) that of the Merged Entity.
- 7.89 Submissions received from third parties indicate that Vita is a relatively close alternative to the Parties, albeit not as close an alternative as the Parties are to one another. A material portion (but not all) of the converted comfort foam customers that submitted responses to the CMA in phase 1 identified Vita as a current, or alternative, supplier of converted comfort foam.¹³⁵ Similarly, some responses received from other suppliers of converted comfort foam identified Vita as a competitor in the supply of converted comfort foam.¹³⁶ REF's internal documents similarly identify Vita as a competitor to REF in the supply of converted comfort foam.¹³⁷
- 7.90 In terms of vertically integrated suppliers producing foam outside of the UK, we find that these suppliers impose only a very limited constraint on the Parties. The vast majority of converted foam customers responding to the CMA in phase 1 submitted that they do not source converted comfort foam from outside the UK and would not consider doing so in future.¹³⁸ Converted foam customers identified several reasons that sourcing converted comfort foam from outside the UK would not be a viable alternative:
- (a) Many customers identified high transportation costs as a barrier to sourcing converted comfort foam from outside the UK; and
 - (b) Many customers also identified long lead times as a barrier to sourcing converted comfort foam from outside the UK.¹³⁹ Some customers explained that they do not have the storage space available that would allow them to purchase bulk shipments from outside the UK, and that is important for them to be able to source converted comfort foam locally as needed with a short lead time.¹⁴⁰

¹³⁵ [redacted] phase 1 third party CMA questionnaire responses.

¹³⁶ [redacted] phase 1 third party CMA questionnaire responses.

¹³⁷ For example, REF Annex 396, Annex 397, Annex 394.

¹³⁸ [redacted] phase 1 third party CMA questionnaire responses.

¹³⁹ [redacted] phase 1 third party CMA questionnaire responses.

¹⁴⁰ [redacted] phase 1 third party CMA questionnaire responses.

- 7.91 Moreover, we have not found any internal documents of the Parties identifying vertically integrated suppliers producing foam outside of the UK as competitive threats.
- 7.92 We therefore find that suppliers located outside the UK do not exert a sufficient competitive constraint on the Parties' supply of converted comfort foam in the UK.
- 7.93 As regards Kayfoam in particular, evidence received by the CMA in phase 1 shows that this supplier competes to a limited extent to supply converted comfort foam in the UK.¹⁴¹ However, Kayfoam was not identified as an alternative or current supplier by any of the converted comfort foam customers that submitted responses to the CMA's phase 1 investigation. We find that these submissions are consistent with the competitor positioning in the market shares set out above, which show that Kayfoam has a limited role in the UK with a share substantially smaller (less than [redacted]) that of the Merged Entity.

Constraint imposed by integrated and independent converters

- 7.94 Integrated converters purchase unconverted comfort foam that they convert in-house for use in end products that they manufacture. However (and as noted by Carpenter) we are aware that a number of integrated converters also supply converted comfort foam to third parties.¹⁴² We find that integrated converters compete with the Parties to the extent that they supply converted comfort foam to third parties.
- 7.95 As explained above, independent converters are converters that do not have their own foam production capabilities. These converters purchase comfort foam from third party suppliers, convert that foam, and then sell the converted comfort foam to manufacturers producing end products.
- 7.96 Evidence received by the CMA in phase 1 shows that there are a large number of independent converters active in the UK. The evidence shows that independent and integrated suppliers compete to supply converted comfort foam in the UK:
- (a) Roughly half of the responses the CMA received in phase 1 from converted foam customers show that independent converters either currently supply these customers or are viewed as alternative suppliers. Independent converters identified in customer responses were: Fibreline;

¹⁴¹ [redacted] phase 1 call note, 7 March 2022; and [redacted] phase 1 third party CMA questionnaire response.

¹⁴² Phase 1 Issues Letter Response, paragraph 5.17.

GNG; Platt & Hill; Comfortex; Clinchplain; Horizon Foam; Peak Converters; Icon Designs; Mammoth; AeroFoam; JT Foam; AMR Textiles; Drury Adams.¹⁴³ The majority of independent or integrated converters that responded to the CMA in phase 1 submitted that they compete with the Parties in the supply of converted comfort foam.¹⁴⁴

- (b) Internal documents submitted by REF demonstrate that it competes with independent converters for at least some converted comfort foam customers.¹⁴⁵

7.97 However, the evidence implies that integrated or independent suppliers do not exert a sufficient constraint on the Parties, especially as regards the customer segment purchasing simple converted components, eg mattress suppliers. Specifically:

- (a) We have not identified any relevant Carpenter internal documents that consider independent converters as competitors in the supply of converted comfort foam. Although one Carpenter document refers to integrated converters as being competitors it also states that 'Many of the independent converters have annual sales of less than £10 million and therefore are not required to file full accounts in the UK. It is therefore difficult to confirm their performance and profitability'.¹⁴⁶
- (b) Integrated or independent suppliers do not manufacture their own foam. As noted at paragraphs 7.79-7.82 above, customers purchasing simple converted components appear to particularly value the offerings of UK-based vertically integrated suppliers. This indicates that integrated or independent suppliers are unlikely to pose a sufficient constraint on the Parties as regards the customer segment purchasing simple converted components, eg mattress suppliers. This is consistent with the fact that roughly half of customers (the majority of which appeared to purchase primarily simple converted components) did not identify any independent or integrated suppliers as being current or alternative suppliers.¹⁴⁷
- (c) One supplier of converted comfort foam that also manufactures its own foam submitted in phase 1 that vertically integrated suppliers such as the Parties have more control over their supply chain, including access to

¹⁴³ [redacted] phase 1 third party CMA questionnaire responses.

¹⁴⁴ [redacted] phase 1 third party CMA questionnaire responses.

¹⁴⁵ For example, REF Annex 396, Annex 397; Independent converters identified in these documents include: [redacted].

¹⁴⁶ Carpenter Annex 168.

¹⁴⁷ [redacted] phase 1 third party CMA questionnaire responses.

innovation and more flexibility over pricing, and that they may be preferred by customers due to their vertical integration.¹⁴⁸

7.98 Finally, we note that there is some evidence that Vita and integrated/independent converters serve the same customer types as the Parties, and that these suppliers are also active in the supply of converted foam to Carpenter's top 10 converted foam customers. However, we find that this evidence is consistent with the existence of a customer segment for which only vertically integrated suppliers are a competitive alternative. In particular, we note that for [X] out of the 10 customers included in the analysis, Carpenter identified REF and Vita as the only other known suppliers of those customers.

Conclusion on Theory of Harm 3

7.99 For the reasons set out above, we find that:

- (a) The Parties are the two largest suppliers of converted comfort foam in the UK, and are substantially (almost [X]) larger than the next largest supplier (Vita) with the remainder of the market being highly fragmented.
- (b) The Parties and Vita are the only vertically integrated suppliers with UK plants. The evidence shows that vertical integration provides an advantage, particularly in the supply of simple converted products that are typically supplied at higher volumes. The evidence further shows that there is a material degree of competitive interaction between the Parties in the supply of converted comfort foam in the UK.
- (c) The Parties do not face sufficient constraints in the supply of converted comfort foam. Alternative suppliers are substantially smaller than the Parties, and evidence from customers shows that these suppliers, with the possible exception of Vita, impose a less strong constraint on the Parties than the Parties exert on each other. While independent and integrated converters exert a constraint on the Parties for some customers, these suppliers are not always viable alternatives, in particular for customers purchasing simple converted components.

7.100 Accordingly, we consider that the Parties compete closely and that the remaining competitive constraints are not sufficient to offset the loss of competition between them potentially resulting from the Merger.¹⁴⁹

¹⁴⁸ [X] phase 1 CMA third party questionnaire response.

¹⁴⁹ [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 4.8.

7.101 We also consider that the adverse effects which may be expected to result from any SLCs that we may find would be that the Merged Entity would be under less pressure to compete and this would result in reduced choice, and higher prices or lower quality and reduced innovation compared to what would otherwise have been the case absent the Merger.

7.102 Before reaching a decision on whether the Merger may be expected to result in an SLC in respect of the supply of converted comfort foam in the UK, we consider in Chapter 8 whether there are any countervailing factors (specifically entry and/or expansion) that could prevent such an SLC arising from the Merger.

8. Barriers to entry and expansion

8.1 In assessing whether market entry or expansion would prevent an SLC, we consider whether such entry or expansion would be timely, likely and sufficient:

(a) **Timely:** whether the effect on competition and the market will be timely. It is not just a case of entry or expansion occurring in a timely manner, but the effectiveness of that entry or expansion on market outcomes must be timely.¹⁵⁰

(b) **Likely:** whether rival firms have the ability and incentive to enter the market.¹⁵¹

(c) **Sufficient:** entry or expansion should be of sufficient scope and effectiveness to prevent an SLC from arising as a result of the merger.¹⁵²

8.2 These conditions are cumulative and must be satisfied simultaneously.¹⁵³

The supply of comfort and technical foam in the UK

8.3 We considered whether entry or expansion would be timely, likely and sufficient to prevent an SLC in the supply of comfort or technical foam in the UK.

¹⁵⁰ [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 8.33. The Merger assessment guidelines note that, typically, entry or expansion being effective within two years of an SLC arising would be considered by the CMA to be timely although, depending on the nature of the market, the CMA may consider a period of time shorter or longer than this.

¹⁵¹ [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 8.35.

¹⁵² [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 8.37.

¹⁵³ [Merger assessment guidelines \(CMA129\) - 2021 revised guidance](#), paragraph 8.32.

- 8.4 We note that some suppliers have spare capacity. However, all but one competing supplier of comfort and technical foam are located outside the UK. As set out in the assessment of competitive effects above,¹⁵⁴ we find that suppliers based outside the UK do not exert a material competitive constraint in the supply of comfort or technical foam in the UK. Moreover, the majority of suppliers of comfort and technical foam active outside the UK which responded to the CMA's phase 1 investigation stated that barriers to entering and expanding in the supply of comfort and technical foam in the UK are high. These suppliers pointed to long lead delivery times and transport costs as barriers to competing effectively in the UK from locations outside the UK.¹⁵⁵
- 8.5 A small number of suppliers indicated a desire to increase capacity in the supply of comfort foam in the UK.¹⁵⁶ However, the phase 1 investigation did not find any evidence to substantiate that such increases in capacity will occur. One of these competitors indicated that its expansion plan is not being considered in the short-term and others did not indicate a time period for expansion plans.¹⁵⁷
- 8.6 We also note that a large number of third parties stated that the significant capital investment that is required to set up a new plant to produce either comfort or technical foam is a barrier to entry in the supply of both comfort and technical foam.¹⁵⁸ In addition, a number of third parties submitted that the production of technical and comfort foam requires a high degree of know-how, which would be a barrier to *de novo* entry.¹⁵⁹
- 8.7 Only one customer of technical foam stated that it would hypothetically sponsor entry by agreeing to purchase volumes.¹⁶⁰ However, the majority of customers that responded to the phase 1 investigation did not state that sponsoring entry of a supplier of comfort foam or technical foam would be a strategy that they would pursue.¹⁶¹
- 8.8 We have not seen any evidence that entry in the form of self-supply is likely.
- 8.9 We considered whether Strandfoam's planned entry into the UK would mean that barriers to entry are lower than might be implied by the evidence set out

¹⁵⁴ See Chapter 7.

¹⁵⁵ [Phase 1 Decision](#), paragraph 160. One supplier based in Europe stated that having a production site in the UK or in a country near the UK was vital to successfully supply comfort and technical foam to UK customers. Another third party submitted that setting up a production plant for comfort foam in the UK is a barrier to entry and expansion and requires significant investment.

¹⁵⁶ [redacted] phase 1 third party CMA questionnaire responses.

¹⁵⁷ [Phase 1 Decision](#), paragraph 160; [redacted] phase 1 third party CMA questionnaire response.

¹⁵⁸ [redacted] phase 1 third party CMA questionnaire responses.

¹⁵⁹ [Phase 1 Decision](#), paragraph 160; [redacted] phase 1 third party CMA questionnaire responses.

¹⁶⁰ [redacted] phase 1 third party CMA questionnaire response.

¹⁶¹ [Phase 1 Decision](#), paragraph 160; [redacted] phase 1 third party CMA questionnaire responses.

above. Strandfoam has informed us that it plans to enter the UK market with a UK plant in the immediate future.^{162,163} Although the ultimate impact of Strandfoam's entry is not yet clear, we note that this is an example of a supplier that is established in another jurisdiction investing to supply comfort foam from a plant in the UK. We note that the investment required to support this planned entry is very significant relative to the size of the relevant markets (in the range of £[<] to date), consistent with evidence referred to above (paragraph 8.6)¹⁶⁴ While Strandfoam's planned entry indicates that entry may be possible, it does not show that barriers to entry are low or that significant entry could be anticipated in response to any lessening of competition as a result of the Merger.

8.10 We have also considered whether Strandfoam has the intention, incentive and ability to expand in a timely, likely and sufficient manner to prevent any SLC arising from the Merger.

8.11 As a preliminary point, we note that Strandfoam's new plant will not produce technical foam or converted comfort foam. Accordingly, our assessment focuses only on the impact on the Merged Entity's position in relation to comfort foam. In relation to comfort foam, Strandfoam told us that it anticipated that it would grow to capture a share of supply of comfort foam in the UK of approximately [<]%. Strandfoam told us that the timescale that it would take to achieve this level of supply was uncertain. It stated that it anticipated that this growth would take between [<] years, and a minimum period of [<]. Strandfoam also indicated that [<].¹⁶⁵

8.12 We note that the comfort foam segment will remain concentrated even following Strandfoam's entry: there will be four UK-based suppliers of comfort foam, which the Merger would reduce to three. Further, we note that even assuming that Strandfoam fully achieves its launch ambitions in the shortest anticipated period, Strandfoam would remain a significantly smaller supplier than the Merged Entity (and Vita). The maximum constraint that it could exert is therefore likely to be limited in scale. Moreover, taking account of the uncertainty as to Strandfoam's degree of success and (in particular) how quickly it will be able to grow its share of supply, we consider that the constraint it would likely exert is still more limited. Accordingly, we conclude that, whilst Strandfoam's entry is likely to occur, its planned entry would likely

¹⁶² On 26 September 2022, the Parties submitted that Strandfoam was making progress towards the start of manufacturing operations, highlighting evidence from public statements made by the construction company EnCon Construction Ltd and the engineering consultancy Craddy Pitchers Ltd.

¹⁶³ [<] [<].

¹⁶⁴ [<] phase 1 call note, 31 March 2021, paragraph 11.

¹⁶⁵ [<] phase 1 call note, 31 March 2021, paragraphs 14 and 15.

exert only a limited constraint on the Parties (and that, post-Merger, it would likely exert only a limited constraint on the Merged Entity).

- 8.13 We conclude that entry or expansion will not be timely, likely and sufficient to prevent any SLC arising from the Merger in relation to the supply of comfort or technical foam in the UK.

The supply of converted comfort foam in the UK

- 8.14 The Phase 1 Decision noted that while the factors relating to the cost of setting up a conversion plant and storage space required to enter and expand in the supply of converted foam in the UK may be less than the factors associated with entry into the supply of unconverted comfort foam, there still remain barriers to growth for independent converters due to the benefits of vertical integration (as described in the competitive assessment at paragraphs 7.76-7.85 above). Further, while the Parties provided evidence of entry into the conversion of comfort foam, the Phase 1 Decision noted that some of these suppliers appeared to be active only in self-supply.¹⁶⁶

- 8.15 We have not seen any evidence to the contrary. Accordingly, we conclude that entry or expansion will not be timely, likely and sufficient to prevent an SLC arising in the supply of converted comfort foam in the UK.

Conclusion

- 8.16 We conclude that entry or expansion will not be timely, likely and sufficient to prevent an SLC arising in the supply of comfort, technical or converted comfort foam in the UK.

9. Findings – overall conclusion

- 9.1 As a result of our assessment we have decided that:
- (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) the relevant merger situation may be expected to result in an SLC in relation to:
 - (i) The supply of comfort foam in the UK.

¹⁶⁶ [Phase 1 Decision](#), paragraph 163.

- (ii) The supply of technical foam in the UK.
- (iii) The supply of converted comfort foam in the UK.

10. Remedies

Introduction

- 10.1 This chapter sets out our assessment of, and final decision on, the appropriate remedy to address the SLCs and their resulting adverse effects.
- 10.2 In reaching our final decision on the appropriate remedies, we have considered: a remedy option proposed by the Parties (the **Parties' Remedy Proposal**),¹⁶⁷ the written responses to our public consultation on our notice of possible remedies (the **Remedies Notice**),^{168,169} the Parties' response to our remedies working paper (**RWP**), and evidence from a number of third parties regarding possible remedies.¹⁷⁰
- 10.3 In the Remedies Notice, we sought views on possible remedies to the SLCs. In particular, we sought responses on structural remedy options involving prohibition and the Parties' Remedy Proposal. We also invited views on other practicable remedies to address the SLCs and any resulting adverse effects, including any behavioural remedies that could be required to support the effectiveness of a divestiture.
- 10.4 In response to the RWP, the Parties submitted that we had solicited and received feedback from a 'limited number' of third parties who have motives and 'independent interests that may not be aligned with those of the CMA', therefore, the CMA should be cautious about relying upon the feedback that it had received from these third parties.¹⁷¹
- 10.5 We do not accept the proposition that we obtained evidence from a limited number of third parties implies that we have insufficient third-party feedback to inform our assessment of remedies. We have no reason to believe that our means of gathering third-party feedback (as followed in previous CMA merger inquiries and set out in the CMA's published guidance) is, in principle, unlikely to be sufficient to gather third-party views. As part of our investigation process, we collect evidence and views from third parties (such as potential

¹⁶⁷ See the non-confidential version of the Parties' Remedy Proposal on the inquiry [webpage](#).

¹⁶⁸ Our Remedies Notice was published on the inquiry [webpage](#) on 28 September 2022. .

¹⁶⁹ Responses were received from the Parties, Greiner and an anonymous party with a letter on 10 October 2022.

¹⁷⁰ The CMA had third party calls with Belfield, Emma, Greiner, Kayfoam and Vita.

¹⁷¹ Parties' response to RWP, paragraphs 2.1 to 2.7.

buyers, customers, etc) who are well-placed to comment on the issues that are relevant to our assessment.¹⁷² In reaching our decision, we have taken into account all relevant considerations, including the incentives of the Parties and third parties providing evidence, weighed that evidence accordingly, and considered it in the round.

CMA remedies assessment framework

- 10.6 Under the Act, where the CMA finds an SLC, it must decide what, if any, action should be taken to remedy, mitigate or prevent that SLC or any adverse effect which may be expected to result from the SLC.¹⁷³
- 10.7 The Act requires that in deciding on remedial action, the CMA shall, in particular, have regard to the need to achieve ‘as comprehensive a solution as is reasonable and practicable’ to the SLC and any adverse effects resulting from it.¹⁷⁴
- 10.8 To fulfil this requirement, the CMA will seek remedies that are effective in addressing the SLC and any resulting adverse effects and it will then select the least costly and intrusive remedy that it considers to be effective.¹⁷⁵
- 10.9 In determining an appropriate remedy, the CMA will consider the extent to which different remedy options will be effective in remedying, mitigating or preventing the SLCs and any resulting adverse effects. The effectiveness of a remedy is assessed by reference to the following considerations:¹⁷⁶
- (a) *Impact on the SLC and its resulting adverse effects*: normally, the CMA will seek to restore competitive rivalry through remedies that re-establish the structure of the market expected in the absence of the merger, rather than seeking to regulate the on-going behaviour of the merger parties.
 - (b) *Appropriate duration and timing*: the CMA will prefer a remedy that quickly addresses competitive concerns, with the effect of the remedy being sustained throughout the expected duration of the SLC.
 - (c) *Practicality*: a practical remedy should be capable of effective implementation, monitoring and enforcement.
 - (d) *Acceptable risk profile*: the CMA will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or

¹⁷² [Merger Remedies](#): CMA87 (13 December 2018), paragraph 4.58.

¹⁷³ Section 36(2) of the Act.

¹⁷⁴ Section 36(3) of the Act.

¹⁷⁵ [Merger Remedies](#): CMA87 (13 December 2018), paragraph 3.4.

¹⁷⁶ [Merger Remedies](#): CMA87 (13 December 2018), paragraph 3.5.

suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects.

10.10 In merger inquiries, the CMA will generally prefer structural remedies, such as a divestiture remedy (if the merger is completed) or prohibition (if the merger is anticipated), rather than behavioural remedies designed to regulate the ongoing conduct of the merger parties or control market outcomes (eg prices) following the merger.¹⁷⁷ This is because:¹⁷⁸

- (a) structural remedies are likely to deal with the SLC and its resulting adverse effects directly and comprehensively at source by restoring the rivalry that would be lost as a result of the merger;
- (b) behavioural remedies generally give rise to risks around specification, circumvention, market distortion and/or monitoring,¹⁷⁹ and may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
- (c) structural remedies do not normally require ongoing monitoring and enforcement once implemented.

10.11 Once the CMA has identified the remedy options that would be effective in addressing the SLC, the CMA will select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no effective remedy is disproportionate in relation to the SLC and its adverse effects.¹⁸⁰ The CMA may also have regard, in accordance with the Act,¹⁸¹ to the effect of any remedial action on any relevant customer benefits¹⁸² (**RCBs**) arising from the merger.¹⁸³

¹⁷⁷ *Merger Remedies: CMA87* (13 December 2018), paragraph 3.5(a); see section 7 of CMA87 for further guidance on behavioural remedies.

¹⁷⁸ *Merger Remedies: CMA87* (13 December 2018), paragraph 3.5.

¹⁷⁹ The design of behavioural remedies should seek to avoid four particular forms of risk to enable these measures to be as effective as possible: (a) *Specification risks*: these risks arise if the form of conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance; (b) *Circumvention risk*: as behavioural remedies generally do not deal with the source of an SLC, it is possible that other adverse forms of behaviour may arise if particular forms of behaviour are restricted; (c) *Distortion risks*: these are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs; and (d) *Monitoring and enforcement risks*: even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement (*Merger Remedies: CMA87* (13 December 2018), paragraph 7.4).

¹⁸⁰ *Merger Remedies: CMA87* (13 December 2018), paragraph 3.4.

¹⁸¹ Section 36(4) of the Act.

¹⁸² Section 30 of the Act defines relevant customer benefits.

¹⁸³ *Merger Remedies: CMA87* (13 December 2018), paragraph 3.4.

Effectiveness of remedy options

Possible remedies set out in our Remedies Notice

10.12 In the Remedies Notice, we set out two remedy options:

- (a) prohibition of the Merger; or
- (b) the Parties' Remedy Proposal which comprises the partial divestiture of the UK assets and operations of REF.

10.13 We invited views on both options, including whether a partial divestiture of UK assets and operations of REF could be effective in addressing our competition concerns.

10.14 We also invited views on aspects of remedy design that might be needed to make a divestiture remedy effective and to ensure that no new competition concerns would arise.

10.15 We also invited views on whether there were any other practicable remedy options (structural or behavioural) which we should consider that could be effective in addressing the provisional SLCs and/or any resulting adverse effects.¹⁸⁴

10.16 We said that our initial view was that a behavioural remedy would be very unlikely to be an effective remedy to the SLC or any resulting adverse effects we had provisionally found. However, we said that we were willing to consider any remedy, including behavioural remedies that were put forward as part of the consultation. We have not received submissions that behavioural remedies in isolation would be effective and so we do not consider them further.

10.17 We assess each of the remedy options, starting with a prohibition of the Merger before considering the Parties' Remedy Proposal. We then conclude on the effectiveness of the remedy options.

Prohibition

Description

10.18 Prohibition of the Merger would prevent any combination of the Parties' businesses, with Carpenter and REF continuing to operate under separate

¹⁸⁴ [Remedies notice](#), paragraph 20.

ownership as independent competitors. This could be effected by accepting undertakings under section 82 of the Act or making an Order under section 84 of the Act, prohibiting the Merger and preventing the Parties from attempting to merge for a further period (our normal practice would be to prevent a future merger between the Parties for the next ten years).

Views of the parties and third parties

10.19 The Parties said that prohibition of the Merger would be ‘wholly disproportionate’ as REF globally operates a total of 33 flexible PU foam manufacturing and converting plants, and of these, only two plants engage in activities relevant to the SLCs. In addition, REF’s 2021 total turnover in the UK accounted for less than [3] % of its total worldwide turnover. Further, the Parties told us that prohibition is ‘unnecessary’ as the Parties have conceded the SLCs.¹⁸⁵

10.20 We received a submission from one third party that prohibition of the Merger would be a comprehensive and effective remedy.¹⁸⁶

Conclusion on the effectiveness of prohibition

10.21 Prohibition of the Merger would result in Carpenter and REF continuing to operate under separate ownership as independent competitors. It would therefore prevent an SLC from arising in any relevant market. Given this, we conclude that prohibition would represent an effective and comprehensive solution to all of the SLCs and consequently prevent any resulting adverse effects. The proportionality of prohibition is addressed in paragraphs 10.106 to 10.118.

The Parties’ Remedy Proposal

10.22 This section covers the effectiveness of the remedy option proposed by the Parties.¹⁸⁷

Description of the Parties’ Remedy Proposal

10.23 The Parties’ Remedy Proposal includes a partial divestiture of REF’s UK assets and operations, principally comprising the divestiture of REF’s UK

¹⁸⁵ [Parties’ response to Remedies Notice](#), paragraphs 2.1 and 2.2.

¹⁸⁶ [Greiner response to Remedies Notice](#), paragraph 2(6).

¹⁸⁷ A non-confidential version of the Parties’ Remedy Proposal was published on the inquiry [webpage](#) on 28 September 2022.

subsidiary Recticel Limited. It includes assets and operations that the Parties have submitted are sufficient to address effectively each of the SLCs, namely:

- (a) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies unconverted flexible polyether PU comfort and technical foam (**Alfreton 1**);
- (b) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies converted flexible polyether PU comfort foam (**Alfreton 2**);
- (c) Data and information (**Relevant IPR**) arising out of completed REF Research and Development (**R&D**) projects which are used by the divestiture package. For relevant current REF R&D projects,¹⁸⁸ the following is included:
 - (i) Where the project is planned to benefit REF's UK operations only, a full transfer of rights with the Parties retaining no rights.
 - (ii) 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 use in UK applications only.

10.24 We note that the divested business would include the intellectual property rights for one product (TRIFLEX), which the UK company currently owns. The divestiture business currently licenses patents for [X] and [X], from a third party. This licence would transfer with the divestment business.¹⁸⁹

10.25 The Parties' Remedy Proposal also provides that Carpenter will enter into Transitional Service and Supply Agreements (**TSA**) for a fixed period with the purchaser for:

- (a) R&D services in relation to current R&D projects and new projects relating to unconverted and converted comfort foam and unconverted polyether sponge foam subject to a cap set at a specified number of hours annually across all projects;
- (b) supply arrangements relating to chemicals and additives used in manufacturing flexible polyether PU foam at Alfreton 1 facility;

¹⁸⁸ Relevant current projects are those which are not closed and which involve comfort foam (upstream/unconverted and converted) and polyether foam for sponge applications (upstream/unconverted; not converted) (also referred to as "polyether sponge foam").

¹⁸⁹ [Parties' Remedy Proposal](#), Annex 1, paragraph 4h(i).

- (c) consulting arrangements to provide expertise to the potential purchaser to conduct its own negotiations with suppliers of chemicals; and
- (d) information technology, finance and HR support services.

Assessment of effectiveness

10.26 We assess the risk profile of the Parties' Remedy Proposal as part of our consideration of its effectiveness and its potential design. In the Remedies Notice, we highlighted concerns we had about the effectiveness and risk profile of a partial divestiture in relation to:¹⁹⁰

- (a) the proposed remedy package continuing to have access to R&D facilities after the divestiture; and
- (b) the TSA between Carpenter and the potential purchaser for supply arrangements relating to chemicals and additives used in manufacturing flexible polyether PU foam at the Alfreton 1 facility.

10.27 There are three categories of risk that could impair the effectiveness of any divestiture remedy: composition risk, purchaser risk and asset risk:¹⁹¹

- (a) composition risk arises if the scope of the divestiture package is too constrained or not appropriately configured to attract a suitable purchaser or does not allow a purchaser to operate as an effective competitor;
- (b) purchaser risk arises if divestiture is made to a weak or otherwise inappropriate purchaser or if a suitable purchaser is not available; and
- (c) asset risk arises if the competitive capability of the divestiture package deteriorates before the completion of the divestiture.

10.28 An effective divestiture remedy should give us confidence that these practical risks can be properly addressed in its design. We, therefore, consider the following:

- (a) the appropriate scope of the Parties' Remedy Proposal;
- (b) the identification and availability of suitable purchasers; and
- (c) ensuring an effective divestiture process.

¹⁹⁰ Remedies Notice, paragraph 20.

¹⁹¹ Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.3.

Parties' and third parties' views on the scope of the Parties' Remedy Proposal

Parties

- 10.29 The Parties submitted that the Parties' Remedy Proposal for the partial divestiture of REF would 'clearly and comprehensively' address the provisional concerns identified.¹⁹²
- 10.30 The Parties submitted that it is common for manufacturers not to have significant in-house R&D capabilities to be competitive, that the Parties' Remedy Proposal includes two years for R&D support, and that there are alternative arrangements that could be made such as outsourcing to specialist providers or publicly available research supported by a consultant.¹⁹³
- 10.31 The Parties submitted that R&D is to 'some degree' necessary to commercialise products, but that it is not the 'key aspect of competition' in the relevant market.¹⁹⁴
- 10.32 The Parties confirmed that the Remedy Proposal includes all relevant REF R&D projects.¹⁹⁵
- 10.33 In response to the RWP, the Parties re-iterated their view that R&D is not significant for competition in the relevant markets because the choice of comfort foam supplier is driven by price, customer service, lead times and delivery options.¹⁹⁶ The Parties also submitted that their proposed R&D TSA does not raise concerns as it is temporary and subject to firewalls.¹⁹⁷
- 10.34 The Parties consider that a divestment purchaser would not encounter difficulties in obtaining competitive supplies of chemicals, regardless of the type of purchaser, as other existing single-site foamers are profitable and competitive.¹⁹⁸
- 10.35 The Parties submitted that REF has only a limited number of supply contracts for chemicals and additives, only some of the supply contracts have provisions for volume discounts, and other purchases are made on a spot basis. The Parties further submitted that the impact of volume discount on chemical and additives purchases for use in Alfreton 1 is limited and that they

¹⁹² [Parties' Remedy Proposal](#), paragraph 3.8.

¹⁹³ [Parties' response to Remedies Notice](#), paragraphs 4.3 and 4.4.

¹⁹⁴ [Parties' response to Remedies Notice](#), paragraph 4.11.

¹⁹⁵ [Parties' response to Remedies Notice](#), paragraphs 4.6 and 4.7.

¹⁹⁶ Parties' response to RWP, paragraph 4.9.

¹⁹⁷ Parties' response to RWP, paragraphs 4.16 to 4.18.

¹⁹⁸ [Parties' response to Remedies Notice](#), paragraph 5.2.

consider that a divestment purchaser with no pre-existing relationships with suppliers would not be materially disadvantaged.¹⁹⁹

10.35 The Parties' Remedy Proposal includes a chemical supply TSA for [X]. The Parties stated that the chemical supply TSA is offered on the basis that, if it is considered necessary by the CMA and required by the divestment purchaser, the chemical negotiation TSA would provide certainty in the supply of chemicals. The Parties do not consider that the chemical supply TSA (as it is not exclusive) would give rise to substantive competition concerns as the chemicals are not re-sold by either party, and firewalls would be put in place to restrict the flow of information.²⁰⁰

10.36 In response to the RWP, the Parties told us chemical supply and chemical negotiation TSAs are offered on a 'fail-safe' basis and are only temporary, with firewalls incorporated.²⁰¹

Third parties

10.37 A third party (Greiner) told us that the Parties' Remedy Proposal is too 'constrained' and would not attract a suitable purchaser to act as an effective competitor in the UK.²⁰² It further told us that there are 'significant interdependencies' between the divestment business and the wider operations of REF and that separating Alfreton 1 and Alfreton 2 from the remainder of REF (including REF's technical foam converting plant in Corby), would therefore 'undermine' the viability and competitiveness of the divestment business.²⁰³

10.38 An anonymous third party told us that the Parties' Remedy Proposal addresses the SLC for the supply of comfort and converted comfort foam only. However, it also said that to address the concerns relating to technical foam, the remedy should also include the divestiture of the Corby plant as the Parties are 'significant competitors', particularly for sponge.²⁰⁴

10.39 In relation to the overall effectiveness of the Parties' Remedy Proposal, most of the third parties that engaged with us in relation to remedies told us that the partial divestiture of REF would represent an effective remedy but that the following elements are critical and would need to be considered during the divestiture process:

¹⁹⁹ Parties' response to Remedies Notice, paragraphs 5.3 to 5.9.

²⁰⁰ Parties' response to Remedies Notice, paragraphs 5.8 and 5.9.

²⁰¹ Parties' response to RWP, paragraphs 4.29 to 4.30.

²⁰² Greiner response to Remedies Notice, paragraph 7.

²⁰³ Greiner response to Remedies Notice, section 3.

²⁰⁴ Anonymous letter (10 October 2022).

(a) On R&D capabilities:

(i) Greiner told us:

- i. without an in-house R&D capability, the divestiture business would be 'harmed'. A potential purchaser can start R&D capabilities from scratch, but it would take three to four years to set up and would have challenges. Alternatively, potential purchasers could collaborate with third party R&D providers but this is mainly the case for project driven developments and has its 'own challenges'.²⁰⁵
- ii. a TSA for R&D may work for a limited period for basic R&D activities such as performing testing services on raw materials, but the TSA would not be appropriate for more advanced R&D.²⁰⁶
- iii. all R&D relevant to the UK business would need to be transferred with the remedy package, and it is not sufficient to share this with Carpenter under TSAs.²⁰⁷
- iv. specialised lab equipment and chemical expertise is required to conduct R&D. R&D is particularly important in the UK market because of the UK-specific fire retardancy regulations (e.g. BS5852 Crib5). There is more than one way to meet the requirements of these regulations and so lab equipment and expertise might be needed to select the best option.^{208,209}
- v. R&D projects generally generate 'know-how', and rarely result in new patent-protected breakthroughs.²¹⁰

(ii) Vita told us:

- i. R&D is becoming increasingly important within the foam industry because of the increasing importance of sustainability (including bans on single-use plastics) and related 'flame retardant' legislative changes. It is already investing heavily in more sustainable products. Furthermore, there may be other new developments in the future and it would therefore be a disadvantage to the divestment business not to have the ability to adapt going forward.²¹¹

²⁰⁵ Greiner call note (14 September 2022), paragraphs 8 to 10.

²⁰⁶ Greiner call note (14 September 2022), paragraph 12

²⁰⁷ Greiner response to Remedies Notice, paragraph 24.

²⁰⁸ Greiner call note (14 September 2022), paragraphs 7 and 10.

²⁰⁹ [Greiner response to Remedies Notice](#), paragraph 23.

²¹⁰ Greiner call note (14 September 2022), paragraphs 7 and 14.

²¹¹ Vita call note (21 September 2022), paragraphs 3 to 5.

- ii. there are third-party independent consultants and/or universities to outsource or help set up R&D capabilities from scratch. However, this would take time, and there is currently a need for rapid innovation due to ‘imminent legislative changes’.²¹²
- iii. the Parties’ proposal for access to the REF’s projects that are coming to a close was a ‘pragmatic approach’. However, Vita has reservations in relation to the R&D services agreement due to Carpenter’s incentive not to continue to support the purchaser’s R&D activities post-merger. Furthermore, such arrangements would be ‘anti-competitive’ since Carpenter would have insight into the purchaser’s business activities.²¹³

(iii) Belfield told us:

- i. R&D is ‘very important’ within the industry, and it considers that the purchaser should have an independent R&D function to ensure its competitiveness. Belfield relies on R&D partners to develop new formulations offering foam that provides differing levels of comfort and/or better use of chemicals to make a more cost-effective product.²¹⁴
- ii. a purchaser would need core expertise in chemicals, and large companies have their in-house R&D capabilities because they understand the supply chain, required chemicals for manufacturing and formulations of chemicals.²¹⁵
- iii. it considers that it would not be possible for a purchaser to replicate the in-depth knowledge within foam companies from outside parties, such as universities.²¹⁶

(iv) Kayfoam told us:

- i. there are third party providers of R&D that can provide R&D services, and that having an in-house R&D function is not important.²¹⁷ Kayfoam said that for many years a USA-based company (Peterson Chemicals) had provided it with R&D

²¹² Vita call note (21 September 2022), paragraph 6.

²¹³ Vita call note (21 September 2022), paragraphs 8 to 9.

²¹⁴ Belfield call note (10 October 2022), paragraphs 4 to 5 and 18.

²¹⁵ Belfield call note (10 October 2022), paragraph 7.

²¹⁶ Belfield call note (10 October 2022), paragraph 8.

²¹⁷ Kayfoam call note (10 October 2022), paragraph 6.

functions. That company had now been purchased by Kayfoam's parent company, so it is now a sister company to Kayfoam.²¹⁸

- ii. UK regulations for fire regulations are under review and may change.²¹⁹
- iii. innovation and invention are very modest within this industry and tend only to happen once every five-to-ten years. Most of the inventions are covered under patents.²²⁰
- iv. chemical suppliers have significant R&D capabilities, and small foam manufacturers and customers are able to get solutions and knowledge from chemical suppliers.²²¹

(v) Emma Sleep GmbH (**Emma**) told us:

- i. it is a development-driven company and looks for R&D opportunities, which include changes to the foaming process, the development of new foams to improve customer satisfaction and the development of foams using sustainable inputs.²²²
- ii. given its focus on development, Emma prefers to work with foam suppliers that have their own R&D functions, rather than those that outsource R&D. However, it does not know whether this is also the case for other customers and it does not see any specific risk if the divestment business did not have its own R&D capabilities.²²³
- iii. the UK's fire-retardant regulations make it more difficult for European suppliers to enter the UK market, but these fire-retardant techniques are not unknown to the European market.²²⁴

(b) On the supply of chemicals:

(i) Greiner told us:

- iv. a TSA to purchase raw materials would not be practical in a volatile market as there is currently insufficient supply. Further, there are only a few raw material suppliers in Europe, and a

²¹⁸ Kayfoam call note (10 October 2022), paragraph 3.

²¹⁹ Kayfoam call note (10 October 2022), paragraph 5.

²²⁰ Kayfoam call note (10 October 2022), paragraph 4.

²²¹ Kayfoam call note (10 October 2022), paragraph 7.

²²² Emma call note (4 November 2022), paragraphs 4, and 5.

²²³ Emma call note (4 November 2022), paragraphs 4, 7 and 8.

²²⁴ Emma call note (4 November 2022), paragraph 6.

potential purchaser would need significant purchasing power because economics of scale provide a competitive advantage. However, the relevant purchasing expertise is not specific to the foam industry.^{225,226}

(ii) Vita told us:

- i. it would be difficult for a purchaser with no experience in the foam industry to procure the relevant chemicals. However, it is easier to set up a procurement function than an R&D function. The purchaser would need to employ someone in a procurement role, but that person would not necessarily need specific chemicals experience in order to negotiate purchases.²²⁷
- ii. the proposed TSA for procurement would not be 'sensible' and the proposal was potentially 'restrictive' since the purchaser may not get the best price for inputs. Carpenter would source inputs taking account of its needs across all of its plants (both within and outside the UK). Carpenter might therefore make different purchasing decisions compared with a purchaser who operates only UK sites.²²⁸

(iii) Belfield told us:

- i. the proposed TSA for the supply of chemicals for a limited period would not work, as there are limited chemicals suppliers, and scale is important to get surety of supply.²²⁹

(iv) Kayfoam told us:

- i. the proposed TSA arrangement could be an appropriate remedy, especially as the chemicals market is currently volatile and will cause difficulties for a new purchaser who is not currently active in chemical procurement.²³⁰
- ii. a potential purchaser should be capable of buying chemicals. It believes that the level of discount received by larger foamers (ie Carpenter, Recticel and Vita) was not 'very significant'.²³¹

²²⁵ Greiner call note (14 September 2022), paragraphs 16 to 19, 21 and 23.

²²⁶ [Greiner response to Remedies Notice](#), section 3.1.5.

²²⁷ Vita call note (21 September 2022), paragraph 11.

²²⁸ Vita call note (21 September 2022), paragraph 12.

²²⁹ Belfield call note (10 October 2022), paragraph 12.

²³⁰ Kayfoam call note (10 October 2022), paragraph 11.

²³¹ Kayfoam call note (10 October 2022), paragraph 9.

- (v) Emma told us:
- i. stability of supply was a factor in identifying which foam suppliers to work with.
 - ii. the scale of the foam supplier (ie having a large potential capacity) is important but partnering with big foam suppliers does not necessarily guarantee stable supply since chemical suppliers may not always allocate raw material to them in shortage situations.²³²

Scope of the divestiture package – our assessment

10.40 Under the Parties' Remedy Proposal, the Parties would implement the partial divestiture of REF by the share sale of Recticel Limited. Recticel Limited includes (i) the flexible polyether PU foam production facility, assets and business (Alfreton 1), and (ii) the flexible polyether PU foam converting facility, assets and business (Alfreton 2).

10.41 In defining the scope of a divestiture package that will satisfactorily address an SLC, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an on-going basis and that includes all the relevant operations pertinent to the area of competitive overlap.²³³ The Parties told us that the divestment business is established, stand-alone and profitable.²³⁴ The Parties consider that the Parties' Remedy Proposal would create a 'new source of competition to maintain the existing competitive position of three longstanding producers of upstream comfort foam with manufacturing facilities in the UK'.²³⁵

10.42 We also note that the Parties submitted the financial performance and projections of Alfreton 1 and Alfreton 2 as set out in Table 7.

Table 7: Financial performance and projections of Alfreton 1 and 2

	FY18A	FY19A	FY20A	FY21 A	FY22F	FY23F	FY24F
Alfreton 1							
Revenue (£m)	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Gross margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]
EBITDA margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]
EBIT margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]

²³² Emma call note (4 November 2022), paragraph 11.

²³³ *Merger Remedies: CMA87* (13 December 2018), paragraph 5.7.

²³⁴ *Parties' Remedy Proposal*, Annex 7, paragraphs 3 and 4.

²³⁵ *Parties' Remedy Proposal*, paragraph 3.3.

Alfreton 2

Revenue (£m)	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Gross margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]
EBITDA margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]
EBIT margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]

Source: [Parties' Remedy Proposal](#), Annex 2

10.43 The Parties also told us that Alfreton 1 facility operated at [X]% capacity²³⁶ and Alfreton 2 facility operated at [X]% capacity. Therefore, both plants have spare capacity for expansion for additional internal and external sales under the divestment purchaser.

10.44 REF's other activity in the UK is its Corby technical PU foam converting facility and business, which has already been carved out of Recticel Limited on 1 June 2022 and which would be retained by Carpenter after the Merger. The Parties told us that Alfreton 1 transferred a [X] ([X]) of upstream foam in 2021 to Corby plant for conversion into technical applications. It further told us that, currently, Alfreton 1 and Alfreton 2 [X] any foam to Corby.²³⁷

10.45 The Parties told us that there is no trading relationship between the divestment business and other REF facilities.²³⁸ Further, the Parties told us that the divestment business has no shared supporting physical assets such as plant and equipment (other than shared IT systems and equipment) with Corby or any other REF plant.²³⁹

10.46 We have not found an SLC in the market for converting technical foam, and note that the upstream polyether technical foam used for cleaning sponges is manufactured at Alfreton 1.²⁴⁰

10.47 Based on the above, our view is that the Corby plant operates in a market (converted technical foam) in which we have not found an SLC. In addition, it makes [X] purchases from Recticel Limited, and Alfreton 1 and Alfreton 2 also have [X] trading relationship with the Corby plant, REF or the wider Recticel group. As a result, we do not consider it necessary to include the Corby plant in the divestiture package.

10.48 As set out in our Remedies Notice, we consider the following issues in more detail:

²³⁶ Alfreton 1 has capacity to produce [X] MT of foam per annum, [Parties' Remedy Proposal](#), paragraph 2.4.

²³⁷ Remedies Form, 11 July 2022, response to question 9, paragraph (v).

²³⁸ [Parties' response to Remedies Notice](#), paragraphs 3.3 and 3.4.

²³⁹ Remedies Form, 11 July 2022, response to question 9, paragraph (ii).

²⁴⁰ Parties' submission on upstream technical foam offerings, 24 June 2022, paragraph 3.1.

- (a) Access to R&D capabilities – we consider that there is a risk that the divestiture business may not have access to necessary R&D capabilities to compete effectively going forward.
- (b) Access to chemicals purchasing capabilities and the need for scale for chemical purchasing – the nature of chemical purchasing is such that access to chemicals purchasing capabilities and sufficient scale would be required for a purchaser to represent an effective competitor to the Parties following the divestiture.

Transfer of R&D projects and access to R&D capabilities

- 10.49 In this case, the Parties' Remedy Proposal does not involve a divestiture of existing REF R&D capabilities, which are located outside the UK and cover all of REF's operations. Instead the Parties' Remedy Proposal comprises a combination of transfers and licensing of rights, data and information relating to relevant R&D projects, as set out in paragraphs 10.23 to 10.25. The Parties have also proposed a TSA for R&D services to the divestment purchaser.
- 10.50 We considered whether the Parties' proposals in relation to R&D were sufficient in scope to ensure an effective remedy and, if not, whether the risks to effectiveness arising could be sufficiently mitigated. First, we looked at the importance of R&D in being able to compete effectively in the supply of comfort foam, technical foam and converted comfort foam. Next, we considered the scope of the Parties' proposals and whether there are alternative or complementary options that might help to ensure that the divestment business has all the necessary R&D capabilities to compete effectively going forward. Finally, we consider how effectiveness risks arising from this element of the remedy might be managed.
- 10.51 Evidence from third parties shows that R&D projects in the industry are not ground-breaking and rarely generate hard IP (eg patents/design rights).
- 10.52 In line with evidence from the Parties and third parties, we consider that R&D capabilities are an important aspect of the effective functioning of the divestiture business for various reasons, including the need to meet customer requirements, the desire to develop environmentally sustainable products, and changes in the availability of chemicals used in manufacturing. In addition, for the divestiture business to remain viable and competitive, we consider that it would need access to the R&D capabilities because of expected changes in fire safety regulations specific to the UK. In this regard, we note that Recticel has already developed new foam products in anticipation of legislative changes which may require the removal of Tris

(chloropropyl) phosphate (**TCPP**) from foam products.²⁴¹ However, the precise scope of the future legislative change is not yet known, and the divestment business may need to conduct further development work to optimise its offering once these changes become known. Overall though, these are mature markets with relatively uncomplex products, and we have not seen evidence of the type of transformational innovation that characterises more 'hi-tech' markets.

- 10.53 Given the importance of R&D outlined above, we considered the scope of the Parties' Remedy Proposal in this area. We noted that the Parties are prepared to warrant to the potential purchaser that all relevant R&D projects would be included in the divestiture business. REF also provided details of [§<] current and recent R&D projects, which we looked at in detail to see whether they were applicable fully or partially to the divestiture business in the UK.
- 10.54 Based on the evidence provided to us by REF, our view is that the Parties' Remedy Proposal includes know-how on the relevant projects that benefit REF's UK operations only. It also covers those R&D projects that benefit both REF's UK and non-UK operations, for which Carpenter would provide a perpetual, irrevocable, royalty-free licence to a potential purchaser for UK applications only. We note that this latter group of projects are not licensed on an exclusive or global basis, potentially restricting their usefulness to a purchaser. However, our examination of the detail of these projects has given us assurance that these restrictions will not have a material impact on the effectiveness of the remedy as a whole.
- 10.55 While the Parties' Remedy Proposal includes the know-how relating to ongoing R&D projects, it does not include dedicated R&D staff or dedicated R&D facilities.²⁴² We consider that it would not be practical or feasible to try to 'carve out' a proportion of REF's R&D operations, assets, and employees (which are based in Belgium) and transfer them to the divestment business.
- 10.56 The proposed R&D TSA could, in principle, mitigate against some of the scope risk. However, the proposed R&D agreements, even with the proposed safeguards (NDA, Firewalls etc) in place, would result in continued involvement of the Parties in the divestiture business. In addition, the Parties' incentives to assist the divestment business (based on its contractual

²⁴¹ Recticel launched 'Niva' in 2021. In its promotional material explaining its motivation for developing Niva, Recticel stated that 'legislation is set to become even more stringent and it is inevitable that [halogenated compounds like TCPP] will eventually be phased out in mattress production and replaced by halogen-free alternatives.' See [Recticel's press release](#) 'Niva, TCPP-Free Foam, Will Be Launched At The Bed Show, UK!' dated 06.09.2021.

²⁴² Only testing equipment on-site in Alfreton and the staff who conduct such testing are included in the divestiture package.

obligations under the TSA) would be diluted and outweighed by their interest as an ongoing competitor; therefore, it would limit the effectiveness of the proposed R&D TSA. We consider that this would raise competition concerns, and therefore exclude it from any remedy.

10.57 The Parties told us that third-party specialist providers of R&D are active in the PU foam (such as Peterson Chemical Technology and Urethane Sciences). They further added that upstream chemical suppliers (such as Shell, BASF, Covestro, Evonik, Momentive, etc.) also promote their innovations and work with downstream customers to develop products and new formulations/grades of foam and, lastly, some independent consultants can assist with the implementation of the R&D from publicly available research.²⁴³ The Parties also submitted additional evidence from suppliers of upstream chemical inputs and contract providers of R&D services to demonstrate that third parties could provide or supplement the necessary R&D services needed by any divestment purchaser.²⁴⁴

10.58 However, we consider that while third-party provision of R&D may to some extent 'close the gap', these capabilities risk not adequately replicating the pre-Merger competitiveness of the divestiture business. There are also practical risks around the timely procuring and setting up of a third-party contract by the divestiture business or its purchaser (such as the limited number of third party R&D providers).

Access and purchasing of chemicals

10.59 We considered whether the Parties' Remedy Proposal was sufficiently scoped to allow the divestiture business to purchase chemicals and compete effectively. In particular, we considered whether the size of the divestiture business relative to REF would cause it to lose purchasing economies, and whether the Parties' proposed TSA would give rise to competitive distortions.

10.60 Evidence from most third parties shows that there is a scale advantage in purchasing chemicals, particularly in terms of the ability to obtain volume discounts for inputs from suppliers. As discussed at paragraph 10.59, there is a risk that the current scale advantage to procure chemicals would be lost, therefore weakening the divestiture business as a competitor in the relevant market. This could also reduce the attractiveness of the divestment business for potential purchasers and also presents a risk to the divestiture process. The proposed TSA might allow the divestiture business to procure chemicals at a lower price, similar to the situation in the absence of the Merger.

²⁴³ Parties' Remedy Proposal, paragraphs 14 and 15 and annexes A, B and C.

²⁴⁴ Parties' response to RWP, paragraphs 4.12 to 4.15.

However, the divested business would be reliant on a competitor (the Parties) for execution of a critical business process, and this competitor would have visibility of the quantity and type of chemicals being bought (notwithstanding the Parties' proposed controls on information).

10.61 In response to the RWP, the Parties submitted that prior experience in chemical purchasing is not required by the purchaser of the divestment business as the divestment business already has an employee engaged in purchasing.²⁴⁵ The Parties did not provide further information on this employee's role in relation to chemical procurement. However, in any event we do not agree that this individual alone would replace the purchasing expertise currently provided by the Recticel Group to the divestment business to the extent necessary for it to exert an effective competitive constraint post-Merger.

10.62 As a result, we consider that the arrangements proposed by the Parties present an unacceptable risk to the effectiveness of the remedy, and we would therefore exclude them from any remedy.

Summary of our assessment of scope

10.63 In our view, the Parties' Remedy Proposal contains most of the elements necessary to enable the divestiture business to compete effectively. However, the proposed TSAs relating to R&D and to chemicals purchasing increase the effectiveness risks of the package to an unacceptable degree and so should be excluded from the scope of any potentially effective partial divestiture.

10.64 The absence of these capabilities gives rise to material effectiveness risks. In the following section, we consider whether these risks could be mitigated or managed by a suitable purchaser.

Identification and availability of suitable purchasers

10.65 In our Remedies Notice, we invited views on whether there were any specific factors to which the CMA should pay particular regard in assessing purchaser suitability, and whether there were risks that a suitable purchaser was not available.²⁴⁶

10.66 In the following section, we cover the criteria for assessing a suitable purchaser, including whether a purchaser would need to have relevant expertise in R&D and in chemicals purchasing to overcome the limitations in

²⁴⁵ Parties' response to RWP, paragraph 5.5.

²⁴⁶ [Remedies Notice](#), paragraph 30.

the scope of the divestiture package set out in paragraph 10.63. We then consider the availability of purchasers that would meet our criteria.

Views of the Parties and third parties

- 10.67 The Parties told us they have identified a range of trade buyers as suitable purchasers for the Parties' Remedy Proposal and provided a recent list of mergers and acquisitions in the industry and related industries.²⁴⁷
- 10.68 The Parties told us that a 'large' number of financial/private equity companies would be interested in the divestiture business as it is stand-alone and has management expertise, including procurement and liaising with REF's R&D projects on an outsourced basis.^{248,249}
- 10.69 The Parties consider that the only purchaser who should be ruled out based on competition concerns is Vita due to its position in the UK upstream comfort foam and upstream technical foam markets.²⁵⁰
- 10.70 The Parties told us there could be other potential purchasers, eg a purchaser with existing downstream UK activities (ie comfort foam converting or finished products manufacture) looking for a potential vertical relationship in the upstream SLC markets in the UK.²⁵¹
- 10.71 The Parties told us that a potential purchaser of the divestment business has already approached Carpenter and expressed preliminary interest.²⁵²
- 10.72 There was broad consensus from third parties on the need for a potential purchaser to meet the CMA's normal purchaser suitability criteria and a purchaser having R&D capabilities and experience in chemical purchasing.
- 10.73 One third party raised concerns that financial investors or strategic buyers who are not foam manufacturers would not be suitable purchasers because they could not recreate the interdependences (such as sales force, R&D, safety measures, supply chain capabilities etc) currently in the REF business.²⁵³
- 10.74 Most third parties told us that there would be interest in acquiring the divestiture business, which could be an existing converter or foam

²⁴⁷ [Parties' Remedy Proposal](#), Annex 7, paragraph 9.

²⁴⁸ [Parties' Remedy Proposal](#), Annex 7, paragraph 10.

²⁴⁹ [Parties' response to Remedies Notice](#), paragraphs 6.4 and 6.5

²⁵⁰ [Parties' response to Remedies Notice](#), paragraph 6.3.

²⁵¹ [Parties' response to Remedies Notice](#), paragraph 6.6.

²⁵² [Parties' Remedy Proposal](#), Annex 7, paragraph 4.

²⁵³ [Greiner response to Remedies Notice](#), paragraph 32.

manufacturer, whether active in the UK or someone who wants to enter the UK market. However, one third party told us that interest in acquiring the business would be limited at this time because of very low consumer confidence owing to rising energy prices.²⁵⁴

10.75 Two third parties (Greiner and Belfield) told us there could be interest from companies active downstream and upstream in the foam industry.

10.76 One third party (Greiner) told us that given the small pool of potential purchasers, an upfront buyer would be 'necessary' to ensure composition and purchaser risks are mitigated, otherwise, the Parties' Remedy Proposal would be too risky to constitute an effective remedy.²⁵⁵

Criteria for assessing purchaser suitability

10.77 In line with CMA merger remedies guidance, we would need to be satisfied that a prospective purchaser of a divestment business of the Parties' Remedy Proposal is suitable in terms of being:

- (a) independent of Carpenter and REF;
- (b) having the necessary capability to compete effectively;
- (c) committed to competing in the relevant markets; and
- (d) that divestiture to the purchaser will not create further competition concerns.²⁵⁶

10.78 We considered whether a purchaser could overcome the limitations in scope in relation to R&D and chemicals purchasing set out in paragraphs 10.49 to 10.64. While we have found that having to set up an R&D or purchasing function from scratch in the divestiture business would be likely to limit its competitive effectiveness, these capabilities were likely to be found in similar industries. These capabilities, combined with the transfer and licensing of know-how for projects in progress, could ensure that the divestiture business could compete effectively. Given the relatively limited scale and importance of these operations to the divestiture business, we do not consider that it would be an insurmountable challenge for a suitable purchaser to be able to take on and develop these functions. To further manage this risk, we will examine these capabilities as part of the purchaser assessment process.

²⁵⁴ Belfield call note (10 October 2022), paragraph 15.

²⁵⁵ [Greiner response to Remedies Notice](#), paragraph 5(33).

²⁵⁶ [Merger Remedies: CMA87](#) (13 December 2018), paragraph 5.21.

10.79 Therefore, we conclude that any purchaser should have its own R&D operations and experience in chemicals purchasing. Any such purchaser would be likely to be active either in foam manufacturing, another plastics manufacturing industry or vertically related industries, and would be readily able to utilise and apply its experience to the divestiture business. This means that, in our view, a pure financial purchaser is unlikely to be suitable unless it is able to demonstrate the R&D capabilities that we consider are needed to compete effectively.

Availability of suitable purchasers

10.80 We considered the availability of suitable purchasers, based on the criteria discussed at paragraphs 10.78 to 10.79. The divestiture business is profitable and is a significant player in the relevant markets. We also note the evidence from the Parties and third parties regarding the potential pool of suitable purchasers.

10.81 While the additional criteria outlined in paragraph 10.78 may exclude some purchasers, we consider that the pool of potential purchasers is sufficiently large, and that it is likely that a suitable purchaser will be found.

10.82 In merger inquiries, where the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively, the CMA is likely to require additional protective measures, such as the identification of an upfront buyer, to mitigate the increased purchaser and composition risk.²⁵⁷

10.83 The Parties have offered to enter into an agreement for the sale and purchase of the divestiture business with an upfront buyer before the CMA accepts final undertakings and the closing of the main transaction. Alternatively, the final undertakings would specify that the main transaction will only proceed once a suitable purchaser is contractually committed.²⁵⁸ We consider that this upfront buyer requirement will further reduce the effectiveness risk of the Parties' Remedy Proposal.

Summary of our assessment of the availability of suitable purchasers

10.84 In view of the above, we consider the risk that a suitable upfront purchaser (ie one meeting the criteria set out in paragraphs 10.77 to 10.79) not being found is low.

²⁵⁷ *Merger Remedies: CMA87* (13 December 2018), paragraph 5.14.

²⁵⁸ *Parties' Remedy Proposal*, Annex 7, paragraph 1.

Ensuring an effective divestiture process and maintaining the competitive capability of the divestiture package

- 10.85 An effective divestiture process will protect the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale, as well as allowing prospective purchasers to make an appropriately informed acquisition decision.²⁵⁹
- 10.86 The incentives of merger parties may serve to increase the risks of divestiture. Although merger parties will normally have an incentive to maximise the disposal proceeds of a divestiture, they will also have incentives to limit the future competitive impact of a divestiture on themselves. Merger parties may therefore seek to sell their less competitive assets/businesses and target them to firms which they perceive as weaker competitors. They may also allow the competitiveness of the divestiture package to decline during the divestiture process.²⁶⁰
- 10.87 We next consider the following aspects of the divestiture process:
- (a) the appropriate timescale for divestiture to take place;
 - (b) whether, and under what circumstances, there is a need to appoint an external and independent trustee to complete a divestiture (**Divestiture Trustee**) to mitigate the risk that the divestiture does not complete within the timescales specified; and
 - (c) the role of interim measures during the divestiture process.

Timescale allowed for divestiture

- 10.88 We considered what would be an appropriate timescale to implement the Parties' Remedy Proposal (the '**Initial Divestiture Period**'). The Initial Divestiture Period would normally run from the acceptance of final undertakings or the making of a final order (for which the statute provides a period of up to 12 weeks after the final report)²⁶¹ until effective disposal of a divestiture package to a suitable purchaser (ie a sale to a purchaser approved by the CMA).²⁶²
- 10.89 In considering an appropriate Initial Divestiture Period, we will seek to balance factors which favour a shorter duration, such as minimising asset risk and

²⁵⁹ *Merger Remedies*: CMA87 (13 December 2018), paragraph 5.33.

²⁶⁰ *Merger Remedies*: CMA87 (13 December 2018), paragraph 5.4.

²⁶¹ *Merger Remedies*: CMA87 (13 December 2018), paragraph 4.68. The 12 week period may be extended once by up to six weeks if the CMA considers that there are special reasons for doing so.

²⁶² *Merger Remedies*: CMA87 (13 December 2018), paragraph 5.40.

giving rapid effect to the remedy, with factors that favour a longer duration, such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence. The Initial Divestiture Period will normally not exceed six months.²⁶³

10.90 One third party told us that it would be a ‘very challenging time’ to sell a foaming business (citing the loss in consumer confidence).²⁶⁴

10.91 However, we note that Carpenter has engaged its investment bankers (Ducera Partners LLC), and is already starting to explore potential purchasers, which we expect should enable it to run an efficient sale process.²⁶⁵ The Parties told us that there has been ‘interest in the [divestiture] business’.²⁶⁶

10.92 In response to the RWP, the Parties told us that they ‘reasonably anticipate closing the divestiture’ within six months.²⁶⁷

10.93 In view of the above, we conclude that the Initial Divestiture Period should be six months from the date of any final undertakings or final order.

Provision for appointment of a divestiture trustee

10.94 The CMA’s standard practice is to provide for the appointment of a Divestiture Trustee to dispose of the divestiture package if the divesting party (in this case, Carpenter) fails to achieve an effective disposal within the Initial Divestiture Period, or if the CMA has reason to be concerned that Carpenter will not achieve an effective disposal within the Initial Divestiture Period. This helps ensure that the seller has a sufficient incentive to implement the divestiture promptly and effectively.

10.95 In line with the CMA’s normal practice, if appointed, a Divestiture Trustee would be tasked with completing the divestiture to a potential purchaser approved by the CMA within a specified period and at the best available price in the circumstances.²⁶⁸

²⁶³ [Merger Remedies: CMA87](#) (13 December 2018), paragraph 5.41.

²⁶⁴ Belfield call note (10 October 2022), paragraph 15.

²⁶⁵ [Parties’ Remedy Proposal](#), Annex 7, paragraph 2.

²⁶⁶ [Parties’ response to Remedies Notice](#), paragraph 7.4.

²⁶⁷ Parties’ response to RWP, paragraph 6.1.

²⁶⁸ [Merger Remedies: CMA87](#) (13 December 2018), paragraph 5.43.

- 10.96 In the Remedies Notice, we invited views on whether the circumstances of this Merger necessitated the appointment of a Divestiture Trustee at the outset of the divestiture process.²⁶⁹
- 10.97 The Parties told us that a Divestiture Trustee is not required and would ‘slow’ the divestiture process to a suitable purchaser within the initial divestiture period.²⁷⁰
- 10.98 We have not received any submission from third parties that a Divestiture Trustee should be appointed at the outset of a divestiture process.
- 10.99 We consider any potential risks low because this is an anticipated merger and because the Parties have offered to proceed with an upfront buyer.
- 10.100 Based on the above, we currently do not see a need to require a Divestiture Trustee to be appointed at the outset of the divestiture process to ensure a timely completion of this remedy, although we intend to reserve our right to appoint a Divestiture Trustee in any of the following situations:
- (a) Carpenter fails to complete the divestiture process within the Initial Divestiture Period;
 - (b) the CMA reasonably believes that there is a risk that the divestiture process would be delayed or fail to complete within the Initial Divestiture Period;
 - (c) Carpenter is not engaging constructively with the divestiture process, eg if it does not comply with its obligations under any final undertakings or order; and
 - (d) there is a material deterioration in the divestiture package during the divestiture process.

The role of interim measures

- 10.101 The Merger is an anticipated merger (i.e. it has not been completed) and the Parties are still competing with each other in the relevant markets. We have not imposed an Interim Order as we consider the risk of pre-emptive action²⁷¹ to be low.

²⁶⁹ Remedies Notice, paragraph 34.

²⁷⁰ Parties’ response to Remedies Notice, paragraph 7.4.

²⁷¹ Pre-emptive action means action which might prejudice the reference or impede the taking of justified remedial action (sections 72(8) and 80(10) of the Act).

10.102 We will ensure that there are provisions in the final undertakings or Order that continue to preserve the independence and attractiveness of the divestiture business until completion of the divestiture.

Conclusion on the effectiveness of the Parties' Remedy Proposal

10.103 In view of the above, we conclude that the divestiture under the Parties' Remedy Proposal (excluding the TSA elements relating to R&D and chemical procurement) to a suitable upfront purchaser, who has sufficient R&D capabilities and, chemical procurement experience, would be effective in addressing the SLCs and the resulting adverse effects.

Relevant customer benefits

10.104 When deciding on remedies, the CMA may have regard to the effects of remedial action on any relevant customer benefits (**RCBs**). An effective remedy may be disproportionate if, for example, it prevents customers from securing substantial benefits arising from the merger. Insofar as these benefits constitute RCBs, the statutory framework allows us to take them into account.²⁷² RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy.²⁷³ The merger parties will be expected to provide convincing evidence regarding the nature and scale of RCBs that they claim to result from the merger and to demonstrate that these fall within the Act's definition of such benefits.²⁷⁴

10.105 The Parties have not submitted that there are any RCBs, and we have not identified any RCBs from the other evidence we have received. Therefore, it is our conclusion that no RCBs arise from the Merger.

Proportionality of remedies

10.106 In this section, we set out our assessment of the proportionality of the package of remedies we consider would be effective in addressing the SLCs and the resulting adverse effects we have found.

Proportionality assessment framework

10.107 In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will

²⁷² Sections 30 and 36(4) of the Act.

²⁷³ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.16.

²⁷⁴ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.20.

be effective. If the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least intrusive or restrictive. In addition, the CMA will seek to ensure that no effective remedy is disproportionate in relation to the SLC and its adverse effects.²⁷⁵

10.108 To fulfil this requirement, we first consider whether there are any relevant costs associated with each effective remedy option. When considering relevant costs, the CMA's considerations may include (but are not limited to):²⁷⁶

- (a) distortions in market outcomes;
- (b) compliance and monitoring costs incurred by the Parties, third parties, or the CMA; and
- (c) the loss of any RCBs that may arise from the Merger which are foregone as a result of the remedy.

10.109 The costs of a remedy may be incurred by a variety of parties, including the merger parties, third parties, the CMA and other monitoring agencies. As the merger parties have the choice of whether to proceed with the merger, the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the CMA and other monitoring agencies.²⁷⁷

10.110 Having identified the least costly effective remedy, we then consider whether even the least costly effective remedy will result in disproportionate costs that far exceed the scale of the SLC and resulting adverse effects. In doing so, we compare the level of harm which is likely to arise from the SLCs with the relevant costs of the proposed remedy. In cases where all feasible remedies are likely to be disproportionate, the CMA may conclude that no remedial action should be taken. In practice, such instances are extremely rare.²⁷⁸

Views of the parties and third parties

10.111 In response to the RWP, the Parties submitted that a prohibition would be 'disproportionate' because the majority of the REF business to be

²⁷⁵ *Merger Remedies*: CMA87 (13 December 2018), paragraph 3.6; see also paragraph 3.4.

²⁷⁶ *Merger Remedies*: CMA87 (13 December 2018), paragraph 3.10.

²⁷⁷ *Merger Remedies*: CMA87 (13 December 2018), paragraph 3.8.

²⁷⁸ *Merger Remedies*: CMA87 (13 December 2018), paragraph 3.53.

purchased by Carpenter is outside the UK and has no connection to the SLCs.²⁷⁹

10.112 We have not received submissions from third parties on this issue.

Our assessment of proportionality

10.113 As set out above, we consider that both the prohibition of the Merger and the partial divestiture of REF (which does not include the TSA relating to R&D and procurement), are both effective remedies to the SLCs and the resulting adverse effects we have found. However, for the reasons set out below, we consider that partial divestiture of REF represents the least costly and intrusive divestiture remedy that would be effective in achieving the legitimate aim of comprehensively remedying the SLCs and their resulting adverse effects that we have found.

10.114 In this particular case, the Parties have not submitted any evidence in relation to the costs of either divestiture remedy. We have not found any costs to third parties arising as a result of either remedy. As noted in paragraphs 10.104 to 10.105, no RCBs have been identified for either remedy.

10.115 We considered the intrusiveness and restrictiveness of each remedy. In our view, it is clear that the partial divestiture effected by the Parties' Remedy Proposal (excluding the TSA elements relating to R&D and chemical procurement) is less intrusive and restrictive than prohibition of the Merger, which involves two significantly larger businesses. It is, therefore, our preferred remedy.

10.116 We considered whether the Parties' Remedy Proposal (excluding the TSA elements relating to R&D and chemical procurement) was disproportionate in relation to the SLCs and their adverse effects. The Parties supply a range of important consumer products, and we have found that the likely effects of the Merger would include reduced choice, and higher prices or lower quality and reduced innovation. In addition, the SLCs are not time-limited, and therefore these adverse effects may be expected to persist under the relevant Merger situation.

Conclusion on proportionality

10.117 We consider that our preferred package of remedies is the least onerous effective action to achieve the legitimate aim of comprehensively

²⁷⁹ Parties' response to RWP, paragraph 7.2.

remedying the SLCs and their resulting adverse effects. We also consider that our preferred package of remedies is not disproportionate in relation to the SLCs and the resulting adverse effects we have found.

10.118 Therefore, we conclude that the Parties' Remedy Proposal is our preferred package of remedies (excluding the TSA elements relating to R&D and chemical procurement) and constitutes a comprehensive solution to the SLCs and their resulting adverse effects that is reasonable and proportionate.

Remedy implementation issues

10.119 Having identified our preferred package of remedies, we now consider how it should be implemented.

10.120 The CMA has the choice of implementing any final remedy decision either by accepting final undertakings pursuant to section 82 of the Act if the Parties wish to offer them, or by making a final order under section 84 of the Act. Either the final undertakings or the final order must be implemented within 12 weeks of publication of our final report (a deadline which can be extended once by up to six weeks for special reasons),²⁸⁰ including the period for any formal public consultation on the draft undertakings or order as specified in Schedule 10 of the Act.

10.121 In line with the CMA's guidance on remedies, once a remedy has been fully implemented in line with the conclusions set out in this final report, we decide that the Parties should be prohibited from subsequently acquiring the assets or shares of the divested businesses or acquiring any material influence over them. The CMA's guidance on remedies states that the CMA will normally limit this prohibition to a period of 10 years.²⁸¹ We find no compelling reason to depart from the guidance in this case by seeking a shorter or longer prohibition period.

Decision on remedies

10.122 We have decided that a divestiture under the Parties' Remedy Proposal (excluding the TSA elements relating to R&D and chemical procurement) to a suitable upfront purchaser, who has sufficient R&D capabilities and chemical procurement experience, would be an effective and proportionate remedy, and thereby as comprehensive a solution as is

²⁸⁰ [Section 82](#) and [section 84](#) of the Act and [Merger Remedies: CMA87](#) (13 December 2018), paragraph 4.68.

²⁸¹ [Merger Remedies: CMA87](#) (13 December 2018), paragraph 5.10.

reasonable and practicable, to the SLCs and the resulting adverse effects we have found.