EUROPEAN COMMISSION
DG Competition

CASE M.7408 - CARGILL / ADM CHOCOLATE BUSINESS

(Only the English text is authentic)

MERGER PROCEDURE

REGULATION (EC) 139/2004

Article 8(2) Regulation (EC) 139/2004

Date: 17/7/2015

EUROPEAN
COMMISSION

Brussels, 17.7.2015
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PUBLIC VERSION

COMMISSION DECISION

of 17.7.2015

declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.7408 - CARGILL / ADM CHOCOLATE BUSINESS)

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COMMISSION DECISION

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declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.7408 - CARGILL / ADM CHOCOLATE BUSINESS)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1], and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 23 February 2015 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations,[2]

Having regard to the final report of the Hearing Officer in this case,[3]

Whereas:

1. INTRODUCTION

(1) On 19 January 2015, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") by which the undertaking Cargill, Incorporated ("Cargill", the United States) intends to acquire control of the industrial chocolate business of the undertaking Archer Daniels Midland Company ("ADM's industrial chocolate business", the United States) by way of purchase of shares and assets ("the Transaction").

(2) Cargill is hereinafter referred to as "the Notifying Party". Cargill and ADM's industrial chocolate business are also collectively referred to as "the Parties" or "the Merged Entity". ADM's industrial chocolate business is also referred to as "ADM".

(3) The Notifying Party, Cargill, is a US-based privately held company active in the international production and sale of food, agricultural and risk management products and services. Cargill's businesses include the processing, sale and distribution of semi-finished cocoa products, industrial chocolate and fat-based coatings and fillings (including chocolate compound).

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1 OJ L 24, 29.1.2004, p. 1 With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

2 OJ C ...,...200. , p....

3 OJ C ...,...200. , p....

(4) The target company, ADM's industrial chocolate business, is active in the processing, sale and distribution of industrial chocolate and fat-based coatings and fillings (including chocolate compound). The mother company Archer Daniels Midland also produces and sells semi-finished cocoa products (cocoa liquor, butter and powder) which are used in the production of industrial chocolate.

2. THE OPERATION AND THE CONCENTRATION

(5) On 28 August 2014, the Parties signed a Master Purchase Agreement pursuant to which Cargill will acquire the assets and some equity interests constituting ADM's industrial chocolate business. The equity interests to be acquired comprise the entities ADM De Zaan Belgium Sprl, ADM Cocoa UK, Ltd, and ADM Schokinag UK Ltd. The acquired assets in the European Economic Area ('EEA') comprise production facilities and related assets located in Mannheim/Germany as well as principally inventory, accounts receivable and contracts.[4] Cargill will also acquire from ADM two industrial chocolate plants in the United States and one in Canada.

(6) Through the Transaction, Cargill will acquire sole control of ADM's industrial chocolate business. The notified operation therefore constitutes a concentration within the meaning of Article 3(1) of the Merger Regulation.

3. UNION DIMENSION

(7) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 2 500 million.[5] In […][6], […][7] and […][8] the combined aggregate turnover of the undertakings concerned is more than EUR 100 million and the aggregate turnover of each of the undertaking concerned is more than EUR 25 million. The aggregate Union-wide turnover of each of the undertakings concerned is more than EUR 100 million,[9] but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State.

(8) The notified operation therefore has a Union dimension within the meaning of Article 1(3) of the Merger Regulation.

4. THE PROCEDURE

(9) The Notifying Party notified the Transaction on 19 January 2015.

(10) Based on the first phase investigation, the Commission raised serious doubts as to the compatibility of the Transaction with the internal market with regard to the sale of industrial chocolate to customers in Germany and the United Kingdom. Therefore, the Commission adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 23 February 2015 ("the Article 6(1)(c) decision").

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4 Form CO, paragraphs 31 and 32.
5 Cargill: […]; ADM Chocolate Business: […].
6 Cargill: […]; ADM Chocolate Business: […].
7 Cargill: […]; ADM Chocolate Business: […].
8 Cargill: […]; ADM Chocolate Business: […].
9 Cargill: […]; ADM Chocolate Business: […].

(11) On 25 February, 26 February, 27 February and 2 March 2015, the Commission provided non-confidential versions of certain key submissions of third parties collected during the first phase investigation to the Notifying Party.

(12) Cargill submitted its written comments on the Article 6(1)(c) decision on 5 March 2015.

(13) On 9 March 2015, a formal State of Play meeting took place between the Commission and the Parties.

(14) On 25 March 2015 the Commission adopted a decision pursuant to Article 10(3) of the Merger Regulation extending the deadline by ten working days in agreement with the Notifying Party in order to allow the Commission to fully assess the arguments advanced by the Parties.

(15) On 23 April 2015, the Parties were informed by the Hearing Officer of his decision to recognise the undertaking Barry Callebaut AG ("Barry Callebaut") as interested third person pursuant to Article 18(4) of the Merger Regulation.

(16) On 28 April 2015, the Commission adopted a second decision pursuant to Article 10(3) extending the deadline by ten working days to fully assess new arguments brought forward by the Parties with respect to the market for industrial chocolate.

(17) In order to address the competition concerns identified by the Commission, of which the Parties were informed in the course of the procedure, the Parties submitted commitments on 4 May 2015. The Commission launched a market test of those commitments on the same day. On 22 May 2015 the Parties submitted revised commitments.

(18) The meeting of the Advisory Committee took place on 2 July 2015.

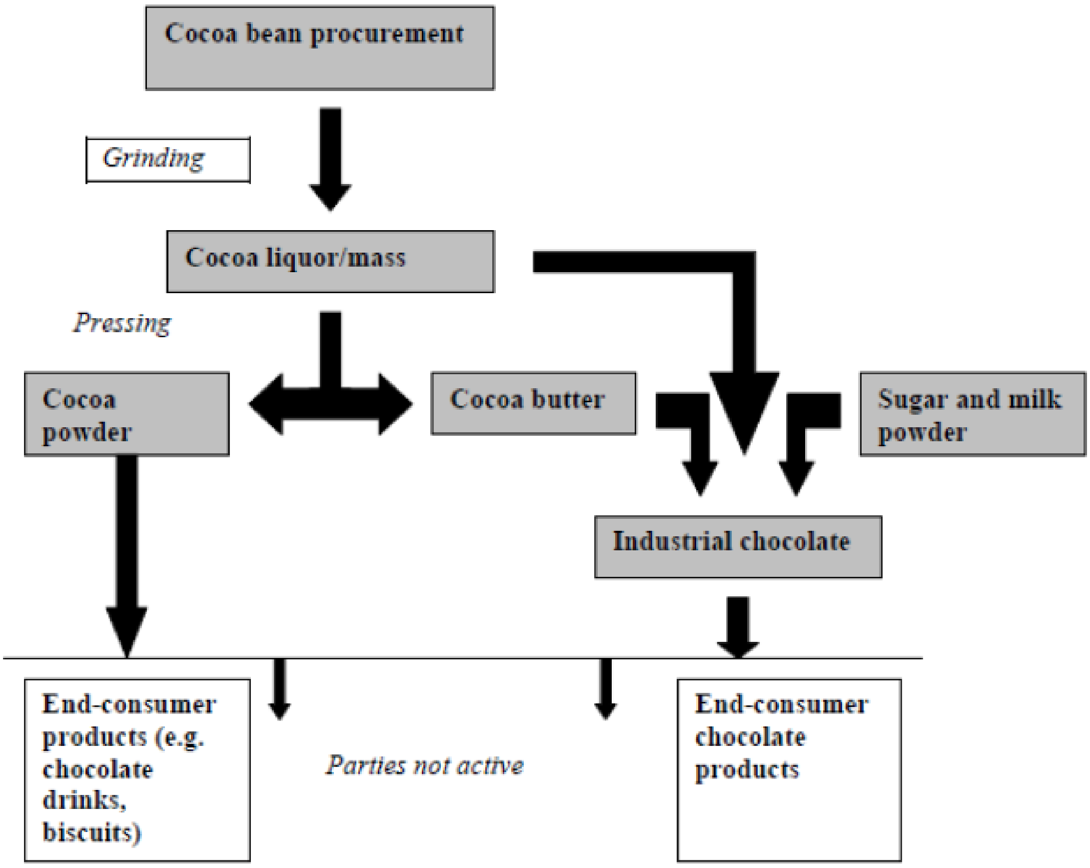
5. DESCRIPTION OF THE PRODUCTS AND VALUE CHAINS

(19) The Transaction concerns (i) the cocoa sector and in particular the production and sale of industrial chocolate and semi-finished cocoa products as well as (ii) the production and sale of fat-based coatings and fillings, including chocolate compound.

5.1. Semi-finished cocoa products and industrial chocolate

(20) Figure 1 illustrates the value chain of the cocoa market.

Figure 1 Illustration of the cocoa value chain, Form CO, paragraph 260



(21) The cocoa value chain starts with the cultivation of cocoa trees. Each pod from a cocoa tree contains up to 50 beans. Farmers harvest the pods and remove the beans from the pod. The beans then undergo fermentation and drying in the country of origin. The resulting cocoa beans are one of the main soft commodities traded worldwide.[10]

(22) Cocoa beans can either be standard or non-standard (certified and/or traceable). Certified cocoa beans refer to beans that have been certified by third-party organizations such as the RainForest Alliance, Fair Trade and Utz Certified for good agricultural, environmental and social practices throughout the whole supply chain. Traceable cocoa beans refer to beans whose supply chain can be tracked by customers back to the individual farm(s).[11] Based on the beans used, standard and non-standard products can also be distinguished within semi-finished cocoa products and within industrial chocolate.

(23) Cocoa beans are processed and ground to produce cocoa liquor. Cocoa liquor may be further pressed to separate cocoa butter (approximately 45%) and cocoa cake (approximately 55%), which is in general pulverized to produce cocoa powder. Cocoa liquor and cocoa butter together with sugar and milk powder are the raw materials for the production of industrial chocolate. Cocoa powder is primarily used

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10 See Commission decision of 10 June 2015 in Case M.7510 – Olam/ADM Cocoa Business, recitals 6-7.

11 Ibid, recital 15.

as a food ingredient to add chocolate taste to a product, for example in chocolate drinks and bakery products.[12]

(24) Industrial chocolate is used in the production of end-consumer chocolate products such as chocolate confectionery, biscuits, bakery goods, ice cream and cereals. Depending on the specific combination of the different ingredients of cocoa liquor, cocoa butter, sugar and milk powder, there are three general types of industrial chocolate: dark, white and milk chocolate.

(25) Once the industrial chocolate has been produced, it is delivered in different formats to the customer: (i) liquid chocolate; or (ii) solid chocolate. Solid chocolate can be produced and delivered in the form of couverture blocks, chocolate chips and chocolate extrusions which are solid chocolate decorations in different shapes.

(26) Before delivery, liquid chocolate is first stored in adjustment tanks. These are standard tanks where the yield, viscosity and colour of the chocolate are fine tuned. The finished liquid product is then stored in liquid heated storage tanks and stirrers. After sieving, the final liquid chocolate is loaded in heated tank trucks to be delivered in liquid form to the end customer.

(27) To produce couverture blocks, liquid chocolate is tempered (a process of cooling and heating), fed into a depositor and poured into a mould. The filled moulds are then vibrated, cooled, released from the frames and wrapped. The couverture blocks of chocolate are stored in a dry and cool area before being shipped to final customers.

(28) Chocolate chips are produced using a similar process to that used to produce blocks of chocolate, save that the type of depositor used differs. Various types of chocolate shapes and formats can be made by the same depositing machine by using different moulds in the depositing phase. Storage and shipping is the same as for couverture blocks.

(29) Chocolate extrusions are produced using a similar process to that used to produce couverture blocks. The difference lies in the extrusion machine which is used to produce the actual shape of the extrusion instead of a depositing line. Storage and shipping is the same as for couverture blocks.

5.2. Fat-based coatings and fillings/chocolate compound

(30) Fat-based coatings and fillings are a mix of vegetable fats, sugar and a flavour ingredient such as cocoa, hazelnut, yoghurt or strawberry.

(31) Chocolate compound is a cocoa-flavoured fat-based coating and filling made of cocoa powder, sugar and vegetable fats. Chocolate compound is sometimes used instead of chocolate in the production of end-consumer products because of its specific product properties and its lower price. Examples include the use of chocolate compound for fillings in cereals or biscuits, inside ice cream cones or as a coating on candy bars.[13]

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12 Ibid, recitals 6-7.

13 Form CO, paragraph 242.

6. RELEVANT PRODUCT MARKETS

6.1. Industrial chocolate

6.1.1. The Notifying Party's arguments

(32) The Notifying Party submits that there is an overall market for industrial chocolate regardless of its forms, composition and characteristics.

(33) First, the Notifying Party submits that it is not relevant to make a distinction between *liquid and solid chocolate.* The Notifying Party submits that the large majority of suppliers produce and commercialise both solid and liquid chocolate. The Notifying Party submits that the production of solid chocolate involves one additional step in the production process which can easily be added or omitted in responses to price changes of solid or liquid chocolate. Moreover, there is also a degree of demand-side substitutability since customers can easily melt solid chocolate into liquid or buy liquid chocolate and then manufacture it to solid chocolate themselves.

(34) Second, the Notifying Party submits that *dark, milk and white chocolate* form part of the same relevant market as they can be produced interchangeably on the same production lines. Furthermore, switching production is common and only switching from dark to white chocolate implies a minimal loss of time and capacity due to the manual cleaning of the line.[14]

(35) As regards further segmentation between *standard and non-standard*, the Notifying Party submits that there is no segmentation to be made. This is because the same manufacturing processes and lines are used and most suppliers are able to offer both standard and non-standard industrial chocolate.[15] Additionally, customers, consumption patterns and uses are similar.

6.1.2. The Commission's precedents

(36) The Commission has previously concluded that each of the intermediary products (cocoa liquor, cocoa powder, cocoa butter) and industrial chocolate constitute separate product markets.[16] More recently, the Commission also considered further possible segmentations but left open the exact product market definitions.[17]

6.1.3. Results of the market investigation

6.1.3.1. Liquid and solid chocolate

(37) The Commission considers that there is certain evidence to consider that liquid and solid chocolate could constitute separate product markets.

(38) First, there is a limited degree of supply-side substitutability between liquid and solid industrial chocolate. It is correct that almost all suppliers that responded to the market investigation already produce both types of industrial chocolate, with the exception of the competitor Alfred Ritter GmbH ("Ritter") which sells only liquid chocolate and a group of smaller German suppliers which sell only solid chocolate. However, even competitors who supply both types of chocolate tend to be more

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[14] Form CO, paragraphs 99-101.

[15] Form CO, paragraph 109.

[16] Commission decision of 6 June 2013 in Case M.6872 – Barry Callebaut/Petra Foods - Cocoa Ingredients Division, Commission decision of 29 April 2011 in Case M.6132 – Cargill/KVB, and Commission decision of 27 May 2009 in Case M.5431 – ADM/ Schokinag.

[17] Commission decision of 23 May 2014 in Case M.7120– Ecom Agroindrustia Corporation / Armajaro Trading.

specialised in one type of industrial chocolate (for example Belcolade in solid chocolate). Moreover, suppliers willing to switch to the production of solid chocolate or to the sale of liquid chocolate need additional equipment and investment, such as a depositing or extrusion line, packaging equipment for the production of solid chocolate as well as the necessary tanks, pipes and loading equipment to allow for the sale of liquid chocolate.[18]

(39) Second, from the demand-side perspective, a large majority of customers indicated that they could not switch between purchasing solid and liquid chocolate. Liquid and solid chocolate are used in different quantities for different end-applications which require different processing equipment. Customers generally indicated that they do not have the facilities or the necessary equipment to switch from liquid to solid or vice versa. In addition, the purchase price for solid chocolate is higher and its processing is more costly and time-consuming than processing liquid chocolate.[19]

6.1.3.2. Other possible segmentations

(40) As regards the possible distinction between *dark, white and milk chocolate*, a large majority of customers indicated that these different types of chocolate were not interchangeable since end-consumers had specific preferences.[20] Moreover, competitors indicated that producing white chocolate on a separate line avoids contamination and a large majority of competitors confirmed having dedicated production lines for white chocolate.[21] The following chart indicates that prices are different between dark, white and milk chocolate but that their prices have converged over time and that the development of prices over time appears to be rather similar.

Figure 2 Cargill internal document entitled […]

[Internal document setting out the development of prices for milk, dark and white industrial chocolate]

(41) In relation to the potential distinction between *non-standard and standard industrial chocolate*, respondents to the market investigation indicated that non-standard chocolate is more expensive and meets specific demands made by end-consumers.[22]

6.1.4. Conclusion

(42) For the reasons set out in this section, including in the light of the market investigation, the Commission considers that liquid and solid chocolate could constitute separate markets. However, the question can ultimately be left open as this would not change the outcome of the competitive assessment. Similarly, as regards possible further segmentations, the exact product market definition can be left open as this would also not change the outcome of the competitive assessment.

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18 See replies to question 3 - Phase I questionnaire to competitors.

19 See replies to question 8 – Phase I questionnaire to customers; see also agreed minutes of the conferences calls with customers of 26 January 2015, 10 February 2015, 11 February 2015, 18 March 2015, 8 April 2015, 9 April 2015 and 20 April 2015.

20 See replies to question 9 - Phase I questionnaire to customers.

21 See replies to questions 14 and 15 – Phase I questionnaire to competitors.

22 See replies to question 12 – Phase I questionnaire to customers and 17 – Phase I questionnaire to competitors.

6.2. Semi-finished cocoa products

6.2.1. The Notifying Party's arguments

(43) The Notifying Party submits that it sees no reason to deviate from the practice of the Commission and other competition authorities to define separate product markets for each of (i) cocoa liquor, (ii) cocoa butter and (iii) cocoa powder.[23]

6.2.2. The Commission's assessment

(44) In previous decisions, the Commission concluded that cocoa liquor, cocoa butter and cocoa powder constitute separate product markets.[24] The Commission also considered in previous cases a potential differentiation between standard and non-standard cocoa products, but left that question open.[25]

(45) The Commission considers that for the purposes of the present case and taking into account the Commission's previous case practice, semi-finished cocoa products should be segmented into the separate product markets for cocoa liquor, cocoa butter and cocoa cake/powder. However, it can be left open whether within each of those markets standard and non-standard semi-finished cocoa products constitute separate product markets as the outcome of the competitive assessment would be the same under those alternative market definitions.

6.3. Fat-based coatings and fillings/Chocolate compound

6.3.1. The Notifying Party's arguments

(46) The Notifying Party explains that chocolate compound can be distinguished from industrial chocolate, as (i) in the Union a product containing chocolate compound cannot be labelled as chocolate, (ii) manufacturers of end-consumer chocolate products are not able to switch from buying industrial chocolate to buying chocolate compound without changing the character of the product and (iii) chocolate compound is 20-30% cheaper than industrial chocolate.[26] At the same time, however, the Notifying Party submits that there is significant supply-side substitutability as it takes less than a day to switch from industrial chocolate to chocolate compound production. In any event, the distinction may be blurred due to the fact that innovation in recent years has allowed for some chocolate recipes to deliver the same functionality as chocolate compound.[27]

(47) If chocolate compound is not considered to be part of the market for industrial chocolate, it can be considered part of a market for fat-based coatings and fillings according to the Notifying Party. Although fat-based coatings and fillings are available in many flavours, the Notifying Party submits that the production process is

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[23] Form CO, paragraphs 273-274.

[24] Commission decision of 10 June 2015 Case M.7510 – Olam/ADM Cocoa Business, recitals 25 and 26; Commission decision of 23 May 2014 in Case M.7120 – Ecom Agroindustrial Corporation/Armajaro Trading, recitals 30-36; Commission decision of 6 June 2013 in Case M.6872 – Barry Callebaut/Petra Foods - Cocoa Ingredients Division, recitals 16-22; Commission decision of 29 April 2011 in Case M.6132 – *Cargill/KVB*, recitals 15-24; and Commission decision of 27 May 2009 in Case M.5431 – ADM/Schokinag, recitals 21-31.

[25] Commission decision of 10 June 2015 Case M.7510 – Olam/ADM Cocoa Business, recitals 25 and 26, Commission decision of 23 May 2014 in Case M.7120 – Ecom Agroindustrial Corporation/Armajaro Trading, recitals 37-40.

[26] Form CO, paragraph 244.

[27] Form CO, paragraph 245.

very similar and that any producer of fat-based coatings and fillings can easily and quickly switch between the production of any coating and filling.[28]

(48) Ultimately, however, the Notifying Party submits that the exact product market definition for chocolate compound can be left open in this case.[29]

6.3.2. The Commission's assessment

(49) There are compelling reasons to believe that chocolate compound falls into a separate product market from industrial chocolate. Chocolate compound is considerably cheaper than chocolate due to the use of vegetable fats instead of the more expensive cocoa butter. Chocolate compound cannot be labelled as "chocolate" or a "chocolate product" in the European Union and chocolate compound has differences in taste and consistency from chocolate.

(50) Furthermore, competitors active in the production of coatings and fillings contacted in the market investigation considered that it was not easy to switch from the production of compound and fillings to the production of industrial chocolate. Those competitors explained that the production of industrial chocolate requires specific equipment and expertise and that starting producing industrial chocolate would require significant investment and time.[30]

(51) The Commission therefore considers that chocolate compound falls into a separate product market from industrial chocolate. The additional question whether chocolate compound constitutes a separate market on its own or falls within the wider market for fat-based coatings and fillings can be left open in this case since no competition concerns arise with respect to coatings and fillings under those alternative market definitions.

7. RELEVANT GEOGRAPHIC MARKETS

7.1. Industrial chocolate

7.1.1. The Notifying Party's arguments

(52) The Notifying Party submits that the geographic market for industrial chocolate is EEA-wide in scope for the following reasons.

(53) First, there are substantial and growing cross-border trade flows across the EEA. Cargill estimates that over 50% of industrial chocolate sold in the EEA is delivered outside the Member State in which it is produced. According to Cargill, the Parties' distribution patterns confirm the significance of cross-border deliveries, as approximately […] of Cargill's deliveries and […] of ADM's deliveries are made abroad.[31]

(54) Second, Cargill considers that prices of industrial chocolate are similar across the EEA. According to Cargill, the price of industrial chocolate is to a large extent determined by the cost of the raw materials, such as the cocoa ingredients, sugar and milk. The price that the individual customer pays for industrial chocolate depends on the conditions of the raw material markets on the day that they book the contract. Consequently, the final ex-factory price of industrial chocolate tends to follow similar dynamics irrespective of the geography.

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28 Form CO, paragraphs 246 and 248-250.

29 Form CO, paragraph 251.

30 See replies to question 17 – Phase II questionnaire to potential entrants.

31 See Response to Commission decision pursuant to Article 6(1)c of Council regulation n°139/2004 ("*the Response to Article 6(1)c decision*"), paragraph 60.

(55) Third, Cargill considers that the cost of shipping industrial chocolate is not an obstacle to trade. According to Cargill, transportation costs of industrial chocolate represent between […] and […][32] of the average sales price of the product, depending on distance. These costs are considered by Cargill as not material enough to have an effect on trade in the EEA.

(56) Fourth, Cargill submits that there is no need for a local sales presence in every Member State where the industrial chocolate is delivered. Industrial chocolate is transported from the factory directly to the customer by transport and logistics companies. Suppliers may also work with distributors. Consequently, no local logistical facility is required for deliveries in a given country within the EEA, even where just-in-time delivery is required by customers. Reliability and consistency of supply are achieved through adequate internal planning systems and processes both on the side of the supplier and of the customer.

(57) Fifth, Cargill submits that industrial chocolate is the same across the EEA. Customer requirements can vary but all suppliers are able to deliver in line with these requirements as they involve the same ingredients and technology. There would be no material "national recipes" or traditions that create any distinction between different grades of industrial chocolate depending on the location of the customer.

7.1.2. The Commission's precedents

(58) In a previous case, the Commission found a number of elements which globally considered provided indications that the relevant geographic market for industrial chocolate is likely to be narrower than the EEA.[33] More particularly, the Commission firstly referred to customers' just-in-time delivery requirements that could reduce the distance from which industrial chocolate is effectively sourced. This is mainly due to the fact that many customers would not typically have large storage facilities and would rely on regular on-time deliveries. These customers would show a preference for sourcing their requirements from factories located nearby on a more regular basis. On that basis, the Commission considered that the scope of relevant geographical market for industrial chocolate was likely to be narrower than the EEA, but left the question open whether it was EEA or narrower (regional or national)

(59) Also, more recently, in Barry Callebaut/Petra Foods,[34] the Commission noted that transport costs may limit the distance to which industrial chocolate may be transported although the investigation confirmed the existence of cross-border trade flows across the EEA.

(60) In both cases, the exact geographic market definition was ultimately left open.

7.1.3. Results of the market investigation

(61) The Commission considers that the relevant geographic market as regards industrial chocolate is not EEA-wide and should rather be defined as catchment areas (approximated by circular shapes) around chocolate suppliers' plants or around individual customers sourcing from these plants. National geographic markets are also a relevant alternative definition.

(62) The market investigation in this case revealed several elements indicating that, despite the apparent absence of obstacles to cross-border trade, physical and demand

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32 These transport costs relate to liquid chocolate in full trucks of 24 tonnes.

33 Commission decision of 29 April 2011 in case M.6132 Cargill/KVB, recitals 36 and 38.

34 Commission decision of 6 June 2013 in case M.6872 – Barry Callebaut/Petra Foods, recitals 35 and 36.

characteristics of industrial chocolate limit the distance to which the product is shipped in practice. It appears furthermore that national borders also play a role in the sourcing patterns and deliveries of industrial chocolate given that industrial chocolate suppliers have established sales forces in some EEA countries and that they assess their market position and performance by country or by reference to national customers.

7.1.3.1. Appropriate radii of the catchment areas

(63) In the first place, as explained below in section 9.2.1.2, the Commission has collected transaction level data for the years 2013 and 2014 from the Parties and their main competitors as regards industrial chocolate. This data was used in order to trace down delivery patterns and to assess the distance at which chocolate producers ship their products. These elements show that liquid chocolate is transported over relatively shorter distances compared to solid chocolate: 80% of liquid chocolate is shipped by chocolate producers, including […], within 500 km from the production plant and 90% within 600 km. By contrast, 80% of solid chocolate, which has a higher value as explained above in section 7, is shipped within 1100 km. Overall, 80% industrial chocolate (liquid and solid together) is shipped within 530 km from the production facility

(64) Customers having responded to the market investigation have confirmed that there is a maximum distance for liquid chocolate within which they typically choose their suppliers of liquid chocolate.[35] A vast majority of these customers have indicated that sourcing liquid industrial chocolate over this maximum distance would entail negative effects because of higher transport costs and lower competitiveness and efficiency (less supply flexibility, delays).[36] Some customers have indicated that their maximum sourcing distance was below 500 km. Other customers, especially those who buy solid chocolate, submitted that they can source beyond this distance.[37] A radius of 500 km appears therefore to reflect on average the distance up to which liquid chocolate suppliers typically sell their product, and individual customers source industrial chocolate.

(65) In the second place, respondents to the market investigation have also confirmed the importance of timely deliveries and reliability of supply. A majority of customers have explained that they rely on just-in-time deliveries, particularly because of limited storage capacities.[38] In this context, any breakdown in the supply chain such as late deliveries may lead to reduced customer service levels, disrupted manufacturing processes and additional costs. As explained by one German customer "*If deliveries are late we may not be able to produce in line with the demands of our customers. In the worst case there will be production stoppage*".[39] The importance of just-in-time deliveries explains why customers source liquid chocolate on relatively short distances and why they are reluctant to source from further away.[40]

(66) The Notifying Party has explained that concerns about just-in-time deliveries can be solved by customers installing a storage tank.[41] According to the Notifying Party,

35 See replies to question 8 – Phase II questionnaire to customers.
36 See replies to question 9 – Phase II questionnaire to customers.
37 See replies to question 9 – Phase II questionnaire to customers.
38 See replies to question 12-1 – Phase II questionnaire to customers.
39 See replies to question 12-2 – Phase II questionnaire to customers.
40 See replies to question 15 – Phase II questionnaire to customers.
41 See Response to Article 6(1)c decision, paragraphs 105-106.

depending on the volume of liquid chocolate that the customer uses annually, installing a tank with a […] capacity at a plant allows the customer to have a safety stock of liquid chocolate that will last for a few days, which has no impact on the quality of the liquid chocolate and constitutes a sufficient buffer against disruption as it largely exceeds any reasonably foreseeable delay that may potentially arise when purchasing from suppliers beyond a radius of […] km or more.

(67) The market investigation has revealed that most of the customers buying liquid chocolate already own tanks to store raw materials.[42] The investment in tanks has already been significant since customers own in general one tank for each different recipe of liquid chocolate that they purchase.[43]

(68) Respondents to the market investigation have indicated that investing in additional tank capacity would not mitigate the issues linked to just-in time deliveries and in particular additional tanks would not be a feasible solution that would enable customers to source over longer distances. Customers have explained that investing in additional equipment would require an upfront investment in the tank itself, with a long return on investment, higher levels of working capital and higher operational costs related to energy, maintenance and cleaning. Moreover, some customers do not have available space for more tanks.[44]

7.1.3.2. Role of national borders

(69) The analysis of transaction data has also revealed that sourcing patterns of industrial chocolate is also influenced by factors other than strictly distance, and in particular national borders. For example, the detailed reconstruction has shown that 70% of the liquid chocolate used in Germany is produced in Germany. These figures are even higher for France (76%), the United Kingdom (90%), the Netherlands (86%) and Belgium (98%) and show that cross-border purchases by customers are limited.

(70) The market reconstruction has also confirmed that the cross-border trade flows of liquid industrial chocolate mainly originate from producers with plants in the import country concerned. For example Germany's main imports of chocolate come from Belgium (45 000 tonnes). German imports from Belgium are […] related to Cargill sales ([…]) and Barry Callebaut sales from their respective Belgian production facilities. Both companies also have production facilities in Germany. Likewise, the United Kingdom's main imports of chocolate come from Belgium (4 500 tonnes). Belgian imports are related […] to Cargill sales, Barry Callebaut sales and ADM sales from their respective Belgian plants. These three producers alone have an industrial chocolate facility in the United Kingdom. Other suppliers that in general own just one plant in a single Member State have much more limited cross-border deliveries.

(71) These trade flows from established producers reflect their ability to produce some specialties in dedicated production sites and to ship them abroad, whereas more basic products are manufactured closer to the customers. They do not, however, appear to show that all competitors located in a given territory are willing and able to ship liquid industrial chocolate across the entire EEA.

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42 See replies to question 51 – Phase II questionnaire to customers.

43 See replies to question 52 – Phase II questionnaire to customers.

44 See replies to question 56 – Phase II questionnaire to customers; see also agreed minutes of the conference calls with customers of 10 February 2015, 18 March 2015, 8 April 2015.

(72) A review of Cargill's internal documents also confirmed that Cargill assesses […]. The internal documents prepared in the context of the acquisition of KVB mention that […].[45] One of Cargill's internal documents assesses the issue of […] in Germany following the merger with ADM.[46] Cargill's sales organization is structured […]. Cargill also has a […] and it furthermore reports its performance […].[47]

(73) ADM's internal documents also show that […] in a given country is a key success factor and that ADM aimed at […]. An ADM strategy review stresses the need to […].[48] ADM has in particular explained that ADM's sales force is organized […].[49]

7.1.4. Conclusion on geographic market definition

(74) For the purpose of the assessment of the Transaction, the Commission considers that the relevant geographic market for all industrial chocolate, and also its potential sub-segment for liquid industrial chocolate, corresponds to circular catchment areas of 500 km distance around the Parties' plants or the Parties' customers as a radius of 500 km appears to reflect on average the distance up to which liquid chocolate suppliers typically sell their product, and individual customers source industrial chocolate. There is also evidence in this case in favour of national markets and the Commission will present market shares for both hypotheses, circle-based or national markets.

(75) In the end the geographic market definition can be left open because the Transaction leads to a significant impediment to effective competition in the market for industrial chocolate sold to customers in Germany or to customers located in the overlap area of the relevant catchment areas of ADM's plant in Mannheim/Germany and Cargill's plants in Germany, regardless of whether the assessment focuses on Germany or on catchment areas around German plants or customers. The outcome of the competitive assessment would, similarly, remain the same for the other geographic areas assessed in this Decision and where the Transaction does not lead to a significant impediment to effective competition.

7.2. Semi-finished cocoa products

7.2.1. The Notifying Party's arguments

(76) The Notifying Party argues that the geographic markets for the manufacture and distribution of each of cocoa liquor, cocoa butter and cocoa powder should be defined as at least EEA-wide in scope because (i) European processors face strong competition from products imported from South America, Africa and Asia, (ii) there are no barriers to trade significant enough to make imports into the EEA unprofitable, (iii) price differences between products from different originating countries tend to be small and (iv) many customers are large multinational companies which source their requirements globally. The Notifying Party submits, however, that it is unnecessary to take a final position on the geographic market definition in this case.[50]

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45 […].

46 […].

47 See for example […].

48 See […].

49 ADM's reply to the Commission's request for information of 7 November 2014, questions 19 to 24.

50 Form CO, paragraphs 279-282.

7.2.2. The Commission's assessment

(77) While some decisions left open the question whether the geographic market for semi-finished cocoa products were EEA-wide or world-wide in scope,[51] in two decisions from 2014 and 2009 the Commission concluded that the geographic market was to be considered as EEA-wide in view of (i) significant differences in customer preferences in the EEA compared to other geographic areas, and (ii) the existence of distinct regulatory regimes, import duties, quotas and technical standards, notably with respect to requirements for certain third-party certification schemes.[52]

(78) As regards cocoa butter in particular, which is generally delivered in liquid form in the EEA, the Commission has previously examined whether there were any factors that limit transportation distance of cocoa butter in the EEA, such as transportation costs and reliability of supply.[53]

(79) However, for the purposes of this Decision, the precise geographic market definition for the different semi-finished cocoa products can be left open as the outcome of the competitive assessment would be the same under the alternative geographic market definitions.

7.3. Fat-based coatings and fillings/chocolate compound

7.3.1. The Notifying Party's arguments

(80) The Notifying Party submits that the geographic market for chocolate compound should be defined in a similar way to the geographic market for industrial chocolate.[54] Therefore the Notifying Party submits that the market should be considered to be EEA-wide in scope but it has also submitted market data for potential geographic markets defined on the basis of radii drawn around the Parties' production plants.

7.3.2. The Commission's assessment

(81) The Commission considers that the geographic market for fat-based coatings and fillings could be constituted by circular catchment areas drawn around the Parties' plants or around the Parties' customers while an assessment at the national level might also be plausible, similar to the Commission's findings as regards the geographic market for industrial chocolate as set out in section 7.1. However, the geographic market definition for fat-based coatings and fillings can be left open in this Decision because the outcome of the competitive assessment would be the same under those alternative geographic market definitions. In particular, the Commission does not consider it necessary to define the precise radius of the circular catchment areas around the Parties' plants or around the Parties' customers as the outcome of the competitive assessment would be the same.

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51 Commission decision of 6 June 2013 in Case M.6872 – Barry Callebaut/Petra Foods - Cocoa Ingredients Division, recitals 32-33, Commission decision of 29 April 2011 in Case M.6132 – Cargill/KVB, recitals 30-32.

52 Commission decision of 10 June 2015 in Case M.7510 – Olam/ADM Cocoa Business, recitals 33, Commission decision of 23 May 2014 in Case M.7120 – Ecom Agroindustrial Corporation/Armajaro Trading, recitals 60-66; Commission decision of 27 May 2009 in Case M.5431 – ADM/Schokinag, recitals 35-38.

53 Commission decision of 10 June 2015 in Case M.7510 – Olam/ADM Cocoa Business, recital 34.

54 Form CO, paragraph 256.

8. THE PARTIES' ACTIVITIES IN THE EEA

(82) Both Cargill and ADM operate chocolate production plants in the EEA.

(83) Cargill operates seven industrial chocolate facilities in the EEA:

(a) three in Germany (two plants in Berlin – Reinickendorf and Lichtenrade – and one in Thuringia – Klein Schierstedt),

(b) two in Belgium (Mouscron and Antwerp),

(c) one in France (Rouen) and

(d) one in the United Kingdom (Worksop).

(84) ADM operates three industrial chocolate factories in the EEA:

(a) one in Germany (Mannheim),

(b) one in Belgium (Manage) and

(c) one in the United Kingdom (Liverpool).

Figure 3 Location of the Parties' plants for the production of industrial chocolate and of coatings and fillings in the EEA, Annex 7.2 to the Form CO, page 2

(85) Cargill also has activities in the production and sale of semi-finished cocoa products, namely in cocoa liquor, cocoa butter and cocoa powder, and has a number of production facilities in the EEA.

(86) As regards coatings and fillings, Cargill produces coatings and fillings in its plant in Deventer in the Netherlands while ADM produces coating and fillings in its plants in Liverpool in the United Kingdom and in Mannheim in Germany.

9. COMPETITIVE ASSESSMENT

9.1. Analytical framework for the competitive assessment

(87) Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of those benefits by significantly increasing the market power of firms.[55]

(88) As regards non-coordinated effects, a merger with horizontal effects may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who may consequently have increased market power. In this respect, the most direct effect of the merger will be the loss of competition between the merging firms.[56] Non-merging firms in the same market can also benefit from the reduction of competitive pressure resulting from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices.[57] Moreover, mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other, together with a reduction of competitive pressure on the remaining competitors, may also result in a significant impediment to effective competition.[58]

(89) In addition, a merger with vertical effects may impede effective competition through non-coordinated effects by resulting in foreclosure where actual or potential competitors' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing those competitors' ability or incentive to compete.[59] When assessing the likelihood of input foreclosure in particular, the Commission examines whether the merged entity would have the ability after the Transaction to foreclose access to inputs, whether it would have the incentive to do so, and whether a foreclosure strategy would have a significant detrimental effect on competition in the downstream market.[60]

(90) In the present case, the Transaction leads to:

(a) horizontal overlaps in the production and sale of industrial chocolate (assessed in Sections 9.2, to 9.7),

(b) vertical links between the production and sale of semi-finished cocoa products (upstream) and the production and sale of industrial chocolate (downstream) (assessed in Section 9.8), and

(c) horizontal overlaps in the production and sale of chocolate compound (assessed in Section 9.9).

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55 Commission Guidelines on the assessment of horizontal mergers, OJ C 31, 5.2. 2004, p. 5 ("Horizontal Merger Guidelines"), paragraph 8; Commission Guidelines on the assessment of non-horizontal merges under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6 ("Non-Horizontal Merger Guidelines"), paragraph 10.

56 Horizontal Merger Guidelines, paragraph 24.

57 Ibid.

58 Ibid, paragraph 25.

59 Non-Horizontal Merger Guidelines, paragraph 29.

60 Ibid, paragraph 32.

(91) The Transaction also leads to a minor horizontal overlap in the production of cocoa liquor, which is a semi-finished cocoa product. The cocoa liquor line located in ADM's industrial chocolate plant in Mannheim/Germany is part of the assets being acquired by Cargill because it is physically located within ADM's industrial chocolate plant in Mannheim.

(92) The liquor line's capacity is […] per year. It has produced […] of cocoa liquor per year over the last number of years, […] of which (around […] per year) was sold on the merchant market. The acquisition of the cocoa liquor line is […]. As a consequence, the corresponding business will […]. In any event, the Transaction would lead to a marginal increase in Cargill's sales share of cocoa liquor in the EEA by [0-5]% (increase from [20-30]% to [20-30]%) and in Cargill's capacity share in cocoa liquor in the EEA by [0-5]% (increase from [20-30]% to [20-30]%). Therefore, and considering that the liquor line is part of the Divestment Business to be sold under the Final Commitments of 22 May 2015 (as discussed in section 10), the Commission will not discuss this horizontal overlap further in this Decision.

9.2. Horizontal overlaps in industrial chocolate concerning Germany

9.2.1. Market shares and market structure

(93) The Commission has found that there was evidence in this case in favour of both national markets and circle-based markets reaching across borders, as set out in Section 7.1.

(94) As regards circle-based markets, there are various ways of calculating market shares and assessing the market structure. The analysis can be plant-centred and can assess the market structure in circular areas around the Parties' plants or in areas between the Parties' plants where the circular areas overlap. Alternatively, the analysis can be customer-centred and can assess the market structure in circular areas drawn around individual customers who can be served from the Parties' plants. The Parties and the Commission have used both approaches in this case.

9.2.1.1. The Notifying Party's estimates

(95) There are no published industry statistics for the industrial chocolate markets. The Notifying Party has therefore relied on its best estimates to provide market shares for the sales regions including German customers.

(96) Table 1 sets out the Notifying Party's market share estimates for industrial chocolate sales at the national German level.

Table 1 Notifying Party's estimates of market shares at the German level[61]

	Germany
Companies	**2013**
Cargill	[30-40]%
ADM	[10-20]%
Combined	**[40-50]%**
Barry Callebaut	[30-40]%
Ritter	[5-10]%
Krüger	[0-5]%
Cémoi	[0-5]%
Belcolade	[0-5]%
Lubeca	[0-5]%
Kessko	[0-5]%
Herza	[0-5]%
Icam	[0-5]%
Rübezahl	[0-5]%
Pronatec	[0-5]%
Total	**100%**

(97) As regards the potential sub-segment of liquid industrial chocolate, the Parties estimate that their combined market share in Germany would be [40-50]% (Cargill: [30-40]%; ADM: [10-20]%).[62]

(98) Table 2 sets out the Notifying Party's estimates of plant-centred market shares. Under this approach, the Notifying Party has drawn circles with radii of 400km and 750km around the Parties' plants and has identified all of the competitors' plants located within each of the circles. The Notifying Party has subsequently calculated the market shares of the Parties and their competitors in those circles based on the Parties' actual sales data and on the competitors' estimated sales data, considering only those plants that fall within the considered circles.[63]

61 Form CO, paragraph 198; see also Cargill's reply to the Commission's request for information of 17 March 2015, question 15.

62 The calculation is based on the Parties' volumes of liquid chocolate sales in Germany, see the Parties' submission of transaction data on 21 December 2014 and 21 January 2015, as well as on the Parties' estimates of the merchant market size for liquid chocolate in Germany as provided in Cargill's reply to the Commission's request for information, of 4 April 2015, question 1.

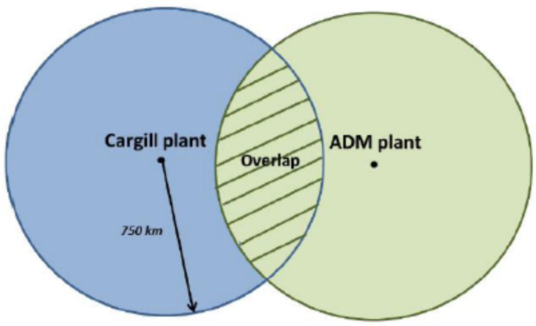
63 Form CO, footnote 57.

Table 2 The Notifying Party's plant-centred market share estimates[64]

	Around Cargill's plants in Berlin		Around Cargill's plant in Klein Schierstedt		Around ADM's plant in Mannheim	
Companies	**400km**	**750km**	**400km**	**750km**	**400km**	**750km**
Cargill	[40-50]%	[20-30]%	[30-40]%	[10-20]%	[20-30]%	[10-20]%
ADM	--	[5-10]%	[10-20]%	[5-10]%	[10-20]%	[5-10]%
Combined	**[40-50]%**	**[30-40]%**	**[50-60]%**	**[20-30]%**	**[30-40]%**	**[20-30]%**
Barry Callebaut	[20-30]%	[40-50]%	[10-20]%	[40-50]%	[40-50]%	[40-50]%
Cémoi	[10-20]%	[0-5]%	[5-10]%	[5-10]%	N/A	[5-10]%
Ritter	N/A	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Krüger	[0-5]%	[0-5]%	[0-5]%	[0-5]%	N/A	[0-5]%
Belcolade	N/A	[5-10]%	N/A	[5-10]%	[5-10]%	[0-5]%
Lubeca	[0-5]%	N/A	[0-5]%	N/A	N/A	N/A
Others	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[0-5]%	[5-10]%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

(99) The Notifying Party has also submitted customer-centred market share estimates.[65] Under this approach, the Notifying Party started by drawing circles based on a 500km and a 750 km radius around a Cargill plant and around an ADM plant covering the German territory. The analysis then focused on German customers in the overlap area, that is to say on the German customers that fall within the circles drawn around both plants.

Figure 4 Identification of overlap customers in the Notifying Party's customer-centred analysis[66]



(100) For each German customer located in the overlap area, the Notifying Party identified all of the industrial chocolate plants that are located at less than 1,500 km away from it. For each of those plants, the Notifying Party calculated a weight that should be ascribed to it driven by (i) the production of the plant and (ii) the distance between the plant and the customer. The impact of the distance on the weight was determined based on the distribution pattern of the Parties' own deliveries. The weight (in %) was applied to the estimated production of each of those plants.

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64 Form CO, pages 59ff and 67ff.

65 RBB Economics submission of 4 March 2015.

66 RBB Economics submission of 4 March 2015, page 5.

(101) On that basis, the Notifying Party calculated market shares for each customer. The Notifying Party then aggregated those results across customers, assigning a weight to each customer on the basis of the volumes purchased.

(102) The Notifying Party calculated such market shares for overlap areas based on 500 km and 750 km radii for the (i) the overlap area between ADM's Mannheim plant and Cargill's Klein Schierstedt plant and (ii) the overlap area between ADM's Mannheim plant and Cargill's Berlin plants. Under a 750 km radius the overlap areas cover the entire German territory, that is to say all German customers, and therefore equal an estimated market share at the national level. Due to the different methodologies used, the market shares estimated under this approach for the 750km radius diverge from the estimated national market share presented in Table 1. That divergence illustrates that the Parties' estimates should serve as a first point of orientation but are inherently uncertain.

Table 3 The Notifying Party's customer-centred market share estimates

	Mannheim and Berlin overlap area		**Mannheim and Klein Schierstedt overlap area**	
Companies	**500 km**	**750 km**	**500 km**	**750 km**
Cargill	[20-30]%	[20-30]%	[20-30]%	[20-30]%
ADM	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Combined	**[30-40]%**	**[30-40]%**	**[30-40]%**	**[30-40]%**
Barry Callebaut	[30-40]%	[40-50]%	[40-50]%	[40-50]%
Cémoi	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Belcolade	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Ritter	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Krüger	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Lubeca	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Total	**100%**	**100%**	**100%**	**100%**

(103) The Commission considers that those methodologies of calculating market shares at the national level as well as from a plant-centred and customer-centred perspective in Germany are useful to come to a first understanding of the concentration levels in the relevant areas. However, the presented data, besides constituting mere estimates (as the Notifying Party has no means of verifying the actual sales figures of its competitors, neither at the aggregate nor at the plant level, in the absence of available data), do not reflect the geographical distribution of the sales of their competitors other than through aggregate estimates at the country level. Hence their plant-centred and customer-centred analyses have to resort to strong assumptions about the geographical distribution of their competitors' sales that might not reflect the actual trade patterns and the actual presence of the different competitors in the different geographic regions. The Parties' figures therefore can only serve as a first point of orientation and have to be verified through the use of actual sales figures, as carried out in the Commission's market reconstruction.

9.2.1.2. The Commission's market reconstruction

(104) In the light of the lack of reliable third party data, the Commission has carried out a market reconstruction for the relevant market concerning German customers.

(105) The Commission has collected transaction level data for the years 2013 and 2014 from the Parties and their main competitors: Barry Callebaut, Belcolade, Cémoi, Herza, ICAM, Irca, Krüger, Natra, Nutkao and Ritter. That data includes all of the individual sales volumes and sales revenues of liquid and solid industrial chocolate broken down by customer location. The Commission estimates that the data set for the 12 industrial chocolate producers together includes about 95% of sales of industrial chocolate sales in the EEA. In addition, the Commission has collected aggregated data on total sales and sales broken down by Member State from a number of additional small producers, including producers who are making sales in Germany. All of the Commission's calculations presented in this decision are based on sales volumes in tonnes and not based on sales revenues.

(106) The Commission's market reconstruction shows that the Parties have over-estimated the sales of their competitors. The combined market shares of the Parties are therefore significantly higher than estimated by the Parties. In addition, the markets are more concentrated if only liquid chocolate is taken into account.

(107) The results of the market share reconstruction at the national German level are set out in Table 4.

Table 4 The Commission's market reconstruction for Germany

Companies	Germany – all chocolate	Germany – liquid chocolate
Cargill	[40-50]%	[40-50]%
ADM	[10-20]%	[10-20]%
Combined	**[50-60]%**[67]	**[50-60]%**[68]
Barry Callebaut	20-30%	20-30%
Ritter	5-10%	5-10%
Cémoi	0-5%	0-5%
Krüger	0-5%	0-5%
Ulmer	0-5%	--
Belcolade	0-5%	0-5%
Lubeca	0-5%	0-5%
Kessko	0-5%	--
Herza	0-5%	0-5%
Others	0-5%	0-5%
Total	**100%**	**100%**
HHI Δ[69]	**[…]**	**[…]**

67 There is an uncertainty as regards the exact sales data of one of the competitors since it is not possible to distinguish with ultimate certainty its sales of industrial chocolate from its sales of chocolate compound. Column 1 1 reflects the Commission's best effort to isolate the sales of industrial chocolate. If all sales (including those of chocolate compound) are included in the calculation, the Parties' joint market share would be [50-60]% and the difference would thus be marginal.

68 If all sales (including those of chocolate compound) are included in the calculation for one of the competitors (see footnote 67), the Parties' joint market share would be [50-60]% and the difference would thus be insignificant.

69 This is the increase in concentration as measured by the Herfindahl-Hirschman Index ("HHI") as referenced in the Horizontal Merger Guidelines, paragraphs 16 and 19-21.

(108) The Commission notes in this context that in one of its internal documents, Cargill appears to estimate the industrial chocolate volumes as follows in the […].[70] According to those internal figures, Cargill and ADM would hold a joint market share of [50-60]% in the cluster (Cargill: [30-40]%; ADM: [10-20]%) while Barry Callebaut would hold a market share of [20-30]% and other suppliers would hold a joint market share of [10-20]%. Those numbers are in line with the results of the Commission's market reconstruction as set out in recital (107).

(109) The Commission has also used the collected market data to calculate market shares under a plant-centred and a customer-centred approach for circle-based markets.

(110) As regards the plant-centred approach, similar to the Notifying Party's approach outlined in recital (97), the Commission identified the overlapping area between the relevant plants by drawing circles of 500km and 600km around the Parties' plants in Germany. That overlap area was not limited to Germany but included parts of neighbouring countries if those were caught in the overlap.

(111) Figure 5 illustrates the Commission's approach of identifying the overlap areas for the example of Cargill's chocolate plants in Berlin and ADM's chocolate plant in Mannheim, using a 600km radius.

Figure 5 Identification of the overlap area between plants

[Map of Europe in which all industrial chocolate customers of the Parties are marked by a dot and in which circles are drawn around Cargill's chocolate plants in Berlin and ADM's chocolate plant in Mannheim, using a 600km radius; the customers located in the overlap area are highlighted in red]

(112) On that basis the Commission calculated the Parties' market shares in the overlap areas based on the data received from the Parties[71] and their competitors[72] in the second phase investigation. Table 5 sets out the results of those plant-centred market share calculations for all chocolate and for the potential sub-segment of liquid chocolate.

70 Cargill internal document entitled […], Annex 2.5.17 to Cargill's reply to the Commission's request for information of 31 March 2015.

71 Transaction data submitted by the Parties on 21 December 2014 and 21 January 2015.

72 Transaction data submitted by the competitors Barry Callebaut, Belcolade, Cémoi, Herza, ICAM, Irca, Krüger, Natra, Nutkao and Ritter in the second phase market investigation.

Table 5 The Commission's market reconstruction for overlap areas between German plants

	All chocolate				Liquid chocolate			
Companies	**Mannheim-Berlin**		**Mannheim-Kl.Schierst.**		**Mannheim-Berlin**		**Mannheim-Kl.Schierst.**	
	500km	**600km**[73]	**500km**	**600km**	**500km**	**600km**	**500km**	**600km**
Cargill	[40-50]%	[30-40]%	[30-40]%	[30-40]%	[40-50]%	[40-50]%	[30-40]%	[30-40]%
ADM	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Combined	**[50-60]%**	**[50-60]%**	**[40-50]%**	**[40-50]%**	**[60-70]%**	**[50-60]%**	**[50-60]%**	**[40-50]%**
Barry Callebaut	20-30%	30-40%	30-40%	40-50%	20-30%	30-40%	30-40%	30-40%
Ritter	0-5%	5-10%	0-5%	0-5%	5-10%	5-10%	5-10%	0-5%
Cémoi	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%
Krüger	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%
Belcolade	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%
Others	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%	0-5%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**
HHI Δ	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

(113) As regards the customer-centred approach, the Commission has in its calculations drawn circles of different radii around each of the Parties' customers and has calculated the market shares in each of those circles based on the actual sales made by the Parties and their competitors within the considered circle (using the data received in the second phase investigation). The Commission calculated the Parties' market shares based on the data received from the Parties[74] and their competitors[75] in the second phase investigation. This analysis based on a 500km radius leads to combined market shares of the Parties between [40-50]% and [50-60]% for customers in many parts of Germany and surrounding areas, with the concentration increasing in the north and east of the Germany territory. The combined market shares are on average higher for a larger number of customers in those areas if only liquid industrial chocolate is considered. Based on a 600km radius, the combined market shares are between [40-50]% and [50-60]% in many parts of Germany and surrounding areas. Again, the combined market shares are on average higher for a larger number of customers in those areas if only liquid industrial chocolate is considered.

[73] The Commission has also assessed the overlap areas based on a 600km radius to verify the robustness of its analysis based on a 500km radius.

[74] Transaction data submitted by the Parties on 21 December 2014 and 21 January 2015.

[75] Transaction data submitted by the competitors Barry Callebaut, Belcolade, Cémoi, Herza, ICAM, Irca, Krüger, Natra, Nutkao and Ritter in the second phase market investigation.

(114) Figure 6 illustrates the outcome of the Commission's assessment for customers of liquid industrial chocolate in customer-centred circles with a radius of 500km.

Figure 6 Customer-centred market shares for circle-based markets with 500km radius for liquid chocolate

[Map of Europe in which all industrial chocolate customers of the Parties are marked by different coulored dots; the colours correspond to different ranges of joint market shares of the Parties in the respective catchment area around the customer, such as 30-40%, 40-45% or 45-50%]

(115) As regards the concentration levels of the market as a whole, according to the Commission's calculations, the Transaction would also lead to substantial increases in concentration as illustrated by the increase in the Herfindahl-Hirschman Index ('HHI') set out in Table 4 and Table 5.

(116) Moreover, according to the results of the Commission's assessment and in line with the Parties' submissions, Barry Callebaut is the Parties' most important – albeit smaller – competitor in the sales regions around their German plants. However, a significant share of Barry Callebaut's sales appears to relate to long-term contracts of several years' duration, including contracts under which vertically integrated companies purchase a part of their needs on the market instead of producing it in-house ("out-sourcing contracts"). Such contracts may be concluded at the EEA level or even have global coverage and may also cover the sale of other products, such as semi-finished cocoa products, in addition to the sale of industrial chocolate.

(117) According to internal documents of the Parties[76] and publicly available information,[77] Barry Callebaut has been particularly successful in winning those long-term contracts. Barry Callebaut publicly refers to itself as the "*Outsourcing/ strategic partner of choice*".[78] This means that part of Barry Callebaut's production volume is currently committed to being sold under long-term contracts to large customers and is accordingly not available for short-term purchases of smaller customers.

(118) If such volumes by Barry Callebaut are not taken into account, this underscores the Parties' important market position in the sales regions around their German plants and further strengthens their already substantial market position with specific respect to short-term purchases.

9.2.1.3. Conclusion

(119) The Merged Entity would have market shares above [50-60]% at the national German level and at least above [50-60]% (and even above [50-60]% or [60-70]% in many cases) for the different circle-based markets that could be considered in this case in the sales regions around the Parties' German plants. The markets for industrial chocolate in the 500km catchment areas around the Parties' German plants

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76 See for instance Cargill internal document entitled […], slides 96 and 99.

77 See for instance Barry Callebaut's press release of 23 January 2012, "*Barry Callebaut and Unilever sign long-term partnership agreement*", according to which Barry Callebaut would become a global partner of Unilever for cocoa and chocolate, doubling its current Unilever volumes, https://www.barry-callebaut.com/news/2012/01/barry-callebaut-and-unilever-sign-long-term-partnership-agreement (last accessed on 3 June 2015); see also Barry Callebaut's press release of 9 September 2010, "*Barry Callebaut and Kraft Foods sign global supply agreement*", https://www.barry-callebaut.com/news/2010/09/barry-callebaut-and-kraft-foods-sign-global-supply-agreement (last accessed on 3 June 2015).

78 Barry Callebaut's Roadshow Presentation 2014/2015, page 3, https://www.barry-callebaut.com/sites/default/files/publications/roadshow_hy_2014-15.pdf (last accessed on 3 June 2015).

are concentrated and the Transaction would lead to a sizeable increase in concentration levels as evident from the increase in HHI levels.

(120) The Commission therefore concludes that the Parties would hold large market shares in concentrated markets, which indicates that the Parties would hold a degree of market power after the Transaction. This result is even more pronounced if only the potential sub-segment for liquid chocolate is considered.

9.2.2. Assessment of potential non-coordinated effects

(121) The Commission's findings on non-coordinated effects in the industrial chocolate markets in the sales areas around the Parties' German plants or German customers will be summarized in the following sections: i) market participants' general views on the effects of the Transaction (section 9.2.2.1); ii) closeness of competition between ADM and Cargill (section 9.2.2.2); iii) competitive constraints from other competitors (section 9.2.2.3); iv) ability of competitors to increase supply (section 9.2.2.4); v) future expansion by competitors (section 9.2.2.5); vi) elimination of a significant competitive constraint (section 9.2.2.6); vii) assessment of critical loss analysis submitted by the Notifying Party (section 9.2.2.7); viii) effects of Cargill's vertical integration on its incentives to increase prices (section 9.2.2.8); ix) market entry (section 9.2.2.9); x) countervailing buyer power and the possibility of sponsoring entry (section 9.2.2.10); and xi) Possibility of in-sourcing and market entry by vertically integrated chocolate producers (section 9.2.2.11).

9.2.2.1. Market participants' general views on the potential effects of the Transaction

(122) The Commission considers that the views expressed by market participants on the effects of the Transaction are an important piece of evidence to be taken into account in the assessment of the Transaction.

(123) The clear majority of customers with production facilities in Germany who replied to the Commission's questions in the first and second phase market investigation[79] have raised concerns about the impact of the Transaction. Indeed, more than two thirds of the customers raised concerns about the effects of the merger if vertically-integrated customers, who have their own internal production of industrial chocolate, are set aside.

(124) Those customers submit that the Transaction will have a negative impact on their company and/or on the supply of industrial chocolate. They claim that the acquisition would lead to the elimination of an important competitor which would result in price increases in the market. Customers explain that in the past they negotiated mainly with the three main suppliers of industrial chocolate (ADM, Cargill and Barry Callebaut) for lack of alternative options. If one of those options disappears, the remaining two will have increased negotiating power and will be able to increase prices.[80]

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[79] A total of around 45 customers with production facilities in Germany replied to the Commission's questions in the market investigation. This count includes customer who have production facilities in Germany, regardless of whether they also have production facilities in other countries.

[80] See for example replies to questions 49 and 50 - Phase I questionnaire to customers.

(125) The following comments are illustrative of customers' reactions:

"*Increasing price level"; "Price increases"; "With the reduction of capacities of chocolate there is less chocolate available in Europe and the Prices will increase."*[81]

"Turning to other suppliers may be possible but only at a higher price. […] Thus the general market price will rise."[82]

"The number of suppliers for the most important masses would be reduced from three to two after a merger between Cargill and ADM. […] The merger would have an effect on prices, however: the merged entity Cargill/ADM would be aware of its market power vis-à-vis [customer] and other customers und would use this for price increases."[83]

"Such an oligopoly situation is always bad for the dependent customers; the price negotiations will be more difficult for the customers."[84]

"[Customer] has strong concerns about a merger between Cargill and ADM in industrial chocolate. Cargill is the market leader already today, in particular in standard industrial chocolate, and would acquire an important rival"[85]

"The competition would be further reduced through an acquisition of ADM by Cargill, and there would be price increases as a consequence."[86]

"The merger will definitely have a negative effect on prices and flexibility of supply."[87]

"[Customer] has strong concerns against a potential acquisition of ADM's chocolate business by Cargill. If Cargill acquired ADM, ADM as the cheapest supplier would disappear. Cargill would transfer at least its own price level to ADM and prices would increase."[88]

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[81] Ibid.

[82] Agreed minutes of a conference call with a customer of 11 February 2015, the German original reads: "*Auf andere Anbieter auszuweichen ist zwar möglich, jedoch nur zu höheren Preisen. […] Damit stiege das Gesamtpreisniveau im Markt.*'

[83] Agreed minutes of the conference call with a customer of 4 February 2015, the German original reads: '*Nach einem Zusammenschluss zwischen ADM und Cargill würde die Zahl der Anbieter für die wichtigsten Massen auf zwei reduziert. […] Hingegen würde es einen Effekt auf die Preise geben: das fusionierte Unternehmen Cargill/ADM wäre sich seiner Marktmacht gegenüber [Kunde] und anderer Kunden bewusst und würde dies für Preiserhöhungen nutzen.*'.

[84] Agreed minutes of the conference call with a custerom of 9 February 2015; the German original reads: "*Eine solche Oligopolsituation is immer schlecht für die abhängigen Kunden; die Preisverhandlungen werden für die Kunden schwieriger.*"

[85] Agreed minutes of the conference call with a customer of 10 February 2015: the German original reads: *"[Kunde] hat starke Bedenken gegen einen Zusammenschluss von Cargill und ADM im Bereich der Industrieshcokolade. Cargill ist bereits heute Marktführer, insbesondere im Bereich der Standardindustrieshcokolade, und würde einen wichtigen Konkurrenten übernehmen*".

[86] Agreed minutes of the conference call with a customer of 8 April 2015; the German original reads: "*Durch die Übernahme ADMs durch Cargill nähme der Wettbewerb weiter ab, und es würde in der Folge zu Preissteigerungen kommen."*

[87] Agreed minutes of the conference call with a customer of 30 January 2015.

[88] Agreed minutes of the conference call with a customer of 20 April 2015; the German original reads: *"[Kunde] hat starke Bedenken gegenüber einer möglichen Übernahme des Schokoladengeschäfts ADMs durch Cargill. Wenn Cargill ADM übernähme, würde ADM als kostengünstigster Anbieter wegfallen. Cargill würde mindestens das eigene Preisniveau auf ADM übertragen und die Preise damit steigen."*

"Even without explicit agreements between Barry Callebaut and Cargill, such an oligopoly would lead to price increases of 5-10%."[89]

"[Customer] has very strong concerns against a merger of Cargill and ADM in the area of industrial chocolate. […] [Customer] expects price increases after a merger. This is the normal path, since playing off suppliers against each other will be much more difficult for customers."[90]

(126) Customers that raised concerns include producers of biscuits, ice-cream, chocolate confectionery and other products. The concerns are thus spread across customers from different downstream industries. The concerned customers are generally mid-size purchasers with purchases above 1 000 tonnes a year. In contrast, (i) very large companies which produce a substantial part of their industrial chocolate requirements in-house are generally not concerned about the effects of the Transaction due to their limited exposure to the merchant market and (ii) some small customers are not concerned about the Transaction because industrial chocolate is not a very important input product for them.

(127) Some of the competitors contacted in the first and second phase market investigation confirm that the Transaction will lead to increases in prices and/or their margins due to the expected reduction in competition.[91] Competitors have made comments such as: "*Prices are likely going to increase"*, and "*If two of the three biggest merge there will be only two big ones left. Their power referring price determination will increase*."[92] Others have commented that "*The potential acquisition of ADM by Cargill will have negative effects for the customers of standard industrial chocolate because of the reduction in their choice of suppliers."*[93], *"According to the opinion of [competitor], Cargill' intention in acquiring ADM was to acquire a rival's capacity and accordingly decrease the competitive pressure. For [competitor] the potential merger is very positive because the margins are likely to increase significantly."*[94] and "*There could be price increases in the area of conventional industrial chocolate. The merger will certainly be problematic in this area.*"[95]

(128) The Commission therefore considers that the replies on the effects of the Transaction received from competitors and customers received in the first and second phase market investigation indicate that the merger could lead to adverse effects on competition.

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89 Agreed minutes of the conference call with a customer of 18 March 2015; the German original reads: "*Auch ohne explizite Absprachen zwischen Barry Callebaut und Cargill wird ein solches Oligopol zu Preissteigerungen im Markt von 5-10% führen*."

90 Agreed minutes of the conference call with a customer of 11 February 2015; the German original reads: *"[Kunde] hat sehr starke Bedenken gegen einen Zusammenschluss von Cargill und ADM im Bereich der Industrieschokolade. […] [Kunde] rechnet mit Preissteigerungen nach einem Zusammenschluss. Dies ist der normale Weg, da das Ausspielen der Anbieter gegeneinander für die Kunden viel schwieriger wird."*.

91 See replies to questions 51 and 52 - Phase I questionnaire to competitors.

92 Ibid.

93 Agreed minutes of the conference call with a competitor of 26 March 2015.

94 Agreed minutes of the conference call with a competitor of 30 January 2015; the German original reads: "*Nach der Einschätzung [Wettbewerbers] kam es Cargill bei dem Enschluss ADM zu kaufen darauf an, die Kapazität eines Wettbewerbers zu kaufen und damit den Wettbewerbsdruck zu verringern. Für [Wettbewerber] ist der Zusammenschluss sehr positiv, da die Margen vermutlich stark steigen werden*."

95 Agreed minutes of the conference call with a competitor of 20 March 2015; the German original reads: "*Im Bereich der konventionellen Industrieschokolade könnte es zu Preissteigerungen kommen. In diesem Bereich ist der Zusammenschluss sicherlich problematisch*."

(129) Furthermore, a number of customers raised concerns during the market investigation that Cargill's acquisition of the German chocolate plants of the former Schwartauer Werke GmbH & Co. KG Kakao Verarbeitung Berlin ('KVB') in 2011 ("the KVB acquisition")[96] led to a deterioration of competitive conditions. The majority of customers replying to specific questions on this issue consider that supply conditions, including not only prices but also lead times and production flexibility, have deteriorated and that the customers' negotiation position has been weakened. According to customers, price negotiations have become more difficult and more protracted, the availability of chocolate has deteriorated in particular in the peak seasons, and Cargill has been less responsive to customer requests.[97]

(130) The Commission considers it difficult to draw a comparison between those two transactions which relate to different points in time with their specific market circumstances. The Commission also takes note of the Notifying Party's submission according to which Cargill's margins booked at its Klein Schierstedt plant between 2011 and 2013 […] after the KVB acquisition.[98] However, that data analysis does not consider the development of margins booked at the former KVB Berlin plants since […]. The Notifying Party's analysis is therefore unable to give a complete picture of the margin development after the KVB transaction.

(131) Against that background, the Commission considers that the customers' concerns about the effects of the KVB acquisition are an indication that the KVB acquisition might have weakened the customers' negotiating position in the sales regions around the Parties' plants in Germany to a certain extent. In any event, as the Transaction considered in this Decision leads to a much higher degree of concentration, the Commission's assessment does not turn on whether or not the KVB acquisition has previously led to negative effects.

9.2.2.2. Closeness of competition between ADM and Cargill

a) The Notifying Party's arguments

(132) The Notifying Party argues that industrial chocolate represents a commodity product, and that it can essentially be considered homogeneous in nature.[99] As such, no two firms in the market for industrial chocolate, including Cargill and ADM, can be considered as close competitors. According to the Notifying Party, all suppliers are able to meet the requirements of individual customers, and suppliers are always able to replicate particular recipes, which requires very little time and effort.

b) The Commission's assessment

(133) Products may be differentiated within a relevant market such that some products are closer substitutes than others. The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will increase prices significantly. For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the Parties has been an important source of competition on the market may be a central factor in the analysis.[100]

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96 Commission decision of 29 April 2011 in Case M.6132 – Cargill/ KVB.

97 See the customers' replies to the Commission's KVB questionnaire of 27 March 2015.

98 See Cargill’s submission to follow up meeting with the case team, 10.04.2015, pages 6-7.

99 Form CO, paragraph 447.

100 Horizontal Merger Guidelines, paragraph 28.

(134) Both Cargill and ADM have production facilities in Germany which constitute geographically close supply options for German customers. Both operate factories in Germany with an established market position and a market history in the form of the former 'Kakao Verarbeitung Berlin' ('KVB') and 'Schokinag' operations.

(135) To assess whether the Parties are close competitors in the German market for industrial chocolate, the Commission has asked the Parties' customers to identify the three companies that compete most closely with ADM on the one hand and Cargill on the other hand. The vast majority of respondents named Barry Callebaut and the other merging party (thus ADM or Cargill as applicable) as the two closest competitors. Competitors such as Cémoi, Belcolade or Ritter were generally ranked lower in terms of closeness of competition to the Parties.[101]

(136) Moreover, according to customers and competitors, the German market is characterized by the presence of three very large companies (Barry Callebaut, ADM and Cargill) which hold a substantial part of the relevant market and are very similar in their size and in their economic strategy.

(137) In particular, those three companies have significant activities upstream in the purchasing, grinding and pressing of cocoa beans and the marketing of semi-finished cocoa products. Market participants explain that this leads to advantages in accessing raw materials at lower costs.[102]

(138) The only competitor who may be similar to the three large suppliers in this respect is Cémoi because it is also vertically integrated upstream. However, as it will be explained in section 9.2.2.3, Cémoi is not considered as an equally relevant alternative as ADM or Barry Callebaut because its plants are located too far away from Germany. Moreover, Cémoi is a vertically integrated producer which produces industrial chocolate as well as end-consumer chocolate products. Therefore, a number of customers do not regard it as a good alternative compared to producers focusing exclusively on industrial chocolate production, as they are reluctant to source from one of their competitors in the downstream markets.

(139) Market participants also explain that the three large suppliers are able to serve the needs of liquid chocolate of mid-sized and large customers. This market segment is volume-driven and customers are price-conscious. In contrast, many of the other competitors are niche suppliers specializing on specific segments of the market (such as high quality/gourmet chocolate or specific types of solid chocolate) and only compete with the main suppliers at the fringe.

(140) The closeness of competition between Barry Callebaut, Cargill and ADM is also reflected in the Parties' internal documents. In one of its internal strategic review, Cargill explains that […].[103]

(141) The Commission has also reviewed Cargill's […] which are used to determine the […]. These reports contain several references to the competitive landscape […].

(142) In view of the information provided by the Parties and in light of the outcome of the market investigation and the review of internal documents, the Commission finds that the geographic proximity of the Parties' plants in Germany, their upstream integration in the sourcing of cocoa raw materials, their activities in the processing of

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[101] See replies to questions 39 and 40 – Phase II questionnaire to customers.

[102] See for example agreed minutes of the conference call with a competitor, 30.01.2015, and with a customer, 26.01.2015.

[103] […].

semi-finished cocoa products, their ability to serve the volume-driven market segment as well as their size and global scale lead to a similar positioning of Cargill and ADM in the marketing of industrial chocolate.

9.2.2.3. Competitive constraint imposed by competitors

(143) The Commission has assessed whether customers of the Parties in the catchment areas around the Parties' German plants would have sufficient alternative suppliers after the Transaction which would be suitable to meet the customers' demand. The Commission has thus analysed whether customers would have the option of switching supplier if prices increased.[104]

a) The Notifying Party's arguments

(144) The Notifying Party submits that the industrial chocolate market is highly competitive. It argues that many other competitors are active on the merchant market that could increase their sales volumes in response to additional demand or changing market conditions. The constraint imposed by other competitors would be particularly strong because customers multi-source and frequently switch their purchases between suppliers.[105]

(145) The Notifying Party submits that Barry Callebaut is by far the largest competitor in the merchant market for industrial chocolate as its share at the EEA level exceeds 50%. Therefore, the Merged Entity would only become a distant second supplier in the EEA with a market share of only half of that of Barry Callebaut at the EEA level ([20-30]% in 2013 according to the Parties' internal estimates).[106]

(146) Furthermore, the Notifying Party argues that Cémoi is equally a significant competitor who has built a sizeable position in the EEA ([5-10]% in 2013 according to the Parties' internal estimates). Cémoi would benefit from its vertical integration and internal use of industrial chocolate which grants Cémoi additional flexibility to compete effectively on the market and adjust its output.

(147) The Notifying Party also stresses that many other smaller competitors with lower market shares are present on the market (Belcolade: [0-5]%; Ritter: [0-5]%; Krüger: [0-5]%; Icam: [0-5]%; Natra: [0-5]% and Union Chocolate with [0-5]% at the EEA level in 2013; all market shares according to the Parties' internal estimates). It submits that their relative small market share does not prevent them from competing effectively with larger producers.[107]

b) The Commission's assessment

(148) The Commission disagrees with the Parties' view that the catchment areas around the Parties' German plants or the Parties' German customers are characterized by the presence of a large number of alternative suppliers that are equally suitable to supply industrial chocolate to customers.

[104] Horizontal Merger Guidelines, paragraphs 31-35.
[105] Form CO, paragraph 232.
[106] Form CO, paragraph 159.
[107] Form CO, paragraph 161, 162.

(149) The results of the Commission's market investigation and data collection support the view that the market is currently mainly characterized by the presence of the three large suppliers Cargill, Barry Callebaut and ADM. Many customers and competitors have described the transaction as a reduction in suitable suppliers from three to two:

> *"The competition between ADM, Barry Callebaut and Cargill has determined the market and has kept margins low."*[108]
>
> *"The market for industrial chocolate is dominated by the large suppliers Barry Callebaut, Cargill and ADM."*[109]
>
> *"Cargill, ADM and Barry Callebaut enter into closest competition with each other […] All other suppliers in the area of industrial chocolate are specialized in other segments of the market."*[110]
>
> *"[…] currently the market for industrial chocolate is an oligopoly and if the merger goes forward the market will turn into a duopoly."*[111]
>
> *"The other alternatives (Fuchs & Hoffmann, Ritter, Belcolade, Cémoi) are not as competitive as the three large suppliers, in particular in liquid industrial chocolate and as regards offering a broad product portfolio"*[112]
>
> *"[After the transaction] there would only be two suppliers left in the market"*[113]
>
> *"The acquisition of ADM by Cargill will therefore lead to a concentration in the market from three to two suitable suppliers of chocolate products […] in Germany."*[114]
>
> *"There would only be few alternatives left [after the Transaction]. The market would be characterised by the presence of two large suppliers: Cargill and Barry Callebaut."*[115]
>
> *"In addition to Cargill/ADM only Barry Callebaut would be available as a potential supplier of large volumes."*[116]
>
> *"Two out of three suppliers intend to merge. The already consolidated market of suppliers is reduced even further."*[117]

(150) The presence of three main suppliers – ADM, Barry Callebaut and Cargill – is also reflected in the internal documents of Cargill's […]. The sales personnel […] produce

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[108] Agreed minutes of the conference call with a customer of 18 March 2015.

[109] Agreed minutes of the conference call with a competitor of 26 March 2015.

[110] Agreed minutes of the conference call with a competitor of 2 February 2015; the German original reads: "*Cargill, ADM und Barry Callebaut konkurrieren am engsten miteinander […] Alle anderen Anbieter im Bereich der Industrieschokolade sind auf andere Teilmärkte spezialisiert.*".

[111] Agreed minutes of the conference call with a customer of 12 December 2014.

[112] Agreed minutes of the conference call with a customer of 9 February 2015.

[113] Agreed minutes of the conference call with a customer of 8 April 2015; the German original reads: "*[Nach der Übernahme] bestünden nur noch zwei Anbieter im Markt.*".

[114] Agreed minutes of the conference call with a customer of 20 November 2014.

[115] Agreed minutes of the conference call with a customer of 20 April 2015; the German original reads: "*Es blieben [nach der Übernahme] nur noch wenige Alternativen, Der Markt würde durch zwei große Anbieter geprägt: Cargill und Barry Callebaut."*.

[116] Agreed minutes of the conference call with a customer of 11 February 2015; the German original reads: "*Neben Cargill/ADM stünde nur noch Barry Callebaut als möglicher Lieferant großer Mengen zur Verfügung"*.

[117] See the replies to questions 49 and 50 - Phase I questionnaire to customers.

[…]. When analysing the competitive situation, the sales personnel […].[118] This seems to show that Cargill places emphasis on monitoring the competitive interactions with Barry Callebaut and ADM […].

(151) The Commission's investigation also shows that customers in the industrial chocolate market around the Parties' German plants generally multi-source their requirements for industrial chocolate.[119] The reasons for such multi-sourcing are primarily to achieve security of supply and to obtain competitive prices from the suppliers.[120] Such multi-sourcing strategies in the industrial chocolate market may make price increases more likely to be profitable as the multi-sourcing customers may be particularly vulnerable because the Transaction would lead to a stronger relative reduction in the number of effective suppliers.[121] The Transaction would eliminate one of the three most important suppliers of industrial chocolate and would thus significantly reduce the opportunity of customers to multi-source.[122]

(152) The competitive constraint imposed by each of the Parties' competitors in the production and supply of industrial chocolate in the relevant industrial chocolate markets around the Parties' German plants or the Parties 'German customers is assessed in the following parts of this section 9.2.2.3.

Barry Callebaut

(153) Barry Callebaut is the largest industrial chocolate producer in volume in the EEA with a merchant market share of [50-60]%, according to the Notifying Party‘s estimates. However, as regards German customers, its market position has to be relativized.

(154) Should the market be defined as national, according to the Commission’s market reconstruction, Barry Callebaut’s market share for industrial chocolate would be 20-30%. This share would be of the same magnitude if liquid chocolate alone was considered.

(155) In the overlap areas between the sales regions around the Parties’ plants in Germany, Barry Callebaut’s market share is comprised of between 20 and 40%, depending on the size of the radius and the plants in question.[123]

(156) As the geographic market is either national or defined as circular catchment areas around Parties 'plants in Germany or around the Parties' German customers, a strong market position at EEA level is not fully relevant to assess its strengths at German level or for German customers. In Germany and for German customers, Barry Callebaut is a smaller and less important supplier than the Merged Entity.

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118 Cargill internal document entitled […], Annex 2.5.14 to Cargill's reply to the Commission's request for information of 31 March 2015; see also Annexes 2.5.2, 2.5.11, and 2.5.13.

119 See replies to question 26 – Phase I questionnaire to customers; about three quarters of the respondents contacted by way of questionnaires and conference calls indicated that they chose to multi-source.

120 See replies to question 22 – Phase II questionnaire to customers.

121 Horizontal Merger Guidelines, paragraph 31.

122 For a similar reasoning, see also Commission decision of 10 September 2014 in Case M.7061 – Huntsman Corporation/Equity Interest held by Rockwood Holdings, recital 428; Commission decision of 24 May 2013 in Case M.6576 – Munksjö/Ahlstrom, recital 626; Commission decision of 23 November 2011 in Case M.6203 – Western Digital Ireland/Viviti Technologies of 23 November 2011, recitals 442-445.

123 As set out above in Table 5, according to the Commission's market reconstruction, the only overlap area where Barry Callebaut has a share above 40% is the overlap areas between the 600 km radius around the Parties 'plants in Mannheim and Klein Schierstedt, which include parts of France, Benelux and Poland.

(157) Furthermore, as explained in recital (116), a significant share of Barry Callebaut's sales relate to long-term contracts of several years' duration under which companies vertically integrated in chocolate consumer products (such as Mondelēz) purchase a part of their needs on the market instead of producing it in-house ("out-sourcing contracts"). Barry Callebaut has been particularly successful in winning those long-term contracts, which is fully consistent with one of its main strategic focus areas as explained in Section 9.2.2.4. Accordingly these contracted volumes with long-term partners are not available for short-term purchases of mid-size customers and do not constitute a relevant alternative for these customers.

(158) This focus on outsourcing deals is also noted in an internal document from Cargill which states that […].[124]

(159) A majority of German customers submitted in the market investigation that Barry Callebaut is not significantly superior compared to Cargill and ADM in terms of quality, innovation capabilities or customer service. As explained by one German customer "*We do not see quality differences between Cargill, ADM and Barry Callebaut*".[125]

(160) The Commission therefore concludes that whilst Barry Callebaut is a major supplier at EEA level, its competitive relevance as regards German customers is less pronounced because of a lower market position and a marked focus on long-term outsourcing deals with very large chocolate consumer product companies. As will be explained in Section 9.2.2.4. Barry Callebaut's strategic priority to reinforce its partnership with these large customers does not indicate that this competitor will impose a stronger competitive constraint on the Merged Entity post-transaction as regards German customers.

Ritter

(161) Ritter (which holds a market share of 0-5% or 5-10% according to the Commission's market reconstruction depending on the precise market definition), based in the Stuttgart region in south-western Germany, is primarily a producer of end-consumer products marketed under the "Ritter Sport" brand. Ritter has historically only produced industrial chocolate for use in its own end-consumer chocolate operations. Ritter only began selling industrial chocolate on the merchant market in 2011. Ritter had spare chocolate production capacity and decided to utilise this spare capacity to sell liquid industrial chocolate on the market in response to requests by customers.[126]

(162) Some of Cargill's internal documents refer to the competitive pressure that has arisen due to Ritter's decision to start selling industrial chocolate on the merchant market: […][127].

(163) However, Ritter's focus remains clearly on its end-consumer chocolate business. Only surplus volumes of industrial chocolate will be sold on the merchant market. Therefore, Ritter's sales volumes available for the merchant market depend on the development of its end-consumer business. Due to the recent increase in Ritter's production of end-consumer products, Ritter has begun reducing its sales of

124 […], slide 99.

125 See replies to question 43– Phase II questionnaire to customers.

126 Agreed minutes of the conference calls with Ritter.

127 Cargill internal document entitled […], Annex 2.4.3 to Cargill's reply to the Commission's request for information of 31 March 2015, slide 7, the German original reads: […]; see also Cargill internal document entitled […], September 2014, Annex 2.5.1 to Cargill's reply to the Commission's request for information of 31 March 2015, page 3.

industrial chocolate on the merchant market in 2015 and is not focussing on actively winning new customers at present.[128] Customers therefore expressed doubts whether Ritter would be a suitable supplier with sufficient supply volumes in the long run.[129]

(164) Furthermore, Ritter is not vertically integrated upstream in the purchasing of cocoa beans and the production of semi-finished cocoa products. Ritter considers that this puts it at a competitive disadvantage compared to its vertically integrated competitors. In addition, Ritter may purchase semi-finished cocoa products from the large competitors and the Commission considers that Ritter may thus have decreased incentives to enter into heads-on competition. Ritter also does not sell solid industrial chocolate and produces fewer recipes of industrial chocolate for fewer customers and is therefore less competitive to offer customers a full product range compared to the larger competitors.[130]

(165) Moreover, a number of customers active in the chocolate confectionery industry compete with Ritter in the sale of end-consumer products. A number of those customers do not regard Ritter as a good alternative compared to producers focusing exclusively on industrial chocolate production. Customers are reluctant to purchase industrial chocolate from their competitors in the sale of end-consumer products because (i) they would reveal their chocolate recipes to their competitors, (ii) they would provide additional revenue to a competitor, (iii) they would disclose commercially sensitive information to a competitor concerning purchase volumes, timing of purchase and purchase prices and (iv) they are afraid that the competitor would favour its own business in times of shortage of supply.[131]

(166) The Commission therefore concludes that while Ritter has been successful in gaining market share in the sales regions around the Parties' German plants, there are a number of factors which negatively affect its competitive position vis-à-vis the three large suppliers Cargill, Barry Callebaut and ADM. In addition, Ritter's position on the merchant market for industrial chocolate will in all likelihood decrease and thus weaken even further the competitive constraint imposed by Ritter on the Merged Entity after the Transaction.

Cémoi

(167) Cémoi (which holds a market share of 0-5% according to the Commission's market reconstruction) is a French family-owned company which produces industrial chocolate (liquid and solid) and end-consumer products and also has activities in the sourcing of cocoa beans and the production of semi-finished cocoa products. Cémoi has four chocolate production plants in France (Dunkirk, Perpignan, Caen and Bordeaux) and one in Poland (Szczecin).

(168) Cémoi has limited activities in Germany; the clear focus of its economic activities is France. Customers based in Germany have also explained that Cémoi's plants are located too far away to be considered on equal ground to other suppliers within Germany or located closer to the German border. They have also explained that Cémoi has not shown a lot of interest in pursuing business with German customers in

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128 Ibid.

129 Agreed minutes of the conference call with a customer of 8 April 2105.

130 Ibid; see also agreed minutes of the conference calls with customers of 10 February 2015, 11 February 2015, 18 March 2015 and 20 April 2015, see also the replies to question 32 – Phase I questionnaire to customers.

131 See replies to question 29 – Phase I questionnaire to customers and to question 26 – Phase II questionnaire to customers.

the past.[132] Cémoi has also not expressed any incentive for developing its activities in Germany under the current market conditions. According to Cémoi, margins in Germany are too low and this situation is not expected to change following the Transaction.[133]

(169) Cémoi's limited role with German customers is reflected in Cargill's internal documents. In one of those documents, Cargill comments: […].[134]

(170) Cémoi is a vertically integrated producer which produces industrial chocolate as well as end-consumer chocolate products. Therefore, a number of customers do not regard Cémoi as a good alternative compared to producers focusing exclusively on industrial chocolate production. Customers are reluctant to purchase industrial chocolate from their competitors in the sale of end-consumer products for the reasons set out in recital (165).[135]

(171) Based on the results of the market investigation, the Commission considers that Cémoi is not a significant competitive constraint on the German market.

Krüger

(172) Krüger (which holds a market share of 0-5% according to the Commission's market reconstruction) produces industrial chocolate through its subsidiary Fuchs & Hoffmann GmbH ("Fuchs & Hoffmann") located in the Saarland federal state in the south-west of Germany. Krüger also has a chocolate confectionery business through its subsidiary Ludwig Schokolade GmbH &Co KG ("Ludwig Schokolade").

(173) The Parties estimate Krüger's industrial chocolate capacity for the merchant market at the Saarland facility to be 5 000 tonnes.[136] In comparison, ADM has a production capacity of […] tonnes in its German facility and Cargill has a joint production capacity of more than 100 000 tonnes in its German facilities.

(174) Krüger itself considers its production capacity to be "*tiny*" in comparison with its larger competitors. Furthermore, Krüger explains that its much smaller scale in terms of cocoa beans and semi-finished cocoa product procurement would lead to cost disadvantages compared to its larger rivals. Furthermore, Krüger does not see industrial chocolate as its main business focus. Krüger has been investing in its cocoa liquor business instead and is placing much more emphasis on developing its cocoa liquor business than on developing its industrial chocolate business.[137]

(175) Krüger's limited production capacity makes Krüger a less attractive supplier of industrial chocolate compared to the large suppliers Cargill, Barry Callebaut and ADM. A small number of customers have also claimed that Krüger's industrial chocolate is not suitable in terms of quality.[138] Some customers who compete with Krüger's subsidiary Ludwig Schokolade in the sale of end-consumer chocolate products are reluctant to purchase industrial chocolate from Krüger for the same reasons as outlined in the section on the competitor Ritter in recital (165) . Therefore,

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[132] Agreed minutes of the conference call with a customer of 10 February 2015.

[133] Agreed minutes of conference calls with Cémoi.

[134] Cargill internal document entitled […], Annex 2.4.3 to Cargill's reply to the Commission's request for information of 31 March 2015, slide 8; the German original reads: […].

[135] See replies to question 29 – Phase I questionnaire to customers and to question 26 – Phase II questionnaire to customers.

[136] Parties' submission of 6 March 2015, "Customer analysis – alternative supply options".

[137] Agreed minutes of the conference calls with Krüger.

[138] Agreed minutes of the conference call with a customer of 20 April 2015; see also the replies to question 32 – Phase I questionnaire to customers.

Krüger is not considered as a sufficient alternative to the large suppliers Cargill, Barry Callebaut and ADM.[139]

(176) Furthermore, according to the reports of a customer, Fuchs & Hoffmann has entered into a long-term contract with one of its customers and has thus committed a substantial part of its production to sales to that customer.[140] Similar to the Commission's findings with respect to Barry Callebaut in recitals (115) to (118) this means that a substantial part of Krüger's production of industrial chocolate for the merchant market would not be available for purchase by other customers in the short to medium term. Furthermore, Krüger's sales would be limited to supplying limited volumes per customer per year if Krüger wants to keep a diversified customer base.

(177) The Commission therefore concludes that the competitive constraint imposed by Krüger's subsidiary Fuchs & Hoffmann on the Merged Entity would be limited after the Transaction.

Belcolade

(178) Belcolade (which holds a market share of 0-5% according to the Commission's market reconstruction) belongs to the Puratos Group. The Puratos Group is active in the food ingredients business dedicated to bakery, pastry and chocolate. Belcolade is the chocolate brand of the Puratos group and produces semi semi-finished cocoa products (liquor, butter, powder) and industrial chocolate (liquid and solid). The name "'Belcolade" will therefore be used in this Decision to designate the Puratos group's activities in industrial chocolate. Belcolade has one chocolate production plant in Aalst (West of Belgium).

(179) Belcolade is active in the EEA in the following countries, amongst others: Belgium, the Netherlands, France, Germany, Italy and the United Kingdom. Belcolade is not vertically integrated upstream in the sourcing of cocoa raw materials to any significant extent but depends on third party suppliers of semi-finished cocoa products.

(180) Belcolade overall has very limited activities in Germany. Moreover, Belcolade is a high quality producer focusing on selling to craft businesses such as chocolatiers and patisseries and it sells a substantial part of its production in solid form. Belcolade is positioned on the higher end of the price range. It generally does not target volume-driven low-price customers in segments such as biscuit or ice-cream making. As it explains "*Belcolade's strategy is to be better on taste, not better on price".*[141] Belcolade explains that it would not be able to serve the largest customers at competitive prices in the market. Belcolade can offer the same or better quality as the largest suppliers, but it will not be able to offer the same price.[142]

(181) Belcolade does not compete closely with larger suppliers such as the Parties. Belcolade is overall a smaller competitor in terms of size and production capacity. It is not able to supply for the demand for high-volume liquid industrial chocolate on the German market.

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139 Agreed minutes of the conference calls with customers of 3 February 2015, 9 February 2015, 10 February 2015, 11 February and 20 February 2015; see also the replies to question 32 – Phase I questionnaire to customers.

140 Agreed minutes of the conference call with a customer of 18 March 2015.

141 Confirmed minutes of the conference calls with Belcolade.

142 Ibid.

(182) This is in line with replies received from market respondents in the first and second phase market investigations. Belcolade is perceived as an expensive and specialized supplier by German and non-German customers and is not perceived as a viable supplier by the majority of customers.[143]

(183) Based on the results of the market investigation, the Commission believes that Belcolade is not a strong competitive constraint on the Parties in the sales regions around their German plants or around the Parties' German customers.

Lubeca

(184) Lubeca (which holds a market share of 0-5% according to the Commission's market reconstruction) is based in Lübeck in northern Germany. It produces industrial chocolate but also marzipan and nougat masses as well as hazelnut and almond preparations and sells those products to processors in the food business.

(185) Lubeca is specialized in producing high quality chocolate which it sells mainly to artisanal and medium-sized businesses, including mostly bakeries, patisseries and chocolatiers. The vast majority of Lubeca's production volumes of industrial chocolate are sold in solid form. Lubeca is specialized in supplying chocolate to smaller customers which require chocolate volumes of 5, 20, 50 or 100 tonnes per year and generally supplies only up to 200 tonnes of chocolate per customer per year (with certain exceptions). Lubeca does not sell chocolate to customers requiring deliveries of several thousand tonnes of industrial chocolate per year. Lubeca therefore does not compete in the high-volume segment.[144]

(186) Furthermore, Lubeca's prices per tonne are higher than the prices charged by the large competitors and Lubeca is not interested in competing in the low-price/high-volume segment. In addition, Lubeca is operating mostly at high capacity utilization so that it has been neither necessary nor a priority for Lubeca to expand more into the business of serving industrial customers.[145]

(187) Due to its focus on high quality chocolate for small and mid-sized customers, Lubeca considers that it is active in a different market segment than Cargill and ADM.[146] This has been confirmed by the replies from customers and competitors in the market investigation. According to the respondents, Lubeca is specialized in supplying small volumes of industrial chocolate at higher prices and is therefore not an alternative for the supply of larger volumes of industrial chocolate in competition with Cargill or ADM.[147]

(188) The Commission therefore considers that Lubeca currently does not impose a significant competitive constraint on the Parties.

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143 Agreed minutes of the conference call with a customer of 4 February 2015: "*[…] had also been in contact with Belcolade in the past but their prices were clearly above that of the competition (by more than 10%)*". The German original reads " *[…] hatte in der Vergangenheit auch mit Belcolade Kontakt, deren Preise jedoch weit (über 10%) über der Konkurrenz lagen*."; see also replies to question 32 – Phase I questionnaire to customers; customers answering question 32 describe Belcolade for instance as "*too expensive*" or as having "*a price out of range".* See also the agreed minutes of the conference calls with customers of 3 February 2015, 9 February 2015, 10 February 2015, 11 February 2015, 18 March 2015, 8 April 2015, 9 April 2015 and 20 April 2015.

144 Agreed minutes of the conference calls with Lubeca.

145 Ibid.

146 Ibid.

147 Agreed minutes of the conference calls with customers of 4 February 2015, 10 February 2015, 11 February, 18 March 2015, 8 April 2015 and 20 April 2015; and of conference calls with competitors of 30 January 2015 and of 2 February 2015.

Other German suppliers

(189) The Commission has also contacted other chocolate producers located in Germany, including Farüchoc GmbH & Co. KG, Herza, Kessko, Ulmer, Ludwig Weinrich GmbH & Co.KG and Pronatec AG ("Pronatec")[148].[149] Those suppliers are very small in terms of chocolate production capacity and output and primarily produce value-added chocolate products sold at higher prices and in smaller volumes compared to the Parties' standard products. The higher value added relates to either the production of (i) specialty solid chocolate products in the form of more complex shapes often used for decoration, (ii) high-value non-standard chocolate, that is to say traceable or organic chocolate or (iii) special chocolate recipes, such as sugar-free or lactose-free chocolate

(190) Due to their specialization in high value-added products, those suppliers consider themselves as niche suppliers that are active in different market segments from the Parties. They do not compete with ADM or Cargill in the supply of industrial chocolate to large customers since they do not have the capacity, required equipment or cost structure to be able to supply large volumes of industrial chocolate and, in particular, to be able to supply large volumes of liquid industrial chocolate.[150]

(191) Accordingly, customers and competitors contacted in the market investigation do not consider those suppliers to be an alternative to Cargill or ADM in the market. Customers specifically explained that those other German suppliers had a product portfolio which was considered to be too limited and that they were considered too small and un-competitive price-wise to be considered an adequate alternative.[151]

(192) The Commission therefore considers that other German suppliers currently do not impose a significant competitive constraint on the Parties.

Southern and eastern European industrial chocolate producers

(193) There are additional industrial chocolate producers based in Italy (Icam, Irca, Nutkao and Unigra), Spain (Natra), Poland (Union Chocolate) and the Czech Republic (Carla co. Ltd).

(194) According to the Parties' estimates set out in recital (96), of those suppliers Icam alone is currently selling industrial chocolate to German customers. Icam is a supplier specialized in niche products, however. It has chosen to produce and sell mainly organic and single-origin products with a focus on sales in Italy because it would struggle to be competitive in the sale of conventional industrial chocolate owing to its limited size and owing to its location in Italy at a considerable distance from the demand of industrial customers in central and western Europe.[152]

(195) Customers in Germany generally do not consider it feasible to buy industrial chocolate from suppliers based in Italy or Spain. This is reflected in the marginal sales of such competitors to customers in Germany. Italian and Spanish producers are

148 Pronatec does not have a production facility in Germany but uses a German producer as a toll manufacturer, see agreed minutes of the conference call with Pronatec.

149 The Commision has also contacted Rübezahl Schokoladen GmbH ("Rübezahl") who, however, do not sell any industrial chocolate in the market, see agreed minutes of the conference call with Rübezahl.

150 Agreed minutes of the conference calls with Herza, Kessko and Pronatec.

151 Agreed minutes of the conference call with customers of 3 February 2015, 4 February 2015, 9 February 2015, 10 February 2015, 11 February 2015, 18 March 2015, 8 April 2015, and with a competitor of 2 February 2015.

152 Agreed minutes of the conference call with Icam.

generally not considered as viable supply options and are not even known to a large majority of German customers. Customers generally consider the transportation distances too long to purchase industrial chocolate, and in particular liquid industrial chocolate, from suppliers based in Spain or Italy. Customers also consider the suppliers to be too small to be a viable alternative.[153] The supplier Natra confirms this view and considers Spain to be its "*natural sales environment*".[154]

(196) As regards the suppliers from Poland and the Czech Republic, the Commission has not found any customers in Germany and other western European countries who would currently be buying industrial chocolate from those suppliers. The two suppliers from Poland and the Czech Republic are either not known to customers or are generally not considered viable alternatives.[155] Those suppliers are considered to offer industrial chocolate too low in quality and customers who have received deliveries of industrial chocolate from those suppliers report that the delivered chocolate has not been of a sufficient quality to be used in the production of their end-consumer chocolate products.[156]

(197) The Commission therefore considers that industrial chocolate suppliers from southern and eastern Europe currently exert a minimal constraint on the Parties in the sales regions around their German industrial chocolate plants or around their German customers.

c) Conclusion on the competitive constraint imposed by competitors

(198) In the light of the considerations set out in section 9.2.2.3, the Commission considers that the customers of the Parties in the sales regions around their German plants may have difficulties switching to other suppliers and may thus be particularly vulnerable to price increase because i) the customers rely on multi-sourcing to obtain security of supply and competitive prices, ii) there are few alternative suppliers available, and iii) many of those alternative suppliers have relevant shortcomings compared to the three large suppliers Barry Callebaut and the Parties related to the small size of their production plants, their limited product portfolio, their competitive relationship with potential customers in downstream markets, the location of their production plants or the quality of their industrial chocolate products.

9.2.2.4. Ability of competitors to increase supply

(199) When market conditions are such that rival firms have sufficient capacity and find it profitable to expand output sufficiently, the Commission is unlikely to find that the merger will significantly impede effective competition.[157] Conversely, when market conditions are such that the competitors of the Merged Entity are unlikely to increase their supply significantly should prices increase, the Merged Entity may have an incentive to reduce output below the combined pre-merger levels thereby raising market prices.[158] The Commission has thus assessed whether alternative suppliers

153 See replies to question 32 – Phase I questionnaire to customers; see also the agreed minutes of the conferences calls with customers of 3 February 2015, 4 February 2015, 9 February 2015, 10 February 2015, 11 February 2015, 18 March 2015, 8 April 2015, 9 April 2015 and 20 April 2015, see also the agreed minutes of the conference call with a competitor of 28 January 2015.

154 Agreed minutes of the conference call with Natra.

155 See replies to question 32 – Phase I questionnaire to customers.

156 Agreed minutes of the conference calls with customers of 11 February 2015, 8 April 2015, and 20 April 2015.

157 Horizontal Merger Guidelines, paragraph 33.

158 Horizontal Merger Guidelines, paragraph 32.

would have sufficient spare capacity to meet the customers' demand and whether the competitors would be likely to increase their supply substantially if prices increased.

a) The Notifying Party's arguments

(200) The Notifying Party estimates that competitor Barry Callebaut has a capacity utilization of […] in the EEA and that the remaining competitors have a capacity utilization of […] in the EEA.[159] On that basis, the Notifying Party argues that there is ample spare capacity in industrial chocolate production for the merchant market in the EEA.[160]

b) The Commission's assessment

(201) The Commission has collected capacity and production data from all relevant competitors in the course of the first and second phase market investigation. Generally, the Commission has not been able to confirm the low capacity utilization rates estimated by the Parties. On the contrary, the results of the Commission's investigation show that the Parties have over-estimated the level of spare capacity of the relevant suppliers competing with the Parties in the sales regions around the Parties' German plants or around the Parties' German customers.

(202) As regards Barry Callebaut, the Parties' largest competitor in the EEA as well as in the sales region around the Parties' German plants, it is operating at close to full capacity according to public statements: "*At the end of fiscal year 2012/13, our capacity utilization in chocolate was 95%*"[161] and "*Capacity constraints, primarily in Western Europe, somewhat restricted our full growth potential.*"[162] Barry Callebaut has recently commenced investing in capacity expansions to mitigate those constraints which will be further discussed in section 9.2.2.5.

(203) Furthermore, the Commission's analysis shows that there is a higher level of spare capacity available among southern and eastern European industrial chocolate suppliers than among northern and western European suppliers. Those southern and eastern European suppliers, however, have substantial difficulties in expanding their sales with customers in the sales regions around the Parties' German plants or around the Parties' German customers. Despite the existing levels of spare capacity, the southern and eastern European suppliers have registered negligible sales in northern or western Europe.

(204) As regards the remaining suppliers in northern or western Europe, the aggregate level of spare capacity is low and not large enough to allow competitors to increase their supply to any significant extent. In particular, Ritter, being the second most important competitor of the Parties after Barry Callebaut in the sales region around the Parties' German plants, has limited spare capacity which will in all likelihood be used increasingly for internal production in the future as set out in recital (163). Furthermore, other competitors pointed out that capacity constraints limit the acquisition of new customers.[163] Moreover, a number of customers reported in the

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159 Form CO, paragraph 218.

160 Form CO, paragraph 219.

161 Barry Callebaut's annual report of 2012/13, accessible at http://annual-report-2013-14.barry-callebaut.com/assets/pdf/2013-14/Barry_Callebaut_Annual_Report_2012-2013.pdf (last accessed on 9 June 2015), page 37, see also pages 16, 29, 51, 53 and 54.

162 Barry Callebaut's annual report of 2013/14, accessible at http://annual-report-2013-14.barry-callebaut.com/assets/pdf/2013-14/Barry_Callebaut_Annual_Report_2013-2014.pdf (last accessed on 9 June 2015), page 14.

163 See replies to question 42 - Phase I questionnaire to competitors.

first and second phase market investigation that they have already faced capacity issues with suppliers in the past, in particular in the high season before Christmas.[164]

c) Conclusion on the ability of competitors to increase supply

(205) On the basis of the elements set out in section 9.2.2.4 , the Commission considers that the Parties' competitors in the sales regions around the Parties' German plants or the Parties' German customers do not currently have the ability to increase supply to a sufficiently large extent to defeat a potential price increase by the Parties after the Transaction.

9.2.2.5. Future expansion by competitors

a) The Notifying Party's arguments

(206) The Notifying Party submits that significant capacity expansion is planned in the coming years by competitors including Barry Callebaut and Belcolade. The Notifying Party submits that Barry Callebaut has announced public plans to increase its capacity level in Europe significantly over the next two years.[165] It also stresses the fact that Belcolade has launched a capacity expansion project. According to the Notifying Party, those capacity increases are more than sufficient to cover the projected growth in demand of industrial chocolate in the EEA.

(207) The Notifying Party also submits that capacity expansion has been significant over the past 25 years in line with the steadily growing demand[166] and that more than […] of the capacity expansion in recent years and until 2016 is accounted for by rivals of the Parties.[167]

(208) The Notifying Party equally argues that competitors will have the economic incentive to increase capacity as the growth trend in the market is strong and stable (around 3% per annum) and the investment is already sufficiently profitable. The Notifying Party submits that lead times for capacity expansions are short and that investment is relatively cheap (at EUR 2-3 million to expand capacity by 5 000 to 10 000 tonnes). As a consequence, all competitors, including the smaller ones, would have the ability to invest in capacity expansions. Capacity may also be expanded by increasing the number of working shifts.[168] Moreover, the capacity expansion would become even more profitable should the Parties decide to reduce output.[169]

b) The Commission's assessment

Barry Callebaut

(209) The Commission notes that European market leader Barry Callebaut has recently announced capacity expansions in industrial chocolate in Europe. Notably, in November 2014 Barry Callebaut unveiled a plan to add two additional modern production lines for chocolate manufacturing in its existing plant in Lodz, Poland.

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164 See for example replies to question 35 - Phase I questionnaire to customers.
165 Supplemental submission of 20 March 2015, paragraph 3.
166 Response to Commission decision pursuant to article 6(1)(c) of 4 March 2015, paragraphs 26, 30.
167 Supplemental submission of 17 April 2015, 1.
168 Submission of 10 April 2015, paragraph 5.
169 Cargill/ ADM : Economic response to the Article 6.1.c decision as regards Germany of 6 March 2015, 5.1.2.

Barry Callebaut indicated in a public report that the expansion of the Lodz plant is a vital element in Barry Callebaut's growth strategy in Central and Western Europe.[170]

(210) External reports also mention that manufacturing capacity expansions have taken place at Barry Callebaut's existing sites in Wieze (Belgium); Lódz (Poland); Banbury (United Kingdom); Vic (Spain); Norderstedt (Germany); as well as in Turkey and North and South America. These capacity expansions aimed at strengthening the Barry Callebaut Group´s «*Cost Leadership*» position while also easing capacity constraints, especially in western Europe.[171]

(211) During the market investigation, Barry Callebaut confirmed its publicly announced plans to expand its capacity in Europe over the next two years, particularly in Poland, Belgium and the United Kingdom. The expansion plans consist, in most cases, in upgrading the existing production lines and, in Poland, the plans also include a new building with newly installed production lines.[172]

(212) Given that Barry Callebaut, as the largest EEA producer of industrial chocolate in volume, is planning capacity expansions in countries close to Germany (Belgium and Poland notably), the Commission has to assess whether these capacity expansions will create sufficient incentives for Barry Callebaut to defeat a price increase for German customers by the Merged Entity. In that regard, Barry Callebaut's public communication provides a useful insight on its strategic goals and how these capacity expansions contribute to the fulfilment of these objectives.

(213) In its public statements towards shareholders and investors, Barry Callebaut identifies three major strategic priorities for its activities: (i) emerging markets such as the Middle East and Asia (ii) outsourcing deals with large branded chocolate manufacturers (notably Mondelēz and Unilever in the EEA and Hershey in the US) and (iii) high quality solid chocolate, notably gourmet and specialties chocolate. In the document below, Barry Callebaut shows how it improved growth significantly in 2013/2014 in line with these strategic objectives.[173]

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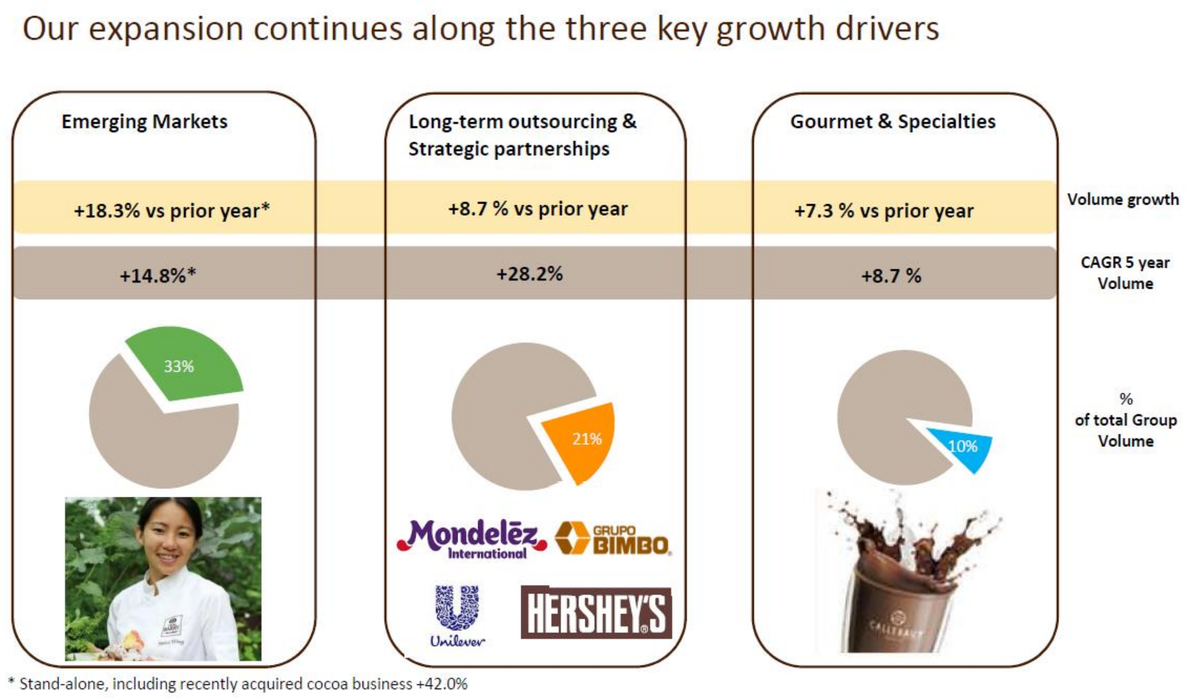
170 https://www.barry-callebaut.com/news/2014/11/barry-callebaut-expand-its-chocolate-plant-lodz-and-boost-employment, last accessed on 10 June 2014.

171 See for example http://www.bakenet.eu/tiki-read_article.php?articleId=5655, dated 8 November 2014.

172 See agreed minutes of the conference call with Barry Callebaut.

173 Full Year Results 2013/2014, Roadshow Presentation, 6 November 2014, https://www.barry-callebaut.com/sites/default/files/publications/fy_2013-14_roadshow_presentation.pdf, page 13, last accessed on 10 June 2014.



(214) Barry Callebaut has also recently announced its objective to improve margins rather than to focus on volume. This strategy has now been implemented and it has already yielded significant results. For example, in the year 2013/2014 gross profits grew by 18.2% (+10.6% on a stand-alone basis) arising from an improved product mix (with relatively more gourmet and specialty products) and better product margin in the industrial chocolate business.[174] Despite lower volumes in Western Europe in 2013/2014 (-1.2%), Barry Callebaut also improved its profit margins in this geographic area through an optimization of geographic and product mix

(215) As regards future developments, Barry Callebaut maintains the objective of improving profitability rather than focusing on volumes, as illustrated by the document below.[175]

(216) Finally, any expansion project has to be assessed against the expected market growth. According to Cargill, sales of industrial chocolate in the EEA are expected to continue growing on average by more than […] tonnes per year. It is therefore likely

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174 See http://www foodingredientsfirst.com/news/Barry-Callebaut-Reports-Strong-Rise-in-Profits-CEO-Plans-to-Step-Down html, dated 6 November 2014.

175 Full Year Results 2013/2014, Roadshow Presentation, 6 November 2014, page 35.

that a part of the additional capacity Barry Callebaut intends to build will serve additional demand and will not be available to decrease the Merged Entity's share.

(217) It follows that Barry Callebaut's main strategic objectives are not geared towards liquid chocolate industrial customers in Europe, where the transaction will have the largest impact, but rather at emerging markets, outsourcing deals with very large customers (in line with its current strategic focus) and gourmet/specialty products. As regards Europe, and in terms of investment, Barry Callebaut has decided to improve its profitability rather than to increase volume, which is consistent with its main efforts on specialty and gourmet products described. It can therefore be assumed that the announced expansion plans will be mainly targeted to achieve these objectives, notably through the conclusion or the prolongation of outsourcing deals, and not to fiercely compete with the Merged Entity on liquid industrial chocolate.

(218) The Commission therefore concludes that Barry Callebaut's planned capacity increases will not offer it any additional incentives to defeat a price increase by the Merged Entity

Belcolade

(219) Belcolade has publicly announced an investment plan to increase its current capacity in its Belgian plant by half in the long-term. According to publicly available information, two production lines are being added initially: one line for the production of liquid chocolate which will lead to an additional 15% capacity in liquid chocolate, and one line for the production of packaged chocolate which will lead to an additional 30% capacity for packaged goods. The additional capacity expansion will follow at a later stage.[176]

(220) As set out in section 9.2.2.3, Belcolade is a company focused on the production of high-end and gourmet solid chocolate, selling those products on a world-wide scale, including exports outside of the EEA. The production and sale of liquid chocolate is much less important to Belcolade than its solid chocolate business. Furthermore, Belcolade concedes that its product offering might not be suitable for customers who are less demanding on quality but who are price-sensitive, such as large industrial producers of ice cream or biscuits.[177]

(221) As also explained in section 9.2.2.3, Belcolade has very limited sales with German customers and also does not have a significant presence on the industrial chocolate market. Moreover, German customers, in particular industrial customers, generally do not consider Belcolade as a viable alternative for their purchases of industrial chocolate.

(222) The market investigation did not reveal any indications that Belcolade's planned capacity expansions at its Belgian plant would be likely to shift its commercial focus from high-end and solid gourmet chocolate. Currently, around 75% of its capacity is dedicated to solid chocolate and around 25% to liquid chocolate and this allocation will not be altered by the planned capacity increase as Belcolade is planning to add the same capacity in liquid and solid. Moreover, according to public sources, the

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176 See Belcolade's press release "*Belcolade continues to build the future of real Belgian chocolate: expansion of production in Erembodegem*", 9 May 2014, available at http://www.belcolade.com/def/en/news/2014/belcolade-continues-build-future-real-belgian-chocolate-expansion-production-erembodegem (last accessed on 10 June 2015).

177 Minutes of the conference call with Belcolade.

expansion of the production line will enable Belcolade to respond more flexibly to the demand of customers that request customization.[178]

(223) The Commission considers therefore that Belcolade will in all likelihood have neither the ability nor the incentive to expand its sales of industrial chocolate in such a way as to defeat a potential price increase by the Parties after the Transaction

Lubeca

(224) The northern German supplier Lubeca has plans to expand its chocolate capacity and to invest in its production facilities over the next five years. At present, Lubeca's full expansion concept is still in development, but it is expecting to finish a first capacity expansion step in its production facility in 2016.[179]

(225) Nevertheless, such capacity expansion will not change Lubeca's commercial focus on supplying industrial chocolate to artisanal and trade customers. As set out in section 9.2.2.3, Lubeca has a clear focus on supplying high quality industrial chocolate, primarily in solid form, in small batches to small customers, primarily patisseries and chocolatiers. Due to its cost structure and its business strategy, Lubeca has explained that it is not interested in competing with the large industrial chocolate suppliers in the high-volume low-price segment of the market and this will remain the same after its potential capacity expansion. Lubeca would only consider expanding into sales of large volumes of standard industrial chocolate to industrial customers if the contribution margins increased quite significantly on a lasting basis. Otherwise, Lubeca does not consider such sales to be an attractive business proposition even after increasing its production capacity.[180]

(226) The Commission considers therefore that Lubeca will in all likelihood have neither the ability nor the incentive to expand its sales of industrial chocolate in such a way as to defeat a potential price increase by the Parties after the Transaction.

9.2.2.6. Elimination of a significant competitive constraint

a) The Notifying Party's arguments

(227) The Notifying Party submits that the Transaction will not lead to the elimination of a significant competitive force.[181] In particular, the Notifying Party considers that ADM is not a "maverick", a recent entrant nor an innovator in the market. It stresses the fact that the market share of ADM has been declining and that […]. Regarding Germany in particular, the Notifying Party submits that the sales of ADM decreased steadily in volume in the 2011-2013 period by around […] despite the growth in the demand for chocolate by German customers of an estimated […].[182] Moreover, ADM's market shares with German customers decreased by […]% from [10-20]% in 2011 to [10-20]% in 2014 according to the Notifying Party's estimates.[183] The Notifying Party also submits that the capacity utilisation of ADM's plant in Germany is only of […]% whereas all other competitors are running at higher capacity rates.[184]

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[178] See "*Belcolade Erembodengen breidt site en prodcutie uit*" 13 May 2014 available at http://radiomontana.be/jd-event/Regio-Info/info-PAGINA/Pagina-600-699/Pagina-00674 htm (last accessed on 10 June 2015).

[179] Agreed minutes of the conference calls with Lubeca.

[180] Ibid.

[181] Form CO, paragraph 223.

[182] Cargill's reply to the Commission's request for information of 17 March 2015.

[183] Supplemental submission of 17 April 2015.

[184] Submission to follow-up request of information of 27 April 2015.

b) The Commission's assessment

(228) Some firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant anticompetitive way, in particular when the market is already concentrated.[185]

(229) Conversely, some companies have less of an influence than their market share would suggest, in particularly because their market share is declining to such an extent that they are likely to exit the market within a short timeframe, or because they do not follow the competitive dynamics of the market in terms of innovation, whereas their competitors would have pipe line products for a specific product market.

(230) As explained above in Section 9.2.1, the Commission's market reconstruction shows that ADM holds a market share between [10-20] and [10-20] with respect to German customers located in the overlapping zones between the Parties' plants' catchment areas, or [10-20]% at the national level in Germany ([10-20]% in liquid industrial chocolate). ADM is therefore an established competitor with a sizable market position. The Commission tried to assess whether ADM's competitive relevance with respect to German customers is less pronounced than its market share would suggest, either because it would experience an irreversible decline in terms of market share or because it would lag behind its main competitors in terms of innovation and product development.

(231) In the first place, the market investigation did not reveal any indications of a potential decline of ADM's market presence in Germany. Customers replying to the Commission's market investigation confirm that ADM has played an important role for the competition in the regions around the Parties' plants in Germany. More than two thirds of German customers replied in the first and second phase market investigations that it was important for them to have ADM as a potential supplier. Almost all customers describe competition between the Parties as relevant or very relevant. In addition, almost all of the concerned customers predict a price increase due to the loss of ADM as a main market alternative. Indeed, almost all customers point out that ADM helps keep prices down in Germany.[186]

(232) One customer explains that ADM is "*the most flexible supplier in terms of delivery and also the most competitive in terms of price*"[187] Other customers agree that ADM has been offering the most favourable prices in recent years.[188]

(233) In the second place, as regards ADM's recent performance in the industrial chocolate market in Germany, ADM has explained that it entered the industrial chocolate market in Germany through its acquisition of Schokinag in 2009.[189] Upon […] ADM decided, in line with its […] strategy […].[190] Volumes sold in Germany […] in 2010 […] in 2012. Transformation revenues in Germany (sales of industrial chocolate less cost of raw materials) […] in 2010 […] in 2012.[191]

185 Horizontal Merger Guidelines, paragraph 37.

186 See replies to questions 34, 36, 42 – Phase II questionnaire to customers.

187 Agreed minutes of the conference call with a customer of 30 January 2015.

188 Email received from a customer on 2 February 2015.

189 See Commission decision of 27 May 2009 in Case M.5431 ADM/Schokinag.

190 See ADM's reply to the Commission's request for information of 24 March 2015, page 10.

191 See ADM's reply to the Commission's request for information of 5 June 2015, page 5.

(234) ADM also explained that it experienced […] in industrial chocolate in the EEA over that period: […] in 2011 and […] in 2012. Those […] were due to a combination of factors, notably […].

(235) In 2012/2013, ADM started to […] (for example it carried out […]). ADM also started to […].[192]

(236) This strategic focus on […] led to […] of sales in Germany ([…] tonnes in 2013, […] tonnes in 2014) whereas transformation revenues […] (EUR […] in 2013, EUR […] in 2014).[193] Looking at the overall period during which ADM ran a chocolate business in Germany (2010-2014), sales […].

(237) ADM's general strategic objective was to […] in order to […][194]. The measures that were taken by ADM to […] of the chocolate business have to be understood in that perspective. ADM's decision to sell its chocolate business in Europe and in North America was eventually taken by ADM's Board as a result of […].[195]

(238) On the basis of the market investigation and the assessment of internal documents and sales data regarding ADM's performance in industrial chocolate in Germany over the entire period, the Commission considers that ADM has managed to grow the business in terms of sales volume and revenues. […] over that period were primarily due to […] that ADM has started to […]. These measures were implemented with a view to […].

(239) The Commission therefore concludes that ADM's current market potential in industrial chocolate in Germany was fairly represented by its [10-20]% market share and that the merger will lead to the elimination of an important competitive force in line with its established market position.

9.2.2.7. Critical loss analysis submitted by the Notifying Party

a) The Notifying Party's arguments

(240) The Notifying Party, through its economic advisors, submitted a critical loss analysis to assess the competitive effects of the Transaction and, in particular, the incentive for the Parties to increase prices following the Transaction.

(241) Critical loss analysis is usually used in the context of market definition. The method first computes the critical loss, defined as the minimum volume of sales that a hypothetical monopolist would need to lose to make a 5-10% price increase in the relevant market unprofitable. If this critical loss is greater than the likely actual loss that the hypothetical monopolist would incur in response to a price increase of the same magnitude, such a price increase would be profitable and the set of products or services considered form part of the same relevant antitrust market.

(242) In the present case, the Notifying Party does not use the critical loss analysis for market definition but rather to assess the competitive effects of the merger and in particular the incentive to increase prices following the Transaction. The Notifying Party claims that only a small volume loss in the sale of industrial chocolate would render any price increase of the Parties unprofitable and that the Merged Entity

192 See ADM European chocolate – management presentation, slide 34.
193 See ADM's reply to the Commission's request for information of 5 June 2015, page 5.
194 […].
195 See […].

would therefore be unlikely to have an incentive to increase prices after the Transaction.[196]

b) The Commission's assessment

(243) The Commission does not agree with the Notifying Party's conclusions from its critical loss analysis.

(244) First, critical loss analysis has the well-known limitation that it fails to examine the implications of the observed margins for the elasticity of demand.[197] The observation of high margins not only leads to a low critical loss to make a given price increase unprofitable. It also suggests that the elasticity of demand and hence the likely actual loss is low. This is because firms would find it profitable otherwise to reduce their current price and margin to attract additional volumes pre-merger. A low critical loss does therefore in itself not indicate that the likely actual loss will be above the critical loss.

(245) Second, critical loss analysis provides no direct insights on the loss of competition between the parties to a merger which is the most direct effect of a horizontal merger[198] and the key driver for price effects. By ignoring this crucial element, critical loss analysis becomes in general uninformative for merger assessment.

(246) In fact, critical loss analysis can be misleading in the context of mergers as, in contrast to standard tools that measure the loss of competition between the merging firms, critical loss analysis suggests that higher margins imply less potential for price increases. This can be seen from the Parties' second critical loss submission of 10 April 2015 which uses an estimate of the integrated margin including upstream margins and leads to […] critical volume loss than the Parties' first critical loss analysis of 6 March 2015 which uses the margin at the industrial chocolate level only. This property of critical loss analysis is due to the fact that, for any given view on the likely actual loss to outsiders – which critical loss analysis assumes can be measured accurately – higher margins of the merging parties can only be reconciled with an implicit assumption of less competition between the merging parties. The Commission considers that direct quantitative or qualitative evidence on the degree of competition between the merging parties provides a better evidentiary basis for merger assessment than implicit assumptions built into claims derived from critical loss analyses.

(247) Third, the critical loss analysis submitted by the Parties is undertaken on the basis of a hypothetical increase in margin (computed as prices minus raw material costs), not in prices. A 5% increase in the industrial chocolate margins, however, only represents a […] increase in the price paid by customers. The critical volume loss calculated by the Parties of approximately […] is not small considering that this demand reaction would have to be the result of a price increase of only […].

(248) Fourth, critical loss analysis only examines very specific price increases. In the context of an industry where firms have limited capacities and only few suppliers are likely to expand their output, critical loss analysis cannot exclude that other, higher than the hypothesised price increases at which rival firms would reach their capacity constraints would not be profitable.

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196 See the first analysis submitted on 6 March 2015 and the second analysis submitted on 10 April 2015.

197 See, for example, M.L. Katz and C. Shapiro (2003), "Critical Loss: Let's Tell the Whole Story", Antitrust magazine, Spring 2003, 49-56.

198 Horizontal Merger Guidelines, paragraph 24.

(249) The elements laid out in recitals (244) to (248) suggest that the critical loss analysis submitted by the Parties is not appropriate to assess the competitive effects of the Transaction in this case as it fails to account for or misrepresents important economic issues.

9.2.2.8. Effects of Cargill's vertical integration on its incentives to increase prices

a) The Notifying Party's arguments

(250) The Notifying Party submits that its industrial chocolate business […]. The Notifying Party argues that it would […] to optimize its integrated cocoa/chocolate business throughout the value chain.[199]

(251) Those dynamics would be amplified by […]. […],[200] […].

b) The Commission's assessment

(252) The Commission notes that […], Cargill has […] capacity utilization in industrial chocolate in the past. Cargill achieved capacity utilization between […] and […] in industrial chocolate in the EEA between 2011 and 2013. Furthermore, the capacity utilization has been […] to […] for certain plants, in particular in Cargill's plants in […] and […], over that period.[201]

(253) Furthermore, the growth in sales of cocoa butter in the EEA has been primarily driven by the non-captive market (an increase from an estimated […] tonnes in 2009 to […] tonnes in 2013 according to Cargill's internal estimates) and sales to the captive market have rather been declining (from estimated […] tonnes in 2008 to […] tonnes in 2013 according to Cargill's internal estimates).[202] This appears to suggest that there has been increasing demand for cocoa butter on the merchant market in the last years which could constitute a potential outlet for the cocoa butter produced.

(254) […] ADM was in the process of selling its Cocoa Business to Olam without the downstream ADM Chocolate Business during the course of the proceedings in this case. The vast majority of ADM's semi-finished cocoa products […]. According to ADM, […].[203]

(255) Similarly to the ADM Cocoa Business after the sale of the downstream ADM Chocolate Business, there are other competitors active in the cocoa butter and cocoa powder markets (as listed in Section 9.8), who are not vertically integrated downstream in industrial chocolate production, including the competitors Ecom and Euromar.

(256) Therefore, Cargill's strategy […] appears to be an individual business decision and choice of strategy which is not shared by all competitors in semi-finished cocoa products. Accordingly, the Commission does not consider that Cargill's vertical integration upstream in the production of semi-finished cocoa products can be considered as a sufficiently certain deterrent to keep Cargill from reducing its industrial chocolate output and increasing its prices after the Transaction.

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199 Supplemental submission of 17 April 2015, page 1 of the letter addressed to the Commission and page 2 of the Supplemental submission annexed to the letter.

200 According to the Parties' internal estimates, about 99% of cocoa butter is used in chocolate production while only the remaining 1% is used in applications such as cosmetics.

201 Form CO, paragraph 382.

202 Cargill internal document entitled […].

203 See ADM's reply to the Commission's request for information of 24 April 2105, question 5.

9.2.2.9. Market entry

(257) Market entry can be a sufficient competitive constraint on the merging parties if such entry would be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.[204]

a) The Notifying Party's arguments

(258) The Notifying Party submits that there are no significant barriers to entry into the merchant market for industrial chocolate in the EEA. The process of manufacturing industrial chocolate does not require customized or expensive equipment since there are no specialized plants or know-how required for specific recipes. According to the Notifying Party, access to input material is easy as is replicating customers' recipes which can be achieved in a short time span of less than two months.[205]

(259) The Notifying Party points out that there have been several entries on the market of industrial chocolate over the last 5 years such as the German producer Ritter, which was traditionally a producer of chocolate end-consumer products, the French company Chocolaterie de Bourgogne which entered the market as a spin-off of Barry Callebaut in 2012, the French company Chocolaterie de Provence, and the Ukrainian group Roshen which acquired the Hungarian manufacturer Bonbonetti.[206]

(260) Moreover, the Notifying Party considers that several companies are credible entrants that are likely to move into the EEA industrial chocolate market: (i) the […] which is developing an industrial chocolate activity in Bulgaria; (ii) the […] specialized in confectionery, dairy and bakery goods; (iii) […] worldwide player in the food industry already active in the chocolate market in […] and (iv) the […] company […] which is among others in chocolate and confectionery fats according to the Notifying Party.[207]

(261) The Notifying Party also submits that market entry may occur as well by players active upstream, downstream and in adjacent markets or by players which have no related activity. This is exemplified by OCG (Orleans Consulting Group) which entered the market through a mix of green-field investments and acquisitions in 1997 (and was purchased by Cargill in 2003). Overall, Cargill argues that many of today's main players were not active 10 to 15 years ago.[208]

b) The Commission's assessment

(262) The Commission notes that the views expressed by market participants do not support the Notifying Party's view.

(263) First, few respondents identified any market entrants in the sale of industrial chocolate over the last three years.[209] None of those identified recent entrants has made more than insignificant sales to Germany except for Ritter.

(264) Second, potential entrants identified by the Notifying Party that replied to the Commission's market investigation indicated that they are neither able nor interested to enter the German market. One respondent indicated that its business *" depends on*

204 Horizontal Merger Guidelines, paragraphs 68-75.
205 Form CO, paragraphs 221-223.
206 Form CO, paragraph 448.
207 Form CO, paragraph 449.
208 Supplemental submission of 20 March 2015, Paragraphs 6-9.
209 See replies to question 43 – Phase I questionnaire to competitors and replies to question 41 – Phase I questionnaire to customers.

these large suppliers in its purchases of cocoa ingredients for industrial chocolate and is therefore much less competitive than Barry Callebaut, ADM and Cargill and therefore overall not competitive in conventional industrial chocolate" and *"vertical integration in the cocoa-chocolate business is a major advantage for the production of industrial chocolate and thus as a producer of a niche market there is a disadvantage".*[210] Another respondent indicated that they *"do not have the necessary facilities to start production of industrial chocolate. The investment required is large and there are relativity limited sources for raw materials, resulting in a major barrier to entering this market".*[211] Other competitors indicated that the current way to enter the market is to buy existing companies.[212] In fact, none of the customers with a production facility in Germany expect any market entry in the next three years.

(265) Third, potential entrants identified by the Notifying Party that replied to the Commission's market investigation do not indicate any willingness to enter the industrial chocolate market. They mentioned for example that it was not easy to switch from the production of fat-based coatings and fillings to the production of industrial chocolate and that specific equipment is required.[213] One company which was mentioned by Cargill as a potential entrant submitted that *"We have no equipment and machines for the production of chocolate. Our expertise lies in the production of fat-based coatings and creams. For this reason we will not consider manufacturing chocolate."*[214]

(266) Fourth, companies with internal production facilities for industrial chocolate confirmed that they do not have any plans to enter the sale of industrial chocolate on the merchant market over the next three years as set out in more detail in section 9.2.2.11.

(267) For the reasons set out in recitals (262) to (267), the Commission considers that it is unlikely that future market entrants in the sale of industrial chocolate would deter or defeat the anti-competitive effects of the Transaction.

9.2.2.10. Buyer power and the possibility of sponsoring entry

(268) Even firms with high market shares may not be in a position to significantly impede effective competition if their customers possess countervailing buyer power. Countervailing buyer power should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiation due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers, including by vertically integrating in the upstream market.[215] In the present case, the Commission also assesses whether customers would have the possibility of sponsoring the entry of new industrial chocolate suppliers in the market, for example by committing to placing large orders with this company.[216]

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210 See replies to question 18 – Phase II questionnaire to new entrants and agreed minutes of the conference call with a potential new entrant of 26 March 2015.
211 See reply to an email with a new entrant of 3 April 2015.
212 See replies to question 14 – Phase I questionnaire to competitors.
213 See replies to question 17 – Phase II questionnaire to new entrants.
214 The German original reads: *"Wir haben keine Anlagen und Maschinen zur Herstellung von Schokolade. Unser Know-How liegt in der Herstellung von Fettglasuren und -cremes. Aus diesem Grund werden wir auch zukünftig keine Schokolade herstellen"* See replies to question 17 – Phase II questionnaire to new entrants.
215 Horizontal Merger Guidelines, paragraph 64.
216 Ibid, paragraph 65.

a) The Notifying Party's arguments

(269) The Notifying Party submits that customers of industrial chocolate have significant buyer power in the EEA.[217] According to the Notifying Party, this is illustrated by (i) customers' multi-sourcing strategy,[218] whereby customers will tend to approve two to four suppliers with the purpose of selecting the best supplier depending on the price quotes they receive on a given date, (ii) customers' ability to switch suppliers, as the processes for manufacturing industrial chocolate are broadly the same irrespective of a specific recipe,[219] and (iii) customers' ability to insource supplies from their internal production facilities.[220]

b) The Commission's assessment

(270) The Commission notes that there are a large number of customers of industrial chocolate in the relevant markets in Germany, including large multinational companies as well as small and mid-size companies.[221] The demand for industrial chocolate is thus not concentrated in a limited number of large companies and each individual small or mid-sized customer does not have a large commercial significance to the Parties.

(271) Contrary to the Notifying Party's view, the possibilities for customers to switch their purchases to suitable suppliers with sufficient spare capacity are limited as set out in sections 9.2.2.3 to 9.2.2.5 of this Decision. Accordingly, the customers' bargaining position vis-à-vis the Merged Entity would be weak due to insufficient alternatives.

(272) Furthermore, countervailing buyer power cannot be found to sufficiently off-set potential adverse effects of a merger if it only ensures that a particular segment of customers is shielded from significantly higher prices or deteriorated conditions after the merger.[222] In this respect, market participants explained in the course of the market investigation that the small and mid-sized customers of industrial chocolate do not have the possibility to resort to internal production of industrial chocolate.[223] This is because they do not have the financial means to invest in their own production facilities. In addition, such production would not be as efficient as the current external production because of the limited scale of such potential in-house production.[224]

(273) In addition, a majority of customers contacted in the market investigation replied that they would not be willing to sponsor capacity expansion by industrial chocolate suppliers in reaction to an attempt by the Merged Entity to increase prices.[225] Most customers considered themselves to be too small an operator to invest in such activities, and vertically integrated customers confirmed that *"they would rather invest in their own internal production lines"*.[226]

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217 Form CO, page 85.
218 Form CO, paragraph 81.
219 Form CO, paragraph 85.
220 Form CO, paragraph 156.
221 Form CO, paragraph 427.
222 Horizontal Merger Guidelines, paragraph 67.
223 Replies to question 37 – Phase II questionnaire to customers.
224 Replies to question 37 – Phase II questionnaire to customers; see also agreed minutes of the conference call with a competitor of 30 January 2015.
225 Replies to Question 50 - Phase II questionnaire to customers.
226 Replies to Question 50.1 - Phase II questionnaire to customers.

(274) In the light of the market investigation, the Commission considers that there is no conclusive evidence of sufficient countervailing buyer power, in particular not for small and mid-size customers of industrial chocolate, so as to impose a significant competitive constraint on the Parties.

9.2.2.11. Possibility of in-sourcing and market entry by vertically integrated chocolate producers

a) The Notifying Party's arguments

(275) According to the Notifying Party, vertically integrated producers active in downstream consumer chocolate products would impose a competitive constraint on the Merged Entity's activities in industrial chocolate.

(276) First, the Notifying Party submits that only analysing the merchant market does not capture the competitive constraint on the market of industrial chocolate and submits the size of the captive production for industrial chocolate is roughly equal to that of the merchant market.

(277) Second, vertically integrated producers are able to use internal production volumes instead of relying solely on the merchant market. They can move at any point from procurement on the merchant market to captive production.[227] They can therefore use the threat to in-source production volumes in their negotiations with industrial chocolate suppliers. The Notifying Party submits that this "make-or-buy" policy is efficient in ensuring that prices on the entire merchant market are kept at reasonable levels.[228]

(278) Third, vertically integrated producers may also decide to move some volumes from captive production to sales on the merchant market following the example of Ritter and Cémoi and hereby exercise a strong competitive constraint.[229]

b) The Commission's assessment

(279) The Commission notes that vertically integrated customers constitute only a small sub-group of the overall customer base of the Parties. The volume sold to those customers represented [10-20]% of Cargill's total sales in the EEA in 2012, [5-10]% in 2013 and [10-20]% in 2014 (for Germany: [5-10]% in 2012, [0-5]% in 2013 and [5-10]% in 2014.) and [0-5]% of ADM's total sales in the EEA in 2012, [0-5]% in 2013 and [5-10]% in 2014 (in Germany: [0-5]% in 2012, [0-5]% in 2013 and [0-5]% in 2014). Any possibility of using potential in-sourcing of industrial chocolate production in commercial negotiations with the Parties would therefore be limited to a small sub-set of their customer base.

(280) The results of the market investigation showed further that a majority of vertically integrated customers confirmed that they are not in a flexible position to switch between using internal production of industrial chocolate and purchasing from the merchant market.[230] The time and costs associated to switching do not render the process flexible. Furthermore, the majority of vertically integrated customers explained that they would not be able to increase their internal production of

227 Form CO, paragraph 202-204.
228 Form CO, paragraph 207.
229 Form CO, paragraph 212,213.
230 See replies to question 45 – Phase I Questionnaire to customers.

industrial chocolate if prices for industrial chocolate on the merchant market increased.[231]

(281) As regards the possibility of vertically integrated companies starting to sell industrial chocolate on the merchant market, none of the customers with a production facility in Germany expect that companies producing industrial chocolate internally could become active in the merchant market. Moreover, sourcing volumes from vertically integrated companies is seen as a less reliable and attractive alternative, as most of these vertically integrated companies are direct competitors.

(282) The vertically integrated companies contacted in the market investigation generally explained that they did not have any plans to commence selling industrial chocolate on the merchant market. One customer indicated "*we are a supplier of consumer products, not of industrial chocolate"*.[232] Another respondent indicated *"The margin in selling commodities is very low and that is why the big manufacturers are looking to sell more and more added value products."*[233] Moreover, vertically integrated customers explained that they would not consider reducing their production of retail products to sell more industrial chocolate on the merchant market, in particular in the light of the higher margins expected in end-consumer chocolate products compared to industrial chocolate.[234]

(283) In the light of these findings, the Commission considers that the possibility of in-sourcing and market entry by vertically integrated chocolate producers does not impose a significant competitive constraint on the Parties.

9.3. Horizontal overlaps in industrial chocolate concerning the United Kingdom and Ireland

(284) For the reasons set out in this Section, the Commission considers that this Transaction does not impede effective competition in the market for industrial chocolate in the United Kingdom. The Commission also considers that the Transaction does not impede effective competition in the market for industrial chocolate in Ireland.[235]

(285) As explained in section 9.2.1.1, there are no published industry statistics for the industrial chocolate markets and the Notifying Party has used different methodologies of calculating market shares.

(286) The table below sets out the Notifying Party's market shares estimates for industrial chocolate sales at the national United Kingdom level.

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231 See replies to question 48 – Phase I Questionnaire to customers.

232 Ibid.

233 See replies to question 43 – Phase I questionnaire to customers.

234 See replies to question 46 – Phase I Questionnaire to customers.

235 The Commission assesses Ireland together with the United Kingdom as there is no industrial chocolate facility in Ireland and the majority of industrial chocolate used in Ireland comes from the United Kingdom (the rest is shipped from Belgium where a broadly similar market structure as in the United Kingdom applies as set out in Section 0).

Table 6 Notifying Party's estimates of market shares at the United Kingdom level[236]

Companies	2013
Cargill	[10-20]%
ADM	[5-10]%
Combined	**[20-30]%**
Barry Callebaut	[60-70]%
Belcolade	[0-5]%
Cémoi	[0-5]%
Kessko	[0-5]%
Icam	[0-5]%
Others	[0-5]%
Total	**100%**

(287) In Ireland, the Notifying Party estimates the combined market share of the Parties to be [30-40]%. Barry Callebaut would be the second largest player with [20-30]%, Belcolade would follow with [5-10]% and a broad category of "other competitors" would hold [20-30]% between them.[237]

(288) According to the Notifying Party, the Parties' market shares and the market structure do not differ significantly if radii of 750 km or 400 km were considered. The combined market share would be [20-30]% (around Worksop) and [20-30]% (around Liverpool) if 750 km radii around the Parties 'plants were considered. If 400 km radii around the Parties 'plants are taken into account, the combined market shares would be [20-30]% (Worksop) and [20-30]% (Liverpool).[238]

(289) The Commission's market reconstruction shows that the Parties' combined market shares are similar to those estimated by the Notifying Party. The transaction level data collected from the Parties and their main competitors for the years 2013 and 2014 showed that the Parties' combined market shares in the United Kingdom is [20-30]% with an increment of [5-10]%. The main competitors have a market share of 60-70% (Barry Callebaut) and 5-10% (Belcolade).[239]

(290) The Commission considers that the Transaction would not significantly impede effective competition in the market for industrial chocolate in the United Kingdom.

(291) First, the Parties' combined market share in the supply of industrial chocolate in the United Kingdom is moderate (less than 30%) with an increment of [5-10]%. Barry Callebaut is the market leader with more than 60% and Belcolade has a more meaningful position than in Germany. Moreover, Barry Callebaut's strong position, being more than twice that of the merged entity would be strengthened with its plans for expansion in the United Kingdom as explained in section 9.2.2.5.

236 Form CO, paragraph 198.

237 Form CO, paragraph 198.

238 Form CO, pages 59ff and 67ff and RBB Economics submission of 4 March 2015, page 9.

239 The Commission has not undertaken a full reconstruction of the market shares as regards 500 km radii around the Parties' plants in the United Kingdom, as the differences between Cargill's estimates and the Commission's reconstruction at the national United Kingdom level were minor. The Commission also considers that sales figures provided by the Notifying Party regarding Ireland are broadly in line with the results of the market investigation.

(292) The market investigation confirmed that Barry Callebaut is the market leader in the supply of industrial chocolate in the United Kingdom and the main supplier for customers.[240] Moreover, customers also indicated that Barry Callebaut is superior in terms of product innovation. One customer stated that *"BC has better technical facilities and research capabilities."*

(293) Second, no customer identified the competition between the Parties as the main source of competition in the United Kingdom market.[241] Indeed, in this regard, in general, customers did not consider the Parties as aggressive competitors.[242]

(294) Third, overall the market investigation did not reveal any substantiated competition concerns in relation to the supply of industrial chocolate in the United Kingdom. Moreover, some customers indicated that the transaction allows the creation of a stronger competitor vis-à-vis the market leader. For instance, one customer indicated *"we believe that transaction will be positive as both the ADM share of the market will get more investments behind it and the new Cargill chocolate business will become more powerful competitor against the large player Barry Callebaut. Something ADM was not able to achieve alone. This will drive more innovation, cost leadership, quality and availability in the market".*[243] Other customers stated that *"Overall BC[Barry Callebaut] is the major player in the market and with Cargill the market would become a stronger 2nd player in industrial chocolate.".*[244]

(295) As regards Ireland, the Merged Entity would become a new market leader with a [30-40]% market share. However, Barry Callebaut remains a significant competitor with a share of almost 30% and Belcolade as well as smaller players are also present. The market investigation did not reveal any substantiated competition concerns in relation to the supply of industrial chocolate in Ireland.[245]

(296) The Commission therefore considers that the Transaction would not significantly impede effective competition on the market for industrial chocolate in the United Kingdom and that the Transaction would not significantly impede effective competition in Ireland

9.4. Horizontal overlaps in industrial chocolate concerning Belgium

(297) For the reasons set out in Section 9.4 below the Commission considers that the notified transaction does not impede effective competition in the market for industrial chocolate in Belgium.

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240 See replies to question 24 – Phase I questionnaire to customers and See replies to question 21 – Phase II questionnaire to customers.

241 See replies to question 36 – Phase II questionnaire to customers.

242 See replies to question 41 – Phase II questionnaire to customers.

243 See replies to question 50 – Phase I questionnaire to customers.

244 See replies to question 36 – Phase II questionnaire to customers.

245 See replies to question 50 – Phase I questionnaire to customers.

(298) Table 7 sets out the Notifying Party's market shares estimates for industrial chocolate sales at the national Belgian level.[246]

Table 7 Notifying Party's estimates of market shares at the national Belgian level

Companies	2013
Cargill	[20-30]%
ADM	[0-5]%
Combined	**[20-30]%**
Barry Callebaut	[70-80]%
Belcolade	[0-5]%
Cémoi	[0-5]%
Icam	[0-5]%
Total	**100%**

(299) According to the Notifying Party, the Parties' market shares and the market structure do not differ significantly if radii of 750 km or 400 km were considered. The combined market share would be [20-30]% (around Antwerp and Mouscron) and [20-30]% (around Manage) if 750 km radii around the Parties 'plants were considered. If 400 km radii around the Parties 'plants are taken into account, the combined market shares would be [20-30]% (Antwerp), [20-30]% (Mouscron) and [20-30]% (Manage).[247]

(300) The Commissions' market reconstruction has broadly confirmed this order of magnitude for the Parties' market share, with a combined share of [20-30]% for all chocolate and [20-30]% for liquid chocolate. In both markets, the overlap is limited ([0-5]%) and Barry Callebaut remains the undisputed market leader with a share of 70-80% in all chocolate and liquid chocolate.[248]

(301) Belgian customers who responded to the market investigation did not express major concerns related to the impact of the Transaction on their activities or on the Belgian chocolate market. Most of these customers explained that they still have potential relevant alternatives from whom they can buy industrial chocolate. One Belgian customer explained that "*We still have other partners that want to provide competitive pricing like Belcolade*."[249]

(302) Customers also explained that the competitive relevance of ADM in Belgium is limited despite the fact that it owns a chocolate processing facility in this country. One Belgian chocolatier put forward that "*ADM has only a very small factory in Belgium and since we have to source our chocolate from Belgium, ADM is not an important supplier for us*".[250] Another customer indicated that "In *Belgium, most competition is between Barry Callebaut, Cargill and Belcolade, with ADM at a second level*".[251]

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246 Form CO, paragraph 198.

247 Form CO, pages 59ff and 67ff and RBB Economics submission of 4 March 2015, page 9.

248 The Commission has not undertaken a full reconstruction of the market shares as regards 500 km radii around the Parties plants in Belgium as the differences between Cargill's estimates and the Commission's reconstruction at the national Belgian level were small.

249 See reply question 49-1 – phase II Questionnaire to customers.

250 See reply question 34 – phase 1 Questionnaire to customers.

251 See reply question 3 – phase 1 Questionnaire to customers.

(303) In the light of the limited overlap between the Parties' activities and the results of the market investigation, the Transaction does not raise competition concerns in the market for industrial chocolate in Belgium.

9.5. Horizontal overlaps in industrial chocolate concerning the Netherlands

(304) For the reasons set out in Section 9.5 below, the Commission considers that the notified transaction does not impede effective competition in the market for industrial chocolate in the Netherlands.

(305) Table 8 sets out the Notifying Party's market shares estimates for industrial chocolate sales at the national Dutch level.[252]

Table 8 Notifying Party's estimates of market shares at the national Dutch level

Companies	2013
Cargill	[20-30]%
ADM	[0-5]%
Combined	**[30-40]%**
Barry Callebaut	[60-70]%
Belcolade	[0-5]%
Others	[0-5]%
Total	**100%**

(306) The Commissions' market reconstruction has broadly confirmed this order of magnitude for the Parties' market share, with a combined share of [20-30]% for all chocolate (with a [0-5]% overlap) and [20-30]% for liquid chocolate (with a [0-5]% overlap). Barry Callebaut remains the undisputed market leader with a share of 70-80% in all chocolate and in liquid chocolate. As none of the Parties has an industrial chocolate production facility in the Netherlands, there is no need to assess market shares and market structure in radii around the Parties 'plants.

(307) Dutch customers that responded to the market investigation did not express major concerns related to the impact of the Transaction on their activities or on the Dutch chocolate market. Moreover, some customers confirmed that the transaction facilitates the creation of a stronger competitor vis-à-vis the market leader. For instance, one customer indicates "*Overall BC is the major player in the market and with Cargill the market would become a stronger 2nd player in industrial chocolate. Cargill would also be less involved in the end user markets with their own brands*."[253]

(308) In the light of the limited overlap between the Parties' activities and the results of the market investigation, the Transaction does not raise competition concerns in the market for industrial chocolate in the Netherlands.

9.6. Horizontal overlaps in industrial chocolate concerning France

(309) For the reasons set out in Section 9.6 below the Commission considers that the Transaction does not impede effective competition in the market for industrial chocolate in France

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252 Form CO, paragraph 198.

253 See reply question 36 – phase II Questionnaire to customers.

(310) Table 9 below sets out the Notifying Party's market shares estimates for industrial chocolate sales at the national French level.[254]

Table 9 Notifying Party's estimates of market shares at the national French level

Companies	2013
Cargill	[10-20]%
ADM	[0-5]%
Combined	**[20-30]%**
Barry Callebaut	[40-50]%
Cémoi	[10-20]%
Chocolaterie de Bourgogne	[0-5]%
Belcolade	[0-5]%
Natra	[0-5]%
Chocolaterie de Provence	[0-5]%
Others	[0-5]%
Total	**100%**

(311) According to the Notifying Party, the Parties' market shares and the market structure do not differ significantly if radii of 750 km or 400 km were considered. The combined market share would be [20-30]% around Cargill's plant in Rouen if a 750 km radius around this plant was considered. If a 400 km radius around the Rouen factory was taken into account, the combined market shares would be [10-20]%.[255]

(312) The Commissions' market reconstruction has broadly confirmed this order of magnitude for the Parties' market share as regards chocolate in general, with a combined share of [20-30]% (with a [5-10]% overlap). Barry Callebaut would have a share of 40-50% and Cémoi a share of 20-30%. As regards liquid chocolate, the Commission's market reconstruction found that the Parties would hold a share of [30-40]% (with a [5-10]% overlap) with Barry Callebaut as a leader with 50-60% and Cémoi with 5-10%.

(313) French customers that responded to the market investigation did not express major concerns related to the impact of the Transaction on their activities or on the French chocolate market. This is in particular due to the limited market presence of ADM in France as well as the significant position of Cémoi. One customer explained with respect to ADM that "*this supplier has never been competitive*".[256]

(314) In the light of the outcome of the market investigation and the presence of at least two large competitors, the Transaction does not raise competition concerns in the market for industrial chocolate in France.

9.7. Horizontal overlaps in industrial chocolate concerning other countries in the EEA

(315) The Parties' sales activities in industrial chocolate in the EEA overlap also with respect to sales in Austria, Bulgaria, Denmark, Greece, Hungary, Italy, Poland,

254 Form CO, paragraph 198.

255 Form CO, Pages 59ff and 67ff and RBB Economics submission of 4 March 2015, page 9.

256 See reply question 34 – phase II Questionnaire to customers.

Romania, Slovenia, Spain and Sweden. According to the Notifying Party's estimates, the Parties' joint market shares are lower than 5% in Bulgaria, Denmark, Hungary, Romania, Slovenia and Spain, between 5% and 10% in Austria and Greece and between 10% and 15% in Italy and Poland.[257] It is only the Parties' activities in Sweden that give rise to an affected market at the national level with an estimated combined market share of [20-30]% (Cargill: [20-30]%; ADM: [5-10]%).

(316) The joint market shares and market share increment at the national level are limited. Furthermore, as regards the countries where the Parties' joint market shares are above 10%, the Divestment Business to be sold under the Final Commitments of 22 May 2015 (as discussed in section 10) accounted for around […] of the industrial chocolate sales of ADM in Sweden in 2014, more than […] of ADM's sales in Poland and more than […] of ADM's sales in Italy.[258] The divestment under the Final Commitments of 22 May 2015 therefore leads to the elimination of almost the entire overlap between the Parties' activities in industrial chocolate in Sweden, Italy and Poland.

(317) In light of the market share levels at the national level and the Final Commitments of 22 May 2015, the overlaps between the Parties' activities in industrial chocolate concerning other countries in the EEA will not be discussed further in this decision.

9.8. Vertical links between semi-finished cocoa products and industrial chocolate

(318) The Transaction also leads to vertical links between Cargill's activities in the production and supply of semi-finished cocoa products, namely cocoa liquor, cocoa butter and cocoa powder (upstream markets) and the Parties' activities in industrial chocolate (downstream market). While Archer Daniels Midland also operates a semi-finished cocoa products business ('the ADM Cocoa Business'), that business will not be acquired by Cargill in the transaction. Instead, Archer Daniels Midland has entered into a binding agreement to sell the ADM Cocoa Business to Olam International Limited ("Olam").[259]

9.8.1. Market shares and market structure

(319) The Notifying Party has provided the market share estimates for semi-finished cocoa products in the EEA in 2013 as set out in Table 10.[260]

[257] Form CO, paragraph 198.

[258] Transaction data submitted by ADM on 21 December 2015.

[259] The acquisition of the ADM Cocoa Business by Olam has been granted unconditional clearance by the Commission in its decision of 10 June 2015 in Case M.7510 – Olam/ADM Cocoa Business.

[260] Form CO, paragraphs 317, 321, 324.

Table 10 The Notifying Party's estimates of the sales market shares in semi-finished cocoa products in the EEA 2013

Companies	Cocoa liquor	Cocoa butter	Cocoa powder
Cargill	**[20-30]%**	**[20-30]%**	**[30-40]%**
ADM Cocoa Business	[10-20]%	[10-20]%	[20-30]%
Barry Callebaut	[10-20]%	[10-20]%	[20-30]%
Ecom	[10-20]%	[20-30]%	[0-5]%
Euromar	[10-20]%	[5-10]%	[0-5]%
Krüger	[5-10]%	N/A	N/A
Cémoi	[0-5]%	[0-5]%	[0-5]%
Natra	[0-5]%	[0-5]%	[0-5]%
Indcresa	N/A	N/A	[0-5]%
Nederland	[0-5]%	[0-5]%	[0-5]%
Olam	N/A	N/A	[0-5]%
Others	[10-20]%	[5-10]%	[10-20]%
Total	**100%**	**100%**	**100%**

9.8.2. Transitional supply agreement between Cargill and the ADM Cocoa Business

(320) As part of the Transaction, Cargill and Archer Daniels Midland through the ADM Cocoa Business entered into a transitional supply arrangement. Under that agreement Cargill will purchase a certain quantity of cocoa liquor, cocoa butter and cocoa powder from the ADM Cocoa Business for a period of […] to supply the needs of the industrial chocolate plants acquired from Archer Daniels Midland.[261] The rationale behind the supply agreement for the ADM Cocoa Business is to secure a customer base following the Transaction for its semi-finished cocoa products which will no longer be used in captive in-house production.

9.8.3. The Parties' arguments

(321) The Notifying Party argues that the above-mentioned vertical relationships do not give rise to competitive concerns in the EEA as there is no vertically affected market between industrial chocolate, on the one hand, and cocoa liquor or cocoa butter, on the other hand.[262] The market shares of Cargill for cocoa butter and liquor are below the 30% threshold. With respect to cocoa powder, the Notifying Party submits that the market share of [30-40]% it had in the EEA in 2013 is only slightly above the threshold for affected markets.

(322) Moreover, the Notifying Party argues there is no risk of post-transaction input foreclosure because Cargill's position on the merchant market for semi-finished cocoa products is too limited to make such an option feasible. Moreover, there are many alternative suppliers of semi-finished cocoa products, and Cargill does not intend to exit or materially reduce its presence in the market.[263] Nor is there, in the view of the Notifying Party, any risk of customer foreclosure[264] as i) Cargill's position in the market is too limited, ii) there are a number of alternative customers

261 Form CO, paragraph 347.
262 Form CO, paragraph 286.
263 Form CO, paragraph 294.
264 Form CO, paragraph 308.

on the market to whom competitors could turn, and iii) the competitive constraint that Cargill faces at a downstream and upstream level would prevent it from increasing prices.

(323) The Notifying Party submits that the transitional agreement mentioned in recital (320) will have no impact on the market for semi-finished cocoa products in the EEA.[265] According to the Notifying Party, Cargill and the ADM Cocoa Business will remain competitors, and the supply agreement will not reduce their incentive to compete with one another. For the sake of completeness, the Notifying Party has considered the hypothetical scenario where Cargill would seek to extend the supply arrangement beyond the […] period, for example because Cargill will depend on ADM supplies or for profit-maximising reasons, and whether that would influence the Parties incentives to compete on the upstream markets.[266] The Notifying Party found that the transitional agreement would raise no such concerns, as Cargill […].

9.8.4. The Commission's assessment

(324) The Commission has assessed the vertical links between the Parties' activities in industrial chocolate and Cargill's activities in semi-finished cocoa products in particular as regards potential input foreclosure concerns. Cargill and ADM do not purchase semi-finished cocoa products on the merchant market but rely on internal supply so that potential customer foreclosure concerns can be excluded.

(325) In addition, the Commission has assessed whether the supply agreement between Cargill and ADM's Cocoa Business would lead to competition concerns by creating a link between competitors in the market for semi-finished cocoa products.

9.8.4.1. Assessment of potential input foreclosure

(326) The results of the Commission's market investigation show that the Parties' vertical links will not give rise to competition concerns. Although certain competitors argue that Cargill's stronger vertical integration might render access to semi-finished cocoa products more difficult,[267] overall market respondents submitted that there are several alternative suppliers in the market for semi-finished cocoa products, notably Barry Callebaut, Ecom, Euromar and Indcresa.[268] A majority of players that are active in the industrial chocolate production and that source cocoa products from third Parties have indicated that they should be in a position to find other sources of supply should semi-finished cocoa products sold by Cargill become more costly or less widely available.[269]

(327) In view of the moderate market position of Cargill in the upstream cocoa markets and the number of alternative suppliers on the market, the Transaction does not give rise to input foreclosure concerns as regards semi-finished cocoa products.

9.8.4.2. Assessment of the links created through the supply agreement

(328) The Commission has assessed whether the supply agreement entered into by Cargill and ADM would create incentives for Cargill and ADM to reduce competition in the upstream semi-finished cocoa products markets.

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265 Form CO, paragraph 352.
266 Form CO, paragraphs 356ff.
267 See replies to question 54 – Phase I Questionnaire for competitors.
268 See replies to question 53 – Phase I Questionnaire for competitors.
269 See replies to question 56 – Phase I Questionnaire to competitors.

(329) The volumes specified in the supply agreement are […]. […], this supply agreement would not change the level of available capacity in the upstream merchant market: […]. In other words, the level of effective demand and supply in the merchant market will not change following the application of this supply agreement. […].

(330) Moreover, the Commission does not consider that there is a risk that the supply agreement will be renewed after the […] period. This is because the volume that Cargill has committed to buy from ADM represents […]% of Cargill's total EEA liquor production capacity, […]% as regards cocoa butter, and […]% as regards cocoa powder. In addition, Cargill had spare capacity at EEA level as regards liquor and powder in 2013, […]. Therefore, Cargill […]. With respect to butter, Cargill is currently […] (discussed in section 9.2.2.8) […].

(331) Cargill's internal documents also demonstrate that Cargill […]. One internal document referring to the supply agreement state that Cargill […].[270] This document clearly shows that Cargill intends to […]. In the same document the supply agreement is qualified as […] and its limitation to […] years as […]. A […] briefing of […] states that entering into the supply agreement has a […] on the business objectives of the transaction and that the arrangement will […].[271]

(332) Moreover, the provisions of the supply agreement are directly related and necessary to the implementation of the Transaction pursuant to the Commission's notice on restrictions directly related and necessary to a concentration[272] as they are limited to […] (with low likelihood of renewal) and concern fixed quantities.

(333) The Commission therefore considers that the […] supply agreement does not create incentives for the merging parties to reduce competition in the upstream cocoa markets and that the incentives for Cargill to renew it are too low to raise any competition concerns.

9.9. Horizontal overlaps in chocolate compound

9.9.1. Market shares and market structure

(334) The Notifying Party has provided market shares for fat-based coatings and fillings as well as for chocolate compound at the EEA level.[273] It has also provided market shares for chocolate compound, where the overlap between the Parties' activities is more pronounced, (i) at the national level and (ii) at the level of circle-based markets drawn with a radius of 1 500km and a radius of 750 km around the Parties' chocolate compound production plants.

(335) According to the Notifying Party's estimates, the Transaction would lead to an affected market for the sale of chocolate compound at the national level in Portugal with a combined market share of [20-30]% (Cargill: [0-5]%; ADM: [20-30]%).[274] If catchment areas around the Parties' plants are considered, there would be an affected market for chocolate compound around Cargill's chocolate compound plant in Liverpool with a combined market share of [30-40]% (Cargill: [20-30]%; ADM: [5-10]%).[275] All other overlaps (considered at the national level or in catchment areas with a 750km radius) would not lead to affected markets, that is to

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270 Cargill internal document entitled […], slide 7.
271 Cargill internal document, […].
272 OJ L24 29.1.2004, page 1.
273 Form CO, paragraph 256.
274 Form CO, paragraph 259.
275 Form CO, paragraph 258.

say the combined market shares would remain below the threshold of 20% in those potential geographic markets.

9.9.2. The Parties' arguments

(336) The Notifying Party submits that the horizontal overlaps in chocolate compound do not lead to a significant impediment to effective competition since they do not lead to affected markets under any plausible geographic market definition. In particular, the Notifying Party submits that the definition of potential national markets as well as of potential circle-based markets drawn with a radius of 750km is not plausible because they define the markets too narrowly and should therefore be disregarded.[276]

9.9.3. The Commission's assessment

(337) The Parties' combined market shares in fat-based coatings and fillings and in chocolate compound remain modest and lead to only two affected markets with market shares of around 30%. Furthermore, the increment in market shares in the affected market shares is limited at below 5% and below 10% respectively.

(338) The results of the market investigation also did not provide evidence that there were any competition concerns related to fat-based coatings and fillings or to chocolate compound specifically. A vast majority of respondents do not believe that the Transaction will impact the market for chocolate compound.[277] One customer replied in particular: "*I believe the situation of supply and demand for chocolate compounds and coatings will not change much with this merger*".[278]

9.10. Conclusion on the compatibility of the Transaction with the internal market

(339) In conclusion, in the light of the above and in view of the results of the market investigation and of the information available to it, the Commission considers that the Transaction leads to a significant impediment to effective competition in the market for industrial chocolate sold to customers in Germany or to customers located in the overlap area of the relevant catchment areas of ADM's plant in Mannheim/Germany and Cargill's plants in Germany for the following reasons i) the Parties are close competitors, ii) there are few alternative suppliers available, and many of those alternative suppliers have relevant shortcomings compared to the three large suppliers (Barry Callebaut and the Parties) iii) competitors are currently capacity constrained and they are unlikely to increase supply in the future if prices increase iv) new entry is unlikely to occur and v) countervailing buyer power is unlikely to offset the adverse effects of the transaction.

(340) On the other hand, the Commission considers that the Transaction does not lead to a significant impediment to effective competition in the markets for (i) industrial chocolate sold to customers located in the overlap areas of the relevant catchment areas of ADM's and Cargill's plants in Belgium, France and the United Kingdom, (ii) semi-finished cocoa products and (iii) chocolate compound.

10. MODIFICATIONS OF THE TRANSACTION

(341) In order to render the Transaction compatible with the internal market in relation to the market for industrial chocolate in the sales regions around the Parties' industrial

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276 Form CO, paragraphs 258 and 259.

277 See replies to question 53 – Phase I Questionnaire to competitors and replies to question 51 – Phase I Questionnaire to customers.

278 See reply to question 51.1 – Phase I Questionnaire to customers.

chocolate plants or around German customers in Germany, the Notifying Party submitted commitments pursuant to Article 8 (2) of the Merger Regulation on 4 May 2015 ("the Commitments of 4 May 2015"). The Commission subjected these commitments to a market test. The market test indicated that the Commitments of 4 May 2015 were insufficient to entirely eliminate the concerns raised by the Transaction.

(342) In order to address the issues raised in the market test, the Notifying Party submitted a final set of commitments on 22 May 2015 ("the Final Commitments").

10.1. Remedies principles

(343) The following principles from the Remedies Notice[279] apply where parties to a merger choose to offer commitments in order to restore effective competition.

(344) Where a concentration raises competition concerns in that it could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger.[280]

(345) The Commission only has power to accept commitments that are capable of rendering the concentration compatible with the internal market in that they will prevent a significant impediment to effective competition in all relevant markets where competition concerns were identified.[281] To that end, the commitments have to eliminate the competition concerns entirely[282] and have to be comprehensive and effective from all points of view.[283]

(346) In assessing whether proposed commitments are likely to eliminate its competition concerns, the Commission considers all relevant factors including *inter alia* the type, scale and scope of the commitments, judged by reference to the structure and particular characteristics of the market in which those concerns arise, including the position of the parties and other participants on the market.[284] Moreover, commitments must be capable of being implemented effectively within a short period of time.[285]

(347) Where a proposed concentration threatens to significantly impede effective competition the most effective way to maintain effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.[286]

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279 Commission's Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("Remedies Notice"), OJ C 267, 22.10.2008, p. 1.

280 Remedies Notice, paragraph 5.

281 Remedies Notice, paragraph 9.

282 Case C-202/06 P Cementbouw Handel & Industrie v Commission [2007] ECR 2007 I-12129, paragraph 54: "*it is necessary, when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration, not to determine whether the concentration still has a Community dimension after those conditions or obligations have been complied with, but to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified*".

283 Remedies Notice, paragraph 9 and 61.

284 Remedies Notice, paragraph 12.

285 Remedies Notice, paragraph 9.

286 Remedies Notice, paragraph 22.

(348) The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. The business must include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which are currently employed or which are necessary to ensure the business' viability and competitiveness.[287]

(349) Personnel and assets which are currently shared between the business to be divested and other businesses of the parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, must also be included. Otherwise, the viability and competitiveness of the business to be divested would be endangered. Therefore, the divested business must contain the personnel providing essential functions for the business such as, for instance, group R&D and information technology staff even where such personnel are currently employed by another business unit of the parties —at least in a sufficient proportion to meet the on-going needs of the divested business.[288]

(350) Normally, a viable business is a business that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.[289]

(351) The intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable purchaser in whose hands it will become an active competitive force in the market. The potential of a business to attract a suitable purchaser is an important element already of the Commission's assessment of the appropriateness of the proposed commitment. In order to ensure that the business is divested to a suitable purchaser, the commitments must include criteria to define the suitability of potential purchasers. This will allow the Commission to conclude that the divestiture of the business to such a purchaser will likely remove the competition concerns identified.[290]

10.2. Description of the Commitments of 4 May 2015

(352) Under the Commitments of 4 May 2015, Cargill proposes to divest ADM's industrial chocolate plant in Mannheim/Germany ("the Divestment Business of 4 May 2015") to a suitable purchaser. The nameplate production capacity of the Mannheim plant is […]. In 2014, the Mannheim plant sold […] of industrial chocolate according to the Parties.[291]

(353) The Divestment Business of 4 May 2015 would not include the production of semi-finished cocoa products in the adjacent ADM cocoa production plant which ADM if part of the ADM Cocoa Business and which ADM was in the process of selling to the company Olam during the course of the proceedings in this case.[292] The two plants are physically separated but […] for the Divestment Business of 4 May 2015.

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287 Remedies Notice, paragraph 23-25.
288 Remedies Notice, paragraph 26.
289 Remedies Notice, paragraph 32.
290 Remedies Notice, paragraph 47.
291 Form RM, paragraph 13.
292 That acquisition was the subject of a Commission decision of 10 June 2015 in Case M.7510 – Olam/ADM Cocoa Business granting unconditional clearance.

(354) The Divestment Business of 4 May 2015 consists of the following main items:[293]

(a) all tangible assets owned or used by the Mannheim plant, including – but not limited to – the site area, the production lines for industrial chocolate, a line for the production of cocoa liquor as well as the production and quality control records;

(b) the know-how of the personnel;

(c) licenses, permits and authorisations as listed in Annex 1 to the Commitments of 4 May 2015;

(d) the contracts, agreements, leases, commitments and understandings as listed in Annex 2 to the Commitments of 4 May 2015, including for instance storage and logistics agreements with third parties as well as transitional service agreements between the Divestment Business of 4 May 2015 and the owner of the adjacent Mannheim cocoa plant as listed in Annex 3 and 4 to the Commitments of 4 May 2015;

(e) the supply contracts of non-cocoa materials, additives and packaging materials;

(f) the contracts with customers to the extent that the volumes are fully produced at the Mannheim plant; for any remaining volumes, Cargill would retain the contract with the customer but Cargill would use its best endeavours to subcontract to the Divestment Business of 4 May 2015 for the remainder of the duration of the contract the production of the volumes which were produced in Mannheim before the divestment;

(g) the personnel in Mannheim consisting of approximately 125 employees, including 5 employees designated as key personnel, such as the general manager and the production manager chocolate;

(h) the sales employees and support staff based in ADM offices in Milan/Italy, Poznán/Poland and ADM's European headquarters in Rolle/Switzerland to the extent that they work in support of the Divestment Business of 4 May 2015.

(355) The Divestment Business of 4 May 2015 does not include:[294]

(a) any IP rights, such as the Schokinag brand;

(b) the contracts related to the production of specialty chocolate; in this line of business, the Mannheim plant produces specialty liquid industrial chocolate […];

(c) the contracts with customers to the extent that the volumes covered by those contracts are not fully produced in the Mannheim plant; […].

(356) The Commitments of 4 May 2015 also do not include the transfer of certain employees based in Rolle/Switzerland who support the Divestment Business of 4 May 2015 in terms of procurement of semi-finished cocoa products as well as finance and human resources activity.[295]

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[293] See Section 1 of the Schedule of the Commitment of 4 May 2015.

[294] See Section 2 of the Schedule of the Commitment of 4 May 2015.

[295] Form RM of 4 May 2015, paragraphs 38-41.

(357) The Commitments of 4 May 2015 contain additional and more detailed provisions as regards access to semi-finished cocoa products for the Divestment Business of 4 May 2015.[296]

(a) At the option of the purchaser, Cargill should procure that […], would supply the needs of the Divestment Business of 4 May 2015 at terms and conditions […].

(b) Alternatively, at the option of the purchaser, Cargill should enter into a […] transitional supply agreement with the purchaser for the supply of cocoa liquor and cocoa butter at terms and conditions […].

(358) As regards the suitable purchaser, the Commitments of 4 May 2015 contain the purchaser criteria of the Commission Model Text for Divestiture Commitments[297]. The Commitments of 4 May 2015 thus do not stipulate explicitly that the purchaser needs to have specific experience or knowledge in the chocolate or cocoa industries.

10.3. Assessment of the Commitments of 4 May 2015

10.3.1. The Parties' arguments

(359) In the Parties' view, the Commitments of 4 May 2015 are sufficient to remove the competition concerns identified by the Commission. The Parties submit that the Commitments of 4 May 2015 would eliminate more than the overlap in the production and sale of industrial chocolate in Germany and provide the purchaser with the required capacity and proven ability to supply customers of industrial chocolate in Germany and beyond.[298]

(360) As regards the viability and competitiveness of the Divestment Business of 4 May 2015, the Parties argue that the Divestment Business includes experienced management and staff which would ensure its long-term viability and profitability.[299]

(361) The Parties acknowledge that certain functions relevant for the Divestment Business of 4 May 2015 are currently carried out at other locations than Mannheim, most importantly at ADM's European headquarters in Rolle/Switzerland (see recital (354) lit. h)). Those include marketing, customer relations, contract and credit management, pricing, contract conclusion, supply chain coordination and non-cocoa raw material procurement. Cargill submits that it will use its best efforts to obtain the consent of the individuals belonging to those teams working for the Mannheim plant to transfer to the Divestment Business of 4 May 2015.[300]

(362) As regards the lack of transfer of ADM employees based in Rolle/Switzerland active in procurement of semi-finished cocoa products as well as finance and human resources (see recital (356)), the Parties argue that the purchaser would be able to perform these functions independently – taking into account the supply agreement discussed in recital (357)(356) and the skills of the transferred employees based in Mannheim.[301]

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296 Commitments of 4 May 2015, paragraph 7 lit (d).

297 That model text is available on the Commission's website under the link http://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf (last accessed on 1 June 2015).

298 Form RM of 4 May 2015, pages 2 and 3.

299 Form RM of 4 May 2015, paragraph 8.

300 Form RM of 4 May 2015, pages 6-8.

301 Form RM of 4 May 2015, paragraphs 38-41.

(363) Moreover, the Parties argue that the exclusion of certain assets and lines of business from the Divestment Business of 4 May 2015 would not have an effect on its viability and competitiveness:[302]

(a) The Divestment Business of 4 May 2015 does not include the Schokinag brand since the industrial chocolate produced at the Mannheim plant is currently not sold under the Schokinag brand[303] and, accordingly, the transfer of the Schokinag brand is not necessary for the viability of the Divestment Business.

(b) The excluded specialty business is small and the specialty chocolate is mainly sold into the United Kingdom and, therefore, the divestment of the specialty business it not necessary for the viability of the Divestment Business of 4 May 2015.

(c) The excluded contracts of the Mannheim plant under which volumes are not fully produced in the Mannheim plant refer to limited production volumes and are therefore not necessary for the viability of the Divestment Business of 4 May 2015; if the Divestment Business needed to be able to offer Belgian chocolate to its customers, the purchaser could outsource the production of such Belgian chocolate to an industrial chocolate supplier based in Belgium.

10.3.2. The Commission's assessment

(364) The Commission's assessment focused on (i) whether the Commitments of 4 May 2015 were sufficient to remove the competition concerns caused by the Transaction in terms of horizontal overlaps; (ii) whether the Divestment Business of 4 May 2015 constituted a viable business able to compete effectively with Cargill on a lasting basis; (iii) whether there were specific conditions that a potential purchaser should fulfil and (iv) whether the Divestment Business of 4 May 2015 was sufficiently attractive to find a suitable purchaser.

(365) On 4 May 2015, the Commission launched a market test regarding the Commitments of 4 May 2015 covering all of the questions outlined in recital (364). The results of the market test showed that the Commitments of 4 May 2015 were in principle deemed a suitable solution to resolve the competition concerns identified by the Commission. Yet a number of issues impacting the viability of the Divestment Business of 4 May 2015 were also identified. These issues were addressed by the Notifying Party through improvements made to the Commitments of 4 May 2015.

10.3.2.1. Removal of competition concerns

(366) The Mannheim plant is the largest of ADM's European industrial chocolate plants with a capacity of […] out of a total capacity of ADM's European chocolate business of […] and it is ADM's only industrial chocolate plant in Germany.

(367) According to the Commission's calculations based on the transaction data provided by ADM, about […] of ADM's sales to German customers originated from the Mannheim plant in 2014. In addition, the Mannheim plant sold about […] of its production to other countries, including to the neighbouring countries France, Poland, Belgium and the Netherlands. Accordingly, the Commitments of 4 May 2015 would eliminate very close to the entire sales overlap in Germany and the area where competition concerns were identified and would thus address the

302 Form RM of 4 May 2015, paragraphs 24-26; see also the Parties' replies to the Commission's request for information of 4 May 2015, question 30.

303 ADM currently markets gourmet chocolate and compound under the DeZaan brand. […].

concerns stemming from the horizontal overlaps between the Parties' activities in those areas.

(368) This view is supported by the results of the market test. The majority of respondents considered that the Commitments of 4 May 2015 would remove any competition concerns raised by the proposed transaction as regards the supply of industrial chocolate.[304] Only a clear minority of the respondents argued that the remaining overlaps in industrial chocolate between ADM and Cargill were problematic, referring to other geographic areas than the ones in which the Commission had identified competition concerns.

10.3.2.2. Viability and competitiveness of the Divestment Business of 4 May 2015

(369) ADM has […] in the operation of its industrial chocolate business over the past years as set out in section 0, including with respect to the operation of the Mannheim plant included in the Divestment Business of 4 May 2015. The Commission notes, however, that according to the profit and loss statement provided by the Parties, the revenues of the Divestment Business of 4 May 2015 have been […] and that the gross margins are […].[305] During the market test, the Commission has received tentative expressions of interest in acquiring the Divestment Business of 4 May 2015 by companies active at different steps of the cocoa and chocolate value chain during the market test.[306]

(370) The Divestment Business of 4 May 2015 produces white, milk and dark industrial chocolate as well as standard and non-standard industrial chocolate. The production of non-standard industrial chocolate – which is a growing market segment – has been growing steadily in the Mannheim plant over the last three years from a production of […] in 2012 to a production of […] in 2014. This indicates that the Divestment Business of 4 May 2015 would be able to continue competing in this important segment in the future. Moreover, in addition to liquid industrial chocolate, the Mannheim plant operates its own depositing line to produce solid industrial chocolate. The Divestment Business of 4 May 2015 is thus able to produce a broad product portfolio.

(371) As regards future expansion possibilities, ADM submits that the building infrastructure and physical space is available for an expansion and that the Mannheim plant could be expanded by approximately […] to […] within a period of […].[307]

(372) The Commission has also taken into account the fact that almost all of the customers replying to the market test replied that they would be ready to purchase industrial chocolate from the Divestment Business of 4 May 2015. None of the respondents identified any reasons for not purchasing from the Divestment Business of 4 May 2015 that were related to the viability or competitiveness of the Divestment Business.[308]

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304 See replies to question 1 – Market Test Questionnaire; of those respondents still identifying concerns, the majority pointed to risks of excluding certain contracts and assets and to uncertainties related to the identity and abilities of the potential purchaser. Those issues will be discussed in the following sections "*Viability and competitiveness of the Divestment Business of 4 May 2015*" and "*Purchaser criteria*".

305 See Annex 7 to the Commitments of 4 May 2015.

306 See replies to question 16 – Market Test Questionnaire.

307 See the Parties' reply to the Commission's request for information of 4 May 2015, question 25.

308 See replies to question 2 – Market Test Questionnaire.

(373) Furthermore, a majority of respondents replying to the market test considered that the Divestment Business of 4 May 2015 was overall viable and competitive.[309] The respondents identified some specific issues, however, that in their view required improvements to the Commitments of 4 May 2015 to ensure the viability and competitiveness of the Divestment Business of 4 May 2015.

a) Exclusion of the specialty business

(374) According to the majority of respondents which expressed an opinion on that issue, the exclusion of the specialty chocolate business from the Divestment Business of 4 May 2015 would compromise its viability.[310] The respondents argued that the specialty business was essential to the profitability and viability of the Divestment Business of 4 May 2015 since the specialty business achieves higher margins than the standard industrial chocolate business. Furthermore, that market segment is expected to grow and the ability to specialize is considered a success factor in the market as it enables the producer to create a unique product portfolio.[311]

(375) According to ADM, the Mannheim plant produced about […] tonnes of specialties chocolate in the Mannheim plant in 2014, realizing a turnover of USD […]. According to the transaction data submitted to the Commission by ADM, those volumes decreased from a total production of more than […] tonnes in 2012.

(376) The Commission acknowledges that the production of specialty chocolate at present represents a minor part of the Mannheim plant's production of industrial chocolate. In the light of the performance of the Divestment Business of 4 May 2015, as analysed in recital (369), however, there are certain viability risks associated with excluding parts from the business. Although the sales volumes are indeed marginal at present, ADM […].[312]

(377) In the light of the results of the market test, the current performance of the Divestment Business of 4 May 2015 and […], the Commission considers that the exclusion of the specialty business constituted a threat to the viability and competitiveness of the Divestment Business of 4 May 2015.

b) Exclusion of the Schokinag brand

(378) A minority of respondents expressing an opinion on that issue also questioned the exclusion of the Schokinag brand from the Divestment Business of 4 May 2015.[313]

(379) However, the Schokinag brand is not used by ADM for any chocolate produced by the Mannheim Business. ADM markets gourmet industrial chocolate under the "DeZaan" brand […]. This is also acknowledged by the majority of market test respondents which maintain that brands do not play an important role in the industrial chocolate business.

(380) The Commission therefore does not consider that the exclusion of the Schokinag brand from the Commitments of 4 May 2015 impacts the viability or competitiveness of the Divestment Business of 4 May 2015.

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309 See replies to question 3 – Market Test Questionnaire.

310 See replies to question 9.2 – Market Test Questionnaire.

311 See replies to question 9.2.1 – Market Test Questionnaire.

312 See for example ADM's internal document entitled […], slide 20; ADM's internal document entitled […], in particular slides 22 and 24; ADM's internal document entitled […].

313 See replies to question 5.2 – Market Test Questionnaire.

c) Exclusion of contracts for volumes not fully produced in the Mannheim plant

(381) A minority of respondents expressing an opinion on that issue considered that excluding certain customer contracts for volumes not fully produced in the Mannheim plant from the Divestment Business of 4 May 2015 could be problematic. The respondents explained however, that the assessment ultimately depended on the whether the excluded volumes were significant for the operation of the Divestment Business of 4 May 2015.[314]

(382) The excluded contracts for volumes not fully produced in the Mannheim plant include a total of […] contracts […]. They relate to a total of […] tonnes and all have a contractual end date […].[315]

(383) The excluded contract volumes are therefore marginal compared with Mannheim's production capacity of […] tonnes and actual production of more than […] tonnes. Furthermore, Cargill will use its best endeavours to subcontract to the Divestment Business of 4 May 2015 for the remainder of the duration of the contracts the production of the volumes which were produced in Mannheim before the divestment. Moreover, contrary to the excluded specialty business, the excluded contracts do not relate to a specific business that the Divestment Business of 4 May 2015 would be able to develop and grow at the Mannheim plant.

(384) The Commission therefore considers that the exclusion of contracts for volumes not fully produced in the Mannheim plant would not compromise the viability and competitiveness of the Divestment Business of 4 May 2015.

d) Carve-out of certain functions not carried out at the Mannheim plant

(385) A majority of respondents expressing an opinion on that issue also expressed concerns that there would be significant risks associated with the carve-out of certain central functions, for instance sales and raw material purchasing, currently carried out in Switzerland. However, the respondents acknowledged that this issue is intrinsically linked to the identity of the Purchaser and whether the Purchaser would have sufficient financial strength and sufficient capabilities of dealing with the volatile cocoa markets.[316]

(386) The Commission considers that the carve-out of the central function bears certain risks for the viability and competitiveness of the Divestment Business. The Commission considers that any impact of the carve-out of certain central functions on the viability and competitiveness of the Divestment Business could be mitigated through strengthened purchaser criteria which would require the purchaser to have certain expertise and knowledge. The issue of strengthened purchaser criteria is further discussed in Section 10.3.2.4. and the Notifying Party ultimately strengthened the purchaser criteria as set out in section 10.4.

10.3.2.3. Access to semi-finished cocoa products

(387) Competitive access to raw materials was identified by respondents to the market test as a key issue which will be decisive for the success of the commitments. The majority of respondents regard the current supply arrangements as sufficient in this regard.[317] As regards the specific terms, the respondents mentioned the necessity of

314 See replies to question 9.3 – Market Test Questionnaire.

315 See Cargill's reply to the Commission's request for information of 4 May 2015, question 31.

316 See replies to question 11 – Market Test Questionnaire.

317 See replies to question 7 – Market Test Questionnaire.

clear provisions regarding quality, volumes and timely deliveries, with a transparent pricing system regarding all major price components. Furthermore, some respondents suggested that there should be increased flexibility in the agreement by allowing the Purchaser to purchase only parts of its cocoa product requirements from the ADM Cocoa Business and to adjust the volumes purchased from year to years.[318]

(388) The Commission considers that additional flexibility in the agreement could strengthen the Purchaser in its operation of the Divestment Business of 4 May 2015. Through that flexibility, the Purchaser would be able to compare the terms of the Supply Agreement with the terms of cocoa products offered on the merchant market and decide freely on the volumes to be purchased from either source.

10.3.2.4. Purchaser criteria

(389) A clear majority of market test respondents submitted that the purchaser should be already active in the cocoa and chocolate value chain while respondents were split as regards the need for the purchaser to be already active in industrial chocolate specifically. Respondents to the market test expressed a strong preference for an industrial purchaser with specific expertise of the cocoa and chocolate value chain which would enable it to run a successful industrial chocolate business in the presence of the volatile cocoa market.[319]

(390) Accordingly, the Commission considers it essential for the successful operation of an industrial chocolate business to have (i) the proven expertise and capability to source independently raw materials, in particular cocoa raw materials, at competitive prices and in sufficient quantities and (ii) to have proven commercial expertise in or around the industrial chocolate business. That would also address certain concerns over the carve-out of central function carried out in Switzerland as discussed in section 10.3.2.2. The Notifying Party chose to reflect this in the improved commitments as described in section 10.4. .

10.4. Description of the Final Commitments of 22 May 2015

(391) In light of the issues described in section 10.3, the Notifying Party submitted the Final Commitments on 22 May 2015 which improve the Commitments of 4 May 2015 as regards the divestment of ADM's industrial chocolate plant in Mannheim to a suitable purchaser in the following main ways:

(a) The Final Commitments include the specialty chocolate business in the Divestment Business;

(b) The Final Commitments include strengthened purchaser criteria according to which "the purchaser shall have the proven expertise and capability to source independently raw materials, in particular cocoa raw materials, at competitive prices and in sufficient quantities to operate the Mannheim plant at full capacity, also beyond the expiry" of any supply agreement entered into under the Final Commitments, and "proven commercial expertise in the food ingredients value chain in or around chocolate, chocolate ingredients or chocolate applications";

(c) The supply agreement under the Final Commitments includes increased flexibility by allowing the purchaser, at its option, to purchase either the full needs or only partial needs for semi-finished cocoa products of the Mannheim

[318] See replies to question 7.1 and 7.2 – Market Test Questionnaire.
[319] See replies to questions 13-15 – Market Test Questionnaire.

plant in each of the years of operation of the supply agreement and to adapt those volumes year on year. The Final Commitments also clarify explicitly that the purchaser will have the right to source from any third party part or all of its requirements of cocoa liquor and cocoa butter above the volumes agreed in the supply agreement entered into under the Final Commitments.

10.5. Assessment of the Final Commitments of 22 May 2015

(392) The Commission considers that the Final Commitments fully address its concerns with respect to the Commitments of 4 May 2015.

(393) The Commission's assessment of the suitability of that divestment to remove the identified competition concerns there apply in the same way to the Final Commitments.

10.6. Conclusion on the remedies

(394) In the light of the above, the Commission concludes that the Final Commitments are adequate and sufficient to eliminate the significant impediment to effective competition in the market for industrial chocolate in the sales regions around the Parties' industrial chocolate plants in Germany.

10.7. Conditions and obligations

(395) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.

(396) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

(397) In accordance with the basic distinction described in recital (396) as regards conditions and obligations, this Decision should be made conditional on full compliance by the Notifying Party with Section B (including the Schedule) of the Final Commitments of 22 May 2015 and all other Sections should be obligations within the meaning of Article 8(2) of the Merger Regulation,. The full text of the commitments is attached as an Annex to this Decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Cargill, Incorporated acquires sole control over Archer Daniels Midland Company's industrial chocolate business within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004 is hereby declared compatible with the internal market and the EEA Agreement.

Article 2

Article 1 is subject to compliance by Cargill, Incorporated with the conditions set out in Section B and the Schedule of the Annex.

Article 3

Cargill, Incorporated shall comply with the obligations set out in Sections A, C, D, E and F of the Annex.

Article 4

This Decision is addressed to:

Cargill, Incorporated

1209 Orange Street

Wilmington, DE 19801

United States of America

Done at Brussels, 17.7.2015

For the Commission
(Signed)
Margrethe VESTAGER
Member of the Commission

Case M.7408 – CARGILL / ADM CHOCOLATE BUSINESS

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Articles 8(2) and 10(2) of Council Regulation (EC) No 139/2004 (the **Merger Regulation**), Cargill, Incorporated (**Cargill**) (the **Notifying Party**) hereby enters into the following Commitments (the **Commitments**) vis-à-vis the European Commission (the **Commission**) with a view to rendering the acquisition of sole control by Cargill of the industrial chocolate business of Archer Daniels Midland Company (**ADM**) (the **Concentration**) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the **Decision**), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the **Remedies Notice**).

Section A. Definitions

1. For the purpose of the Commitments, the following terms shall have the following meaning:

   Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the **Consolidated Jurisdictional Notice**).

   Assets: the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business as indicated in Section B, paragraph 5 and described more in detail in the Schedule.

   Closing: the transfer of the legal title to the Divestment Business to the Purchaser.

   Closing Period: the period of […] from the approval of the Purchaser and the terms of sale by the Commission.

   Confidential Information: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

   Conflict of Interest: any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.

Divestment Business: the business or businesses as defined in Section B and in the Schedule which the Notifying Party commit to divest.

Divestiture Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by Cargill and who has/have received from Cargill the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of […] from the Effective Date.

Hold Separate Manager: the person appointed by Cargill for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Schedule, including the Hold Separate Manager.

Monitoring Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by Cargill, and who has/have the duty to monitor Cargill's compliance with the conditions and obligations attached to the Decision.

Parties: the Notifying Party and the undertaking that is the target of the concentration.

Personnel: all staff currently employed by the Divestment Business, including staff seconded to the Divestment Business, shared personnel as well as the additional personnel listed in the Schedule.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

Purchaser Criteria: the criteria laid down in paragraph 16 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

Schedule: the schedule to these Commitments describing more in detail the Divestment Business.

Trustee(s): the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

Trustee Divestiture Period: the period of […] from the end of the First Divestiture Period.

Section B. The commitment to divest and the Divestment Business

Commitment to divest

2. In order to maintain effective competition, Cargill commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 17 of these Commitments. To carry out the divestiture, Cargill commits to find a purchaser

and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If Cargill has not entered into such an agreement at the end of the First Divestiture Period, Cargill shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 29 in the Trustee Divestiture Period.

3. Cargill shall be deemed to have complied with this commitment if:

   (a) by the end of the Trustee Divestiture Period, Cargill or the Divestiture Trustee has entered into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraph 17; and

   (b) the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.

4. In order to maintain the structural effect of the Commitments, the Notifying Party shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Divestment Business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 43 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

<u>Structure and definition of the Divestment Business</u>

5. The Divestment Business consists of ADM's Mannheim industrial chocolate plant (the **Mannheim plant**) and the related business. The legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business, in particular:

   (a) all tangible assets which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;

   (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;

   (c) all contracts, leases, commitments and customer orders of the Divestment Business and all customer, credit and other records of the Divestment Business described in Schedule 1, and

   (d) the Personnel.

6. In addition, the Divestment Business includes the benefit, for a transitional period after Closing and on terms and conditions materially equivalent to those at present afforded to the Divestment Business, of all current arrangements under which products or services are supplied to the Divestment Business, as provided in the Schedule, unless otherwise agreed with the Purchaser. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements will not be shared with, or passed on to, anyone, other than for the strict purpose of ensuring the efficient supply of the Mannheim industrial chocolate operations.

Section C. Related commitments

Preservation of viability, marketability and competitiveness

7. From the Effective Date until Closing, the Notifying Party shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular Cargill undertakes:
   (a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;

   (b) to make available, or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;

   (c) to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business, and not to solicit or move any Personnel to Cargill's remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, Cargill shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. Cargill must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.
8. At the option of the Purchaser of the Divestment Business:

   - Cargill shall use its best efforts to procure that […] will, subject to the following paragraph, supply the needs of the Mannheim plant at terms and conditions equal to those of […]; or

   - Alternatively, at the option of the Purchaser of the Divestment Business, Cargill shall, subject to the following paragraph, enter into a […] transitional supply agreement with the Purchaser for the supply of cocoa liquor and cocoa butter for the needs of the Mannheim plant at terms and conditions equal to those of […].

   The terms and conditions of the […] would be varied to the extent that the supply agreement with the Purchaser will be "non-exclusive" with quantities ("Agreed Upon Quantities") to be agreed between the Purchaser and […], or between the Purchaser and Cargill, as the case may be, upon signature of the supply agreement. At the Purchaser's discretion, the Agreed Upon Quantities can be either for the entire needs of the Mannheim plant for […] years or for volumes lower than the entire needs of the Mannheim plant for the […] contract year or for a decreasing volume for the […] year only. The Purchaser will have the right to source part or all of its requirements of cocoa liquor or cocoa butter above the Agreed Upon Quantities from any third party.

For the avoidance of doubt, the Purchaser will be free to choose not to enter into any supply agreement with Cargill or […].

Hold-separate obligations

9. The Notifying Party commits, from the Effective Date until Closing, to keep the Divestment Business separate from the business it is retaining and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the business retained by Cargill have no involvement in the Divestment Business; (ii) the Key Personnel and Personnel of the Divestment Business have no involvement in any business retained by Cargill and do not report to any individual outside the Divestment Business.

10. Until Closing, Cargill shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the business which Cargill is retaining. Immediately after the adoption of the Decision, Cargill shall appoint a Hold Separate Manager. The Hold Separate Manager, who shall be part of the Key Personnel, shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by Cargill. The Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of the Hold Separate Manager shall be subject to the procedure laid down in paragraph 7(c) of these Commitments. The Commission may, after having heard Cargill, require Cargill to replace the Hold Separate Manager.

Ring-fencing

11. Cargill shall implement, or procure to implement, all necessary measures to ensure that it does not, after the Effective Date, obtain any Confidential Information relating to the Divestment Business and that any such Confidential Information obtained by Cargill before the Effective Date will be eliminated and not be used by Cargill. This includes measures vis-à-vis Cargill's appointees on the supervisory board and/or board of directors of the Divestment Business. In particular, the participation of the Divestment Business in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. Cargill may obtain or keep information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or the disclosure of which to Cargill is required by law.

Non-solicitation clause

12. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of two (2) years after Closing.

Due diligence

13. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, Cargill shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

    (a) provide to potential purchasers sufficient information as regards the Divestment Business;

    (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

14. Cargill shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than ten (10) days after the end of every month following the Effective Date (or otherwise at the Commission's request). Cargill shall submit a list of all potential purchasers having expressed interest in acquiring the Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within five (5) days of their receipt.

15. Cargill shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser

16. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:

    (a) The Purchaser shall be independent of and unconnected to the Notifying Party and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).

    (b) The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors. In particular, the Purchaser shall have the proven expertise and capability to source independently raw materials, in particular cocoa raw materials, at competitive prices and in sufficient quantities to operate the Mannheim plant at full capacity, also beyond the expiry of any supply agreement entered into pursuant to paragraph 8, and proven commercial expertise in the food ingredients value chain in or around chocolate, chocolate ingredients or chocolate applications.

    (c) The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

17. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the Commission's approval. When Cargill has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. Cargill must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commission's Decision and the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

Section E. Trustee

I. Appointment procedure

18. Cargill shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Party commits not to close the Concentration before the appointment of a Monitoring Trustee.

19. If Cargill has not entered into a binding sale and purchase agreement regarding the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by Cargill at that time or thereafter, Cargill shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

20. The Trustee shall:

(i) at the time of appointment, be independent of the Notifying Party and its Affiliated Undertakings;
(ii) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and
(iii) neither have nor become exposed to a Conflict of Interest.

21. The Trustee shall be remunerated by Cargill in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

Proposal by Cargill

22. No later than two (2) weeks after the Effective Date, Cargill shall submit the name or names of one or more natural or legal persons whom Cargill proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one (1) month before the end of the First Divestiture Period or on request by the Commission, Cargill shall submit a list of one or more persons whom Cargill proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient

information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 20 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;

(b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;

(c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

23. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, Cargill shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Cargill shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Cargill

24. If all the proposed Trustees are rejected, Cargill shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 18 and 23 of these Commitments.

Trustee nominated by the Commission

25. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Cargill shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. <u>Functions of the Trustee</u>

26. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or Cargill, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

27. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

(ii) oversee, in close co-operation with the Hold Separate Manager, the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by Cargill with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

(a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 7 and 9 of these Commitments;

(b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 10 of these Commitments;

(c) with respect to Confidential Information:

– in consultation with Cargill, determine all necessary measures to ensure that Cargill does not after the Effective Date obtain any Confidential Information relating to the Divestment Business,

– in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business,

– make sure that any Confidential Information relating to the Divestment Business obtained by Cargill before the Effective Date is eliminated and will not be used by Cargill and

– decide whether such information may be disclosed to or kept by Cargill as the disclosure is reasonably necessary to allow Cargill to carry out the divestiture or as the disclosure is required by law;

(d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and Cargill or Affiliated Undertakings;

(iii) propose to Cargill such measures as the Monitoring Trustee considers necessary to ensure Cargill's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

(iv) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process:

(a) potential purchasers receive sufficient and correct information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and

(b) potential purchasers are granted reasonable access to the Personnel;

(v) act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;

(vi) provide to the Commission, sending Cargill a non-confidential copy at the same time, a written report within fifteen (15) days after the end of every month that shall cover the operation and management of the Divestment Business as well as the splitting of assets and the allocation of Personnel so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers;

(vii) promptly report in writing to the Commission, sending Cargill a non-confidential copy at the same time, if it concludes on reasonable grounds that Cargill is failing to comply with these Commitments;

(viii) within one (1) week after receipt of the documented proposal referred to in paragraph 17 of these Commitments, submit to the Commission, sending Cargill a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser;

(ix) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

28. If the Monitoring and Divestiture Trustee are not the same persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

Duties and obligations of the Divestiture Trustee

29. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 16 and 17 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of Cargill, subject to Cargill's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

30. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within fifteen (15) days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Notifying Party.

III. Duties and obligations of Cargill

31. Cargill shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of Cargill's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Cargill and the Divestment Business shall provide the Trustee upon request with copies of any document. Cargill and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

32. Cargill shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. Cargill shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. Cargill shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.

33. Cargill shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, Cargill shall cause the documents required for effecting the sale and the Closing to be duly executed.

34. Cargill shall indemnify the Trustee and its employees and agents (each an **Indemnified Party**) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Cargill for, any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

35. At the expense of Cargill, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Cargill's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Cargill refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Cargill. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 34 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Cargill during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

36. Cargill agrees that the Commission may share Confidential Information proprietary to Cargill with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.

37. The Notifying Party agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.

38. For a period of ten (10) years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Trustee

39. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:

    (a) the Commission may, after hearing the Trustee and Cargill, require Cargill to replace the Trustee; or

    (b) Cargill may, with the prior approval of the Commission, replace the Trustee.

40. If the Trustee is removed according to paragraph 39 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 18-25 of these Commitments.

41. Unless removed according to paragraph 39 of these Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The review clause

42. The Commission may extend the time periods foreseen in the Commitments in response to a request from Cargill or, in appropriate cases, on its own initiative. Where Cargill requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one (1) month before the expiry of that period, showing good cause**.** This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. Only in exceptional circumstances shall Cargill be entitled to request an extension within the last month of any period.

43. The Commission may further, in response to a reasoned request from the Notifying Party showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section G. Entry into force

44. The Commitments shall take effect upon the date of adoption of the Decision.

22 May 2015
(Signed)
duly authorised for and on behalf of Cargill

SCHEDULE 1 – THE DIVESTMENT BUSINESS

1. The Divestment Business consists of the Mannheim plant and the related business. The organisational structure of the Mannheim plant has been described in section 5.1 of the Form RM. In accordance with paragraph 5 of these Commitments, the Divestment Business includes, but is not limited to:

(a) Tangible assets

(1) The Divestment Business includes all tangible assets owned or used by ADM Schokinag Germany in relation to the Mannheim industrial chocolate plant, including the following main tangible assets:

(A) The freehold title to the site area of approximately [\u2026] square meters.

(B) The properties on the site area including the production plant and warehousing. The total floor area of the plant including production and warehousing comprises approximately [\u2026] square meters.

(C) The following records: the production records and the quality control records. Records on contract history, sales and invoice history will to the extent practicable, and at least as of January 2013, be made available for the Purchaser.

(D) The relevant production lines for industrial chocolate.

The Mannheim chocolate plant has [\u2026].

There is the opportunity to install a [\u2026] within the existing chocolate plant\u2019s available space.

The liquor processing facility in the Mannheim chocolate plant (i.e. the K/N line mentioned below under (E)) can receive and process [\u2026]; the liquor produced can be used in chocolate production or delivered externally.

(E) The other main tangible assets of the Divestment Business consist of the following:

I. K/N line for the production of cocoa liquor

II. Boiler and boilerhouse[1]

III. Water wells[2]

IV. Sand filters

V. Chocolate laboratory

VI. Locker room

[1] Pursuant to the MPA, [\u2026].
[2] Pursuant to the MPA, [\u2026].

VII. Shower room

VIII. Cafeteria

IX. Weighbridge

X. Owned real property:

- Schanzenstraße 8, 68159 Mannheim, map 35731a 85/2, plot nr.: 3481
- Neckarvorlandstraße 18, 20, 22, 25, Seilerstraße 16, 68159 Mannheim, map 34733C, plot nr. 3481/2 and map 35731A 85, plot nr. 3481/3
- Neckarvorlandstraße 21, 23, 68159 Mannheim, map 35731 b 85/2, plot nr. 3478 and map 35731B, plot nr. 3479
- Seilerstraße 14, 68159 Mannheim, map 35731a 85/2, plot nr. 3482/5
- Seilerstraße 14A, 68159 Mannheim, map 35731a 85/2, plot nr. 3482/4
- Neckarvorlandstraße 19, 68159 Mannheim, map 35731b 85/2, plot nr. 3477
- Schanzenstraße 10, 12, 14, Neckarvorlandstraße 27, Seilerstraße 29, 68159 Mannheim, map 35731a 85/2, plot nr. 3482 and map 34733c 87/1, plot nr. 3545/9

XI. The following servers/domain controllers:

Server Name	**Location**	**Company Name**	**Location Name**	**Role**
[…]	[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]	[…]

(b) Intangible assets

(2) The Divestment Business includes the know-how of the personnel that will be transferred (see paragraph (5) below). However, the Divestment Business does not include any IP rights, such as the Schokinag brand.

(3) The Divestment Business includes running projects for new products. A list of these projects is provided as **<u>Annex 5</u>**.

(c) Contracts and licenses

(4) The principal contracts and licenses of the Divestment Business include the following:

(A) The licenses, permits and authorizations described in **<u>Annex 1</u>** of these commitments (to the extent that consent by any third party is given, where applicable).

(B) The contracts, agreements, leases, commitments and understandings described in **<u>Annex 2</u>** of these commitments (to the extent that consent by any third party is given, where applicable).

(C) The purchase contracts for cocoa liquor, cocoa butter and cocoa powder for the same quantity and at the same price as included in the transferred sales contracts.

(D) The purchase contracts of non-cocoa raw materials, additives and packing material.

(E) The contracts with customers, to the extent the volumes covered by those contracts are fully produced in the Mannheim plant. These contracts cover the vast majority of the industrial chocolate volumes currently produced at the Mannheim plant. In the event that some customers are not willing to give their consent to a transfer of the contract and with respect to contracts covering volumes that are only partly produced at the plant (the latter contracts are listed in **<u>Annex 6</u>**), Cargill will retain the contract with the customer but the Merged Entity will then use its best endeavours to subcontract to the plant for the remainder of the duration of the contract the production of the volumes which were produced at the plant before the divestment.

(F) The Divestment Business will initially share the following intangible assets with ADM cocoa but will ultimately retain them

I. […]

II. […]

III. […]

IV. […]

V. […]

VI. […]

(G) ADM cocoa will initially share the following asset with the Divestment Business for […] after the closing of the transaction between ADM and Cargill, but will ultimately retain it thereafter

I. […]

(d) Personnel

(5) The Divestment Business includes the following personnel.

(A) Approximately 125 employees, active in the following areas.

Area	Number of employees
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
TOTAL	**127**

(B) The following individuals who are key to the operation of the Divestment Business, and considered to be Key Personnel:

Last name	First name	Position
[…]	[…]	Business Analyst IT
[…]	[…]	General Manager
[…]	[…]	Logistics Manager
[…]	[…]	Production Manager Chocolate
[…]	[…]	Head of QA, QM & QC

(C) Cargill will use its best efforts to obtain the consent of the sales employees based in […] and […], as well as the support staff in […] to the extent that they work in support of the Divestment Business, to a transfer to the Purchaser.

(e) Transitional arrangements

(6) At the option of the Purchaser of the Divestment Business:

- Cargill shall use its best efforts to procure that […] will, subject to the following paragraph, supply the needs of the Mannheim plant at terms and conditions equal to those of the […]; or

- Alternatively, at the option of the Purchaser of the Divestment Business, Cargill shall, subject to the following paragraph, enter into a […] transitional supply agreement with the Purchaser for the supply of cocoa liquor and cocoa butter for the needs of the Mannheim plant at terms and conditions equal to those of […].

The terms and conditions of the […] would be varied to the extent that the supply agreement with the Purchaser will be "non-exclusive" with quantities ("Agreed Upon Quantities") to be agreed between the Purchaser and […], or between the Purchaser and Cargill, as the case may be, upon signature of the supply agreement. At the Purchaser's discretion, the Agreed Upon Quantities can be either for the entire needs of the Mannheim plant for […] years or for volumes lower than the entire needs of the Mannheim plant for […] contract year or for a decreasing volume for the […] year only. The Purchaser will have the right to source part or all of its requirements of cocoa liquor or cocoa butter above the Agreed Upon Quantities from any third party. For the avoidance of doubt, the Purchaser will be free to choose not to enter into any supply agreement with Cargill or […].

(7) If requested by the Purchaser, the Divestment Business would also include transitional arrangements to the extent that such arrangements are necessary for the viability of the Divestment Business. The Divestment Business has sufficient in-house capabilities as regards R&D, master planning, purchasing, sales and plant cost accounting. As a consequence, the Divestment Business has no need for transitional arrangements on those areas. The Divestment Business may, however, require transitional support as regards IT and A/P and A/R financial accounting services.

(8) Any transitional IT services shall be supplied in such manner the independence of the Divestment Business will not be compromised.

2. <u>The Divestment Business shall not include:</u>

(a) Any IP rights, such as the Schokinag brand;

(b) The contracts with customers, to the extent that the volumes covered by those contracts are not fully produced in the Mannheim plant. These contracts are listed in **Annex 6**.

3. If there is any asset or personnel which is not covered by paragraph 1 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

ANNEX 1 – MAIN LICENCES, PERMITS AND AUTHORIZATIONS

The main licences, permits and authorizations related to the Divestment Business are as follows.

[…]

ANNEX 2 – MAIN CONTRACTS, AGREEMENTS, LEASES, COMMITMENTS AND UNDERSTANDINGS

The main contracts, agreements, leases, commitments and understandings related to the Divestment Business are as follows:

[…]

ANNEX 3 - PURCHASER TRANSITIONAL SERVICES

Services that the Purchaser of the Divestment Business will have to provide to the Mannheim cocoa plant currently owned by ADM and to be sold to Olam ("Closing Date" means the closing date of the transaction between ADM and Cargill):

[…]

ANNEX 4 – SELLER TRANSITIONAL SERVICES

Services that the Mannheim cocoa plant will provide to the Purchaser of the Divestment Business ("Closing Date" means the closing date of the transaction between ADM and Cargill):

[…]

ANNEX 5 – NEW PRODUCTS

[…]

ANNEX 6 - CONTRACTS WITH CUSTOMERS WITH VOLUMES NOT FULLY PRODUCED IN THE MANNHEIM PLANT

[…]