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SB PreZero GmbH & Co. KG
PreZero International GmbH
SB Dienstleistung KG
Stiftsbergstraße 1
74172 Neckarsulm
Germany

Subject: **Case M.10047 — Schwarz Group/SUEZ Waste Management Companies**
Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 19 February 2021, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which SB PreZero GmbH & Co. KG, PreZero International GmbH and SB Dienstleistung KG, all part of the Schwarz group (together 'Schwarz', or 'PreZero') acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control over a number of companies of SUEZ Groupe S.A.S. ('SUEZ') which comprise its recovery and recycling operations in Luxembourg, Germany, the Netherlands and Poland (together the 'Target'), by way of purchase of shares (the 'Proposed Transaction').[3] Schwarz is designated hereafter as the 'Notifying Party' and together with the Target as the 'Parties'.[4]

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1 OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). 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 L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

3 Publication in the Official Journal of the European Union No OJ C 71, 1.3.2021, p. 70.

4 The companies over which Schwarz will acquire control are the following: Brahms Abfallentsorgung Deutschland GmbH, SUEZ Polska sp. z o.o., SUEZ Recycling & Recovery Netherlands B.V., Jean Lamesch Exploitation S.A., SUEZ Immobilia GmbH & CO. KG and SUEZ Immobilien GmbH, comprising certain waste management operations of SUEZ detailed in Annex 1.1 of the Form CO. It should be noted that SUEZ will also retain some of its activities in these countries. Notably, in Germany,

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1. THE PARTIES

(2) **Schwarz** operates as an integrated service provider in the markets for the collection, sorting, treatment, recycling and disposal of household and commercial waste under its PreZero division. PreZero has sites in Austria, Belgium, Germany, Italy, the Netherlands, Poland and the United States. Recently, PreZero acquired SUEZ Nordic AB and is now also active in Sweden.[5] Schwarz is also active in food retailing in over 30 countries through its retail chains Lidl and Kaufland.

(3) The **Target** is active in the markets for collection, sorting, treatment, recycling and disposal of household and commercial waste in each of Germany, Poland, Luxembourg and the Netherlands.

2. THE OPERATION

(4) The Proposed Transaction consists of the acquisition by Schwarz of the entire issued share capital of companies that constitute the Target. Upon completion of the Proposed Transaction, Schwarz will exercise sole control over the Target.[6]

3. UNION DIMENSION

(5) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Schwarz: EUR 114 302 million; Target: EUR 1 133 million).[7] Each of them has a Union-wide turnover in excess of EUR 250 million (Schwarz: EUR […]; Target: EUR 1 133 million), but each does not achieve more than two-thirds of its aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension.

4. RELEVANT MARKETS

4.1. Introduction

(6) Schwarz and the Target are both vertically integrated throughout the waste management chain.

(7) Waste management and recycling services comprise a number of services with respect to a variety of different types of waste and materials, provided by waste management companies to municipalities, industrial and commercial customers, and households. The Parties are active in the collection, sorting and treatment, recycling and disposal of various types of waste and waste fractions.

SUEZ will keep its hazardous waste incinerator in Schkopau, the dual system BellandVision and the LWP sorting facility in Ochtendung. Similarly, in the Netherlands, SUEZ will keep its participation in QCP, which recycles plastics. In Poland, SUEZ will keep the water activity of SUEZ Polska.

5 This transaction was notified to the Commission under case number M.10000, and has been cleared on 17 November 2020. The transaction was closed end of November 2020.

6 Some of the plastic recycling and hazardous waste treatment activities of SUEZ in these countries are not part of the Proposed Transaction (see footnote 4).

7 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.4.2008, p. 1).

(8) The Commission has previously concluded that the supply of waste management services for hazardous waste[8] is distinct from that for non-hazardous waste.[9]

(9) The Notifying Party agrees with this delineation, and submits that for hazardous waste no further segmentation in any manner is required. Concretely, the Proposed Transaction does not result in any overlaps other than for the collection of hazardous waste.[10] The Notifying Party submits that customers of waste collection services tend to entrust the collection of all their hazardous waste together, and that from a supply-side perspective the leading waste management companies are all able to collect all types of hazardous waste, and it is easy to adapt or subcontract the collection of certain types of hazardous waste if needed.[11]

(10) The market investigation results did not lead to any conclusions contradicting this assessment. As regards a possible further segmentation for hazardous waste, it is in any case not necessary to delineate exactly the scope of the relevant product markets, since any such segmentations do not affect the outcome of the competitive assessment of the Proposed Transaction. In particular, the Proposed Transaction does not result in affected markets for hazardous waste under any plausible product market definition.[12] For that reason, hazardous waste will not be further discussed in this Decision.

(11) With regard to non-hazardous waste, the Commission has found that separate product markets could be defined for each stage of the waste management process in previous decisions. Concretely, as a first step, the different waste fractions, such as paper and cardboard, lightweight packaging ('LWP'), glass and residual waste, are collected from households, collection points, factories, offices, industrial sites, shops etc. (collected volumes may be grouped in a transfer station before further treatment). The collected waste is then sorted and/or treated, to recover valuable waste fractions for commercialisation as secondary raw materials (*e.g.* recycling) or prepare the waste for disposal at incineration plants or landfill sites. As a result, the Commission has in the past defined separate product markets for the collection, sorting and treatment[13], commercialisation[14] and disposal[15] of non-hazardous waste.[16]

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8 Waste is considered hazardous when it contains substances that cause the waste to display hazardous properties for people or the environment. An overview of the properties that can render waste hazardous can be found in Annex III of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives as modified by Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 (OJ L 150, 14.6.2018, p. 109). See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0851.

9 See cases M.4576, *AVR/Van Gansewinkel*, paragraph 9; M.5901, *Montagu/ GIP/Greenstar*, paragraph 10; M.448, *GKN/Brambles/Leto Recycling*, paragraph 13.

10 Paragraph 293 of the Form CO.

11 Paragraphs 125 *et seq*. of the Form CO.

12 See paragraphs 290 *et seq*. of the Form CO; no affected markets would arise in the markets for (i) collection, (ii) chemical and physical treatment, (iii) disposal (distinguishing between incineration and landfill), whether at the EU, national, or narrower than national level.

13 Treatment includes for instance the crushing of glass, biological treatment, mechanical-biological treatment, and the production of alternative fuels such as refuse-derived fuel or solid-recovered fuel, that are used in for example cement kilns. As the Proposed Transaction does not result in affected markets under any plausible market definition, treatment will not be further discussed in this Decision.

(12) With regard to the collection of non-hazardous waste, the Commission has in previous decisions differentiated between the collection of household waste on the one hand, and industrial and commercial waste on the other.[17] Within industrial and commercial waste, the Commission has considered a possible further segmentation between demolition & construction waste, industrial waste, and commercial waste.[18]

(13) Within household waste, the Commission has found that separate product markets could be defined depending on the type of waste fraction concerned, and has considered a distinction between *inter alia* paper, paperboard and cardboard ('PPC'), flat glass, hollow glass and LWP (including different plastics, aluminium, tinplate and various composites).[19] This segmentation has been applied across the various stages of the waste management chain.

(14) The Notifying Party agrees with the Commission's decision-making practice of defining separate relevant product markets for the various stages of the waste management process. It also concurs that a relevant product markets exists for the collection of household waste, separate from the collection of commercial and industrial waste.[20] As regards a further segmentation based on waste fractions, the Notifying Party agrees that such a segmentation is appropriate for the collection of waste,[21] so that a separate relevant product market exists for the collection of hollow glass, as well as for sorting and treatment, so that a separate relevant product market exists for the sorting of LWP.[22]

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14 Commercialisation refers to the selling of marketable fractions to traders, manufacturers etc. As the Proposed Transaction does not result in affected markets under any plausible market definition, commercialisation will not be further discussed in this Decision.

15 Disposal refers to the incineration in various waste incineration plants, or landfill (*i.e.* burying or piling of waste), primarily of waste that does not contain any recoverable waste fractions. As the Proposed Transaction does not result in affected markets under any plausible market definition, disposal will not be further discussed in this Decision.

16 See cases M.4576, *AVR/Van Gansewinkel*, paragraph 10; M.9164, *Remondis/DSD,* paragraph 9; M.295, *SITA-RPC/SCORI*, paragraph 17; M.5464 – *Veolia Eau / Société des eaux d'Arles / Société Stéphanoise des eaux,* paragraph 26; M.5901 – *Montagu/GIP/Greenstar*, paragraph 20.

17 See cases M.4576, *AVR/Van Gansewinkel*, paragraph 10; M.5901, *Montagu/ GIP/Greenstar*, paragraph 15.

18 See cases M.4576, *AVR/Van Gansewinkel*, paragraph 11; M.5464 – *Veolia Eau / Société des eaux d'Arles / Société Stéphanoise des eaux,* paragraph 27. As the assessment does not differ for commercial and industrial waste irrespective of the relevant product market considered, the Commission considers that for the purpose of this Decision, the exact scope of the product market can be left open.

19 See case M.9164, *Remondis/DSD,* paragraphs 9, 14.

20 Paragraph 188 of the Form CO.

21 More specifically, the Notifying Party puts forward that a segmentation per waste fraction is relevant for collection in Germany, as there contracts with municipalities only cover certain waste fractions. It further argues that such segmentation is however not relevant for collection in the Netherlands or Poland, as in those countries contracts with municipalities cover all fractions. As the Proposed Transaction does not result in affected markets in the Netherlands or Poland irrespective of the exact product market concerned, the Commission did not investigate this further. As the Proposed Transaction also does not result in affected markets for the collection of other waste fractions irrespective of the exact product market concerned, the Commission limited its investigation to hollow glass, and did not otherwise further investigate the other waste fractions.

22 Paragraphs 141-178 of the Form CO. As the Proposed Transaction does not result in affected markets for the sorting of other waste fractions irrespective of the exact product market concerned, the Commission limited its investigation to LWP, and did not otherwise further investigate the other waste fractions.

(15) The market investigation confirmed that separate relevant product markets exist for the various stages of the waste management process. Furthermore, the market investigation did not elicit any evidence contradicting the existence of a relevant product market for household waste, separate from industrial and commercial waste. Lastly, as regards the distinction by waste fractions at the different stages of the waste management process, market participants confirmed that separate relevant markets exist at least for each of collection of hollow glass and sorting of LWP.[23]

(16) Within the framework described above, considering all plausible product markets and the assessment on the plausible geographic markets in Sections 4.2.2 and 4.3.2, the Proposed Transaction only gives rise to horizontally affected markets in relation to the sorting of LWP as a result of the Parties' overlapping activities in the Netherlands and for the collection of hollow glass as a result of the Parties' overlapping activities in Germany. As such, this will be the starting point for the Commission's assessment in this Decision. Furthermore, the Proposed Transaction gives rise to several vertical links (examined in section 5.3), namely (i) between the collection of LWP and the collection of industrial and commercial ('I&C') waste[24] (both upstream) and the sorting of LWP (downstream), (ii) between the sorting of LWP (upstream) and the commercialisation of LWP (downstream), and (iii) between the collection of I&C waste (upstream) and the retail sale of daily consumer goods[25] (downstream).[26]

4.2. Sorting of LWP

(17) Within the recycling process, the first stage is for LWP to be collected, following which it is brought to an LWP sorting plant where different fractions are recovered, before being commercialized. LWP sorting plants use different techniques (such as optical or magnetic sorting, infrared technology and compressed air) to separate all

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23 Replies to questions 4-5 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to questions 3-4 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to questions 4-5 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium; Replies to questions 3-4 of Questionnaire Q4 – Customers for the sorting of Dutch LWP; Replies to questions 3-5 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; Replies to questions 3-5 of Questionnaire Q6 – Customers for the collection of hollow glass in the Bielefeld region. For the purpose of this Decision, the Commission did not investigate the exact delineations of other waste fractions, as the Proposed Transaction does not result in affected markets under any plausible market definition.

24 Potentially segmented on the basis of whether the waste is commercial, industrial, or demolition and construction waste, as explained in paragraph (12).

25 The Commission has in previous cases considered that there is a distinct relevant product market for the retail sale of daily consumer goods mainly carried out by retail outlets such as supermarkets, hypermarkets and discount chains. See for example M.4590 – *Rewe/Delvita*, paragraphs 9-14, M.7920 – *Netto/J Sainsbury/Dansk Supermarked/New Edlington/Hedon/Roundhay Road*, paragraph 19; M.7224 – *Koninklijke Ahold/Spar CZ*, paragraph 10; M.1221 – *Rewe/Meinl*, paragraph 81; M.3905 – *Tesco/Carrefour (Czech Republic and Slovakia),* paragraph 15.

26 As for all of the vertical links created by the Proposed Transaction, all plausible markets would result in the same outcome in terms of the competitive assessment (as explained in detail below in Section 5.3), the exact market definitions can be left open for the purpose of the assessment of vertical links in this Decision. As such, the remainder of Section 4 will focus on the relevant product markets for the sorting of LWP and the collection of hollow glass, for which the Proposed Transaction results in horizontally affected markets.

types of LWP fractions.[27] The extracted materials are then compressed into bales, which are sold to recyclers.[28]

(18) In the Netherlands, there are two alternative ways of collecting and sorting LWP from households: source-separation and post-separation. In a system of source-separation, households separate their waste, disposing of LWP in a distinct bin or bag that is collected separately and then sorted into different LWP fractions at an LWP sorting plant. Post-separation systems require an additional step: households do not separate all their waste but rather dispose of LWP and residual waste in a single bin or bag. Consequently, after collection, the LWP must be separated from the residual waste at a post-separation plant and is then transported to the LWP sorting plant, where it is sorted into different LWP fractions. [29]

(19) Finally, the demand for LWP sorting services in the Netherlands emanates from organisations to which producers and importers of packaged products – which are legally responsible for the prevention, collection and recycling of packaging waste – have delegated their responsibilities.[30] This 'extended producer responsibility' applies to companies that are the first to make packaged products available to the market in the Netherlands and/or who remove the packaging on import.

4.2.1. Product market definition

(20) As mentioned above in Section 4.1, the Commission has previously considered the existence of separate relevant product markets for each stage of the waste management process on the one hand, and for the various waste fractions on the other, pointing to the existence of a relevant product market for the sorting of LWP.

Notifying Party's view

(21) In line with the Commission's decision-making practice, the Notifying Party agrees that a separate relevant product market exists for the sorting of LWP.[31]

(22) The Notifying Party submits that no further segmentation based on whether a source-separation or post-separation system applies is warranted. Notably, it argues that both source-separated LWP and post-separated LWP are ultimately sorted by an LWP sorting plant, and that the vast majority of LWP sorting plants are able to compete for the sorting of both source-separated LWP and post-separated LWP without a need for technical adjustments. Moreover, it observes that, in addition to separating waste streams, post-separation plants also extract LWP fractions for a portion of the volumes that they handle. Indeed, post-separation plants sell

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27 In the Netherlands, the relevant fractions for LWP sorting are, in general: (i) beverage cartons, (ii) polyethylene ('PE') – HD-PE (high-density), LD-PE (low-density, film fraction) (iii) polypropylene ('PP'), (iv) polyethylene terephthalate ('PET') - PET bottles, PET trays, (v) polystyrene ('PS'), (vi) mixed plastics, (vii) residue (baled and fines), (viii) tin-plate, (ix) aluminium. According to the Notifying Party, all LWP sorting facilities in the Netherlands are able to sort these fractions.

28 Paragraphs 650 *et seq* of the Form CO.

29 Paragraph 520 of the Form CO.

30 This extended producer responsibility follows from Dutch national legislation, the Packing Decree 2014, which implements the Directive 94/62/EC of 20 December 1994 on packaging and packaging waste.

31 Paragraphs 165, 178 of the Form CO.

approximately 25% of the extracted LWP fractions directly to recyclers,[32] just as LWP sorting plants do with the fractions that they extract. As such, according to the Notifying Party those volumes should be included in the LWP sorting market.[33]

Commission's assessment

(23) Firstly, the market investigation has confirmed the existence of a distinct market for the sorting of LWP. Indeed, virtually all market investigation respondents have confirmed that LWP sorting is carried out separately from the sorting of other waste fractions, by different companies and at specific plants that are only able to sort LWP. There is a specific demand for the sorting of LWP, which is subject to distinct tendering and contracting.[34]

(24) Secondly, as regards a possible distinction based on whether a source-separation or post-separation system applies, a large majority of market investigation respondents confirmed that post-separation plants and LWP sorting plants are operated by different companies, carry out different tasks and correspond to different customer needs. Concretely, the market investigation showed that post-separation and LWP sorting in fact take place at different levels of the waste management value chain, with post-separation being a necessary intermediary step before LWP sorting when no source-separation is being carried out.[35] Moreover, the Parties admit that post-separations services are subject to different contracts than LWP sorting.[36] Respondents to the market investigation have confirmed that operators of post-separation facilities do not compete for LWP sorting contracts and, vice-versa, LWP sorters do not compete for post-separation contracts.[37] As a result, post-separation services do not compete with LWP services. The Commission therefore considers, for the purpose of this Decision, that both source-separated LWP and post-separated LWP *volumes* should be considered to belong to the LWP sorting market (as ultimately both types of LWP are sorted in the same LWP sorting plants); however, post-separation *services* form a separate market, upstream of LWP sorting.

(25) As regards the LWP fractions extracted in post-separation plants and sold directly to recyclers, the Commission does not consider that these volumes belong to the LWP sorting market. The mere fact that LWP fractions extracted in post-separation plants might compete with the fractions extracted in LWP sorting plants when it comes to the commercialisation of LWP fractions[38] does not provide evidence of the existence of any competitive relationship between post-separation plants and LWP sorting

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32 The remaining 75% needs to be sorted by a LWP sorting plant.

33 Paragraphs 520 *et seq.* of the Form CO; Notifying Party's White Paper 2, submitted on 19 March 2021, paragraph 2.

34 Replies to question 5 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to question 4 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to question 5 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium; Replies to question 4 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

35 Replies to question 5 of Questionnaire Q4 – Customers for the sorting of Dutch LWP; Replies to question 6 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands.

36 See paragraph 525 of the Form CO.

37 Replies to question 5 of Questionnaire Q4 – Customers for the sorting of Dutch LWP; Replies to question 6 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands.

38 An activity in respect of which the Parties' presence does not give rise to an affected market and therefore it is not analysed in this Decision.

plants in the LWP sorting market. On the contrary, as explained in paragraph (24) above, LWP sorting entities do not compete for post-separation contracts and post-separation plants do not compete for LWP sorting contracts. Therefore, there is no reason to include LWP fractions extracted in post-separation plants in the LWP sorting market.

(26) Thirdly, one respondent to the market investigation observed that, in the Netherlands, household LWP should be distinguished from commercial LWP. This is because the sorting of household LWP falls under the extended producer responsibility scheme, while commercial LWP currently does not.[39]

(27) In this regard, first, according to the Notifying Party, there are no technical obstacles preventing facilities from sorting both household and commercial LWP, and in any case the current situation will change from 2023, when commercial LWP will also fall under the scope of the extended producer responsibility scheme. At that time, both types of LWP will be dealt with in the same manner. Second, it appears that currently, commercial LWP is primarily incinerated, with only very limited volumes being sorted (6 kt of commercial LWP compared to 455 kt of household LWP). Third, while the Target has sorted approximately […] in 2020, the Notifying Party […].[40]

(28) For those reasons, the Commission considers that the question whether different markets for the sorting of commercial and household LWP exist can be left open for the purpose of this Decision. Given that the Parties' activities only overlap for the sorting of household LWP, and as the limited volumes of commercial LWP sorted would make no material difference to the competitive assessment, the Commission will only examine the effects of the Proposed Transaction on the market for the sorting of household LWP.

4.2.2. Geographic market definition

(29) The Commission has not previously examined the sorting of LWP. In *Remondis/DSD,* which was referred by the Commission to the German competition authority ('Bundeskartellamt'),[41] the Bundeskartellamt considered regional markets for the sorting of LWP in Germany, based on the LWP sorting plants' catchment areas and supply streams, without reaching a conclusion on the precise geographic market definition.[42]

Notifying Party's view

(30) Overall, the Notifying Party takes the view that the market for the sorting of LWP generated in the Netherlands is at least national in scope, given that LWP can easily be transported across the Netherlands for sorting as well as cross-border.[43] Concretely, currently approximately a third of all Dutch LWP is sorted in Germany.

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39 Replies to question 4.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP; See also Paragraphs 509 of the Form CO.

40 Notifying Party's reply to RFI 14, paragraph 25.

41 See case M.9164 – *Remondis/DSD*, paragraph 20.

42 See case B4-21/19 - *Remondis/DSD*, paragraphs 138 *et seq*.

43 Paragraphs 234 *et seq*. of the Form CO.

Furthermore, according to the Notifying Party Belgian LWP sorting plants can also compete for the sorting of Dutch LWP.[44]

(31) The Notifying Party further argues that barriers for LWP sorters located outside of the Netherlands to compete are low. First, as regards transport costs, the Notifying Party explains that, while it does not know the distance LWP currently travels between the point of collection and the LWP sorting plants, the distance between its transfer stations and LWP sorting plants (*i.e.* excluding the distance between the point of collection and the transfer station which is unknown, thus underestimating the overall travel distance) varies but can viably go up to 300 km or more. Notably, the Notifying Party submits that several of their German LWP sorting plants are sorting or have sorted Dutch LWP in the past. For example, […], and PreZero has in the past sorted Dutch LWP at Porta Westfalica, which is 170 km from the Dutch border.[45] The Notifying Party also provided examples of LWP being transported over distances greater than 300 km. Concretely, it submits that PreZero sorts LWP from […] in its German LWP sorting facilities. According to the Notifying Party, this shows that there is no fixed maximum distance for the transport of Dutch LWP for sorting.[46]

(32) The Notifying Party stresses that in any event, the transport costs are not a determinative factor for obtaining LWP sorting contracts, as ultimately customers consider the total costs of the LWP recycling chain.[47] According to the Notifying Party, transport costs for the transfer of the (collected) LWP from the transfer station to the sorting facility accounts in general for significantly less than […]%, and possibly less than […]%, of the total costs of the recycling chain.[48] In the Notifying Party's view, transport costs therefore cannot be considered to impede German LWP sorting facilities in competing for Dutch LWP sorting contracts. In that context, the Notifying Party has, by way of example, provided information on a tender issued by Midwaste/RKN which it won (for quality reasons) in 2019, though for which the second-closest bidder was a German LWP sorter, which was actually able to offer a better price in spite of distance.[49]

(33) The Notifying Party further argues that transport costs are not determinative given that higher transport costs for sending LWP to Germany can be compensated by lower sorting costs in Germany and by lower transport costs when LWP is subsequently sent to recyclers in Germany. This is in particular relevant as "almost none" of the recycling plants to which sorted Dutch LWP can be sent are located in the Netherlands.[50]

(34) Second, as regards technical barriers, the Notifying Party submits that there are no technical barriers that could limit the possibilities for non-Dutch LWP sorting plants to sort Dutch LWP. Concretely, the waste fractions making up the LWP sorted in

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44 Paragraphs 453 *et seq*. of the Form CO.

45 Paragraph 470 of the Form CO.

46 Notifying Party's White Paper 2, submitted on 19 March 2021, paragraphs 6-10.

47 Paragraph 470 of the Form CO.

48 Paragraph 470 of the Form CO.

49 Notifying Party's White Paper 2, submitted on 19 March 2021, paragraphs 6-10; Notifying Party's reply to RFI 4, Annex 4.2.

50 Notifying Party's White Paper 2, submitted on 19 March 2021, paragraphs 11-15; Notifying Party's reply to RFI 10, paragraph 24.

LWP sorting plants are in general similar in both the Netherlands and Germany.[51] While the Notifying Party recognizes that the proportion of the different waste fractions in the overall LWP mix differs depending on the country the LWP originates from, it argues that these differences do not have an impact on the ability of German LWP sorters to sort Dutch LWP, as German plants would only have to make minor adjustments to achieve that purpose.[52] Furthermore, although Regulation (EC) No 1013/2006 of 14 June 2006 on shipments of waste (the 'Waste Shipment Regulation'), provides that packaging waste from different areas of origin must not be mixed,[53] LWP sorters are able to sort LWP from both countries in the same LWP sorting plant by using a so-called 'batch operation' system.[54] The Notifying Party estimates that it takes less than one hour to switch between the sorting of Dutch LWP and the sorting of German LWP or vice versa, and the switching does not incur other costs than the loss of revenues flowing from the time required for the switching.[55]

(35) Third, from a regulatory perspective, German LWP sorting facilities need to obtain an export license to be authorized to import Dutch LWP to Germany, which is to be requested by the exporting company (*i.e.* the LWP sorter's customer).[56] According to the Notifying Party, all waste management companies are used to and can easily do the required notifications. Moreover, administrative authorities reviewing license applications have no discretion and must accept them provided that the required forms are filled in adequately.

(36) Moreover, LWP transport is subject to the requirement of a financial guarantee (or equivalent insurance) covering in particular the cost of transport, cost of storage and costs of recovery or disposal. The amount of the bank guarantee is generally based on the volumes transported, though local authorities have discretion in determining the exact amount of such guarantees. According to the Notifying Party, the need to provide a financial guarantee does not constitute a barrier to trade since it can either be easily obtained by a bank or directly provided by the customer.[57]

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51 Footnote 282 of the Form CO.

52 Paragraph 476 of the Form CO.

53 Footnote 286 of the Form CO.

54 In a batch operation system, there are separate input warehouses, the sorting system is completely emptied before the changes from German to Dutch material, or vice versa, and there are separate output warehouses, so that the entire process can ensure separate treatment of waste according to its origin.

55 Paragraph 477 of the Form CO.

56 See paragraphs 485 *et seq.* of the Form CO. The regulation of the cross-border transport of waste is harmonized at EU level through the Waste Shipment Regulation. Under this Regulation, the transport of LWP across borders is subject to prior written notification and consent by the competent authorities of destination and dispatch. This prior written notification and consent process generally takes 3-5 months depending on the level of information required by the competent authority. The company that intends to export waste needs to submit a prior written notification to the competent authority of dispatch, which will then transmit the notification to the competent authority of destination once the notification has been properly carried out.

57 Paragraph 485 of the Form CO.

Commission's assessment

(37) As per the Market Definition Notice, the relevant geographic market is defined as '*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*.'[58] Determining a relevant (geographic) market is thus a tool to identify the geographic area within which the conditions of competition are sufficiently homogeneous, and within which companies are able to exert a competitive constraint on the Parties concerned.

4.2.2.1. Demand for LWP sorting is national

(38) The Notifying Party has explained,[59] and the market investigation has shown, that demand for the sorting of LWP is national, as the chain for the recycling of LWP is organised at the national level.

(39) European Union Directive 94/62/EC of 20 December 1994 on packaging and packaging waste ('the Packaging Directive') requires Member States to take necessary measures to ensure that systems are set up for the collection and recycling of packaging waste. These systems must be open to the participation of economic operators. Member States however have discretion regarding the manner in which they choose to implement this obligation, and schemes implementing the Packaging Directive vary by country in their design and scope.

(40) Under the Dutch 'extended producer responsibility' regime, which implements the Packaging Directive,[60] producers and importers of packaged products are legally responsible for the prevention, collection and recycling of packaging waste. Such companies, when they are above a certain size, must register with Afvalfonds Verpakkingen ('Afvalfonds'),[61] and pay a fee to Afvalfonds according to the volumes of packaging they place on the market. In exchange, Afvalfonds takes over their responsibility for the recycling of packaging waste. Nedvang BV ('Nedvang', formerly 'VPKT') is the fully-owned subsidiary of Afvalfonds that ensures the practical implementation of the extended producer responsibility principle, both directly by contracting for the sorting and recycling of packaging waste, and indirectly by compensating other bodies that arrange for sorting and recycling.

(41) Moreover, the composition of LWP to be sorted and the manner in which collection of waste is organised varies from country to country. For instance, Dutch LWP typically has a higher plastic content that LWP originating in Germany, where

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58 Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, paragraph 8.

59 Paragraphs 432 *et seq.* of the Form CO.

60 Through the *Besluit beheer verpakkingen 2014* ('Packaging Decree 2014').

61 The packaging waste fund, a non-profit organisation established by producers and importers to collectively meet the extended producer responsibilities stated in the Packaging Decree. See https://afvalfondsverpakkingen.nl/en/packaging-waste-fund.

plastic bottles are partly covered by a deposit scheme and recovered separately.[62] These differences have a decisive impact in the sorting process, as explained in Section 4.2.2.2(D).

(42) In short, demand for LWP sorting services is structured nationally, based on national rules governing the legal responsibility for the collection and sorting of LWP. As such, in the following section, the Commission will assess the competitive conditions for the supply of LWP sorting services to customers in the Netherlands, where the Parties' activities overlap.

4.2.2.2. Supply of sorting services of LWP is impacted by distance, customer preferences, composition of LWP and national regulations

(43) The supply of LWP sorting services to Dutch customers appears to be limited by a number of factors, in particular distance from the plant to collection point, customer preferences, composition of LWP and national regulations, although this does not prevent some facilities located in Germany from also sorting LWP from the Netherlands. Concretely, of the approximately 450kt of Dutch LWP sorted in 2020, around 1/3rd was sorted in plants in Germany located close to the Dutch border (with the farthest plant being situated 150km from the border in driving distance).

(44) In order to identify the area in which the conditions of competition are sufficiently homogeneous, the Commission will assess the barriers that exist for the sorting of LWP from the Netherlands, as identified by the market investigation. The following factors are relevant for this assessment: first, transport costs significantly limit the distance which LWP can travel to reach an LWP sorting plant. Second, environmental costs are taken into account as customers try to avoid transporting LWP for sorting over long distances to minimize the associated CO_2 emissions. Third, beyond transport and environmental costs, LWP sorters broadly report that customers have a preference for keeping waste within the country. Fourth, due to the specific LWP composition and quality requirements, technical adjustments are required for a German (or Belgian) plant to be able to sort also Dutch LWP. Fifth, sending LWP for sorting outside the Netherlands involves more administrative formalities than sorting the LWP within the country.

(A) Travel distance and transport costs

(45) In order to test the Notifying Party's arguments on the lack of economic barriers for non-Dutch LWP sorters to sort LWP from the Netherlands, the Commission investigated the maximum economically viable travel distance of LWP for sorting and the importance of transport costs.

(46) First, as regards the maximum economically viable distance over which LWP can travel for sorting, the Notifying Party's views were contradicted by the market investigation. Notably, in the course of the market investigation, a majority of respondents asserted that LWP cannot profitably travel distances in excess of 200 km for sorting. This is because LWP is a very light material with a low mass density,

[62] The German deposit scheme for PET bottles and beverage cans means that a greater proportion of this type of waste is returned by consumers instead of being disposed of with LWP waste (see footnote 283 of the Form CO).

which therefore occupies considerable space. In terms of tonnage this means that only a relatively small amount of LWP can be transported in a truck at a time. Pressing the LWP in bales is not an option because this has a very negative effect on the sorting of the material.[63] This places plants in the Netherlands at a competitive advantage compared with plants in Germany.[64] German competitors specifically indicated that distance is a 'critical' condition to be competitive in the market[65] and they confirmed that it becomes uneconomical to transport LWP for sorting beyond 200 km.[66] Moreover, one of the larger German sorters was of the view that it would not be competitive in tenders for the sorting of LWP originating from the provinces in the western part of the Netherlands, *i.e.* those located at around 200 km or more from its plant.[67]

(47) The Notifying Party points to instances in which LWP has travelled over distances greater than 200 km in order to reach a sorting plant.[68] Concretely, the Notifying Party submits that it sorts LWP from […] at its plants in Germany, and that it is aware of several instances of LWP being transported over longer distances in Germany. However, the Notifying Party admits at the same time that […]% of the LWP sorted at the Parties' own Rotterdam and Zwolle plants likely comes from less than 90 km away.[69] Moreover, the mere fact that some LWP volumes are sent or have been sent in the past from […] to Germany by ship for sorting has little bearing on the assessment of competitive conditions for the sorting of LWP from the Netherlands and the transport costs involved in these cases cannot be compared with those for the transport of LWP from the Netherlands, which takes place entirely via truck. For those reasons, the Commission considers that the contrary examples provided by the Notifying Party do not alter the Commission's finding that 200 km appears to be the maximum economically viable distance over which LWP can competitively travel for sorting, as shown by both the results of the market investigation. If anything, this appears conservative in view of Notifying Party's own observation of the distance travelled by the bulk of the volumes that they sort, of 90 km.

(48) Second, with regard to transport costs, the Notifying Party argues that they are not a determinative factor for obtaining LWP sorting contracts, as ultimately the costs taken into account are the total costs of the LWP recycling chain. It further considers that higher transport costs for sending LWP to Germany can be compensated by lower sorting costs in Germany and by lower transport costs when LWP is subsequently sent to recyclers in Germany.[70] The Notifying Party provides in this context as an example a tender issued by […] under which it was awarded a lot in 2019.[71] The Notifying Party claims that it was awarded this tender as a result of

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63 Replies to question 8 of Questionnaire Q4 – Customers for the sorting of Dutch LWP; Replies to question 16 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

64 Replies to question 9.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

65 See minutes of a call with a competitor on 9 February 2021, paragraph 9.

66 See minutes of a call with a competitor on 9 February 2021, paragraph 8.

67 See minutes of a call with a competitor on 10 March 2021, paragraph 4.

68 Notifying Party's White Paper 2, submitted on 19 March 2021, paragraphs 6-10.

69 Paragraph 470 of the Form CO.

70 Notifying Party's reply to RFI 10, paragraph 24. See also Notifying Party's White Paper 1, submitted on 5 March 2021, paragraphs 11-15.

71 Notifying Party's White Paper 2, submitted on 19 March 2021, paragraphs 6-10; Notifying Party's reply to RFI 4, Annex 4.2.

qualitative rather than price factors (with price in this tender being the sum of the sorting rate and transport costs). The Notifying Party believes that the second-closest bidder was a German LWP sorter, which was actually able to offer a better price, and concludes from this that neither transport costs nor transport distance are determinative in tenders.

(49) However, the Notifying Party's argument that the transport costs are not determinative for obtaining LWP sorting contracts is at odds with the tender specifications that it itself has shared, which do consider transport costs as an important assessment factor. Concretely, the Notifying Party has shared a sample of documents showing award criteria for eight tenders for the sorting of Dutch LWP awarded between 2014 and 2019. In six of the eight calls for tenders/contracts for LWP sorting, bidders were specifically asked to indicate the distance over which LWP would travel to reach the LWP sorting plant for the purpose of calculating transport costs, as an element of the price. Consequently, it appears that the cost of transport to the sorting station is a relevant element for customers to assess bids and determine the award of an LWP sorting contract.

(50) As such, it is clear that the correct framework for assessing the transport costs is not the total costs of the LWP recycling chain, as the Notifying Party claims, but rather the costs related to LWP sorting. Considering this, the data available shows that transport costs constitute a significant proportion of the costs of LWP sorting, and do limit how far LWP can be sent for sorting. Concretely, while the Notifying Party estimates that the cost of transporting Dutch LWP to a sorting plant in the Netherlands accounts for […]% of the *total* costs of the recycling chain (this figure rises to […]% if Dutch LWP is sent to a plant in Germany),[72] however, as a proportion of *sorting* costs (rather than the total cost of the recycling chain), these figures rise to […]% and […]% when the LWP is sorted in plants in the Netherlands and Germany respectively. This indicates not only that transport costs are a significant part of the costs of sorting, but that those costs will increase substantially when LWP is sent to plants located in Germany.

(51) Furthermore, the Notifying Party's argument in any case does not apply to situations where the entity commercialising the sorted LWP to recyclers is not the customer but the sorting entity itself. Notably, according to the Notifying Party, Nedvang – the main Dutch LWP sorting customer – '*generally transfers the ownership of the LWP to the sorting plants except for some small volumes, for which it commercializes the sorted LWP itself*'.[73] Furthermore, the Notifying Party confirmed that for […] of the Target's large LWP sorting contracts with the main Dutch customers, it is the Target itself (*i.e.* the LWP sorter, not the customers of the sorting service) that carries out the commercialisation of the sorted LWP.[74] In those situations, the customer has an interest in minimising transport cost to the sorting station since it will not bear the costs from the sorting station to the recyclers.

(52) As described at paragraph (33) above, the Notifying Party also argues that transport costs are not determinative given that higher transport costs for sending LWP to Germany can be compensated by lower sorting costs in Germany and by lower

72 Notifying Party's reply to RFI 10, paragraphs 21-22.
73 Notifying Party's reply to RFI 3, paragraphs 54-55.
74 Notifying Party's reply to RFI 3, paragraphs 54-55.

transport costs when LWP is subsequently sent to recyclers in Germany. According to the Notifying Party, this is particularly relevant given that almost none of the recycling plants to which sorted LWP is sent are based in the Netherlands.

(53) On this, firstly the Commission notes that even in cases where the customer is responsible for the entire recycling chain, this argument would not apply in cases where the LWP is not recycled in Germany. Contrary to what the Notifying Party implies, this seems to be most of the cases. Concretely, according to the information provided by the Notifying Party, only […]% of the output volumes of the Target's plant in Rotterdam was recycled in Germany in 2019, whereas […] […]% was recycled in the Netherlands and […]% in other countries. As regards PreZero, […]% of the output of its Zwolle plant in 2020 was recycled in the Netherlands.[75] Therefore, in contrast to what the Notifying Party submits, it seems that in the vast majority of situations the entire recycling chain is kept within Dutch borders.

(54) Furthermore, even regarding the proportion of LWP sent to recycling plants in Germany, it is not apparent why for these volumes the lower cost of transporting sorted LWP from a sorting to a recycling plant in Germany would compensate for the higher cost of transporting LWP for sorting from the Netherlands to Germany. Indeed, unsorted LWP is more costly to transport than sorted LWP.[76] Sorted LWP has a higher mass density since it has been cleaned up of impurities and, unlike unsorted LWP, can be and in fact is compressed into bales.[77] As a result, the transport of sorted LWP is more efficient than the transport of unsorted LWP. In order to minimise costs at every step of the recycling chain, customers therefore seek to limit pre-sorting transport (i.e. where transport costs are proportionately higher).

(55) Finally, the Notifying Party's view that higher transport costs can be compensated by lower sorting costs (in particular due to lower labour costs) in German plants is inconsistent with the views of market participants, who, as mentioned above in paragraph (46), indicated that they cannot offer competitive sorting services for LWP if it would need to travel further than 200 km. Furthermore, the Notifying Party's own estimates are that the sorting cost of LWP (*i.e.* covering only the sorting fees at the facilities and not transport costs) in the Netherlands accounts for […]% of total costs (based on the entire recycling chain, from collection to commercialisation), while the figure for Germany is […]%.[78] The difference therefore accounts for […]% of total sorting costs. The Notifying Party also estimates that the difference between the cost of transporting LWP to a sorting plant in the Netherlands and to a sorting plant in Germany is […]% of total costs of the recycling chain (and thus at least in a number of cases greater than the […]% difference in sorting fees). Therefore, even according to the Parties' own estimates, higher transport costs are not necessarily entirely compensated by lower sorting costs. Moreover, the fact that plants in Germany may have lower labour costs does not change the fact that they are nonetheless rendered less competitive by transport costs.

75 Notifying Party's reply to RFI 14, paragraphs 5-7.
76 Notifying Party's reply to RFI 14, paragraph 12.
77 Notifying Party's reply to RFI 14, paragraph 12.
78 Notifying Party's White Paper 1, submitted on 5 March 2021, paragraph 35.

(B) Environmental costs (CO_2 emissions)

(56) The information available, notably calls for tenders and their specifications, shows that next to transport costs, the environmental cost of transport is also a factor taken into account by customers in awarding tenders. Sorters with more distant LWP sorting plants are sometimes penalised, through a correction of the price quoted or through negative points for quality, not only because of higher transport costs but also for environmental reasons related to the increased CO_2 emissions associated with longer transport.

(57) Concretely, as mentioned, the Notifying Party has shared a sample of documents showing award criteria for eight tenders for the sorting of Dutch LWP organised between 2014 and 2019. In half of these tenders, bidders were awarded qualitative points for 'sustainable transport',[79] based on the distance LWP would need to travel to the LWP sorting plant. The application of these qualitative criteria is intended to capture the environmental impact through higher CO_2 emissions of transporting LWP over long distances.[80]

(58) As already mentioned in Section 4.2.2.2(A), besides being penalised under qualitative criteria, the transport distance to the sorting plant is also often reflected in the price score that a bidder is awarded. In six of the eight tenders reviewed, bidders were asked to specify the distance over which LWP would travel to reach the sorting plant for the purpose of calculating transport costs, as an element of the price. Although adjustments to the price are intended to correct for the financial cost of transportation over longer distances (rather than for the higher CO_2 emissions from trucks), there is a significant overlap between tenders in which the transport distance is penalised through corrections to the price and those in which it is penalised through a loss of points for quality. In three of the eight tenders examined, a bidder with a plant located in Germany would have been doubly penalised for the distance of the sorting plant from the transhipment station where collected LWP would be gathered: first for the additional transport costs making the price less competitive (as explained in Section 4.2.2.2(A)), and second by losing points for quality linked to 'sustainable transport'.[81] This double penalty has been confirmed in the market investigation: customers expressed that LWP sorting plants should be situated as close as possible to the source of the waste, both because of the cost of transportation and given the need to minimise environmental harm from CO_2 emissions in the waste management chain.[82] Competitors also confirmed that besides being less competitive on price, bidders located at a greater distance would be allocated negative points in a tender due to high CO_2 emission incurred by the transport of the waste, a disadvantage for which a bidder would need to compensate by lowering its price.[83]

79 Notifying Party's reply to RFI 13, Annexes 1-B.1, 1-B.5, 1-B.6, 1-B.8.
80 See minutes of a call with a competitor on 10 February 2021, paragraph 15.
81 Notifying Party's reply to RFI 13, Annexes 1-B.5, 1-B.6, 1-B.8.
82 Minutes of a call with a customer on 19 February 2021, paragraph 12.
83 Minutes of a call with a competitor on 10 February 2021, paragraph 15.

(C) Customer preference for sorting of Dutch LWP in the Netherlands

(59) In addition to transport costs and environmental costs which limit the distance over which LWP can travel for sorting, the market investigation also elicited that the sorting of Dutch LWP is impacted by the existence of a preference for sorting Dutch LWP within the Netherlands.

(60) Concretely, all sorters active on the Dutch LWP sorting market that responded to the market investigation considered that there is a political preference for Dutch LWP to be sorted in the Netherlands.[84] One sorter explained that this preference is grounded on concerns about the integrity of the overall LWP sorting and recycling chain, and in particular regarding the proportion of collected LWP that is actually sorted and recycled. For that reason, sorting in the Netherlands is viewed more favourably from a political point of view, as it '*provides better political backup*'.[85] German sorters active in offering LWP sorting services to customers in the Netherlands also believe that such customers have a preference for sorting to take place in the Netherlands.[86]

(61) Customers themselves provided mixed views. On the one hand, a number of customers denied the existence of any kind of national preference,[87] or explicitly insisted that the distance, and not the specific country in which a sorting plant is located, is the most important factor in selecting a supplier of sorting services.[88] On the other hand, several customers confirmed that municipalities on whose behalf they arrange for sorting do prefer LWP to be sorted in the Netherlands or close to the border.[89] One respondent explains that this is motivated both by environmental reasons and by a desire to stimulate employment in the country where the waste is generated.[90] One customer, which contracts LWP sorting services on behalf of a number of Dutch local authorities, explained that the Dutch government and municipalities expect LWP sorting to be achieved as close to the point where waste is generated as possible, and that they only have recourse to German sorters to the extent that capacity in the Netherlands is short.[91] This would seem to be consistent with the (volume) market shares provided by the Notifying Party (see Table 2), which show that the proportion of LWP that customers have sent to be sorted to German plants has declined over the last years as new capacity has been built in the Netherlands.

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84 Replies to question 13.1 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to question 19.1 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

85 […]'s response to question 13.1 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands.

86 Replies to questions 19 and 20 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

87 Replies to question 14 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

88 Replies to question 14.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

89 […]'s replies to question 13.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP. Minutes of a call with a customer on 19 February 2021, paragraph 12.

90 […]'s replies to question 13.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

91 Minutes of a call with a customer on 19 February 2021, paragraph 12.

(62) With regards to the 2019 Midwaste/RKN tender cited by the Notifying Party, the Commission understands that the most important factor in the Notifying Party's success was its commitment to build a new sorting facility in the Netherlands. It is apparent from the award letter sent to the Notifying Party that under 3 of the 5 qualitative criteria applied in this tender, the decision to build a new plant at Zwolle was a key reason for the score awarded. This award letter states that "*the new installation (in the Netherlands) creates clear added value for the circular economy*." The fact that the Notifying Party's offer may not have been the most competitive in terms of price is unsurprising given that it involved sending LWP to Germany (to Schwarz's plant in Porta Westfalica) for sorting during a transitional period (2019 and early 2020, incurring higher transport costs in that time) and given also the investments which the Notifying Party was incurring in building the new sorting plant in Zwolle. In any case, the fact that Schwarz decided to build a new plant in Zwolle to sort the Dutch LWP under this contract when it could have continued to sort Dutch LWP from its LWP sorting plant in Germany is indicative of a clear advantage for sorting Dutch LWP in plants closer to the collection point. The Commission therefore considers this tender to be further evidence of the fact that customers have a clear preference for LWP to be sorted in the Netherlands.

(D) Technical barriers

(63) The results of the market investigation also pointed to the existence of technical barriers for non-Dutch LWP sorters to sort Dutch LWP, related to the composition of the LWP mix and to the regulations on traceability of LWP. These barriers imply additional costs that LWP sorting plants located in other Member States must face when also sorting Dutch LWP alongside LWP from their own country. This further limits the possibility of sending Dutch LWP to neighbouring countries for sorting.

(64) First, the differences in the LWP mix between the Netherlands and Germany impact sorting operations. Sorters, in particular those which are able to sort Dutch LWP from plants in Germany, confirmed that the mix of waste fractions composing LWP is different in both countries and needs to be treated separately. Indeed, Dutch LWP tends to contain greater quantities of plastics, while German LWP tends to contain a greater proportion of paper and metallic waste. Because of the different composition of the waste, LWP needs to be sorted in different batches, and some adjustments must be made to the sorting machinery when changing batches from different countries, resulting in lost time (and therefore lost capacity). One sorter in Germany estimated the costs associated with switching between the sorting of Dutch and German LWP to be several thousands of euros per week, while another estimated these costs to be approximately EUR 250 000 per year. Therefore, a German plant that intends to sort also Dutch LWP must change its production process.[92]

(65) Moreover, Dutch regulatory requirements on the traceability of waste require that Dutch LWP be stored separately from LWP from other countries, both before and after sorting,[93] which means that plants that want to sort both German and Dutch LWP need to invest in additional storage.

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92 Replies to question 8 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

93 As explained in paragraph (34).

(66) For those reasons, despite mixed views as to the importance of these factors,[94] German sorters that responded to the market investigation agreed that LWP sorting plants in Germany are at a significant disadvantage compared to LWP sorting plants in the Netherlands. A competitor who previously sorted Dutch LWP mentioned: '*German and Dutch sorting plants are designed differently; have different processes in place to sort the different LWP mixes and attain the different standards. Sorting a different LWP mix would require the rebuilding of a facility. Adapting the plant to be able to receive LWP from another country would require significant investments, depending on the existing technology and size of the plant. Consequently, it is generally impossible for a plant to serve simultaneously Dutch and German customers*'[95]. Another sorter which currently serves the Dutch market indicated that '*[n]ot all German LWP sorting plants are necessarily able to sort Dutch LWP. Dutch regulations set different quality standards for the LWP sorting output than German authorities, and not all German plants can meet these standards, at least not without incurring additional costs*'.[96]

(67) One respondent active in Germany located less than 20 km from the Dutch border, with prior experience in sorting Dutch LWP, indicated that adapting the sorting plants to sort LWP from different countries is very costly, while sorting LWP from different countries in shifts would also be very difficult, as the adjustments to the sorting lines would take 4-5 hours each time (thereby lowering the plant's utilization). For these reasons, combined with the need to obtain authorisations for cross-border shipments of waste (discussed below), this respondent considered that it was significantly more difficult for plants in Germany to sort Dutch LWP.[97] Other LWP sorters with plants in Germany close to the Dutch border, and which have sorted Dutch LWP in the past, likewise confirmed that sorting LWP from the Netherlands and Germany within the same facility was excessively complex and costly.[98]

(E) Administrative formalities

(68) Lastly, specific administrative formalities apply to the cross-border transport for LWP sorting. Concretely, sending LWP for sorting outside the Netherlands involves more administrative formalities than sorting the LWP in the country, including the setting up of a financial guarantee. This too limits the possibilities for transporting Dutch LWP cross-border for sorting.

(69) As mentioned above in paragraph (34), the regulation of cross-border transport of waste is harmonized at EU level through the Waste Shipment Regulation. Although these are not considered a serious impediment by German sorters already sorting Dutch LWP, they are seen as an additional obstacle by sorters in Germany and Belgium not currently active for the sorting of Dutch LWP.

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94 Replies to questions 8.3, 8.4, 10.1, 10.2 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

95 Minutes of a call with a competitor of 2 February 2021, paragraph 17.

96 Minutes of a call with a competitor on 9 February 2021, paragraph 8.

97 Reply of a German sorter to question 8.4 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium.

98 Reply of a German sorter to RFI 9, paragraph 3; Minutes of a call with a competitor on 2 February 2021, paragraph 17.

(70) Concretely, sorters located in Germany which are active in the sorting of Dutch LWP indicated that they do not consider the costs of satisfying these administrative formalities (*i.e.* the fees and guarantees) to be very significant, although they also indicated that these costs, combined with the obligation to keep waste from different countries separate, did make it significantly more difficult for them to sort Dutch LWP.[99] Among sorting plants close to the Dutch border in Belgium and Germany which do not sort Dutch LWP, a majority indicated that these administrative barriers make it significantly more difficult to sort Dutch LWP.

(71) Large customers of LWP sorting services in the Netherlands held differing views on whether the administrative barriers associated with the cross-border shipment of waste are a significant impediment for plants outside of the Netherlands. One large customer explained that in its view, the administrative obligations that come with notifying cross-border transports of waste, and the cost of the associated fees and guarantees, are not a problem for German LWP sorters for whom the sorting of Dutch LWP is part of their daily business.[100] Three other customers however explained that the requirement to comply with the Waste Shipment Regulation places an additional burden on LWP sorting plants located in Germany when it comes to the sorting of Dutch LWP.[101]

4.2.2.3. Conclusion on geographic market definition

(72) In conclusion, for customers of LWP sorting services in the Netherlands, both supply and demand are national in scope.

(73) Indeed, it results from the above that Dutch LWP can generally only be sorted in an economically viable manner in LWP sorting plants that are relatively close to the transfer station where collected waste is gathered, notably at most approximately 200 km. The Market Definition Notice remarks that in cases like the present one, where the transport of a product incurs significant transport costs, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs.[102] In principle, such an area could constitute the relevant geographic market. However, as the Market Definition Notice explains, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. Such chain substitution effects would appear to be present in the Netherlands. Given the size of the country, all sorting plants are able to compete for a significant part of national demand, and the radii within which they are able to offer LWP sorting services overlap to a significant extent.

(74) Other factors identified in the market investigation also suggest that the market for the sorting of Dutch LWP is national in scope, notably customer preference, variation in the composition of the LWP between Member States, technical regulations on traceability and other administrative factors.

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99 Replies to questions 11, 12, 13 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

100 Minutes of a call with a customer on 19 February 2021, paragraph 14.

101 Replies to question 11 and 11.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

102 Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, paragraph 57.

(75) While these elements limit the ability of plants in other Member States to compete on an equal footing with Dutch plants for the sorting of Dutch LWP, they do not completely prevent them from competing, as illustrated by the fact that certain plants in Germany, located within the economically viable distance, together currently receive approximately one third of the volumes of Dutch LWP for sorting. These plants however should be considered out-of-market constraints, as they face additional costs and obstacles to supply customers in the Netherlands that Dutch plants do not face and, as explained earlier, are generally considered disadvantaged in comparison to them. That plants in other Member States are out-of-market constraints is also demonstrated by the fact that other German and Belgian plants do not sort Dutch LWP, do not submit bids or participate in any tenders for the sorting of Dutch LWP and, when approached by the Commission, these competitors showed to be largely unaware of the conditions (quality standards, administrative requirements) for sorting LWP, despite being in some cases very close to the Dutch border.[103]

(76) Ultimately, therefore, competitive conditions for the sorting of Dutch LWP are different for LWP sorting plants located in the Netherlands and LWP sorting plants located outside of the Netherlands (even if close to the border).

(77) For these reasons, the Commission considers that conditions of competition are sufficiently homogeneous only within the territory of the Netherlands, so that the relevant geographic market for the sorting of LWP is national.

4.3. Collection of hollow glass

4.3.1. Product market definition

(78) As mentioned above, in prior decisions, the Commission distinguished separate relevant product markets for each stage of the waste management process and for different waste fractions. In particular, the Commission has identified a separate relevant product market for the collection of hollow glass.[104]

Notifying Party's view

(79) The Notifying Party agrees that the collection of hollow glass constitutes a separate relevant product market, though caveats that this is primarily relevant for household waste only, and for Germany.

(80) Notably, in Germany only certain waste fractions are collected directly from the households (*i.e.* PPC, LWP and residual household waste). Hollow glass is collected in containers that are set up in different communal spaces throughout the municipality, under specific collection contracts. This distinction is not relevant for I&C waste, where the different waste fractions are typically not collected separately.[105]

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[103] Replies to questions 9.4 and 12 of Questionnaire Q3– Competitors for the sorting of Dutch LWP located in Germany and Belgium.

[104] See Section 4.1 for a more detailed overview of the Commission's decision-making practice.

[105] Paragraphs 172-173 and footnote 103 of the Form CO.

Commission's assessment

(81) The market investigation confirmed the existence of a separate relevant product market for the collection of hollow glass. All market investigation respondents, both competitors and customers, indicated that in Germany, the collection of hollow glass is organised separately from the collection of other waste fractions.[106] They explain that the collection of hollow glass is organised by so-called 'dual systems', which are operators that organise the recycling of packaging waste on behalf of the manufacturers, importers and retailers who, as distributors, are originally responsible for the recycling. This service is provided by the dual systems against payment of a license fee by the distributors. Dual systems thus tender and contract the collection of hollow glass separately. The collection itself is, contrarily to other waste fractions, not done directly at the households, but rather at centralised drop-off points in the collections areas of the municipality.[107]

(82) In view of the above, the Commission considers, for the purpose of this Decision, a separate relevant product market for the collection of hollow glass.

4.3.2. Geographic market definition

(83) In the past, the Commission has considered for the Netherlands that while the demand for the collection of hollow glass must be regarded as local, collection schemes are set up, financed and operated at national level, and that consequently prices, subsidies and means of collection vary from Member State to Member State. Larger collection companies are active across the country. For those reasons, the Commission considered the market for collection of hollow glass to be national.[108] The Commission has not investigated the geographic scope for the collection of hollow glass in Germany. However, the Bundeskartellamt has considered both the national level and a 'regional level' comprising of a Landkreise ('district') and adjoining districts, ultimately leaving the geographic market definition open.[109]

Notifying Party's view

(84) The Notifying Party submits that also for Germany, the collection of hollow glass is national in scope. It argues that in Germany too, large companies operate throughout the country, tenders are organised on a national basis and the regulatory framework is predominantly national in scope. The barriers to entry at regional level are very low; a company only needs to make available bottle banks and collection trucks and potentially hire additional employees in order to start operating in another region. Ultimately, companies collecting hollow glass face their competition at national level.[110]

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106 Replies to question 4 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 4 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region.

107 Replies to question 4.1, 5, 5.1 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 4.1, 5, 5.1 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region.

108 See case M.4576 – *AVR/Van Gansewinkel,* paragraph 19.

109 See case B4-21/19 – *Remondis / DSD*, paragraphs 125 *et seq.*

110 Paragraphs 223, 312 of the Form CO.

Commission's assessment

(85) The market investigation in the present case supports largely the arguments put forward by the Notifying Party.

(86) The demand for hollow glass collection services in Germany is structured on the basis of individual districts, but following rules set nationally. Contracts typically last three years, and market investigation respondents explained that on an annual basis, around a third of all districts in Germany are allocated to the dual systems, who are responsible for the organisation of the collection of hollow glass. The allocation of districts is random, on the basis of a lottery system which takes into account the volume licensed to each dual system. Dual systems can be allocated districts from all over the country. Dual systems operators then select their hollow glass collector in each of the districts for which they are responsible, by issuing calls for tenders that are open to all hollow glass collectors nationwide. The collection itself is done locally.[111]

(87) On the supply-side, the market investigation showed that some bigger companies, such as Schwarz, SUEZ, Remondis and Alba, organise their operations in terms of collection schemes, operations and financing nation-wide and are active across the country, while others are only present at the regional or local level. Indeed, whereas some competitors indicated that they have submitted bids and offer collection services across the country, others stated that they have submitted bids and offer services only for certain regions/districts. Customers have also indicated that while some companies submit bids across the country, others' focus is more regionally or locally.[112] As such, bigger companies appear to compete with each other at national level, and in certain regions with more regional or local players too.

(88) Furthermore, the market investigation has revealed that there are price differences across different regions in Germany, though market respondents explained in this regard that this is related mainly to whether it concerns collection in more urban versus in more rural areas, as transport costs differ.[113] The legal framework is the same across the country, as it *'is essentially determined by the Verpackungsgesetz (VerpackG), and in part also by the Kreislaufwirtschaftsgesetz (KrWG). Both are federal laws that claim national validity.'*[114] Whereas a local presence is required, barriers to enter a region seem to be rather low: market investigation respondents described that *'[t]o take on a contract in a new district, a collector needs only trucks, containers and drivers, and a place to park the trucks and to weigh / temporarily store the hollow glass collected (transit warehouse) before it is picked*

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111 Replies to questions 4-5 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 4-5 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region; Minutes of a call with a competitor on 2 February 2021, paragraphs 3-5, 9; Minutes of a call with a customer on 2 February 2021, paragraphs 5-6.

112 Replies to questions 6-10 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 6-8 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region; Minutes of a call with a competitor on 2 February 2021, paragraph 10.

113 Replies to questions 11, 11.1 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 9, 9.1 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region.

114 Replies to questions 12, 12.1 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 10, 10.1 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region.

up for transport to the sorting plants'. However, respondents also mentioned that *'a company is usually less willing to compete in a region in which it does not yet have any infrastructure'*. Some market investigation participants added that *'the regional knowledge in a contractual area due to collection from central depot containers does not have to be too well-founded, as is the case with near-household collection services'* and that *'[a]s projects are awarded based on the offered price, local reputation does not play a role in winning contracts for the collection of glass.'*[115]

(89) In conclusion, while the market investigation point to the existence of a national market, it also showed the existence of regional or local elements. In any case, for the purpose of this Decision the exact geographic market definition can be left open as it does not affect the outcome of the competitive assessment of the Proposed Transaction with regard to the collection of hollow glass.

(90) As explained below, applying a conservative approach, the Commission will in its competitive assessment consider a smaller than national geographic market, comprising of the Bielefeld district and adjoining districts (the 'Bielefeld Region')[116], as only under this plausible market definition the Proposed Transaction results in an affected market.

5. COMPETITIVE ASSESSMENT

(91) The Proposed Transaction gives rise to horizontally affected markets in relation to the sorting of LWP in the Netherlands and for the collection of hollow glass if the Bielefeld Region (Germany) is considered.

(92) Furthermore, the Proposed Transaction will give rise to several vertical links, namely (i) between the collection of LWP and the collection of I&C waste[117] (both upstream) and the sorting of LWP (downstream), (ii) between the sorting of LWP (upstream) and the commercialisation of LWP (downstream), and (iii) between the collection of I&C waste (upstream) and the retail activities (downstream).[118]

(93) In addition, on 15 March 2021 the Commission received a submission from the Polish national competition authority UOKiK, putting forth general concerns about the Proposed Transaction due to the fact that *'[t]he market for waste disposal is highly concentrated and we have spotted some competition problems in the past.*

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115 Replies to questions 13.1 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 11.1 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region; Minutes of a call with a customer on 2 February 2021, paragraphs 7-9; Minutes of a call with a competitor on 2 February 2021, paragraph 6-8.

116 Concretely, in line with the approach taken by the Bundeskartellamt and suggested by the Notifying Party, the starting point is the Target's location in Bielefeld, and then including two layers of adjoining districts: (i) the immediate adjoining districts *i.e.* Gütersloh and Lippem and (ii) the outer adjoining districts *i.e.* Herford, Soest, Paderborn, Höxter, Holzminden, Hameln-Pyrmont, Schaumburg, Minden-Lübbecke, Osnabrück, Warendorf and Steinfurt. See footnote 194 of the form CO.

117 Potentially segmented on the basis of whether the waste is commercial, industrial, or demolition and construction waste.

118 As for all of the vertical links created by the Proposed Transaction, all plausible markets would result in the same outcome in terms of the competitive assessment (as explained in detail below in Section 5.3), the exact market definitions can be left open for the purpose of the assessment of vertical links in this Decision.

Since it is the biggest transaction in this market in Poland in years we needed to express our concerns that it may worsen the situation on a general level.'

(94) However, on the basis of the information submitted by the Notifying Party, the Proposed Transaction would not result in affected markets for waste management services within Poland under any plausible product or geographic market definition. UOKiK's submission does not contain information supporting another conclusion; in fact, it does not raise merger-specific concerns or even allege the existence of affected markets in Poland.[119] Furthermore, UOKiK attached two studies[120] to its submission which contain market share estimates, including those of the Parties, which do not rise to the level of affected markets under the meaning of the Form CO.[121] Rather, UOKiK's concern relates to the fact that in spite of the high number of competitors in Poland, many local authorities receive no more than one bid when organising tenders. The Proposed Transaction will not materially worsen this situation due to the Parties' limited competitive position in Poland (whether at the local, regional, or national level). Finally, the market investigation did not elicit any information that could point to the existence of affected markets for waste management services in Poland, nor did the Commission receive any additional complaints in relation to the Polish market. For that reason, the possible impact of the Proposed Transaction for the Parties' waste management activities in Poland will not be further discussed in this Decision.

5.1. Horizontal non-coordinated effects – sorting of Dutch LWP

(95) The Proposed Transaction raises concerns in relation to horizontal non-coordinated effects in the sorting of Dutch LWP. The Commission's concerns result from (i) the Parties and competitors' position in the relevant market, (ii) the closeness of competition, (iii) the spare capacity in the market, (iv) the structure of demand for the sorting of LWP, and (v) the barriers to entry or expansion.

5.1.1. Structure of supply: the Parties and competitors' position in the relevant market.

(96) Within the Netherlands there are 5 competitors (each of the Parties, Omrin, Attero and PRA) for the sorting of LWP. Table 1 below shows each sorter's plant, its capacity, and its capacity market share.

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119 UOKiK submission of 15 March 2020; Notifying Party's reply to RFI 16, paragraph 1.

120 *Raport - Badanie rynku usług związanych z gospodarowaniem odpadami komunalnymi w gminach miejskich w latach 2014-2019*, UOKiK (2020); *Raport badanie rynku usług związanych z zagospodarowania odpadów komunalnych w instalacjach w latach 2014-2019*, UOKiK (2019).

121 According to these studies, the Parties' combined share at the national level in Poland would not exceed 10% in the last year for which data was available (*i.e.* in 2019).

Table 1: Parties' and Dutch competitors' capacity market shares for the sorting of Dutch LWP (2020)[122]

Company	Location	Capacity (kt)	Capacity share
PreZero	Zwolle (NL)	[…]	[20-30]%
Target	Rotterdam (NL)	[…]	[30-40]%
Combined		[…]	**[50-60]%**
Omrin	Heerenven (NL)	[…]	[10-20]%
Attero	Wijster (NL)	[…]	[10-20]%
PRA	Amsterdam (NL)	[…]	[5-10]%
TOTAL	/	329	100%

Source: Form CO, Table 20 and Annexes 6-D and 7 and competitors' non-confidential responses to the market investigation. For the driving distance, the information has been provided by the respective competitors or elaborated by the Commission.

(97) According to the above Table, the Parties would control almost [50-60]% of the capacity in the Netherlands for the sorting of LWP. It should be noted that this figure underestimates the Parties' position since, as explained in paragraph (111), a significant part ([…] kt, *i.e.* almost half) of Omrin's capacity is dedicated to sorting the LWP generated by its own municipalities,[123] which means that the portion of its capacity actually available for the merchant market would be significantly lower (around […] kt, instead of the […] kt mentioned in the Table above).

(98) These figures differ from those provided by the Notifying Party, which pointed to a significantly lower combined market share. Notably, the Notifying Party has provided capacity market shares taking into account next to the Dutch LWP sorting plants also the entire capacity of the five German plants that serve the Dutch LWP sorting market.[124] On this basis, the Parties' combined market share in terms of capacity would be [20-30]%. The Commission, however, considers that these shares overestimate the competitive strength of German LWP sorting plants, since most of their capacity is used to serve the German market.[125]

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122 Besides its plant in Zwolle, PreZero has a plant in Porta Westfalica, Germany, around 150 km from the Dutch border, from which it used to sort Dutch LWP. The Zwolle plant in the Netherlands was built in the context of a contract with a Dutch customer [confidential details on customer and contract duration] , although the Porta Westfalica plant continued sorting Dutch LWP […] until the Zwolle plant was completed (see paragraph 505 of the Form CO). The Notifying Party submits that since then the Porta Westfalica plant has not sorted Dutch LWP [confidential details on the sorting activities of the Notifying Party] (see paragraph 452 of the Form CO). For this reason, this plant has not been included in this table. The Commission has not included in the table above the capacities of post-separation plants which the Notifying Party included in Table 20 and Annexes 6-D and 7 of the Form CO (namely, HVC Alkmaar, AVR Rotterdam, AEB Amsterdam) since, as explained in paragraphs (24),(25) above, post-separation must be considered a separate market from LWP sorting.

123 See minutes of a call with a competitor on 27 January 2021, paragraphs 5-6.

124 Notably, in addition to the LWP sorting plants mentioned above, the Notifying Party included in its estimations also […] Ochtendung, […] kt for Hubert Eing Gescher, […] kt for Augustin Meppen, […] kt for Alba Marl and […] kt for Schönmackers Kerpen/Kempen, resulting in an overall market of 863 kt capacity, of which the Parties' […] kt represents approximately [20-30]%.

125 In fact, Dutch LWP only accounts for 15% of the capacity of Alba's plant's in Marl (see minutes of the call with Alba of 9 February 2021, paragraph 5 and Alba's reply to RFI 11, paragraph 1) and one third of the capacity of Hubert Eing's plant (see Hubert Eing's reply to RFI 11, paragraph 1). SUEZ also indicated that […]% of its plant in Ochtendung is dedicated to sort Dutch LWP. Augustin did not reply to the market investigation. As regards the spare capacity (*i.e.* capacity not currently used) of these plants, it is uncertain what proportion will be dedicated to the German or to the Dutch market. However, Alba has

(99) The Commission considers that market shares based on the volumes of Dutch LWP effectively sorted by each market player provide a more accurate picture of the competitive situation in the market. Table 2 below shows for the Parties' and their competitors' plants located in the Netherlands the volumes of Dutch LWP sorted by each of them and their market shares for the last three years.

Table 2: Parties' and Dutch competitors' volume market shares for the sorting of Dutch LWP (2018-2020)

Company	2018		2019		2020	
	Vol. (kt)	%	Vol. (kt)	%	Vol. (kt)	%
PreZero*	[…]	[10-20]%	[…]	[20-30]%	[…]	[20-30]%
Target	[…]	[40-50]%	[…]	[30-40]%	[…]	[30-40]%
Combined	**[…]**	**[60-70]%**	**[…]**	**[60-70]%**	**[…]**	**[60-70]%**
Attero	[…]	[20-30]%	[…]	[20-30]%	[…]	[10-20]%
Omrin**	[…]	[10-20]%	[…]	[10-20]%	[…]	[10-20]%
PRA	[…]	[0-5]%	[…]	[0-5]%	[…]	[5-10]%
TOTAL	*217*	100%	*217*	*100%*	*261*	*100%*

Source: Form CO, Table 20 and Annexes 6-D and 7.
(*) Including Zwolle and Porta Wesfalica plants.
(**) Assuming that […] *kt of the volumes sorted in the plant in 2020 and 2019 are captive (of a total of capacity of the plant of* […] *kt). For 2018, the capacity of the plant was lower (*[…] *kt) and all volumes are assumed to be sold to the merchant market.*

(100) The above Table shows that also in terms of volumes sorted in the Netherlands, the Proposed Transaction consists in the combination of the two largest competitors in the Dutch LWP sorting market. Post-transaction, the Parties' combined market share considering only the Dutch LWP sorting plants would be [60-70]% in 2020, a percentage which has remained stable over the last three years. This market share would be more than […] points higher than that of its next competitor, Attero ([10-20]%), who would be the only remaining competitor with a market share higher than [10-20]%.

(101) The Notifying Party submits that the volumes of Dutch LWP sorted by plants in Germany should also be taken into account. If these were taken into account in the same manner as the volumes sorted by Dutch plants, the Parties would have a combined market share of [30-40]% in 2020 (see Table 3 below).

indicated that even though all the capacity of its plant in Marl can theoretically serve the Dutch market, they do not expect a growth in the volumes of Dutch LWP to be sorted in the future. Hubert Eing also replied that they do not expect increases in the volumes of Dutch LWP volumes to be sorted and their capacity to take additional ones would in any case be limited (see replies by Alba and Hubert Eing to question 4 and 5 of RFI 8 and RFI 11).
Theoretically, some of the Dutch sorting plants could also serve the German market. However, this has never been the case due to the historic under-capacity of the Dutch market. Moreover, neither the Parties nor any competitor has indicated during the market investigation that they have any plans to serve the German market from Dutch plants.

Table 3: Parties' and Dutch/German competitors' volume market shares for the sorting of LWP (2018-2020)

Company	2018		2019		2020	
	Vol. (kt)	%	Vol. (kt)	%	Vol. (kt)	%
PreZero*	[…]	[10-20]%	[…]	10-20]%	[…]	10-20]%
Target	[…]	[20-30]%	[…]	[20-30]%	[…]	[20-30]%
Combined	[…]	**[30-40]%**	[…]	**30-40]%**	[…]	**30-40]%**
Attero	[…]	10-20]%	[…]	10-20]%	[…]	10-20]%
Omrin**	[…]	[5-10]%	[…]	[5-10]%	[…]	[5-10]%
PRA	[…]	[0-5]%	[…]	[0-5]%	[…]	[0-5]%
TOTAL NL Plants	[…]	*[40-50]%*	[…]	*[40-50]%*	[…]	*[50-60]%*
Schönmackers	[…]	10-20]%	[…]	10-20]%	[…]	10-20]%
SUEZ Ochtendung ****	[…]	10-20]%	[…]	[5-10]%	[…]	10-20]%
Agustin Meppen	[…]	10-20]%	[…]	10-20]%	[…]	10-20]%
Hubert Eing	[…]	[0-5]%	[…]	[0-5]%	[…]	[5-10]%
Alba	[…]	[0-5]%	[…]	[5-10]%	[…]	[0-5]%
TOTAL NL+DE Plants	*377*	100%	*416*	100%	*447*	*100%*

Source: Form CO, Table 20 and Annexes 6-D and 7 and replies to the market investigation.
(*) The volumes for Prezero include all Dutch LWP volumes sorted at its Zwolle and Porta Westfalica plants.
(**) Assuming that […] *kt of the volumes sorted in the plant in 2020 and 2019 are captive (of a total of capacity of the plant of* […] *kt). For 2018, the capacity of the plant was lower (*[…] *kt) and all volumes are assumed to be sold to the merchant market.*
(***) The "total NL plants" for 2018 and 2019 does not include any of PreZero's volumes, since all Dutch LWP sorted by PreZero was sorted from Porta Westfalica, Germany. For 2020, all of PreZero's volumes were sorted at its Zwolle Plants, hence all of PreZero's volumes are included in the "total NL plants".
(****) SUEZ's plant in Ochtendung is excluded from the scope of the Proposed Transaction.

(102) Even if the volumes of Dutch LWP sorted by German LWP sorting plants were taken into account, the merged entity would, as the table above indicates, be the clear market leader, with almost three times the size of the next competitor, Schönmackers (who has a market share of [10-20]%, *i.e.* […] percentage points less). There would be no remaining competitors with a market share higher than [10-20]%.

(103) In conclusion, regardless of whether only competitors located in the Netherlands, or also competitors located in Germany, are taken into account, the Proposed Transaction would combine the two largest competitors in the market and would result in the combined entity becoming the clear market leader, with a considerable lead over any competitor.

(104) As a caveat to the latter scenario (*i.e.* considering both Dutch and German LWP sorters), the Commission notes that, as explained in detail in Section 5.1.2, German LWP sorting plants cannot be deemed to exercise an equivalent competitive constraint to LWP sorting plants located in the Netherlands. The former are out-of-market players which are more distant competitors to the Parties than other Dutch plants or than the Parties are to each other. Notably, as already mentioned above in Section 4.2.2.2, German LWP sorters face costs and barriers that Dutch customers do not face and customers in the Netherlands have a preference for LWP to be sorted in the country, which places German plants at a competitive disadvantage. Moreover, as explained in Section 5.1.3, the constraint that each player can exert in this market is largely determined by its spare capacity. As such, the volume market shares including Dutch and German LWP sorters underestimates the merged entity's market power post-transaction.

5.1.2. *Closeness of competition*

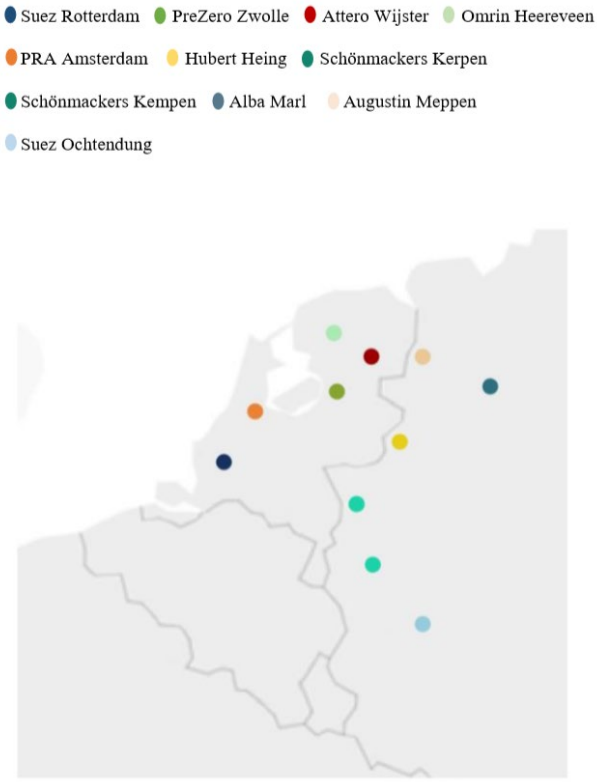
Notifying Party's view

(105) The Notifying Party argues that the Parties do not compete closely, as their activities are largely complementary from a geographic perspective. Notably, given that their LWP sorting facilities are far away from each other, the Notifying Party argues that they do not compete as closely with respect to customers closer to one of the facilities, since in some cases customers may decide to go to the nearest facility.[126]

Commission's assessment

(106) As a preliminary note, the Commission will assess the closeness of competition between those LWP sorters which currently serve the Dutch LWP sorting market. These competitors include five Dutch entities (each of the Parties, Attero, Omrin and PRA), as well as five out-of-market competitors with plants located in Germany close to the Dutch border (SUEZ,[127] Augustin, Hubert Eing, Alba and Schönmackers) for the sorting of Dutch LWP.[128] Figure 1 below shows the location of all of these plants.

Figure 1: LWP sorting plants in Germany and the Netherlands currently sorting Dutch LWP



Source: Notifying Party, presentation of 12.03.2021

126 Paragraphs 439, 467 and footnote 277 of the Form CO.

127 SUEZ's plant in Ochtendung has not been included in the scope of the Proposed Transaction.

128 The Notifying Party claims that there are a number of other German and Belgian plants close to the Dutch border. The Commission has approached these companies in the market investigation and all the entities responding have confirmed that they have not sorted any Dutch LWP or have not participated in any tender for the sorting of Dutch LWP in the last 5 years.

(107) This Section addresses closeness of competition between these competitors by analysing (i) the capacity, location of the plants and business models of the different market players, and (ii) the perceived closeness as per the market investigation.

(A) Capacity, location and business models of LWP sorting plants

(108) The characteristics of the demand for LWP sorting reflect customers' particular attention to the ability of sorters to meet their requirements, both in terms of capacity and distance to the LWP sorting plant. Furthermore, the different business models in place, in terms of customer focus or type of operations, have an impact on the Parties' and their competitors' competitive interactions. The analysis of the capacity, business models and location of the plants of the different players available to sort Dutch LWP suggests that the Parties compete particularly closely.

(109) Concretely, the Parties own the two largest plants in the Netherlands in terms of capacity ([…] kt and […] kt respectively). These plants are respectively located slightly north and south of the most populated area of the country (encompassing the provinces of North Holland, South Holland and Utrecht) and close to the largest cities (Rotterdam, The Hague, Amsterdam).

(110) In contrast, the plants of all the other competitors in the Netherlands have significantly less capacity, are less centrally located (with the exception of a much smaller plant in Amsterdam) and their business models also differ significantly:

(111) Omrin's plant is the largest facility on the market after the Parties' plants.[129] However, its capacity ([…] kt) is […]% less than PreZero's and […]% less than SUEZ's, whereas the difference in capacity between the Parties' Zwolle and Rotterdam plants is only roughly […]%. Furthermore, Omrin is a public entity, owned by 33 municipalities in the North of the country.[130] Omrin focuses its activity in serving municipalities in that area.[131] Notably, almost half of the capacity of its sorting plant ([…] kt) is used to sort the LWP generated by its 33 municipalities.[132] Therefore, the capacity which Omrin can dedicate to the merchant market – where it competes with the Parties – is limited (around […] kt, *i.e.* less than […]% of PreZero's current capacity and less than […]% of SUEZ's capacity). In addition, Omrin focuses mainly on serving its shareholders in specific regions in the North whereas SUEZ's plant is geographically close to municipalities in the South of the country due to its location in Rotterdam, and PreZero's plant at Zwolle is located in the centre of the country at a short distance from the main urban areas.

(112) Attero owns the fourth largest plant in the country, located in the province of Drenthe, also in the north of the country (which, like Omrin makes it a less close competitor). Its capacity ([…] kt), however, is limited when compared to the Parties' ([…]% less than PreZero's capacity in its Zwolle plant and almost […] of SUEZ's Rotterdam capacity).

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129 Omrin's plant is co-owned with Midwaste/RKN, one of the main customers in the market, and with HVC, an entity which also owns a pre-sorting plant.

130 See minutes of a call with a competitor on 27 January 2021, paragraph 3.

131 *Ibid*. More specifically, the municipalities concerned are located in particular in the provinces of Friesland (where the plant is located), Groningen and Drenthe.

132 Which are previously pre-sorted in a post-separation plant also owned by Omrin. See minutes of a call with a competitor on 27 January 2021, paragraph 5-6.

(113) PRA owns a relatively small plant of […] kt close to Amsterdam. PRA is part of Umincorp, a company originating from a project by the Resources and Recycling Group of Delft University of Technology which has developed the magnetic density separation ('MDS') technology, on which the plant is based. This technology allows PRA to achieve a higher recovery rate and an output of higher purity.[133] Another specificity of PRA is that it sorts and recycles LWP in the same facility. The plant sorts LWP coming from the post-separation stream, and consequently it does not compete fully with the Parties (which sort both post-separated and source-separated LWP). In the market investigation it has been the only company singled out by customers as having a technology which stands out from the rest.[134] One of the main customers has indicated that PRA's new technology is new and promising but there presents a degree of uncertainty as to its effectiveness.[135] Therefore, PRA would not constitute a close competitor to the Parties in view of its specific technology, its ability to combine sorting and recycling activities at its plant, its ability to compete only for part of the LWP and its very limited capacity.

(114) In addition, five competitors in Germany, with plants located close to the Dutch border, sort Dutch LWP (including SUEZ with its plant in Ochtendung). All these competitors combined have significant capacities. Concretely, SUEZ Ochtendung has a capacity of […] kt, Hubert Eing Gescher has […] kt, Augustin Meppen has […] kt, Alba Marl […] kt and Schönmackers Kerpen/Kempen […] kt. However, they sort significantly less volumes of Dutch LWP than the Parties (see Table 3) as most of their capacity is dedicated to German customers. The Commission considers that the competitive constraint exerted by these out-of-market competitors cannot be considered comparable to the constraint that the Parties exert on each other or that Dutch plants exert on the Parties, for the reasons explained below.

(115) First of all, for the reasons explained in Section 4.2.2.2, German competitors are in general at a competitive disadvantage in comparison to Dutch LWP sorting plants. This has been confirmed by all competitors active in the market which responded to the market investigation, which have indicated that there is a political preference for Dutch LWP to be sorted in the Netherlands.[136] In general, Dutch customers seem to resort to out-of-market competitors only to the extent that there is not available capacity in local plants. This weaker competition exerted by out-of-market plants is reflected in the evolution of the market shares. Table 3 shows that, as Dutch players have increased capacity in the last three years (PreZero's and PRA's new plants, expansion of Omrin's plant), there has been a decline in the proportion of LWP

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133 MDS allows the different flakes to float at their own magnetic level (which is different for different types of polymers because of their different densities) by using a very strong magnet. Using this method, the different polymers are separated in one process step, which allows, according to PRA, to achieve higher recovery and an output of higher purity, leading to lower gate fee costs for recycling. PRA maintains that around 85% of the input of its plant is recovered, while others only recover around 60%. (see minutes of call with PRA of 3 February 2021).

134 See replies to question 17.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

135 See minutes of a call with a customer on 5 February 2021, paragraph 31. Another respondent also showed uncertainty as to the success of this new technology (see minutes of a call with a competitor on 27 January 2021, paragraph 25).

136 Replies to question 13.1 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to question 19.1 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

sorted in German plants (from 53% in 2018 to 42% in 2020),[137] despite the fact that the latter have also expanded.[138] In other words, the proportion of Dutch LWP sorted in plants located in the Netherlands has increased in two years from 47% to 58%. In the Commission's view, this is an indication that, when available, Dutch customers turn to local capacity, while German sorters are used to adjust for Dutch capacity constraints and therefore serve the demand not served domestically. This also explains why Schwarz decided to build a sorting plant in Zwolle to sort Dutch LWP when it had capacity to do it in its plant in Germany and why German competitors do not expect an increase in the volumes of Dutch LWP to be sorted by them in the next years.[139]

(116) Second, the Commission observes that all these plants are significantly more distant to the western area of the country (where the Parties' plants are located). As already described in Section 4.2.2.2(A), a majority of respondents to the market investigation – and all German competitors – have indicated that the maximum distance within which it is economically viable to transport LWP collected in the Netherlands is 200 km. The Commission notes in this regard that most of the capacity of German competitors is located at more than 200 km from the main cities in Western Netherlands. For example, Alba's plant in Marl – which is the largest competing German plant in terms of capacity – is located 230 km from Rotterdam (where the Target's plant is located), 237 km from The Hague, and 215 km from Amsterdam. SUEZ's Ochtendung plant is more than 330 km from Rotterdam and Amsterdam, and Schönmaker's plant in Kerpen would be 250 km from Amsterdam and 240 km from Rotterdam. Therefore the fact remains that, regardless of the identified technical administrative barriers and of customer preference, most of the capacity of the German plants cannot compete for the LWP collected in Western Netherlands (the most densely populated part of the country) as intensely as the Parties currently do. In fact, a German competitor pointed out that the contracts awarded by their Dutch customer concerned LWP collected in the Eastern provinces of the country – closer to the German border – and expressly indicated that it would not be capable of competing for the sorting of LWP collected further inland.[140]

(117) In view of the above, the Commission considers that German competitors are likely to be economically less efficient than the Parties (or other Dutch plants), at least when bidding for contracts for the sorting of LWP in the western part of the country or for contracts where a relevant proportion of the LWP is collected in that area.

(118) Third, besides being economically less competitive, plants located at greater distances from the collection points than the Parties' plants may also be seen as environmentally less efficient than the local ones. As explained in Sections 4.2.2.2(A) to 4.2.2.2(C), distance is also a relevant factor for customers

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137 While the total volume of Dutch LWP sorted has grown considerably in the last three years, from 377 kt in 2018 to 447 kt in 2020, *i.e.* an 18% growth in only two years, in that same period the amount of LWP sorted by Dutch plants has grown at an even faster rate, from 177 in 2018 to 261 kt in 2020, *i.e.* an increase of 47%. These percentages do not take into consideration recent contracts granted recently by Dutch customers to German plants.

138 In fact, Alba's plant has been recently expanded but only a minor portion of its capacity is dedicated to the sorting of Dutch LWP.

139 One of the customers cites as the main reason for this the recent openings and expansions by PreZero (see reply of a competitor to question 5 of RFI 11).

140 See minutes of call with […], of 10 March 2021, paragraph 4.

when assessing the environmental efficiency or transport sustainability of the different offers submitted in a tender. Longer transport distances imply more CO_2 emissions and therefore higher long-term environmental costs. Customers accounting for close to half of demand openly admitted this preference, citing reasons linked to sustainability and environmental reasons and, expressly, the need to reduce CO_2 emissions and to minimise environmental costs.[141]

(119) In short, at least as regards a relevant portion of the country, most of the capacity in the hands of German competitors is located more than 200 km from the collection point and is therefore too distant and thus less efficient economically and environmentally than the Parties' plants. As regards German plants which are located closer to the borders and thus at 200 km or less from the collection points, they are still more distant from the western area of the Netherlands than the Parties' plants, and are therefore less competitive from both an economical and an environmental perspective.

(120) In conclusion, the Parties can be considered to compete particularly closely with one another for Dutch LWP sorting contracts. Moreover, although out-of-market competitors located in Germany can and do compete for the sorting of Dutch LWP, they compete with the Parties less closely than other Dutch plants and less closely than the Parties compete with each other.

(B) Closeness perception of market investigation respondents

(121) The responses provided by the different market participants during the market investigation support the view that the Parties are each other's closest competitors. When asked to rank the closest competitors to each of the Parties, market participants mention the Parties more frequently than any other market player. Attero and Omrin are mentioned too, though significantly less frequently and generally as less close. Respondents also suggest that German competitors are more distant competitors: Alba is only mentioned as fourth or fifth closest (and is mentioned only once as the closest to the Parties) and Hubert Eing or Augustin are mentioned less frequently.[142]

(122) Therefore, in a manner consistent with the Commission's own assessment, market participants perceive the Parties as each other's closest competitor, with Attero being second, Omrin third and Alba only fourth.

(C) Conclusion on closeness of competition

(123) In view of the above, the Parties appear to be particularly close competitors, and possibly the closest to each other. Attero and Omrin seem to be less close, and German competitors even more distant competitors.

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[141] Replies to question 14 of Questionnaire Q4 – Customers for the sorting of Dutch LWP. See also the minutes of a call with a customer on 19 February 2021, paragraph 12.

[142] Replies to question 23 of Questionnaires Q1 – Competitors for the sorting of Dutch LWP and of Q2 - Competitors for the sorting of Dutch LWP located in Germany. See also question 18 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

(124) Therefore, the Proposed Transaction would likely eliminate PreZero's main competitive constraint.

5.1.3. Analysis of the spare capacity in the market

Notifying Party's view

(125) The Notifying Party acknowledges that, due to the low marginal costs of LWP sorting plants, these sorting plants need to be operated at almost full capacity to be profitable.[143] Notably, in order to be profitable, a sorting plant must operate at 90% of its capacity.[144] It specifies that limited spare capacity is however irrelevant, as competition takes place when contracts expire (and capacity is thus opened up), which occurs regularly. Concretely, in the Netherlands the contracts typically have a length of three to four years (and in Germany they are awarded on an annual basis).[145] As a result, the Notifying Party argues that, post-merger, PreZero would not have market power because a number of the Parties' contracts will expire at the end of 2022 and these volumes could be lost to competitors.[146]

Commission's assessment

(126) The Commission acknowledges that at times information on spare capacity may offer a somewhat static view of the market, since contracts expire regularly, which liberates new capacity. However, while it is true that at expiration of the contracts new capacity is added to the market, at that moment also more demand needs to be satisfied. Therefore, if demand is relatively stable, the overall amount of spare capacity in the market will likely remain unchanged, albeit its distribution among the different players may vary as contracts expire and new ones are adjudicated, which the Commission will take into account in its assessment.

(127) LWP sorting plants need to operate at 90% in order to be profitable (which means that any new entrant will need to ensure that most of its new capacity is reserved to be profitable). For the same reason, the unused or spare capacity in the market tends not to exceed 10% of the total capacity. Once this level is reached, the incentives to expand capacity will decrease or disappear altogether as any new capacity investment runs the risk of being unprofitable in the absence of an increase in demand. Because of this structural limitation, spare capacity becomes a critical element to assess the degree of market power. In fact, it is the spare capacity in the hands of competitors that will determine their ability to prevent or defeat any price increases by the merged entity post-transaction.

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143 Notifying Party's White Paper 1, submitted on 5 March 2021, paragraph 62, and paragraph 483 of the form CO.

144 See footnote 313 of the Form CO. This has been confirmed in the market investigation, although with some minor differences in the percentages: Dutch competitors have provided a slightly lower figure (80-85%, see replies to question 26 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands), and German competitors a slightly higher one (95%, see replies to question 34 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany).

145 See paragraphs 515, 591, 647 of the Form CO and Notifying Party's White Paper 1, submitted on 5 March 2021, paragraph 96

146 See Notifying Party's White Paper 1, submitted on 5 March 2021, paragraphs 63-65. In particular, the Parties point out to the following contracts which are due to expire by the end of 2022: (i) for PreZero, […]; (ii) for the Target, […].

(128) The Commission will assess, first, the spare capacity in the hands of competitors in the Netherlands (which are the closer to the Parties), and second, the spare capacity in the hands of out-of-market competitors (which are more distant competitors to the Parties).

(A) Spare capacity of Dutch LWP sorting plants

(129) Table 4 offers an overview of the spare capacity of the different LWP sorting plants located within the Netherlands.[147]

Table 4: Spare capacity of Dutch plants (2020)

Company	Plant location	Total capacity (in Kt)	Volumes sorted (in Kt)	Spare capacity	Spare capacity (in Kt)
PreZero	Zwolle	[…]	[…]	[20-30]%[148]	[…]
SUEZ	Rotterdam	[…]	[…]	[10-20]%	[…]
Combined		[…]	[…]	**[10-20]%**	[…]
PRA	Amsterdam	[…]	[…]	[0-5]%	[…]
Attero	Wijster	[…]	[…]	[5-10]%	[…]
Omrin	Heerenveen	[…]	[…]	[5-10]%	[…]
TOTAL		*329*	*291*	*12%*	*38*

Source: Form CO, Table 20 and Annexes 6-D and 7.

(130) Table 4 reflects that, although the total amount of spare capacity is not negligible (38 kt, representing 12% of the total installed capacity in the Netherlands), [70-80]% of that spare capacity ([…] kt) is in the hands of the Parties. The spare capacity in the hands of other Dutch competitors ([…] kt) represents [0-5]% of the total capacity of Dutch plants, [0-5]% of the total amount of LWP volumes sorted in Dutch plants and, most importantly, only [0-5]% of the Parties' combined capacity post-transaction, and [20-30]% of their combined spare capacity.

(131) Essentially, this means that for any of the Parties' customers with a demand higher than […] kt[149] or any customer of the Parties' competitors with an increase in demand higher than […] kt wanting to sort its LWP within the Netherlands – as many prefer to do, see Section 4.2.2.2(C) – the Parties will continue to be or become an unavoidable trading partner. It is true that for smaller customers with very limited sorting needs (e.g. small municipalities), it would be easier to find some spare capacity.[150] However, as the Parties indicate and as will be explained in Section 5.1.4.2, these customers represent a minority of demand (only […]% of the

147 For simplification purposes, PRA is included in the Table, although it could considered a less close competitor to the Parties (see paragraph (113)). However, given its limited capacity, its inclusion as no appreciable effect on the assessment.

148 The Zwolle plant only became operational midway through 2020. The decision to build the Zwolle plant however was premised on it being used at […]% of capacity, as per the Notifying Party's reply to RFI 4, Annex 5.1 page 5.

149 To put in the right context the […] kt of spare capacity that all Dutch competitors have, it suffices to note that the smaller contract the Parties currently have in force is for […] kt.

150 The responses to the market investigation, indeed, reflect that smaller customers often do not see the Parties as unavoidable (see replies to question 23 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.).

total demand of the market, according to the Parties' own estimates[151]) and, most importantly, will disappear as customers as of 2023 given that Afvalfonds will then take over the responsibility for their LWP sorting needs.[152] Therefore, for the customers representing the large majority of the market, the combined spare capacity in the Netherlands of the Parties' closer competitors does not seem sufficient to meet their demand.

(132) In this context, the Notifying Party's argument that, post-merger, PreZero would not have market power because a number of the Parties' contracts will expire at the end of 2022 and these volumes could be lost to competitors is ineffective. The data on spare capacity shows that these contracts could not be lost to any other competitor in the Netherlands, since the spare capacity of all Dutch competitors combined is lower than the volumes of each of those contracts. While customers could opt to divide their needs into multiple smaller contracts and in that way divert sufficient demand away from the merging entity to make its operations unprofitable, this solution would probably be ineffective to compensate the merged entity's marker power. First because the capacity that could effectively be diverted (8 kt according to current spare capacity figures) would be extremely limited. Second, because since the merged entity's capacity would still be indispensable to meet the customers' entire demand at a given moment, the Parties will likely retain considerable bargaining power even when negotiating smaller contracts for which there could still be some competing capacity.[153] This bargaining power could be further reinforced by the fact that a considerable portion of the demand in the market[154] is adjudicated in private negotiations, and is therefore not subject to public tender laws aiming at protecting smaller bidders.

(133) In sum, post-transaction the merged entity would control [70-80]% of the spare capacity in the Netherlands. This means that for customers representing the large majority of the market, the combined spare capacity of Dutch competitors would not be sufficient to meet their demand. As a result, the merged entity will be an indispensable trading partner for Dutch LWP sorting customers.

(B) Spare capacity of out-of-market competitors

(134) In this Section, the Commission will analyse whether customers would have the ability to switch a significant part of their demand to German competitors in case the merged entity were to increase prices post-transaction.

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151 See the Target's estimates provided in its reply to RFI 14, paragraph 17.

152 According to the Notifying Party, in 2023, Nedvang and RKN will be the only two customers, representing 100% of the demand. The limited volumes currently organized by some municipalities will shift to the two largest customers (Nedvang or RKN), see Notifying Party's reply to RFI 14, paragraphs 18, 19. See Section 5.1.4 for more details.

153 The same could be said of the contracts of other Dutch competitors which may expire in the next years. Admittedly, customers would always have the choice to renew those contract with the same sorter. Also in these cases, though, the Parties' perceived indispensability for future contracts could translate into an increased bargaining power.

154 In particular, the demand represented by Nedvang, a private organisation which is not subject to public tender rules. According to the Parties, Nedvang currently represents 42% of the total demand of the market, a percentage that will increase as of 2023 when smaller customers will exit the market (see Notifying Party's replies to RFI 14, paragraph 18-19). For more details, see Section 5.1.4).

(135) The Notifying Party argues that since LWP sorting plants need to operate at near full capacity, there is an incentive for German competitors to fill any spare capacities they might have by sorting additional Dutch LWP,[155] especially in view of the fact that (i) contracts in the Netherlands are awarded for longer periods than in Germany,[156] and that (ii) sorting Dutch LWP might be more profitable, mainly because prices for the sorting of LWP are higher in the Netherlands than in Germany.[157]

(136) Table 5 offers an overview of the spare capacity of the different sorting plants in Germany that compete for the sorting of Dutch LWP.

Table 5: Spare capacity of German plants (2020)

Company	Plant location	Total capacity (in Kt)	Volumes sorted (in Kt)			Spare capacity (in %)	Spare capacity (in Kt)
			Total (in Kt)	Dutch LWP (in kt)	German LWP (in Kt)		
Alba	Marl	[…]	[…]	[…]	[…]	[20-30]%	[…]
SUEZ	Ochtendung	[…]	[…]	[…]	[…]	[0-5]%	[…]
Schönmackers	Kerpen/ Kempen	[…]	[…]	[…]	[…]	[10-20]%	[…]
Hubert Eing	Gescher	[…]	[…]	[…]	[…]	[5-10]%	[…]
Augustin	Meppen	[…]	[…]	[…]	[…]	[10-20]%	[…]
TOTAL		**530**	**454**	**169**	**285**	**14%**	**75**

Source: Form CO, Table 20 and Annexes 6-D and 7 and competitors' non-confidential responses to the market investigation.

(137) As Table 5 shows, with the exception of Alba, the spare capacity in the hands of German competitors is very limited and the total amount (75 kt) is still less than the capacity of each of the Parties.

(138) Moreover, the Commission has been able to verify that the capacity available for German competitors to react to a price increase by the merged entity post-transaction would in reality be considerably lower than 75 kt and, possibly, only slightly above 30 kt or even less in the future. First of all, sorting facilities do not achieve a 100% utilisation rate, since factors such as downtimes for maintenance need to be factored in, which means the available capacity is always less than the figure resulting from subtracting the used capacity from the total capacity.[158] Second, the spare capacity of German LWP sorting plants, although theoretically available for the Dutch LWP sorting market,[159] also needs to serve the German LWP sorting market in case of an increase of the sorting needs of customers in that market, which constitutes the majority of most of these plants' business.[160] Third, as regards specifically […]'s plant – where most of the spare capacity would be concentrated – the Commission has found that due to recent contractual commitments, its available capacity is

155 See Notifying Party's White Paper 1, submitted on 5 March 2021, paragraphs 70-73.

156 Three/four years in the Netherlands vs. one in Germany.

157 The market investigation has indeed confirmed that prices in Germany are 20% higher than in the Netherlands (see replies to question 17 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany).

158 Notifying Party's White Paper 1, submitted on 5 March 2021, footnote 37.

159 As […] has confirmed (see […]'s reply to RFI 8, paragraph 5.1).

160 In fact, as Table 5 shows, most of the capacity of German plants is used to serve German customers.

significantly lower than the […] kt reflected in Table 5 and that in the next years its overall capacity will need to be reduced by up to 10% to improve its sorting quality in order to meet new regulatory targets.[161] Fourth, other competitors have also indicated to the Commission that their spare capacity is even more limited than what the non-confidential figures reflected in Table 5 show. In short, the combined spare capacity in the hands of all German competitors is also very limited, currently amounting to about [10-20]% of the combined capacity of the Parties and less than the volumes of the smallest contract the Parties currently have in force. This capacity combined would be insufficient to satisfy the demand of the main customers representing the large majority of the Dutch market. Therefore, as explained above, any attempt by these customers to divert smaller volumes away from the merging entity to render its operations unprofitable would be unlikely considering the latter's bargaining power, and in any case would result in the LWP being transported longer distances and thus in higher transport costs and CO_2 emissions.

(139) In conclusion, even if there were an incentive for German plants close to the border with the Netherlands to fill their spare capacity with Dutch LWP, the Commission finds that the existing levels of spare capacity of competitors would likely be insufficient to discipline the merged entity's competitive behaviour post-transaction.

(140) Regardless of the above, the Commission acknowledges that besides filling-in their spare capacity with Dutch LWP, German competitors could also try to increase the capacity available to the Dutch market by making more capacity available to Dutch than to German customers in future. Plants might choose not to compete for the renewal of German contracts once they expire[162] and to dedicate the resulting capacity to the Dutch market.[163] While this strategy could admittedly increase the spare capacity for Dutch customers in the medium term, it would involve a number of risks since, as explained above,[164] German competitors face economic, administrative and technical challenges to sorting Dutch LWP that Dutch competitors do not face and, most importantly, that they do not have to face when sorting German LWP. Despite the potential higher profitability of sorting Dutch LWP, German competitors who currently focus their activity on German customers are unlikely to have sufficient incentives to sacrifice stable and more certain sales in their primary market in exchange for a hypothetical and more uncertain growth in the Dutch market, where local sorters have a competitive advantage and where customers are perceived to have a national preference.[165] The submissions by German competitors in response to the market investigation suggest that they do not contemplate such a strategic change in the next years, and in fact indicated that, even

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161 See replies to question 26.2 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

162 Sorting LWP contracts in Germany typically have a duration of one year (see Notifying Party's White Paper 1, submitted on 5 March 2021, paragraph 71).

163 Another way would be by allocating part of the volumes currently sorted in their plants next to the Netherlands to other plants in Germany ([…], for instance, has other plants in Germany). However, the effects of any reallocation would be, in the Commission's view, limited, since the spare capacity of the plants that these competitors have in other parts of Germany would also be limited and, in any case, reallocation could only take place in respect of LWP generated in locations sufficiently close to the new plant.

164 See Section 4.2.2.2.

165 See Section 4.2.2.2(C).

taking into account the Proposed Transaction, they do not expect a significant increase in the volumes of Dutch LWP to be sorted in the next years.[166]

(141) Moreover, even if German competitors could make available sufficient spare capacity, switching a part of the demand for the sorting of Dutch LWP to German (or Belgian) out-of-market competitors would be in many instances at the expense of longer transportation distances for the LWP, and thus higher environmental costs in the form of CO_2 emissions, which, as explained in Section 4.2.2.2(B), is one of the elements customers take into account when awarding tenders or contracts.

(142) In conclusion, even if out-of-market competitors had or could make available sufficient spare capacity to satisfy the demand of the main Dutch customers for LWP sorting, these competitors are more distant competitors to the Parties than other Dutch competitors or than the Parties are to each other. Therefore, the Proposed Transaction would result in a in a significant loss of competition in the Dutch LWP sorting market.

(C) Conclusion on spare capacity

(143) In view of the above, the Commission concludes that:

(a) Considering the limited spare capacity in the hands of (Dutch and German) competitors, it is unlikely that customers could switch a significant part of their demand to those competitors in case the merged entity was to increase prices post-transaction. The merged entity would therefore become an unavoidable trading partner as a result of the Proposed Transaction, which would thus threaten to create a dominant position in the Dutch LWP sorting market; and

(b) even if out-of-market competitors were capable of making additional capacity available to the Dutch LWP sorting market, the constraint exerted by these competitors would be significantly lower than the constraint the Parties currently exert on each other and their capacity would risk to be environmentally less efficient.

(144) These conclusions are consistent with the views of market participants consulted in the market investigation. Most customers did not indicate being able to switch a significant amount (more than 100 kt) of LWP volumes currently sorted by Dutch plants to German plants[167] and not a single customer considered itself to be capable of defeating a possible price increase by the merged entity by sending the LWP to other competitors in the Netherlands or in Germany. German sorters indicated that, even taking into account the Proposed Transaction, the amount of Dutch LWP to be sorted in their plants will likely decrease or remain stable.[168] Finally, the larger Dutch customers – which represent more than 80% of the current demand – consider

166 See paragraph (115).

167 Replies to question 24 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

168 Alba's reply to RFI 8, paragraph 4.2 and Hubert Eing's reply to RFI 11, paragraph 4.2 ; Replies to question 28 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

that they will become dependent on the Parties for the sorting of large volumes of LWP.[169]

5.1.4. Demand-side consideration

5.1.4.1. Expected future evolution in demand

Notifying Party's view

(145) In the Notifying Party's view, the outlook for demand for LWP sorting services in the Netherlands in the coming years is uncertain. The Notifying Party submits that despite an increase in population in the Netherlands, overall a waste per capita reduction is expected in the country[170] and identifies three trends which will decrease the amount of LWP to be collected from households and sorted. These include a government strategy (through the Dutch Plastic Pact) to reduce the amount of plastics in packaging by 2025, the implementation of the EU's Single Use Plastics Directive,[171] and the implementation of a deposit scheme for small drinks bottles and cans (which will mean that less plastic waste will be sent to LWP sorting plants).[172] The Target however estimates an annual increase in Dutch LWP volumes at around 2%.[173]

Commission's assessment

(146) Demand for LWP sorting services in the Netherlands is largely driven by the regulatory intervention of the public administrations.

(147) At EU level, the Packaging Directive aims at harmonising national measures on waste management and to reduce the impact of packaging and packaging waste on the environment. The PPWD contains measures designed to prevent the production of packaging waste, and to promote the re-use, recycling and other alternatives to final disposal. Two of the policies enacted by PPWD have a direct impact on the demand for LWP sorting in the Netherlands: (i) recycling targets, and (ii) extended producer responsibility.

(148) First, the PPWD's recycling targets require EU Member States to take the necessary measures to ensure that at least 65% (by weight) of all packaging waste (50% for plastic) will be recycled by 31 December 2025. By 31 December 2030, this target will rise to 70% (55% for plastic). In the Netherlands, these recycling targets have

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169 See replies by Nedvang and RKN/Midwaste to question 23 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

170 See paragraph 598 of the Form CO.

171 According to the Notifying Party, the Single Use Plastics Directive provides that certain single-use plastic products (cotton bud sticks, cutlery, plates, straws, stirrers, sticks for balloons, cups, food and beverage containers made of expanded polystyrene, and all products made of oxo-degradable plastic) will be banned from 3 July 2021. For other single-use plastic products, the Directive provides for a mechanism aiming at limiting their use including through awareness-raising measures. In the Notifying Party's view, the impact of this Directive on the LWP volumes will remain limited, as the single use plastics are predominately non packaging products (see Notifying Party's reply to RFI 14, paragraphs 35, 36).

172 Paragraph 600 of the Form CO.

173 Paragraph 603 of the Form CO.

been implemented in the Packaging Decree 2014.[174] These regulatory targets imply that demand is expected to be relatively inelastic, and that therefore an increase of prices is not expected to lead to a decrease in demand.

(149) There seems to be no consensus in the industry as to how demand will evolve. Some market respondents indicated that the increased targets will make demand increase.[175] Others, however, pointed out that they will not change substantially the input of sorting plants – since all household LWP is already sorted – but will increase the output, *i.e.* in the extracted materials, through an improvement of the quality of the sorting process.[176] In line with this, several respondents also explained that the increase in recycling targets would be accompanied by more stringent standards for measuring recycling rates,[177] which will require sorters to improve their processes in order to improve recovery of materials which can be sent to recycling plants, and to reduce residual waste which needs to be disposed of. These improvements in quality are expected to come either through sorting lines being slowed down (resulting in reduced capacity) or in costly investments to improve efficiency.[178]

(150) Second, under the extended producer responsibility scheme, producers are made responsible for the treatment or disposal of consumer goods after use. The PPWD requires all EU Member States to ensure that extended producer responsibility schemes are set up for all kinds of packaging by the end of 2024. In the Netherlands, the Packaging Decree of 2014 set up an extended producer responsibility scheme under which producers and importers of packaged goods are legally responsible for the prevention, collection and recycling of packaging waste. As explained in paragraph (38), Afvalfonds is ultimately responsible for meeting its members' obligations.

(151) At present, the extended producer responsibility scheme for packaging in the Netherlands only applies to household waste, and not to waste collected outside of households (e.g. from companies, sporting clubs, schools, etc.). On 1 January 2023, the scheme will be extended to waste collected through commercial streams. The Notifying Party believes that this will result in an increase in LWP volumes sorted.

(152) The market investigation also showed that there is uncertainty among market participants as to how demand will evolve in the coming years. More than half of customers of LWP services which responded to the market investigation expected the demand for LWP sorting services to increase in the Netherlands in the next 3-5

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174 The Netherlands already achieved the 2025 65% recycling target for all packaging waste and 50% for plastic in 2017 and 2018, respectively (see paragraph 632 of the Form CO).

175 See replies to question 26 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to question 20.1 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

176 See minutes of a call with a competitor on 9 February 2021, paragraph 12; See also replies to question 19 and 20 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

177 See replies to questions 20.1 and 20.2 of Questionnaire Q4 – Customers for the sorting of Dutch LWP; Replies to question 19.1 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium; Minutes of a call with a customer on 5 February 2021, paragraph 25; Minutes of a call with a competitor on 3 February 2021, paragraph 26.

178 See replies to questions 20.1 and 20.2 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.; replies to question 19.1 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium.; Minutes of a call with a customer on 5 February 2021, paragraph 32; Minutes of a call with a competitor on 3 February 2021, paragraph 26.

years.[179] However, only two of the market respondents considered that demand would increase significantly. The rest responded either that it would increase (without providing any estimates) or that it would grow moderately (in line with GDP). However, there were also market respondents that stated that demand will remain stable, and some explicitly pointed out that the sorting market is characterized by significant uncertainty so that they could not be conclusive.[180] A competitor also mentioned that in 2020 the coronavirus pandemic resulted in an increase in packaging waste (possibly due to higher demand for food consumed at home), suggesting that this could result in a decrease in LWP volumes as consumption patterns return to normality.[181]

(153) In short, in view of the Notifying Party's views and the market investigation, it is unclear whether or to what extent demand for LWP sorting services will actually increase in the coming years.

5.1.4.2. Buyer Power

Notifying Party's view

(154) The Notifying Party argues that the concentration of demand in the Netherlands gives customers significant buyer power. According to the Notifying Party, buyer power manifests itself in the fact that Nedvang has significant discretion in organizing its demand. It can for instance award contracts directly to sorters without recourse to a tender procedure, award contracts for relatively lengthy periods of 3-4 years, sponsor expansion or entry, and split demand among multiple different sorters. The Notifying Party also argues that Midwaste/RKN's practice of setting a maximum sorting price in its tenders is illustrative of buyer power.[182]

Commission's assessment

(155) In the Netherlands, two customers account for the majority of the demand for LWP sorting. As explained above (paragraphs (38) and (150)), the extended producer responsibility scheme in place in the Netherlands means that Afvalfonds and Midwaste/RKN account for approximately 85% of the demand.[183]

(156) There are currently four types of customers for LWP sorting in the Netherlands:[184] (i) private company Nedvang (subsidiary of Afvalfonds); (ii) public organizations representing municipalities, which take on responsibility for sorting and recycling under a contract with Nedvang for the sorting and recycling of waste (at present, Midwaste/RKN is the only organization of that kind); (iii) municipalities or groups

[179] See replies to question 19 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

[180] See replies to question 25 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to question 19 of Questionnaire Q4 – Customers for the sorting of Dutch LWP. See also minutes of a call with a competitor on 5 March 2021, paragraph 5.

[181] See minutes of a call with a competitor on 9 February 2021, paragraph 10. The Notifying Party also confirmed that there had been a surplus of LWP in 2020 due to the pandemic (see Form CO, footnotes 259 and 260); Replies to question 25.1 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany.

[182] See Notifying Party's White Paper 1, submitted on 5 March 2021, paragraph 94.

[183] Notifying Party's reply to RFI 14, paragraph 17.

[184] See footnote 365 of the Form CO.

of municipalities which retain the responsibility for the sorting and commercialization, such as ASL Limburg, Haarlem, Den Haag or Omrin; and (iv) waste management companies, such as Veolia, to which the sorting and commercialization services have been subcontracted by municipalities.

(157) Currently, approximatively 5 municipalities or groups of municipalities (i.e. Haarlem, Den Haag, ASL, Voorschoten Rozendaal, Westerkwartier and Omrin) have chosen to retain responsibility for the sorting and commercialization of the LWP.[185] However, from 2023, municipalities will no longer be authorized to keep responsibility for the sorting and commercialization of LWP and will be required either to join an organization regrouping several municipalities such as Midwaste/RKN which organize these activities on behalf of the municipalities, or to transfer these responsibilities to Nedvang. Nedvang will therefore take responsibility for all sorting and recycling of LWP, either directly, or through an agreement with public organizations which have entered into an agreement with Nedvang (at present, only Midwaste/RKN, though Omrin may do so in future). In view of this, the Notifying Party argues that, as from 2023, 100% of the demand will be in the hands of Nedvang and Midwaste/RKN.[186]

(158) Although the Commission acknowledges that there is buyer concentration in the market, this does not necessarily give rise to sufficient buyer power to prevent any risk of competitive harm. In fact, in order for large customers to exert buyer power, it is indispensable that they have at least two options in the market. The market investigation and the analysis of spare capacity indicate that this will not always be the case post-transaction. Rather, customers have indicated that post-transaction the merged entity would be an unavoidable trading partner, outweighing any buyer power which customers in this market might have.[187]

(159) As described in section 5.1.3, considering the limited spare capacity in the hands of (Dutch and German) competitors, it is unlikely that customers could switch a significant part of their demand to those competitors were Schwarz to increase prices post-merger. Current spare capacities in the Netherlands are approximately 38 kt (of which […] kt are in the hands of the Parties), and estimated to be significantly below 75 kt in plants close to the border and capable of sorting Dutch LWP in Germany.[188] By contrast, volumes contracted by large customers like Midwaste/RKN and Nedvang are significantly higher. In one single contract, expiring late 2023, Midwaste/RKN allocated a contract for annual sorting of 90 kt of LWP, split into two parcels. At present, and even with recourse to plants in Germany, it would be impossible for Midwaste/RKN to find sufficient spare capacity for these volumes without relying on the Parties. In circumstances where only one service provider can effectively satisfy the demand, the setting of maximum prices in tender conditions would be ineffective (as a price constraining tool) since the service provider always retains the option not to participate in the tender.

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185 See footnote 365 of the Form CO.

186 Notifying Party's reply to RFI 14, paragraph 18.

187 Minutes of a call with a customer of 5 February 2021, paragraph 35, 37.

188 As explained above, actual spare capacity is estimated to be considerably lower in Germany for a number of reasons, including the fact that the reported 55 kt of capacity at Alba's plant in Marl is no longer accurate as Alba has signed new contracts for 2021.

(160) It is true that smaller customers with limited demand could theoretically find some spare capacity available and would not be entirely dependent on the merged entity.[189] However, as the Notifying Party indicates, these customers represent a minor portion of the current demand[190] and are expected to disappear as from 2023. By contrast, the Parties' largest customers consider that they will be dependent on the Parties for the sorting of a large proportion of their LWP.[191] Moreover, none of the customers responding to the market investigation considered that it would be capable of defeating a price increase by the combined entity post-transaction.[192]

(161) Although it is possible for customers to split their demand into smaller contracts in order to stimulate competition, it will impossible for any of the largest customers to divert the entirety of their demand away from the Parties post-transaction.

(162) In view of the above, the Commission considers that although demand for LWP sorting services is highly concentrated in the Netherlands, the market investigation has shown that customers would nonetheless be highly dependent on the merged entity post-transaction.

5.1.5. Barriers to entry and expansion

Notifying Party's view

(163) The Notifying Party submits that the barriers to enter the market for the sorting of Dutch LWP are low. In support of its assessment, the Notifying Party submits that a facility can be built within two years, the technology is widely available and there are no strong regulatory hurdles. In terms of costs, the Notifying Party includes that the building of its plant in Zwolle incurred costs of up to approximately EUR […]. And while the minimum capacity of an LWP sorting plant should be 50 kt and it should operate at 90% of its capacity in order to be viable, according to the Notifying Party nothing prevents a new entrant from participating in tenders for LWP sorting before having become operational.[193]

(164) According to the Notifying Party, the lack of high barriers to entry is demonstrated by regular entries and expansions. The Notifying Party refers in this regard to a number of recent entries and expansions, including by Alba, whose […] kt plant in Marl (Germany) became recently operational and has secured a […] kt contract for the sorting of Dutch LWP, and by Omrin, who built a […] kt LWP sorting plant in Heereveen (the Netherlands) that started its activities in 2018, as well as by PreZero itself, who built its […] kt LWP sorting plant in Zwolle which started operations in 2020.[194]

(165) The Notifying Party also argues that there are enough LWP volumes on the market to make new entry attractive and viable, and that new entry is expected. In that regard, the Notifying Party submits that PRA is planning on opening a second LWP

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189 Replies to question 22 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

190 Approximately 15%, see paragraph (155).

191 See replies to question 23 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

192 See replies to question 30 of Questionnaire Q4 – Customers for the sorting of Dutch LWP.

193 See paragraphs 504-507 of the Form CO.

194 See paragraphs 495-496 of the Form CO.

sorting plant, and that ASL Limburg, an association representing the municipalities of Limburg, will launch a tender for the building of an additional sorting facility, to be operational in 2024. Furthermore, a number of German LWP sorting plants which currently do not sort Dutch LWP might enter the market, and in Belgium five new LWP sorting plants are being constructed.[195]

Commission's assessment

(166) New entry is unlikely to take place in a sufficiently ample and timely manner to deter or defeat anti-competitive effects of the Proposed Transaction, for the following reasons.

(167) First, most participants to the market investigation pointed to barriers to entry, in the form of costs between EUR 30 and 40 million for the building of an LWP sorting plant, and an average time for carrying out such a project of 2 years with the time period for amortization being 7 years.[196] Various market investigation respondents indicated that *'the funds required to invest in a new facility are high and not easy to attract. […] This gives large companies a real advantage and could push smaller, innovative players out of the market. […] smaller companies cannot afford the risk of building a new facility and do not necessarily have the skills to do it',* that *'[t]he construction of a sorting plant requires tens of millions of euros of investment. Large companies are able to build new plants because of their financial means.'* and that *'the bigger waste management companies are, the more likely they will have enough financial resources to build bigger plants'.* Some respondents further specified their statement by identifying the companies they considered able to invest in a new LWP sorting plant. These stated only a few large players, explaining that only those could credibly afford the risk of an expansion.[197]

(168) The Commission examined the possibility of subsidized entry in this context, and found that while the largest customers for LWP sorting services, notably Nedvang and Midwaste/RKN, can try to incentivise the building of a new plant, even they are not in a position to subsidize such entry. Concretely, whereas these LWP sorting customers can favour new entry by granting a contract with a longer duration, no financial benefits are given. Indeed, responses to the market investigation showed that *'there is a limit to what […] can do to try to subsidize new capacity in that manner, as it will not pay more than the market rate for the LWP'* and that even the largest customers are not in a position to sponsor new entry, as they cannot take over the risk for the building of a new plant from the LWP sorter; at most, such customers can offer contracts with a longer duration than is usual.[198]

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195 See paragraphs 497-503 of the Form CO.

196 See paragraph 504 of the Form CO; Notifying Party's reply to RFI 4, paragraph 18; Replies to question 25 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to question 32 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to question 34 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium.

197 Minutes of a call with a competitor on 16 February 2021, paragraph 18; Minutes of a call with a competitor on 29 January 2021, paragraph 6; Minutes of a call with a competitor on 3 February 2021, paragraph 28; Minutes of a call with a customer on 19 February 2021, paragraph 17.

198 Minutes of a call with a customer on 5 February 2021, paragraph 32; Minutes of a call with a customer on 19 February 2021, paragraph 17.

(169) Furthermore, it appears from the market investigation as well as the Notifying Party's own submissions, that in order to be viable a new plant must have a minimum capacity of 70-100 kt and must operate at a high capacity utilisation rate, of at least 90%.[199] A large majority of market investigation respondents has indicated that this forms an obstacle for entry.[200]

(170) In addition, the fact that expansions have been carried out in or around the Netherlands in the last years could act as a disincentive for new entry/expansion. In fact, as indicated in Section 5.1.3, once the spare capacity in the market reaches 10% of the total installed capacity, the incentives for entry/expansion may decrease or disappear altogether as any new capacity investment runs the risk of being unprofitable. In this sense, it cannot be excluded that these recent entries/expansions may have placed the market in a situation of equilibrium between supply and demand, although uncertainty as to the evolution of demand renders this assessment highly tentative.[201] Nevertheless, this has been corroborated by a major customer which has indicated that, after Alba's expansion, there would currently seem to be some excess capacity in the market.[202]

(171) In short, taking into account (i) the (costs related with) the minimum required investments, (ii) the need for assurance of supply at least for 7 years, (iii) the need to ensure a very high utilisation rate and the consequent structural limitation of capacity in this market, and (iv) the recent expansions and the uncertainty as regards future demand, the Commission takes the view that the current market conditions render the incentive of competitors to expand or enter in the market for the sorting of Dutch LWP very unlikely.

(172) In addition to, and regardless of, the limited ability and incentives for entry or expansion of capacity for the sorting of Dutch LWP, the Notifying Party's argument that new entry is expected was contradicted by the market investigation.

(173) Concretely, only one concrete plan for the building of one small plant in the Netherlands in the coming years was identified in the course of the market investigation. This new plant would represent approximately a 3% increase in LWP sorting capacity in the Netherlands. Indeed, across all market investigation respondents, all but one mentioned that they were not aware of new LWP sorting capacity effectively entering the Dutch LWP sorting market in the coming years.

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[199] Replies to questions 26 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to questions 34 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to question 23 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium. Minutes of a call with a competitor on 29 January 2021, paragraph 5. For completeness, some respondents mentioned slightly lower numbers, of 80-85%, though the majority, including the Notifying Party, indicated a required capacity utilisation rate of 90% or higher. Hence, for the purpose of this Decision 90% was taken as a representative average.

[200] Replies to question 27 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to questions 35 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to question 33 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium; Minutes of a call with a competitor on 27 January 2021, paragraph 22.

[201] As would be indicated by the fact that, as Table 5 shows, the spare capacity of Dutch plants in the market is already above 10%.

[202] Minutes of a call with a customer on 5 February 2021, paragraph 22.

While some respondents listed supposed projects, these were indicated to be based on rumours and were not confirmed by the market player concerned.[203]

(174) Furthermore, while some projects for the building of new LWP sorting plants outside of the Netherlands were announced, none of these will have an impact on the capacity available for sorting Dutch LWP. Notably, as the Notifying Party indicated, in Belgium five LWP sorting plants will become operational in the coming years, operated by PreZero, Indaver, Valodec, Valtris and Sitel. The construction of these plants is connected to revisions to the Belgian LWP collection system in 2019, namely the introduction of the 'New Blue Bag', whereby households will be able to sort all types of LWP.[204] While the Notifying Party assumes that the construction of these plants will lead to overcapacity in Belgium, possibly translating in capacity available for the sorting of Dutch LWP, the market investigation results showed that none of the companies building a new LWP sorting plant expects the capacity it will make available to sort Dutch LWP to increase in the coming years.[205] The Notifying Party, for its part, confirmed with regard to its new LWP sorting plant in Belgium that no capacity will be available for Dutch LWP.[206] Similarly, the market investigation indicated that only a small amount of additional capacity would be created in Germany, though respondents also confirmed expecting no changes in the capacity that will be available for sorting Dutch LWP.[207]

(175) For these reasons, the Commission considers that new entry is not likely, timely and sufficient to deter or defeat anti-competitive effects brought about by the Proposed Transaction.

5.1.6. Conclusion on horizontal non-coordinated effects – sorting of Dutch LWP

(176) In view of the above, the Commission considers that the Proposed Transaction raises serious doubts as to its compatibility with the internal market with regards to the sorting of Dutch LWP either (i) by the creation of a dominant position and/or (ii) by the elimination of important competitive constraints that the Parties had exerted upon each other and a reduction of competitive pressure on the remaining competitors.

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[203] Replies to questions 20, 22, 23 of Questionnaire Q1 – Competitors for the sorting of Dutch LWP located in the Netherlands; Replies to questions 30, 31 of Questionnaire Q2 – Competitors for the sorting of Dutch LWP located in Germany; Replies to questions 26, 30, 31 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium; Replies to questions 25 of Questionnaire Q4 – Customers for the sorting of Dutch LWP; Minutes of a call with a competitor on 9 February 2021, paragraph 19; Minutes of a call with a customer on 3 February 2021, paragraph 22; Minutes of a call with a competitor on 5 March 2021, paragraph 6; Minutes of a call with a customer on 19 February 2021, paragraph 17.

[204] As explained by the Notifying Party, in its reply to RFI 4, paragraph 36.

[205] Replies to question 28 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium.

[206] Notifying Party's reply to RFI 10, paragraphs 28, 29.

[207] Reply to question 28 of Questionnaire Q3 – Competitors for the sorting of Dutch LWP located in Germany and Belgium.

5.2. Horizontal non-coordinated effects – collection of hollow glass

Introduction

(177) The overlaps of the Parties' activities in relation to the collection of hollow glass differ depending on the exact geographic market considered. Concretely, although the Parties' activities for the collection of hollow glass overlap both at a regional level (in the Bielefeld region[208]), as well as at national level in Germany, the Proposed Transaction would only give rise to an affected market at the level of the Bielefeld region. For that reason, the below competitive assessment will only concern the collection of hollow glass in the Bielefeld region.

Notifying Party's view

(178) The Notifying Party submits that the Proposed Transaction would not lead to competition concerns, for the following reasons.

(179) First, the Notifying Party submits that collection companies compete on a national level, as larger collection companies operate throughout the country, tenders are organised nationally, the legal framework is predominantly determined at national level and barriers to enter at regional level are low.

(180) Second, with regard to the Bielefeld region specifically, the increment brought about by the Proposed Transaction is limited[209] and the Parties focus on different districts within this region. Furthermore, the Parties face many strong competitors, such as Remondis, August Meyer and Reiling Glass Recycling.[210]

Commission's assessment

(181) As a preliminary note, the Notifying Party's arguments in relation to the national scale of competition were partly confirmed by the results of the market investigation. Indeed, as mentioned above in Section 4.3.2, the results of the market investigation confirmed that some larger companies operate nationally, that tenders are open to market participants nationwide, and the legal framework is set by nationally applicable rules. However, some regional and local elements were also brought to light. For example, the market investigation pointed to the presence of regional and local market players and to the existence of price differences across different regions in Germany. For this reason, the Commission has left open whether the market's geographic scope is national or narrower, and will assess the competitive impact of the Proposed Transaction on the only potentially affected market, in the Bielefeld region.

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208 In line with the approach taken by the Bundeskartellamt and suggested by the Notifying Party, the starting point for defining this regional area is the Target's location in Bielefeld, and then including two layers of adjoining districts: (i) the immediate adjoining districts *i.e.* Gütersloh and Lippe, and (ii) the outer adjoining districts *i.e.* Herford, Soest, Paderborn, Höxter, Holzminden, Hameln-Pyrmont, Schaumburg, Minden-Lübbecke, Osnabrück, Warendorf and Steinfurt.

209 Concretely, the Target's activity in the area of hollow glass collection in Bielefeld is rather incidental and covers only one contract of the 16 currently in place in the region. See Notifying Party's reply to RFI 15, paragraph 14.

210 Paragraphs 302-330 of the Form CO.

(182) For the collection of hollow glass in the Bielefeld region, the Notifying Party submits that the market shares are the following.

Table 5: Sorting of hollow glass in the Bielefeld region in 2020

Company	Volumes (kt)	Share in %
Schwarz	[…]	[40-50]
Target	[…]	[5-10]
Combined	[…]	**[40-50]**
Reiling Glass Recycling	[…]	[20-30]
August Meyer	[…]	[10-20]
ARGE NW020-GE Kreis Paderborn	[…]	[5-10]
ARGE DS Glas Kreis Warendorf	[…]	[5-0]
Remondis Recycling	[…]	[0-5]
Total	93	100

Source: Form CO and Notifying Party's reply to RFI 15

(183) Notwithstanding the merged entity's significant market share for the collection of hollow glass in the Bielefeld region, the Commission ultimately considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market as a result of horizontal non-coordinated effects, for the following reasons.

(184) First, the Parties' market position is constrained in the short term as new contracts will be tendered out in the next years and there are sufficient credible bidders in the market.

(185) In fact, the market investigation respondents have explained that contracts for collection services for hollow glass are tendered out regularly, with the price appearing to be the determining– and according to various respondents the only – criterion of selection of the preferred bid.[211] In that context, the large majority of market investigation respondents, including competitors and customers, has also stated that they do not consider the Parties to have any competitive advantage vis-à-vis other companies active in the Bielefeld region.[212]

(186) At the same time, the market investigation has shown that customers consider that they would have sufficient alternative collectors of hollow glass to turn to should the merged entity refuse to provide collection services or otherwise provide these services at significantly worse conditions in the Bielefeld region, and vice versa that competitors consider that they would be able to present as an alternative to the merged entity for the collection of hollow glass in the Bielefeld region in such a

[211] Replies to question 15 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 13 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region. The Notifying Party has specified that the majority of the 16 contracts currently in place in the Bielefeld region will expire in the coming 2 years. See Notifying Party's reply to RFI 15, paragraph 5.

[212] Replies to question 17 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 15 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region.

case.[213] Therefore, there appears to be a sufficient number or credible bidders post-transaction to compete for the new contracts.

(187) Second, on the barriers to enter a new region for the collection of hollow glass, market investigation respondents revealed that while the current contractor has a small advantage vis-à-vis others, this is true for all regions, and that in any case the investments which would be needed for entry are rather limited. Concretely, this requires only the set-up of the logistical infrastructure, such as bottle banks, trucks (with a crane that can handle the specific dimensions of the bottle banks), loading and parking space and personnel, some of which may be rented, leased or subcontracted.[214]

(188) In any case, there will be five remaining competitors already operating in the Bielefeld region who would not need to face these investments in order to expand their operations in the region and bid for new contracts. Nothing would seem to prevent customers from resorting to these competitors in future contracts if the Parties were to refuse to provide collection services or provide these services at significantly worse conditions.

(189) This assessment was largely confirmed in the market investigation, across both competitors and customers, as a majority of respondents does not expect a price increase in the collection of hollow glass in the Bielefeld region as a result of the Proposed Transaction.[215]

(190) For these reasons, the Commission takes the view that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market as regards the collection of hollow glass in the Bielefeld region.

5.3. Vertical effects

(191) The Commission has analysed the existence of three potential vertical links identified by the Parties: (i) between the collection of LWP and the collection of I&C waste[216] (both upstream) and the sorting of LWP (downstream), (ii) between the sorting of LWP (upstream) and the commercialisation of LWP (downstream), and (iii) between the collection of I&C waste (upstream) and the Notifying Party's grocery retail activities (downstream).

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[213] Replies to question 16 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 14 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region; Minutes of a call with a competitor on 2 February 2021, paragraph 12; Minutes of a call with a customer on 2 February 2021, paragraphs 10-11.

[214] Replies to questions 18-19 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 16-17 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region; Minutes of a call with a competitor on 2 February 2021, paragraphs 6-7; Minutes of a call with a customer on 2 February 2021, paragraph 8.

[215] Replies to question 22 of Questionnaire Q5 – Competitors for the collection of hollow glass in the Bielefeld region; replies to question 20 of Questionnaire Q6 - Customers for the collection of hollow glass in the Bielefeld region.

[216] Potentially segmented on the basis of whether the waste is commercial, industrial, or demolition and construction waste. As mentioned before in paragraph (12) and footnote 18, for the purpose of this Decision the Commission refers to 'I&C waste' while leaving the exact scope of the product market open, as the assessment does not differ irrespective of the exact relevant product market considered.

5.3.1. Collection of LWP and collection of I&C waste (both upstream) and the sorting of LWP (downstream)

(192) The Target collects LWP (with a [5-10]% market share) and I&C waste (with a market share below 5% under any plausible product or geographic market definition) in the Netherlands, and both Parties are active in LWP sorting in the Netherlands (and would have a combined market share in excess of 30% under any plausible geographic market definition).

(193) However, from a commercial perspective, there is no vertical link between these two activities. Indeed, in the Netherlands collecting entities do not themselves decide who will sort waste volumes. These decisions can only be made by Nedvang, public organisations such as Midwaste/RKN and the municipalities.[217] Consequently, the Parties are not in a position, even theoretically, to determine the vertical integration of their collection and sorting services. As such, the Proposed Transaction could not possibly result in customer or input foreclosure.[218]

(194) Therefore, the Commission considers that the Proposed Transaction does not give rise to any vertical link between the Parties[219] and, for that reason does not raise serious doubts as to its compatibility with the internal market as a result of vertical effects between the collection of LWP or I&C waste and the sorting of LWP, irrespective of the market definition upheld.

5.3.2. Sorting of LWP (upstream) and commercialisation of LWP (downstream)

(195) Similarly, the Proposed Transaction does not appear to result in a vertical link between the sorting of LWP (upstream) and the commercialisation of LWP (downstream).

(196) Indeed, in practice, an LWP sorting facility either acquires ownership of the LWP it sorts, or the ownership is retained by the customer. If the LWP sorter takes ownership of the LWP it sorts, it then commercialises the output of its sorting process. If the ownership of the LWP remains with the customer however, this customer will itself arrange for the sorted fractions to be commercialised. As such, either both of these activities are entirely internalised, or the sorted LWP remains the customer's property, so that this customer takes care of the commercialisation. For that reason, the Proposed Transaction could not create any risk of input or customer foreclosure. And while commercialisation can also be done by a trader, who engages

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[217] Some municipalities have subcontracted their waste management services to private companies (e.g. Veolia), but none of them to the Parties. In any case, municipalities will no longer be authorized to keep responsibility for sorting and commercialization of LWP as from 2023.

[218] From 2023, with the expansion of Extended Producer Responsibility, this will also be applicable to LWP coming from the commercial waste stream.

[219] According to paragraph 4 of the Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ('Non-horizontal Guidelines'), OJ C 265, 18.10.2008, '*[v]ertical mergers involve companies operating at different levels of the supply chain, for example, when a manufacturer of a certain product (the 'upstream firm') merges with one of its distributors (the 'downstream firm') [...]*'. Footnote 4 clarifies that '*the terms 'downstream' and 'upstream' are used to describe the (potential)* ***commercial relationship*** *that the merging entities have with each other. Generally the commercial relationship is one where the 'downstream' firm purchases the output from the 'upstream' firm and uses it as an input in its own production, which it then sells on to its customers*'. Therefore, in the absence of a commercial relationship, there cannot be any vertical overlap between the Parties.

in mere trading activities (*i.e.* commercialises LWP fractions that have not been sorted by itself), as neither of the Parties is active in such trading activities no vertical relationship arises from the Proposed Transaction in this regard.

(197) For these reasons, the Commission considers that the Proposed Transaction does not give rise to any vertical link between the Parties and, for that reason, does not raise serious doubts as to its compatibility with the internal market as a result of vertical effects between the sorting of LWP and the commercialisation of LWP, irrespective of the market definition upheld.

5.3.3. Collection of I&C waste (upstream) and grocery retail (downstream)

(198) The Notifying Party's LIDL and Kaufland grocery retail stores in Germany, Luxembourg, the Netherlands and Poland, generate waste and are therefore customers for the collection of commercial waste. This would give rise to a potential vertically affected market in Luxembourg, where the Target's share on the market for the collection of non-hazardous commercial waste is approximately [70-80]%,[220] while the Notifying Party's share of the retail market is approximately [0-5]%. The Notifying Party further submits that its share of demand for commercial waste collection services is approximately [0-5]%, lower than its share on the downstream retail market.[221]

(199) The Notifying Party argues that services for the collection of commercial waste are not an important input for the operation of grocery retail stores as such services are not an important cost factor for a retail business. The Notifying Party estimates that the collection of commercial waste accounts for less than […]% of a retail business' operating costs. This means that waste collection accounts for a smaller proportion of the business' costs than electricity, personnel, leasing and marketing.

(200) The Commission takes the view that there does not seem to be a vertical relationship between the Parties within the meaning of paragraph 4 of the Non-horizontal Guidelines. In fact, waste collection services purchased by a retail business cannot be considered to constitute an '*input in its own production, which it then sells on to its customers*'.[222] Retail businesses do not incorporate waste collection services in any way into their production process or into the products or services they offer to their customers.

(201) However, even if these markets were considered to be vertically related, no competition concerns as a result of vertical effects would arise, for the following reasons.

(202) First, the Commission considers that, for the purposes of the present Decision, any hypothetical input foreclosure would not raise any competition problems since waste collection services would not be an 'important input' for the downstream activity within the meaning of paragraph 34 of the Non-horizontal guidelines: in the first place, the collection of commercial waste accounts for less than […]% of a retail

220 The Target's share would be above 30% on any plausible sub-segmentation.

221 See paragraphs 395 *et seq.* of the Form CO.

222 See the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, footnote 4.

business' operating costs, which is a smaller proportion of the business' costs than electricity, personnel, leasing and marketing. In the second place, it does not seem that the collection of waste can be considered a critical component of grocery retail businesses without which they could not effectively sell their products on the market. In the third place, waste collection does not represent a significant source of product differentiation for supermarkets.

(203) In any case, the Commission takes the view that the Proposed Transaction will not lead to input foreclosure, as the merged entity would have neither the ability nor the incentive to engage in an input foreclosure strategy.

(204) Regarding the merged entity's ability to foreclose, although the Target has a very significant position in the upstream market for commercial waste collection in Luxembourg, other providers of similar services, such as Veolia active in neighbouring France, could easily enter the market.

(205) As regards the merged entity's incentive to engage in input foreclosure, given that waste collection services form a very small proportion of a retail business' costs, such a strategy would not have a significant impact on the competitiveness of downstream rivals, and would not result in downstream demand being diverted away from foreclosed rivals. Nor would such a strategy allow the merged entity to benefit from higher price levels downstream, as it would be unlikely to succeed in significantly raising rivals' costs.

(206) Second, the Commission takes the view that the Proposed Transaction will also not lead to customer foreclosure, given the Notifying Party's low share of demand for commercial waste collection services in Luxembourg ([0-5]%).

(207) For these reasons, the Commission considers that the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market as a result of vertical effects between the retail activities and the collection of I&C waste irrespective of the market definition upheld.

6. PROPOSED REMEDIES

(208) In order to render the concentration compatible with the internal market, the Notifying Party has modified the notified concentration by entering into the following commitments (the 'Commitments')[223], which are annexed to this Decision and described in detail in the Form RM, and form an integral part thereof.

(209) Notably, on 17 March 2021, the Notifying Party submitted a set of remedies ('Initial Commitments'), which the Commission market tested from 18 March 2021 to 26 March 2021. On 31 March 2021, the Commission communicated to the Notifying Party the feedback received by market test respondents, after which the Notifying Party submitted revised commitments and a revised Form RM, on 8 April 2021 (the 'Revised Commitments').

[223] For the purpose of Sections 6, 7 and 8, the 'Commitments' refer to both the Initial and Revised Commitments.

(210) As per the Commitments[224], the Notifying Party proposes to divest the 'Rotterdam plant', an LWP sorting plant in Rotterdam currently owned by SUEZ Recycling and Recovery Netherlands B.V., which is part of the Target.

(211) Specifically, the Notifying Party commits to divest (together the 'Divestment Business'):

(a) All tangible assets necessary for the sorting of LWP at the Rotterdam plant, including [Confidential information on details of the Divestment Business].

(b) Licenses, permits and authorisations necessary for the sorting of LWP at the Rotterdam plant to the extent transferrable under applicable law, related to the sorting capacity and storage of waste, as well as for the export of mixed plastic packaging (the latter during a transitional period).

(c) Sorting contracts, notably the external customers contracts relating to the sorting of LWP, supply contracts for a number of trade flows, and the lease contracts for working equipment.

(d) Customer accounts, orders, and credit records relating to the sorting of LWP at the Rotterdam plant.

(e) The Personnel included in the organisational chart under paragraph 23 of the Schedule to the Commitments.

(f) The Key Personnel, notably the Plant Manager, Production Manager, Watch Leaders and Head of Maintenance.

(g) A number of transitional services, for the Divestment Business to continue to be economically viable and competitive.

(212) In addition, the Notifying Party has entered into related commitments, *inter alia* regarding the separation of the Divestment Business from their retained businesses, the preservation of the viability, marketability and competitiveness of the Divestment Business, including the appointment of a monitoring trustee and, if necessary, a divestiture trustee.

(213) The Notifying Party considers that these Commitments would eliminate any serious doubts which may be identified by the Commission in relation to the sorting of Dutch LWP. In particular, the Notifying Party is of the view that the Commitments fully set off the addition of market shares and capacity in relation to LWP sorting in the Netherlands through the Proposed Transaction, as they would effectively remove the overlap between the Parties for this activity.

[224] The general description below appears both in the Initial and Revised Commitments. The amendments made in the Revised Commitments are explained in detail in Section 7.1.2.

7. ASSESSMENT OF THE PROPOSED REMEDIES

7.1. Suitability of the Commitments to remove serious doubts

(214) The Divestment Business has a sorting capacity of 102 kt, and sorted 92 kt of LWP in 2020, making it the largest sorting facility in the Netherlands both in terms of capacity and in terms of LWP volumes sorted. Furthermore, the Divestment Business is well located to compete for the sorting of Dutch LWP, in Rotterdam and within a short driving distance from the main Dutch population centres, suggesting that it is particularly well placed to serve a significant proportion of demand in the Netherlands. Given that it is also the only plant the Target uses for the sorting of Dutch LWP, these Commitments would result in a removal of the entire overlap resulting from the Proposed Transaction in relation to the sorting of Dutch LWP.

(215) However, specific provisions and the structure of the divestment raised issues identified in the course of the market test, which led to a revision of the Notifying Party's Initial Commitments.

7.1.1. Results of the market test of the Initial Commitments

(216) The results of the market test indicated that overall, in principle the sale of the Divestment Business to a suitable purchaser would be sufficient to remove the competition concerns raised by the Proposed Transaction. Indeed, the overwhelming majority of both competitors and customers that took a position indicated that they consider that the Commitments would remove the competition concerns in respect of the sorting of Dutch LWP.[225]

(217) Market test respondents however did voice concerns with regard to the sharing of facilities between the merged entity and the purchaser, and pointed to a risk of dependency of the purchaser on the merged entity.

(218) Concretely, the Initial Commitments as originally submitted on 17 March 2021 envisaged two scenarios with respect to the tangible assets, with a possibility for the purchaser to choose among those.

(219) The Divestment Business is located on the Rotterdam site, which is currently leased to SUEZ by [Confidential information on details of the Divestment Business]. The Divestment Business includes the LWP sorting plant, which is located in the main building on the Rotterdam site. [Confidential information on details of the Divestment Business].

(220) [Confidential information on details of the Divestment Business].

(221) [Confidential information on details of the Divestment Business].

(222) In the course of the market test, the concern was raised that the shared use [Confidential information on details of the Divestment Business], could result in exchanges of sensitive information, since information on the volumes and capacity

[225] Replies to question 8 of Questionnaire Q7 – Market test of the proposed remedies – Questionnaire to customers; Replies to question 8 of Questionnaire Q8 – Market test of the proposed remedies – Questionnaire to competitors.

of the Rotterdam plant would be [Confidential information on details of the Divestment Business], allowing Schwarz to have access to it.[226]

(223) Some respondents also believed that renting the site from Schwarz could make the purchaser dependent on the merged entity in its operation of the divestment business.[227] If the merged entity were to retain a lease over the site and to sublet parts of the site to the purchaser, the latter would be reliant on the merged entity continuing to do so on market terms. It could also have the effect of hindering the purchaser from deciding to make additional investments in the facilities. Finally, one respondent explained that the use of the Rotterdam facilities was subject to a number of permits regulating the permissible waste volumes and noise and odour emissions that could emanate from the site. According to this respondent, there was a risk that the shared use of these permits could likewise make the purchaser dependent on the merged entity for the operation of the facility.[228]

7.1.2. The Revised Commitments and the Commission's assessment

(224) In order to address the concerns raised during the market test, the Notifying Party amended the Initial Commitments to provide for two alternatives, between which the purchaser will be able to choose. The Notifying Party retained Scenario 2 [Confidential information on details of the Divestment Business].

(225) As such, the Revised Commitments provide that in principle, Schwarz will divest to the purchaser [Confidential information on details of the Divestment Business], including the Divestment Business, [Confidential information on details of the Divestment Business], and facilities such as [Confidential information on details of the Divestment Business] (*i.e.* Scenario 2). Alternatively, in case the purchaser prefers this and [Confidential information on details of the Divestment Business], Schwarz would divest only the Divestment Business (including the respective part of the ground lease and [Confidential information on details of the Divestment Business]), but retain [Confidential information on details of the Divestment Business] and share [Confidential information on details of the Divestment Business]. This would not result in the purchaser having to rent any part of the land or facilities from Schwarz. Although the purchaser could choose to make [Confidential information on details of the Divestment Business] available to Schwarz, this would not result in the purchaser obtaining sensitive information relating to a competitor, as Schwarz would not be operating a competing LWP sorting business on the Rotterdam site.[229]

(226) Moreover, the Revised Commitments no longer include a possibility for the VCCP to assist the purchaser during a transitional period before returning to the Notifying

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[226] Replies to questions 2, 5, and 6 of Questionnaire Q7 – Market test of the proposed remedies – Questionnaire to customers.

[227] Replies to question 6 of Questionnaire Q7 – Market test of the proposed remedies – Questionnaire to customers.

[228] Replies to question 6.1.1 of Questionnaire Q7 – Market test of the proposed remedies – Questionnaire to customers.

[229] The reverse situation, whereby Schwarz would have made the weighbridge available to the purchaser, would have created a risk of information sharing because Schwarz would have had access to confidential information regarding the operation of the Rotterdam plant while continuing to operate an LWP sorting plant at Zwolle.

Party, again to remove any risk of inappropriate exchange of information. Per the Revised Commitments, the VCCP, at the choice of the purchaser, will either be included in the Divestment Business or be retained by Schwarz, in which latter case there would be no possibility for assistance of the purchaser for a transitional period.

(227) The Commission considers that these amendments address the concerns raised during the market test, and that as such the Revised Commitments of 8 April 2021 are suitable to remove the competition concerns raised by the Proposed Transaction.

7.2. Viability and attractiveness of the Divestment Business

(228) The Divestment Business is profitable, with a turnover of EUR […] in 2020, and an EBITDA of EUR […].[230]

(229) The market test has confirmed the viability and attractiveness of the Divestment Business. Concretely, of the market test respondents that replied in this regard, all but one confirmed that the Divestment Business would be viable, and would allow a suitable purchaser to compete effectively and on a lasting basis for the sorting of Dutch LWP.[231]

(230) Based on the market test results, the Commission considers that the Divestment Business is a viable and attractive business. This is further confirmed by the fact that at least five companies active in waste management have expressed a preliminary interest in acquiring the Divestment Business.

7.3. Purchaser criteria and buyers

(231) The Commitments contain the standard requirement that the purchaser (i) be independent from the Notifying Party, (ii) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force, and (iii) be unlikely to create competition concerns.[232]

(232) The Commission's market test aimed at verifying whether these criteria were sufficient or whether further purchaser criteria should be included.

(233) Among market test respondents that expressed a view, a majority believed that the standard criteria would be sufficient and that a potential purchaser would not necessarily need to have specific operational experience in order to operate the Divestment Business as an active competitive force.[233] Nevertheless, respondents unanimously considered that a purchaser with general experience of waste

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230 Paragraph 52 of the revised Form RM.

231 Replies to question 4 of Questionnaire Q7 – Market test of the proposed remedies – Questionnaire to customers; Replies to question 4 of Questionnaire Q8 – Market test of the proposed remedies – Questionnaire to competitors.

232 The same requirements appear in the Initial and Revised Commitments.

233 Replies to question 11 of Questionnaire Q7 – Market test of the proposed remedies – Questionnaire to customers; Replies to question 11 of Questionnaire Q8 – Market test of the proposed remedies – Questionnaire to competitors.

management would be suitable, but that specific experience in the LWP sorting market does not appear to be a necessary condition.[234]

(234) Consequently, the Commission considers that, as provided in the Revised Commitments, any suitable purchaser will need to demonstrate 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.[235] As per the results of the market investigation and the Commission's competitive assessment, a purchaser with waste management experience would likely fulfil these criteria.

7.4. Conclusion

(235) For the reasons outlined above, the Revised Commitments entered into by the Notifying Party are sufficient to eliminate in full the serious doubts as to the compatibility of the Proposed Transaction with the internal market with regard to the sorting of Dutch LWP as a result of horizontal non-coordinated effects. The Commission therefore concludes that, subject to full compliance with the Revised Commitments given by the Notifying Party, the Proposed Transaction would not significantly impede effective competition in the internal market or a substantial part thereof.

(236) The Revised Commitments in section B of the Annex constitute conditions attached to this Decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out in the Annex constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market.

8. CONCLUSION

(237) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the Revised Commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section B of the commitments annexed to the present Decision and with the obligations contained in the other sections of the said commitments. This Decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

[234] Replies to question 13 of Questionnaire Q7 – Market test of the proposed remedies – Questionnaire to customers; Replies to question 13 of Questionnaire Q8 – Market test of the proposed remedies – Questionnaire to competitors.

[235] Paragraph 15(b) of the Revised Commitment Text.

Case M.10047

SCHWARZ GROUP / SUEZ WASTE MANAGEMENT COMPANIES

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (the "***Merger Regulation***"), **Schwarz Group** (the "***Notifying Party***") hereby enter into the following Commitments (the "***Commitments***") vis-à-vis the European Commission (the "***Commission***") with a view to rendering the **acquisition of sole control over several companies which form the recycling and recovery operations of SUEZ in Germany, Luxembourg, the Netherlands, and Poland** (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 6(1)(b) 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 (a), (b) and (c) 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 commits to divest.

Divestiture Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by Schwarz and who has/have received from Schwarz 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 Schwarz 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 Schwarz, and who has/have the duty to monitor Schwarz' 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 15 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.

SUEZ: SUEZ Groupe S.A.S., France

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.

Schwarz: the German Schwarz Group which the acquirers of the Concentration (SB PreZero GmbH & CO. KG, PreZero International GmbH, and SB Dienstleistung KG) are part of. Schwarz is not a subordinate group of companies (and is not incorporated as such), but does form a single economic unit pursuant to para 135 of the Commission's Consolidated Jurisdictional Notice. The acquirers of the Concentration are part of Schwarz and are all incorporated under the laws of Germany, have their registered office at Stiftsbergstraße 1, Neckarsulm, Germany, and are

registered with the Commercial Register at Stuttgart (SB PreZero GmbH & Co. KG under number HRA 737416, PreZero International GmbH under number HRB 772407, and SB Dienstleistung KG under number HRA 721997).

Section B. The commitment to divest and the Divestment Business

Commitment to divest

2. In order to maintain effective competition, Schwarz 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 of these Commitments. To carry out the divestiture, Schwarz 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 Schwarz has not entered into such an agreement at the end of the First Divestiture Period, Schwarz shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 28 in the Trustee Divestiture Period.

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

   (a) by the end of the Trustee Divestiture Period, Schwarz 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 16; 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 42 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.

Structure and definition of the Divestment Business

5. The Divestment Business consists of a sorting facility for lightweight packaging waste in Rotterdam which is currently owned by SUEZ Recycling & Recovery Netherlands B.V. which is a part of SUEZ. 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 and intangible assets (including intellectual property rights);

   (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; all customer, credit and other records of the Divestment Business; and

   (d) the Personnel.

6. In addition, the Divestment Business includes the benefit, for a transitional period of up to […] after Closing and on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current arrangements under which Schwarz or its Affiliated Undertakings supply products or services to the Divestment Business, as detailed 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 outside the providing Schwarz 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 Schwarz 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 Schwarz' remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, Schwarz shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. Schwarz 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.

Hold-separate obligations

8. The Notifying Party commits, from the Effective Date until Closing, to keep the Divestment Business separate from the business(es) it is retaining and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the business(es) retained by Schwarz 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 Schwarz and do not report to any individual outside the Divestment Business.

9. Until Closing, Schwarz shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the business(es) which Schwarz is retaining. Immediately after the adoption of the Decision, Schwarz 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 Schwarz. 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 8(c) of these Commitments. The Commission may, after having heard Schwarz, require Schwarz to replace the Hold Separate Manager.

Ring-fencing

10. Schwarz 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 Schwarz before the Effective Date will be eliminated and not be used by Schwarz. This includes measures vis-à-vis Schwarz' 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. Schwarz 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 Schwarz is required by law.

Non-solicitation clause

11. 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 […] after Closing.

Due diligence

12. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, Schwarz 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

13. Schwarz 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 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). Schwarz 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 days of their receipt.

14. Schwarz 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

15. 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;
    (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.

16. 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 Schwarz 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. Schwarz 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

17. Schwarz 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.

18. If Schwarz 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 Schwarz at that time or thereafter, Schwarz shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

19. 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.

20. The Trustee shall be remunerated by the Notifying Party 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 Schwarz

21. No later than two weeks after the Effective Date, Schwarz shall submit the name or names of one or more natural or legal persons whom Schwarz proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period or on request by the Commission, Schwarz shall submit a list of one or more persons whom Schwarz 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 19 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

22. 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, Schwarz 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, Schwarz 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 Schwarz

23. If all the proposed Trustees are rejected, Schwarz 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 17 and 22 of these Commitments.

Trustee nominated by the Commission

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

II. Functions of the Trustee

25. 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 Schwarz, 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

26. 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 Schwarz 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 8 of these Commitments;

(b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 9 of these Commitments;

(c) with respect to Confidential Information:

- determine all necessary measures to ensure that Schwarz 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 Schwarz before the Effective Date is eliminated and will not be used by Schwarz and
- decide whether such information may be disclosed to or kept by Schwarz as the disclosure is reasonably necessary to allow Schwarz 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 Schwarz or Affiliated Undertakings;

(iii) propose to Schwarz such measures as the Monitoring Trustee considers necessary to ensure Schwarz' 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 Schwarz a non-confidential copy at the same time, a written report within 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 Schwarz a non-confidential copy at the same time, if it concludes on reasonable grounds that Schwarz is failing to comply with these Commitments;

(viii) within one week after receipt of the documented proposal referred to in paragraph 16 of these Commitments, submit to the Commission, sending Schwarz 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.

27. If the Monitoring and Divestiture Trustee are not the same [legal or natural] 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

28. 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 17 and 16 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 Schwarz, subject to the Notifying Party unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

29. 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 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 the Parties

30. Schwarz 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 Schwarz' 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 Schwarz and the Divestment Business shall provide the Trustee upon request with copies of any document. Schwarz 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.

31. Schwarz 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. Schwarz 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. Schwarz 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.

32. Schwarz 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, Schwarz shall cause the documents required for effecting the sale and the Closing to be duly executed.

33. Schwarz 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 Schwarz 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.

34. At the expense of Schwarz, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Schwarz' 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 Schwarz refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Schwarz. Only the Trustee shall be entitled to issue instructions to the advisors.

Paragraph 33 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Schwarz during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

35. Schwarz agrees that the Commission may share Confidential Information proprietary to Schwarz 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*.

36. 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.

37. For a period of 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

38. 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 Schwarz, require Schwarz to replace the Trustee; or

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

39. If the Trustee is removed according to paragraph 38 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 17-24 of these Commitments.

40. Unless removed according to paragraph 38 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

41. The Commission may extend the time periods foreseen in the Commitments in response to a request from Schwarz or, in appropriate cases, on its own initiative. Where Schwarz requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one 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 Schwarz be entitled to request an extension within the last month of any period.

42. 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

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

……
(Signed)
duly authorised for and on behalf of
SB PreZero GmbH & CO. KG, PreZero International GmbH, SB Dienstleistung KG

SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure:

1) The Divestment Business consists of a sorting facility for light weight packaging waste located in Rotterdam.

2) The Divestment Business is currently part of the Recycling & Recovery Operations of SUEZ in the Netherlands. The Divestment Business sorts light weight packaging waste from the Netherlands, and extracts several different recyclable materials, in particular plastic and metal fractions, which are then available for further recycling. For approx. […]% of the volumes, the Divestment Business handles the outbound contracts, i.e. the further recycling. For the remaining […]%, the customer arranges for further recycling and the Divestment Business is only contracted with the sorting of the LWP..

3) […].

4) The transfer of the Divestment Business will take place in the form of a transfer of shares, but not of the entity […]. […] includes […] and a large number of […], i.e. also those with no relation to the LWP sorting business in Rotterdam. Therefore, a new entity will be established, to which the Divestment Business, including the personnel, the relevant assets, the relevant licenses and permits (to the extent legally possible), the lease agreement for the site on which the Divestment Business operates, and the relevant contracts will be transferred. This new entity will be sold to the Purchaser. This facilitates the divestment process for the Purchaser and allows a quick implementation

5) Thus, the entity that currently holds the […] licences, shall not be transferred as such, as the Divestment Business is only a small part of it. The […] licenses cannot be transferred to another entity, because such licenses are granted to the specific requesting legal entity.[Confidential information on details of the commitment].

6) An organisational chart of the Divestment Business including the number of employees is included below.

[Confidential information on details of the commitment]

7) The Divestment Business is currently operated from an industrial site on which also other facilities are operated which are neither part of nor relevant for the Divestment Business, as shown in more detail below. For the implementation of the Commitments, Schwarz proposes to divest the entire site on which the Divestment Business operates, including other activities not relevant for the Divestment Business and allowing for a lease-back of the other activities by Schwarz (unless the Purchaser prefers another solution). This is also explained below.

2. In accordance with paragraph 5 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

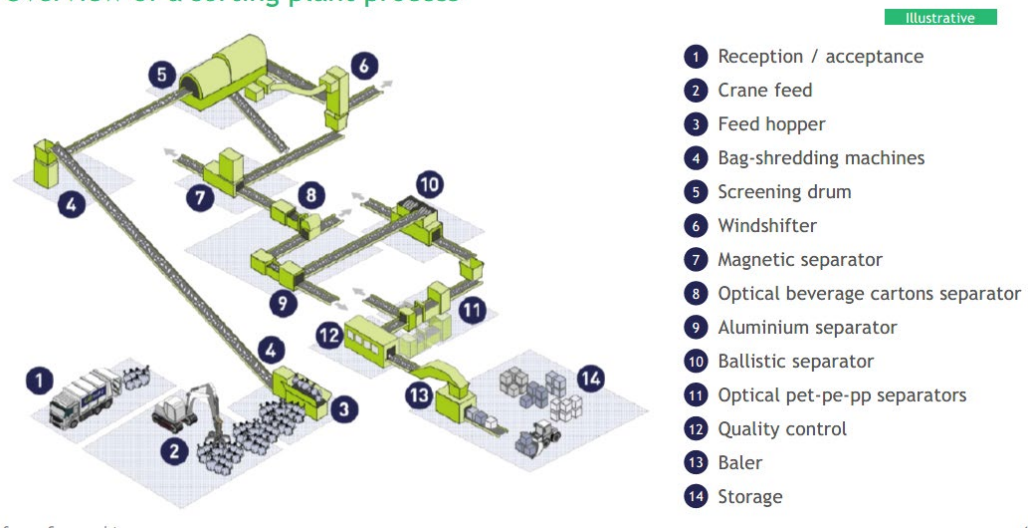
8) The Divestment Business is located at Waalhavenweg 50, Rotterdam, Netherlands. The site Waalhavenweg 50 (the "Rotterdam Site") is owned [Confidential information on details of the commitment].

[…]

9) The Divestment Business includes the light weight packaging sorting facility ("**LWP Sorting Plant**"), which is located in the main building ("**Main Building**") on the Rotterdam Site (large building in the picture above) including the lease agreement. The LWP Sorting Plant consists of (a) a warehouse, (b) sorting machinery, (c) sprinkler, (d) coalfilter (to reduce odour), (e) compactor, (f) shredder, (g) climate control, (h) workshop .

10) The LWP sorting equipment / machinery forms the main part of the tangible assets of the Divestment Business. The figure gives an illustrative overview of the sorting plant process and the relevant machinery.

Overview of a sorting plant process



11) In addition to the equipment owned by the Divestment Business, as outlined above, for the operation of the Divestment Business, there is also working equipment leased by the Divestment Business, including […].

12) Other facilities and equipment of the Target, which are not part of the Divestment Business / LWP Sorting Plant and are not relevant for the operation or the competitive viability of the Divestment Business with a view to LWP sorting ("**Other Business**") are also located on the Rotterdam Site. This Other Business includes […], including […] which is located on the Rotterdam Site next to the LWP Sorting Plant (and separate from the Main Building).

13) There are limited facilities shared by the Divestment Business and the Other Business at the Rotterdam Site ("**Shared Facilities**"). The Shared Facilities include a […], which is used by both the Divestment Business and the Other Business, […].

(b) the following main intangible assets:

14) There are no relevant essential intangible assets. There are no intellectual property rights used in conducting the Divestment Business. To the extent that the Divestment Business currently operates under a brand name of its current owner and operator, such brand names are not essential for its viability and competitiveness. Any purchaser can operate the Divestment Business under its own brand – there are no relevant competitive advantages associated with the current brand name which would not also be associated with the sorting facility (i.e. the Divestment Business) itself.

(c) the following main licences, permits and authorisations:

15) The Divestment Business is authorized to sort […] kt of LWP in the LWP Sorting Plant. As regards the Other Business, the Target is authorized to […] (which is not relevant for the Divestment Business / LWP Sorting Plant). These authorizations have no expiration date.

16) The Rotterdam Site is licensed to store a maximum of […] kt or […] m3 of all waste flows (plastics and non-plastics) at any time. Storage is licensed either inside, outside, in bulk, stored in containers or outside but protected against rain. Licensed storage method is dependent on type of waste. […].

17) The Rotterdam Site has also a number of […] licenses, for mixed plastic packaging and other materials ([…]). Only the […] license for mixed plastic packaging is relevant for the Divestment Business / LWP Sorting Plant. […].

(d) the following main contracts, agreements, leases, commitments and understandings:

18) The Divestment Business has currently […] contracts for the sorting of light weight packaging (i.e. the sole business activity of the Divestment Business) (the "**Sorting Contracts**"). […] These contracts will be transferred to the Purchaser.

19) The Divestment Business has a supply contract for the following trading flows:
[…].
[…].
[…].

20) The Rotterdam Site is subject to […].

21) There are the following lease contracts for working equipment leased by the Divestment Business: […].

(e) the following customer, credit and other records:

22) […].

(f) the following Personnel:

23) The Personnel includes the staff included in the organisational chart below (approx. […] employees […]).
[Confidential organisational chart of the Divestment Business]

24) […].

(g) the following Key Personnel:

25) The Key Personnel for the Divestment Business are (i) the "Plant Manager", (ii) the "Production Manager", (iii) the "Watch Leaders", and (iv) the "Head of Maintenance". […], but hired externally by the Divestment Business. […]. The relevant employees will be transferred to new entity that will be divested. The identified employees are 100% working for LWP Sorting Plant in Rotterdam. The Head of Maintenance will also be transferred.

26) In addition, a "Value Chain Coordinator Plastics" (the "**VCCP**") is relevant for (but not employed by) the Divestment Business, as he organizes the in-bound flow of to be sorted material and the outbound flow of sorted material and also handles the management of commercial contracts. […].

(h) the arrangements for the supply with the following products or services by Schwarz or Affiliated Undertakings for a transitional period of up to […] after Closing:

27) For the Divestment Business to continue to be economically viable and competitive, the following services are required and shall be provided by Schwarz for a transitional period after Closing:
[…]
[…]
[…]
[…]

3. The Divestment Business shall not include:

28) The Target has also a contract with […] for the sorting of LWP ([…]). These volumes are sorted only in SUEZ's facility in […]. This contract is not part of the Divestment Business and the contracted volumes will remain to be sorted in the […] facility (which will be retained by SUEZ post-Transaction).

29) As explained, at the Rotterdam Site, besides the Divestment Business, also the Other Business is currently operated.

30) Schwarz proposes the following scenario for the implementation of the divestment of the Divestment Business:

31) Schwarz divests […], including the Divestment Business, i.e. the LWP Sorting Plant including all relevant assets, the Sorting Contracts, and the relevant Personnel, [confidential information on the details of the commitment].

32) In case the Purchaser prefers a scenario [confidential information on the details of the commitment].

4. If there is any asset or personnel which is not be covered by paragraph 2 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.