

Case No COMP/M.6850 - MARINE HARVEST/ MORPOL

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**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) in conjunction with Art 6(2)
Date: 30/09/2013

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.6850 - MARINE HARVEST/ MORPOL
Commission decision pursuant to Article 6(1)(b) in conjunction with
Article 6(2) of Council Regulation No 139/2004¹**

1. On 9 August 2013, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") by which the undertaking Marine Harvest ASA ("Marine Harvest", Norway) intends to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Morpol ASA ("Morpol", Norway) by way of purchase of shares (the "Transaction"). Marine Harvest and Morpol are hereinafter referred to as "the Parties" or "the Merged Entity" and Marine Harvest is also referred to as "the Notifying Party".

I. THE PARTIES

2. **Marine Harvest** is a Norwegian seafood company listed on the Oslo Stock Exchange which produces farmed salmon and white halibut and offers a wide range of value added products of various seafood species. It has salmon farming and primary processing activities in Norway, Chile, Scotland, Canada, Ireland and the Faroe Islands, as well as white halibut farming and primary processing activities in Norway. Marine

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.

Harvest has secondary processing activities located in Norway, Chile, Ireland, Belgium, France, the Netherlands, Poland, the United States, Japan and the Czech Republic.²

3. **Morpol** is a Norwegian producer and processor of salmon. It produces farmed salmon and offers a broad range of value added salmon products, such as smoked, marinated, fresh and frozen salmon products. It has salmon farming and primary processing activities in Norway and Scotland. It also has secondary processing activities located in Poland, Vietnam and the United Kingdom. Morpol is listed on the Oslo Stock Exchange.

II. THE TRANSACTION

4. On 14 December 2012, Marine Harvest entered into a Share Purchase Agreement (the "SPA") with Friendmall Ltd ("Friendmall") and Bazmonta Holding Ltd. (Bazmonta). Bazmonta is a fully-owned subsidiary of Friendmall, which is in turn controlled by Mr Jerzy Malek. Pursuant to the SPA, Marine Harvest acquired a 48.5% shareholding of Morpol. The closing of this acquisition took place on 18 December 2012.
5. On 15 January 2013, Marine Harvest submitted a mandatory public offer for the remaining shares in Morpol pursuant to the Norwegian Securities Trading Act, representing 51.5% of the shares in the company. Following the settlement and completion of the mandatory offer on 12 March 2013, Marine Harvest acquired 87.1% of the shares in Morpol.
6. The Notifying Party submits that consistent with Article 7(2) of the Merger Regulation, pending the Commission's merger control review, Marine Harvest will not exercise any voting rights or other forms of *de jure* or *de facto* control over Morpol.
7. The Commission, however, notes that Article 7(2) applies to acquisitions of control by means of acquisition of packages of shares from "various sellers" in the context of a public bid or series of transactions in securities including those convertible to other securities admitted to trading on a market such as a stock exchange (so called "creeping bids"). The Commission considers that the exemption of Article 7(2) is therefore not applicable in a case where a controlling stake is acquired by the purchaser of a single package of shares from one seller.
8. In the case at hand, the Commission considers that the acquisition by Marine Harvest of a 48.5% stake in Morpol on 18 December 2012 has already conferred upon Marine Harvest *de facto* sole control over Morpol. As recognised by the Notifying Party, [...].³ As such, the purchase of all the shares held by Friendmall and Bazmonta by the Notifying Party can be considered as sufficient to grant to the latter sole control over Morpol.
9. The Commission therefore takes the view that an infringement of the stand-still obligation in Article 7(1) and of the notification requirement in Article 4(1) of the

² Primary processing includes harvesting and slaughtering of the salmon, head-on/head-off, gutting, and sometimes filleting of the salmon. In the secondary processing, salmon is further processed into other products such as fillets, portions, smoked salmon or ready meal products.

³ Reply to the Commission's request for information submitted on 25 February 2013.

Merger Regulation cannot be excluded in the present case and the Commission may examine in a separate procedure whether a sanction under Article 14(2) the Merger Regulation is appropriate.⁴

III. CONCENTRATION

10. The proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. EU DIMENSION

11. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 2 500 million (Marine Harvest: EUR [...]; Morpol: EUR [...]). Each of them has an EU-wide turnover in excess of EUR 100 million (Marine Harvest: EUR [...]; Morpol: EUR [...]). The Parties achieve a combined aggregate turnover of more than EUR 100 million, while also achieving separately an aggregate turnover of more than EUR 25 million each, in [...]. Neither of the Parties achieves more than two-thirds of its Union-wide turnover within one and the same Member State.⁵
12. The proposed concentration therefore has an EU dimension pursuant to Article 1(3) of the Merger Regulation.

V. APPLICABILITY OF THE EEA AGREEMENT

13. All the salmon products affected by the proposed concentration fall outside the scope of the Agreement on the European Economic Area ("EEA Agreement"). Article 8(3)(a) of the EEA Agreement states that products falling within Chapters 1 to 24 of the Harmonised Commodity Description and Coding System are not covered by the EEA Agreement, unless such products are listed in Protocol 3 of said Agreement. Therefore fish products (including salmon products), which are listed in Chapter 3 (fish) and Chapter 16 (preparations of fish) of the Harmonised Commodity Description and Coding System and are not listed in Protocol 3 of the EEA Agreement, are not covered by the EEA Agreement.
14. The assessment of the impact of the proposed transaction in the EFTA States hence falls outside the jurisdiction of the Commission.

VI. RELEVANT MARKETS

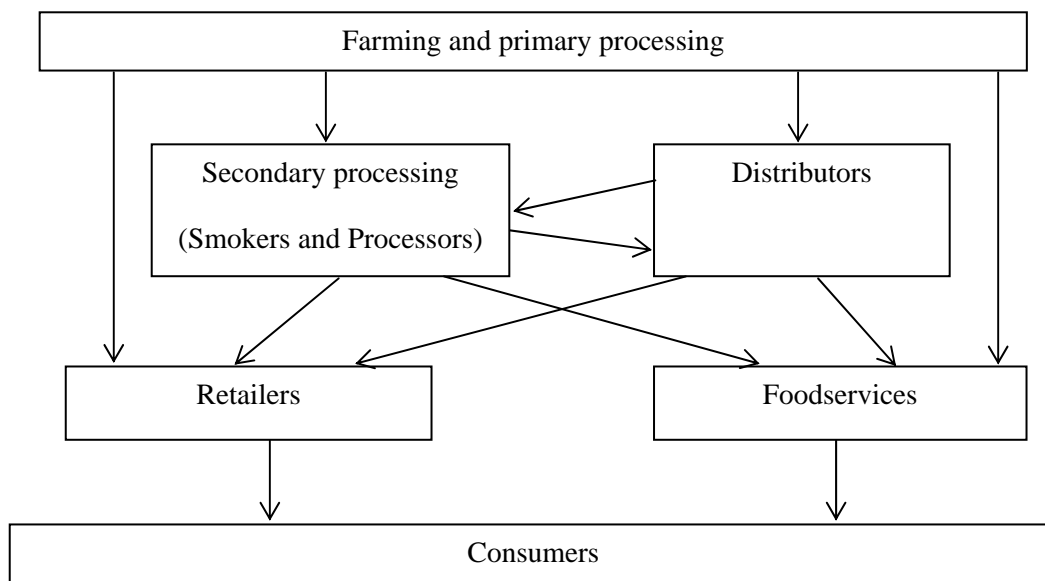
A. INTRODUCTION

15. The proposed concentration concerns the salmon sector, where the Parties are active along the whole supply value chain, from farming, primary processing and secondary processing, to sales to other secondary processors, distributors, retailers and foodservices.

⁴ See Case T-332/09, *Electrabel v Commission* [2012], ECR II-0000.

⁵ Given that control over Morpol was acquired by Marine Harvest prior to Croatia's accession to the European Union on 1 July 2013, Croatia is neither considered for the purposes of the assessment of Union Dimension nor for the purposes of the competitive assessment of this transaction.

16. The value chain of the salmon market is thus illustrated in the graph below:



17. Farming is the activity of growing the salmon from juvenile salmon (called smolt) in fresh water to ready to harvest salmon in seawater, usually in the size range of 4-5 kg. The salmon farming production cycle normally takes about 3 years and it is heavily dependent on the seawater temperature which is different for the various regions and throughout the year.
18. Having reached harvestable size, the salmon is transported to primary processing plants where it is slaughtered and gutted.
19. Salmon which has undergone primary processing is used captively by farmers in their own secondary processing plants and/or is sold to third parties. In the latter case, most of the quantities of salmon are sold either to secondary processors or distributors and some quantities of salmon are also sold directly to retailers and foodservices.
20. Secondary processing includes the transformation of primary processed salmon into value-added products, such as smoked salmon, salmon portions, salmon fillets and ready-made meals. Secondary processors sell these value-added products to retailers, foodservices or distributors.

B. RELEVANT PRODUCT MARKET

1. Introduction to the Notifying Party's views

21. The Notifying Party submits that the relevant product market is the market for production, processing, distribution and selling of salmon including salmon trout regardless of the species of the salmon, the origin, the different treatments (fresh or frozen) and the different production and processing stages.

2. Findings in past merger review cases

22. In a previous case from 2005,⁶ the Commission considered that there is a separate market for the production and sale of farmed salmon (as opposed to wild salmon). In that case, the Commission indicated that its market investigation had not shown that the market for farmed salmon should be further subdivided according to the species (such as Atlantic salmon, Pacific salmon and salmon trout) or origin of the farmed salmon (such as Scottish salmon, Irish salmon or Norwegian salmon), other than Atlantic farmed salmon. However, the Commission ultimately left open the question as to whether Atlantic farmed salmon should be distinguished as a separate market.
23. In the same decision, the Commission also investigated whether organic salmon and smoked salmon should each be distinguished as separate markets. However, these questions were ultimately left open.
24. The market for the production and sale of salmon has been also considered by two National Competition Authorities ("NCAs") – the French Competition Authority⁷ ("FCA") and the Competition Commission of the United Kingdom (the "UK Competition Commission")⁸, in the context of parallel phase II investigations of the same transaction. In the course of their investigations, the FCA and the UK Competition Commission identified separate relevant product markets for fresh farmed Atlantic salmon. In this respect, both NCAs concluded that fresh salmon and frozen salmon belong to separate product markets.
25. The two NCAs also analysed whether a further segmentation of the market for fresh farmed Atlantic salmon should be made on the basis of its origin. The UK Competition Commission considered that, in view of strong customer preferences, Scottish salmon may form a relevant market segment within the broader relevant market for farmed Atlantic salmon and discussed the effects of the merger on this segment. The FCA concluded that the different origins of salmon constitute elements of differentiation and that the relevant market comprises three imperfectly substitutable products (Norwegian, Scottish and Irish salmon). The FCA also identified a separate product market for smoked salmon.

3. Possible product markets

a. Farmed vs wild salmon

26. The Notifying Party submits that there might be physical differences between wild salmon and farmed salmon, but consumers are not aware of these differences and treat wild and farmed salmon as interchangeable products.
27. The market investigation in the present case indicated that farmed salmon and wild salmon are considered by respondents as different products in terms of taste, quality and

⁶ Commission Decision in Case COMP/M.3722 – *Nutreco/Stolt-Nielsen/Marine Harvest JV*, dated 12 April 2005.

⁷ French Competition Authority, Decision of 1 December 2006 – *Pan Fish/Marine Harvest*.

⁸ UK Competition Commission, Decision of 18 December 2006 – *Pan Fish/Marine Harvest*.

price. Moreover, the market investigation showed that wild salmon has also limited seasonal availability while farmed salmon is supplied regularly during the year.⁹

28. In view of the above, for the purpose of this case, the Commission considers that farmed salmon constitutes a separate product market from wild salmon.

b. Farming and primary processing vs secondary processing

29. The Notifying Party submits that the farming and processing stages should not be distinguished for the purposes of market definition.
30. However, the market investigation showed that a clear distinction should be made on the salmon value chain between (a) the upstream level (farming and primary processing of salmon) and (b) the downstream level (secondary processing of salmon) on the basis of the following elements.
31. First, farming and primary processing comprise a number of activities at the top of the salmon supply chain, namely: harvesting, slaughtering, head-on/head-off gutting and sometimes filleting of the salmon. Companies active at this level sell whole or filleted salmon mainly to secondary processors, but also to wholesalers/distributors, retailers and foodservices. Alternatively, they can use the primarily processed salmon for captive secondary processing. On the contrary, secondary processing includes the transformation of primary processed salmon into processed products, such as salmon portions, ready-made meals and smoked salmon. Players active in secondary processing mainly sell to retailers and foodservices.
32. Second, farming and primary processing are normally carried out in nearby facilities and by one and the same vertically integrated operator. Barriers to entry are relatively high because of significant initial investments, licenses required to open and operate farms and the expertise needed in salmon farming.
33. By contrast, secondary processing can be carried out in plants which are far away from the salmon farms, with the use of different and dedicated equipment. Barriers to entry appear to be low, also because of the small initial investment required to enter the market. As such, a large number of secondary processors are active across all the EEA.
34. In view of the above, for the purposes of the present case, the Commission considers that farming and primary processing of salmon constitutes a separate product market from secondary processing of salmon.

c. Farming and primary processing in the EEA vs farming and primary processing outside the EEA

35. The Notifying Party submits that due to the global nature of the market, various origins and species have become more relevant in Europe, such as farmed Chilean salmon, Alaskan wild salmon and salmon from the Faroe Islands.

⁹ Competitors' reply to the Commission Request for information of 9 August 2013, question 21; Secondary processors' reply to the Commission Request for information of 9 August 2013, question 10; Customers' reply to the Commission Request for information of 9 August 2013, question 8; Foodservices' reply to the Commission Request for information of 9 August 2013, question 8.

36. The market investigation in the present case showed, however, that non-EEA farmed salmon (essentially salmon from Chile and Canada) does not exercise a sufficient competitive constraint on EEA-farmed Atlantic salmon.¹⁰
37. Salmon from Chile and Canada generally has to be frozen in order to be transported and used in the EEA. According to the EU applicable rules,¹¹ previously frozen salmon has to be identified as such on its label when sold to the end consumer (for example by the wording "do not refreeze").¹²
38. Further, customers normally perceive previously frozen salmon as having poorer quality than fresh salmon.
39. With particular regard to smoked salmon, the freezing process prior to smoking is normally seen as leading to a deterioration in the quality of the fish. As such, EEA smokers of salmon ("smokers") prefer not to use frozen salmon coming from outside the EEA as raw material. In view of these factors, non-EEA farmed salmon appears to be suitable only for use as frozen salmon, which represents a relatively small part of the downstream market.
40. In light of the above, for the purpose of this case, the Commission considers that salmon farmed in the EEA constitutes a separate product market from salmon farmed outside the EEA.

d. Farming and primary processing in Norway vs farming and primary processing in Scotland

41. The market investigation showed that for a number of customers and end-applications Norwegian and Scottish salmon are not substitutable.¹³
42. First, in some countries (namely Belgium, France and the United Kingdom), there appear to be strong customer preferences oriented towards Scottish salmon. In those countries, a significant number of retailers have a policy of buying only Scottish salmon. Those retailers indicated that they would not switch to Norwegian salmon on a regular basis. Apart from the perception of Scottish salmon as being superior in quality, United Kingdom retailers in particular appear to favour Scottish salmon because of

¹⁰ Competitors' reply to the Commission Request for information of 9 August 2013, question 19; Secondary processors' reply to the Commission Request for information of 9 August 2013, question 8; Customers' reply to the Commission Request for information of 9 August 2013, question 6.

¹¹ Commission Regulation (EU) No 16/2012 of 11 January 2012 amending Annex II to Regulation (EC) No 853/2004 of the European Parliament and of the Council as regards the requirements concerning frozen food of animal origin intended for human consumption, OJ L 8/29 of 12.1.2012.

¹² Competitors' reply to the Commission Request for information of 9 August 2013, question 24; Secondary processors' reply to the Commission Request for information of 9 August 2013, question 12; Customers' reply to the Commission Request for information of 9 August 2013, question 10; Foodservices' reply to the Commission Request for information of 9 August 2013, question 10.

¹³ Competitors' reply to the Commission Request for information of 9 August 2013, questions 28, 29, 40, 41; Secondary processors' reply to the Commission Request for information of 9 August 2013, questions 16, 17, 18, 19; Customers' reply to the Commission Request for information of 9 August 2013, questions 14, 15, 16, 17; Foodservices' reply to the Commission Request for information of 9 August 2013, questions 14, 16, 17.

geographic proximity, which allows for more efficient logistics, a fresher product for end-consumers, and increased control on the management of the farms with respect to sustainability and environmental standards during the production process.

43. Second, Scottish salmon is associated with distinct technical accreditations, which provide clear differentiation from Norwegian salmon, such as Protected Geographical Indication (PGI) and Label Rouge in France.¹⁴ More generally, all over the EEA, Scottish salmon is considered as a high-end product compared to Norwegian salmon, particularly for its reputation and lower fat content.
44. Third, with specific regard to smoked salmon, consumers appear to attach significant importance to the origin of the salmon, which is normally clearly displayed on the packaging even in the case of private label smoked salmon.
45. For all these reasons, customers already accept to pay a price premium for Scottish salmon, which is on average 10% more expensive than Norwegian salmon.
46. The market investigation also showed that the Parties are generally able to clearly identify customers with a strong preference for Scottish salmon, like retailers with a "Scottish only" sourcing policy, or certain top secondary processors including smokers. These customers have only a limited scope for arbitrage, as they tend to source all their requirements from salmon farmers. This may depend on a number of factors, amongst which, retailers' food traceability requirements. Therefore, Scottish salmon farmers like the Parties seem able to raise price for those customers with a strong preference for Scottish salmon.
47. In order to complement the qualitative analysis above, the Commission has carried out an econometric analysis of transaction data submitted by the Parties,¹⁵ using price correlation techniques. The price correlation analysis is consistent with the findings described above of limited substitutability between salmon of Scottish and Norwegian origins.¹⁶
48. In the sections below the Commission presents the result of a price-correlation analysis. This type of analysis is based on an arbitrage argument: if two products A and B belong to the same relevant market, it would be expected that their prices tend to move in parallel over time (co-movement); the levels may differ, for example to reflect quality differences, but if the price of one product increased it would be reasonably expected that customers would switch demand to the relatively cheaper product (arbitrage on the

¹⁴ Label rouge is a French technical accreditation awarded by the French Ministry of Agriculture which certifies the quality of the product. Scottish salmon was the first fish and the first non-French product to be awarded the "label rouge" in 1992.

¹⁵ Form CO, Annex 68 and Annex 69.

¹⁶ It should be noted, however, that though a correlation analysis might provide some evidence as regards the interaction between different product segments, it is not equivalent to a SSNIP ("Small but Significant Non-transitory Increase in Price") test.

demand side).¹⁷ The exploitation by customers of this arbitrage opportunity would bring prices back in line if the products are close substitutes.

49. The correlation coefficient measures the extent to which the price series of two different products move together and therefore the strength of correlation between the prices of one product and another, which should be (strongly) positively correlated if the products are on the same market. The value of the correlation coefficient can be between -1 and 1. While 1 indicates a perfect parallel co-movement of the examined prices, 0 indicates lack of co-movement, and -1 indicates opposite co-movement of prices.
50. It must however be taken into account that a co-movement or correlation of prices may respond to other variables. Therefore, a co-movement of prices should be interpreted with great care. First, prices may display similar behaviours even though the products are not in the same relevant market, which could result from, seasonal influences, or common cost influences driving prices (spurious correlation). Therefore, even if in those cases price correlation may show co-movement of prices, it may not be inferred from that that the products are substitutable unless these common components causing spurious correlation are removed from the price series. Second, prices of different segments might react to each other but with some delay. This suggests that, say, weekly prices might show weak co-movement, but monthly average prices may be more strongly correlated. Third, prices might be non-stationary (or unstable) due to other, unrelated factors (for example, trends caused by unrelated factors like the evolution of the overall economic conditions).
51. In conclusion, a price correlation exercise is meaningful only if such problems are properly addressed.
52. In its submission, the Notifying Party aggregated the transaction data on a weekly basis and submitted pivot tables allegedly showing that the Scottish and Norwegian price series move together over time.¹⁸ This exercise was performed for each size of the salmon harvested (1-2 kg, 2-3 kg, 3-4 kg, 4-5 kg, 5-6 kg, 6+ kg HOG). The Notifying Party also submitted that sales prices for Norwegian and Scottish salmon are interrelated.¹⁹ The Notifying Party further submitted that a strong correlation exists between the Norwegian and Scottish price series aggregated on a weekly basis, with a correlation coefficient of [...].²⁰ Based on these results, the Notifying Party argued that the Scottish and Norwegian salmon types belong to the same relevant market.
53. The Commission notes, however, that the Notifying Party's correlation calculations do not adequately address the problems of common price components and non-stationarity of the price series. Therefore, the methodology used by the Notifying Party to calculate the correlation leads to a spurious correlation and is not indicative of a strong interaction

¹⁷ There might also be an arbitrage on the supply side since producers can substitute production to the relatively more expensive product. In other words, the increased supply of product A results in a downward pressure on its price. The supply side arbitrage is less relevant here.

¹⁸ Form CO, Annex 68.

¹⁹ Form CO, paragraph 309.

²⁰ Page 10 of the document submitted by Marine Harvest during the State of Play meeting on 3 September 2013.

between the products for the purpose of concluding that Scottish salmon and Norwegian salmon are part of the same relevant product market.

54. The Commission has found that once these methodological problems are corrected, the results do not support the existence of a single market including both Scottish and Norwegian salmon.²¹
55. In its price correlation exercise, the Commission compared the price correlation between the Norwegian and Scottish salmon with a benchmark correlation used to define the concept of a "high/low" correlation. A "benchmark correlation" is defined as the correlation between two segments of the same product that belong to the same market. In its analysis, the Commission used two types of benchmarks: the price correlations between the different sizes of Norwegian salmon and the price correlations between the different sizes of Scottish salmon.
56. In most of the cases, the results of the Commission economic analysis show that the correlation between salmon of Norwegian and Scottish origin is lower than the benchmark correlation.²²
57. The several robustness checks performed, for example, using different benchmarks and using different data aggregation, confirmed the result showing limited interaction between the two origins of salmon.²³ When the sample is restricted by category of customers, the limited interaction between the two origins of salmon is more pronounced for the food industry category (which includes processors and smokers) than for the whole set of customers and the distributor category.

²¹ The methodological issues are corrected by working with the price series in first-difference (price of today minus price of yesterday) and by looking at the correlation between the first-differenced Norwegian price and the first-differenced Scottish price series. This approach makes the price series stationary and removes to a certain extent the common costs. A partial correlation exercise has also been performed using the average cost of feed (at a monthly level) between Norwegian and Scottish salmon as a measure of common cost. The cost of feeds represents approximately [...] of the cost for the Scottish and Norwegian salmon. However, the partial correlation should be interpreted very cautiously due to the small number of observations and should be given limited weight. When the underlying regressions were reliable, the partial correlation exercise did not contradict the previous results.

²² Only when using the benchmark computed on the 6kg+ size salmon, the results of the analysis are not confirmed. However, the 6kg+ size price seems to depend on the interest from non-EEA countries (the Asian, Ukrainian, and Russian markets for example), and standard salmon processing machines may not be able to process salmon of 6kg+ size (see reply to Request for Information of 27 August 2013). As such, customers which purchase the 6kg+ size may belong to a specific category which might have peculiar preferences or use the salmon for specific end-applications. Therefore, in the empirical analysis the 3-4 kg, 4-5 kg, and the 5-6 kg sizes, which represent [...] of the volume for both Scottish and Norwegian salmon seem to be the most representative sizes in the salmon industry and were given more weight.

²³ To tackle the problem of delayed price interaction between the segments, different time aggregations have been tried. Using the 3-4 kg, 4-5 kg, and 5-6 kg sizes, at a weekly level the correlation between the Scottish and Norwegian price series is [...], whereas the benchmarks correlations are between [...] and [...] for the Scottish benchmarks and between [...] and [...] for the Norwegian benchmarks. At a monthly level, the correlation between the Scottish and the Norwegian price series is [...], whereas the Scottish benchmarks are between [...] and [...] and the Norwegian benchmarks are between [...] and [...]. Hence, neither the weekly or monthly aggregations are supportive of a common Scottish-Norwegian type relevant market hypothesis.

58. In view of the above, the Commission concludes that it is likely that separate markets for the farming and primary processing of Scottish salmon and Norwegian salmon exist. In any event, it is not necessary for the Commission to conclude on the matter, given that the Parties have submitted remedies that eliminate serious doubts on the narrowest possible market.

e. Salmon vs salmon trout

59. The market investigation in the present case indicated that Atlantic salmon and salmon trout are considered as different products. Respondents to the Commission's requests for information indicated that they are two different species that differ considerably in terms of appearance, taste and nutrition value.²⁴
60. It is therefore likely that salmon and salmon trout belong to separate product markets. However, for the purposes of this case, this issue can be left open as given the limited volume of salmon trout consumed in the EU in comparison to the volume of salmon, its inclusion or exclusion from the relevant product market would not have changed the outcome of the competitive assessment in the case at hand.

f. Organic and non-organic salmon

61. The market investigation in the present case suggested that organic salmon and non-organic salmon may belong to separate product markets.²⁵ Respondents to the Commission's requests for information stated that there is considerable difference in price between organic salmon and non-organic salmon and that organic salmon is perceived as a healthier and premium product when compared to non-organic salmon.
62. In view of the above, the Commission considers that organic salmon and non-organic salmon may belong to separate product markets. However, for the purposes of the present case, the precise market definition may be left open as this would not change the outcome of the competitive assessment in the case at hand.

g. Possible downstream markets for secondary processed salmon products

63. The Notifying Party submits that from a customer's perspective, not only the different processing methods, but also the processed salmon products are substitutable. According to the Notifying Party, many processors offer a wide range of salmon products, such as fresh, frozen and smoked, and they can easily switch between the different processing methods. In addition, many customers such as large retail chains can switch from one supplier to another, given the lack of brand awareness affecting consumer choice.

²⁴ Competitors' reply to the Commission Request for information of 9 August 2013, question 20; Secondary processors' reply to the Commission Request for information of 9 August 2013, question 9; Customers' reply to the Commission Request for information of 9 August 2013, question 7; Foodservices' reply to the Commission Request for information of 9 August 2013, question 7.

²⁵ Competitors' reply to the Commission Request for information of 9 August 2013, question 30; Secondary processors' reply to the Commission Request for information of 9 August 2013, question 20; Customers' reply to the Commission Request for information of 9 August 2013, question 18; Foodservices' reply to the Commission Request for information of 9 August 2013, question 18.

64. The market investigation showed evidence that a separate market could be identified for fresh, frozen and smoked salmon.²⁶
65. First, the market investigation confirmed that fresh salmon and frozen salmon have different characteristics in terms of taste, quality and price.²⁷ Respondents to the Commission's requests for information indicated that consumers prefer fresh salmon rather than frozen salmon, which is traditionally cheaper, and that the two products are usually purchased for different occasions.
66. Second, respondents to the Commission's requests for information indicated that the product requirements and eating occasions for smoked salmon in comparison to fresh and frozen salmon are distinct. This is because smoked salmon, with its specific taste, is often used as a festive product and as a ready-to-eat appetizer.
67. However, for the purpose of this case, the exact product market definition can be left open as this would not change the outcome of the competitive assessment in the case at hand.

4. Conclusion on relevant product markets

68. On the basis of the elements discussed above, it is concluded that there are separate product markets for farming and primary processing of farmed Atlantic salmon, and secondary processing of salmon. Moreover, it is likely that separate markets for Norwegian and Scottish farmed Atlantic salmon exist. The need for a further segmentation for salmon trout, fresh, frozen and smoked salmon, and organic salmon can be left open for the purpose of this Decision since this would not change the outcome of the competitive assessment in the case at hand.

VII. RELEVANT GEOGRAPHIC MARKET

69. The Notifying Party submits that the relevant geographic market for the production, processing, distribution and selling of salmon including salmon trout is at least EEA-wide in scope. The Notifying Party indicates that consumer preferences and eating habits do not differ significantly between countries. Regarding the possible market for smoked salmon, the Notifying Party submits that flows of smoked salmon products between the various EEA countries have increased in recent years.
70. The previous Commission and NCA decisions considered that the market for the production and sale of farmed (Atlantic) salmon is EEA-wide in scope. With regard to the market for production and sale of smoked salmon, the FCA considered the geographic scope at national level.
71. The market investigation in the present case has confirmed that the geographic scope of the market(s) for salmon farming and primary processing is the EEA. Although salmon

²⁶ Secondary processors' reply to the Commission Request for information of 9 August 2013, question 14; Customers' reply to the Commission Request for information of 9 August 2013, question 12; Foodservices' reply to the Commission Request for information of 9 August 2013, question 12.

²⁷ Competitors' reply to the Commission Request for information of 9 August 2013, question 23; Secondary processors' reply to the Commission Request for information of 9 August 2013, question 11; Customers' reply to the Commission Request for information of 9 August 2013, question 9.

is only farmed in Norway, Scotland and Ireland, it is transported from these locations all across the EEA and the rest of the world. Transport costs do not appear to affect customers' sourcing decisions to any appreciable extent.

72. As regards possible downstream markets, in particular for smoked salmon it cannot be excluded that these markets are national in scope due to different consumer preferences and the different role played by brands at Member State level.
73. For the purposes of this case, the Commission therefore considers that the markets for farming and primary processing of farmed Scottish and Norwegian Atlantic salmon are EEA-wide in scope, while the geographic market definition for downstream products can be left open as it would not change the outcome of the competitive assessment in the case at hand.

VIII. COMPETITIVE ASSESSMENT

Horizontal overlaps

74. The proposed transaction leads to a number of horizontal overlaps between the Parties' activities in the salmon sector, mainly in: (i) farming and primary processing of Norwegian farmed salmon at EEA-level; (ii) farming and primary processing of Scottish farmed salmon at EEA-level; and (iii) secondary processing at national level.²⁸

1. Market for farming and primary processing of Norwegian salmon

75. Norway is by far the largest salmon producer in the EEA.²⁹ According to the data submitted by the Parties, the market for farming and primary processing of salmon in Norway amounted to [...] of salmon head on gutted ("HOG")³⁰, which represented approximately [...] of the EEA farmed salmon production.
76. In the salmon industry, the market investigation showed that competition and prices are mainly driven by output, regardless of whether this is used for captive or third party processing. Consequently, market shares in capacity and output are a suitable proxy for market power in a homogenous market such as salmon where capacity is expensive.³¹ The table below provides the market shares of the Parties and their main competitors.

²⁸ The proposed transaction also results in horizontal overlaps in wild salmon, salmon trout and organic salmon. The overlaps in wild salmon and salmon trout do not result in affected markets under any plausible market definition, and therefore will not be further discussed in this Decision. A technically affected market would arise with respect to organic salmon, where the combined market shares of the Parties amount to [10-20]%. However, this overlap will not give rise to any concern given that the increment added by Morpol is negligible ([0-5]%).

²⁹ As stated in paragraphs 68, the markets for the farming and primary processing of Norwegian salmon and Scottish salmon are EEA wide in scope, even if farming activities only take place within the border of the respective States. This is because both Norwegian and Scottish salmon are widely shipped from their origin to the rest of the EEA. As such, the impact of the transaction stemming from the concentration of productive activities at national level would be EEA-wide.

³⁰ All volume figures are calculated on the basis of head on gutted weight units (HOG) corresponding to a whole fish where the blood and the guts are removed and the fish is cleaned before packing.

³¹ See Commission Decisions in Cases COMP/M.6171- *IPIC / CEPSA* and COMP/M.6471 – *Outokumpu / Inoxum*.

Table 1: Harvest of farmed Atlantic salmon in Norway (2012)

Farmer	Quantities	Share
Marine Harvest	[...]	[20-30]%
Morpol	[...]	[0-5]%
Combined	[...]	[20-30]%
Leroy	[...]	[10-20]%
Salmar	[...]	[10-20]%
Cermaq	[...]	[5-10]%
Grieg Seafood	[...]	[0-5]%
Nordlaks	[...]	[0-5]%
Nova Sea	[...]	[0-5]%
Alsaker Fjordbruk	[...]	[0-5]%
Bremnes Seashore	[...]	[0-5]%
Norway Royal salmon	[...]	[0-5]%
Sinkaberg Hansen	[...]	[0-5]%
Others	[...]	[30-40]%
Total	[...]	100

Source: Kontali estimates.

77. The Parties' combined market share would reach [20-30]%, and the increment added by Morpol would be negligible ([0-5]%). Post transaction, a number of relatively sizeable players will remain active in the market, such as Leroy ([10-20]%), Salmar ([10-20]%) and Cermaq ([5-10]%). In addition, a large number of small players (which account for half of the market) will remain active in this market since the Norwegian farming industry appears to be quite fragmented.
78. The majority of competitors and customers responding to the Commission's requests for information stated that the transaction will not have an impact on competition or prices as regards salmon farming in Norway³², as Morpol is not a major player in salmon farming in Norway.
79. In light of the above, the Commission considers that the proposed concentration does not give rise to serious doubts as to its compatibility with the internal market on the market for farming and primary processing of Norwegian farmed salmon.

2. Market for farming and primary processing of Scottish salmon

80. Scotland is the second largest salmon producer in the EEA after Norway and farmed salmon is the largest food export from Scotland.³³ In 2012, Scotland accounted for approximately [...] of the EEA farmed salmon production or [...] of salmon HOG.

³² Competitors' reply to the Commission Request for information of 9 August 2013, questions 74 and 75; Secondary processors' reply to the Commission Request for information of 9 August 2013, questions 44 and 45.; Retailers' reply to the Commission Request for information of 9 August 2013, questions 38 and 39; Foodservice customers reply to the Commission Request for information of 9 August 2013, question 38 and 39.

³³ http://www.scottishsalmon.co.uk/facts_figures/index.aspx

(i) Market shares data

81. As stated above, the market investigation showed that competition and prices in the salmon industry are mainly driven by output, regardless of whether this is used for captive or third party processing. Consequently, market shares in capacity and output represent a suitable proxy for market power in a homogenous market where capacity is expensive.³⁴
82. The table below provides the production market shares of the Parties and their main competitors as regards salmon production in Scotland.

Table 2: Harvest of farmed Atlantic salmon in Scotland (2012)

Farmer	Quantities	Share
Marine Harvest	[...]	[20-30]%
Morpol	[...]	[10-20]%
Combined	[...]	[40-50]%
Scottish Sea Farms	[...]	[10-20]%
The Scottish Salmon Company	[...]	[10-20]%
Grieg Seafood	[...]	[10-20]%
Loch Duart	[...]	[0-5]%
Others	[...]	[0-5]%
Total	[...]	100

Source: Kontali estimates.

83. The Parties' combined market share would be [40-50]% (Marine Harvest [20-30]%, Morpol [10-20]%) of the total salmon production in Scotland. The new entity will be more than twice as large as its nearest competitor, Scottish Sea Farms ([10-20]%). Other players active in the market are the Scottish Salmon Company ([10-20]%), Hjaltland Seafarms (Grieg Seafood) ([10-20]%) and Loch Duart ([0-5]%).
84. The Merged Entity will also become by far the largest player in Scotland in terms of farming capacity. The combined entity's share of the total 2012 biomass capacity on active sites amounts to [40-50]%, which is more than double than its next largest competitors Scottish Sea Farms ([10-20]%), The Scottish Salmon Company ([10-20]%) and Grieg Seafood ([10-20]%).³⁵
85. In addition, the Merged Entity will also become by far the largest player in terms of number of licensed sites ([...]) and total licensed Maximum Standing Biomass ("MSB") ([...])³⁶. The next largest competitors would be Scottish Sea Farms with [...] sites ([...])

³⁴ See footnote 31.

³⁵ The Notifying Party has not been able to provide an estimate of their competitors' capacities and hence of their share of capacities in Scotland. The Commission has therefore reconstructed the capacity shares of competitors based on the data provided by the Scottish Environment Protection Agency (SEPA). SEPA keeps the records of seawater sites in Scotland, as well as their MSB, their locations, their owner and the current use (site active or inactive). This information is available for the last five years, from 2008 until 2012.

³⁶ Maximum Standing Biomass (MSB) accounting for the maximum live weight allowed on a particular farming site. These figures include active and inactive sites in Scotland.

of MSB), The Scottish Salmon Company with [...] sites [...] of MSB) and Hjaltland Seafarms (Grieg Seafood) with [...] sites [...] of MSB).

86. In terms of sales of Scottish salmon at the farming and primary processing level in the EEA (ex-plant sales), the Parties' market share is [30-40]% (Marine Harvest [20-30]%, Morpol [10-20]%). The Parties' market share only for non-captive sales is more limited (around [30-40]%, Marine Harvest [20-30]%, Morpol [5-10]%), since both Marine Harvest and Morpol are vertically integrated and use some of their Scottish salmon production in their own secondary processing plants.³⁷ However, as mentioned before, market shares in production and/or capacity are a more suitable proxy for market power in a homogenous market such as Scottish salmon, as ex-plant sales and non-captive sales heavily depend on whether the Parties choose to sell fresh salmon to retailers and/or wholesalers or process it and, in the latter case, on whether they channel it through their own downstream operations or rely on third parties' services.
87. Lastly, the Parties would also have a very strong position in a distinguishing area known as the "label rouge", a Scottish salmon niche where the Parties represent roughly [70-80]% of sales of Scottish salmon "label rouge", with an increment of [30-40]%.

(ii) Concerns raised in the market investigation

88. During the market investigation, a large number of concerns have been raised by third parties, in particular, competitors, large United Kingdom and continental retailers, top secondary processors or major industrial users. The main concerns identified by third parties as regards the impact of the proposed transaction are outlined below.
89. First, respondents to the market investigation submitted that the Parties would achieve a strong position in the market for Scottish salmon both at farming level and processing level and thus the proposed transaction would lead to an impact on competition on this market³⁸.
90. Second, several respondents to the market investigation claimed that post-transaction there would be a risk of limitation of production either by decreasing the volumes available to the EEA market or by diverting sales from the EEA to other markets.³⁹
91. Third, respondents to the market investigation claimed that the Parties would be able to influence the level of prices for Scottish salmon in the EEA and competitors would have limited options to increase output. Consequently, the ability of customers to switch would be limited.⁴⁰

³⁷ In more detail roughly [...] of Marine Harvest's Scottish salmon is processed internally, while Morpol uses between [...] and [...] of the Scottish salmon in its own processing activities.

³⁸ Competitors' reply to the Commission Request for information of 9 August 2013, question 74; Secondary processors' reply to the Commission Request for information of 9 August 2013, question 44; Salmon customers' reply to the Commission Request for information of 9 August 2013, question 38.

³⁹ Salmon customers' reply to the Commission Request for information of 9 August 2013, question 40; Competitors' reply to the Commission Request for information of 9 August 2013, question 76; confidential minutes with customers and confidential minutes with competitors.

⁴⁰ Salmon customers' reply to the Commission Request for information of 9 August 2013, question 40 and 24; Competitors' reply to the Commission Request for information of 9 August 2013, question 76.

(iii) Notifying Party's position

92. The Notifying Party submits that the proposed transaction will have no negative impact on the competitive situation, even if the farming and primary processing of Scottish salmon were considered as a distinct relevant product market.
93. The Notifying Party claims that an output restriction strategy with the aim of increasing prices is not feasible in the salmon industry, where output is primarily driven by natural factors outside the farmers' control. The Notifying Party also submits that there are numerous competitors at the farming level and that players of all sizes (large and medium-sized) compete with each other on rather equal terms. Moreover, the Notifying Party explains that there are indications that the overall farming capacity in Scotland will be increased in the near future, which would facilitate the expansion of existing competitors and/or the entry of new players.

(iv) Commission's assessment

94. In a homogeneous industry such as salmon farming and primary processing, production and capacity shares represent a good proxy for market power. Post-transaction, the combined entity would become the first player in the Scottish salmon industry, and account for a large share of production and capacity of the market (see above). In this case, therefore, the high market shares acquired by the Merged Entity represent a first indication that the proposed transaction gives rise to serious doubts with regard to the farming and primary processing of Scottish salmon.
95. This first indication appears to be confirmed by the substantiated concerns which have been raised by many market players in the course of the Commission's market investigation.
96. In view of the Notifying Party's defensive arguments, the Commission has carried out a more in-depth assessment and looked into whether: (i) an output restriction strategy would be in principle feasible in the salmon industry; (ii) existing competitors would be able to increase their output to offset a price increase from the Merged Entity; and (iii) new entry would be likely, timely and sufficient and therefore able to counter a possible price increase.

(a) Output restriction in the salmon industry is a possible and potentially profitable strategy

97. The market investigation confirmed that the combined entity will hold a significant share of capacity in Scotland, in a market where price levels are driven by capacity and output.
98. In this context, it appears possible for a large producer such as Marine Harvest to engage in an output restriction strategy with the aim of generating a price increase. As salmon, once put to sea, have to be harvested, a direct price rise would cause some of their product to remain unsold despite having incurred the costs of production. However, by restricting supply, production costs could be avoided, making this strategy potentially attractive.
99. This reduction of supplies could be carried out, in a variety of ways, for example, by putting less smolts to sea, thereby increasing prices at the end of the production cycle

and thereafter. It would also be possible to cut production by reducing the intensity of production at existing sites or by leaving entire sites unused. Another more short-term method of reducing output would be to divert more sales to exports, thereby generating a shortage of Scottish salmon in the EEA.

100. The Commission therefore concludes that output reduction is in principle a possible and potentially profitable strategy in the salmon industry.

(b) Competitors' reaction possibilities are limited in a context of increasing demand

101. The market investigation indicated that all players in Scotland are producing at full or almost full capacity.

102. The Commission reconstructed the utilisation rates of the main players on the basis of the theoretical production capacity and the actual production figures that were provided by the Notifying Party and their competitors during the market investigation.

103. The computation of the theoretical production capacity for the Parties and for their main competitors at farming level is based on the total biomass data provided by the Scottish Environment Protection Agency ("SEPA") on active sites for 2012.⁴¹ Combining the data provided by SEPA and the production data from the market investigation, the high levels of capacity utilisation appear to be confirmed with utilisation rates in the range of 90% in Scotland.

104. As explained by the Parties' competitors in the market investigation "*The percentage of spare capacity in the industry is extremely limited and almost all players produce close to full capacity*".⁴² Another market player in Scotland explained that "*The potential increase in production volume is not keeping pace with the increase in demand for salmon products. Demand expanded rapidly in the past few years and is forecast to continue growing globally at 8-12% per annum. As such, capacity utilisation is expected to remain very high*".⁴³

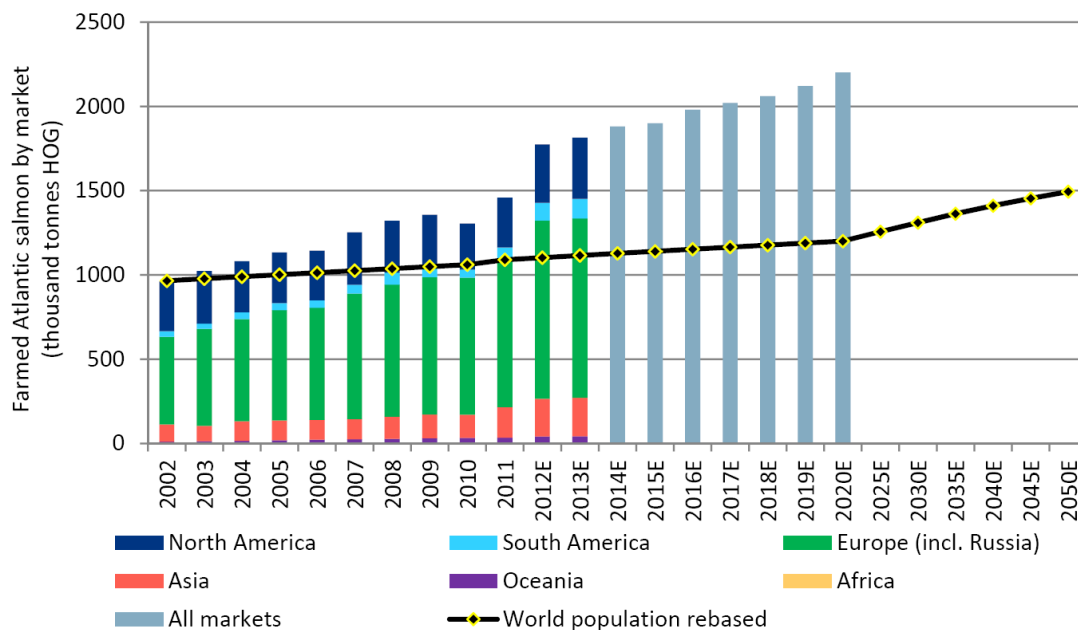
105. There is still some limited degree of unused capacity in the industry. However, due to biological conditions and environmental issues, only a part of the potential capacity can be effectively used by salmon producers. Thus, taking into account these restrictions, the percentage of spare capacity in the Scottish industry is extremely limited and almost all players produce close to full capacity.

⁴¹ Marine Harvest's production capacity is computed by applying a coefficient of [...] over a two-year cycle on the combined MSB for all the company's active sites (see Form CO, paragraphs 346 and 347). The coefficient used to compute the production capacity of Morpol is [...] in order to reflect the differences in Morpol's stocking strategy and handling of harvesting and fallowing (see Form CO, Annex 81). As regards the capacity of the competitors operating in Scotland, a [...] multiplier has been applied. Some competitors stated that a [...] coefficient is too high for farming in Scotland as there are also biological performance constraints that impact the biomass. Therefore, as suggested by the competitors, a [...] coefficient seems to be more appropriate to compute the competitors' theoretical production capacity.

⁴² Non-confidential minutes of a conference call with Scottish Sea Farms on 2 July 2013.

⁴³ Non-confidential minutes of a conference call with The Scottish Salmon Company on 3 August 2013.

106. Furthermore, as shown in the graph below, demand for farmed salmon as a whole has increased significantly in the past years (+19% in Europe between 2010 and 2012), and is expected to increase even more in the future.



Source: Kontali Analyse, Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, World Population Prospects: The 2010 Revision

107. The significant increase in demand expected in the coming years will lead to a further reduction in the already limited spare capacity available to competing producers of Scottish salmon. The market investigation showed that production for Scottish salmon as indicated within Scotland’s National Marine Plan is likely to increase steadily year on year from 150 000 to around 200 000 tonnes in 2020. This equates to approximately 5% growth per annum, which is much lower than the expected increase of consumption for Scottish salmon (8-12%).

108. In addition to operating at full or almost full existing capacity, competitors are not able to increase their capacity in the short term to respond to an output-reduction strategy carried out by the Merged Entity. The production capacity of Scottish farms is capped by the maximum MSB consent granted by SEPA and cannot be materially increased (unless producers wish to add new cages in a given farm – in this situation, they have to undergo the full planning application described below). The only way for remaining competitors to significantly increase their capacity would be to open new farms. However, there are only limited opportunities for capacity increase in the future (see section below).

109. In view of the above, the Commission concludes that competitors will not have the ability to increase their output sufficiently to offset a possible price increase by the Merged Entity.

(c) There are significant barriers to entry and expansion for farming in Scotland.

110. Within the framework of its analysis, the Commission examined the likelihood, timeliness and scale on entry or expansion by any other undertaking into the salmon market post-Transaction.
111. In order to open a new salmon farm in Scotland, a potential entrant or an already active player would have to first identify a suitable spot to build the farm, which in itself is an obstacle since the number of such spots is limited. After identifying a suitable spot, the company would need to undergo a rather lengthy and cumbersome regulatory process, which can last up to three years, and the outcome of which is uncertain.⁴⁴
112. First of all, in order to be allowed to operate on the seabed any producer wanting to establish a salmon farm must obtain a lease which is authorised by the Crown Estate and pay a rent, which depends on the intended production volume.
113. The second step is to go through the environmental and biomass assessment of SEPA. SEPA's role is to approve or refuse the chosen location, following criteria based on biomass. SEPA regulates the discharges from fish farms and the limit of medicine usage that can be administered. SEPA delivers a licence stating the amount of biomass the operator can use.
114. Third, the salmon farming company must obtain planning permission for the physical equipment that it wishes to place in the sea. The planning application has to include a detailed Environmental Impact Assessment. Throughout the planning process individuals and organisations (including competitors) can submit their own comments for or against a particular planning application. After due consideration of all the information the planning department of the relevant local authority confirms the approval or not of the farm in the chosen location.
115. There is no Government sale of salmon farming licences or planning permission. The costs for obtaining the licence are therefore largely associated with salaries for staff involved in the process, fees that are required by local authorities, SEPA and the Crown Estate and any fees that are required for external analysis and other tasks. They are not particularly high since on average, including salary costs, these fees amount to around GBP 50 000.
116. Furthermore, it can be noticed that each element of a salmon farm approval process which includes the Crown Estate lease, the SEPA consent and the local authority planning approval are specific to a given site and cannot be transferred from one location to another.
117. In general, companies apply for permissions in areas where they already have a farming presence, ideally with no close proximity to other operators as this enables the farmer to have a tighter control on the biology of the areas.

⁴⁴ Competitors' reply to the Commission Request for information of 9 August 2013, question 71.

118. In this context, a large operator such as Marine Harvest with many farms located throughout Scotland would be able to influence the approval procedure and control the area near its farm. Any company can object with reasons given to the local authorities for their consideration on the suitability of the new request for a salmon farm planning approval. In this situation, any comments from an adjacent farm operator would be carefully looked at by the local authority.
119. By possibly doing this, companies which have a large salmon farming footprint throughout Scotland are strategically able to influence the expansion of competitors, thereby potentially restricting their development and hence their possibilities to react to any output reduction strategy by the Merged Entity. The larger the size of a firm, the more areas they will have a farming presence and the more they will be in a position to potentially hinder or slow down the development process of their rivals.
120. The difficulties faced by current and potential farmers are also demonstrated by the relatively low growth of the industry in the past decades. Over the last 20 years, the production of salmon in the United Kingdom has expanded at a much slower rate than salmon production elsewhere in the EEA (with a compounded annual growth rate of only 5% versus 10% for Atlantic salmon overall).⁴⁵
121. The market investigation also indicated that it is not expected that the granting of new licences will enable competitors to increase their capacity in line with market demand. Respondents to the market investigation stated that the number of new licences, which the Scottish authorities currently plan to grant in the next years is clearly insufficient when compared to the forecasts on demand increase.⁴⁶
122. Moreover, it is likely that any such new licenses would also be allocated to the existing market players. Furthermore, it is unlikely that the Merged Entity's competitors would be able to secure a greater proportion of such licenses than the Merged Entity and therefore re-balance the post transaction market structure. Marine Harvest indicated during the investigation that it is in the process of expanding its farming capacity in Scotland [...].⁴⁷
123. The Commission therefore concludes that entry or expansion will not be timely, likely and sufficient within the meaning of the Commission's Horizontal Merger Guidelines so as to deter or defeat any potential anticompetitive effects of the Transaction.⁴⁸

(v) Conclusion

124. In light of the above, the Commission concludes that that the proposed transaction raises serious doubts concerning its compatibility with the internal market as regards the market for farming and primary processing of Scottish salmon in the EEA.

⁴⁵ <http://marineharvest.com/PageFiles/1296/2013%20Salmon%20Handbook%2027-04-13.pdf>

⁴⁶ Competitors' reply to the Commission Request for information of 9 August 2013, question 71.

⁴⁷ Form CO, paragraph 349.

⁴⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5.2.2004, paragraphs 68-75.

3. Markets for secondary processing of farmed Atlantic salmon

125. Both Marine Harvest and Morpol offer a wide range of secondary processed salmon products such as salmon fillets, smoked salmon, salmon portions, marinated salmon, ready-to-eat and ready-to-heat meals.
126. The Parties' combined market shares in the overall market for processed salmon at the EEA level is [10-20]% (Marine Harvest [10-20]%, Morpol [5-10]%). At the national level, the Parties' highest combined market shares will be [30-40]% (Marine Harvest [30-40]%, Morpol [0-5]%) in the United Kingdom and [20-30]% (Marine Harvest [20-30]%, Morpol [5-10]%) in France.⁴⁹
127. On a possible market for smoked salmon, the Parties' combined market share at the EEA level is [20-30]% (Marine Harvest [5-10]%, Morpol [10-20]%). At the national level, the Parties' highest combined market shares will be [30-40]% (Marine Harvest [10-20]%, Morpol [10-20]%) in France and [20-30]% (Marine Harvest [20-30]%, Morpol [5-10]%) in Belgium.⁵⁰
128. All markets for secondary processed salmon appear to be very fragmented. The market investigation showed that a number of alternative suppliers of secondary processed salmon will remain present in the all possible markets post transaction, such as Labeyrie, Norvelita, Suempol, Mer Alliance, Leroy, The Seafood Company or Moulin de la Marche.
129. In addition, there is significant spare capacity at secondary processing level and barriers to entry are low. There are neither significant technical nor financial barriers to entry or expansion and an increase in secondary processing production is possible without material incremental investments.
130. In light of the above, the Commission considers that the proposed concentration does not give rise to serious doubts as to its compatibility with the internal market on possible markets for fresh, frozen or smoked salmon.

Vertical relationship

1. Salmon farming and primary processing / Salmon secondary processing

131. The proposed transaction would lead to vertically affected markets as regards the farming and primary processing of salmon and the secondary processing of salmon.
132. A large number of players at all levels of the supply chain of salmon raised concerns that the Merged Entity could engage in an input foreclosure strategy, given the

⁴⁹ The Parties' position in any of the countries in which the Parties' activities also overlap is limited or the increment brought about the proposed transaction is insignificant.

⁵⁰ The Parties' position in any of the countries in which the Parties' activities also overlap is limited or the increment brought about the proposed transaction is insignificant.

combination of Marine Harvest, the largest player at farming and primary processing with Morpol, a very large secondary processor.⁵¹

133. Any vertical concerns that the proposed transaction may raise, particularly because of a risk of input foreclosure would be associated with the Merged Entity's ability to limit its competitors' access to salmon due to its increased market position on the upstream market for farming and primary processing of farmed salmon.⁵²
134. Such concerns do not appear to be substantiated in so far as the farming and primary processing of Norwegian salmon is concerned. Post transaction, the Parties' combined market share in farming and primary processing of farmed Norwegian salmon would amount to [20-30]%, and the increment added by Morpol would be negligible ([0-5]%). In addition, a number of other competitors will remain in the market to exercise competitive constraint on the Merged Entity.
135. As regards Scottish salmon, vertical concerns related to the risk of input foreclosure for Scottish salmon appear to be substantiated in principle, as result of the Merged Entity's ability to limit its competitors' access to Scottish salmon due to its increased market position on the upstream market for farming and primary processing of Scottish salmon, as well as the limited expansion capabilities of its competitors (see above).
136. Taking these factors into account, there are indications that the proposed transaction as notified to the Commission may give rise to serious doubts as a result of input foreclosure effects on the markets for secondary processing of Scottish salmon. In any event, since the commitments submitted by the Notifying Party remove the serious doubts in relation to the upstream farming and primary processing of Scottish salmon market, there is no need to conclude in this regard.

IX. PROPOSED REMEDIES

137. In order to render the concentration compatible with the internal market, the Notifying Party submitted commitments under Article 6(2) of the Merger Regulation on 9 September 2013 ('initial commitments'). These commitments were market tested by the Commission. Following certain modifications, a final set of commitments was submitted on 25 September 2013 ('revised commitments'). These final commitments are annexed to this Decision and form an integral part thereof.

⁵¹ Salmon customers' reply to the Commission Request for information of 9 August 2013, question 40; Competitors' reply to the Commission Request for information of 9 August 2013, question 76; confidential minutes with customers and confidential minutes with competitors.

⁵² The Merged Entity will not have the ability to engage in customer foreclosure with respect to the Parties' competitors in farming and primary processing (upstream) since there would remain a significant customer base to its actual or potential rivals at upstream level.

INITIAL COMMITMENTS

138. The initial commitments submitted on 9 September 2013 consisted of the divestiture of Morpol's farming operations in [...] Shetland ([...]) in Scotland. The farming operations to be divested included:
- (i) [...] freshwater farming sites in [...] with average total annual production capacities of [...] eggs, [...] fry and [...] smolts;
 - (ii) [...] seawater farming sites in [...] with average total annual production capacities of [...];
 - (iii) [...] primary processing plant in [...] with average total annual production capacities of [...]; and
 - (iv) all tangible assets (biomass, premises, machinery and equipment), all intangible assets (licences), all site specific personnel and all site specific contracts.
139. According to the initial set of commitments, however, assets equalling an average total annual harvest volume of [...] would be excluded from the total annual production capacities of [...] of the divestment business in discussion with the purchaser. Consequently, only [...] would ultimately be divested.
140. A significant number of respondents to the market test stated that the initial commitments did not fully remove the serious doubts identified with regard to the farming and primary processing of Scottish salmon.
141. A number of respondents to the market test questioned whether the annual production capacity (namely [...]) would be sufficient to eliminate the competition concerns identified by the Commission and therefore to restore effective competition.
142. A number of respondents also expressed doubts as to whether the production capacity of the divested business would be sufficient to enable a suitable purchaser to operate a viable and competitive business in competition with the Merged Entity and its competitors. Some respondents indicated that the sufficient critical mass to operate the divestment business in a cost-effective way would be between [...] and [...]. It was also noted that the primary processing facility with its capacity of [...] per annum would only be operating at some [...] utilisation based on a harvest volume of [...].⁵³
143. Moreover, some respondents to the market test of the initial commitments considered that the supply of smolts required to be able to produce [...] would be [...] and that existing sales contracts should also be included as part of the divestment business⁵⁴.
144. A number of respondents were of the view that the proposed remedy would attract interest from several potential purchasers if additional volumes of production capacity

⁵³ Third Parties' non-confidential replies to the Commission's questionnaire on remedies.

⁵⁴ Third Parties' non-confidential replies to the Commission's questionnaire on remedies.

were included in the divestment business. Respondents also indicated given the specificities of salmon farming that a suitable purchaser should have relevant industry expertise.

145. The Commission informed the Parties of the results of the market test. Subsequently, the Notifying Party made certain improvements to the commitments and submitted a set of revised commitments on 25 September 2013.

REVISED COMMITMENTS SUBMITTED ON 25 SEPTEMBER 2013

146. In summary, the revised commitments consist of (i) the divestiture of the totality of Morpol's salmon farming operation in Shetland with an annual production capacity of [...] and (ii) the divestiture of Morpol's salmon farming operations in Orkney (Scotland).
147. The Morpol's salmon farming operation in Shetland consists of all the elements included in the initial remedies plus the initially excluded [...] referred to in paragraph 139. As a result, the revised commitments will include the total annual production capacities (i.e. [...]).
148. Morpol's salmon farming operations in Orkney include:
- (i) [...] seawater farming sites with average total annual production capacities of [...];
 - (ii) [...] primary processing plant in [...] with average total annual processing capacities of [...];
 - (iii) all tangible assets (biomass, premises, machinery and equipment), all intangible assets (farming licences), all site specific personnel and all site specific contracts.⁵⁵
149. In addition, the revised commitments also include for a transitional period of up to [...] the benefit of all site specific current contracts for the supply of products (smolt and feed) or services (HR and IT) to the divestment business. Moreover, the Notifying Party committed for an extra period of up to [...] after the transitional period, at the option of the purchaser, to conclude supply contracts for smolts on market terms with the divestment business in order to ensure its viability and competitiveness.
150. On the other hand, the sales and supply contracts are not part of the divestment business, [...].
151. Lastly, the Notifying Party included in the revised commitments an additional purchaser suitability criterion stating the purchaser must be a market player active in the salmon farming business, be it as salmon farmer, primary processor and/or secondary processor, or as an alternative option any other company able to procure a comparable level of expertise at Closing (transfer of the Divestment Business to the purchaser), including a market entrant or a financial investor.

⁵⁵ Morpol's farming operations in Orkney do not include freshwater farming sites.

ASSESSMENT OF THE PROPOSED REMEDIES

152. Under the Merger Regulation, the Commission has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent a significant impediment of effective competition. As indicated in point 9 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("the Remedies Notice")⁵⁶ the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view and must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which the competition concerns arise.
153. Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps. The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the Merged Entity on a lasting basis and that is divested as a going concern. Although normally the divestiture of an existing viable standalone business is required, the Commission taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing strong links or are partially integrated with businesses retained by the Parties and therefore need to be 'carved out' in those respects. However, the Commission is only able to accept such commitments if it can be certain that, at least at the time when the business is transferred to the purchaser, a viable business on a standalone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will thereby be reduced to a minimum.
154. The business must include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which are currently employed or which are necessary to ensure the business' viability and competitiveness. Personnel and assets which are currently shared between the business to be divested and other businesses of the parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, must also be included. Otherwise, the viability and competitiveness of the business to be divested would be endangered. Therefore, the divested business must contain the personnel providing essential functions for the business at least in a sufficient proportion to meet the on-going needs of the divested business.
155. Furthermore, the intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable purchaser with proven relevant expertise and ability to maintain and develop the divested business as a viable and active competitive undertaking.
156. In this case, the Commission considers that the commitments offered by the Notifying Party on 25 September are sufficient to remove the serious doubts regarding the

⁵⁶ OJ C 267, 22.10.2008, p. 1.

compatibility of the transaction with the internal market in relation to the market for farming and primary processing of Scottish farmed salmon in the EEA.

157. First, the commitments will remove approximately three quarters of the overlap between the Parties' Scottish salmon farming capacity,⁵⁷ thereby dispelling the serious doubts identified by the Commission.
158. Second, as regards the scope of the divestment business and its transfer to a suitable purchaser, the increase in the annual production capacity and other assets offered in the revised commitments is such as to provide the purchaser/s with the necessary assets to successfully run the divestment business and effectively compete in the market.
159. In this regard, the Notifying Party committed to provide the purchaser with the current contracts for supply products (smolt and feed) or services (HR and IT) in order to ensure the marketability, viability and competitiveness of the divestment business.
160. Furthermore, the Parties submitted [...]. Therefore, even if sales contracts are excluded from the final set of commitments, the purchaser will be able to continue Morpol's activities [...] without any disruption.
161. More particularly, the specific criteria for suitability of the purchaser in this case also reduce risks as to the viability of the divestment business in this carve-out remedy. The vast majority of the respondents to the market test considered that the purchaser of the divestment business in order to be viable and competitive force should be already active in the farming of salmon. Consequently, the Notifying Party included in the revised commitments that the purchaser shall be, as a preferred option, an existing market player active in the salmon farming business.
162. For the reasons outlined above, the final commitments entered into by the undertakings concerned are sufficient to eliminate the serious doubts as to the compatibility of the transaction with the internal market.

X. CONDITIONS AND OBLIGATIONS

163. The commitments in Section B of the commitments annexed to the this Decision constitute conditions attached thereto and form an integral part thereof, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market.

XI. CONCLUSION

164. For the above reasons, the European Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market, subject to full compliance with the conditions in Section B of the commitments annexed to the this Decision and with the obligations contained in the other sections of the said commitments.

⁵⁷ The divestment business accounts for [70-80]% of Morpol's capacity (depending on the data source).

165. This Decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

For the Commission
(signed)
Joaquín ALMUNIA
Vice-President

By hand and by fax: +32 2 296 43 01

European Commission
DG Competition
Merger Registry
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CASE COMP/M.6850 – MARINE HARVEST/MORPOL

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6 (2) of Council Regulation (EC) No 139/2004 (the “*Merger Regulation*”), Marine Harvest ASA (“*Marine Harvest*”) hereby provides the following Commitments (the “*Commitments*”) in order to enable the European Commission (the “*Commission*”) to declare the acquisition of Morpol ASA (“*Morpol*”) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6 (1) (b) of the Merger Regulation (the “*Decision*”).

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

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

Section A. Definitions

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

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

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

Divestment Business: the business as defined in Section B, the Schedule and the Annexes that Marine Harvest commits to divest, including Morpol's salmon farming operations

- (i) in Shetland, consisting of freshwater farming sites capable of producing [...] eggs, [...] fry and [...] smolts per year, of seawater farming sites capable of producing harvest volumes of [...] of Scottish salmon per year as well as of a primary processing plant capable of processing [...] of farmed salmon per year, and
- (ii) in Orkney, consisting of seawater farming sites capable of producing harvest volumes of [...] of Scottish salmon per year as well as of a primary processing plant capable of processing [...] of farmed salmon per year. Morpol's farming operations in Orkney do not have freshwater farming sites.

Divestiture Trustee: one or more natural or legal person(s), independent from Marine Harvest, who is approved by the Commission and appointed by Marine Harvest and who has received from Marine Harvest the exclusive Trustee Mandate to sell the Divestment Business to the Purchaser(s) 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 Marine Harvest 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 and the Annexes.

Marine Harvest ASA: public limited liability company registered with the Norwegian Register of Business Enterprises under the registration number 964 118 191.

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

Morpol ASA: public limited liability company registered with the Norwegian Register of Business Enterprises under the registration number 895 465 232.

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

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

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

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

Section B. The Divestment Business

Commitment to divest

1. In order to restore effective competition, Marine Harvest commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to the Purchaser(s) and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 14. To carry out the divestiture, Marine Harvest commits to find the Purchaser(s) and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If Marine Harvest has not entered into such an agreement at the end of the First Divestiture Period, Marine Harvest shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 23 in the Trustee Divestiture Period.
2. Marine Harvest shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, Marine Harvest has entered into a final binding sale and purchase agreement, if the Commission approves the Purchaser(s) and the terms in accordance with the procedure described in paragraph 14 and if the closing of the sale of the Divestment Business takes place within a period not exceeding three months after the approval of the Purchaser(s) and the terms of sale by the Commission.
3. In order to maintain the structural effect of the Commitments, Marine Harvest shall, for a period of ten years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found 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 common market.

Structure and definition of the Divestment Business

4. The Divestment Business, described in more detail in the Schedule and the Annexes, consists of Morpol's salmon farming operations
 - (a) in Shetland, including freshwater farming sites capable of producing [...] eggs, [...] fry and [...] smolts per year, seawater farming sites capable of producing harvest volumes of [...] of Scottish salmon per year as well as a primary processing plant capable of processing [...] of farmed salmon per year, and

- (b) in Orkney, including seawater farming sites capable of producing harvest volumes of [...] of Scottish salmon per year as well as of a primary processing plant capable of processing [...] of farmed salmon per year. Morpol's farming operations in Orkney do not have freshwater farming sites.

The present legal and functional structure of the Divestment Business as operated to date is described in the Schedule and in the Annexes. The Divestment Business, described in more detail in the Schedule and the Annexes, includes

- (a) all site specific tangible and intangible assets, which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;
- (b) all site specific licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;
- (c) all site specific contracts (items referred to under (a) to (c) hereinafter collectively referred to as "**Assets**");
- (d) all site specific personnel;
- (e) for a transitional period of up to [...] after Closing, the benefit, on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current site specific contracts under which Marine Harvest or Affiliated Undertakings supply products (smolt and feed) or services (HR and IT) to the Divestment Business, described in more detail in the Schedule and the Annexes, unless otherwise agreed with the Purchaser(s).

To the extent possible, Marine Harvest shall implement all necessary measures to ensure that it does not, after Closing, obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business.

Sales and supply contracts are not site specific contracts and are not part of the Divestment Business. [...]. Site specific contracts are farm management agreements as well as area management agreements.

For a subsequent period of up to [...] after the transitional period, Marine Harvest commits, unless otherwise agreed with the Purchaser(s), to conclude supply contracts (smolt) on market terms with the Divestment Business which contribute to the current operation or are necessary to ensure the marketability, viability and

competitiveness of the Divestment Business. The market terms shall be monitored by the Monitoring Trustee.

In order to accommodate the preferences and requirements of the potential purchasers to the extent possible, the Divestment Business shall be divested – as options of equal value – to one single purchaser or to two separate purchasers, subdivided into the two farming regions. The transfer of the Divestment Business to the Purchaser(s) will proceed by way of an asset transaction, a share transaction or a combination of the two.

Section C. Related commitments

Preservation of Viability, Marketability and Competitiveness

5. From the Effective Date until Closing, Marine Harvest shall preserve 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 Marine Harvest undertakes
 - (a) not to carry out any act upon its own authority 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 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, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business.

Hold-separate obligations of Parties

6. Marine Harvest commits, from the Effective Date until Closing, to keep the Divestment Business separate from the businesses it is retaining and to ensure that Key Personnel of the Divestment Business – including the Hold Separate Manager – have no involvement in any business retained and vice versa. Marine Harvest shall also ensure that the Personnel does not report to any individual outside the Divestment Business.

7. Until Closing, Marine Harvest shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses retained by Marine Harvest. Marine Harvest shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager 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 Marine Harvest.

Ring-fencing

8. Marine Harvest shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. Marine Harvest may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to Marine Harvest is required by law.

Non-solicitation clause

9. Marine Harvest undertakes, 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 one year after Closing.

Due Diligence

10. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, Marine Harvest 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

11. Marine Harvest shall submit written reports in English language on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than ten days after the end of every month following the Effective Date (or otherwise at the Commission's request).
12. Marine Harvest 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 an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser(s)

13. In order to ensure the immediate restoration of effective competition, the Purchaser(s), in order to be approved by the Commission, must:
 - (a) be independent of and unconnected to Marine Harvest and Affiliated Undertakings;
 - (b) 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 Marine Harvest and other competitors;
 - (c) neither be likely to create, in the 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, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the Purchaser(s) hereafter the "***Purchaser Requirements***").
 - (d) The Purchaser shall be – as preferred option – a market player active in the salmon farming business, be it as salmon farmer, primary processor and/or secondary processor, or – as alternative option – any other company able to procure a comparable level of expertise at Closing, including a market entrant or a financial investor.
14. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When Marine Harvest has reached an agreement with the Purchaser(s), it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee.

Marine Harvest must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the Purchaser(s) fulfil(s) the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser(s).

Section E. Trustee

I. Appointment Procedure

15. Marine Harvest shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If Marine Harvest has not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected the purchaser(s) proposed by Marine Harvest at that time or thereafter, Marine Harvest shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Extended Divestment Period.
16. The Trustee shall be independent of Marine Harvest, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by Marine Harvest 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, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by Marine Harvest

17. No later than one week after the Effective Date, Marine Harvest shall submit a list of one or more persons whom Marine Harvest 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, Marine Harvest shall submit a list of one or more persons whom Marine Harvest proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 16 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

18. 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, Marine Harvest shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Marine Harvest 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 Marine Harvest

19. If all the proposed Trustees are rejected, Marine Harvest shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 15 and 18.

Trustee nominated by the Commission

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

II. Functions of the Trustee

21. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or Marine Harvest, 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

22. 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 the substance of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by Marine Harvest 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 Marine Harvest, in accordance with paragraphs 5 and 10 of the Commitments;
 - (b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;
 - (c) (i) in consultation with Marine Harvest, determine all necessary measures to ensure that Marine Harvest does not after the effective date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature 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, and (ii) decide whether such information may be disclosed to Marine Harvest as the disclosure is reasonably necessary to allow Marine Harvest 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 Marine Harvest or Affiliated Undertakings;
- (iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to Marine Harvest such measures as the Monitoring Trustee considers necessary to ensure Marine Harvest's compliance with the

conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

- (v) 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 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;
- (vi) provide to the Commission, sending Marine Harvest a non-confidential copy at the same time, a written report within fifteen days after the end of every month. The report shall cover the operation and management of the Divestment Business 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. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending Marine Harvest a non-confidential copy at the same time, if it concludes on reasonable grounds that Marine Harvest is failing to comply with these Commitments;
- (vii) within one week after receipt of the documented proposal referred to in paragraph 14, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser(s) 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(s).

Duties and obligations of the Divestiture Trustee

23. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to the Purchaser(s), provided that the Commission has approved both the Purchaser(s) and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 14. The Divestiture Trustee shall include in the sale and purchase agreement 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 Marine Harvest, subject to Marine Harvest's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

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

III. Duties and obligations of Marine Harvest

25. Marine Harvest shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. To the extent necessary, the Trustee shall have full and complete access to any of Marine Harvest's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Marine Harvest and the Divestment Business shall provide the Trustee upon request with copies of any document. Marine Harvest 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.
26. Marine Harvest 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. Marine Harvest 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. Marine Harvest shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.
27. Marine Harvest shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, 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, Marine Harvest shall cause the documents required for effecting the sale and the Closing to be duly executed.

28. Marine Harvest 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 Marine Harvest 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.
29. At the expense of Marine Harvest, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Marine Harvest’s approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Marine Harvest refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Marine Harvest. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 28 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Marine Harvest during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

30. 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, require Marine Harvest to replace the Trustee; or
 - (b) Marine Harvest, with the prior approval of the Commission, may replace the Trustee.
31. If the Trustee is removed according to paragraph 30, 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 15 to 20.

32. Beside the removal according to paragraph 30, 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

33. The Commission may, where appropriate, in response to a request from Marine Harvest showing good cause and accompanied by a report from the Monitoring Trustee:

- (i) Grant an extension of the time periods foreseen in the Commitments, or
- (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where Marine Harvest seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall Marine Harvest be entitled to request an extension within the last month of any period.

Düsseldorf, 25 September 2013

Dr. Peter Niggemann

Sabrina Raatz

duly authorised for and on behalf of Marine Harvest

SCHEDULE TO COMMITMENT LETTER

I. Details on Divestment Business

Marine Harvest offers to divest the farming operations of Morpol

- in Shetland, consisting of freshwater farming sites with average total annual production capacities of [...] eggs, [...] fry and [...] smolts, of seawater farming sites with average total annual production capacities of [...] as well as of a primary processing plant with average total annual processing capacities of [...], and
- in Orkney, consisting of seawater farming sites with average total annual production capacities of [...] as well as of a primary processing plant with average total annual processing capacities of [...]. The farming operations in Orkney do not have freshwater farming sites.

The divestment business includes all tangible assets (biomass, premises, machinery and equipment), all intangible assets (farming licences), all site specific personnel and all site specific contracts of the two farming operations. Detailed information on the divestment business is provided below as well as in **Annex 1** for the farming operations in Shetland and in **Annex 2** for the farming operations on Orkney.

Shetland:

- First of all, the farming operations in Shetland consist of [...] **freshwater farming sites** in [...] with average total annual production capacities of [...] eggs, [...] fry and [...] smolts. Additional information on the freshwater farming sites, including the location, the names, the types, the products, the production capacity and the personnel of the sites, is provided in **Annex 1**.⁵⁸
- Secondly, the farming operations in Shetland include [...] **seawater farming sites** with average total annual production capacities of [...]: [...] seawater farming sites are located in [...] ([...]), [...] seawater farming sites are situated in [...] ([...]), [...]

⁵⁸ Cf. pages 3, 10, 12, 13 and 16 of **Annex 1**.

seawater farming sites are located in [...] ([...]) and [...] seawater farming sites are situated in [...] ([...]). Further information on the seawater farming sites, including the location, the names, the gross growth, the harvest volumes, the consented volumes, the farming licences, the personnel and the financial performance of the sites is compiled in **Annex 1**.⁵⁹

- Last but not least, the farming operations in Shetland consist of [...] **primary processing plant** in [...] with average total annual production capacities of [...]. Supplementary information on the primary processing plant, including the location, the name, the production capacity and the production volumes of the plant, is enclosed in **Annex 1**.⁶⁰

Orkney:

- The farming operations in Orkney do not have **freshwater farming sites**.
- First of all, the farming operations in Orkney include [...] **seawater farming sites** with average total annual production capacities of [...]: [...] seawater farming sites are located in [...] ([...]), [...] seawater farming sites are situated in [...] ([...]), [...] seawater farming sites are located in [...] ([...]) and [...] seawater farming sites are situated in [...] ([...]). Additional information on the seawater farming sites, including the location, the names, the gross growth, the harvest volumes, the consented volumes, the farming licences, the personnel and the financial performance of the sites, is compiled in **Annex 2**.⁶¹
- Secondly, the farming operations in Orkney consist of [...] **primary processing plant** in [...] with average total annual production capacities of [...]. Supplementary information on the primary processing plant, including the location, the name, the

⁵⁹ Cf. pages 3, 4, 6 to 9 and 12 to 18 of **Annex 1**.

⁶⁰ Cf. pages 2, 3, 11 to 13 and 15 of **Annex 1**.

⁶¹ Cf. pages 2, 3, 5 to 9, 11 to 13 and 15 to 17 of **Annex 2**.

production capacity and the production volumes of the plant, is provided in **Annex 2**.⁶²

Due to the fact that sales contracts are negotiated – in some cases – for a specific farming origin, but not for a specific farming site and that supply contracts are concluded – in most cases – for the whole company group, but not for a specific farming site, sales contracts and supply contracts are not site specific contracts and will not be part of the divestment business. [...]. Site specific contracts are, vice versa, farm management agreements as well as area management agreements. The freshwater farming sites either have valid leases from the Crown Estate or the Crown Estate will issue new leases, the applications are merely paperwork and have already been completed by Morpol.

Given the general market transparency of the salmon farming industry, the purchaser will anyhow have access to customers, suppliers and/or service providers: first of all, the Commission has identified several customers, dependent on farmed Scottish salmon and interested in strengthening their current supply sources or establishing further supply sources. In addition, there are three main global suppliers of fish feed, being EWOS, Skretting and Biomar, vying with each other for additional customers, as well as Bakkafrost as established market player, controlling its own feed production. Over and above that, established market players, such as Scottish Sea Farms, Grieg Seafood, Scottish Salmon Company and Bakkafrost, will not only be able, but also willing either to provide marketing and distribution services to potential market entrants or to acquire the divestment business, allowing for an improved performance both by increasing the harvest volumes and reducing the related expenses.

In order to enable the purchaser to make contacts to customers, suppliers and/or service providers as well as to ensure the viability of the divestment business, Marine Harvest will – upon request – be prepared to provide the divestment business with transitional services, such as shared IT and HR services, as well as to uphold or renew transitional contracts for the supply with smolt and to transfer transitional contracts for the supply with feed, so that the two farming operations can be run as stand-alone businesses either on a combined basis or on a separate basis. The transitional services will be based on current conditions in [...] after the divestment business has been transferred to the purchaser as well as on market conditions in [...] after the divestment business has been transferred to the purchaser. The maximum period of the

⁶² Cf. pages 2, 3, 10, 11, 12 and 14 of **Annex 2**.

transitional services will be limited to [...] in total. Further information on the current and future smolt and feed supply of the divestment business is provided below:

Smolt supply:

- The seawater farming sites in Shetland and Orkney are currently supplied with smolts from both the freshwater operations in [...] as well as from the freshwater farming sites in [...]. Based on an average production capacity of [...], the seawater farming sites in Shetland will require around [...] smolts, allowing for [...] mortality for the cycle, while, based on an average production capacity of [...], the seawater farming sites in Orkney will require around [...] smolts, allowing for [...] mortality for the cycle.
- [...]. By building a new recirculation unit, the freshwater farming sites in Shetland will be able to produce enough smolts in order to supply all of the seawater farming sites in Shetland. Given that live fish is involved, it will take up to [...], before the new recirculation unit will be able to reach the full production capacity. [...]. The related tangible and intangible assets are also part of the Divestment Business. There are several Norwegian and Danish suppliers selling recirculation units as turn-key projects and the recirculation units are based on add-on systems, enabling the purchaser to further expand the production capacity.

Feed supply:

There are three suppliers of fish feed in the United Kingdom, being EWOS, Skretting and Biomar, all of them with excess production capacities, so that all three suppliers will not only be able, but also willing to supply the divestment business with feed. [...] is currently the largest supplier of Morpol, covering [...] of the total volume. Morpol has a [...] contract with [...]. The managing director of [...] in the United Kingdom has already confirmed that [...] would be interested in providing the divestment business with feed after a change of control, both on a rolling basis or on a standing basis, depending on the preferences and requirements of the purchaser. The feed is directly supplied by boat to barge, both by [...] and by [...].

II. Transfer of Divestment Business

Due to the fact that the divestment business does not form a separate legal entity, but is part of Meridian Salmon Group, the transfer of the divestment

business to the purchaser will proceed by way of an asset transaction, a share transaction or a combination of the two, including selling, transferring, assigning, licensing, as the case may be, all tangible assets (biomass, premises, machinery and equipment), all intangible assets (farming licences), all site specific personnel and all site specific contracts to the purchaser of the divestment business. Further information on the legal structure of the divestment business is included in **Annex 1** and **Annex 2**.⁶³

The final structure is dependent [...] on whether the transfer of the divestment business to the purchaser will progress by way of an asset deal or a share deal:

- In case of an **asset transaction**, the assets of the divestment business will first of all be acquired by the purchaser who will afterwards integrate the assets of the divestment business into an existing group company or into a new holding vehicle.
- In case of a **share transaction**, the assets of the divestment business will first of all be consolidated in a holding vehicle which will afterwards be acquired by the purchaser and either integrated into an existing group company or maintained as a separate legal entity.

[...].

In any case, neither an asset deal nor a share deal will face any factual or legal obstacles, the more so as it is common practice to sell and buy farming licences on the open market. The practical and legal feasibility of the transfer of the divestment business to the purchaser is also proven by the fact that [...].

Freshfields Bruckhaus Deringer (PN/SR)

25 September 2013

⁶³ Cf. page 19 of **Annex 1** and page 18 of **Annex 2**.

Annex 1 [...]

Annex 2 [...]